UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

M.C. et al., on behalf of themselves and all similarly situated individuals,

Plaintiffs,

v.

JEFFERSON COUNTY, NEW YORK, et al.,

Defendants.

Case No. 6:22-cv-190 (DNH/ML)

REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

Terry T. Ding, #702578
Antony P.F. Gemmell, #700911
Molly K. Biklen, #515729
Gabriella M. Larios, #703415
Claire E. Molholm*
125 Broad Street, 19th Floor
New York, New York 10004
Telephone: 212-607-3368
tding@nyclu.org

* Admission to the New York bar pending; practicing under supervision.

Dated: April 29, 2022
New York, New York

TABLE OF CONTENTS

PRELIMINARY STATEMENT

In the two months since Plaintiffs filed this lawsuit, a dozen individuals at the Jefferson County Correctional Facility have filed declarations attesting that Defendants have forcibly withdrawn them from their prescribed medication for opioid use disorder ("MOUD"). And each month, more people prescribed these life-saving medications are taken into the jail's custody, where they are stripped of their treatment and subjected to excruciating withdrawal and acute risks of relapse, overdose, and death. These individuals seek to be certified as a class to challenge Defendants' practice of denying MOUD treatment and to ensure that no one else in their situation will be forced to suffer the agony and dangers of involuntary withdrawal.

Defendants lodge a variety of arguments against class certification, but, as set forth below, none withstands scrutiny. Accordingly, the Court should grant Plaintiffs' motion for class certification.

ARGUMENT

I. The Putative Class Meets the Requirements of Rule 23(a).

a. The Class and Subclasses Are Sufficiently Numerous.

Defendants contend that Plaintiffs fail to meet their burden of establishing the numerosity of the class.[1] But that claim, grounded in a series of obvious flaws, is easily rejected.

First, Defendants accuse Plaintiffs of asking the Court to "infer that the numerosity [requirement] has been met." Defs.' Mem. Opp'n Class Certification ("Class Cert. Opp'n") at 6,

[1] In so arguing, Defendants do not dispute that the numerosity inquiry—which is "not strictly mathematical" to begin with, *Pa. Pub. Sch. Employees' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 120 (2d Cir. 2014)—is relaxed in this case, both because the class members belong to an inherently fluid population and because they are seeking injunctive and declaratory relief pursuant to Rule 23(b)(2). *See* Pls.' Mot. Class Certification at 7–9, ECF No. 2-1 (citing relevant authorities).

ECF No. 45. Defendants are correct. Courts routinely rely on "reasonable inferences drawn from the available facts" in finding sufficient numerosity. *Hamelin v. Faxton-St. Luke's Healthcare*, 274 F.R.D. 385, 394 (N.D.N.Y. 2011) (Hurd, J.) (citing examples). No different approach is warranted with respect to the evidence of numerosity Plaintiffs present here.

Second, Defendants attempt to refocus the numerosity inquiry on whether class members have been "deprived of MOUD treatment." Class Cert. Opp'n at 5. But that ignores the class that Plaintiffs actually seek to certify: "[A]ll non-pregnant individuals who are or will be detained at the Jefferson County Correctional Facility and had or will have prescriptions for agonist MOUD at the time of entry into Defendants' custody." Pls.' Mot. Class Certification ("Class Cert. Mot.") at 5, ECF No. 2-1. Whether class members were subject to Defendants' practice of denying MOUD is a merits issue that need not be resolved for the Court to find numerosity. And even setting aside Defendants' misunderstanding of the definition of the class, their argument fails on its own terms: Every class member who has submitted a declaration bar M.C. *has* been denied MOUD by Defendants. *See* T.G. Decl. ¶¶ 8–9, ECF No. 2-5; M.S.C. Decl. ¶¶ 1, 13, ECF No. 8; R.G. Decl. ¶¶ 1, 11, ECF No. 9; S.G. Decl. ¶¶ 1, 11, ECF No. 10; J.C. Decl. ¶ 8, ECF No. 33; J.M. Decl. ¶¶ 8–9, ECF No. 34; M.L. Decl. ¶ 13, ECF No. 35; P.M. Decl. ¶ 9, ECF No. 36; R.D. Decl. ¶ 11, ECF No. 37; S.C. Decl. ¶ 10, ECF No. 38.

Third, Defendants ignore the evidence before this Court regarding the size of the proposed class. A dozen individuals have submitted declarations establishing their current or recent class membership. *See immediately supra* (citing declarations of ten class members); M.C. Decl., ECF No. 2-4; P.G. Decl., *P.G. v. Jefferson Cnty.*, No. 5:21-cv-388 (N.D.N.Y. Apr. 29, 2021), ECF No. 20; *see also In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006) (concluding Rule 23 requirements can be established "by affidavits"). And in the short

time since the filing of their class certification motion, Plaintiffs' counsel have spoken with another four class members, including T.P., who has submitted a declaration with this reply. *See* T.P. Decl., ECF No. 50.

These accounts are entirely consistent with Defendant's own data, which reflect that hundreds of people with OUD pass through the jail each year, *see* Gemmell Decl. in Supp. of Mot. Class Certification, Ex. A, ECF No. 2-3[2]; and with statistics provided by the Substance Abuse and Mental Health Services Administration ("SAMHSA"), which show that almost half of the people in New York receiving outpatient treatment for OUD are being treated with prescribed MOUD. *See* SAMHSA, *National Survey of Substance Abuse Treatment Services State Profiles*, 200 (2020), https://perma.cc/A25A-K2HE; *e.g.*, *Westchester Indep. Living Ctr., Inc. v. State Univ. of N.Y., Purchase Coll.*, 331 F.R.D. 279, 288–89 (S.D.N.Y. 2019) (noting "[c]ourts within this Circuit have frequently relied on reasonable inferences based on statistical data to establish numerosity," and collecting examples).

b. Plaintiffs Will Fairly and Adequately Represent the Class.

Similarly meritless is Defendants' claim that Plaintiffs M.C. and T.G., whose interests in this litigation align fully with those of the class, are inadequate class representatives. *See Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006) ("Adequacy is twofold: the proposed class representative must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members.").

Defendants insist that M.C. cannot adequately represent the class because he was not in custody at the outset of this case, and because he has not been denied access to treatment. Class

[2] Defendants characterize these data as "records from third-party providers." Class Cert. Opp'n at 6. Not so. Defendants *themselves* provided these statistics in response to a Freedom of Information Law request by Plaintiffs' counsel. *See* ECF No. 2-3.

Cert. Opp'n at 7–8. As to M.C.'s custody status, Defendants overlook that the proposed class encompasses people "who are or *will be* detained" at the jail. Class Cert. Mot. at 5 (emphasis added). M.C. was squarely within that definition when this case was filed and his detention was imminent, and remains squarely within it now that he is in custody. M.C.'s current treatment status, by contrast, is not a part of the class definition and therefore has no effect on his class membership. In any event, M.C. is only receiving treatment pursuant to the Court's preliminary injunction. ECF No. 30; *see also* ECF No. 16. His interest in securing more permanent relief through this litigation is therefore the same as any other class member's.

Nor is T.G. an inadequate class representative. Her interest in challenging Defendants' prohibition on prescribed MOUD does not diverge from the interests of the class in any way, even if it is true that she relapsed in the days before her incarceration.

First, a relapse does not diminish the importance and urgency to T.G. of resuming her prescribed treatment. Rosenthal Second Suppl. Decl. ¶¶ 2, 9, ECF No. 48. Relapse is a common, if unfortunate, occurrence for people receiving treatment with agonist MOUD. *Id.* ¶¶ 4–5; *see also* Rosenthal Decl. ¶ 11, ECF No. 32 ("Like other chronic diseases, opioid use disorder often involves cycles of relapse and remission."). It does not indicate that treatment with agonist MOUD is ineffective and certainly does not justify involuntary withdrawal. Rosenthal Second Suppl. Decl. ¶¶ 5–7. To the contrary, it may indicate an especially severe disorder, *heightening* the importance of access to treatment. *Id.* ¶ 7. The suggestion that a relapse should disqualify T.G. from representing the class thus ignores the clinical reality of OUD and is not supported by the record. *See id.*

Second, Defendants' unsupported speculation that heroin, not methadone, accounts for T.G.'s withdrawal symptoms contradicts the only actual expert evidence before the Court.[3] It is undisputed that T.G. was receiving methadone treatment immediately prior to incarceration. Her medical records leave "no question that her withdrawal has been caused in part by the denial of her methadone." *Id.* ¶ 8. And simultaneous withdrawal from heroin would not diminish the life-threatening risks of forced withdrawal from methadone. *Id.* T.G., no less than any other class member, has an interest in accessing her prescribed and medically necessary treatment. *See id.* ¶ 9 ("[T]he involuntary cessation of T.G.'s prescribed methadone treatment continues to create a substantial risk of relapse, overdose, and death. Restoring her access to methadone treatment is therefore critical.").

Third, Defendants suggest T.G. has sought to obscure her struggles with addiction, Class Cert. Opp'n at 8, but the opposite is true. As Defendants acknowledge, T.G. *self-reported* her relapse when she entered the jail. *Id.* And her declaration candidly recounts that her illness has been punctuated by relapse and remission, T.G. Decl. ¶¶ 3–4, ECF No. 2-5, a predictable reality in the lives of people with OUD, *see* Rosenthal Second Suppl. Decl. ¶¶ 4–5. Accordingly, there is no basis to disqualify T.G. as a class representative. *See Lapin v. Goldman Sachs & Co.*, 254 F.R.D. 168, 177 (S.D.N.Y. 2008) ("Only when attacks on the credibility of the representative party are so sharp as to jeopardize the interests of absent class members should such attacks render a putative class representative inadequate." (cleaned up)).[4]

---

[3] Once again, Defendants have declined to support their medical and scientific assertions with any expert evidence. *See* Class Cert. Opp'n at 8.

[4] Even were the Court to conclude that T.G. is not an adequate class representative (and it should not), ordinary practice would be to permit Plaintiffs a reasonable time to identify a suitable substitute class representative, not to deny class certification outright. *See In re Initial Pub. Offering Sec. Litig.*, No. 21 MC 92, 2008 WL 2050781, at *2 (S.D.N.Y. May 13, 2008)

c. Plaintiffs' Claims are Typical of Those of the Putative Class.

Defendants' argument that Plaintiffs' claims are not typical of those of the putative class is likewise unavailing.

Defendants claim M.C. cannot serve as a class representative because the jail has not withheld his MOUD treatment. Class Cert. Opp'n at 9–10. This is a remarkable claim, given that M.C.'s access to his treatment has been preserved only by court order. *See* ECF Nos. 16, 30; *see also Helling v. McKinney*, 509 U.S. 25, 33 (1993) (underscoring that "a remedy for unsafe [jail] conditions need not await a tragic event"). The Court's preliminary injunction order specifically noted the evidence M.C. submitted showing that "people receiving treatment with agonist MOUD . . . must stop receiving the treatment abruptly upon entering the jail's custody." ECF No. 30 at 4. The Court intervened to spare M.C. the "life-threatening harm" inflicted by "Defendants' blanket policy to refuse *those in his position* access to treatment." *Id.* at 9 (emphasis added). Thus, M.C.'s claims are typical of "those in his position"—the other class members. *Id*.

Defendants next assert that T.G.'s claims are atypical because the withdrawal she is suffering "likely" resulted from heroin withdrawal, not Defendants' removing her from methadone. Class Cert. Opp'n at 10. This assertion is misguided. "[T]ypicality 'does not require that the factual background of each named plaintiff's claim be identical to that of all class members; rather, it requires that the disputed issue of law or fact occupy essentially the same

("Courts have generally permitted the addition or substitution of class representatives when there is no showing of prejudice to defendants and such addition or substitution would advance the purposes served by class certification." (citations omitted)); *e.g.*, *Haley v. Tchrs. Ins. & Annuity Ass'n of Am.*, 337 F.R.D. 462, 477–79 (S.D.N.Y. 2020) (granting class certification and permitting the addition of class representatives to "address potential deficiencies" with the adequacy of the original class representative).

degree of centrality to the named plaintiff's claim as to that of other members of the proposed class.'" *Spicer v. Pier Sixty LLC*, 269 F.R.D. 321, 337 (S.D.N.Y. 2010) (quoting *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 293 (2d Cir. 1999)). And here, there are numerous disputed issues that are just as central to T.G.'s claims as they are to the claims of the other class members. For example, Defendants do not contest that she was prescribed agonist MOUD and that the jail forcibly withdrew her from it. Like every other class member, it remains central to T.G.'s claims "[w]hether Defendants maintain any policy or practice of denying prescribed agonist MOUD" at the jail, and whether such denial "discriminates on the basis of disability." Class Cert. Mot. at 10–11; *see V.W. by and through Williams v. Conway*, 236 F. Supp. 3d 554, 576 (N.D.N.Y. 2017) (Hurd, J.) (finding typicality where plaintiffs and other class members shared claims "based on the common application of certain challenged policies"). Moreover, the immediate symptoms of withdrawal are just one of the many harms of forced removal from MOUD, and the question whether T.G. faces those harms as a result of Defendants' denial of her prescribed MOUD is as important for her as it is for every other class member. *See* Rosenthal Decl. ¶¶ 36–38, 41–42, 44, ECF No. 32 (describing wide range of harms caused by forced removal from MOUD).

In any event, as Plaintiffs' expert explains, occasional relapse into drug use is not atypical of patients battling OUD. Rosenthal Second Suppl. Decl. ¶¶ 4–5. This Court has recognized the same. *See* ECF No. 30 at 4 ("M.C.'s recovery has not been without setbacks. Like many with OUD, he has relapsed . . . ."). Plaintiffs' claims here are not premised on agonist MOUD guaranteeing that a patient will never again relapse. Rather, Plaintiffs are simply seeking to ensure they are not denied the medically necessary treatment they have been prescribed. That

core "issue . . . occup[ies] essentially the same degree of centrality to [T.G.'s] claim as to that of other members of the proposed class." *Spicer*, 269 F.R.D. at 337.

II. The Putative Class Meets the Requirements of Rule 23(b).

Defendants' contention that Plaintiffs have failed to meet the requirements of Rule 23(b) is also meritless. There is no dispute that Plaintiffs have adequately alleged that Defendants have "acted or refused to act on grounds that apply generally to the class." Fed. R. Civ. P. 23(b)(2). While Defendants dispute that they maintain a practice of denying MOUD treatment, they concede that the existence of such a practice is an "issue common to all of the [class] members." Class Cert. Opp'n at 10–11; *see also id.* at 9 (acknowledging that "Plaintiffs have identified questions of law and fact that are common among the proposed class"). That means "this lawsuit is predicated on acts and omissions of the [Defendants] that apply generally to the class," *Barrows v. Becerra*, 24 F.4th 116, 132–33 (2d Cir. 2022) (cleaned up), and the class members "would benefit from the same remedy—an order enjoining defendants from application of the [challenged practice]," *V.W.*, 236 F. Supp. 3d at 577. Thus, this is precisely the kind of class that is "properly certified under Rule 23(b)(2)." *Barrows*, 24 F.4th at 132–33.

Defendants' claim that they have no practice of denying MOUD is not an argument about the requirements of Rule 23(b). Rather, it is about mootness: Defendants are suggesting that because they claim to have voluntarily ceased the challenged practice, there is no longer a dispute for the Court to resolve. This suggestion is wrong. "[A] defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur." *Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 603–04 (2d Cir. 2016) (quoting *Friends of the Earth, Inc.*

v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 190 (2000)). Defendants have not met that "stringent" and "formidable burden" here. *Id.*

Defendants' own statements, as well as other record evidence, belie Defendants' claim that class members are not being denied treatment. By Defendants' own account, the jail is only considering patients "on a *methadone* treatment program" for treatment, Class Cert. Opp'n at 11 (emphasis added); patients prescribed other forms of agonist MOUD continue to be denied access, *see, e.g.*, T.P. Decl. ¶¶ 3–5 (buprenorphine). And Defendants stated just this week that they will not "recommence treatment" to those class members who have already been stripped of their MOUD by the jail. Defs.' Mem. Opp'n Prelim. Inj. ("PI Opp'n") at 5, ECF No. 46. As a result, numerous class members still do not have access to their prescribed MOUD. *See, e.g.*, T.G. Suppl. Decl. ¶¶ 1–2, ECF No. 49.[5] Further, Defendants are continuing to strip individuals arriving at the jail from their treatment. *See* T.P. Decl. ¶¶ 4–5 (class member admitted into jail this month stripped of prescribed MOUD). Thus, Defendants cannot even establish that their practice of denying MOUD treatment has ended, much less make "absolutely clear" that it will not recur. *Mhany Mgmt.*, 819 F.3d at 603–04.

Defendants also fail to disclose that they began allowing a small number of people to access their MOUD only *after* Plaintiffs filed this suit. *See, e.g.*, M.L. Decl. ¶ 13 (removed from MOUD in February 2022); P.M. Decl. ¶ 9 (same); *see also* PI Opp'n at 5 (confirming there are currently people at the jail who have already been withdrawn from MOUD). That is, Defendants belatedly started inching away from their ban on agonist MOUD treatment only within the last month, with a hearing on class certification and a classwide preliminary injunction motion

[5] According to Defendants, the jail is currently allowing only seven individuals to access their prescribed MOUD. ECF No. 46-2 ¶ 7. Two of those individuals are P.G. and M.C.

looming. In situations like this, courts look "particularly skeptically" at "voluntary cessation of challenged conduct" that "appear[s] to track the development of th[e] litigation." *Nat. Res. Def. Council v. U.S. Dep't of Energy*, 362 F. Supp. 3d 126, 138 (S.D.N.Y. 2019) (quoting *Mhany Mgmt.*, 819 F.3d at 604). That is for good reason. Without such scrutiny, a defendant would be able to easily moot out litigation and then be "free to return to his old ways." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (citation omitted).

Accordingly, Defendants' eleventh-hour representations regarding voluntary cessation with respect to only a handful of class members is not a basis to deny class certification. *See, e.g.*, *Easterling v. Conn. Dep't of Correction*, 278 F.R.D. 41, 46–47 (D. Conn. 2011) (citing examples of courts certifying Rule 23(b)(2) classes where "the defendant changed its behavior only in the face of a lawsuit").

CONCLUSION

For these further reasons, Plaintiffs respectfully request that the Court certify the putative class and subclasses in accordance with the proposed definitions; appoint Plaintiffs M.C. and T.G. as class representatives; and appoint undersigned counsel as counsel for the class.

Dated: April 29, 2022
New York, New York

Respectfully submitted,

NEW YORK CIVIL LIBERTIES UNION FOUNDATION

/s/ Terry T. Ding
Terry T. Ding, #702578
Antony P. F. Gemmell, #700911
Molly K. Biklen, #515729
Gabriella M. Larios, #703415
Claire E. Molholm*
125 Broad Street, 19th Floor
New York, New York 10004

Telephone: 212-607-3368
Facsimile: 212-607-3318
tding@nyclu.org

Counsel for Plaintiffs

* Admission to the New York bar pending; practicing under supervision.