

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

LESTER DOBBEY, et al.,)	
Plaintiffs,)	Case No. 13-cv-1068
)	
v.)	Honorable Judge
)	Robert M. Dow
WILLIAM WEILDING, et al.,)	
Defendants.)	

**PLAINTIFFS’ SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF PLAINTIFFS’ EMERGENCY MOTION
AND AMENDED MOTION FOR APPOINTMENT OF RULE 706 EXPERT**

Plaintiffs, by and through their counsel, LOEVY & LOEVY, submit the following supplemental memorandum in support of their Emergency Motion for Temporary Appointment of a Special Master. Dckt. 230. In further support of their amended motion, Plaintiffs state as follows:

Background

Last week, Plaintiffs filed a motion seeking the Court to appoint a temporary special master to monitor the conditions at Stateville Correctional Center (“Stateville”), to ensure Class Members health and safety in light of imminent and serious risk to their health and lives due to the outbreak of COVID-19. As of the filing last week, the rate of infection at Stateville was nearly forty times higher than the rate of infection reported in Cook County, Illinois most infected county. As of today, at least two Class Members have died due to the virus¹ and nine others are on respiratory support. The Illinois Department of Corrections is reporting that there

¹ Tom Schuba, “2nd Stateville prison inmate dies of COVID-19,” Chi. Sun Times (Apr. 5, 2020), available at <https://chicago.suntimes.com/coronavirus/2020/4/5/21208643/2nd-stateville-prison-inmate-dies-of-covid-19> (last visited Apr. 6, 2020).

are a total of 119 positive cases at Stateville: 95 Class Members and 24 staff.² Just yesterday, IDOC reported 56 positive Class Members. Plaintiffs urgently sought the appointment of an expert to offer guidance to the IDOC because attempts to access information by class counsel in advance of the outbreak and crisis were insufficient to ensure Class Members' health and safety.

Plaintiffs initially requested the Court to appoint a Special Master to monitor: (1) segregating Class Members who are exhibiting symptoms of infection from healthy Class Members; (2) reducing the spread of the virus through all necessary health and sanitation recommendations; (3) instituting social distancing for living, daily activities like eating and showering; (4) providing PPE to Class Members to reduce the spread of the virus; and (5) ensuring all possible means are used to segregate any Class Members whose age or prior medical conditions puts them at increased risk of developing severe medical complications if they contract COVID-19. Dckt. 230 at 27-28.³

On Friday, April 3, the Court held a status with the parties to discuss Plaintiffs' motion. During that hearing, the Court requested that Plaintiffs supplement their motion with a concrete proposal, including the identities and backgrounds of proposed experts who could serve as an expert. In addition, the Court suggested that the Parties consider whether a request to appoint an expert pursuant to Rule 706 of the Federal Rules of Evidence would be more appropriate for the issues raised by Plaintiffs than a request for appointment of a special master under Rule 53 of the Federal Rules of Civil Procedure. The Court also encouraged the Parties to meet and confer regarding Plaintiffs' motion to determine if there were possible areas of agreement.

On Friday afternoon and over the weekend, the Parties conferred in good faith during two

² See IDOC COVID-19 Update, <https://www2.illinois.gov/idoc/facilities/Pages/Covid19Response.aspx> (Apr. 6, 2020).

³ Plaintiffs citations to their motion are to the ECF filing pages numbers.

hour-long telephonic conferences and the exchange emails. Unfortunately, the Parties were unable to reach a compromise agreement. Accordingly, Plaintiffs are supplementing their emergency motion to modify their request to formally seek a Rule 706 expert, provide further detail on the scope of the experts' appointment, and offer proposed experts for the Court to consider in ruling on Plaintiffs' request.

Argument

Plaintiffs respectfully modify the relief sought in their motion and instead of requesting the appointment of a special master pursuant to FED. R. CIV. P. 53, they alternatively seek appointment of an expert pursuant to FED. R. EVID. 706.

Federal Rule of Evidence 706(a) vests this Court with the authority to appoint an expert, which provides, in relevant part, that “[o]n a party’s motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed.” FED. R. EVID. 706(a). *See also Ledford v. Sullivan*, 105 F.3d 354, 358–59 (7th Cir. 1997) (“Generally, if scientific, technical, or other specialized knowledge will assist the trier-of-fact to understand the evidence or decide a fact in issue, a court will utilize expert witnesses” under Rule 706). Given the urgent need to quickly appoint an expert to monitor Defendants COVID-19 response along with requested relief that Class Members seek being advisory in nature, Rule 706, would be a preferred method to appoint an expert here. Courts have appointed experts pursuant to Rule 706(a) in other prison or jail condition cases as means for the court to appropriately evaluate alleged conditions that require an expert’s skill and training to analyze. *See, e.g., Lightfoot v. Walker*, 486 F. Supp. 504, 506 (S.D. Ill. 1980) (court appointed a panel of three medical experts pursuant to Rule 706 to inform it on the constitutionality of Menard’s health care system in 1980s); *McClendon v. City of Albuquerque*, No. 95 CV 24 JAP/KBM, 2016 WL 9818311, at *9

(D.N.M. Nov. 9, 2016) (In class action of jail conditions, “[t]he Court appointed the [plaintiff intervenors’] requested Rule 706 experts and had those experts initially evaluate the conditions within [metropolitan detention center] using certain provisions of the 2005 settlement agreements as the standards of measurement.”); *Karsjens v. Jesson*, 6 F. Supp. 3d 916, 946 (D. Minn. 2014) (appointment of four Rule 706 experts in conditions of confinement class action brought by civilly committed sex offenders to evaluate the programs, treatment and evaluate each individual class members for evaluation of proper treatment and if fit for less restrictive placement); *Balla v. Idaho Bd. of Correction*, No. CV-81-1165-S-BLW, 2007 WL 4531304, at *1 (D. Idaho Dec. 18, 2007), order clarified, No. CV81-1165-S-BLW, 2009 WL 1574454 (D. Idaho May 28, 2009) (use of Rule 706 expert to assess whether prison overcrowding required continued enforcement of a population cap); *Balla v. Idaho State Board of Corrections*, 656 F. Supp. 1108, 1110 (D. Idaho 1987) (earlier in same class action, court appoint an expert witness to investigate allegations of prison overcrowding and requiring defendants to pay entire fee for indigent class of inmates); *Beaver v. Bd. of Cty. Comm’rs of Gooding Cty.*, No. CIV. 91-0165-S-EJL, 1991 WL 350749, at *1 (D. Idaho Sept. 19, 1991) (court appointed expert under Rule 706 to evaluate the jail’s ventilation, sanitation, and adequate staffing for the number of inmates in pro se jail conditions case). *See also Tangwall v. Robb*, No. 01-10008-BC, 2003 WL 23142190, at *3 (E.D. Mich. Dec. 23, 2003) (collecting prison condition cases that Rule 706 experts were used in the 1980s and 1990s); *Cf Armstrong v. Brown*, 768 F.3d 975, 987 (9th Cir. 2014) (reversing district court’s delegation of authority to a Rule 706 expert who was appointed to resolve disputes over defendant’s compliance with making California prisons ADA compliant for class of disabled inmates where court granted expert authority to resolve disputes but, “provide[d] no mechanism for review by the district court”).

In the context of this case, the Court and parties effectively used Bruce Kaskel as a Rule 706 expert to evaluate and report on the structural integrity of Stateville's facilities early this year. *See, e.g.*, Dckt. 224. Mr. Kaskel was permitted to consult with the Parties as well as the Court to obtain the information needed from Defendants to effectively survey Stateville, including conversations with Stateville's engineers and facility staff. Mr. Kaskel was also permitted to conduct a day-long inspection of the facility in September 2019, and ultimately provided reports to the Court regarding the structural integrity of the buildings that relate to the safety of Class Members, such as the quarter houses, dining and health care unit. This model serves as a good model for the requested relief Plaintiffs seek here.

On that score, Plaintiffs enumerate with more specificity the scope of their requested relief sought with the appointment of a Rule 706 expert. Ultimately, Plaintiffs are seeking the temporary appointment of a Rule 706 expert to: (1) access information from Defendants regarding the conditions at Stateville, and speak with relevant IDOC employees about Defendants' COVID-19 response at Stateville; and (2) provide recommendations to the Court and Parties regarding Defendants' COVID-19 response at Stateville to ensure that all Class Members' health and safety are protected during this crisis period.

Information Requested to Monitor and Advise and Reporting

The information and conditions that Plaintiffs are seeking that the Rule 706 expert would be involved in monitoring and advising the Court and the parties, including the IDOC, include the following:

1. Housing of Class Members During the COVID-19 Crisis
 - a. Monitoring/advising how Class Members who are healthy and not exhibiting symptoms are housed so that they can avoid possible exposure;

- b. Monitoring/advising how Class Members with symptoms are being segregated/quarantined;
 - c. Monitoring/advising how Class Member with positive test results are being isolated to avoid further exposure.
2. Class Member Access to Personal Protective Equipment (“PPE”)
- a. Monitoring/advising what PPE such as masks and gloves are being made available to Class Members depending on their status with respect to risk of exposure;
 - b. Monitoring/advising the frequency of access/replacement of PPE to Class Members;
3. Class Member Access to Cleaning Supplies/Laundry Services/Showers
- a. Monitoring/advising on Class Members access to cleaning products and their strength to ensure regular cleaning of the cells and housing units and other areas of the facility;
 - b. Monitoring/advising on Class Member access to laundry services;
 - c. Monitoring/advising on Class Member access to showers and how to accommodate social distancing recommendations in the provision of each of showers.
4. Social Distancing Implementation for Access to Physical Exercise: monitoring/advising how to implement social distancing to permit some form of physical exercise and when that might be appropriate.
5. Food Service/Distribution

- a. Monitoring/advising on food distribution/access distribution during COVID-19 crisis movement restrictions;
 - b. Monitoring/advising access to special dietary restrictions during COVID-19 crisis restrictions.
6. Access to Communication with Legal Counsel: monitoring/advising on how to implement access to legal counsel through non-monitored telephonic or email communications during COVID-19 crisis movement restrictions.
 7. Access to Communication with Family/Friends: monitoring/advising on how to ensure Class Members have access to communication with their family and friends during the COVID-19 crisis and movement restrictions.

Plaintiffs are requesting the temporary Rule 706 expert would have regular access to information from Defendants and/or staff at the facility in order to monitor the conditions for Class Members during the COVID-19 crisis. Plaintiffs do not intend to unnecessarily burden Defendants with regular reporting requirements, and so rather than institute a schedule or reporting requirement, would instead seek for the expert to obtain information via email or telephone communications and to do so on a sufficient basis to make informed reporting and recommendations to the Court and the parties, and to report to the Court and the parties in a similarly regular but informal manner. If a less formal reporting system is not successful to achieve Plaintiffs' needs, Plaintiffs will apprise the Court and seek a formal reporting structure to be implemented.

Plaintiffs' Proposed Experts

Plaintiff propose the Court appointing Dr. Michael Stern and Mr. Eldon Vail to serve as temporary Rule 706 experts to monitor and advise Defendants on Stateville's response to the COVID-19 crisis. Together, Dr. Stern and Mr. Vail can provide the required expertise to ensure the Class Members' health and safety are protected during this crisis. Plaintiffs' counsel has consulted with both Dr. Stern and Mr. Vail and they are willing to be appointed by the Court in this capacity. Dr. Stern and Mr. Eldon together provide the combination of expertise in the provision of correctional health care and administration to monitor and advise on the conditions at Stateville.

Dr. Stern is an M.D. and holds a Masters in Public Health and is a Fellow the American College of Physicians. Exhibit A (Dr. Stern CV) at 1. Dr. Stern is currently serving as the COVID-19 Medical Advisor for the National Sheriffs Association. *Id.* Dr. Stern has extensive experience in the provision of medical care in correctional facilities, including serving as the Director of Health Services for the Washington State Department of Corrections from 2005 through 2008 and the Assistant Director of Health Services for the same from 2002 through 2005. *Id.* at 2. Dr. Stern also served as the Regional Medical Director, Northeast Region, 2001 – 2002 for the New York State Department of Correctional Services and medical director for a private vendor of correctional medical services in New York state. *Id.* at 3.

Mr. Vail has thirty-five years of correctional management experience. Exhibit B (Vail CV). Mr. Vail was the superintendent of three correctional facilities in Washington. He also served as Secretary for the Washington State Department of Corrections (WADOC) from 2007 until 2011. Mr. Vail has also consulted and served as an expert in a numerous cases involving evaluation and auditing of correctional facilities, including serving as the plaintiffs' expert in

Davis v. Baldwin, No. 16-cv-600 (S.D. Ill.), for which he issued a report regarding IDOC's solitary confinement. Mr. Vail is also currently being consulted on the COVID-19 crisis in cases involving correctional settings.

Alternatively, and in an effort to compromise, Plaintiffs are willing to agree to the appointment of Dr. Michael Puisis, one of the monitors in *Lippert* as a temporary Rule 706 expert in this case should Defendants be willing to agree. Dr. Puisis currently serves as one the monitors tasked with advising the Court about Defendants' compliance with the parties' settlement agreement in *Lippert v. Baldwin*, No. 10-cv-3603. In that capacity, Dr. Puisis has been part of the team conferring with the IDOC on its system of medical and mental health care statewide prior to the COVID-19 pandemic. Exhibit C (Order approving use of Dr. Puisis as a consultant in the *Lippert* class action).

Dr. Puisis is qualified to serve as the Court's Rule 706 expert. Dr. Puisis has extensive experience with the IDOC medical system. Exhibit D (Letter by Dr. Raba, the monitor in *Lippert*, to Judge Alonzo, May 29, 2019), in support of appointing Dr. Puisis as a consultant due to his extensive knowledge of IDOC's health care delivery system) at 2-3. He has served as the medical direct of IDOC and the medical director of a private vendor providing medical services to IDOC. *Id.* at 2. In addition, Dr. Puisis has performed review and auditing of over twenty-five prison/jail health care delivery systems. *Id.*

As Defendants argued during the last telephonic status hearing, Plaintiffs recognize the obvious synergies to appointing Dr. Puisis here because he is already familiar with IDOC and its facilities, including Stateville, and has already been working with Defendants to obtain information from them about their provision of medical case, including some information related to IDOC's response to COVID-19.

While Dr. Puisis would be required to temporarily serve in dual roles, the appointment sought here is limited to only the duration of the COVID-19 crisis outbreak at Stateville. Plaintiffs would be amendable to compromising and agreeing to the Court's appointment of Dr. Puisis to serve as the temporary Rule 706 expert here.

Conclusion

Plaintiffs respectfully seek this Court to appoint Dr. Michael Stern and Mr. Eldon Vail as temporary Rule 706 experts to monitor and advise Defendants on their response to the COVID-19 crisis at Stateville to ensure Class Members' health and safety for the duration of the crisis. Alternatively, if Defendants are willing to agree, Plaintiffs will agree the Court's appointment of Dr. Puisis to serve as the temporary Rule 706 expert.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Heather Lewis Donnell, an attorney, certify that I filed Plaintiff's Emergency Motion for Temporary Appointment of a Special Master on April 6, 2020, and thereby caused all counsel of record to be served via the Court's ECF/CM electronically filing system.

/s/ Heather Lewis Donnell