

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

Defendants respectfully request leave to file a short reply to Plaintiffs' Response to Defendants' Statement Regarding Proposed Class Representatives and Notice (ECF No. 316-1).

In its Opinion and Order Granting Plaintiffs’ Class Certification Motion, the Court directed Plaintiffs to select a single representative for each class, and “advise the court . . . of such selections and the qualifications for class representative of each such person selected, for approval and designation by the court.” ECF No. 299 at 42. The Court further authorized “Defendants [to] respond to class counsel’s suggested class representatives.” *Id.*

After the parties filed their respective briefs—each of which was under 10 pages—Plaintiffs submitted a 12-page supplemental brief, attached to a motion for leave. *See* Pls.’ Mot for Leave, ECF No. 315; Pls.’ Memo. of Law in Supp. of Mot. for Leave, ECF No. 316. Plaintiffs asked to reply to Defendants’ positions regarding the proposed class representatives class notice. Plaintiffs asserted that Defendants impliedly moved the Court to reconsider aspects of the class certification decision, so Plaintiffs “should not be denied the opportunity to respond to such arguments.” ECF No. 316 at 2. Plaintiffs also contended that supplementation was

necessary “to respond to ... numerous factual misstatements and omissions.” *Id.* at 3. The Court granted Plaintiffs’ motion for leave and deemed the supplemental brief filed. *See* ECF No. 318.

The Court should grant Defendants leave to file a response for the same reasons it granted Plaintiffs leave. **First**, while Plaintiffs characterize Defendants’ arguments as *impliedly* seeking reconsideration of a prior order, in their reply Plaintiffs themselves *expressly* ask the Court to overrule a prior order. It is an argument they raise for the first time in reply. Plaintiffs assert that they lack the information needed to conduct the fact-intensive, class member-specific inquiry required to ascertain membership of the Disabilities Damages Class. ECF No. 316-1 at 8. As Plaintiffs acknowledge, Magistrate Judge Sargent recently denied on burden grounds a motion to compel production of the documents they now claim they need—a decision to which Plaintiffs did not object. *See* ECF No. 296. So Plaintiffs explicitly ask the Court to reverse Magistrate Judge Sargent’s ruling. *See* ECF No. 316-1 at 9. Even more so than Plaintiffs, Defendants “should not be denied the opportunity to respond to such arguments.”

Second, the Court should permit Defendants to respond to other new issues raised in Plaintiffs’ supplemental brief. Plaintiffs mischaracterize or misapprehend Defendants’ positions on whether Mukuria and Wall should serve as class representatives; whether the proposed class notice is sufficient to satisfy due process; and the intractable problems with Plaintiffs’ actual plan for identifying members of the Disabilities Damages Class, which Plaintiffs pointedly omitted from their supplementation. As Plaintiffs said about their own supplemental brief, “granting leave for [Defendants] to file a brief response is the most efficient way to resolve the parties’ dispute over the form and plan of notice” and the approval of class representatives. ECF No. 316 at 3.

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

Dated: June 6, 2023

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS,
HAROLD CLARKE, A. DAVID ROBINSON,
RANDALL MATHENA, H. SCOTT RICHESON,
HENRY PONTON, MARCUS ELAM, DENISE
MALONE, STEVEN HERRICK, TORI RAIFORD,
JEFFREY KISER, and CARL MANIS,
Defendants.

By: /s/ Maya M. Eckstein
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CERTIFICATE OF SERVICE

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

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