

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

)
)
)
)
)
)
)
)
)
)
)

Case No. 2:20-cv-00007-JPJ-PMS

**DEFENDANTS' OPPOSITION TO
PLAINTIFFS' MOTION TO AMEND SCHEDULING ORDER**

For the third time in the case, and less than six months after the Court entered its most recent Amended Scheduling Order containing deadlines agreed to by the parties, Plaintiffs move yet again to extend those deadlines (the "Current Motion"). Defendants Harold Clarke, Randall Mathena, H. Scott Richeson, A. David Robinson, Henry Ponton, Marcus Elam, Denise Malone, Steve Herrick, Tori Raiford, Jeffrey Kiser, and Carl Manis (collectively, "Individual Defendants") and the Virginia Department of Corrections (collectively, with Individual Defendants, "Defendants") oppose the requested extension. Plaintiffs not only reasonably could have met the scheduled deadlines with the exercise of due diligence, they still can meet those deadlines, regardless whether new counsel will be joining the case. Good cause does not exist to amend the Court's schedule. Plaintiffs' motion should be denied.

FACTS

Attorneys for White & Case LLP ("White & Case") and the American Civil Liberties Union Foundation of Virginia ("ACLU") filed Plaintiffs' Complaint on May 6, 2019, more than three-and-one-half years ago. Plaintiffs served their First Set of Requests for Production of Documents on Defendants approximately five months later, in October 2019. Shortly thereafter,

the parties began meeting and conferring on those requests. Defendants began producing documents to Plaintiffs in November 2019. To date, Defendants have produced 35,520 files, consisting of at least 165,097 pages, including among other things, Plaintiffs' entire institutional and medical / mental health files (including such files for Plaintiff Christopher Cottrell before his withdrawal from the case); similar such files for 33 additional Class Sample inmates; segregation files for Plaintiffs and 28 additional inmates; CORIS reports reflecting officer notes, classification records, grievance summaries, disciplinary action summaries, and sentence summaries for Plaintiffs, 70 proposed Class Members, and 59 additional inmates; full personnel files for named Defendants; operating procedures; External Review Team books and other status-review-related materials; Step-Down Program manuals; a sampling of duty rosters; contracts with medical providers; financial operating plans; ADA tracking logs; email correspondence and documents pulled from the files of Defendants, an additional 12 custodians, and 2 institutional share drives; and a data file identifying all inmates who were assigned a Level S or Level 6 security status on or after of August 1, 2012.

The May 4, 2020 Scheduling Order

On Defendants' motion, the United States District Court for the Eastern District of Virginia transferred the action to this Court on April 20, 2020.¹ Pursuant to Federal Rule of Civil Procedure 26(f) and this Court's directive, counsel for the parties met telephonically and filed a Joint Supplemental Rule 26(f) Report on April 30, 2020; counsel from White & Case and the ACLU represented Plaintiffs at that meeting.² In that Joint Supplemental Rule 26(f) Report, Plaintiffs' counsel represented to the Court that Plaintiffs anticipated taking approximately fifty depositions

¹ Dkt. No. 41.

² Dkt. No. 50 at 1.

and that the action “should be ready for trial by December 2021, at the latest,”³ despite the fact that the Court had not yet ruled on Defendants’ Motion to Dismiss and briefing had not yet even begun on Plaintiffs’ Motion for Class Certification. On May 4, 2020 the Court entered a Scheduling Order with a trial date beginning on January 10, 2022.⁴

The June 16, 2021 Scheduling Order

On May 25, 2021, the parties discussed with the Court, by conference call, discovery issues and deadlines. Counsel from White & Case and the ACLU represented Plaintiffs on the call.⁵ During the call, the Court “request[ed] counsel confer regarding proposed deposition dates and report back to Judge Sargent within the next 10 days.”⁶ The parties did so, with Plaintiffs’ counsel representing that they “need[ed] to take 90 – 100 depositions in the fact discovery portion of the case” and estimating that they could do so in “approximately six months by taking three to four depositions a week.”⁷

Plaintiffs took their first deposition almost a year later, on May 17, 2022, taking a total of four depositions over the one-month period from May 17 to June 17, 2022. Plaintiffs did not take another deposition for six months (as further discussed below).

On June 15, 2021, the Court entered an Order dismissing Plaintiffs’ breach of settlement claim, equal protection claim, due process and Eighth and Fourteenth Amendment claims against VDOC and Individual Defendants in their official capacities, and Americans with Disabilities

³ *Id.* at 4, 10.

⁴ Dkt. No. 56.

⁵ Dkt. No. 95.

⁶ *Id.*

⁷ Email from R. Dennis Fairbanks to J. Pamela Meade Sargent dated June 4, 2021, Subject: Thorpe v. VDOC (No. 2:20-cv-00007) - Deposition Information, attached as Exhibit 1.

(“ADA”) and Rehabilitation Act (“RA”) claims against Individual Defendants in their individual capacities (the “June 15 Order”).⁸ The next day, the Court entered an Amended Scheduling Order, setting the close of non-expert fact discovery on December 16, 2021, consistent with Plaintiffs’ estimate that they would complete their 90-100 depositions in approximately six months (the “June 16, 2021 Scheduling Order”).⁹

The August 17, 2021 Scheduling Order

A week after the Court’s June 15 Order, Individual Defendants filed their Notice of Appeal of that portion of the June 15 Order denying their motion to dismiss Plaintiffs’ Constitutional claims on qualified immunity grounds;¹⁰ at the same time, Defendants moved for a stay of the proceeding pending resolution of Individual Defendants’ appeal.¹¹ Plaintiffs opposed Defendants’ motion, arguing, among other things, that they should not have to wait to depose Individual Defendants (“[d]eposing the Individual Defendants is inevitable”) and suggesting that discovery would end by the time the appeal was decided (“[f]ollowing a decision on the Individual Defendants’ appeal, this Court could simply amend the class definition No new discovery would be required”).¹² Plaintiffs further argued that the “only prejudice at stake” in delaying the case was to their clients because they alleged “shocking harms”—both physical and psychological” that were being imposed by Defendants.¹³ On July 23, 2021, the Court denied Defendants’ Motion to Stay insofar as it sought to stay all discovery in the matter but granted it

⁸ Dkt. No. 101 at 27.

⁹ Dkt. No. 103.

¹⁰ Dkt. No. 104.

¹¹ Dkt. No. 105.

¹² Dkt. No. 110 at 2.

¹³ *Id.*

insofar as to stay discovery of monetary damages against Individual Defendants in their individual capacities.¹⁴ The United States Court of Appeals for the Fourth Circuit issued its decision on June 14, 2022. Nevertheless, Plaintiffs have yet to depose a single Individual Defendant.

Three weeks after the Court denied Defendants' Motion to Stay, on August 16, 2021, Plaintiffs moved to amend the June 16, 2021 Scheduling Order to extend the deadline for their Class Certification Motion, which was due that day, i.e., "60 days from court's ruling on defendants' motion to dismiss"¹⁵. Plaintiffs asked that all dates in that Order be vacated and, among other things, that the due date for Plaintiffs' Class Certification Motion be extended by five months.¹⁶ The Court granted Plaintiffs' Motion (the "August 17, 2021 Scheduling Order").¹⁷

The December 27, 2021 Scheduling Order

Four months later, on December 22, 2021, Plaintiffs moved to amend the August 17, 2021 Scheduling Order, seeking, among other changes, another five-month extension of the due date for Plaintiffs' Class Certification Motion, proposing a new deadline of June 20, 2022.¹⁸ Plaintiffs did not notice a single deposition between August 16 and December 23, 2021. As part of the basis for seeking the extension, Plaintiffs asserted that certain documents, including medical and other records, pertaining to certain "putative class members" were "necessary to prepare their motion

¹⁴ Dkt. No. 117.

¹⁵ Dkt. No. 103 at 1.

¹⁶ Dkt. No. 121 at 3.

¹⁷ Dkt. No. 122.

¹⁸ Dkt. No. 134.

for class certification by the current deadline.”¹⁹ The Court granted Plaintiffs’ Motion (the “December 27, 2021 Scheduling Order”).²⁰

Plaintiffs’ Motion for Class Certification

Plaintiffs took a total of four depositions (the four noted above, taken between May 17 and June 17, 2022) before filing their Motion for Class Certification on June 20, 2022.²¹ Neither that Motion nor Plaintiffs’ Memorandum of Law in Support of that Motion identified a single fact obtained from the medical or other records of the “putative class members” that Defendants had produced.²² Plaintiffs did not attach any portion of the medical or other records of the “putative class members” as an exhibit to their filings.²³ And Plaintiffs’ experts did not review a single page from the medical or other records of the “putative class members” (or even of Plaintiffs themselves).²⁴ Plaintiffs’ Memorandum did include as exhibits declarations of attorneys from White & Case and the ACLU, both of whom asserted that their organizations were “ready, willing, and able to prosecute this case on behalf of Plaintiffs and the proposed classes” and have “resources necessary to fairly and adequately represent the interests of the proposed classes in this action.”²⁵

On August 12, 2022, Plaintiffs filed their Unopposed Motion for Leave to File Amended Class Certification Materials and for Extension of Time.²⁶ In that Motion, Plaintiffs represented to

¹⁹ *Id.* at 3

²⁰ Dkt. No. 135.

²¹ Dkt. No. 166.

²² Dkt. Nos. 166, 170, 171, 174.

²³ Dkt. Nos. 174-01–63.

²⁴ Dep. Trans. of Dan Pacholke dated July 21, 2022, at 23:19–24:13, relevant portion attached as Exhibit 2; Dep. Trans. of Craig W. Haney, Ph.D., J.D. dated August 17, 2022, at 75:2–7, relevant portion attached as Exhibit 3.

²⁵ Dkt. Nos. 174-62 at ¶¶ 3, 8; 174-63 at ¶¶ 3, 15.

²⁶ Dkt. No. 191.

the Court that “the law firms of Hogan Lovells US LLP and Ali & Lockwood LLP *have joined as additional counsel* on behalf of Plaintiffs.”²⁷ Nowhere in that Motion did Plaintiffs inform the Court that they “intended to retain Hogan Lovells as new lead counsel.”²⁸ In Exhibit 1 to that Motion, Plaintiffs moved the Court to appoint White & Case, the ACLU, Hogan Lovells LLP (Hogan Lovells), and Ali & Lockwood LLP (Ali & Lockwood) as counsel for each class.²⁹ In their Amended Memorandum of Law in Support of Amended Motion for Class Certification, Plaintiffs asserted that they were represented by Hogan Lovells, Ali & Lockwood, White & Case, and the ACLU.³⁰ And attorneys for Hogan Lovells and Ali & Lockwood filed declarations that their firms were “ready, willing, and able to prosecute this case on behalf of Plaintiffs and the proposed classes.”³¹ The Court granted Plaintiffs’ Motion.³²

An attorney from Ali & Lockwood noticed her appearance in the case in September 2022.³³ Additional attorneys from White & Case continued to notice appearances in the case as recently as December.³⁴ At no point before the Current Motion did Plaintiffs inform the Court that Hogan and Lovells would not be appearing on their behalf or that White & Case would be seeking to withdraw, despite the fact that the Court is considering Plaintiffs’ Motion for Class Certification, including the adequacy of counsel requirement inherent in that Motion, on the basis that both of those firms will be representing Plaintiffs if class certification is granted.

²⁷ *Id.* at 2 (emphasis added).

²⁸ Dkt. No. 249, the Current Motion, at 5 (citing Dkt. No. 191 in support of quoted statement).

²⁹ Dkt. No. 191-2.

³⁰ Dkt. No. 191-4 at 45.

³¹ Dkt. Nos. 191-5 at ¶ 11 and 191-6 at ¶ 9.

³² Dkt. No. 192.

³³ Dkt. No. 204.

³⁴ *See, e.g.*, Dkt. No. 223.

The Current Amended Scheduling Order

Consistent with the Court’s December 27, 2021 Scheduling Order and a subsequent order extending the time to do so, the parties jointly proposed deadlines for the remainder of the case on July 28, 2022.³⁵ Plaintiffs requested that the schedule include a deadline for substantial completion of document production on January 17, 2023—six weeks before the end of fact discovery; Defendants opposed such a deadline.³⁶ On August 2, 2022, the Court entered the Amended Scheduling Order with Plaintiffs’ requested deadline for substantial completion of document production and the remainder of the dates agreed to by Plaintiffs (the “Current Amended Scheduling Order”).³⁷

The Alleged “Discovery Delays”

Pre-2018 Email

Plaintiffs accuse Defendants of producing an insufficient number of emails predating 2018. As an initial matter, Defendants have located and produced 3,810 documents from email files predating 2018 through a collection of PSTs maintained by agreed custodians, emails located on institutional share drives, and Google Vault email accounts.

Regardless, Plaintiffs have been aware of the alleged “pre-2018 Email” issue for more than three years. At least as early as a meet and confer on January 16, 2020, the parties began conferring over the issue of the Outlook email archives and the 2018 migration of VDOC’s email to another provider as the Virginia Information Technology Agency (VITA) transitioned state agency IT services away from Northrup Grumman—Plaintiffs filed this litigation in May 2019, long after

³⁵ Dkt. No. 187.

³⁶ Dkt. No. 187-1.

³⁷ Dkt. No. 189.

VITA had transitioned VDOC's email system from Outlook to Gmail. The parties continued to meet and confer on the issue, and, in 2020, Plaintiffs served third-party subpoenas companies that had provided email-support and other IT services to VITA.³⁸ In February 2021, Plaintiffs, by email, first raised this issue with the Court, at which point the Court suggested that the parties meet and confer, and, if they could not reach agreement, set up a conference call.³⁹ After the parties met and conferred, Plaintiffs did not ask to set up a conference call, did not serve discovery on Defendants related to the "pre-2018 Email issue," and did not file any motion related to this alleged issue.

More than a year ago, in December 2021, Defendants informed Plaintiffs that they had learned that the Google Vault account of Earl Barksdale, who is not a defendant in this matter but who is an agreed-upon custodian for document searches, had been deleted by VITA's subcontractor without notice to VDOC, despite VDOC having flagged Barksdale's account for legal hold. VDOC shared the results of its investigation into what happened.⁴⁰ Despite already having collected emails from Barksdale's account in a similar litigation and identifying access to several other sources of his emails, Defendants volunteered to take additional actions to determine if any Barksdale emails from the relevant time period could be located on physical backup tapes then recently located in VITA's data center.⁴¹ Defendants volunteered to take this extraordinary

³⁸ Email correspondence between Maxwell Kalmann, J. Pamela Sargent, and Maya Eckstein dated February 16-18, Subject: RE: Thorpe v. VDOC (No. 2:20-cv-00007) -- Request for Pre-Motion Conference, attached as Exhibit 4, at 3.

³⁹ *Id.* at 1.

⁴⁰ Letter from Meghan Podolny to Roland Hartung, Tim Wilson, and Vishal Agraharkar dated December 30, 2021, Re: *Thorpe v. VDOC*, No. 3:19-cv-332, attached as Exhibit 5.

⁴¹ *Id.* at 3-4.

step, in part, because Barksdale, who passed away on September 9, 2020, could not be questioned about his time as warden of Red Onion State Prison.⁴²

Defendants received no response to that letter for a full year. Indeed, Plaintiffs did not raise the alleged issue of the pre-2018 Emails again until December 15, 2022.⁴³ Three weeks later, Plaintiffs broached the potential for a three-month extension of the existing schedule.

Health Information

Despite acknowledging that the parties long ago negotiated a compromise on this issue, Plaintiffs complain that Defendants are relying on Va. Code § 32.1-127.1:03 to require either signed waivers or a court order before producing inmate health information. Plaintiffs have been aware of Defendants' position on producing health information for non-Plaintiff inmates since November 2019, when they served objections to Plaintiffs' discovery requests.⁴⁴ Approximately two years ago, on January 25, 2021, Defendants further articulated their position on Va. Code § 32.1-127.1:03 in an email to Plaintiffs.⁴⁵ In that same email, Defendants agreed that "the statute does anticipate 'the necessity of a court order in certain circumstances to release the records in the advancements of the ends of justice.'"⁴⁶ Defendants' position has not changed since that time, despite additional emails and discussions of the issue in the interim.⁴⁷ Indeed, although they

⁴² *Id.*

⁴³ Dkt. No. 249-3 at 1.

⁴⁴ Dkt. No. 249-4 at 21-25 (objecting to providing protected mental-health or medical information regarding non-parties to this litigation or disclosing identities of individuals with certain mental-health characteristics without execution of waivers that fully comply with federal and state law).

⁴⁵ Email from R. Dennis Fairbanks to Nicholas Putz dated January 25, 2021, Subject: RE: Thorpe v. VDOC, attached as Exhibit 6, at 1.

⁴⁶ *Id.*

⁴⁷ *See, e.g.*, Email from R. Dennis Fairbanks to Vishal Agraharkar dated April 27, 2021, Subject: RE: Thorpe v. VDOC, attached as Exhibit 7, at 1; Email from R. Dennis Fairbanks to Roland

continued to state that they disagreed with Defendants' position, Plaintiffs seemed to have acceded to the approach of obtaining waivers, as they negotiated to obtain waivers for Class Sample inmates in order to receive those inmates' hard copy medical / mental health files.

Disciplinary Files

Plaintiffs have been aware of Defendants' position on producing disciplinary files for non-parties to this litigation since November 2019, when Defendants served objections to Plaintiffs' discovery requests.⁴⁸ The parties addressed their positions on Plaintiffs' request in a meet and confer on October 1, 2020.⁴⁹ Plaintiffs then waited more than two years to move to compel Defendants to provide the documents requested in their incredibly broad Document Request No. 29.⁵⁰ This Court denied that Motion, finding that the discovery request was "not relevant or proportional to the plaintiffs' remaining claims."⁵¹

Updated Document and Related Queries

Plaintiffs began discussing the possibility of obtaining an updated version of VADOC-00037970 during a meet and confer on November 22, 2022.⁵² Plaintiffs confirmed that they wanted VDOC to run the updated version during a meet and confer on December 13, 2022.⁵³ At that time,

Hartung dated March 25, 2022, Subject RE: Thorpe v. VDOC: July 14, 2021 Meet & Confer Follow-Up, attached as Exhibit 8, at 1; Dkt. No. 249-7 at 1.

⁴⁸ Dkt. No. 249-4 at 17.

⁴⁹ Email from Nicholas Putz to Meghan Podolny dated December 8, 2020, Subject: re: Thorpe v. VDOC, with relevant portions of attachment (pp. 17-18), attached as Exhibit 9.

⁵⁰ Dkt. No. 212 at 11-14.

⁵¹ Dkt. No. 226 at 2.

⁵² Dkt. No. 249-7 at 12.

⁵³ *Id.* at 5.

Plaintiffs also confirmed that they wanted VDOC to run the related VACORIS queries after VDOC ran the updated version of VADOC-00037970.⁵⁴

Privilege Designations

As noted by Plaintiffs, VDOC served its initial privilege log eight months ago.⁵⁵ Seven months later—just before broaching the subject of a potential three-month extension to the deadlines—Plaintiffs’ counsel raised the issue of alleged deficiencies in that privilege log.⁵⁶ Defendants responded to that letter in a timely fashion, and agreed to remove certain documents from the log and produce them, leaving a mere 115 documents on the log.⁵⁷

The deadline for Substantial Completion of Document Production was January 17, 2023.⁵⁸ Defendants. Defendants are finalizing a supplemental log that, at current count, has a mere 13 additional documents on it.

ARGUMENT

“[A] judge's scheduling order ‘is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.’”⁵⁹ Accordingly, Federal Rule of Civil Procedure 16(b)(4) requires good cause to modify a scheduling order. To establish good cause, the moving

⁵⁴ *Id.*

⁵⁵ Dkt. No. 249 at 10.

⁵⁶ Letter from Meghan Podolny to Ned Thrasher, Michelle Letourneau-Belock, and Kelly Newman dated January 24, 2023, Re: *Thorpe v. VDOC*, No. 3:19-cv-332, attached as Exhibit 10, at 1.

⁵⁷ *Id.*

⁵⁸ Dkt. No. 189 at 1.

⁵⁹ *Potomac Elec. Power Co. v. Elec. Motor Supply, Inc.*, 190 F.R.D. 372, 375–76 (D. Md. 1999) (quoting *Gestetner Corp. v. Case Equipment Co.*, 108 F.R.D. 138, 141 (D.Me.1985)).

party “‘must show that, despite due diligence, it *could not have* reasonably met the scheduled deadlines.’”⁶⁰ Plaintiffs cannot meet that standard here.

Plaintiffs’ existing counsel cannot feign ignorance of the Court’s scheduling orders. And Plaintiffs’ new counsel knew, or should have known, of the status of discovery and the existing case schedule when they agreed to take over as lead counsel. Further, Plaintiffs continue to be represented by White & Case, even if during a “transition period.”⁶¹ Plaintiffs do not assert that the transition period must, or even will, be less than another month, which is all of the time remaining in the fact discovery period.

As for their allegations of “discovery delays” caused by Defendants, Plaintiffs fail to explain why their months-long and sometimes years-long delays in addressing alleged “issues”—in some cases delaying bringing them up with Defendants until recently and, in all cases, delaying raising the issues with the Court—now justify extending the schedule. The alleged delays are nothing more than a hodgepodge of issues cobbled together and raised in recent months in anticipation of Plaintiffs’ Current Motion.

A. Retention of New Lead Counsel Does Not Constitute Good Cause to Amend the Scheduling Order.

As noted by the court in *Sall v. Bounassissi*, the entry of new counsel, standing alone, does not justify a finding of good cause.⁶² For example, in *Les Indus. Wipeco, Inc. v. Bluestem Mgmt. Advisors, LLC*, the parties jointly moved for an extension of the remaining case-management deadlines, including discovery, contending that each side had obtained new counsel since the scheduling order

⁶⁰ *Southern v. Bishoff*, 675 F. App’x 239, 249 (4th Cir. 2017) (quoting 3 James Wm. Moore et al., *Moore’s Federal Practice* § 16.14[1][a], p. 16-75 (3d ed. 2016)) (emphasis added).

⁶¹ Dkt. No. 249 at 5.

⁶² No. CIV.A. DKC 10-2245, 2011 WL 2791254, at *3 (D. Md. July 13, 2011) (and cases cited therein).

was entered.⁶³ In denying the motion, the court disagreed that new counsel warranted extending the schedule, noting that “[t]he new attorneys ... were charged with knowing the status of discovery and the existing case schedule.”⁶⁴ Plaintiffs fail to cite to a single case to suggest otherwise.

Plaintiffs also fail, despite assertions of diligent efforts on behalf of all involved, adequately to explain why the introduction of another new counsel here is the exception. As an initial matter, Defendants find no filing with the Court, prior to Plaintiffs’ Current Motion, stating that White & Case was “[e]xisting lead counsel.”⁶⁵ White & Case and the ACLU jointly filed the Complaint, and have appeared on every pleading filed since then, including the Current Motion, which was filed by the ACLU. White & Case and the ACLU jointly represented Plaintiffs in conference calls with the Court. Until recently, attorneys from White & Case and the ACLU corresponded with Defendants on discovery issues and jointly represented Plaintiffs in meet and confers. In their Motion for Class Certification, Plaintiffs represented to the Court that “Plaintiffs are represented by White & Case [and the ACLU]. Counsel *together* have been have been investigating Plaintiffs’ claims and representing the interests of Plaintiffs for four years.”⁶⁶ In her declaration filed in support of Plaintiffs’ Motion for Class Certification, Eden B. Heilman noted the experience of each member of the ACLU team working on the case, including her own, representing that each had experience as lead counsel in cases involving the rights of incarcerated individuals.⁶⁷ Yet, Plaintiffs do not even attempt to explain why the ACLU’s continued involvement should not be a factor in determining whether good cause exists.

In general, the explanations that Plaintiffs do not provide in their Current Motion raise important questions, rather than providing any support for extending the schedule.

⁶³ No. 21-2289-JAR-ADM, 2022 U.S. Dist. LEXIS 82842, at *3 (D. Kan. May 6, 2022)

⁶⁴ *Id.*

⁶⁵ Dkt. No. 249 at 5.

⁶⁶ Dkt. No. 174 at 42 (emphasis added).

⁶⁷ Dkt. No. 174-63 at ¶¶ 7, 12, 13.

- Plaintiffs do not explain why, if Plaintiffs intended to retain Hogan Lovells “as new lead counsel in the late summer,” Plaintiffs did not disclose this fact to the Court during briefing and argument on Plaintiffs’ Motion for Class Certification, where adequacy of counsel is a factor in determining whether to certify a class.
- Plaintiffs do not explain when White & Case made the decision that it would “be seeking to withdraw in this matter,” including whether it had made that decision when it began discussions with Hogan Lovells about becoming new lead counsel and before it represented to the Court in briefing that it was “ready, willing, and able to prosecute this case on behalf of Plaintiffs and the proposed classes.”⁶⁸
- Plaintiffs do not explain when Hogan Lovells made the determination that it was not able to appear as “lead counsel” or why Plaintiffs chose not to inform the Court, which has not yet issued a decision on Plaintiffs’ Motion for Class Certification, including the adequacy of counsel factor, at that time that Hogan Lovells is not, in fact, “ready, willing, and able to prosecute this case on behalf of Plaintiffs and the proposed classes.”⁶⁹
- Most importantly, for purposes of the Current Motion at least, Plaintiffs do not explain how long the “appropriate transition period” will be before White & Case seeks to withdraw as counsel, including whether that period must end before the close of fact discovery, or why, now that Plaintiffs once again have attorneys from three law firms and the ACLU representing them, the addition of the third law firm prevents them from completing fact discovery over the next month.
- Finally, Plaintiffs, apparently assuming that their anticipated-but-not-yet-filed motion to withdraw will be granted, do not endeavor to articulate the “compelling grounds” upon which that motion will rest, evidently—and perhaps erroneously—treating the outcome of that motion as a foregone conclusion.⁷⁰

Plaintiffs provide no indication that White & Case is unable to remain on the case for another month, or even longer, to complete fact discovery.

⁶⁸ Dkt. No. 174-62 at ¶ 8.

⁶⁹ Dkt. No. 191-5 at ¶ 11.

⁷⁰ *Schock v. S.C. Johnson & Sons*, No. 6:06cv020, 2007 U.S. Dist. LEXIS 56725, at *7 (W.D. Va. Aug. 3, 2007) (denying motion by plaintiff’s counsel to withdraw, finding no cause under Rule 1.16 of the Virginia Rules of Professional Conduct, noting that withdrawal would be “disruptive to the timely resolution of this matter,” and in declining to find “good cause for withdrawal,” concluding that, “[g]iven the length of the representation and the age of this lawsuit, counsel is required to see it through”).

B. Plaintiffs’ Alleged “Discovery Delays” Do Not Constitute Good Cause to Amend the Scheduling Order.

In addition to noting what new attorneys to a case are charged with knowing, the *Les Indus. Wipeco, Inc.* court examined what the parties had done during the discovery period in concluding that good cause did not exist to extend the scheduling order in that case.⁷¹ Specifically, in denying the motion, the court cited the parties’ “lack of diligence to date” during discovery.⁷² Similarly, this Court should examine not only whether Plaintiffs can reasonably meet the existing case deadlines with diligence going forward but whether they could have met the deadlines had they been diligent in a case “that had already been underway for more than four years.”⁷³ No doubt exists that they could have done so.

Defendants do not argue that Plaintiffs have not served plenty of discovery. But serving a large number of document requests and interrogatories does not establish diligence, especially where that written discovery is so overbroad, irrelevant, not proportional to the needs of the case, or otherwise objectionable, that the opposing party asserts legitimate objections as part of its responses. Further, where there is disagreement as to the proper scope of the response, diligence involves timely seeking a compromise or, if no compromise can be reached and the discovery is sufficiently important, timely seeking the court’s guidance in settling the dispute, up to, and including, filing a motion to compel. Plaintiffs cannot establish diligence by raising or reraising alleged issues that are months or years old only a couple of months before seeking an extension of the schedule, asserting that the discovery is critical to their ability to take depositions and without explaining why.

⁷¹ 2022 U.S. Dist. LEXIS 82842, at *3.

⁷² *Id.*

⁷³ Dkt. No. 249 at 6.

1. The alleged “Pre-2018 Email” issue does not constitute good cause to extend the scheduling order.

This alleged issue, along with the alleged “health information” and “disciplinary files” issues, each in their own way, demonstrate why this Court should *not* extend the discovery schedule, or any other aspect of the schedule, in this case.

On December 15, 2022, Plaintiffs’ counsel sent Defendants new correspondence on this issue (in which they accuse Defendants of producing an insufficient number of emails predating 2018), apparently for the primary purpose of obtaining a recent response from Defendants that Plaintiffs could cite in their Motion to create a “new” issue—despite the fact that Defendants’ January 17, 2023 response to Plaintiffs merely repeated what Defendants had been telling Plaintiffs since 2019 about the migration of State-agency emails. Plaintiffs’ Motion could have instead cited to Defendants’ correspondence from May 2022;⁷⁴ or Plaintiffs could have cited to the email correspondence that the parties had with the Court on this issue in February 2021.⁷⁵

Instead, Plaintiffs want to suggest to the Court that this issue is somehow new and suddenly critical to their ability to take Defendants’ depositions. It is not. Further, it is unclear how extending the schedule three months has any hope of resolving this issue. Plaintiffs aver that “[t]he parties have been meeting and conferring about these issues,”⁷⁶ which is true; the parties have been doing so for years. As noted by Defendants in their correspondence,

VITA confirmed in its own December 30, 2021 letter to Plaintiffs that the data within those [physical backup tapes that allegedly contain Exchange email from VDOC employees from 2014-2016] is not organized or separated out in such a way that VDOC data can be easily disaggregated from other agencies’ data. Further, even if mailboxes as to specific VDOC

⁷⁴ Letter from R. Dennis Fairbanks to Kelly Newman dated May 6, 2022, Re: *Thorpe v. VDOC*, No. 3:19-cv-332, attached as Exhibit 11, at 5-6.

⁷⁵ Exhibit 4.

⁷⁶ Dkt. No. 249 at 8

employees were identified, there would be significant costs to restore each Exchange database to retrieve the files associated with the individual VDOC employees.

Because those backup tapes identified belatedly by Unisys are physically with Unisys, contain data of other State agencies intermingled with VDOC data, and would be costly to restore for minimal benefit, VDOC stands on its objections that the demand to restore that information would be disproportional and require activity beyond VDOC's possession, custody and control.⁷⁷

An extension of the schedule would neither suddenly eliminate VDOC's legitimate objections nor, (1) if required, account for the time necessary to brief the issue to the Court and (2) again, if required, the time necessary to acquire, collect, review, and—if any unique responsive, non-privileged documents were located—produce any information that complied with a Court order.

2. The alleged “Health Information” issue does not constitute good cause to extend the scheduling order.

Like the “Pre-2018 Email” issue, the alleged “Health Information” issue has been known to Plaintiffs for years. The most telling sentence in Plaintiffs' Current Motion on this alleged issue is the following: “Plaintiffs intend to file a motion, which Plaintiffs understand may be unopposed at this point, seeking an order of good cause from the Court to allow VDOC to produce documents containing health information, without the need to obtain individual waivers.”⁷⁸

As with the new counsel argument, this statement begs for additional explanation that is not provided, including when Plaintiffs “intend to file” such a motion and what prevented them from filing such a motion two years ago (or at any time since then), when Defendants acknowledged that the statute allowed for disclosure with a court order, rather than signal this intent with approximately a month before the close of fact discovery. This question is of particular

⁷⁷ Dkt. No. 249-3 at 5.

⁷⁸ Dkt. No. 249 at 9.

interest to Plaintiffs' Current Motion because these health records, which they represented to the Court were "necessary to prepare their motion for class certification by the current deadline"⁷⁹ but were not referenced in that motion (despite Defendants having undertaken significant effort to locate and produce those records pursuant to written waivers), were part of Plaintiffs' asserted good cause that resulted in the December 27, 2021 Scheduling Order.

In addition to not saying when they "intend to file a motion," Plaintiffs do not state definitively how many additional inmates for which they will seek health information. Plaintiffs complain of the "significant effort" of obtaining waivers but ignore the significant effort necessary for VDOC to produce this information. Obtaining and producing these records, which are in hard copy and are located at multiple institutions, is not a simple or quick task, especially because statutory obligations require VDOC to redact certain information, even with an otherwise valid waiver, if the inmate does not specifically waive disclosure of certain items of information, or if a court order does not relieve VDOC of those obligations.

Finally, Plaintiffs misrepresent VDOC's position regarding "perform[ing] certain searches," and fail to cite the Court to any specific page of their 38-page exhibit to support their allegation.⁸⁰ VDOC's position has long been that it would not accept the burden of performing multiple, serial searches and productions while Plaintiffs gathered waivers; accordingly, VDOC offered Plaintiffs alternative approaches.⁸¹ At *no point* did Plaintiffs inform VDOC that they were finished collecting waivers and wanted VDOC to perform additional searches for the inmates for whom waivers were provided. Further, there was no movement toward agreement of the

⁷⁹ Dkt. No. 134 at 3

⁸⁰ Dkt. No. 249 at 9.

⁸¹ *See, e.g.*, Dkt. No. 249-8 at 22.

appropriate scoping of such an electronic search if Plaintiffs concluded the waiver seeking process. Rather, the parties' recent discussions have focused on the need to discuss scoping of a reasonable electronic search should Plaintiffs seek, and be granted a court order, i.e., the motion that Plaintiffs still have not filed.

3. The alleged “Disciplinary Files” issue does not constitute good cause to extend the scheduling order.

This is yet another alleged issue that Plaintiffs have known about for years. Unlike the previous two issues, however, Plaintiffs actually sought to resolve this issue with the Court in the last couple of months by filing a motion to compel. After filing the motion to compel, Plaintiffs actually engaged Defendants in an effort to resolve the issue, during which Plaintiffs offered to narrow their position slightly and Defendants also offered alternatives as a compromise. The parties did not reach agreement, and the Court denied Plaintiffs' request to compel Defendants to produce documents in response to Plaintiffs' incredibly broad document request. The Court entered its Order on January 10, 2023.⁸² Plaintiffs then waited two-and-one-half weeks—until 10:37 p.m. on the last day (a Friday) to serve discovery under the Current Amended Scheduling Order and the Federal Rules of Civil Procedure—to serve their “narrowed requests for disciplinary files.”⁸³ VDOC will review those requests and timely respond appropriately. While pointing out that they will need time to review any documents produced “in advance of the related depositions,”⁸⁴ whatever those may be, Plaintiffs, again, conveniently ignore that it will take time for VDOC to locate, collect, and produce any files that exist and that VDOC agrees to produce, if any, subject to any objections.

⁸² Dkt. No. 226.

⁸³ Dkt. No. 249 at 9.

⁸⁴ *Id.*

4. The alleged “Updated Document and Related Queries” issue does not constitute good cause to extend the scheduling order.

Updates that Plaintiffs requested and issues that they chose to revisit in December, after they had located “new lead counsel” and begun planning to request an extension of the scheduling order, should not be considered a basis for that extension. Again, Plaintiffs do not cite to any page of the 38-page Exhibit 8 for their assertion that they “have diligently sought this information during discovery.”⁸⁵ Further, Plaintiffs make no attempt to explain how updating VADOC-00037970, which likely will add several hundred rows to a spreadsheet that contains more than 25,000 rows, is critical to their ability to depose any of Defendants in this action.

5. The alleged “Privilege Designations” issue does not constitute good cause to extend the scheduling order.

As with the previous alleged issue, Plaintiffs’ decision to make the privilege designations an issue in December, seven months after they received Defendants’ privilege log, should not be considered a basis for extension. Plaintiffs already had Defendants’ privilege log when they agreed to the dates set forth in the Current Scheduling Order. Plaintiffs had Defendants’ privilege log when they requested, in November, deposition availability dates for Defendants in “late January through mid-February of next year” and when Defendants provided proposed dates.⁸⁶ After Plaintiffs received those proposed dates, they raised this alleged issue.⁸⁷

⁸⁵ *Id.* at 10.

⁸⁶ Email from R. Dennis Fairbanks to Michelle Letourneau-Belock dated December 13, 2022, Subject: RE: Thorpe et al. v. VDOC et al., No. 2:20-cv-00007-JPJ-PMS (W.D. Va.) - Defendant Depositions, attached as Exhibit 12.

⁸⁷ Dkt. No. 249-9 at 1.

6. The alleged “Documents Based on Class Certification” issue does not constitute good cause to extend the scheduling order.

Defendants address this purely speculative alleged issue—raised in a single sentence in Plaintiffs’ Motion—merely for the sake of completeness. Plaintiffs have asserted throughout this litigation that discovery has not been bifurcated between class certification and merits discovery and have engaged in discovery on that basis. This alleged issue should be considered for exactly what it is: the starting point for Plaintiffs’ next argument for “good cause” to amend the scheduling order that the Court will put into place if it grants Plaintiffs’ Current Motion.

C. Defendants Will Be Prejudiced By the Requested Amendment to the Scheduling Order.

Defendants are not required to establish prejudice where, as here, Plaintiffs have not established good cause to amend the Current Scheduling Order. Nevertheless, Defendants are compelled to correct Plaintiffs’ blithe remark that “Defendants [cannot] credibly claim that they would be prejudiced by this brief extension.”⁸⁸

As noted by the Fifth Circuit Court of Appeals in *Geiserman v. MacDonald*, 893 F.2d 787, 792 (5th Cir. 1990) “delays are a particularly abhorrent feature of today's trial practice,” in part, because “[t]hey increase the cost of litigation, to the detriment of the parties enmeshed in it.”⁸⁹ Plaintiffs fail to mention that, in addition to “express[ing] a desire to maintain the existing dispositive motion deadline,” Defendants explained during the meet and confer process that they objected to an extension of the period for written discovery.⁹⁰ Nowhere in Plaintiffs’ Current Motion do they suggest that they will refrain from serving yet more document requests,

⁸⁸ Dkt. No. 249 at 12.

⁸⁹ 893 F.2d 787, 792 (5th Cir. 1990).

⁹⁰ Dkt. No. 249 at 11.

interrogatories, or requests for admission on Defendants. In fact, Plaintiffs’ last alleged issue (“Documents Based on Class Certification”) and the fact that they have served a single interrogatory on Individual Defendants suggest otherwise. The cost of additional written discovery may not constitute a “credibl[e] claim of prejudice” to Plaintiffs, who have produced a total of 1,820 documents, containing 4,397 pages, the vast majority of which consist of recopies of their institutional files, and responded to multiple interrogatories by merely directing Defendants to the allegations in their Complaint, but it constitutes major prejudice to Defendants.

As for Plaintiffs’ drive-by assertion that Defendants “exacerbate[d] the issues”⁹¹ by waiting to file Defendants’ motion to depose them, Plaintiffs fail to apprise the Court, as with so many of their alleged issues, of the full story. Defendants reached out to Plaintiffs more than a month before filing their motion to discuss scheduling the depositions and were met with a list of demands before Plaintiffs would engage in that discussion.⁹²

Finally, Plaintiffs assert facial and as-applied Constitutional challenges to the Step-Down Program. Defendants anticipate that at least the facial claims will be resolved at summary judgment (regardless of whether class certification is granted). It is past time to get to that stage of the case. And it benefits the Court to have sufficient time to consider summary judgment motions and other motions ahead of trial. Moving the briefing schedule for dispositive motions and motions to exclude expert testimony to mid-December likely means that the parties will be faced with meeting some, if not all, of the pre-trial deadlines without knowing what issues will be tried. Although Plaintiffs may not consider this prejudicial to their ability to prepare for trial, Defendants do.

⁹¹ *Id.* at 12.

⁹² Email from Michelle Letourneau-Belock to R. Dennis Fairbanks dated December 21, 2022, Subject: RE: Thorpe v. VDOC: Depositions of Plaintiffs, attached as Exhibit 13.

CONCLUSION

Plaintiffs lack any cause, let alone good cause, to justify an extension of the Current Scheduling Order. The Court should deny Plaintiffs' Motion to Amend Scheduling Order in its entirety.

February 6, 2023

Respectfully submitted,

/s/ Maya M. Eckstein

Jason S. Miyares
Attorney General of Virginia

Margaret Hoehl O'Shea (VSB #66611)
Assistant Attorney General,
Criminal Justice & Public Safety Division

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
Ph: (804) 786-2206
Fax: (804) 786-4239
moshea@oag.state.va.us

Maya M. Eckstein (VSB #41413)
Thomas R. Waskom (VSB #68761)
Trevor S. Cox (VSB #78396)
R. Dennis Fairbanks (VSB #90435)

HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Ph: (804) 788-8200
Fax: (804) 788-8218
meckstein@HuntonAK.com
twaskom@HuntonAK.com
tcox@HuntonAK.com
dfairbanks@HuntonAK.com

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 6, 2023 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

By: /s/ Maya M. Eckstein
Maya M. Eckstein (VSB # 41413)
Hunton Andrews Kurth LLP
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
Telephone: (804) 788-8200
Facsimile: (804) 788-8218
meckstein@HuntonAK.com

Counsel for Defendants