UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, *et al.*,

Plaintiffs,

v

MUSKEGON COUNTY, *et al.*,

Defendants.

_____/

Case No. 1:14-cv-1245

HON. JANET T. NEFF

OPINION AND ORDER

Plaintiffs initiated this purported class action pursuant to 42 U.S.C. § 1983, challenging as unconstitutional the conditions of their confinement at the Muskegon County Jail, specifically, the facility built in 1959. Now pending before the Court is Defendants' motion for partial judgment on the pleadings (Dkt 47). For the reasons that follow, the Court determines that Defendants' motion is properly denied in part and granted in part. Given the disposition of Defendants' motion, the Court will also deny without prejudice Plaintiffs' pending motions for class certification, a preliminary injunction, and expert testimony in support of a preliminary injunction (Dkts 2, 5 & 35). Plaintiffs may re-file these motions to conform to the Court's rulings herein, giving due consideration to if and/or how the transition of inmates to the new jail facility has also rendered their requests moot, in whole or in part.

I. BACKGROUND

Plaintiffs initiated this case on December 4, 2014, delineating their five counts topically, as follows:

I. Violation of Privacy and Bodily Integrity

II. Denial of Exercise

III. Denial of Access to Feminine Hygiene Products, Toilet Paper and Adequate Underwear and Other Clothing

IV. Severe Overcrowding and Other Abysmal Conditions

V. Michelle Semelbauer Only

(Dkt 1). With their Complaint, Plaintiffs also moved for a preliminary injunction and for class certification (Dkts 2 & 5). As of December 4, 2014, all Plaintiffs except Plaintiff Stashia Collins were former inmates or pretrial detainees of the Muskegon County Jail ("MCJ"). Collins was then a current inmate, but she has since been released. On February 6, 2015, after Defendants filed responses to the pending motions raising issues of standing and mootness, Plaintiffs filed a First Amended Complaint, which did not alter their factual or legal allegations but added three additional Plaintiffs, who were then current inmates (Dkt 18, First Amend. Compl., ¶¶ 37-39). Defendants moved to strike the First Amended Complaint (Dkt 19), and Plaintiffs moved to compel certain discovery in support of their motion for a preliminary injunction (Dkt 35).

Defendants, who had filed an Answer to Plaintiffs' First Amended Complaint (Dkt 20), proposed to file a dispositive motion under FED. R. CIV. P. 12(c) (Dkt 28). Following a Pre-Motion Conference on April 22, 2015, the Court issued a briefing schedule, denying Defendants' motion to strike Plaintiffs' First Amended Complaint and instead permitting the parties to proceed with briefing Defendants' proposed motion (Order, Dkt 42). Deciding Defendants' dispositive motion before deciding Plaintiffs' class certification motion is, in this Court's opinion, in the interest of overall efficiency, as the Court's assessment of the pleadings will dictate the character of the classes, if any. *See* FED. R. CIV. P. 23(c)(1) (requiring only that courts decide motions for class certification

"at an early practicable time"); 7AA CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROCED. § 1785.3 (3d ed. 2015) ("The time at which the court finds it appropriate to make its class-action determination may vary with the circumstances of the particular case.").

The parties filed the instant motion papers in July 2015 (Dkts 47-51). In responding to Defendants' motion, Plaintiffs agreed to stipulate to dismiss Defendants Dean Roesler and Mark Burns in their official capacities, a stipulation the Court entered July 6, 2015 (Pls.' Resp., Dkt 49 at 31-32; Proposed Stip., Dkt 50; Stip., Dkt 52). Having conducted a Pre-Motion Conference in this matter and having fully considered the parties' written briefs and accompanying exhibits, the Court finds that the relevant facts and arguments are adequately presented in these materials and that oral argument would not aid the decisional process. *See* W.D. Mich. LCivR 7.2(d).

II. ANALYSIS

A. Motion Standard

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). On a Rule 12(c) motion, the court must take "all well-pleaded material allegations of the pleadings of the opposing party ... as true, and the motion may be granted only if the moving party is nevertheless clearly entitled to judgment." *Wurzelbacher v. Jones-Kelley*, 675 F.3d 580, 583 (6th Cir. 2012).

A well-pleaded complaint contains "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), such that the plaintiff pleaded sufficient "factual content [to allow] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is "a context-specific task that requires the reviewing court to draw on its judicial experience and

common sense." *Iqbal*, 556 U.S. at 679. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* at 678 (quoting *Twombly*, 550 U.S. at 556).

"[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Further, "the court need not accept as true a legal conclusion couched as a factual allegation, or an unwarranted factual inference." *Handy-Clay v. City of Memphis, Tenn.*, 695 F.3d 531, 539 (6th Cir. 2012) (citation and internal quotation marks omitted).

B. Discussion

Defendants' motion at bar challenges Plaintiffs' stated claims in Counts I, II, III and IV under 42 U.S.C. § 1983. Section 1983 is a method for vindicating federal rights, not a source of substantive rights itself. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). To state a claim under 42 U.S.C. § 1983, a plaintiff must (1) allege the violation of a right secured by the Constitution or laws of the United States and (2) show that the deprivation of that right was committed by a person acting under color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988); *Harbin-Bey v. Rutter*, 420 F.3d 571, 575 (6th Cir. 2005). Local governing bodies may be sued under § 1983 where, as Plaintiffs here allege (Dkt 18, First Amend. Compl. ¶¶ 242-59), "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 690 (1978). The liability of a local governing body under § 1983 depends solely on whether a plaintiff's constitutional rights have been violated as a result of a

"policy" or "custom" attributable to the government. *Holloway v. Brush*, 220 F.3d 767, 772 (6th Cir. 2000) (en banc). Defendants challenge whether Plaintiffs have stated cognizable claims under the constitutional rights they identify: the Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

1. Count I: Claims of Violation of Privacy and Bodily Integrity

In Count I (Violation of Privacy and Bodily Integrity), Plaintiffs allege that due to Defendants' policy, practice or custom, Plaintiffs "have been, are being, and will be subjected, without any penological justification or other legitimate purpose, to routine and systematic viewing by members of the opposite sex while naked and partially naked, while showering, while toileting, and while attending to their menstrual periods" (Dkt 18, First Amend. Compl. ¶ 261). Plaintiffs further allege that they "have been, are being, and will be subjected to discipline, punishment and threats of discipline and punishment for trying to use reasonable means to protect their privacy and bodily integrity while they shower, dress, and use toilets at the MCJ" (*id.* ¶ 262).

Plaintiffs cite the Fourth, Eighth and Fourteenth Amendments to the United States Constitution as supporting their cross-gender viewing claims under § 1983 in Count I. Specifically, Plaintiffs allege that "[r]outine viewing by male guards and trustees ... constitutes an unjustified invasion of privacy and bodily integrity in violation of the Fourth Amendment to the United States Constitution" (Dkt 18, First Amend. Compl. ¶ 265). Second, Plaintiffs allege that "[w]th respect to convicted inmates incarcerated at the MCJ, the routine viewing by male guards and male trustees constitutes unnecessary and wanton infliction of pain and are maintained with deliberate indifference to Plaintiffs' Eighth Amendment rights" (*id.* ¶ 263). Last, Plaintiffs allege that "[w]ith respect to pretrial detainees incarcerated at the MCJ, the routine viewing by male guards and male trustees has

caused such detainees who have not yet been convicted of any crime to suffer punishment without due process of law" (*id.* ¶ 264).

a. *Under the Eighth & Fourteenth Amendments*

Defendants argue that Plaintiffs' cross-gender viewing claims are based on alleged violations of their right to privacy and therefore should be reviewed only under the Fourth Amendment (Defs.' Br., Dkt 48 at 29-30, citing *Everson v. Mich. Dep't of Corrs.*, 391 F.3d 737, 757 (6th Cir. 2004)). Defendants assert that to the extent Plaintiffs' cross-gender viewing claims are brought under the Eighth and Fourteenth Amendments, they must be dismissed (*id.* at 30). Defendants emphasize that when there is a specific textual source of constitutional protection, as here, the Court should follow it rather than apply the more generalized Fourteenth Amendment substantive due process claim (*id.*, citing *Walker v. Norris*, 917 F.2d 1449 (6th Cir. 1990)).

Plaintiffs respond that Count I should be permitted to proceed under not only the Fourth but also the Eighth and Fourteenth Amendments (Pls.' Resp., Dkt 49 at 25-26). According to Plaintiffs, the Sixth Circuit in *Everson* recognized that courts have found inmates' rights against unnecessary cross-gender viewing to be a liberty interest protected by the Due Process Clause of the Fourteenth Amendment, and further, under certain circumstances, that the invasion of an inmate's bodily privacy can also violate the inmate's Eighth Amendment rights (*id.* at 25).

Defendants' argument lacks merit.

Defendants are correct that the Sixth Circuit in *Everson* recognized a cross-gender viewing claim based on a right to privacy found in the Fourth Amendment. 391 F.3d at 756. The Sixth Circuit observed, in a footnote, that some circuits have found that that privacy right is instead located in the Due Process Clause of the Fourteenth Amendment. 391 F.3d at 757 n.26 (citing other

circuits). However, the Sixth Circuit has instructed that "the Fourth Amendment approach is the precedent in this circuit." *Brannum v. Overton Cnty. Sch. Bd.*, 516 F.3d 489, 494 (6th Cir. 2008) (indicating that it was "aware" that "some circuits have found that the same privacy right is located in the Due Process Clause").

Nonetheless, this Court does not find that *Everson* precludes the determination that the invasion of an inmate's bodily privacy can also violate an inmate's Eighth Amendment right to be free from cruel and unusual punishment. Hence, in *Kent*, the Sixth Circuit analyzed the inmate's cross-gender viewing claim under both the Fourth Amendment, 821 F.2d at 1226-27, and the Eighth Amendment, *id.* at 1227-28. The Sixth Circuit held that the inmate had stated a claim under the Eighth Amendment for purposes of Rule 12(b)(6) of the Federal Rules of Civil Procedure by alleging that "female prison guards have allowed themselves unrestricted views of his naked body in the shower, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy." *Id.* And pretrial detainees, who are not technically within the protection of the Eighth Amendment prohibition against cruel and unusual punishment, receive protection under the Due Process Clause of the Fourteenth Amendment analogous to the protection of the Eighth Amendment. *County of Sacramento v. Lewis*, 523 U.S. 833, 849-50 (1998); *Horn by Parks v. Madison Cnty. Fiscal Court*, 22 F.3d 653, 660 (6th Cir. 1994); *Wilson v. City of Kalamazoo*, 127 F. Supp. 2d 855, 862 (W.D. Mich. 2000).

For these reasons, the Court will deny Defendants' motion to dismiss in part Plaintiffs' Count I. Plaintiffs' Count I may proceed under the Fourth Amendment based on their claim that the cross-gender viewing violated their right to privacy, and Count I may proceed under the Eighth and Fourteenth Amendments based on Plaintiffs' claim that the cross-gender viewing violated their right

to be free from cruel and unusual punishment. Whether these claims have merit is, of course, not the question before the Court at this juncture, only whether they state cognizable § 1983 claims under these amendments.

b. *Under the Fourth Amendment*

Defendants concede that "some" of Plaintiffs' cross-gender viewing allegations sufficiently state a Fourth Amendment claim but assert that "certain parts of the claim are subject to dismissal" (Defs.' Br., Dkt 48 at 31). Specifically, Defendants first argue that given Plaintiffs' own admission that Defendants now supply a two-piece uniform to all inmates, their claim for prospective relief regarding the uniform must be dismissed, regardless whether Plaintiffs could establish standing (*id.*). Second, Defendants argue that Plaintiff Denise Vos' allegation that correctional officer David Gutoswki may have observed her naked on the toilet while he was passing medication to occupants of her cell cannot support a valid Fourth Amendment invasion of privacy claim (*id.* at 32).

In response, Plaintiffs assert that their First Amended Complaint "contains no request for prospective relief regarding uniforms," so no such "dismissal" is warranted (Pls.' Resp., Dkt 39 at 31 n.15). Second, regarding Plaintiff Vos' claim against Defendant Gutowski, Plaintiffs assert that Defendants have not framed the relevant inquiry and that Defendants have overlooked that Vos' claim against Gutowski is further supported by Plaintiffs' allegations that "Gutowksi repeatedly tore down sheets and toilet paper that [Vos] had erected in an effort to protect her privacy while she was showering and using the toilet" (*id.* at 26-27, citing Dkt 18, First Am. Compl. ¶¶ 81, 83).

The Court agrees with Plaintiffs. Defendants have not demonstrated that dismissal is warranted where Plaintiffs deny any claim for prospective relief regarding their uniforms. Further, contrary to Defendant's argument, Vos' claim is not based on a "single instance" and therefore her

claim also does not warrant dismissal, even assuming, arguendo, that Defendants correctly analyzed the single instance.

2. Counts II, III & IV: Conditions-of-Confinement Claims

Plaintiffs cite the Eighth and Fourteenth Amendments to the United States Constitution as supporting their conditions-of-confinement claims in Count II (Denial of Exercise), Count III (Denial of Access to Feminine Hygiene Products, Toilet Paper and Adequate Underwear and Other Clothing) and Count IV (Severe Overcrowding and Other Abysmal Conditions).

In its prohibition of "cruel and unusual punishments," the Eighth Amendment imposes duties on prison officials, duties to provide "humane conditions of confinement." *Farmer, supra.* "Prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care." *Id.* (quoting *Hudson v. Palmer*, 468 U.S. 517, 526-27 (1984)). However, "conditions that cannot be said to be cruel and unusual under contemporary standards are not unconstitutional. To the extent that such conditions are restrictive and even harsh, they are part of the penalty that criminal offenders pay for their offenses against society." *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.'" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (citations omitted). Again, pretrial detainees receive protection under the Due Process Clause of the Fourteenth Amendment analogous to the protection of the Eighth Amendment. *See Lewis*, 523 U.S. at 849-50; *Horn by Parks*, 22 F.3d at 660; *Wilson*, 127 F. Supp. at 862.

An Eighth Amendment claim contains both an objective and a subjective component. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991); *Richmond v. Settles*, 450 F. App'x 448, 453 (6th Cir. 2011).

"[C]ourts considering a prisoner's claim must ask both if 'the officials act[ed] with a sufficiently culpable state of mind' and if the alleged wrongdoing was objectively 'harmful enough' to establish a constitutional violation." *Hudson v. McMillian*, 503 U.S. 1, 8 (1992) (quoting *Wilson, supra*). "In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety." *Farmer*, 511 U.S. at 834 (quoting *Wilson*, 501 U.S. at 302-03). Specifically, "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Id.* at 837.

Last, and relevant to resolving the motion in this case, which contains multiple claims concerning the conditions of Plaintiffs' confinement, the Supreme Court has instructed that "[s]ome conditions of confinement may establish an Eighth Amendment violation 'in combination' when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need such as food, warmth, or exercise—for example, a low cell temperature at night combined with a failure to issue blankets." *Wilson*, 501 U.S. at 304. The Supreme Court emphasized that "[t]o say that some prison conditions may interact in this fashion is a far cry from saying that all prison conditions are a seamless web for Eighth Amendment purposes." *Id.* And the Court concluded that "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Id.*

Similarly, the Sixth Circuit has instructed that in certain "extreme circumstances," the totality of the circumstances may itself amount to an Eighth Amendment violation, "but there still must exist a specific condition on which to base the eighth amendment claim." *Walker v. Mintzes*, 771 F.2d 920, 925 (6th Cir. 1985). "[S]uch conditions, 'considered alone or in combination [with other

conditions],' *Rhodes*, 452 U.S. at 347, 101 S.Ct. at 2399, must amount to a deprivation of 'life's necessities,' *id.*, before a violation of the eighth amendment can be found." *Id. See also Thompson v. Cnty. of Medina, Oh.*, 29 F.3d 238, 242 (6th Cir. 1994) (observing that "[a] general allegation of indecent circumstances usually is not sufficient").

a. *Count II: Denial of Exercise*

In Count II, Plaintiffs allege that "[d]ue to defendants' policy, practice or custom, plaintiffs and class members have been, are being, and will be denied out-of-cell exercise" (Dkt 18, First Amend. Compl. ¶ 269). According to Plaintiffs, Defendants "have violated and are violating the prohibition against cruel and unusual punishment under the Eighth Amendment and the prohibition against punishment of pre-trial detainees under the Due Process Clause of the Fourteenth Amendment to the United States Constitution" (*id.* ¶ 272).

In the factual section of their First Amended Complaint, Plaintiffs allege that "[f]emale MCJ inmates are rarely or never permitted out-of-cell exercise" (Dkt 18, First Amend. Compl. ¶ 11). According to Plaintiffs, "[t]hey are essentially locked in their cells 24 hours per day, 7 days per week" (*id.* ¶ 87). More specifically, Plaintiffs allege that

> 93. During the approximately five-month period that Ms. Bosch was incarcerated at MCJ, she was allowed to go to the gym only twice.
>
> 94. During Ms. Vos's 7½-month-long incarceration, she was allowed to go to the gym on only two brief occasions and only because her cell was being searched.
>
> 95. During the approximately 30 days Ms. Semelbauer was incarcerated, she was never allowed access to the gym.
>
> 96. During the approximately three months Ms. Brown was incarcerated, she was allowed to go to the gym only once for 30 minutes while corrections officers searched her cell.

97. During Ms. Kitchens' approximately eight-month incarceration, she asked to use the gym repeatedly and was never allowed access. In order to exercise while at MCJ, Ms. Kitchens tried to walk laps around her cell because she was denied access to the gym or any outdoor recreational area.

98. During the approximately five months that Ms. Brown was incarcerated, she was allowed to go to the gym only three times.

99. Ms. Baker was never allowed access to the gym during either her March/April 2014 incarceration or her November 2014 incarceration.

100. From the beginning of Ms. Collins's incarceration in August 2014 until this lawsuit was filed, she was given access to the gym only once, and during that visit the exercise equipment kept in the gym was locked away.

101. Ms. Dorn has been to the gym only twice in her three-month incarceration.

102. Ms. Pauley has been to the gym only three times in her eight-month incarceration.

103. Ms. Wickliffe has been to the gym only twice during her two month incarceration.

Defendants argue that Plaintiffs' denial-of-exercise allegations fail to state a valid claim (Defs.' Br., Dkt 48 at 17). Defendants point out that Plaintiffs do not assert that they were completely denied all exercise opportunities or claim they were unable to engage in any form of exercise in their cells, such as "as 'running in place, doing push-ups, setups, or other exercises" (*id.* at 18, quoting *Grzelak v. Ballweg*, No. 2:13-cv-31, 2014 WL 5101333 (W.D. Mich. 2014)). Defendants point out that Plaintiff Londora Kitchens, in fact, specifically claims she engaged in exercise within her cell (*id.*). According to Defendants, the inmates were averaging one to two trips to the MCJ's gym every couple months, and the crux of Plaintiffs' claim is instead an assertion of a constitutional right to "exercise of their choice" (*id.* at 18-19). Defendants assert that Plaintiffs' allegations are consistent with the allegations in *Grzelak* and *Rahman X*, which this district and the Eighth Circuit found did not support an Eighth Amendment violation (*id.* at 19, citing *Grzelkak*,

supra; *Rahman X v. Morgan*, 300 F.3d 970, 974 (8th Cir. 2002)). Defendants conclude that Plaintiffs here have similarly failed to state a colorable Eighth Amendment denial of exercise claim and that judgment on the pleadings is therefore appropriate (*id.* at 19).

Plaintiffs respond that the cases cited by Defendants are "largely irrelevant," because they concern limitations on outdoor exercise, not denials of out-of-cell exercise (Pls.' Resp., Dkt 49 at 21). Plaintiffs emphasize that they are requesting sufficient out-of-cell exercise to maintain reasonably good physical and psychological health (*id.*). Plaintiffs argue that because they properly state a claim that they are being deprived of that basic need, Defendants' motion should be denied (*id.*).

In reply, Defendants point out that Plaintiffs have "not alleged facts which show the size of the cells they were in or the dayroom they had access to were insufficient to engage in other forms of exercise" (Defs.' Reply, Dkt 51 at 7).

Defendants' argument does not warrant dismissal under FED. R. CIV. P. 12(c).

Again, the Court's function is not to determine "how best to operate a detention facility." *See Rhodes*, 452 U.S. at 351 (quoting *Bell v. Wolfish*, 441 U.S. 520, 539 (1979)). Rather, the Court's function at this juncture is to determine whether Plaintiffs have stated an Eighth Amendment claim concerning deprivation of the "minimal civilized measure of life's necessities." *See id.* at 347. Therefore, pivotal to the Court's analysis of Plaintiffs' allegations in Count II is the Supreme Court's identification of exercise as "an identifiable human need" protected by the Eighth Amendment. *Wilson*, 501 U.S. at 304.

In *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983), which was decided before the Supreme Court's decision in *Wilson*, the Sixth Circuit recognized the possibility that denial of a right

to exercise could rise to the level of an Eighth Amendment violation; in addition, the court outlined factors relevant to determining the constitutionality of exercise restrictions: the size of the cell, opportunity for contact with other inmates, time per day expended outside the cell, justifications for denial of the right to exercise, physical or psychological injuries resulting from a lack of exercise or a particularized need for exercise. *Rodgers v. Jabe*, 43 F.3d 1082, 1086 (6th Cir. 1995). In *Walker v. Mintzes*, 771 F.2d 920 (6th Cir. 1985), the Sixth Circuit again "implicitly recognized a prisoner's general right to exercise where circumstances demand," but "stopped far short of endorsing that amount, or indeed any amount, as a constitutional requirement." *Rodgers*, 43 F.3d at 1087. This district has recognized that the constitutionality of prison exercise restrictions is generally best determined following presentation of evidence, either in trial or in support of a motion for summary judgment. *Jones v. Stine*, 843 F. Supp. 1186, 1192 (W.D. Mich. 1994); *Pressley v. Brown*, 754 F.Supp. 112, 116 (W.D. Mich. 1990) (citing cases therein).

Here, Plaintiffs have alleged facts from which a reasonable factfinder could plausibly infer that they have suffered a total or near-total deprivation of exercise and were not provided with sufficient exercise to maintain their physical and mental health, although prison officials knew of the continuing deprivation of out-of-cell exercise. As Plaintiffs recognize (Pls.' Resp., Dkt 49 at 20), what constitutes adequate exercise will depend on the circumstances of each Plaintiff, including the physical characteristics of the cell and the length of stay. *Cf. Spain v. Procunier*, 600 F.2d 189, 199 (9th Cir. 1979) (outdoor exercise required when prisoners otherwise confined in small cells almost 24 hours per day); *Clay v. Miller*, 626 F.2d 345, 347 (4th Cir. 1980) (outdoor exercise not required when prisoners otherwise had access to dayroom 18 hours per day). However, their Eighth Amendment claim for out-of-cell exercise does not warrant dismissal at this time.

b. ***Count III: For denial of feminine hygiene/toilet supplies and free extra clothing***

In Count III, Plaintiffs allege that "[d]ue to defendants' policy, practice or custom, plaintiffs and class members have been, are being, and will be denied feminine hygiene products, toilet paper, and adequate underwear and other clothing" (Dkt 18, First Amend. Compl. ¶ 275). Plaintiffs allege that Defendants "have violated and are violating the prohibition against cruel and unusual punishment under the Eighth Amendment and the prohibition against punishment of pre-trial detainees under the Due Process Clause of the Fourteenth Amendment to the United States Constitution" (*id.* ¶ 276).

In the factual section of their First Amended Complaint, regarding the alleged "denial of feminine hygiene ... supplies," Plaintiffs generally allege that "Plaintiffs and other women inmates at MCJ are not provided with adequate feminine hygiene products or toilet paper" (Dkt 18, First Amend. Compl. ¶ 108). "Female inmates who menstruate do not receive sanitary napkins in a timely fashion and in some instances are not provided with sanitary napkins at all" (*id.* ¶ 109). "Plaintiffs and other female inmates who menstruate and are denied pads bleed into their clothing and are often not provided with clean clothing until the next laundry day, which only occurs once per week" (*id.* ¶¶ 8, 110). Specifically, Plaintiffs allege the following:

> 112. When Ms. Vos got her menstrual period while incarcerated at MCJ, she pleaded again and again for several hours before she was finally provided with sanitary napkins.
>
> 113. When officers finally provided feminine hygiene products to Ms. Vos, they did not provide enough.
>
> 114. When Ms. Vos was held in the day room, unknown correctional officers provided only one pack of 12 pads for as many as 30 women, and told them to share.

> 115. Ms. Kitchens asked MCJ staff for pads on or about July 13, 2014. She did not receive any for hours . . . .
>
> 116. Ms. Speers bled into her clothes when she had her period. Although she begged for sanitary products, Ms. Speers was not given pads for approximately two days.
>
> 117. Ms. Brown requested sanitary products during her period, but was not given any for approximately eight hours.
>
> 118. Ms. Collins requested sanitary products from defendant Morris and did not receive any for over ten hours. By the time she finally received sanitary products she had bled into her clothing. She was not able to obtain fresh clothing for several hours.
>
> 119. On or about December 27, 2014, Ms. Wickliffe began menstruating and asked guards for pads. Guards ignored her requests for almost a day. Consequently, Ms. Wickliffe bled into her uniform. When she requested a new uniform, guards told her that "it was her own fault," and did not provide a replacement uniform for another 24 hours.

(Dkt 18, First Amend. Compl.).

Regarding the alleged "denial of ... toilet supplies," Plaintiffs allege only that "Ms. Dorn and Ms. Baker have both been forced to wait hours in order to obtain toilet paper" (Dkt 18, First Amend. Compl. ¶ 120).

Last, regarding the alleged "denial of ... free extra clothing," Plaintiffs generally allege that women who enter the MCJ wearing a bra that is not approved have their bras confiscated (Dkt 18, First Amend. Compl. ¶¶ 9, 121). According to Plaintiffs, "[w]hen the MCJ confiscates a bra, MCJ does not provide a replacement bra, forcing women to go without a bra" (*id.* ¶ 122). Specifically, Plaintiffs allege that "[w]hen Ms. Bosch was taken to jail, unknown correctional officers confiscated her red sports bra and her boxer underwear," and that the "MCJ did not provide Ms. Bosch with a replacement bra, and she did not get a bra until a family member put money in her commissary account and she was able to buy one" (*id.* ¶¶ 123-24). Plaintiffs also generally allege that "MCJ

does not provide underwear" and specifically alleges that "Ms. Speers wore the same single pair of underwear for most of her time at MCJ" (Dkt 18, First Amend. Compl. ¶¶ 125-26). Plaintiffs generally allege that "[w]omen inmates are given inadequate clean clothing, laundry and linens" and "[d]uring wash day women are forced to wrap themselves in towels or sheets because they lack adequate clothing" (*id.* ¶¶ 128-29).

In support of judgment in their favor on Count III, Defendants argue that Plaintiffs' denial of feminine hygiene products fails to state a valid claim (Defs.' Br., Dkt 48 at 19). Defendants point out that Plaintiffs do not actually claim they were denied sanitary products; rather, each Plaintiff alleges "a single, temporary delayed delivery of sanitary napkins" (*id.* at 20-21). According to Defendants, courts have consistently held that short-term deprivations of such items fail to raise a colorable constitutional claim (*id.* at 19). Defendants argue that courts have consistently held that allegations regarding the deprivation of toilet paper likewise fail to raise a colorable constitutional claim (*id.* at 21). Last, Defendants argue that Plaintiffs' denial of clothing fails to state a valid claim, as this Court recently decided (*id.* at 21-22, citing *Mitchell v. Kalamazoo Cnty. Sheriff's Dep't*, No. 1:14-cv-824, 2014 WL 7330974 (W.D. Mich. 2014) (Neff, J.)).

In their response to Defendants' argument, Plaintiffs do not separately address the alleged deprivations of feminine hygiene products, toilet paper and extra clothing. Rather, Plaintiffs assert that Defendants' failure to provide menstrual pads resulted in the women bleeding into their clothes, and Defendants' failure to provide clean replacement clothing "exacerbat[ed] the humiliation and serious health risks Plaintiffs must endure" (Pls.' Resp., Dkt 49 at 24). According to Plaintiffs, Defendants err in attempting to frame Plaintiffs' claim as several individual and isolated instances of deprivation, rather than an overall policy and practice (*id.* at 23). Plaintiffs argue that they have

alleged facts from which a reasonable factfinder could plausibly infer that Defendants have a custom, policy, or practice of failing to provide female inmates with basic hygiene items (*id.*).

Defendants' argument for dismissal has merit.

Even accepting Plaintiffs' allegations as true, the allegations fail to state any plausible claim for relief under the Eighth Amendment. While clothing has been generally identified as a basic need deserving of Eighth Amendment protection, "'[t]he circumstances, nature, and duration of a deprivation ... must be considered in determining whether a constitutional violation has occurred.'" *Spencer v. Bouchard*, 449 F.3d 721, 728 (6th Cir. 2006) (quoting *Johnson v. Lewis*, 217 F.3d 726, 731 (9th Cir. 2000)). Here, Plaintiffs' allegation about "wash day" concerns a delay in delivery, not a deprivation, of clothing, and the Court therefore agrees with Defendants that the temporary inconvenience alleged does not rise to the level of a civil rights violation. As for the allegations that Defendants failed to provide Plaintiffs with bras or underwear, at county expense, Defendants are correct that this Court previously held that "[t]he jail's failure to provide additional free items, such as ... underwear and socks does not constitute the denial of the 'minimal civilized measure of life's necessities.'" *Mitchell*, 2014 WL 7330974, at *6 (quoting *Rhodes*, 452 U.S. at 347). A similar conclusion is appropriate in this case.

While "hygiene" has also been generally identified as a basic need deserving of Eighth Amendment protection, *see Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Argue v. Hofmeyer*, 80 F. App'x 427, 430 (6th Cir. 2003), the Court determines that the nature and duration of the alleged deprivations in this case similarly lead to the conclusion that Plaintiffs have not stated a plausible Eighth Amendment violation. Plaintiffs opine that "women at MCJ are, as a matter of policy or practice, regularly ignored when they request toiletries including menstrual pads," (Pls.' Resp., Dkt

49 at 24), but Plaintiffs' allegations indicate only that each Plaintiff alleges a single delay in receiving feminine hygiene products during their terms of incarceration. Plaintiff Vos, who alleges a single delay of "several hours" (and challenges the adequacy of the provision that was made), was incarcerated for approximately eight months (Dkt 18, First Amend. Compl. ¶ 31). Plaintiff Kitchens, who similarly alleges a single delay of "hours," was incarcerated for approximately nine months (*id.* ¶ 31). Plaintiff Speers, who alleges a single delay of "approximately two days," was incarcerated for approximately six months (*id.* ¶ 34). Plaintiff Brown, who alleges a single delay of "approximately eight hours," was incarcerated for approximately three months (*id.* ¶ 32). And Plaintiff Collins, who alleges a single delay of "over ten hours," was incarcerated for approximately six months (*id.* ¶ 36).[1] Regarding the alleged denial of toilet paper, Plaintiffs in fact allege only a deprivation of toilet paper for "hours" by two Plaintiffs, Dorn and Baker (*id.* ¶ 120).

Defendants are correct that courts have routinely found that such allegations demonstrate only de minimis deprivations, which do not rise to the level of civil rights violations. *See, e.g., Harris v. Fleming*, 839 F.2d 1232, 1235-36 (7th Cir. 1988) (holding, where the inmate alleged he was not provided with toilet paper for five days, and that he lacked soap, toothbrush, and toothpaste for ten days and was kept in a filthy, roach-infested cell, "the defendants' temporary neglect of Harris's needs was not intentional, nor did it reach unconstitutional proportions"); *Sublett v. White*, No. 5:12CV-P180-R, 2013 WL 2303249, at *1 (W.D. Ky. May 24, 2013) ("Depriving an inmate of sheets, clothing and toilet paper for a forty-eight hour period does not rise to the level of an Eighth Amendment violation"); *Argo v. Gobble*, No. 1:10-CV-227, 2011 WL 2181956, at *6 (E.D. Tenn. June 3, 2011) (unspecified allegation regarding difficulty obtaining toilet paper does not state a

[1]Plaintiff Wickliffe, who alleges a delay of "almost a day," was incarcerated shortly before Plaintiffs filed their First Amended Complaint in December 2014.

claim); *Hunter v. Helton*, No. 1:10-CV-00021, 2010 WL 2405092, at *8 (M.D. Tenn. June 10, 2010) (dismissing "plaintiff's claim that one roll of toilet paper per inmate per week violates the Eighth Amendment"); *Gilland v. Owens*, 718 F. Supp. 665, 685 (W.D. Tenn. 1989) ("Short term deprivations of toilet paper, towels, sheets, blankets, mattresses, toothpaste, toothbrushes and the like do not rise to the level of a constitutional violation."); *Gilson v. Cox*, 711 F. Supp. 354, 355 (E.D. Mich. 1989) ("the failure to provide a prisoner with an adequate supply of toilet paper does not create a violation of constitutional magnitude").

Again, the Court's function in resolving this motion is to determine whether the conditions of confinement, as alleged, amount to state a claim of cruel and unusual punishment under current case law. Plaintiffs' allegations fail to state a plausible claim under the Eighth Amendment. Therefore, the Court grants Defendants' motion as to Count III (Denial of Access to Feminine Hygiene Products, Toilet Paper and Adequate Underwear and Other Clothing).

c. *Count IV: Severe Overcrowding & Other Abysmal Conditions*

In Count IV, Plaintiffs allege that "[d]ue to defendants' policy, practice or custom, plaintiffs and class members have been, are being, and will be subjected, without any penological justification or other legitimate purpose, to severe overcrowding and other inadequate, unsanitary and dangerous conditions" (Dkt 18, First Amend. Compl. ¶ 279). Plaintiffs allege that Defendants "have violated and are violating the prohibition against cruel and unusual punishment under the Eighth Amendment and the prohibition against punishment of pretrial detainees under the Due Process Clause of the Fourteenth Amendment to the United States Constitution" (*id.* ¶ 282).

In the factual section of their First Amended Complaint, Plaintiffs allege that the MCJ, built in 1959, is designed to house 370 inmates but "routinely houses well over 400 inmates" (Dkt 18, First Amend. Compl. ¶¶ 50-52, 159, 167-175). Plaintiffs delineate the standards in Michigan's

County Jail Overcrowding State of Emergency Act ("JOA"), MICH. COMP. LAWS § 801.51 *et seq.*, and the steps provided in the Act to reduce the jail population (*id.* ¶¶ 160-66). Plaintiffs allege that "the MCJ has consistently failed to meet the standards" set out in the JOA and "defendants have not continued to employ overcrowding reduction measures mandated by the JOA" (*id.* ¶ 176).

According to Plaintiffs, "[o]ther appalling conditions at MCJ include vermin, insects, mold, overflowing and constantly running toilets, broken sinks, scalding water, unchecked contagious diseases, and falling ceiling tiles" (Dkt 18, First Amend. Compl. ¶¶ 5, 145-51). Specifically, Plaintiffs allege that "[d]uring Ms. Bosch's incarceration, the shower in her cell stopped working, and was not repaired for three days" (*id.* ¶ 152). Further, according to Plaintiffs, "[s]ome showers have only burning hot water," and "Ms. Speers was burned on her scalp by scalding water from the shower" (*id.* ¶¶ 153 & 155). Plaintiffs allege that "female inmates collect the scalding water in rubber or plastic totes, and wait for it to cool before using it to bathe" (*id.* ¶ 153). "On one occasion, the tote Ms. Bosch was using to collect hot water tore open, causing hot water to burn her skin" (*id.* ¶ 154).

As a threshold matter, Defendants argue that Plaintiffs' general overcrowding allegations, in and of themselves, fail to state a valid claim under 42 U.S.C. § 1983 (Defs.' Br., Dkt 48 at 22, citing *Johnson v. Hefron*, 88 F.3d 404, 407 (6th Cir. 1996) (citing *Rhodes, supra*)). Defendants assert that it is well established that violations of state statutes or administrative rules are not constitutional violations, as § 1983 is designed to remedy violations of federal law, only (*id.*, citing. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 924 (1982); *Laney v. Farley*, 501 F.3d 577, 581 n.2 (6th Cir. 2007); *Smith v. Freland*, 954 F.2d 343, 347-48 (6th Cir. 1992)). Therefore, Defendants argue that to the extent Plaintiffs' complaint asserts a § 1983 claim based on the alleged violation of

Michigan's County Jail Overcrowding State of Emergency Act, MICH. COMP. LAWS § 801.51 *et seq.*, it must be dismissed (*id.*). On the specific conditions alleged, Defendants argue that courts have found that allegations regarding sleeping on floors and/or cots fail to state valid claims (Defs.' Br., Dkt 48 at 22). Similarly, Defendants argue that Plaintiffs' allegations regarding the plumbing, other temporary water issues, and falling ceiling tiles fail to state a valid claim (*id.* at 24).

In response, Plaintiffs clarify that they are claiming no such rights or luxuries as "raised beds or perfect plumbing" (Pls.' Resp., Dkt 49 at 17). Rather, they assert that they have alleged facts from which a reasonable factfinder "could plausibly infer that the abysmal conditions at MCJ jeopardize their health and safety, and deprive them of basic human needs" (*id.*). Specifically, Plaintiffs opine that the question is not, as Defendants suggest, "whether inmates have the right to water of a particular temperature, but instead whether non-functioning or scalding showers and exposure to raw

sewage and other inmates' bodily fluids combine to deprive Plaintiffs of their constitutional right to basic hygiene" (*id.* at 17-18). Similarly, Plaintiffs opine that rather than isolate the allegations that inmates must sleep on concrete floors, the Court must consider "whether (a) sleeping on the floor is safe, given the overflowing toilets, standing water, vermin, and insect infestations; and (b) denying inmates in overcrowded holding tanks a place to lie down for days at a time deprives them of their basic human need for adequate, safe sleep" (*id.* at 18). Last, Plaintiffs clarify that they included allegations about the MCJ's "chronic failure to meet state-law requirements" and repeated declaration of overcrowding emergencies as "evidence of and a likely cause of unsafe, unsanitary, and inhumane conditions" (*id.* at 17).

Defendants' argument has merit.

"Courts certainly have a responsibility to scrutinize claims of cruel and unusual confinement, and conditions in a number of prisons, especially older ones, have justly been described as 'deplorable' and 'sordid.'" *Rhodes*, 452 U.S. at 352 (quoting *Bell*, 441 U.S. at 562). "[H]owever, courts cannot assume that state legislatures and prison officials are insensitive to the requirements of the Constitution or to the perplexing sociological problems of how best to achieve the goals of the penal function in the criminal justice system: to punish justly, to deter future crime, and to return imprisoned persons to society with an improved change of being useful, law-abiding citizens." *Id.* Particularly here, as Plaintiffs acknowledge (Dkt 18, First Amend. Compl. ¶¶ 212-14), the county was not unaware of needed improvements to its aging jail facility but authorized and oversaw the recent construction of a new jail to replace the facility that once housed Plaintiffs.

"[O]vercrowding is not, in itself, a constitutional violation." *Agramonte v. Shartle*, 491 F. App'x 557, 560 (6th Cir. 2012). "Harsh and uncomfortable prison conditions do not automatically create an Eighth Amendment violation. . . . Rather, 'extreme deprivations' must be alleged in order to support a prison-overcrowding claim." *Hudson v. McMillian*, 503 U.S. 1, 9 (1992). And, "[n]othing so amorphous as 'overall conditions' can rise to the level of cruel and unusual punishment when no specific deprivation of a single human need exists." *Wilson*, 501 U.S. at 304.

Plaintiffs' specific allegations, even accepted as true, fail to state a plausible claim for relief. Plaintiffs' allegations that inmates must eat and sleep on the floor do not demonstrate deprivations of the minimal civilized measure of life's necessities. *See Preston v. Smith*, 750 F.2d 530, 534 (6th Cir. 1984) (finding no constitutional violation for confinement in a segregation cell without mattress); *Shelton v. Christian Cnty. Jail*, No. 5:14-CV-P146-GNS, 2015 WL 236853, at *2 (W.D. Ky. 2015) ("Plaintiff's allegations that inmates must eat and sleep on the floor are not deprivations

of the minimal civilized measure of life's necessities."). Defendants are correct that courts have also routinely held that allegations such as Plaintiffs' allegations about the plumbing, other temporary water issues, and falling ceiling tiles similarly fail to state a valid claim. *See Dellis v. Corr. Corp. of Am.*, 257 F.3d 508, 511 (6th Cir. 2001) (inmate's allegations that he was subjected to flooded cell and deprived of working toilet failed to state claim upon which relief could be granted under § 1983); *Dean v. Campbell*, 156 F.3d 1229 (6th Cir. 1998) (lack of hot water does not constitute an extreme deprivation); *Preston*, 750 F.2d at 534 (finding no constitutional violation for confinement in a segregation cell without hot water); *Anthony v. Bradley Cnty. Justice Ctr.*, No. 1:12-CV-303, 2015 WL 1206620, at *9 (E.D. Tenn. 2015) (finding that claims of frequent toilet backups failed to state a valid claim because "even in the free world, toilets back up and bad odors which cannot be eliminated must be endured" and "while Plaintiffs claim waste from other toilets collects in the toilet in their cell is an everyday occurrence, they have not specified the length of time to which they have been exposed to the sewer backup.").

In sum, Plaintiffs have not alleged conditions that resulted in an unconstitutional denial of their basic needs. Therefore, the Court grants Defendants' motion as to Count IV (Severe Overcrowding and Other Abysmal Conditions).

d. Other

Last, Defendants identify allegations within Plaintiffs' First Amended Complaint regarding "extended stays in the holding cell" (Defs.' Br., Dkt 48 at 12; Dkt 18, First Amend. Compl. ¶¶ 3-4, 130-44, 177, 256, 279), "deliberate indifference to medical needs" (Defs.' Br., Dkt 48 at 27; Dkt 18, First Amend. Compl. ¶¶ 178, 185), and a "non-functional complaint system" (Defs.' Br., Dkt 48 at 26; Dkt 18, First Amend. Compl. ¶¶ 14-16, 179-97, 246, 255). Defendants seek dismissal of these three "claims" (Defs.' Br., Dkt 48 at 32).

In response, Plaintiffs clarify that they "discussed these issues in the factual allegations section of their complaint because they lend support to the legal claims asserted in Counts I through IV [b]ut these issues are not themselves independent legal claims asserted by Plaintiffs in their complaint" (Pls.' Resp., Dkt 49 at 31). According to Plaintiffs, "[t]he court should deny Defendants' request for a judgment as to supposed legal claims that Plaintiffs have not brought" (*id.*).

Given Plaintiffs' clarification that they do not intend to pursue these three topics as claims, the Court finds dismissal unwarranted.

III. CONCLUSION

In sum, Defendants have not demonstrated that dismissal of either Count I (Violation of Privacy and Bodily Integrity) or Count II (Denial of Exercise), in whole or in part, is warranted, and these two counts will therefore proceed. Defendants' arguments challenging the allegations of Count III (Denial of Access to Feminine Hygiene Products, Toilet Paper and Adequate Underwear and Other Clothing) and Count IV (Severe Overcrowding and Other Abysmal Conditions) have merit, and Counts III and IV are dismissed. Defendants' motion did not challenge Count V, and Count V will also proceed.

Given the disposition of Defendants' motion, the Court will also deny without prejudice Plaintiffs' pending motions for a preliminary injunction and for class certification (Dkts 2 & 5). Plaintiffs may re-file these motions to conform to the Court's rulings herein, giving due consideration to if and/or how the transition of inmates to the new jail facility has also rendered their requests moot, in whole or in part.

Accordingly:

IT IS HEREBY ORDERED that Defendants' motion for partial judgment on the pleadings (Dkt 47) is DENIED IN PART as to Counts I and II, and GRANTED IN PART as to Counts III and IV.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Preliminary Injunction (Dkt 2) and Plaintiffs' Motion to Certify Class (Dkt 5), and Plaintiffs' "Motion to Compel Defendants to Permit Entry on Land and to Hear Expert's Testimony in Support of Plaintiffs' Preliminary Injunction Motion (Dkt 35) are DISMISSED WITHOUT PREJUDICE to re-filing, as noted herein.

DATED: September 11, 2015

/s/ Janet T. Neff
JANET T. NEFF
United States District Judge