

**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.

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

CLASS ACTION

**PLAINTIFFS’ MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR LEAVE TO
FILE A RESPONSE TO DEFENDANTS’ STATEMENT REGARDING PROPOSED
CLASS REPRESENTATIVES AND NOTICE**

Plaintiffs respectfully request leave to file a brief response to Defendants’ Statement Regarding Proposed Class Representatives and Notice, ECF No. 313.

In its Opinion and Order Granting Plaintiffs’ Class Certification Motion, the Court directed Plaintiffs “submit a proposed notice and process for notice to class members” and invited Defendants to “respond to class counsel’s . . . proposed notice and process” shortly thereafter. ECF No. 299, at 42. Plaintiffs’ submitted their proposal on May 3, 2023, ECF No. 310, and Defendants filed their “response” on May 17, 2023, ECF No. 313. Instead of responding to Plaintiffs’ proposed plan of notice, however, Defendants response is largely aimed at attempting to relitigate the merits of this Court’s class certification decision. In particular, in their May 17 submission, Defendants “renew[ed] their objection” to Plaintiffs’ class certification motion, asserted that the Court erred in finding that Plaintiffs had satisfied Rule 23’s

requirements for certification, and invited the Court to reverse its decision *sua sponte* and without any further briefing from the parties. ECF No. 313, at 1–3 & n.1.

Plaintiffs should be allowed to respond to Defendants’ arguments. If Defendants wanted to contest the Court’s class certification decision, they could have filed a motion for reconsideration or petitioned the Court of Appeals for interlocutory review. *See* Fed. R. Civ. P. 54(b); Fed. R. Civ. P. 23(f). Had they done so, Plaintiffs would have been afforded the opportunity to respond to—and refute—Defendants’ arguments about the merits of the Court’s class certification decision. Plaintiffs should not be denied the opportunity to respond to such arguments simply because Defendants raised them in a procedurally improper manner and without regard to the facts, law, or standards that apply to reconsideration requests. *Cf. Lopez v. Council on Am.-Islamic Relations Action Network, Inc.*, 657 F. Supp. 2d 104, 108 (D.D.C. 2009) (“It is within the court’s authority to grant leave to file [additional briefing] when the party making the motion would be unable to contest matters presented to the court for the first time in the opposing party’s reply.” (internal quotation marks and citation omitted)).

Leave to respond to Defendants’ submission should also be granted because Defendants’ papers contain numerous factual misstatements and omissions. For example, Defendants’ submission contends that Plaintiffs’ proposed notice “does not include [the] elements typically required” by Federal Rule of Civil Procedure 23(c)(2)(B). ECF No. 313, at 3–4. But Plaintiffs’ proposed Notice contains each and every one of these elements. ECF No. 310-1. As another example, Defendants contend that Plaintiffs’ proposed plan of notice—pursuant to which Plaintiffs propose that (i) Defendants distribute the notice to class members in VDOC custody, (ii) Plaintiffs distribute the notice to class members outside of VDOC custody, and (iii) Plaintiffs engage a vendor to locate class members for whom the parties lack information—“is not a plan”

of notice at all. ECF No. 313, at 8. Defendants do not cite a single case for this proposition, and in fact, courts routinely approve such notice programs. *See, e.g., O'Connor v. AR Resources, Inc.*, 2010 WL 1279023, at *6 (D. Conn. Mar. 30, 2010) (holding that plan of notice in which “class counsel will be responsible for the administration of the class, including mailing notices to the class members [and] skip-tracing to locate class members whose notices are returned without forwarding addresses . . . is the best notice practicable under the circumstances”); *Ruiz v. Trugreen Landcare, LLC*, 2008 WL 11338881, at *3 (C.D. Cal. 2008) (endorsing plan of notice in which plaintiffs agreed to “[p]erform standard skip tracing on all Class Members whose initial mailing is returned ‘undeliverable’”).

Indeed, granting leave for Plaintiffs to file a brief response is the most efficient way to resolve the parties’ disputes over the form and plan of notice. Absent a response from Plaintiffs, the Court would be required to resolve purported “deficiencies” with the plan of notice on its own. But because the “deficiencies” that Defendants raise are not deficiencies at all, Plaintiffs submit that a brief response would assuage the Court of any concerns it has about the proposed plan of notice, thereby obviating the perceived need to make changes to the notice program. Indeed, courts routinely grant leave for such efficiency reasons. *See, e.g., Radware, Ltd. v. F5 Networks, Inc.*, 2016 WL 393227, at *2 (N.D. Cal. Feb. 2, 2016) (granting leave to file additional briefing because it “helped to crystalize the disputed issues”); *In re: Cathode Ray Tube (CRT) Antitrust Litig.*, 2014 WL 7206620, at *1 n.2 (N.D. Cal. Dec. 18, 2014) (granting leave to file additional briefing “in the interests of completeness and judicial efficiency”).

Therefore, Plaintiffs respectfully request leave to submit a reply addressing the matters above.

Dated: May 25, 2023

Respectfully submitted,

/s/ Megan A. Crowley

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