STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

WAYNE COUNTY JAIL INMATES, et. al.,

Plaintiffs,

v

WILLIAM LUCAS, et. al.,
Defendants.

Case No. 71 173 217 CZ

Hon. Timothy M. Kenny

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PLAINTIIFS' REPLY IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

Defendants correctly state that "[t]he issue before this court is whether the delivery of health care (within the jail) is so bad that it amounts to a violation of the [Eighth] Amendment." The answer to this question is simple: it is.

Thirteen detainees have filed sworn declarations with this Court, describing, in great detail, Defendants' failure to take even the most basic precautions to mitigate the spread of COVID-19. The inspection report prepared by Fred Rottnek, M.D., MACHM independently confirms what these detainees have already explained: that three months after this pandemic began, Defendants are perpetuating dangerous conditions at the Wayne County Jail (the "Jail") that put Plaintiffs' lives at risk. And the ***seventeen*** sworn declarations attached to this Reply confirm that Defendants are *still* failing to undertake minimal measure to mitigate the transmission and spread of COVID-19 at the Jail.

Defendants argue that, because they have enacted policies and procedures, and because "no one solution is perfect," they are absolved from any constitutional accountability. But as Plaintiffs' declarations and Dr. Rottnek's report demonstrate, the Jail continues to remain an unconscionably dangerous place where these policies and procedures are disregarded. Defendants have offered no evidence to the contrary.

Nowhere is Defendants' deliberate indifference clearer than in Division II. Dr. Rottnek found that it is too dangerous to house detainees in Division II because it is impossible for detainees to socially distance or for the decrepit facility to be adequately cleaned. Defendants do not dispute this: they themselves concede that Division II should have been closed "well before the health crisis." But even though Defendants are fully aware of these deplorable conditions, and despite having ample space in other facilities, they continue to confine detainees in Division II. The unconstitutional use of Division II to confine detainees during the pandemic is indisputably a

policy that is attributable to Defendants and was not addressed in the temporary stipulated order entered by this Court. This Court should therefore issue an order immediately requiring Defendants to discontinuing using Division II to confine detainees during the pandemic.

As to Plaintiffs' remaining requests for relief, Defendants correctly note that the parties have entered into a temporary stipulated order addressing some, but not all, of the relief sought. This does not, however, prohibit this Court from ordering the relief sought. First, the voluntarily entered stipulated order is temporary and expires in seven days on June 18, 2020. Absent an order from this Court, Defendants would be free to continue violating detainees' constitutional rights on June 19. More importantly, the declarations submitted with this Reply show that, notwithstanding the temporary order, Defendants continue to confine detainees in conditions that show an indifference to their health, lives, and constitutional rights.

Defendants' indifference for detainees' lives cannot be permitted to continue. This Court should order Defendants to immediately discontinue the use of Division II during the COVID-19 pandemic and reduce the Jail population to a level where social distancing is possible in Division I and III, including the floors in those facilities that are currently closed. This Court should also immediately enter the additional emergency relief Plaintiffs seek to ensure minimal health and hygiene safeguards are required beyond June 18, 2020.

UNDISPUTED FACTUAL BACKGROUND

A. COVID-19 Is A Deadly Infectious Disease That Is Spreading Rampantly Within the Wayne County Jail.

The overwhelming medical, scientific, and governmental consensus is that COVID-19 is a highly transmissible and deadly infectious disease. Defendants confine medically vulnerable people who are at heightened risk for serious complications or death in all three divisions at the Jail.

Defendants tested 689 detainees for COVID-19 between May 8, 2020 and May 11, 2020. Test results showed that 56 detainees actively had the virus (in total, 85 people have tested positive for the virus at the Jail, Defs. Br. at 9) and that 116 detainees tested positive for the antivirus, meaning that they were previously infected with the virus. Of the 111 detainees who tested positive for the virus, 90 were admitted to the jail before March 10, 2020, the day the first COVID-19 case was reported in Michigan. The test results, which provide a snapshot of the rate of infection at the Jail, show that 22 percent (146 out of 689) contracted COVID-19 while detained at the Jail. *See* Ex. 1 (Kim Decl.). Additionally, over 200 employees from the Wayne County Sheriff's Office have already tested positive, and four members of the Jail staff have already died as a result of being infected with the virus. Pls.' Br. at 1.

B. Confining Detainees in Division II Is Unsafe.

"Social distancing," as defined by the Centers for Disease Control and Prevention (CDC) and by the medical experts in this case, is necessary to protect individuals from the serious risk of contracting and spreading COVID-19. Social distancing is the single most important measure anyone can take to reduce the transmission of COVID-19. If social distancing cannot be meaningfully practiced, then preventing the spread of infection is nearly impossible. Thoroughly cleaning and disinfecting high-touch surfaces and areas where people with confirmed or suspected COVID-19 cases spent time is also integral to stopping the spread and transmission of COVID-19, particularly in environments where consistent social distancing is difficult.

Social distancing is frankly not possible within Division II of the Jail. Dr. Fred Rottnek, the expert appointed by this Court, concluded that, "[i]n Division II, social distancing is impossible for inmates as well as for staff doing round[s]." Rottnek Report at 11; *id.* at 12. Dr. Rottnek further concluded that the physical condition of Division II renders thorough cleaning and disinfecting

impossible. *Id.* at 12 ("[T]he physical conditions are filthy and cannot be adequately cleaned due to pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold."). Defendants concede that discussions to cease the use of Division II have been ongoing "well before the current health crisis." Defs.' Br. at 17. Defendants nevertheless insist that an infectious disease pandemic makes confining persons in these unsanitary conditions necessary.

A recent Jail population report showed that there are ample beds, across multiple floors that are currently closed, in Division III, the newest Jail facility. The 7th and 9th floors of the facility each have 128 available beds; the 7th floor annex has another 53 available beds; the 2nd floor has 86 available beds; and the 8th floor has 64 available beds. Thus, there are a total of 459 available beds across the closed floors in Division III. *See* Ex. 2.

C. Social Distancing Was Not Being Practiced When This Motion Was Filed and Was Not Being Practiced During Dr. Rottnek's Inspection.

When this Motion was filed, Defendants were not providing adequate spacing of six feet or more so that social distancing could be accomplished. Detainees were being confined in cells approximately 8 feet by 15 feet that are shared by up to four other people, making it impossible for detainees to stay more than a few feet away from each other.[1] Detainees were required to eat meals at communal tables where social distancing could not be practiced.[2]

[1] Mathews Decl. ¶ 3 (The jail put me on a unit with 40 men, and it is almost impossible to be six feet away from anyone at any given time."), ¶ 6 ("We sleep in four-person cubicles . . . and they are approximately 2 ½ - 3 ft away from each other.); C. White Decl. ¶ 3 ("I slept in an 8 or 9 by 15 feet cubicle with three other men."); Nickel Decl. ¶ 5 ("There are two women to every cell, and each cell has bunk beds."); Kelly Decl. ¶ 17 (In the mental health rocks, "there are two beds and two people in each a cell.").

[2] C. White Decl. ¶¶ 3 ("During meals, 4-5 men sit at each table. It is impossible to maintain a distance of six feet from another person."); Mathews Decl. ¶ 8 ("During meals, all 40 men share a few tables. It is impossible to be six feet away from anyone during meals, and none of the guys wear masks when they're eating."); Pearson Decl. ¶ 6 ("We shared the same tables at meals"); Nickel Decl. ¶ 6 ("The unit with 10 women has three tables, and the 20 women unit has five tables. Everyone eats at those tables."); Malec Decl. ¶ 5 ("[D]uring the day were all packed together into a common space with bad ventilation that makes it almost impossible to get six feet away from anyone at any given time."); see also Kelly Decl. ¶ 6 (". . . I was physically touched or at a distance of less than six feet from approximately six officers.")

D. Social Distance Was Not Being Practiced When Dr. Rottnek Conducted His Inspection.

In addition to the fact that social distancing remains impossible in Division II, Dr. Rottnek found that social distancing at the current jail population level in Division I is impossible because the jail cells have front-facing walls of bars or open steel grids, which allow large aerosolized droplets containing COVID-19 to spread freely between cells. Rottnek Report at 3, 4, 8.

Dr. Rottnek also found that Defendants continue to double-bunk detainees in beds that are only a few feet apart from each other. Rottnek Report at 8, 11-12. And in the medical unit, detainees with co-occurring health problems were kept on stretchers in close proximity to one another. *Id.* at 8.

Lastly, Dr. Rottnek observed that Jail staff were not practicing social distancing while at the Jail. *Id.* at 14 (observing Jail staff in a medical clinic "two feet apart, without wearing masks.").

E. Defendants Did Not Post Signage at the Jail Warning Detainees of the Risk of COVID-19 Before This Motion Was Filed or Before Dr. Rottnek's Inspection.

The CDC recommends that correctional facilities: (1) post signage throughout the facility communicating COVID-19 symptoms and hand hygiene instructions; (2) ensure such signage is understandable for non-English speaking people as well as those with low literacy; and (3) provide clear information about the presence of COVID-19 cases within a facility and the need to practice social distancing and maintain hygiene precautions.[3]

At the time this Motion was filed, the Jail provided detainees with little to no information about COVID-19. Specifically, the Jail failed to advise detainees of: the basic prevention guidance; the risks associated with infection, especially to certain vulnerable populations;

[3] *See Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities*, CDC.gov (available at: https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html).

symptoms; and available treatments.[4] When detainees asked Jail staff for information, staff were dismissive, actively misled detainees, or falsely advised detainees that they were safer from infection inside the Jail.[5]

During his inspection, Dr. Rottnek found that the signage at the Jail *still* did not mention COVID-19 or discuss measures that must be taken to mitigate the spread of the virus. Rottnek Report at 14, 17. In Division I, Dr. Rottnek found that there was "limited and outdated" signage which did not mention COVID-19. *Id.* at 14. In Division II, the signage was "old and inaccurate" and made "no mention of COVID-19 or [the] definition of social/physical distancing." *Id.* at 17. Further, although there were signs in Division III, they were outdated: "they had the old signs and symptoms—not the newer expanded signs and symptoms list by the CDC." *Id.* at 20.

[4] Matthews Decl. ¶ 10 ("The jail hasn't told us anything about coronavirus."); Kelly Decl. ¶ 10 (". . . the Jail staff didn't mention anything about coronavirus."); Carline Decl. ¶ 15 ("The Jail isn't telling us anything about COVID. When I ask about COVID they dismiss what we have to say."); Smelley Decl. ¶ 13 (In Division II, "[t]he jail hasn't given us any information about COVID or hung any posters."); Blanks Decl. ¶ 15 ("The Jail hasn't given us any additional information about COVID-19, but a nurse posted a sheet of paper up that lists COVID-19 symptoms."); Malec Decl. ¶ 3 ("The Jail hasn't given us any information about COVID-19."); Russell Decl. ¶ 13 ('They haven't given us anything or any information [regarding COVID-19], there is nothing even posted on the pod."); Pearson Decl. ¶ 16 ("We have not heard anything about COVID-19 from the jail staff."); Velez Decl. ¶ 10 ("The Jail doesn't tell us anything about COVID-19."); Nickel Decl. ¶ 4 ("The jail never gave us any guidelines or information, verbally or in writing, about how to stay safe, how the virus is spread, or what symptoms we should look for.").

[5] Nickel Decl. ¶ 2 ("The general narrative from deputies was "you're safer in here than you are out here."), ¶ 4 ("I never received any information about Covid-19 from the jail staff until the last ten days that I was locked up. The jail turned the heat up really high one day, and one of the deputies told us that heat kills the virus"); H. White Decl. ¶ 12 ("I see coronavirus on TV and keep hearing someone in the kitchen died. When the guards hear something bad coming from the TV, they unplug it."); Smelley Decl. ¶ 13 ("[The Jail] only tell us that we are in the best position in here because we haven't been outside. Otherwise."); Blanks Decl. ¶ 16 ("The Jail seems to be hiding what is going on.").

F. Defendants Were Not Providing Detainees with Adequate Hygiene Products and Cleaning Supplies When This Motion Was Filed and During Dr. Rottnek's Inspection.

When this Motion was filed, Detainees had limited access to hygiene supplies.[6] Detainees also had limited or no access to cleaning supplies.[7] Dr. Rottnek confirmed that, in many parts of the Jail, inmates *still* do not have adequate access to hygiene supplies to regularly wash their hands. Dr. Rottnek reported that, for Division I, Defendants provide detainees with only two or three hotel-sized bars of soap per week, which Plaintiffs must use to wash their clothes, hands, and bodies. Rottnek Report at 17 (Division II: "[i]nmates report that they were given 3 soaps every week or every 2 weeks. This is remarkably inadequate for regular hand washing and showering, particularly during a pandemic in which people are encouraged to frequently was[h] hands.")

G. Defendants Were Not Adequately Cleaning and Sanitizing the Jail When This Motion Was Filed or During Dr. Rottnek's Inspection.

When this Motion was filed, Defendants were not taking basic measures to maintain safe, hygienic conditions at the Jail. The bathrooms and showers the detainees shared were unsanitary,

[6] Kelly Decl. ¶ 11 ("I only got one bar of soap for three days. It's a hotel bar size . . . I asked multiple times for soap, but the jail wouldn't give it to me."); Carline Decl. ¶ 11 (In Division II, "[w]e're given three hotel bars of soap per week to wash clothes, hands, bodies If we run out, we have to ask another inmate. The jail won't give us more soap."); Smelley Decl. ¶ 11 (same); Blanks Decl. ¶ 12 (same); Nickel Decl. ¶ 10 (same); Blanks Decl. ¶ 13 (I have only gotten one new uniform since I was transferred to Division II, and I have not received a new towel or new linens.").

[7] Matthews Decl. ¶ 7 (detainees only have access to Simple Green); Kelly Decl. ¶ 13 ("In quarantine we have no access to cleaning products."), ¶ 16 (There is no hand sanitizer in mental health ward or in quarantine."); Matthews Decl. ¶ 9 ("We don't have access to any hand-sanitizer."); Carline Decl. 11 (same); Smelley Decl. ¶ 9 (In Division II, [w]e don't have any access to disinfectant of any kind."); Nickel Decl. 13 ("We don't have disinfectant to clean the tables or any other surfaces, such as the toilets, sinks, or showers."); C. White Decl. ¶ 6 ("We do not have access to disinfectant of any kind."); Carline ¶ 9 ("We only have access to cleaning supplies once in the morning."), ¶ 10 ("All of the inmates share one tablet and one telephone. We don't have any way to clean the tablet or phone after each use."); Blanks Decl. ¶ 5 (In the quarantine unit, [e]ven though one of the guys in the unit was ill, we had no access to cleaning products."); Russell Decl. ¶ 14 ("They won't allow us to clean our rooms with [bleach], or even add it to the water that we mop with.").

containing fecal matter, or often not even functioning.[8] Cleaning of high-touch surfaces and areas was infrequent and insufficient.[9]

During Dr. Rottnek's inspection, Jail staff informed him that they were not able to sufficiently clean the Jail. Rottnek Report at 5 (Kitchen staff stated "'we can't clean like [they're] supposed to' because [they] used to have 25-28 trust[ies] for cleaning and now only [have] 2."), *id.* at 5 ("[Bathrooms] should be cleaned after each use," but some are cleaned only ". . . one/day by a trust[y].").

H. Jail Staff Were Consistently Failing to Wear Protective Equipment When This Motion was Filed and During Dr. Rottnek's Inspection.

At the time this Motion was filed, Jail staff fail were consistently failing to wear appropriate protective gear while inside the Jail.[10] Dr. Rottnek observed that Jail staff was not wearing

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[8] Blanks Decl. ¶ 4 ("The sink in the first cell was unusable because the sink and toilet water were connected, and the sink water appeared to be tainted with fecal matter"); Nickel Decl. ¶ 10 ("most of the sinks were unusable" and "many of the sinks aren't completely in working condition . . . or [are] too dirty to use"), ¶ 11 ("The showers are filthy."); Carline Decl. ¶ 6 (sole shower was unusable for seven days); Russell Decl. ¶ 9 (five of the eight showers in pod do not work and four of the eight toilets are out of service); Pearson Decl. ¶ 18 ("The cell was disgusting . . . There was dried urine in the toilet. The whole cell smelled like urine. The toilet bowl is white but has turned orange because of the dried waste."). Some of the cell walls in Division I, at least, were covered with urine, feces, and vomit. Kelly Decl. ¶ 15 ("The walls are covered in feces, pee, and vomit. You can smell the toilets. They're filthy. The sinks are filthy. The walls are filthy.").

[9] Matthews Decl. ¶ 7 ("40 guys share eight sinks, eight toilets, and eight showers. They are cleaned twice daily, regardless of how often they are used."), ¶ 8 (communal tables are wiped down only after meals); Kelly Decl. ¶ 10 ("[F]ive inmates, including myself, shared one shower. The shower is not cleaned after each use."), ¶ 13 ("In quarantine . . . I never saw anyone clean the showers or phone or any of the other common areas. . . ."), ¶ 18 (In the mental health rock, "[i]'ve never seen [Jail staff] clean the shower."), ¶ 25 (On a different side of the mental health rock, [e]veryone shares one shower. I've never seen it cleaned. I never saw any disinfectant, and never saw anyone wipe it down.), ¶ 33 (In Division II, "[t]he cell bars are not cleaned."); Smelley Decl. ¶ 10 ("Jail staff comes in to clean the shower once a week or every other week. I have never seen the phone or tablet cleaned."); Blanks Decl. ¶ 5 (In the quarantine unit in Division I, "the Jail staff did not clean [at] any point."), ¶ 11 (In the quarantine unit in Division II, "[t]he unit has only been cleaned once in two weeks"); Hubbard Decl. ¶ 6 ("Every two weeks a corrections officer uses bleach to spray the bathroom."); Velez Decl. ¶ 9 ("I have never seen anybody clean with bleach or lysol or anything like that."); C. White Decl. ¶ 6 ("[N]o one cleans with disinfectant."), id. ("The tables are sprayed down with Simple Green after every meal, but the phones, tablets, bathrooms and everything else is cleaned with Simple Green once daily at the most.").

[10] Matthews Decl. ¶ 11 ("The jail staff does not wear gloves, but some of them wear masks."); Kelly Decl. ¶ 6 (". . . Some wore gloves and others wore nothing. But no one wore masks."), ¶ 7 (when serving food, Jail staff ". . . never wore gloves or masks when they did that."), ¶ 22 (In the mental health rock, [s]ome [Jail staff] were wearing protective wear. Others were not."), ¶ (In Division II, Jail staff "inconsistently wear masks and gloves. Sometimes one or the other, sometimes nothing, and sometimes both."); Carline ¶ 11 ("Some of the jail staff is wearing masks and gloves,

protective equipment during his inspection. Rottnek Report at 14 (observing two staff "sitting side by side, two feet apart, without wearing masks."); *id.* at 6 ("There was inconsistent use of masks . . . among both inmates and staff.").

I. The Distribution of Protective Equipment to Detainees Was Insufficient When This Motion Was Filed and During Dr. Rottnek's Inspection.

The distribution of personal protective equipment ("PPE") to Detainees was insufficient at the time this Motion was filed.[11] Distribution continues to be insufficient. Dr. Rottnek observed that "most of the masks I saw were fraying and/or visibly dirty." Rottnek Report at 7; *id.* ("The two trustees I interviewed had visibly dirty and frayed masks.") Detainees continued to report that they are given masks once every two weeks and by then, the mask is dirty and falling apart." *Id.* at 15.

J. Defendants Were Failing to Provide Adequate and Timely Medical Care to Detainees When this Motion was Filed and During Dr. Rottnek's Inspection

At the time this Motion was filed, the process for obtaining medical care, including COVID-19 testing for symptomatic detainees, was woefully deficient.[12]

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but some are not."), ¶ 18 ("The medical staff is wearing gloves and masks, but when they distribute medication, they use and reuse the same cups for multiple inmates."); Smelley ¶ 8 ("Sometimes the deputies who serve food are not wearing masks and sometimes they are."); Blanks Decl. ¶ 7 (Only one in three deputies responsible for serving food wore masks and gloves); Malec Decl. ¶ 10 ("The deputies hand out meals, which we eat in our cells. Some of them wear gloves and masks and some of them don't."); Pearson Decl. ¶ 8 ("The cooks do not wear face masks while they are making our food."), ¶ 11 ("Some of the deputies don't wear masks."); C. White Decl. ¶ 9 ("The jail staff inconsistently wears masks. Some wear them and some don't.").

[11] Matthews Decl. ¶ 11 ("We got masks for the first time a couple of weeks ago. They are blue cloth. We haven't received new masks since then."); Smelley Decl. ¶ 7 (same); Kelly Decl. ¶ 6 (". . . I also did not have gloves or a mask."); Nickel Decl. ¶ 8 ("I never received any gloves or a mask, and neither did any of the other inmates."); Malec Decl. ¶ 7 ("The first time we ever got masks was on April 9. They are cloth masks like you see at the dentist office. They told us we have to use these for two weeks, and then after two weeks, we can get a clean one."); Pearson Decl. ¶ 10 ("We were constantly asking for masks. Some of the guys have asthma and COPD."), ¶ 11 ("When we finally got masks, we were told we had to keep them for two weeks."); H. White Decl. ¶ 4 ("They gave us a paper mask that only gets changed every two weeks. The mask tears easily, it's the cheapest mask you could ever wear.").

[12] Malec Decl. ¶ 8 ("When I first started feeling sick, I complained to the guards, and they told me to tell a nurse. I told the nurse that I thought I had the virus. She asked if I had a fever, but she didn't take my temperature and didn't test me. She gave me Tylenol."); Pearson Decl. ¶ 17 ("If anyone has any symptoms of the disease, they are given a Tylenol and sent back to the pod."); Matthews Decl. ¶ 5 ("When I went to medical, they kept telling me they couldn't really do anything, and that I had to see a doctor. No doctor was available."); Smelley Decl. ¶ 3 ("Regular requests

At the time of his inspection, Dr. Rottnek found that "inmates reported being disincentivized by both medical and correctional staff to seek medical care for anything other than complaints related to coronavirus." Rottnek Report at 9. Patients report delayed or ignored sick calls. Dr. Rottnek also found that several detainees reported "delayed and ignored requests for medical care," id. at 10. Jail medical staff confirmed these findings: "When I asked [the nurse] if she thought they were adequately staffed in medical with COVID as well as chronic care and sick calls, she stated 'Not really, to be honest, due to the shortage [of staffing].'" *Id.* at 5.

K. Defendants' Policies

In March and April 2020, Defendants promulgated nine policies related to the COVID-19 pandemic. Defs.' Ex. 2. Wellpath, Defendants' contracted medical provider, also promulgated policies relating to medical care during the COVID-19 pandemic. Defs' Ex. 3.

DEFENDANTS ARE STILL NOT TAKING THE NECESSARY STEPS TO MITIGATE THE TRANSMISSION OF COVID-19 IN THE JAIL[13]

In addition to the undisputed facts above, Plaintiffs submit seventeen recently sworn declarations with this Reply which shows that Defendants are still not taking the necessary precaution to mitigate the transmission of COVID-19 in the Jail.

for medical treatment take anywhere from two weeks to one month. And, that's if we get any response at all. It's not uncommon for the jail not to respond."); Russell Decl. ¶¶ 2-5 ("I have not been taken to radiation treatments since being in the jail . . . I need my treatment really bad. If I don't get it my cancer will probably spread."); Hubbard Decl. ¶¶ 2, 17 ("I am diabetic and I have asthma. They are supposed to check my blood sugar at least one time per day. They've gone from testing once a day to once a week."); Pearson Decl. ¶ 14 ("In order to get a medical appointment we have to fill out a request form, called a kite, [but the nurse] won't give us the forms."); H. White Decl. ¶ 7 ("I've been kiting to the doctors but I haven't seen one yet. I send a kite every day. I don't think the nurse turns them in because there is no doctor."), ¶ 9 ("The only thing they give me is one ibuprofen and tell me to see a doctor but there isn't one."), ¶ 11 ("When I first got here I used to tell the deputies about my pain every day. They said if you aren't dying, you're not going to see a doctor."); Velez Decl. ¶¶ 2-4 (Before testing positive for COVID-19, I consistently asked for medical treatment . . . In addition to telling the guards about how I didn't feel well, I also filled out medical kite, and spoke to a nurse about how I felt. I said that I had shakes, that I was coughing, and that I didn't have an appetite. In response, she gave me Tylenol, but she did not check my temperature, nor did she test me for COVID-19.); C. White Decl. ¶ 13 ("Recently, I requested medical care because my left arm was numb. I still haven't seen a doctor. They only thing the jail did was give me Tylenol.").

[13] The Declarations referenced herein are attached to this Reply as Exhibit 3.

Defendants continue to confine detainees in cells and configurations where it is impossible to social distance**.** Detainees consistently express that it is extremely challenging to maintain six feet of distance in the jail facilities.[14] It remains impossible to adequately practice social distancing in many parts of the Jail, including in common areas.[15] In order to use the phones, tablets, and televisions inside the Jail, detainees must utilize the commons areas. In these spaces, there is no way to meaningfully socially distance.[16]

Detainees inside the jail do not have access to cleaning solutions that are necessary to sanitize the facilities they inhabit. Defendants are *still*—over six weeks since Plaintiffs' complaint was filed in federal court—not providing adequate hygiene and cleaning products to detainees. Defendants are not providing enough soap for detainees to regularly and sufficiently wash their hands and bodies.[17] Additionally, detainees are forced to use the soap that is already sparsely provided to *also* do their laundry. Although the Wayne County Jail is mandated to provide laundry

[14] Long Decl. ¶ 8 (Our cells are closed with bars but the cells are so close together that you could reach through the bars and touch someone in the cell next to you."); Campbell Decl. ¶ 7 ("The cells are very close together and if two people reached their hands through the bars, they could touch."). This consistent inability to socially distance increases the likelihood of transmission of COVID-19.

[15] Long Decl. ¶ 7 ("It is really hard to social distance in here."); During meal times detainees are seated in close proximity to one another. [Laws Declaration – needs to be finalized] In some units the tables and chairs are bolted to the floor making it impossible to create space between other detainees dining in the same close space. Campbell Decl. ¶ 9 (It is impossible to socially distance yourself in here . . . We are always right next to each other when eating meals."); Cochran ¶ 10 ("[In E-1] [i]t was jam-packed. It was like 60 of us in the open pod. There wasn't no social distancing. It was dangerous."); Johnson Decl. ¶ 8 ("It is impossible to social distance in here. There are only a few tables in our unit so every time we eat, we all sit right next to each other.").

[16]Card Decl. ¶ 8 ("We are two and a half feet apart in the common area and we are together all day, every day. There is no way to social-distance."); Long Decl. ¶ 7 ("I can usually only get about one or two feet away from the person sitting or standing next to me."); Lynn Decl. ¶ 6 ("We have one T.V. where all 14 of us stand huddled around to watch the news and other programs…We have to stand close to each other to watch the TV because if it's too loud, the guards will cut it off.").

[17] Long Decl. ¶ 6 (We are given three bars of soap that are tiny for the entire week."); Campbell Decl. ¶ 8 ("We are given soap to clean ourselves with once a week, three little bars"); Card Decl. ¶ 12 ("We only get one role of tissue paper and three small bars of soap per week."); Lynn Decl. ¶ 13 ("We get three little bars of soap per week."); Johnson Decl. ¶ 7 ("Once a week I am given three tiny bars of soap.").

service per this Court's consent decree, many detainees must use the few resources they can access to launder their own undergarments if they want it done with any reasonable frequency.[18]

Further, Defendants are *still* failing to provide detainees with adequate and effective cleaning agents.[19] Detainees are forced to use battered and deteriorating tools to try and cleanse their living spaces.[20] The lack of useful cleaning instruments make it extremely challenging, if not impossible, to consistently main hygienic living spaces. This problem is further compounded by the fact that Defendants are *still* not adequately cleaning high-touch areas and surfaces in the facility.[21]

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[18] Lynn Decl. ¶ 13 ("We also have to use that soap to wash our underclothes…we have to use the soap to wash our underclothes or else we have to buy detergent from the commissary."); Campbell Decl. ¶ 5 ("To wash our clothes we aren't given any laundry soap."); Card Decl. ¶ 10 ("We have to wash our laundry by hand when we get in the shower. We don't get anything to help clean our sheets and laundry.").

[19] Long Decl. ¶ 3 (The mop bucket comes three times a week. "It looks like it's mainly water."); Campbell Decl. ¶ 3 ("The guards bring the bucket of cleaning supplies every morning but there aren't any disinfectants . . . There used to be cleaning solution in the bucket but it ran out and hasn't been replaced."); Cochran ¶ 7 ("After I was sick, I cleaned my bunk with Simple Green, but that was all I could do."), ¶ 9 ("We never have bleach or Lysol or anything like that."); Anthony Decl. ¶ 6 ("You know this place is dirty, and we don't have access to bleach. We have access to Simple Green."); Card Decl. ¶ 11 ("We are always asking the guards for cleaning supplies. But we don't get enough of them."); Edwards Decl. ¶ 3 ("It was up to us to clean, but we weren't given any cleaning supplies."), ¶¶ 18-20. There is an absence of disinfectants that would be more effective at sanitizing the jail. Edwards Decl. ¶ 17 ("We have been asking for bleach. Every time they say no.").

[20] Lynn Decl. ¶ 8 ("We share one broom and one mop with some solution in it. They give us a spray bottle every once in a while, with a cleaning solution in it."); Johnson Decl. ¶ 4 ("The guards bring a cleaning bucket in the mornings but it only has a broom and a mop in it. The mop is never washed so it stinks."). Detainees must frequently resort to re-purposing toilet paper as a cleaning tool. Edwards Decl. ¶ 18 ("You have to use your one roll of toilet paper to wipe down your table, bars, etc."). Lynn Decl. ¶ 14 (We are given one roll of toilet paper a week which we have to use to clean surfaces as well as use the bathroom. When you run out, the guards won't give you a new roll.").

[21] Long Decl. ¶ 4 ("The common areas are cleaned once about once a week by us, but only if we get the cleaning solution All ten of us on the unit share one shower. It is normally cleaned once a week but I can't remember the last time it was actually cleaned."); Byrant Decl. ¶ 14 (Jail staff did not clean Michael Meschinski's room after he was released from the Jail; he died of COVID-19 shortly after being released.); Campbell Decl. ¶ 4 ("There is one phone in our unit for ten people to share. This phone doesn't ever get cleaned. Our common areas are cleaned about once a month by certain guards."); Campbell Decl. ¶ 8 ("The shower is supposed to be cleaned every week but it is really more like every nine days. The single shower in our unit is shared by the ten of us."); Anthony Decl. ¶ 5 ("It's nasty as hell in here. Nothing gets wiped down. It's messed up. Showers are nasty. I've seen mold in the showers, and they don't have nothing to clean that with."); Card Decl. ¶ 9 ("The 10 of us share the same shower. The trustees used to come once a week to clean the shower with bleach."); Edwards Decl. ¶ 3 ("The deputies don't have anybody come in and clean anything in the quarantine unit."); Lynn Decl. ¶ 9 ("When the coronavirus happened, they said they would spray the bars and cells regularly but I can't remember the last time they sprayed the bars down."); Johnson Decl. ¶ 6 (" I don't see them clean the common areas or the things we touch often, like the phones.").

Defendants are still not providing detainees with adequate supply of protective gear.[22] This failure to provide sufficient PPE impedes any attempt by detainees to protect against illness inside the jail facilities. And Jail staff continue to fail to wear protective gear in the facility.[23]

Medical care remains inadequate.[24] Defendants are not immediately testing detainees who present COVID-19 symptoms. Defendant are not immediately testing detainees who come in close contact with a person who has symptom of or a confirmed case of COVID-19.[25] Defendants have not given detainees the results of their COVID-19 tests.[26] This failure to provide adequate medical care perpetuates fear and anxiety amongst detainees, many of whom remain extremely susceptible

[22] Long Dec. ¶ 4 ("We have not been given any protective gear other than three masks over the last few months."); Card Decl. ¶ 15 ("They only give us disposable masks twice a month. They don't help us clean it."); Lynn Decl. ¶ 15 (same); Johnson Decl. ¶ 3 (same); Crothers ¶ 5 (They're five-hour masks, but we only get new masks every two weeks.").

[23] Long Decl. ¶ 11 ("When the guards don't wear their masks, we ask them why but they just say to stop hollering."); Bryant Decl. ¶ 12 (Jail staff "openly don't wear the mask."); Campbell Decl. ¶ 12 ("One time, when we asked a guard where his mask was, he said that he had adapted to the coronavirus because he had already been sick with it."); Anthony Decl. ¶7 ("The sheriffs walk around with no masks."); Johnson Decl. ¶ 8 ("But when the guards serve us food, only some of them wear both masks and gloves."); Crothers Decl. ¶ 2 ("Some of them keep their masks around their chin instead of their face.").

[24] Cochran Decl. ¶ ¶ 2-6; Edwards Decl. ¶¶ 13-14 (It took a week get a COVID-19 test after telling nurse about flu symptoms).

[25] Lynn Decl. ¶ 4 (There was actually a man in our unit who ended up testing positive for the virus who was walking around and talking to everybody. Once he tested positive, we all asked to get re-tested but they refused.").

[26] Long Decl. ¶ 2; Bryant Decl. ¶ 17 (same); Campbell Decl. ¶ 2 (same); Cochran Decl. ¶ 13 (same); Card Decl. ¶ 4 (same); Johnson Decl. ¶ 2 (same); Crothers Decl. ¶ 10 (same).

to illness.[27] And Jail staff continues to take retaliatory actions against Detainees that endanger their safety and lives.[28]

ARGUMENT

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR EIGTH AMENDMENT CLAIMS

Defendants have a constitutional obligation to protect incarcerated people from a substantial risk of serious harm. *Farmer v. Brennan*, 511 U.S. 825, 828 (1994). Under the Eighth Amendment, prison officials "must provide humane conditions of confinement; . . . must ensure that inmates receive adequate . . . medical care, and must take reasonable measures to guarantee the safety of the inmates[.]" *Id.* at 832 (internal quotation marks omitted). This obligation requires corrections officials to address prisoners' serious medical needs—including needs far less dire than those at stake here.[29]

This constitutional obligation requires Defendants to protect incarcerated people from the risk of "infectious maladies" and "serious contagious diseases" rather than waiting until someone tests positive to provide treatment. *Helling v. McKinney*, 509 U.S. 25, 33–34 (1993). Indeed,

[27] Long Decl. ¶ 9 ("I've put in three kites in the last month or so and when I tried to ask why they weren't being responded to, the nurse said that they weren't taking any patients because of COVID-19."); Bryant Decl. ¶ 3 ("The deputies kept denying me medical treatment because there were no doctors."), ¶ 5 ("Two months ago . . . I filled out a kite to see one but they still haven't taken me to see one."), ¶ 6 ("I'm allergic to citric acid. It took them about a month just to give me my dietary tray."); Campbell Decl. ¶ 13 ("I've put in kites for medical treatment but they are not taking them."); Cochran Decl. ¶ 11 ("I have high blood pressure. It took them over a month to prescribe my high blood pressure medicine."); Card Decl. ¶ 2 ("I have hypertension, high cholesterol, and respiratory problems. But I cannot go to medical to attend to my personal health issues. No one responded to my medical kites."); Edwards Decl. ¶ 10; Lynn Decl. ¶ 4 ("I have not seen a KITE nurse since I came to this unit."); Johnson Decl. ¶ 10 ("Kites are ignored.").

[28] Bryant Decl. ¶ 15 (after a detainee swore at deputy, the deputy made 40 detainees go into a small gym, where they were standing no more than two feet apart); Campbell Decl. ¶ 11 ("Whenever we ask about COVID-19, the guards get mad at us and threaten to lock us down."). Many detainees live in the constant fear of will be punished related to COVID-19

[29] *See Plata*, *Brown v. Plata*, 563 U.S. 493, 531-32 (U.S. 2011); *Helling*, 509 U.S. at 35; *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Flanory v. Bonn*, 604 F.3d 249, 255 (6th Cir. 2010) (extended failure to provide toothpaste); *Talal v. White*, 403 F.3d 423, 427 (6th Cir. 2005) (exposure to tobacco smoke).

"[i]t would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.*; *see also Farmer*, 511 U.S. at 833 ("having stripped [detainees] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course").

Eighth Amendment claims require a showing of "deliberate indifference" to a substantial risk of serious harm. *Farmer*, 511 U.S. at 828. "Deliberate indifference has two components to it: objective and subjective." *Villegas v. Metro. Govt. of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013).[30] Deliberate indifference may be "infer[red] from circumstantial evidence," including "the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842. Courts in Michigan and elsewhere have found that jail officials demonstrate deliberate indifference when they confine persons in conditions that do not prevent the spread of COVID-19.[31]

As explained below, the undisputed record evidence in this case demonstrates that Defendants have been and continue to remain deliberately indifferent to the serious risks posed by COVID-19. Defendants do not refute the most serious allegations in Plaintiffs' Motion: that the inability to socially distance in, and adequately clean, Division II makes it impossible to mitigate the spread of COVID-19 at the Jail, and thus, that detainees should not be confined there during

[30] Defendants' assertion that "[d]eliberate indifference claims are the same under the Eighth and Fourteenth Amendments," Def. Br. at 15, relies entirely on outdated case law preceding *Kingsley v. Hendrickson*, 576 U.S. 389 (2015). Since *Kingsley*, the Sixth Circuit has recognized that pre-trial detainees, whose terms of confinement are governed by the Fourteenth Amendment, may no longer need to demonstrate the subjective component of the deliberate indifference standard in order to show that their conditions of confinement are unconstitutional. *See Hopper v. Phil Plummer*, 887 F.3d 744, 752 (6th Cir.), *reh'g denied* (May 1, 2018); *Richmond v. Huq*, 885 F.3d 928, 938 n.3 (6th Cir. 2018). In any event, Plaintiffs meet both standards as explained herein.

[31] *See, e.g.*, *Cameron v. Bouchard*, —— F. Supp. 3d ——, 2020 WL 2569868, at *20-25 (E.D. Mich. May 21, 2020); *Wilson v. Williams*, —— F. Supp. 3d —— , 2020 WL 1940882, at *8 (N.D. Ohio Apr. 22, 2020) ; *Fofana v. Albence*, —— F. Supp. 3d —— , 2020 WL 1873307, at *8 (E.D. Mich. Apr. 15, 2020); *Malam v. Adducci*, —— F. Supp. 3d —— , 2020 WL 1672662, at *12 (E.D. Mich. Apr. 5, 2020); *Thakker v. Doll*, —— F. Supp. 3d ——, 2020 WL 1671563, at *8 n.15 (M.D. Pa. Mar. 31, 2020).

the pandemic, if ever, at all. Pls.' Br. at 4. Indeed, Defendants effectively concede that Division II *should* have been closed "well before the current health crisis." Defs.' Br. at 17. Yet despite the availability of over 400 beds in closed floors in other Jail facilities, Defendants insist that COVID-19 makes confining persons in Division II necessary. The continued use of Division is by itself sufficient to establish Defendants' deliberate indifference. Beyond the decrepit and dangerous conditions specific to Division II, the general conditions of confinement at the Jail on May 4, 2020, when this Plaintiffs' complaint was initially filed in federal court, and during Dr. Rottnek's inspection, further establish Defendants' deliberate indifference. Immediate action by this Court to protect the health and safety of Detainees is urgently needed.

A. Defendants' Use of Division II to Confine Detainees During the Pandemic Constitutes Deliberate Indifference to Detainees' Constitutional Rights.

Defendants' continued use of Division II to confine Detainees during the pandemic constitutes deliberate indifference to the serious risk that detainees may contract COVID-19.

As set forth above, due process requires that persons confined prior to trial be protected from conditions that "pose an unreasonable risk of serious damage to . . . future health." *Helling*, 509 U.S. at 35. *Helling* holds that the Constitution forbids jailing people when "the risk . . . is not one that today's society chooses to tolerate." *Id.* at 36. Longstanding precedent applies these principles to a serious risk of infectious disease. *See, e.g.*, *Gates v. Collier*, 501 F.2d 1291, 1300-03 (5th Cir. 1974). In order to succeed on an Eighth Amendment claim, Plaintiffs must show that Defendants were objectively and subjectively "deliberately indifferent" to a substantial risk of serious harm. *Farmer*, 511 U.S. at 828; *Villegas* v. *Metro. Govt. of Nashville*, 709 F.3d 563, 568 (6th Cir. 2013).

There is no dispute that the objective prong of the deliberate indifference test has been satisfied here. To satisfy the objective component, detainees must demonstrate that they are

"incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834; *see also Richko v. Wayne Cty.*, 819 F.3d 907, 915 (6th Cir. 2016) (quoting *Amick v. Ohio Dep't of Rehab. & Corr.*, 521 F. App'x 354, 361 (6th Cir. 2013)) (explaining that a plaintiff satisfies "the objective component by showing that, 'absent reasonable precautions, an inmate is exposed to a substantial risk of serious harm'"). Defendants do not dispute that the objective component is satisfied. The record shows that COVID-19 is a highly transmissible and deadly disease. The congregate nature of the Jail—where hundreds of persons share sinks, toilets, and showers, as well as eating, sleeping, and living spaces—makes it an unfortunately ideal environment for the spread of COVID-19. *See, e.g.*, *Cameron v. Bouchard*, 2020 WL 2569868, at *21 (E.D. Mich., 2020) (citing cases)[32].

The subjective component is also satisfied. "To satisfy the subjective component, the plaintiff must allege facts which, if true, would show that the official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference and then disregarded that risk." *Comstock*, 273 F.3d at 703 (citing *Farmer*, 511 U.S. at 834). Defendants do not—and cannot—dispute that COVID-19 poses a grave risk the detainees. Defendants disregard that risk by failing to take reasonable measures to abate it. *Farmer*, 511 U.S. at 847. The overwhelming medical and scientific consensus is that social distancing of at least six feet is required to reduce the risk of transmission of COVID-19.[33] Medical and scientific

[32] The Sixth Circuit motions panel's stay of Cameron, pending appeal, does not abrogate *Cameron*, as decisions of motions panels are not binding. *See Wallace v. FedEx Corp.*, 764 F.3d 571, 583 (6th Cir. 2014).

[33] *See, e.g., Social Distancing: Keep Your Distance to Slow the Spread*, CDC.gov (available at: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html).

consensus also require that high-touch surfaces and areas in a facility be routinely cleaned and disinfected in order to reduce the risk and spread and transmission of COVID-19.[34]

Defendants do not dispute that neither of these critical steps can be taken in Division II. They do not dispute Dr. Rottnek's conclusion that "[i]n Division II, social distancing is impossible for inmates as well as for staff doing rounds." Rottnek Report at 11; *id.* at 12. And they do not dispute that the decrepit physical condition of Division II renders thorough cleaning and disinfecting impossible. *Id.* at 12 ("[t]he physical conditions are filthy and cannot be adequately cleaned due to pervasive disrepair, irregular surfaces, rust, paint peeling and chipping, mildew, and mold.").

In fact, Defendants concede that not only should detainees not be housed in Division II during the current pandemic, but that Division II should have been closed "well before the current health crisis." Defs.' Br. at 17.[35] There could not be stronger evidence of deliberate indifference at this stage in the litigation. Defendants have unmistakably "turned the kind of blind eye and deaf ear to a known problem that would indicate total unconcern for the [detainees'] welfare." Defs.' Br. at 16 (citing *Money v. Pritzker*, —— F. Supp. 3d ——, 2020 WL 1820660, at *18 (N.D. Ill. Apr. 10, 2020)).

Defendants attempt to defend their actions, arguing that "ceasing to house inmates at Division II amidst this pandemic would only create for greater difficult [sic] in spacing of inmates." Defs.' Br. at 18. But a recent Jail population report showed that there are ample beds, across

[34] *See, e.g., Cleaning and Disinfection for Households*, CDC.gov (available at: https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/cleaning-disinfection.html).

[35] Wayne County Jail Sheriff Robert Dunlap has publicly noted the decrepit conditions in Division II. *See Claims of 'inhumane' conditions fuel bid for new Wayne County jail*, The Detroit News (June 6, 2018), https://www.detroitnews.com/story/news/local/wayne-county/2018/06/06/claims-inhumane-conditions-fuel-bid-new-wayne-county-jail/653117002/ ("It doesn't afford inmates the level of decency that a human being should have").

multiple floors that are currently closed, in Division III, the newest Jail facility. Indeed, there are over 450 beds available across the closed floors in Division III alone. Defendants do not mention this fact in their brief, let alone explain why these facilities are not being used to confine detainees, in lieu of confining them in Division II. Judge Linda V. Parker of the Eastern District of Michigan very recently found that Oakland County was deliberately indifferent for continuing to house detainees in dangerous conditions, where, *inter alia*, social distancing was not possible, even though "many of the Jail's housing cells remain empty":

> And despite their understanding of the risk associated with the close quarters in which inmates reside, as of May 1, almost half of the Jail's population was housed in multi-person cells, with a significant number in housing units with more than 10 individuals. At the same time, many of the Jail's housing cells remain empty. The fact that Defendants offer no explanation regarding why individuals have not been moved to these available cells in order to maximize the distance between inmates suggests a disregard of the substantial risk of contracting a virus that already has been demonstrated to be lethal.

Cameron, 2020 WL 2569868, at *23.

Even if Defendants could not use other facilities to confine inmates during the pandemic, the Constitution would require them to reduce the jail population to a level that did not necessitate the use of Division II. In *Brown v. Plata*, the Supreme Court confirmed that if the prison conditions are such that a population reduction is the only way to cure a constitutional violation, then the Constitution requires a reduction in the prison population. 563 U.S. 493, 521, 526–29 (2011) (noting that prisoner release order was appropriate because adequate care was "impossible" without a reduction). Defendants' failure to either utilize ample existing, constitutionally adequate facilities or to reduce the Jail population to a level where all detainees are housed in constitutionally adequate conditions constitutes deliberate indifference. An order requiring Defendants to immediately discontinue using Division II during the pandemic is warranted and necessary.

B. The Undisputed Findings in Dr. Rottnek's Report Establishes Defendants' Deliberate Indifference

In addition to Defendants' continued unconstitutional use of Division II to confine detainees, *see* pp. 3-4, *supra*, Defendants' deliberate indifference as to detainees' wellbeing during this pandemic is evident from the undisputed fact that, at the time of Dr. Rottnek's inspection, Defendants were *still* failing to follow basic health and safety measure recommended by the CDC to mitigate the spread of the COVID-19. The CDC Guidelines were promulgated on March 23, 2020. The *Russell* Plaintiffs filed their lawsuit in federal court on May 4, 2020, alleging that Defendants were unconstitutionally indifferent by failing to take basic measures to mitigate the transmission of COVID-19. In the interim, thousands of news stories and reports documenting the severity of COVID-19 were published, and state and local governments undertook significant shutdown measures that have drastically affected the economy and transformed our society. Despite these warnings—and despite *notice* that Dr. Rottnek would be conducting an inspection—Defendants *still* failed to take basic health and safety precautions when the inspection occurred. This constitutes deliberate indifference.

For example, Dr. Rottnek found that Defendants were failing to implement one of the simplest measures necessary to mitigate the risk of spreading COVID-19: posting accessible signs containing critical pandemic-related information. The CDC recommends that correctional facilities "post signage throughout the facility communicating COVID-19 symptoms and hand hygiene instructions, ensure such signage is understandable for non-English speaking people as well as those with low literacy, and provide clear information about the presence of COVID-19 cases within a facility and the need to increase social distancing and maintain hygiene

precautions."[36] On May 4, 2020, the *Russell* plaintiffs alleged that Defendants were failing to provide detainees with information about COVID-19, including posting signs about necessary precautions and the importance of social and physical distancing. *See supra* p. 6. Despite ample notice of the necessity of signage—in addition to what one would hope to be common sense—Dr. Rottnek found that, in Division I, there was "limited and outdated" signage which did not even mention COVID-19. *Id.* at 14. In Division II, the signage was "old and inaccurate" and made "no mention of COVID-19 or [the] definition of social/physical distancing." *Id.* at 17. And although there were signs in Division III, the were outdated: "they had the old signs and symptoms—not the newer expanded signs and symptoms list by the CDC." *Id.* at 20. Defendants' failure to comply with the CDC's *most basic* recommendation, despite having notice of this deficiency, constitutes deliberate indifference. *See Farmer*, 511 U.S. at 842.

Dr. Rottnek also found that Defendants were failing to implement one of the most *critical*—not to mention one of the most widely accepted and understood—measures necessary to mitigate the risk of transmission of COVID-19: social distancing. Here, again, even though the CDC guidelines, countless publications and reports, and the allegations in *Russell* put Defendants on notice of the need to ensure adequate social distancing at the Jail, Defendants nevertheless continued to confine detainees in conditions where social distancing was not possible. Two weeks after *Russell* was filed, Dr. Rottnek found that Defendants were confining detainees in conditions were social distancing was impracticable and was otherwise not being practiced. Dr. Rottnek found that social distancing at the current jail population level in Division I is impossible because the jail cells have front-facing walls of bars or open steel grids, which allow large aerosolized droplets containing COVID-19 to spread freely between cells. Rottnek Report at 3, 4, 8. Dr.

[36] *See* note 3, *supra.*

Rottnek also found that Defendants continue to double-bunk detainees in beds that are only a few feet apart from each other. Rottnek Report at 8, 11-12. And in the medical unit, detainees with co-occurring health problems kept on stretches in close proximity to one another. Id. at 8. Even worse, Dr. Rottnek observed that Jail staff were not practicing social distancing while at the Jail. Id. at 14 (observing Jail staff in a medical clinic "two feet apart, without wearing masks."). Defendants do not dispute any of these facts in their brief.

Worse yet, the ***seventeen*** sworn and mutually corroborating detainee declarations filed with this Reply further demonstrate that Defendants are *still* failing to follow basic health and safety measure recommended by the CDC to mitigate the spread of the COVID-19. *See* Ex. 3.

The failure to implement these necessary, obvious precautions after the filing of a class action lawsuit alleging dangerous and unconstitutional conditions of confinement further demonstrates Defendants' deliberate indifference. In a case seeking only prospective relief, even if Defendants only learn about the "objectively intolerable risk of serious injury" from the Complaint, an ongoing refusal to cease confining individuals in the face of that immitigable risk is "deliberately indifferent." *See Farmer v. Brennan*, 511 U.S. 825, 846 n.9 (1994); *Helling*, 509 U.S. at 36 ("[T]he subjective factor . . . should be determined in light of the prison authorities' *current* attitudes and conduct." (emphasis added)). Any other rule would not make sense. As a federal district court in another COVID-related case noted, "the status quo of a mere few weeks ago no longer applies. Our world has been altered with lightning speed, and the results are both unprecedented and ghastly . . . . The choice we now make must reflect this new reality." *Thakker*, 2020 WL 1671563. The court thus held that, even though the conditions in the local federal detention facilities were not insufficient because of intent or malice, "should we fail to afford

relief" to medically vulnerable prisoners, "we will be a party to an unconscionable and possibly barbaric result." *Id.*

As discussed below, Defendants are also failing to enforce and follow the policies that they claim to have put in place to address the COVID-19 pandemic. In *Phillips v. Roane Cty., Tenn.*, the Sixth Circuit recognized longstanding precedent that officials' failure to comply with their own policies establishes deliberative indifference. 534 F.3d 531, 541 (6th Cir. 2008) (concluding that the officials' failure to comply with the protocols and transport the inmate to the medical center, for over two weeks, demonstrated deliberate indifference. In a recent Sixth Circuit case addressing the conditions of confinement in Jails during the COVID-19 pandemic, the court relied on *Phillips* in finding that a federal prison had not been deliberately indifferent to the health and lives of detainees under their custody because it had complied with a five-phased national directive, including updating the directives and protocol, and trained staff on the directives. *Wilson* at 5, 14, 18. Conversely, Defendants have failed to comply even with their own policies to address COVID-19, in addition to not implementing other minimally necessary polices, *see* p. 24, *infra*. Defendants are deliberately indifferent.

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THEIR *MONELL* CLAIMS

The Supreme Court has held that a municipality or other local government is liable under 42 U.S.C. § 1983 when action pursuant to official municipal policy causes injury. *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 694 (1978); *Richmond*, 885 F.3d at 948. Plaintiffs are incarcerated in the Jail, so Wayne County is responsible for ensuring that Plaintiffs are protected from and not exposed to the Jail-wide substantial risks posed by COVID-19. *See Helling*, 509 U.S. at 32 (quoting *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 199–200 (1989)).

Plaintiffs allege that Defendants continue to confine detainees in Division II in violation of the Eighth Amendment, despite their awareness that social distancing in the facility is not possible, and that the conditions of disrepair make it impossible to clean the facility such that the risk of transmission of COVID-19 can reasonably be mitigated. Plaintiffs also allege that Defendants are failing to take minimal necessary hygiene and safety precautions (such as posting signs, as discussed, p. 6, *supra*) necessary to mitigate the spread of the virus. These alleged unconstitutional policies are directly attributable to Defendants.

Defendants' *Monell* arguments rest largely on two flawed grounds. First, they argue that highly generalized policies show that they were taking some measures to mitigate the spread of COVID-19 at the Jail when this Motion was filed, and therefore Plaintiffs' ***thirteen*** sworn declarations and Dr. Rottnek's corroborating report do not establish that Plaintiffs are likely to succeed on their *Monell* claims. This is wrong.

The unconstitutional use of Division II to confine detainees during the pandemic is a policy directly attributable to Defendants, and therefore, Plaintiffs are likely to succeed on their *Monell* claim. Further, as discussed below, Defendants' written policies do not address or otherwise discuss the Jail-wide allegations in Plaintiffs' sworn declarations and in Dr. Rottnek's report. Plaintiffs' evidence therefore demonstrates that they are likely to prevail on their *Monell* claim. For example, the inability to provide conditions that allow for adequate social distancing, the failure to post signage communicating the risk of COVID-19, the failure to provide sufficient hygiene products suffices to show a "direct causal link between [the County's] action and the deprivation of federal rights." *Gregory v. Shelby Cty.*, 220 F.3d 433, 442 (6th Cir. 2000).

Even where Defendants' policies do address Plaintiffs' allegations, they do not put forward specific and detailed evidence demonstrating that these polices are being carried out as

written. Plaintiffs' overwhelming evidence therefore establishes that Defendants are likely failing to train and supervise staff in deliberate indifference to Plaintiffs' constitutional rights. *City of Canton, Ohio v. Harris,* 489 U.S. at 388 (1989) (". . . failure to train amounts to deliberate indifference. . ."); *Gregory v. City of Louisville*, 444 F.3d 725, 753 (6th Cir.2006) ("A systematic failure to train . . . adequately is a custom or policy which can lead to municipal liability." And, "[l]iability for unconstitutionally inadequate supervision or discipline is treated, for all intents and purposes, as a failure to train.").

Second, Defendants allege that they are now in compliance with much of what Plaintiffs request and what the Constitution requires, and therefore, that many of Plaintiffs' claims are moot. This is not true, and if it were, it would be irrelevant. Defendants' purported voluntary cessation of unconstitutional conduct does not moot Plaintiffs' claims because Defendants could return to their unlawful conduct after the stipulated order expires.

A. Defendants' COVID-19 Policies Do Not Address Many of the Unconstitutional Conditions of Confinement at the Jail and Where They Do, Are Insufficient or Not Being Practiced.

First, the highly generalized policy documents Defendants have submitted do not address critical aspects of Plaintiffs' allegations and motions, and therefore there can be no dispute that Plaintiffs are likely to succeed on their *Monell* claims:

1. Defendants' policy documents do not address critical social distancing as it relates to spacing detainees in cells around the facility. Dr. Rottnek found that in Division I (as in Division II, *see* pp. 3-4, *supra*), the jail cells have front-facing walls of bars or open steel grids, which allow large aerosolized droplets containing COVID-19 to spread freely between cells. Rottnek Report at 3, 4, 8. And, as of the filing of this reply, Defendants continue to confine detainees in cells and configurations where social distaining is impracticable. *See* pp. 4-5, *supra*. Because Defendants are not adequately spacing the cells used to confine detainees, social distancing is currently

impossible. Defendants' policies do not address social distancing—what should be a critical component of any COVID-19 response in a jail—whatsoever.

2. Defendants' policies do not suggest that they have undertaken any "intensified" and "aggressive" cleaning and disinfecting procedures, as recommended by medical experts and the CDC, to reduce the transmission. *See* Ex. 4, Lauring Decl. ¶¶ 12, 24. Their policy document makes a mere, fleeting remark to cleaning. *See* Defs.' Exs. at 20. Defendants make no mention as to how often each area and surface of each division of the Jail should be cleaned and make no reference to disinfecting areas of the Jail. *Id.* Defendants therefore cannot refute Plaintiffs' declarations and Dr. Rottnek's report which establish that Defendants are not sufficiently cleaning the facility.

3. Defendants' policies do not address the provision and distribution of hygiene and cleaning supplies to detainees during the pandemic. In fact, the policy says that hygiene supplies should be distributed consistent with department policy, making no attempt to account for the heightened need of hygiene and cleaning supplies during the COVID-19 pandemic. The thirteen declarations submitted with Plaintiffs' initial filing demonstrate that detainees are not given sufficient hygiene and cleaning supplies to effectuate the medically required frequent handwashing and cleaning that is necessary to mitigate the spread and contraction of COVID-19. Dr. Rottnek also found that the distribution of hygiene products was insufficient to meet these ends. Defendants therefore cannot refute Plaintiffs' declarations or Dr. Rottnek's report, which establishes that they are not providing sufficient hygiene and cleaning products.

4. Defendants' own policies suggest that they impermissibly quarantine detainees who have symptoms or test positive for COVID-19 in punitive settings. One of the policy documents submitted by Defendants that all inmates with ". . . a confirmed or potential case of

COVID-19 shall be housed in the Behavioral Management Unit at Division III. If overflow space is needed, Segregation at Division III shall be utilized." Defs.' Exs. at 13. Behavioral Management and Segregation Units at jails are used to punish detainees. Plaintiffs' declarations confirm that this written policy is put into practice across the jail.

Second, Defendants submit no evidence suggesting that the policies they put in place to address the COVID-19 pandemic are being followed by Jail staff. Plaintiffs, on the other hand, put forth the mutually corroborating declarations of thirteen detainees across different divisions at the Jail, which individually and cumulatively indicate that the Jail is not doing what it claims to do. Many of the allegations in the declarations were also confirmed by Dr. Rottnek during his inspection:

1. Plaintiffs' declarations show that, throughout the Jail and in all three divisions, Jail staff are failing to wear PPE. Dr. Rottnek also reported that Jail staff were not wearing protective equipment. Rottnek Report at 6. This evidence affirmatively shows that Defendants' staff maintains a widespread pattern and practice of not wearing protective equipment in the Jail and that Defendants have failed to train or supervise them in that regard.

2. Plaintiffs' declarations show that, throughout the Jail, Defendants are failing to provide adequate and timely medical care as it relates to testing and treating inmates who show symptoms of a COVID-19 infection and are categorically failing to address detainees urgent non-COVID-19 related medical needs. *See, e.g.*, Pearson Decl. ¶ 14; H. White Decl. ¶¶ 7, 9, 11; Velez Decl. ¶¶ 2-4; C. White Decl. ¶ 13.

3. Dr. Rottnek's inspection and report confirmed these allegations. Rottnek Report at 9-10. Defendants put forth no specific evidence showing that they are immediately responding to and testing detainees who have symptoms of COVID-19. Defendants' general policies, which

purportedly require them to test symptomatic patients, say nothing about the timing of these tests and how quickly they must respond to detainees' complaints. (The one-time Jail wide test does not sufficiently account for the continued spread of COVID-19 in the Jail, Pls. Br. at 22.) Additionally, Defendants put forth *no* evidence demonstrating that they are responding immediately to medical emergencies unrelated to COVID-19. Defs. Br. at 21. Plaintiffs evidence is thus sufficient to establish that Defendants have a policy and practice of not providing timely medical care. Dr. Rottnek found that Defendants' policy of screening Jail staff and persons who enter the facility is insufficient. Given that over 200 Jail staff have already tested positive for COVID-19 and that asymptomatic people can transmit the virus, the policy of testing people when they enter the building is by itself insufficient.

B. Defendants' Remaining *Monell* Arguments are Meritless.

First, Defendants argue that Plaintiffs cannot show that they maintain unconstitutional policy or practice "because neither Oakland County, nor any other municipality, has ever faced an epidemic such as the current COVID-19 pandemic." Defs.' Br. at 14. This argument was raised by the Defendants in Oakland County and rejected by Judge Parker, for it "conflates the concept of municipal liability with qualified immunity." Regardless of the exceptional nature of the circumstances presented, liability can attach if Defendants are aware of the serious threat to Jail inmates posed by COVID-19 and respond to it with a policy that is deliberately indifferent to Plaintiffs' constitutional rights." *Cameron*, 2020 WL 2569868, at *20 (citing *Duvall v. Dallas Cty.*, 631 F.3d 203, 207 (5th Cir. 2011) ("While COVID-19 is a new virus not previously diagnosed in people prior to late 2019, highly contagious viruses are not unique. Unfortunately, nor is the risk of highly contagious viruses or infections spreading throughout a prison facility.")).

Second, Defendants, in passing, and again without citation or support, argue that Plaintiffs cannot seek to impose liability on Wayne County through "anecdotal evidence" in the form of declarations. Defs.' Br. at 15. This argument misapprehends the nature of the Motion in front of this Court and the Michigan Court Rules. The Michigan Court Rules requires a party seeking a temporary restraining order to submit declarations in support of its motion. MCR 3.310(B)(1)(a) ("A temporary restraining order may be granted . . . if it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss, or damage [will occur]"); *see also People v. Patton*, 308 N.W.2d 163, 164, 411 Mich. 490, 492 (1981) (recognizing the use of hearsay testimony in connection with petition for preliminary injunction). In fact, Defendants submitted declaration testimony, as well as policy documents unaccompanied by declarations, in support of their opposition. Defendants could not possibly expect this Court to credit their sworn written testimony, but not Plaintiffs'. Courts routinely rely on affidavit testimony in issuing injunctions pursuant to emergency motions alleging unconstitutional conditions of confinement. *See, e.g.*, *Cameron*, 2020 WL 2569868, at *2; *see generally* 11 C. Wright & A. Miller, Federal Practice & Procedure, § 2949 (citing cases) ("It is not surprising that in practice affidavits usually are accepted on a preliminary injunction motion . . . .").[37]

III. THE CONSENT ORDER DOES NOT PRECLUDE THIS COURT FROM ENTERING PLAINTIFFS' PROPOSED EMERGENCY ORDER

Defendants do not—and cannot—dispute the evidence presented in the thirteen mutually corroborative detailed and sworn declarations filed with this Court on May 4, 2020, and largely confirmed by Dr. Rottnek during his inspection. The declarations demonstrate that Defendants

[37] MCR 3.310 is substantively identical to Fed. R. Civ. P 65, the federal rule governing emergency injunctive relief, and, thus, Federal authority on the issue is instructive. *See e.g. Barnard Mfg. Co. v. Gates Performance Eng'g, Inc.*, 285 Mich. App. 362, 379, 775 N.W.2d 618, 628 (2009) ("Because [the Michigan] court rules are patterned after the federal court rules, in the absence of state authority, this Court may consider federal authorities that interpret analogous provisions of the federal rules.").

maintained chaotic and dangerous conditions at the Jail, including: widespread indifference across the three Jail divisions; a widespread and consistent failure to provide or use protective equipment like masks and gloves; crowded dorms and bathrooms that force detainees to bathe and sleep within a couple of feet of each other; conditions that force detainees to repeatedly congregate without the ability to engage in social distancing, even in the medical unit; and consistent failure to provide medical attention for days to those exhibiting COVID-19 symptoms.

Instead, Defendants spend much of their brief arguing that this Court should not enter Plaintiff's proposed order because, since the entry of the temporary stipulated consent order, they have been in compliance with much of what Plaintiffs request and what the Constitution requires with respect to hygiene and safety conditions at the Jail. This is a voluntary cessation argument. It fails.

As a threshold matter, some of the relief Plaintiffs seek, including immediately discontinuing the use of Division II to confine detainees during the pandemic, are not covered by the temporary order.[38] Defendants' voluntary cessation arguments are therefore inapplicable to those claims for relief.

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[38] Other requested release that differs from the Stipulated Temporary Amendment includes:

1) Provide adequate spacing of six feet or more between people incarcerated so that social distancing can be accomplished, (*see also* Rottnek ¶ 7(a),(f),(i); Lauring 5/2 Decl. ¶ 31, 43; Lauring 6/11 Decl. ¶ 17(b)(i));

2) Ensure that each incarcerated person receives, free of charge: (1) an individual supply of liquid hand soap and **paper** towels sufficient to allow **frequent** hand washing and drying each day, and (2) an adequate supply of disinfectant hand wipes or other products effective against the virus that causes COVID-19 for daily cleanings, (*see also* Rottnek ¶ 7(c),(h),(i); Lauring 5/2 Decl. ¶ 32, 33, 39);

3) Ensure that all incarcerated people have access to hand sanitizer containing at least 60% alcohol, (*see also* Lauring 5/2 Decl. ¶ 33);

4) Provide an adequate stock of daily cleaning supplies, such as sponges, brushes, disinfectant hand wipes, and/or disinfectant products effective against the virus that causes COVID-19, (*see also* Rottnek ¶ 7(c),(h),(i); Lauring 5/2 Decl. ¶ 32, 39; Lauring 6/11 Decl. ¶ 17(b)(vi); CDC Guidance at 7-10, 17-18);

5) Provide **daily** access to clean showers and **clean laundry**, including clean personal towels and washrags for each shower;

6) Require that all Jail staff wear personal protective equipment, including masks and gloves, **when interacting with any person or when touching surfaces in cells or common areas**, (*se also* Rottnek ¶ 7(e));

In addition, Defendants have not met their burden in establishing voluntary cessation as it relates to the request for relief that is currently covered by the temporary order. Both the Michigan Supreme Court and the United States Supreme Court have long held that voluntary cessation of illegal conduct does not moot a claim. *Dep't of Social Services v. Emmanuel Baptist Preschool*, 434 Mich. 380, 425, 455 N.W.2d 1 (1990) (Cavanagh, J., concurring) (quoting *United States v. W T Grant Co.*, 345 U.S. 629, 633 (1953)). Defendants bear the burden of establishing voluntary cessation and must demonstrate that (1) they have ceased the illegal conduct" and (2) "that the alleged wrong will not arise again." *Anglers of AuSable, Inc. v. Department of Environmental Quality*, 783 N.W.2d 502, 503, 486 Mich. 982, 984 (Mich.). Here, Defendants cannot establish that they have met either factor.

First, and most importantly, Dr. Rottnek's inspection report and the declarations submitted with this reply demonstrate that after entry of the temporary order, were *still* failing to provide constitutional conditions of confinement during the COVID-19 pandemic. *See* pp. 3-13, *supra*. As the Supreme Court has noted, "[t]here is no mere risk that [a defendant] will repeat its allegedly wrongful conduct, [than when] it has already done so. *Northeastern Fla. Chapter of Associated*

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7) Take each incarcerated person's temperature daily (with a functioning, properly operated, and sanitized thermometer) to identify potential COVID19 infections;

8) Conduct **immediate** testing for anyone displaying known symptoms of COVID-19 and who has potentially been exposed to infection, (*see also* Rottnek ¶ 7(b); Lauring 6/11 Decl. ¶ 17(b)(iv));

9) Ensure that individuals identified as having COVID-19 or having been exposed to COVID-19 receive adequate medical care and are properly quarantined **in a non-punitive setting**, with continued access to showers, recreation, mental health services, reading materials, phone and video calls with loved ones, communications with counsel, and personal property, (*see also* Rottnek ¶ 7(g); Lauring 5/2 Decl. ¶ 30, 37-38; Lauring 6/11 Decl. ¶ 17(b)(vii));

10) Respond to all emergency (as defined by the medical community) requests for medical attention within an hour, (*see also* Rottnek ¶ 7(d); Lauring 5/2 Decl. ¶ 36);

11) Cease and desist retaliatory disciplinary action in response to (a) incarcerated persons' requests for medical attention and basic, necessary protections, and/or (b) efforts by incarcerated persons to publicize unsafe and life-threatening conditions inside the Jail, (*see also* Rottnek ¶ 7(d); Lauring 5/2 Decl. ¶ 36; Lauring 6/11 Decl. ¶ 17(b)(vii)); and

12) Appoint an independent monitor (who can enter the Jail to ensure compliance with this Court's order).

General Contractors of America v. City of Jacksonville, Fla., 508 U.S. 656, 662 (1993); *Sullivan v. Benningfield*, 920 F.3d 401, 411 (6th Cir. 2019) ("before voluntary cessation of a practice could ever moot a claim, the challenged practice must have actually ceased."). Defendants therefore do not satisfy the first factor of the voluntary cessation test.

Second, the order is temporary and expires on June 18, 2020. Efforts (disputed as this may be) to comply with a temporary order do not demonstrate that Defendants have ceased the illegal conduct. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983) (finding that intervening events were "not permanent" and could have not "irrevocably eradicated the effects of the alleged violation."); *Milwaukee Police Ass'n v. Jones*, 192 F.3d 742, 747 (7th Cir. 1999) (efforts to comply with TRO did not demonstrate that the wrong will not be repeated). In a recent case challenging the conditions of confinement at a jail during the COVID-19 pandemic, a federal district court held that the entry of a temporary restraining order did not establish that defendants had ceased the illegal conduct. *Swain v. Junior*, No. 1:20-CV-21457-KMW, 2020 WL 2078580, at *14 (S.D. Fla. Apr. 29, 2020). So, even if Defendants had voluntarily ceased the unconstitutional conduct —and they have not—Defendants' argument that their change purported changes in policy and practice precludes this Court from ordering the relief Plaintiffs' seek would still be meritless. That a temporary stipulated order requires them to cure some of the constitutional deficiencies does not change this fact, as Defendants are "free to return to [their] old ways" once the order expires. *W T Grant Co.*, 345 U.S. at 632.

Because Defendants' voluntary cessation argument does not apply, normal rules of civil procedure govern. This Court thus must base its order on the facts alleged and the facts that existed when the Plaintiffs' filed this Motion. In light of Plaintiffs' overwhelming evidence, Defendants'

failure to proffer facts beyond highly generalized evidence regarding purported efforts to marginally improve some conditions within the Jail must be fatal.

Plaintiffs, however, have no objection to this Court's entry of the temporary consent order as a preliminary injunctive order, in addition to the relief Plaintiffs seek here that was not included in the temporary order. But the entry of a stipulated temporary order does not change the operative facts that existed at the time Plaintiffs filed this Motion, and it does not preclude this Court from entering the order that Plaintiffs' seek.

III. THE PRISON LITIGATION REFORM ACT IS INAPPLICABLE

Defendants argue that Plaintiffs cannot demonstrate a likelihood of success on the merits because they have not exhausted administrative remedies as required by the Prison Litigation Reform Act ("PLRA").[39] This argument defies logic.

Plaintiffs' Motion was filed pursuant to a stipulated order permitting Plaintiffs to reopen this case, which was originally filed in 1971, 25 years before the enactment of the PLRA in 1996. *Wayne County Jail Inmates v. Wayne County Chief Executive Officer*, 444 N.W.2d 549, 551, 178 Mich. App. 634, 637 (Mich. App. 1989); *Martin v. Hadix*, 527 U.S. 343, 343 (1999). Because the PLRA is not retroactive, it does not apply to motions brought in this case. *Wright v. Morris*, 111 F.3d 414, 418 (6th Cir. 1997) (concluding that "the text of the PLRA indicates that the new administrative exhaustion requirement applies only to cases filed after the Act's passage."); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 275 n.29 (1994) ("A new rule concerning the filing of

[39] PLRA exhaustion is an affirmative defense, *Jones v. Bock*, 549 U.S. 199, 200 (2007). Defendants therefore bear the burden of proving that no member of the Detainee class has exhausted their administrative remedy. *Taylor v. Lindamoon*, 2017 WL 4176338, at *4 (M.D. Tenn. Sept. 19, 2017) ("The doctrine of vicarious exhaustion allows a single member of a class action to satisfy the exhaustion requirement for all class members by exhausting his or her own administrative remedies with respect to each class-action claim.").

complaints would not govern an action in which the complaint had already been properly filed under the old regime."). And under the PLRA, this is not a new "action," such that the exhaustion requirement would be triggered. *See Jones v. Bock*, 549 U.S. 199, 219 (2007) (interpreting the statutory term "action" to mean the filing of a complaint).

Even if this Court finds that the PLRA's exhaustion requirement is applicable to motions filed in this case, Defendants argument would fail because Defendants' grievance procedures are unavailable to detainees. *See Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016) (holding that a detainee "need only exhaust those remedies that are 'available' to him"). Defendants' grievance process does not provide a forum to raise the emergency issues detainee's raise here and have expedited consideration of their request. To the contrary, Defendants' grievance process is long, tedious, and multi-tiered. It could take a detainee almost 70 days to exhaust the grievance process. *See* Defs.' Ex. 10. Thus, if a detainee has an emergency that must be met in less than two weeks—such as needing soap to wash one's hands in a crowded dorm as a viral infection spreads—Defendants' grievance procedures are not "available" to resolve the emergency. *See Fletcher v. Menard Corr. Ctr.*, 623 F.3d 1171, 1174 (7th Cir. 2010) ("If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no 'possibility of some relief' and so nothing for the prisoner to exhaust."). Addressing the exhaustion requirement in the context of the COVID-19 pandemic, Supreme Court Justice Sonia Sotomayor, joined by Justice Ruth Bader Ginsburg, recently acknowledged that when faced with "a rapidly spreading pandemic[,]" administrative remedies may be "unavailable," "where an inmate faces an imminent risk of harm that the grievance process cannot or does not answer, the PLRA's textual exception could open the courthouse doors where they would otherwise stay closed." *Valentine v. Collier*, U.S. ——, —— S.Ct. ——, —— L.Ed.2d ——, 2020 WL 2497541, *1 (May 14, 2020); *see also*

Cameron, 2020 WL 2569868 at *16. Additionally, detainees have submitted ample evidence that Jail staff threaten, intimidate, and retaliate against them when they raise grievances about COVID-19, further establishing that the grievance process is unavailable.

IV. THE UNTIMELY AFFIDAVITS OF BRIDGETTE JONES AND LOUIS SHICKER DO NOT CHANGE THIS COURT'S ANALYSIS

Six days after Defendants submitted their Response to Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and on the day Plaintiffs' Reply is due, Defendants, without notice or leave of this Court, filed three affidavits: 1) Bridgette Jones, 2) Louis Shicker, and 3) and an updated affidavit from Mark Morrissey.

Dr. Shicker, a physician with two decades of experience in correctional health care, has a similar background to Dr. Rottnek. Unlike Dr. Rottneck, however, neither Dr. Shicker nor Ms. Jones has stepped foot inside of the Jail, let alone conducted a thorough inspection of its facilities. Neither Dr. Shicker nor Ms. Jones have apparently spoken with any Jail staff or detainees.

With the exception of information about their backgrounds, the affidavits of Bridgette Jones, an epidemiologist, and Dr. Shicker are identical in language. The attestations of Ms. Jones and Dr. Shicker both lack credibility and do not change the analysis here.

The affiants make conclusory statements that lack any foundation as well as statements that are incorrect:

1. The Jail's population has been reduced to the point where social distancing can be achieved;
2. The medically vulnerable individuals…have been released if the risk to the public is tolerable;
3. The Wayne County Jail and its stakeholders have headed the CDC Recommendations and have enacted adequate pandemic plans;
4. It is unnecessary to close Division II because preventative measure can be enacted to prevent the spread of the virus, as evidenced by the test results; and
5. Dr. Lauring and Dr. Rottnek "rely on certain parts of the CDC guidelines in formulating their opions," and "the guidelines are intended to be used and adapted to one's own setting."

The affiants' attestations assume that the Jail is complying with the policies its promulgated in response to COVID-19. As stated earlier, the detainee declarations and Dr. Rottnek's observations prove that the Jail is not complying with its own policies. Dr. Lauring also notes that "the results suggest that the Jail is not practicing all of the mitigation and prevention efforts set forth in the directives, orders, and policies adopted since March 13, 2020," Ex. 4 ¶ 21, and that "it is apparent that some of the policies are dangerously inadequate." *Id* at ¶ 31.

For the reasons discussed fully in Plaintiffs' response to Defendants' Motion to Strike the Inspection Report, Dr. Rottnek relies on much more than the CDC guidelines. So, too, does Dr. Lauring. To be sure, in his supplemental affidavit, Dr. Lauring "make[s] clear that [his] expert opinion derives not only from [his] review of the CDC guidelines for correctional facilities, but from [his] extensive experience in respiratory viruses and other infectious diseases, as documented in paragraphs 5-15 of this affidavit:

1. I received my medical degree from the University of Washington in 2002. I subsequently trained as a Resident in Internal Medicine at the University of California, San Francisco (UCSF) – one of the country's top academic medical centers. In recognition of my skills as a clinician and teacher, I was selected by the faculty and my peers to serve as Chief Medical Resident. I subsequently trained as a Fellow in Infectious Diseases and have been Board Certified in Infectious Diseases (American Board of Internal Medicine) since 2008. I have practiced as an Infectious Diseases specialist, first at UCSF, and since 2012, at the University of Michigan.

2. I completed a PhD in Molecular and Cellular Biology at the University of Washington in 2000. My thesis research was on how viruses like HIV cause disease. I performed postdoctoral research in virus evolution from 2007-2012. I have directed a research laboratory at the University of Michigan since 2012. I continue to study how viruses evolve and spread with a focus on influenza and other respiratory viruses. Based on my scientific success and track record of innovation, I have received several highly competitive awards, including: the Pfizer Young Investigator Award in Vaccine Development, a Doris Duke Charitable Foundation Clinician Scientist Development Award, and a Burroughs Wellcome Fund Investigator in the Pathogenesis of Infectious Disease Award.

3. I participate in the US Hospital Vaccine Effectiveness Network and the US Influenza Vaccine Effectiveness Network, two large CDC-funded studies of influenza virus

epidemiology in communities and healthcare environments. I am the Principal Investigator on a 5-year, $3.7 million NIH grant on respiratory virus transmission, which recently scored in the top percentile and is expected to begin on July 1, 2020.

4. I am currently an Associate Professor with Tenure in the Division of Infectious Diseases and the Department of Microbiology and Immunology at the University of Michigan.

5. In 2019, I became a Fellow of the Infectious Diseases Society of America, an honor given to individuals who have demonstrated excellence in Infectious Diseases. In 2020, I was elected to the Governing Council of the American Society for Virology.

6. I cared for one of the first two patients with COVID-19 in the State of Michigan on March 10, 2020. I watched Governor Whitmer announce these first cases while at the patient's bedside in the intensive care unit at the University of Michigan Hospital. From mid-March through the end of May, I spent 5 weeks taking care of COVID-19 patients at the University Hospital. Most of the patients were in the Intensive Care Units.

7. Since March, I have been instrumental to the University's response to COVID-19. I developed our diagnostic and testing guidelines, contributed to institutional treatment guidelines, and worked closely with hospital infection control to manage patient flow over the first two weeks of the Michigan epidemic. I helped to set up our Regional Infection Containment Unit (RICU), a dedicated COVID-19 intensive care unit.

8. My laboratory performed key experiments for a University of Michigan N95 disinfection project, which informed the hospital's decision to process masks for re-use at a time of critical PPE shortages (https://www.medrxiv.org/content/10.1101/2020.04.28.20084038v1). We are in the process of sequencing SARS-CoV-2 specimens from 400 patients and 250 health care workers, with the goal of understanding COVID-19 transmission and spread.

9. I helped to set up the Medical Center's COVID-19 Patient Registry and the COVID-19 Biospecimen Repository. I serve on the University's COVID-19 Research Prioritization Committee and COVID-19 Clinical Trials Feasibility Review Committee. I also serve on the Institutional Biosafety Committee, which reviews all protocols for pathogen research at the University of Michigan. I am Co-Director of the University's new Michigan Center for Infectious Disease Threats.

10. Based on my training, my expertise in respiratory virus transmission, and my deep and varied experiences with SARS-CoV-2 and COVID-19, I am very well qualified to comment on many aspects of this case, including: basic biology of SARS-CoV-2 and methods for its inactivation; how this virus transmits from person to person and spreads through communities, healthcare settings, and congregate environments; infection control procedures; COVID-19 epidemiology; diagnostic tests for COVID-19; and clinical care of patients with COVID-19.

Dr. Lauring explains why Mr. Morrissey's, Dr. Shicker's, and Ms. Jones's attestations about the infection rate and test results are incorrect or misleading and should not be credited. ¶¶ 19, 20, 22-25, 27. He further explains why their conclusions regarding the closure of Division II, social distancing, the risk to Jail detainees, and the adequacy of the Jail's policies are incorrect. ¶¶ 28-31, 33.

Put simply, in his supplemental declaration, Dr. Lauring, applying his expertise in infectious diseases to Dr. Rottnek's findings, concludes that the Jail must "**stop housing inmates in Division II as soon as possible**. And then stop requiring staff to work there." Rottnek Report, p. 12. In so finding, he notes that he "strongly disagree[s] with Ms. Bridgette Jones's and Dr. Louis Shicker's judgment on this issue," and explains why he agrees with Dr. Rottnek's recommendations:

> I would also add that the medically vulnerable detainees housed in Division II must be moved immediately. Poor ventilation and extensive disrepair creates an unreasonable risk infection of airborne illnesses, and, as Dr. Rottnek further noted, once a person is infected, the conditions create a grave risk of serious illness or death because they exacerbate respiratory conditions and chronic conditions. Further, the sub-par medical care for non-COVID-19-related health problems strongly indicates that Jail staff remains ill-equipped and unprepared to manage and prevent a further outbreak of COVID-19 and any related complications. And, notwithstanding the fact that the medical care is deficient, and the conditions increase both the likelihood of infection and the risk of severe consequences from infection, detainees are incapable of achieving social distancing and are not receiving sufficient hygiene supplies.

Accordingly, the untimely declarations filed by Defendants in support of their opposition should not be given any weight by this Court, nor should they, in any way, change this Court's analysis.

CONCLUSION

For these reasons, Plaintiffs ask this Court to issue a temporary restraining order and preliminary injunction ordering the relief requested in their motion.

Dated: June 11, 2020

Respectfully submitted,

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\CERTIFICATE OF SERVICE

I certify that the foregoing document was filed with the Clerk of Court using this Court's electronic filing system.

/s/Allison L. Kriger