UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND

KEITH SETH, et al.,
Individually and on behalf of a class of similarly situated persons

Plaintiffs-Petitioners,

v.

MARY LOU MCDONOUGH,
In her official capacity as Director of the Prince George's County Department of Corrections

Defendant-Respondent.

Civil Action No. 8:20-cv-01028-PHX

Plaintiffs' Opposition to Defendant's Motion to Stay the Court's May 21, 2020 TRO

Defendant Mary Lou McDonough is not entitled to a stay of the Court's May 21, 2020, Memorandum Opinion ("Mem. Op.") and Temporary Restraining Order ("May 21 Order" or "TRO") (ECF Nos. 84 & 85) pending appeal, and the Court should deny Defendant's Opposed Emergency Motion to Stay Pending Appeal (ECF No. 90) ("Mot.").

I. INTRODUCTION

Defendant is not entitled to a stay pending appeal because the May 21 Order is not appealable, and even if the Order is appealable, Defendant has failed to establish that any of the criteria for a stay pending appeal are satisfied here. Defendant is not likely to succeed on the merits, and Defendant will not suffer any irreparable injury by complying with the TRO. However, Plaintiffs will be substantially injured by a stay of the TRO and the public interest will not be served by granting the stay.

II. ARGUMENT

As an initial matter, the Court's May 21 Order is a temporary restraining order and therefore not appealable. *See, e.g., Northeast Ohio Coalition for Homeless & Serv. Emps. Int'l Union, Local 1199 v. Blackwell*, 467 F.3d 999, 1005 (6th Cir. 2006) ("[T]his court generally lacks jurisdiction to hear an appeal of the district court's decision to grant or deny a TRO."); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 426 (5th Cir. 1981) ("The disposition of a motion for a temporary restraining order is generally not appealable under 28 U.S.C. § 1292(a)(1) as an order granting, denying, or modifying an injunction."); *cf. Bratcher v. Clarke,* 725 F. App'x 203, 204 (4th Cir. 2018) ("An order denying a preliminary injunction is an immediately appealable interlocutory order.") (citing 28 U.S.C. § 1292(a)(1)).

However, if the TRO were appealable, "[t]he standards for granting a stay closely resemble the standards for the grant of a preliminary injunction." *Condon v. Haley*, 21 F. Supp. 3d 572, 587 (D.S.C. 2014). Those standards include "(1) 'a strong showing' that the party requesting the stay will succeed on the merits; (2) the presence of irreparable injury by the party seeking the stay; (3) whether the stay will substantially injure other parties to the litigation; and (4) whether the public interest is served by the grant of the stay. *Condon*, 21 F. Supp. 3d at 587 (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Importantly, "[a] stay 'is not a matter of right' and the party seeking a stay bears the burden of demonstrating the presence of the exacting standards for the granting of such relief." *Id.* Defendant cannot satisfy its burden.

A. The Court's TRO Is Not An Appealable Order

Under 28 U.S.C. § 1292(a)(1), the federal courts of appeal only have jurisdiction over "[i]nterlocutory orders of the district courts of the United States, . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions[.]"

This jurisdictional requirement bars the appeal of temporary restraining orders. *See Northeast Ohio Coalition*, 467 F.3d at 1005 ("[T[his court generally lacks jurisdiction to hear an appeal of the district court's decision to grant or deny a TRO."); *Belo Broadcasting Corp.*, 654 F.2d at 426 (same).

The May 21 Order is plainly a TRO, not a preliminary injunction. It is, as the Court expressly said, "temporary." Mem. Op. at 33. The Court has already scheduled a hearing on June 22 to decide whether to extend it. May 21 Order at 2. And the May 21 Order is consistent with the time limits imposed on temporary restraining orders by Federal Rule of Civil Procedure 65(b)(2), which applies only to temporary restraining orders, and which the May 21 Order cited. *See* May 21 Order at 2 (citing Fed. R. Civ. P. 65(b)(2)); *see also* Fed. R. Civ. P. 65(b)(2) (providing requirements for temporary restraining order extensions); Mem. Op. at 33 ("Plaintiffs have convinced the Court that *temporary* injunctive relief, narrowly drawn, is proper." (emphasis added)). Rule 65(b)(2) puts an outer limit of 28 days on temporary restraining orders (at least when issued without notice), and the order here imposes obligations only from May 26 (when defendants' first plans were due) until June 22, a total of 26 days. *See Costa v. Bazron*, 2020 WL 2410502, at *4 (D.D.C. May 11, 2020) ("It is well-settled that 28 days is the outer limit for the time that a TRO can remain in place without consent of the enjoined party, regardless of whether the TRO was issued with or without notice." (citing *H-D Michigan, LLC v. Hellenic Duty Free Shops S.A.*, 694 F.3d 827, 844 (7th Cir. 2012) and *Sampson v. Murray*, 415 U.S. 61, 87 (1974)).[1] The order is thus fully consistent with the Fourth Circuit's rule that district courts have "broad discretion . . . to manage the timing and process for entry of all interlocutory injunctions—both

[1] Temporary restraining orders issued without notice are limited to an initial 14 days but may be extended if the Court finds there is good cause for such an extension. That requirement need not apply here, since the TRO was issued on notice, but in any event there is ample cause for the TRO to remain in effect for 28 days, in order to provide adequate time to evaluate the efficacy of the Defendant's plans.

TROs and preliminary injunctions—so long as the opposing party is given a reasonable opportunity, commensurate with the scarcity of time under the circumstances, to prepare a defense and advance reasons why the injunction should not issue." *See Ciena Corp. v. Jarrard*, 203 F.3d 312, 319 (4th Cir. 2000).).

Here, Defendant had an opportunity to respond to Plaintiffs' Motion for a TRO, to place hundreds of documents in the record, and to be heard orally and in writing before the Court entered the TRO. Furthermore, the Court's Order is temporary relief limited in time by the upcoming hearing on June 22, 2020, at which time the Court has explained it will "determine whether th[e] order should be extended or modified." May 21 Order at 2. Additionally, the Parties have agreed to an evidentiary hearing to commence on or after June 29, 2020, which further echoes both Parties' understanding that the relief ordered in the May 21 Order is temporary and based on an initial assessment of the facts in this case. *See* Joint Status Report Regarding Scheduling at 2, ECF No. 91.

Accordingly, the Court properly exercised its authority to enter a TRO in this matter, and because a TRO is not an appealable order, Defendant is not entitled to a stay pending appeal.

B. Defendant Is Not Likely To Succeed On The Merits Of Its Appeal

Defendant fails to make a "strong showing" it is likely to succeed on the merits. *Nken*, 556 U.S. at 434. Defendant presents four arguments for its claim that is likely to succeed on appeal.

First, Defendant claims that Plaintiffs failed to exhaust administrative remedies as required under the Prison Litigation Reform Act ("PLRA"). Mot. at 3. This claim fails because there is robust evidence in the record that no administrative process was available to Plaintiffs. The PLRA provides that "[n]o action shall be brought with respect to prison conditions under

section 1983 . . . or any other federal law . . . until such administrative remedies *as are available* are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). However, it is axiomatic that administrative remedies are not *available* where "prison employees do not respond to a properly filed grievance, or if they otherwise act to prevent a prisoner from exhausting his administrative remedies." *Washington v. Rounds*, 223 F. Supp. 3d 452, 459 (D. Md. 2016); *see also, e.g.*, *Ross v. Blake*, 136 S.Ct. 1850, 1855 (2016) ("A prisoner need not exhaust remedies if they are not 'available.'"); *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008) ("[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.").

Here, there is strong record evidence that Defendant's purported grievance process was in fact not available to Plaintiffs. At least seven uncontested declarants explained that the Jail's grievance process was not available to them for the purpose of complaining about the Jail's constitutionally insufficient response to the COVID-19 pandemic. *See, e.g.*, Decl. of Declarant #10 at ¶ 24, ECF No. 2-10 ("First, if you ask for a grievance form, they might not give you one at all. And second, if you even ask for a grievance form, they know you're trying to report them. I'm too afraid of retaliation by the COs to ask for a grievance form from in here. . . . I'm afraid if I even ask for a grievance form, they'll just send me back to the isolation cell."); Decl. of Declarant #11 at ¶ 38, ECF No. 2-11 ("I can't file a grievance about any of this, because they won't give us any paper or anything to write with. And they've said anything that goes into our cells can't come back out, including paper."); Decl. of Declarant #14 at ¶ 10, ECF No. 2-14 ("I have asked for a grievance form but was refused."); Decl. of Declarant #19 at ¶ 11 (ECF No. 2-19) (similar); Decl. of Declarant #23 at ¶ 9 (ECF No. 2-23) (similar); Decl. of Declarant #24 at ¶ 12 (ECF No. 2-24) (similar). Furthermore, the Court-Appointed Independent Inspector, Dr.

Franco-Paredes, explained that "[t]here is no existing functioning protocol for inmates to report grievances of recent negative events. It is a major challenge for detainees to report any abuses." Expert Report of Dr. Carlos Franco-Paredes at 8, ECF No. 65-1 (May 11, 2020).[2]

Accordingly, Defendant has failed to make a "strong showing" that it will prevail on this argument on appeal because there is overwhelming evidence that no administrative remedies were "available" to Plaintiffs for them to exhaust under the PLRA.

Second, Defendant claims that Plaintiffs' Eighth and Fourteenth Amendment claims lack merit and are unsupported by the record. Mot. at 3. As with its first argument, this claim fails because there is ample record evidence that Defendant violate Plaintiffs' Eighth and Fourteenth Amendment rights with respect to the constitutionally insufficient prison conditions. To succeed on appeal, Defendant must persuade the Fourth Circuit that this Court erred by concluding that "COVID-19 objectively presents a substantial risk of harm to detainees' health," and "Plaintiffs have demonstrated likelihood of success on the merits as to the objective prong of the deliberate indifference test," Mem. Op. at 23-24; and that Defendants acted with reckless disregard of this risk in light of the "clear triple-threat: (1) undertesting, and (2) inadequate treatment and isolation of COVID-19 symptomatic detainees, and (3) no plan for those at high risk of COVID-19 complications," *id.* at 26. *See Cox v. Quinn*, 828 F.3d 227, 235-236 (4th Cir. 2016) (describing the two-prongs of an Eighth Amendment violation).

To start, Defendant does not dispute that the COVID-19 pandemic presents an objectively substantial risk of harm and has not argued that the Jail's actions were objectively

[2] The mere fact that a formal grievance process may exist does not mean that it is available. Accordingly, the existence of a formal grievance process that requires the permission of correctional officers at the Jail as prescribed in Defendant's Handbook, *see* ECF No. 37-4 at 76-77, is in fact unavailable for PLRA-purposes when the processed is, as described by declarants and Dr. Franco-Paredes, unable to be accessed.

reasonable. *See* Mot. at 3 (omitting any discussion of the objective prong of the Eighth Amendment analysis). This concession alone may prove fatal on appeal. Indeed, this Court acknowledged in its Memorandum Opinion that there is serious dispute about whether pretrial detainees must satisfy both the objective and subjective prongs of the Eighth Amendment analysis, as opposed to only the objective prong as the Supreme Court has recently suggested and other courts have held, *see* May 21 Order at 22-23 ("Whether both prongs of the deliberate indifference standard apply to pretrial detainee claims has been the subject of much debate.").[3] Accordingly, if the Fourth Circuit adopts the reasoning of its sister circuits and holds that *Kingsley* applies to medical conditions at the Jail, Defendant's concession on the objective prong will be fatal. This alone belies Defendant's claim that it has made a "strong showing" that it is likely to succeed on the merits of this claim.

Nevertheless, even if the subjective—reckless disregard—prong does apply to the pretrial conditions claims in this case this Court's holding that Plaintiffs are likely to succeed on this prong is supported by ample record evidence. This Court's holding relied on an easily supported trifecta of "(1) undertesting, and (2) inadequate treatment and isolation of COVID-19 symptomatic detainees, and (3) no plan for those at high risk of COVID-19 complications," Mem. Op. at 26.

[3] *See Kingsley v. Hendrickson*, 135 S.Ct. 2466, 2473 ("[A] pretrial detainee must show only that the force purposely or knowingly used against him was objectively unreasonable."); *see also Miranda v. Cty of Lake*, 900 F.3d 335, 352 (7th Cir. 2018) ("We thus conclude, along with the Ninth and Second Circuits, that medical-care claims brought by pretrial detainees under the Fourteenth Amendment are subject only to the objective unreasonableness inquiry identified in *Kingsley*."); *Banks v. Booth*, No. 20-849 (CKK), 2020 WL 1914896, at *6 (D.D.C. Apr. 19, 2020) ("Based on the pertinent reasoning of *Kingsley* and the persuasive authority of other courts, the Court concludes that pre-trial detainee[s] . . . do not need to show deliberate indifference in order to state a due process claim for inadequate conditions of confinement. As such, under the due process clause, pre-trial detainee[s] . . .are likely to succeed on the merits by showing that the Defendants knew or should have known that the jail conditions posed an excessive risk to their health.").

1. Defendant undertested people incarcerated at the Jail

When this litigation commenced Defendant had tested 20 people incarcerated at the Jail and 18 of those people tested positive for COVID-19. Decl. of Dr. Asresahegn at ¶¶ 5, 33, ECF No. 29-1 (providing that 20 COVID-19 tests have been performed and "only eighteen (18)" patients tested positive within just a four-week period). With a positive test rate of 90%, it is easy to conclude that Defendant was significantly undertesting people incarcerated at the Jail. Furthermore, as this Court explained "Defendant knew the Facility had scores of untested detainees who had been in contact with the confirmed COVID-19 detainees." Mem. Op. at 7. Nevertheless, the "Facility maintained only 20 additional test kits," and "had no plan for how to secure more tests, or how to administer the tests on hand, as recommended by the CDC." *Id.*

2. Defendant inadequately treated and improperly isolated COVID-19-sympotmatic people incarcerated at the Jail

The record is replete with evidence that Defendant inadequately treated and isolated COVID-19 symptomatic people held at the Jail. *See, e.g.* Decl. of Declarant #11 at ¶ 10, ECF No. 2-11 ("I went back and forth from the medical unit three times before they finally took my symptoms seriously and put me in isolation"); Decl. of Declarant #17 at ¶ 4, ECF No. 2-17 ("I asked to be tested for the virus, but they said they don't have any tests. Last night I went to sick call again. I had a fever and a headache. They told me that my fever wasn't high enough, and that they would only test me if it got higher. They told me to drink water and sent me back to the unit."); Decl. of Declarant #9 at ¶ 17, ECF No. 2-9 ("It took four or five days before they gave me a hygiene kit in the medical unit. Before then, I had no soap, toothbrush, toothpaste, or deodorant to keep myself clean. I asked them many times, but the COs would play with us and tell us we didn't need a hygiene kit. Finally the nurse went to the Sergeant and told him what was going on, and the Sergeant got us our hygiene kits. They gave us the hygiene kits for free

because we're on the medical unit. But on the housing unit, the hygiene kits cost about $9."); *see also* Mem. Op. at 8 (noting that "[o]ther detainees reported chronic lack of timely—or sometimes any—medical care, even when they presented with and complained of COVID-19 symptoms to Facility staff," and collecting record cites).

3. Defendant failed to develop or implement a plan for high-risk people incarcerated at the Jail

The Jail did not have a plan for identifying, protecting, and treating people incarcerated at the Jail who are at high risk of serious complications should they contract COVID-19. The Court found the same to be true even after "several rounds of briefing and this Court's pointed questions regarding the Facility's plan for high risk detainees." Mem. Op. at 26 n. 21.[4]

Third, Defendant seems to argue, without legal support, that it is likely to succeed on appeal because the Court's remedy—requiring certain plans to be put in place—does not address the Eighth and Fourteenth Amendment violations. Mot. at 5-6. However, the Court's remedy goes to the heart of the Court's trifecta of concerns. Moreover, courts routinely order corrections facilities to create plans, whether on their own or by conferring with Plaintiffs, to remedy conditions—indeed, doing so is a means of ensuring that corrections officials maintain discretion in how to carry out the necessary remedies. *See, e.g.*, *Carranza v. Reams*, No. 20-cv-00977-PAB, 2020 WL 2320174 at *12-15 (D. Colo. May 11, 2020) (ordering a jail to identify medically vulnerable prisoners and "put in place a plan" to protect them; "implement a plan" to improve sanitation in certain areas; and "formulate a plan" to obtain sufficient masks); *Martinez-Brooks v. Easter*, 20-cv-569-MPS, 2020 WL 2405350, at *32-34 (D. Conn. May 12, 2020) (ordering Defendant to develop certain plans and that parties confer to implement relief); *Braggs*

[4] In Plaintiffs' view, the Jail still lacks an adequate plan to identify, protect, and treat medically vulnerable detainees.

v. Dunn, 257 F. Supp.3d, 1171, 1268 (M.D. Ala. 2017) (finding Eighth Amendment violation and ordering parties to "meet to discuss a remedy"). To be sure, the "plans" promulgated by Defendant in response to the TRO are woefully insufficient and do not appear to comply with the Court's TRO in several respects. *Compare, e.g.*, May 21 Order at 1 (requiring that Defendant file a "comprehensive written plan" that addresses the treatment of high risk detainees), *with* Def.'s Resp., Doc. 88 at 10-12 (including no plan for treatment of high risk detainees beyond the general statement that any inmate who develops serious illness from COVID-19 will be transferred to the hospital); Doc. 85 at 1 (requiring that Defendant's plan address the "specific steps" it will take to secure single-cell housing for high risk detainees when appropriate), *with* Doc. 88 at 12-13 (providing no specific steps beyond the placement of a note on high risk inmates' tracking file that they should be housed alone "whenever possible"). However, these inadequacies are not a reflection of the Court's Order, but of Defendant's continued reckless disregard for the constitutional rights of Plaintiffs.

Fourth, Defendant seems to argue that the Court's Order requiring a plan for hygiene and sanitation is unsupported by the record. Mot. at 6. However, there is ample record evidence that these supplies were not being afforded to Plaintiffs prior to and after commencement of this litigation, and that alone is a sufficient legal basis for this Court's imposition of such a plan in its TRO. *See* Mem. Op. at 12 n.3 ("The record, when viewed as a whole, reflects historic insufficient provision of soap, masks, cleaning products, and a lack of social distancing.") (citing ECF Nos. 2, 3-1, 29, 36, 37); see *also* Doc. 3-1 at 5-6 (citing evidence about inadequate hygiene and sanitation practices); Doc. 44 at 14-15 (citing to evidence that cleaning supplies were scare at the Jail). Moreover, contrary to Defendant's representations, the Independent Inspector's report does not suggest that the Jail is complying with CDC guidelines for hygiene and

sanitation; it states that the Jail had provided extra cleaning supplies and soap "recently," but that detainees "consistently" reported that they do not have adequate supplies to clean their cells, and that the medical isolation cells were clean (and empty) on the day of the visit. Doc. 65-1 at 10. None of these findings—nor any other evidence submitted by Defendant—demonstrates meaningful, day-to-day compliance with the CDC guidelines, particularly in light of the Jail's failures on these measures. Accordingly, Defendant is not likely to succeed on appeal on this claim.

In short, each of Defendant's proposed arguments on the merits on appeal are without merit and therefore Defendant is not entitled to a stay pending appeal.

C. Defendant Will Not Suffer Irreparable Injury By Complying With The District Court's TRO

Defendant claims that it will suffer irreparable injury absent a stay for two reasons: (1) the TRO interferes with its authority as a correctional administrator, and (2) it will have to expend resources to comply with the TRO. Neither of these constitutes irreparable harm sufficient to justifying staying the TRO.

The defendant cites no authority that supports its claim that interference with its "judgment as a correctional administrator," Mot. at 7, constitutes irreparable injury. Instead, it points only to cases supporting the general assertion that courts must evaluate the actions of correctional administrators with deference. *See id.* at 7. But as Defendant's cited cases acknowledge, even when viewing such actions "through the lens of due deference," "a court should not rubber stamp or mechanically accept the judgments of prison administrators." *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006). Furthermore, "[b]y definition, a temporary

loss is not irreparable." *Mountain Valley Pipeline, LLC v. 6.56 Acres of Landed, Owned by Sandra Townes Powell*, 915 F.3d 197, 218 (4th Cir. 2019).

Defendant's temporary loss of unrestrained discretion to supervise the Jail as Defendant sees fit is definitionally not irreparable. If Defendant were correct that any temporary interference with its "prerogative," Mot. at 8, constituted irreparable injury, it would effectively insulate any correctional administrator from any preliminary order. But that is not the law. The general principle of deference to correctional administrators does not preclude narrowly drawn, temporary, preliminary relief when the defendant "significantly undertested the population of COVID-19 symptomatic detainees," had "no plan to secure more [COVID-19] tests," had "no plan of any kind for the high-risk detainees," and oversaw medical personnel who "lack a basic understanding of COVID-19" and whose "dereliction was patent." Mem. Op. at 6-7, 11, 13.

Defendant's claim that it must expend resources to comply with the TRO similarly fails to rise to the level of irreparable injury. "Mere injuries, however substantial, in the terms of money, time and energy necessarily expended in the absence of a stay are not enough" to demonstrate the requisite irreparable harm. *Di Biase v. SPX Corp.*, 872 F.3d 224, 230 (4th Cir. 2017) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974)). Defendant may press its argument that Plaintiffs are not "needlessly suffering for lack of a plan," Mot. 8, at the imminent hearing. But, given this Court's findings that Defendant's lack of a plan was and continues to present a risk of irreparable harm to Plaintiffs—including a risk that Plaintiffs could die—a narrowly tailored order to develop basic plans addressing these risks will not irreparably harm it.

D. Plaintiffs Will Be Substantially Injured By A Stay Of The District Court's TRO

Defendant is not entitled to a stay pending appeal because Plaintiffs will be substantially injured by the issuance of the stay. *See Nken*, 556 U.S. at 426; *see also McFarland v. Capital*

One, N.A., 2019 WL 5079777, at *3 (D. Md. 2019). The risk of substantial injury is not speculative. Numerous courts—including this one—have already held that the risk of exposure to COVID-19 is imminent, grave, and a substantial harm that warrants relief. *See Cameron v. Bouchard*, No. 2:20-cv-1469 (6th Cir. May 26, 2020); *Coronel v. Decker*, No. 20-cv-2472, 2020 WL 1487274 (S.D.N.Y. Mar. 27, 2020); *Basank v. Decker*, No. 20-cv-2518, 2020 WL 1481503 (S.D.N.Y. Mar. 26, 2020); *Calderon Jimenez v. Wolf*, No. 18-cv-10225 (D. Mass. Mar. 26, 2020) (Appendix A).

Defendant argues that Plaintiffs do not face a risk of substantial injury because no detainee has required hospitalization, and any "claims of symptoms [from inmates] . . ., if believed, could be attributed to a number of illnesses." Mot. at 4, 8. Not only is this argument flawed, but it is a callous disregard of calls for care by inmates in the Jail. "It 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." *Helling v. McKinney*, 509 U.S. 25, 33 (1993). The Courts of Appeals have recognized "that a remedy for unsafe conditions need not await a tragic event." *Cameron v. Bouchard*, No. 20-1469 (6th Cir. May 23, 2020) (quoting *Helling*, 509 U.S. at 25). Staying the injunction will expose the class members and the wider community to risk of infection and even death.

E. The Public Interest Will Not Be Served By Granting The Stay

The public interest weighs against a stay and in favor of rapidly resolving this dispute. Defendant has put forward no arguments on this front. *See Combs v. FV–1, Inc.*, No. MJG–13–3734, 2013 WL 6662729, at *2 (D. Md. Dec. 16, 2013) (The district court and other courts in this circuit have held that a "[movant] must satisfy each element [of a motion to stay] for relief.").

This Court has already explained the significant public interest in maintaining this TRO: "Every detainee, and every staff member, is loved by someone on the outside, the members of our larger community." Mem. Op. at 29. Furthermore, "[m]inimizing risk to the detainees suffering from COVID-19 indisputably remains as high a priority as minimizing the risk for the state and country as a whole." Mem. Op. at 29. And, because corrections staff enter and leave the jail every day, efforts to minimize the spread of COVID-19 at the Jail advances the public interest by reducing the chance of community spread in Prince George's County. *See* Order, *Cameron*, No. 2:20-cv-1469 ("The public has a strong interest in . . . reducing the transmission of COVID-19."); *Thakker v. Doll*, 2020 WL 1671563, at *9 (M.D. Pa. Mar. 31, 2020) ("Efforts to stop the spread of COVID-19 and promote public health are clearly in the public's best interest."). This Court also acknowledged that the public reaps the broader collateral benefits, such as conserving healthcare resources. Mem. Op. at 29.

Finally, courts routinely find that a stay is against the public interest where, as here, the moving party has little to no chance of success on the merits. *See Ebin v. Kangadis Food Inc.*, 297 F.R.D. 561, 572 (S.D.N.Y. 2014) *reconsideration denied*, No. 13 CIV. 2311 JSR, 2014 WL 1301857 (S.D.N.Y. Mar. 19, 2014) ("[C]ourts tend to find that a stay is against the public interest where the moving party has not shown a sufficient likelihood of success on the merits.") (internal citation omitted).

F. Defendant's New *Monell* Argument Is Impermissible

Defendant raises a new argument in its Motion for a Stay Pending Appeal arguing that "Plaintiffs fail[ed] to properly plead a *Monell* claim against the County" in seeking relief under Section 1983. Mot. at 9-10. This new argument was not raised by Defendant prior to the Court's issuance of the TRO and must first be presented to the Court in a motion for

reconsideration subject to the limitations of Rule 60, not in a motion for a stay pending appeal.[5] Accordingly, no stay may issue on this grounds as this claim will not be properly before the Fourth Circuit. *See United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 379 (4th Cir. 1995) (providing that new objections may not be raised for the first time on appeal).

Nevertheless, for the sake of completeness, Plaintiffs note that the argument is meritless. *Monell* merely requires that for Section 1983 claims that "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or that the action is alleged to remedy "constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." *Monell v. Department of Social Servs. of City of N.Y.*, 436 U.S. 658, 690-691 (1978). Plaintiffs have more than adequately pled and shown that Defendant's unconstitutional acts in response to COVID-19 are consistent with *Monell*'s requirements. Because these arguments mirror the arguments made *supra* at 4-11 explaining why Defendant is not likely to succeed on the merits on appeal, Plaintiffs do not reiterate them here.

III. CONCLUSION

For the foregoing reasons, Defendant is not entitled to a stay pending appeal and Plaintiffs respectfully request that this Court deny Defendant's Emergency Motion to Stay Pending Appeal (ECF No. 90).

[5] Plaintiffs do not concede that Defendant could raise this new argument in a motion to reconsider and would oppose consideration of this new argument. *See Wooten v. Commonwealth of Va.*, 168 F. Supp. 3d 890, 893 (W.D. Va. 2016) ("In sum, 'a party who fails to present his strongest case in the first instance generally has no right to raise new theories or arguments in a motion to reconsider.'"). Plaintiffs merely intend to note that a motion for a stay pending appeal is an improper place to raise a new argument.

05/29/2020

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