IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICHELLE SEMELBAUER, PAULETTE BOSCH, DENISE VOS, CRISA BROWN, LATRECE BAKER, TAMMY SPEERS, LONDORA KITCHENS, STASHIA COLLINS, ANDREA DORN, JUDY PAULEY, and DELILAH WICKLIFFE, individually and on behalf of all similarly situated persons,

Plaintiffs,

vs.

MUSKEGON COUNTY, a municipal corporation; DEAN ROESLER, in his official capacity as Muskegon County Sheriff; LT. MARK BURNS, in his official capacity as Jail Administrator; CORRECTIONAL OFFICERS IVAN MORRIS, GRIEVES, DEYOUNG, and DAVID GUTOWSKI, in their individual capacities; and UNKNOWN CORRECTIONAL OFFICERS, in their individual capacities,

Defendants.

_____/

CASE NO: 1:14-cv-01245-JTN

HON. JANET T. NEFF

ORAL ARGUMENT REQUESTED

REPLY BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Table of Contents

Table of Authorities

Cases

Treatises

I. Defendants Misstate the Legal Standard for a Preliminary Injunction.

As a matter of law, defendants are incorrect in their assertion that "the plaintiffs in this case must carry an even heavier burden because the injunction they seek mandates affirmative conduct." (Defs.' Prelim. Inj. Br., Dkt 14 at 6.) The Sixth Circuit has specifically rejected the argument that a plaintiff carries a heavier burden when seeking a "mandatory" injunction as opposed to a "prohibitory" injunction:

> Recognizing that preservation of the court's ability to exercise meaningful review may require *affirmative* relief in order to prevent some future irreparable injury, several commentators have criticized judicial hesitancy to disturb the status quo where the conditions favoring injunctive relief are satisfied. . . . [I]f the currently existing status quo itself is causing one of the parties irreparable injury, it is necessary to alter the situation so as to prevent the injury. We therefore . . . conclude that the distinction between mandatory and prohibitory injunctive relief is not meaningful . . . and hold that the traditional preliminary injunctive standard—the balancing of equities—applies to motions for mandatory preliminary injunctive relief as well as motions for prohibitory preliminary injunctive relief.

United Food & Comm. Workers Union v. Sw. Ohio Reg'l Trans. Auth., 163 F.3d 341, 348 (6th Cir. 1998) (emphasis in original; citations and quotation marks omitted). Plaintiffs therefore face no "heavier burden" here.

II. Plaintiffs' Injunctive Claims Are Not Moot.

Defendants acknowledge that plaintiff Stashia Collins had standing to seek injunctive relief when this case was filed. Yet Defendants argue that because they released Ms. Collins from custody, no plaintiff has standing to seek a preliminary injunction. (Defs.' Prelim. Inj. Br., Dkt 14 at 4-5.) As discussed in detail in plaintiffs' reply on their class certification motion (pages 1-7), this argument fails for two reasons. First, plaintiffs Andrea Dorn and Judy Pauley are currently incarcerated, and thus have standing to seek injunctive relief both for themselves and for the injunctive classes.

Second, and more importantly, because the claims of the injunctive classes are inherently transitory, prospective class representatives whose individual claims are moot nevertheless have standing to represent the class and seek class-wide injunctive relief.[1] *Sosna v. Iowa*, 419 U.S. 393, 402 n.11 (1975); *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980); *Ball v. Wagers*, 795 F.2d 579, 581 (6th Cir. 1986); *Olson v. Brown*, 594 F.3d 577, 582-84 (7th Cir. 2010); *Newberg on Class Actions* § 2.13 (5th ed. 2013). Accordingly Ms. Collins may seek a preliminary injunction on behalf of the injunctive classes, as may Ms. Dorn and Ms. Pauley, regardless of whether they are released prior to the court's decision on this motion.

III. Defendants Cannot Defeat Plaintiffs' Preliminary Injunction Motion Simply By Filing a Brief That Says Plaintiffs' Allegations Are Untrue.

Plaintiffs' request for a preliminary injunction is supported, *inter alia*, by:

- declarations from twelve inmates attesting to the abysmal conditions of confinement at the Muskegon County Jail (MCJ)[2];
- a report by corrections expert Peter Wilson who, based on an inspection of the jail and a review of jail records, found that the MCJ is chronically overpopulated; safety, security and sanitary conditions are below constitutional standards; the breasts and genitals of female inmates are visible to male guards while those inmates shower and use the toilet; feminine hygiene products and undergarments are not provided on a timely basis; and exercise opportunities are inadequate or entirely lacking (Dkt 4);
- a Michigan Department of Corrections inspection report documenting serious safety and health problems and advising defendants to make immediate repairs (Dkt 4-3);

[1] While Ms. Collins has standing to seek injunctive relief on behalf of the injunctive classes, she no longer has standing to seek injunctive relief on her own behalf.

[2] Declarations from the eight original plaintiffs were attached to the preliminary injunction brief, and four additional inmate declarations were attached to plaintiffs' reply brief on the motion for class certification. Dkt 3-2 to 3-9; 21-4 to 21-6; 21-8. An updated index of exhibits was also filed with plaintiffs' reply in support of their motion for preliminary injunction. Dkt 21-1.

- an analysis of jail population records showing that MCJ virtually always exceeds its rated design capacity (Dkt 4-1; *see* First Am. Compl. ¶¶ 168-172, Dkt 18);
- multiple memos from defendant Roesler declaring overcrowding emergencies at MCJ (Dkt 4-4 to 4-6); and
- multiple news reports describing mold, crumbling ceilings and "jail ooze" seeping through the walls (Dkt 4-7 to 4-10).

In response to this extensive evidentiary record documenting plaintiffs' claims, defendants simply argue that an injunction should not be granted because plaintiffs' allegations are "not truthful." (Defs.' Prelim. Inj. Br., Dkt 14 at 7.) This argument fails because (A) defendants have failed to respond to plaintiffs' evidence with any competent contradictory evidence; (B) defendants implicitly concede many of the facts alleged; and (C) there are no facts in dispute relevant to plaintiffs' preliminary injunction motion.

A. Defendants Have Failed to Respond to Plaintiffs' Evidence With Any Competent Contradictory Evidence.

In opposing plaintiffs' motion, defendants did not proffer any evidence refuting plaintiffs' evidence that MCJ is severely overcrowded or that conditions are abysmal. Rather, defendants' brief baldly asserts, without an iota of evidentiary support, that plaintiffs' allegations are untrue. Similarly defendants fail to proffer evidence to contradict plaintiffs' declarations that they are routinely viewed naked or partly naked by male guards and that they are denied regular out-of-cell exercise. With respect to plaintiffs' evidence about unreasonable denials of feminine hygiene products, defendants do provide purchasing information (Dkt 16-30), but no evidence that pads are actually provided to inmates on a timely basis.

Defendants cannot overcome the evidentiary showing made here by plaintiffs merely by stating that plaintiffs' allegations, as supported by an extensive evidentiary record, are untrue without proffering alternative credible evidence. When a motion for preliminary injunction is supported by affidavits, "statements of fact in these affidavits may be taken as true where no

counter-affidavits are filed in opposition to the motion for preliminary injunction." *Corning Glass Works v. Lady Cornella Inc.*, 305 F. Supp. 1229, 1231 (E.D. Mich. 1969); *see also Elrod v. Burns*, 427 U.S. 347, 350 n.1 (1976) ("uncontroverted affidavits filed in support of the motion for a preliminary injunction are taken as true"); *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1313 (11th Cir. 1998) (affirming grant of preliminary injunction without a hearing where defendants "had ten days to provide affidavits or other evidence showing a material issue of fact regarding whether [they] actually had committed the infractions described by [plaintiff]"); *Imagine Medispa, LLC v. Transformations, Inc.*, 999 F. Supp. 2d 862, 869 (S.D.W. Va. 2014) (on motion for preliminary injunction, "[s]tatements contained in an uncontroverted affidavit may be accepted as true"); *Arch Ins. Co. v. Sierra Equip. Rental, Inc.*, 2012 WL 5897327, at *5 (E.D. Cal. Nov. 13, 2012) (accepting plaintiff's sworn facts in support of preliminary injunction where defendant failed to dispute them with admissible evidence).

If a plaintiff's proof could be overcome simply by stating the plaintiff's evidence is untrue, then preliminary injunctions would never be granted. Moreover, this is not a situation where relevant information is in the hands of a third party, which would make it difficult for defendants to respond to plaintiffs' allegations. Defendants operate the jail, so if they have evidence that plaintiffs' allegations are untrue they are obligated to present it in opposition to plaintiffs' motion. Because defendants have failed to introduce any competent evidence contradicting that of the plaintiffs, the plaintiffs' evidence must be taken as true for the purposes of deciding the preliminary injunction motion.

B. Defendants Implicitly Concede Many of the Facts Alleged.

A careful reading of defendants' pleadings indicates that they effectively admit many of the facts. For example, defendants claim that women inmates need not be taken to the gym

because they can get adequate exercise by walking around their 12-person cells or the "day room."[3] Dkt 16, at 14. There is thus no factual dispute about whether women inmates are denied regular exercise in the gym, but only a legal dispute about whether the ability to move about a small living space crammed with other inmates is adequate exercise. Defendants also concede that male officers patrol the female housing areas. Dkt 16, at 15. And defendants' Answer notes that the contents of the Department of Corrections' inspection report "speak for themselves." Answer, Dkt 20, ¶ 144. That report found that leaking toilets create a "serious potential health hazard"; that flushing toilets cause sewage backups in toilets of other cells; that shower water is "extremely hot" in many cells, creating "a potential hazard to the user"; that water is leaking onto cell floors; that shower curtains are soiled and "contain a black substance suspected to be mold/mildew"; that air vents contain a black substance suspected to be mold/mildew; and that there were bugs in the sleeping areas. Dkt 4-3.

In sum, defendants have not only failed to proffer evidence rebutting plaintiffs' claims, but have on multiple issues conceded that plaintiffs' allegations are true.

C. There Are No Facts in Dispute That Are Material to Plaintiffs' Preliminary Injunction Motion.

Although the rhetoric of defendants' briefs might suggest that there are material facts in dispute, the only facts for which defendants put forth competent contradictory evidence are facts that are not material to the injunctive relief that plaintiffs request. In this context it may be useful to review exactly what relief the plaintiffs seek. Plaintiffs have only asked that the court order defendants to take immediate measures to:

[3] The day room is not only very small and is used as a living space for all of the inmates in the adjoining two-person cells, but also is filled with cots due to overcrowding. *See* MCJ floor plans, Dkt 4-2; Brown Decl., Dkt 3-5; Semelbauer Decl, Dkt 3-2; Baker Decl., Dkt 3-6.

a. repair broken and backed-up plumbing and other failures of basic infrastructure, treat and exterminate infestations of mold and vermin, and implement a regular system of inspection, maintenance and repair to prevent these and related conditions from recurring at the existing jail, pending completion of the new jail;

b. provide women inmates with privacy from being routinely viewed by members of the opposite sex while showering, using the toilet, getting dressed and undressed, and attending to their sanitary needs related to menstruation;

c. provide women inmates with reasonable access to toilet paper, feminine hygiene products, and clean undergarments; and

d. provide women inmates with out-of-cell exercise opportunities at least one hour per day.

See Pls' Prelim. Inj. Mot., Dkt 2, at 3. There are simply no factual disputes supported by competent evidence that relate to any of the relief requested.

In response to plaintiffs' preliminary injunction motion, defendants provided a single affidavit from Lt. Mark Burns, which concerns the dates when the plaintiffs were incarcerated. Dkt 14-1. In response to plaintiffs' class certification motion, defendants also provided jail records for each of the original eight plaintiffs, which show dates of incarceration and cell placements during the course of incarceration. Dkt 16-2 to 16-29. These documents in no way contradict plaintiffs' evidence showing that the conditions at MCJ are dangerous and unsanitary, that female inmates are subjected to routine and unchecked cross-gender viewing, that female inmates are denied reasonable access to hygiene products, and that MCJ fails to provide adequate out-of-cell exercise opportunities.

To the extent defendants rely on those records to suggest that a preliminary injunction should be denied based on a factual dispute about how long the plaintiffs were in the holding cells, that is a red herring. Plaintiffs have not sought injunctive relief specific to the length of detention in holding tanks.

IV. Defendants' Practices Are Unconstitutional.

Finally, defendants argue that a preliminary injunction should be denied because their practices are constitutional. Defendants' strategy in opposing both class certification and preliminary injunctive relief is to minimize the serious nature of the systemic problems that plague MCJ by mischaracterizing plaintiffs' allegations as complaints about "ordinary discomfort" and "temporary inconveniences." (Defs.' Class Cert. Br., Dkt 16 at 18.) But the uncontroverted record evidence reveals that conditions of confinement at MCJ present a serious threat to the health and safety of the inmates and deprive them of the basic dignity and humane treatment to which all persons have a natural and constitutional right.

Regarding the abysmal conditions of the facility, the evidence demonstrates that the jail is in such a state of decay and disrepair that human waste backs up into cells, inmates are unable to bathe safely, the facility is infested with mold, vermin and animal droppings, and the walls and ceilings are literally falling down. (*See* Pls.' Prelim. Inj. Br. at 3-4, 13; *see also* Dorn Decl., Dkt 21-4; Pauley Decl., Dkt 21-5; Wickliffe Decl., Dkt 21-6; Randle Decl., Dkt 21-8.) These are intolerable conditions and cannot be dismissed as mere ordinary or temporary inconveniences or discomforts.

On cross-gender viewing, defendants admit that female inmates cannot constitutionally be subjected to the degradation of having their breasts and genitals viewed by male guards without any penological justification. (Defs.' Prelim. Inj. Br., Dkt 14, at 7.) But defendants do not even attempt to justify the routine, systemic cross-gender viewing that occurs daily at MCJ, which is described in detail in plaintiffs' brief, Dkt 3, at 15, and in the additional declarations of the three new plaintiffs, *see* Dorn Decl., Dkt 21-4; Pauley Decl., Dkt 21-5; Wickliffe Decl., Dkt 21-6. Instead, defendants claim such viewing does not occur, even as they admit that male guards

patrol the female living areas. (Defs.' Class Cert. Br., Dkt 16, at 15.) Defendants' principal argument is that female inmates are now provided with two-piece jumpsuits. This is indeed an improvement over the prior one-piece jumpsuits, which required women to expose their breasts when using the toilet. But defendants fail to explain how female inmates in the new two-piece suits – while in full view of male guards – are supposed to use the toilet without lowering their pants or take a shower without removing their clothes entirely.

As to plaintiffs' claim regarding the denial of access to hygiene products and clean clothes, defendants argue that there is no constitutional violation because "none of the individual Plaintiffs claim that they were *denied* feminine hygiene products." (Defs.' Class Cert. Br. at 13, emphasis added.) To the contrary, the evidence demonstrates that plaintiffs are routinely deprived of timely and reasonable access to basic hygiene products such as feminine pads and toilet paper. Inmates have ended up bleeding into their uniforms and have been denied timely access to clean clothes. (*See* Pls.' Prelim. Inj. Br. at 7, 16; *see also* Dorn Decl., Dkt 21-4; Pauley Decl., Dkt 21-5; Wickliffe Decl., Dkt 21-6; Randle Decl, Dkt 21-8.) Such mistreatment "is incompatible with the concept of human dignity and has no place in civilized society." *Brown v. Plata*, 131 S. Ct. 1910, 1928 (2011).

Defendants themselves acknowledge the inmates have a right to hygiene, which for women includes access to feminine hygiene products. (Defs.' Class Cert. Br. at 13.) However, defendants suggest that only a total deprivation of hygiene products – i.e. never providing such products all – would violate the Constitution. Thus, in defendants' view, they can deny pads and toilet paper to women for hours or even days, so long as they eventually provide them, albeit

after the women have soiled their uniforms (which they may not have an opportunity to change until the next laundry day)[4].

The very case cited by the defendants, while suggesting that the inadvertent, short-term denial of hygiene items may not state a constitutional violation[5], also explains that "frequent or long term deprivations of such items would deprive inmates of constitutional rights." *Gilland v. Owens*, 718 F. Supp. 665, 685 (W.D. Tenn. 1989). Here the evidence shows that defendants routinely deny women inmates access to hygiene products. Indeed, inmates requesting these items have been told that they are "shit out of luck" and have been warned not to "bleed on the floor." (*See* Kitchens Decl, Dkt 3-8 at ¶19.) The evidence is not that there was an isolated incident where, due to circumstances beyond their control, defendants could not provide hygiene products. Rather, the evidence shows that defendants routinely fail to provide sanitary products within anything close to the timeframe that human dignity and female hygiene demands.

Finally, with regard to exercise opportunities, the record evidence demonstrates that women have access to the gym once every few *months* at the most, and they have virtually no opportunities for any meaningful physical exercise. (*See* Pls.' Prelim. Inj. Br. at 8, 17-18; *see also* Dorn Decl., Dkt 21-4; Pauley Decl., Dkt 21-5; Wickliffe Decl., Dkt 21-6.) "It is generally recognized that a total or near-total deprivation of exercise or recreational opportunity, without penological justification, violates Eighth Amendment guarantees. Inmates require regular exercise to maintain reasonably good physical and psychological health." *Patterson v. Mintzes*, 717 F.2d 284, 289 (6th Cir. 1983). Clearly, there is no "regular exercise" for women at MCJ. Therefore, injunctive relief is warranted.

---

[4] *See* Vos Decl., Dkt 3-4, at ¶ 20.

[5] *But see Carver v. Knox Cnty., Tenn.*, 753 F. Supp. 1370, 1389 (E.D. Tenn. 1989), *aff'd in part, rev'd in part*, 887 F. 2d 1287 (6th Cir. 1989) (holding that "occasional incidents" of denying hygiene items violate the Constitution).

V. Conclusion

The conditions at MCJ put inmates at serious risk of ongoing physical and psychological harm. Broken plumbing, infestations of vermin, inadequate cleaning supplies, scorching hot water, and a crumbling facility leave all inmates at risk of contracting diseases or injuring or burning themselves. Systemic cross-gender viewing of women who are showering, changing, toileting, or attending to sanitary needs related to menstruation creates ongoing psychological harm, not to mention increasing the risk that female inmates will be sexually harassed and assaulted. Lack of feminine hygiene products leave inmates prone to infections. And lack of exercise takes an ongoing toll on both the physical and psychological health of inmates. These conditions call for immediate injunctive relief.

Respectfully submitted,

By: /s/ Miriam J. Aukerman

Miriam J. Aukerman (P63165)
Marc S. Allen (NY 5230008)
American Civil Liberties Union Fund of Michigan
1514 Wealthy Street SE, Suite 242
Grand Rapids, MI 49506
(616) 301-0930
maukerman@aclumich.org
mallen@aclumich.org

Michael J. Steinberg (P43085)
Daniel S. Korobkin (P72842)
Kary L. Moss (P49759)
American Civil Liberties Union Fund of Michigan
2966 Woodward Avenue
Detroit, MI 48201
(313) 578-6806
msteinberg@aclumich.org
dkorobkin@aclumich.org

PITT, MCGEHEE, PALMER& RIVERS, P.C.
Cooperating Attorneys, American Civil Liberties Union Fund of Michigan
Michael L. Pitt (P24429)
Beth M. Rivers (P33614)
Kevin M. Carlson (P67704)
Andrea J. Johnson (P74596)
117 West Fourth Street, Suite 200
Royal Oak, MI 48067
(248) 398-9800
mpitt@pittlawpc.com
brivers@pittlawpc.com
kcarlson@pittlawpc.com
ajohnson@pittlawpc.com

Attorneys for Plaintiffs

Dated: February 17, 2015