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

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

Plaintiffs,

vs.

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

Defendants.

Case No. 1:14-cv-1245

Honorable Janet T. Neff

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DEFENDANTS' BRIEF IN SUPPORT OF DENIAL OF PRELIMINARY INJUNCTION
ORAL ARGUMENT REQUESTED

INTRODUCTION

This case involves claims by the named Plaintiffs of unconstitutional conditions of confinement in the Muskegon County Jail ("Jail"). They seek a preliminary injunction to correct what they allege are unconstitutional practices by the Jail. This request should be denied, as none of the named Plaintiffs are current inmates in the Jail, and their request is moot, as to the named Plaintiffs. While the Plaintiffs have requested that the Court grant them status as representatives of two classes of inmates seeking injunction and declaratory relief, to date no class has been certified.[1]

BRIEF STATEMENT OF FACTS

This lawsuit was filed on December 4, 2014, and served on Defendants on or about January 8, 2015. At the time of filing, only one of the named Plaintiffs, Stashia Collins, was a resident of the Jail. She was released from the Jail on January 12, 2015. As a result, none of the named Plaintiffs is currently residing in the Jail. (Exhibit 1- Aff. of Lt. Mark Burns)

[1] That is the subject of a separate motion which is contested by Jail's co-counsel

Plaintiffs have filed a motion for the Court to certify two classes seeking declaratory and injunctive relief:

> 1. Pursuant to Fed. R. Civ. P. 23(b)(2), a class of all current and future inmates at the Muskegon County Jail ("MCJ"), represented by plaintiff Stashia Collins, seeking declaratory and injunctive relief from unconstitutional conditions of confinement that affect all inmates ("Overcrowding Injunctive Class");
>
> 2. Pursuant to Fed. R. Civ. P. 23(b)(2), a class of all current and future female inmates at MCJ, represented by Ms. Collins, seeking declaratory and injunctive relief from unconstitutional conditions of confinement specific to female inmates ("Female Injunctive Class")

Plaintiffs identify Ms. Collins as the representative of these classes. However, as noted above, she was released from the Jail on January 12, 2015. As a result, none of the named Plaintiffs is a current inmate at the Muskegon County Jail.

LAW AND ARGUMENT

A. Standard for Preliminary Injunction.

When determining whether to issue a preliminary injunction, a district court must consider four factors: (1) whether the movant has a 'strong' likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction. *Karhani v. Meijer*, 270 F. Supp. 2d 926, 929 (E.D. Mich. 2003); *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000) (citation omitted). None of these four factors is a prerequisite to the issuance of a preliminary injunction; rather the Court's determination as to the requested injunctive relief is reached by **balancing these factors against each other.** *United Food & Commercial Workers Union, Local 1099 v. Southwest Ohio Reg'l Transit Auth.*, 163 F.3d 341, 347 (6th Cir. 1998) (citation omitted)

(emphasis added). To the extent to which a party must demonstrate a likelihood of success varies inversely with the degree of harm the party will suffer absent an injunction. *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 538 (6th Cir. 1978), cert. dismissed, 442 U.S. 925 (1979).

B. Plaintiffs' issue is moot as all named plaintiffs are no longer Jail inmates.

Federal courts have limited jurisdiction. Under Article III of the United States Constitution, federal courts may only hear "cases" and "controversies". As a first step, a plaintiff must have standing to bring suit. This has been described by the Supreme Count as having a "personal stake" in the litigation.

> Plaintiffs must demonstrate a "personal stake in the outcome" in order to "assure that concrete adverseness which sharpens the presentation of issues" necessary for the proper resolution of constitutional questions. *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Abstract injury is not enough. The plaintiff must *102 show that he "has sustained or is immediately in danger of sustaining some direct injury" as the result of the challenged official conduct and the injury or threat of injury must be both "real and immediate," not "conjectural" or "hypothetical. (Citations omitted)

City of Los Angeles v. Lyons, 461 U.S. 95, 101-102; 103 S.Ct. 1660 (1983). In this case, Stashia Collins had standing at the filing of this case, such that she could request injunctive and declaratory relief. She was at that time an inmate in the Jail.

Having standing at the outset of a lawsuit, however, is not sufficient to maintain the requirement of "case" or "controversy" during the pendency of a case. If the plaintiff loses his/her personal stake in the litigation by a change in circumstance, then the plaintiff's case becomes moot. *U.S. Parole Comm. v. United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 397; 100 S.Ct. 1202 (1980):

> The "personal stake" aspect of mootness doctrine also serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest

> that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973).

At this time, none of the named Plaintiffs is an inmate in the Jail. Stashia Collins has been released since this case was filed. She was the only inmate at the time of filing. None of the Plaintiffs has a "personal stake" in obtaining a preliminary injunction. All of their experiences with the allegedly unconstitutional conditions in the Jail is in the past. As the Court stated in *O'Shea v. Littleton*, 414 U.S. 488, 495-496; 94 S.Ct. 669 (1974):

> Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief, however, if unaccompanied by any continuing, present adverse effects.

In this case, all exposure by the Plaintiffs to alleged unconstitutional conduct by the Defendants lies in the past. There exists no present case or controversy regarding injunctive relief.

If a class of "current and future inmates" of the Jail is certified by this Court, the request for injunctive and declaratory relief may not be moot as to the class. However none of the named Plaintiffs in this case are currently a member of either of the proposed classes that seek injunctive relief. As the Court stated in *Sosna v. Iowa*, 419 U.S. 393, 403; 95 S.Ct. 553 (1975):

> A litigant must be a member of the class which he or she seeks to represent at the time the class action is certified by the district court. *Bailey v. Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); *Rosario* [*v. Rockefeller*, 410 U.S. 752, 93 S.Ct. 1245, 36 L.Ed.2d 1 (1973)]; *Hall v. Beals*, 396 U.S. 45, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969).

In this case, even at this early stage of this litigation, none of the named Plaintiffs is a member of either of the classes that seeks injunctive relief. Under these circumstances, neither of these putative classes should be certified by this Court, as the claims of the putative representatives are moot.

C. Plaintiffs cannot meet the preliminary injunction standards.

Moreover, while a party seeking a prohibitory injunction generally bears a heavy burden of proof, the plaintiffs in this case must carry an even heavier burden because the injunction they seek mandates affirmative conduct. Where a prison or jail inmate seeks an order enjoining state prison or county jail officials, this Court is required to proceed with the utmost care and must recognize the unique nature of the prison setting. *See Kendrick v. Bland*, 740 F.2d 432, 438, n.3, (6th Cir. 1984); *see also Harris v. Wilters*, 596 F.2d 678 (5th Cir. 1979). It has also been remarked that a party seeking injunctive relief bears a heavy burden of establishing that the extraordinary and drastic remedy sought is appropriate under the circumstances. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1986).

Plaintiffs' "initial burden" in demonstrating entitlement to preliminary injunctive relief is a showing of a strong or substantial likelihood of success on the merits of their Section 1983 action. *NAACP v. City of Mansfield, Ohio*, 866 F.2d 162, 167 (6th Cir. 1989). A cursory review of the pleadings to date fail to establish a substantial likelihood of success with respect to plaintiffs' claim that the defendants are violating inmates' constitutional and federal rights. Assuming arguendo the allegations put forth are true, they do not rise to the level of constitutional right violations. Plaintiffs allege that they are forced to shower in standing water used by other inmates, and showers are either non-functional for days at a time or spray inmates with scalding hot water, yet none of the named plaintiffs are housed in Jail. Additionally, it is noted that none of the case law cited in support of their arguments for the condition of the jail cells as violating their constitutional rights is from a controlling jurisdiction.

Plaintiffs assert they are likely to succeed on their cross-gender viewing claims under the Fourth, Eighth, and fourteenth Amendments. However, like their other claims, these too are

more likely to fail. The Sixth Circuit has specifically held that the privacy rights of Michigan's female inmates protects them from unreasonable unnecessarily viewings. *Everson v. Mich. Dep't of Corrs.*, 391 F.3d 737 (6th Cir. 2004). While plaintiffs' counsel cites to an appropriate case, its factual application is inappropriate. All female inmates housed at the Jail are now provided two-piece inmate suits. Further, all allegations regarding deprivations of menstrual products, access to additional underwear, and out of cell exercise time are not supported by any allegations from any current inmates for a simple reason: they are not truthful allegations.

Further, as discussed above, as all named plaintiffs are not housed in the jail, plaintiffs have failed to establish that they will suffer irreparable harm absent injunctive relief. Previously, all issues regarding female inmate clothing was rectified months before the initiation of this litigation. All other allegations of irreparable harm are on their face insufficient, and inapplicable in this case.

Finally, in the context of a motion impacting on matters of prison administration, the interests of identifiable third parties and the public at large weigh against the granting of an injunction. Any interference by the federal courts in the administration of state prison or county jail matters is necessarily disruptive. The public welfare therefore militates against the issuance of extraordinary relief in the prison or jail context, absent a sufficient showing of a violation of constitutional rights. *See Glover v. Johnson*, 855 F.2d 277, 286-87 (6th Cir. 1988). Assuming arguendo plaintiffs' allegations are true, the necessary showing of constitutional rights violations is still missing. Furthermore, absent a class certification, plaintiffs' allegations of constitutional rights violations are innately non-existent, as all named plaintiffs are not housed in Jail. Therefore, this Court should avoid the disruption of the county jail administrators and their

operations, especially in the transition phase towards the new Muskegon County Jail, which will be fully operational later this year.

CONCLUSION

At this point in this litigation, any requests for preliminary injunctions are moot as to all of the named Plaintiffs. None is currently a resident in the Jail. In addition, there is no Plaintiff present in this litigation that represents the proposed class of plaintiffs requesting injunctive relief, namely "current and future inmates" of the Jail. Due to mootness and the fact plaintiffs cannot meet the preliminary injunction standards, the request for a preliminary injunction should be denied.

Dated: February 2, 2015

WILLIAMS HUGHES, PLLC

By: /s/ Douglas M. Hughes

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EXHIBIT 1

AFFIDAVIT OF LT. MARK BURNS

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

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

Plaintiffs,

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AFFIDAVIT OF LT. MARK BURNS IN SUPPORT OF DEFENDANTS' DENIAL OF PRELIMINARY INJUNCTION

STATE OF MICHIGAN)
) ss:
COUNTY OF MUSKEGON)

I, Lt. Mark Burns, after being duly sworn, say as follows:

1. I am Mark Burns and am one of the Defendants in this lawsuit.

2. I am a Lieutenant with the Muskegon County Sheriff Department.

3. My duty for the Sheriff Department is that of Jail Administrator.

4. As of this date, none of the named Plaintiffs in this lawsuit is housed in the Muskegon County Jail.

5. Plaintiff Latrece Nikole Baker was released from the Jail on November 17, 2014. She was booked into the Jail on November 1, 2014.

6. Plaintiff Paulette Marie Bosch was released from the Jail on April 22, 2013. She was booked into the Jail on November 5, 2012.

7. Plaintiff Crisa Lynn Brown was released from the Jail on April 16, 2014. She was booked into the Jail on February 10, 2014.

8. Plaintiff Stashia Shawkia Collins was released from the Jail on January 12, 2015. She was booked into the Jail on August 5, 2014.

9. Plaintiff Londora Lathasha Kitchens was released from the Jail on September 22, 2014. She was booked into the Jail on January 23, 2014.

10. Plaintiff Michelle Ann Semelbauer was released from the Jail on November 7, 2012. She was booked into the Jail on October 10, 2012.

11. Plaintiff Tammy Lynn Spears was released from the Jail on August 28, 2014. She was booked into the Jail on March 20, 2014.

12. Plaintiff Denise Lynne Brown was released from the Jail on September 21, 2012, having been booked into the Jail the same day.

Mark Burns #84240

Subscribed and sworn to before me, a Notary Public, this 29th day of January, 2015.

Notary Public, State of Michigan
County of Muskegon
My Commission Expires: 5-15-19
Acting in the County of Muskegon