

**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

**PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO
COMPEL THE PRODUCTION OF MEDICAL RECORDS**

INTRODUCTION

On April 12, 2023, Judge Jones granted Plaintiffs’ motion for class certification and certified four sub-classes, including two disabilities-related classes (the “Disabilities Classes”). ECF No. 299, at 41–42. Although the identities of the members of the Disabilities Classes were not known as of the date of the certification order, Judge Jones emphasized that the identities of such Class Members could be “easily identified” based on a review of “VDOC records, including medical records and mental health services progress notes.” *Id.* at 17.

After the certification order, Plaintiffs asked Defendants to produce the relevant records so that they could identify members of the Disabilities Classes in accordance with Judge Jones’s order. But Defendants have refused to provide them. Citing a prior discovery ruling by Judge Sargent, Defendants argued that they were not required to produce the requested records, notwithstanding Judge Jones’s instruction that such records were necessary to identify Class Members. ECF No. 322-1, at 4 (citing ECF No. 296). Because Defendants’ position flouts Judge Jones’s order—and contravenes their obligations under the Federal Rules of Civil Procedure—Plaintiffs hereby move to compel the production of certain inmate medical records.

As a threshold matter, there can be no credible dispute that the requested records are relevant, non-privileged, and proportional to the needs of the case. FED. R. CIV. P. 26(b)(1). While Defendants note that “Magistrate Judge Sargent [previously] denied [Plaintiffs’] request” for certain Class Members’ records “on burden grounds,” ECF No. 322-1, at 4, Defendants fail to acknowledge that Judge Sargent issued this order before the classes had been certified and that Judge Sargent herself signaled that she would need to revisit her decision *if and when* a class was certified. Ex. 1, Tr. of 3/10/2023 Hrg., at 5:22–6:19. The classes have been certified, and Defendants possess the information necessary to identify the members of those classes.

Accordingly, Defendants can no longer argue that the burden of producing medical records is “undue.” In all events, Plaintiffs have limited their request to try to minimize any burden on Defendants by identifying the specific medical forms they are seeking (as opposed to, for example, asking for the entirety of Class Members’ records).

Defendants’ refusal to produce these medical records in the face of the class certification decision is particularly inappropriate in light of Federal Rule of Civil Procedure 23(d), which requires Defendants to “cooperat[e] in identifying . . . class members.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 355–56 (1978). Here, Judge Jones has identified the materials necessary to identify members of the Disabilities Classes, but Defendants refuse to produce those materials or otherwise participate in the identification of such Class Members. Because Defendants’ obligations under Rule 23(d) are independent of their obligations under Rule 26(b), Defendants cannot hide behind a discovery ruling to avoid assisting with identifying Class Members.

For these and other reasons discussed below, Plaintiffs’ motion should be granted.

FACTUAL BACKGROUND

A. Plaintiffs’ Discovery Requests and Motion to Compel

Between 2019 and 2022, Plaintiffs served multiple discovery requests seeking putative class members’ medical and mental health records, including requests for:

- medical and mental health evaluations, treatments, services, or transfers, *see* Ex. 2, Pls.’ First Set of Requests for Production Nos. 35–37, 39, 41, 43; Ex. 3, Pls.’ Third Set of Requests for Production Nos. 1, 2, 8, 10, 13; Ex. 4, Pls.’ Fifth Set of Requests for Production No. 3;
- disability assessments, Ex. 3, Pls.’ Third Set of Requests for Production Nos. 3, 10;
- mental and physical health-related grievances, Ex. 2, Pls.’ First Set of Requests for Production No. 40; Ex. 3, Pls.’ Third Set of Requests for Production No. 4; and

- reports of self-harm and related behavior, Ex. 2, Pls.’ First Set of Requests for Production No. 38; Ex. 3, Pls.’ Third Set of Requests for Production No. 6; Ex. 4, Pls.’ Fifth Set of Requests for Production Nos. 1–2.

Citing a Virginia privacy law, VA. CODE ANN. § 32.1-127.1:03, Defendants refused to produce documents in response to *any* of these requests, absent receipt of waivers from putative class members or an order from the Court compelling production.¹ Defendants further objected to the requests as disproportional to the needs of the case insofar as “no class ha[d] been certified” as of the date of service.²

For more than a year, Plaintiffs tried to accommodate Defendants’ concerns by seeking waivers from an agreed-upon sample of 70 putative class members, thereby obviating Defendants’ privacy and burden concerns. Plaintiffs worked diligently to secure the requested waivers, but were unable to obtain waivers from the entire class sample. Accordingly, on February 13, 2023, Plaintiffs moved to compel the production of medical records for the remainder of the inmates in the agreed-upon sample for whom they were unable to obtain the relevant waivers. ECF No. 270.

On March 31, 2023, Magistrate Judge Sargent granted Plaintiffs’ motion in part and denied it in part. ECF No. 296. With respect to Defendants’ privacy concerns, Judge Sargent rejected Defendants’ arguments, holding that the Virginia privacy law on which Defendants relied “does not apply in this federal question litigation to prevent the disclosure of . . . records containing medical and mental health information.” *Id.* at 2. Magistrate Judge Sargent

¹ Ex. 5, Defs.’ Resps. & Objs. to Pls.’ First Set of Requests for Production Nos. 35–41, 43; Ex. 6, Defs.’ Resps. & Objs. to Pls.’ Third Set of Requests for Production Nos. 1–4, 6, 8, 10, 13; Ex. 7, Defs.’ Resps. & Objects to Pls.’ Fifth Set of Requests for Production No. 1–3.

² Ex. 5, Defs.’ Resps. & Objs. to Pls.’ First Set of Requests for Production Nos. 35–41, 43; Ex. 6, Defs.’ Resps. & Objs. to Pls.’ Third Set of Requests for Production Nos. 1–4, 6, 8, 10, 13; Ex. 7, Defs.’ Resps. & Objects to Pls.’ Fifth Set of Requests for Production No. 1–3.

nonetheless denied the bulk of Plaintiffs’ motion because “the burden and expense . . . of compiling the remaining requested discovery . . . outweighs the likely benefit.” *Id.*

In reaching her decision, Magistrate Judge Sargent emphasized that, as of the date of Plaintiffs’ motion, a class had not been certified. *See* Ex. 1, Tr. of 3/10/2023 Hrg., at 5:22–6:3. Judge Sargent explained that this fact informed her analysis, but also emphasized that once a class was certified, she would “[o]f course . . . assume then there will be a procedure” for Plaintiffs to obtain information about class members’ records. *Id.* at 6:15–19. This is consistent with several other discovery rulings in the case, in which Judge Sargent expressed a willingness to revisit her holdings after class certification. *See, e.g.,* Ex. 8, Tr. of 1/9/2023 Hrg., at 6:2–6; *id.* at 56:25–57:8.

B. The Class Certification Decision

After Judge Sargent’s decision on Plaintiffs’ motion to compel, Judge Jones granted Plaintiffs’ motion for class certification and certified four sub-classes: two “Constitutional Violation Classes” and two “Disabilities Classes.” ECF No. 299, at 41–42.

As set forth in Judge Jones’s order, the Constitutional Violation Classes are comprised of:

- “All persons who are currently, or will in the future, be confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program” (“Constitutional Violation Injunction Class”); and
- “All persons who at any time from August 1, 2012, to the present have been confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program (the “Constitutional Violation Damages Class”).

Id. at 41.

The Disabilities Classes are *subsets* of the Constitutional Violation Classes, comprising:

- “All persons who are currently, or will in the future, be confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program and who suffer from mental health disabilities and are qualified as individuals

with disabilities under either the Americans with Disabilities Act or the Rehabilitation Act” (the “Disabilities Injunction Class”); and

- “All persons who at any time from August 1, 2012, to the present have been confined at Red Onion or Wallens Ridge at the Level S or Level 6 security levels and subject to any phase of the Step-Down Program and who suffer from mental health disabilities and are qualified as individuals with disabilities under either the Americans with Disabilities Act or the Rehabilitation Act” (the “Disabilities Damages Class”).

Id. at 41–42.

As Judge Jones acknowledged in his certification order, members of the Disabilities Classes had not been identified as of the date of his order. *Id.* at 17. He nonetheless found that Disabilities Class Members could be “easily identified” after class certification from “VDOC records, including medical records and mental health services progress notes.” *Id.* Indeed, based on his review of the named Plaintiffs’ medical histories, Judge Jones had no problem concluding that each of the proposed class representatives “have sufficiently established that they are members of the disabilities classes they purport to represent.” *Id.* at 26.

C. Defendants’ Refusal to Participate in the Identification of Class Members

Following the certification order, Plaintiffs requested Defendants’ assistance in identifying members of the Constitutional Violation Classes so that Plaintiffs could prepare a notice of the pending class action. Ex. 9, 4/21/2023 E-mail from W. O’Neil to M. Eckstein. Specifically, Plaintiffs asked Defendants to provide lists of Class Members currently in VDOC custody, Class Members who are Virginia inmates but who are incarcerated in facilities other than VDOC facilities, and Class Members who are no longer in VDOC custody. *Id.*

Defendants refused to provide any of this information. Instead, Defendants referred Plaintiffs to Defendants’ interrogatory responses, which they claimed could be used to identify Constitutional Violation Class Members. On May 4, 2023, Plaintiffs provided Defendants with the aforementioned lists of Class Members and asked Defendants to confirm the accuracy of the

lists they generated. Ex. 10, 5/4/2023 E-mail from W. O’Neil to T. Waskom. Defendants, once again, refused to provide the requested information. Ex. 11, 5/12/2023 E-mail from R. Fairbanks to W. O’Neil. Three weeks later, Defendants informed Plaintiffs that Defendants’ interrogatory responses were incorrect. Ex. 12, 5/24/2023 Letter from M. Podolny. They nonetheless declined to assist in identifying members of the Constitutional Violation Classes.

Plaintiffs also requested Defendants’ assistance in identifying members of the Disabilities Classes, including by providing Plaintiffs with inmate medical records. To minimize the burden on Defendants, Plaintiffs narrowed their requests to 10 discrete medical forms for each Class Member, namely:

- “At Risk” Offender Notification (MH14A) forms;
- Mental Health Serious Mental Illness Determination forms;
- Mental Health Clinical Supervisor – External Review forms;
- Mental Health Coding Classification Update (MH18) forms;
- Mental Health Screening (MH14) forms;
- Mental Health Appraisal (MH17) forms;
- Mental Health Monitoring forms;
- Psychiatry Progress Notes;
- Intrasystem Medical Transfer Review (DOC 726-B) forms; and
- Change of Medical Classification forms.

Ex. 13, 5/16/2023 E-mail from W. O’Neil to T. Waskom.

Defendants once again refused to produce the requested information.

ARGUMENT

In his class certification order, Judge Jones (i) certified two Disabilities Classes, and (ii) specified the materials necessary to identify the members of those classes—*i.e.*, inmate medical records. ECF No. 299, at 17, 41–42. Defendants’ refusal to produce the records identified in Judge Jones’s order undermines that order, violates Defendants’ obligations under the Federal Rules, and inhibits Plaintiffs’ representation of the Disabilities Classes.

I. Magistrate Judge Sargent’s Pre-Certification Discovery Ruling Does Not Justify Withholding Class Members’ Medical Records.

Defendants refuse to produce inmate medical records based on a discovery ruling by Magistrate Judge Sargent that was issued *before* Judge Jones reached his decision on Plaintiff’s class certification motion. ECF No. 322-1, at 4. As described above, in her discovery order, Judge Sargent determined that, based on the record before her, Defendants were not required to produce inmate medical records because the burden and expense of compiling the materials “outweigh[ed] its likely benefits.” ECF No. 296, at 2. Defendants incorrectly interpret this order to excuse their production of *any* medical records for *any* purpose, even *after* class certification.

To be clear, Magistrate Judge Sargent did not hold that Defendants are excused from producing inmate medical records at any point in the litigation. Instead, Judge Sargent made clear she did not believe that the production of medical records was appropriate *unless and until a class was certified*. As she explained during oral argument: “[H]ere is my concern about many of the medical records that are requested. . . . I don’t yet have a class certified. I have a potential class, or I have a request to certify a class, but I don’t have a ruling on that yet.” Ex. 1, Tr. of 3/10/2023 Hrg., at 5:22–6:3. Judge Sargent continued: “Of course, I would assume that once this—if this is certified as a class action and once the class is defined, I would assume then there will be a procedure” for Plaintiffs to obtain the information “needed to prove [their]

claims.” *Id.* at 6:15–19, 4:1–3. Judge Sargent’s statements are consistent with representations she made throughout the discovery process, in which she repeatedly stated that additional discovery may be appropriate after class certification. *See, e.g.*, Ex. 8, Tr. of 1/9/2023 Hrg., at 6:2–6 (“[I]f Judge Jones should certify the class as defined now by the plaintiffs, then I could allow additional discovery on that issue, even though technically our scheduling order has fact discovery closing in February[.]”).

Defendants’ reliance on Judge Sargent’s order is particularly inappropriate, given that the underlying basis for the order has been overtaken by Judge Jones’s class certification order. In her order, Magistrate Judge Sargent explained that Defendants were not required to produce inmate medical records at the time of the order because, according to Judge Sargent, “the burden and expense to the defendants of compiling the . . . requested discovery . . . outweighs its likely benefit.” ECF. No. 296, at 2. This may have been true *before* a class was certified, as Plaintiffs’ need for the records was contingent on class certification. But it is certainly not the case *now*, after the classes have been certified—and especially given Judge Jones’s emphasis on the importance of the requested records in identifying members of the Disabilities Classes. ECF No. 299, at 17 (“VDOC records, including medical records and mental health services progress notes, indicate that class members can be easily identified.”). Defendants cannot claim that “the burden and expense” of producing such records “outweighs its likely benefit,” given Judge Jones’s instruction about how Class Members are to be identified.

II. Defendants Should Be Required to Produce the Requested Medical Records Pursuant to Federal Rule of Civil Procedure 23(d)(1).

Separate and apart from Defendants’ obligations under Federal Rule of Civil Procedure 26(b)(1), Defendants should be required to produce the requested records pursuant to Federal Rule of Civil Procedure 23(d). That Rule allows a court to issue orders to facilitate “giving

appropriate notice to some or all class members.” FED. R. CIV. P. 23(d)(1)(B); *see Oppenheimer Fund*, 437 U.S. at 354 (“It is clear that Rule 23(d) vests power in the district court to order one of the parties to perform the tasks necessary to send notice.”). Because class members have to be identified “in order to send notice,” courts routinely issue orders pursuant to Rule 23(d) that require a defendant to assist in identifying class members. *Oppenheimer Fund*, 437 U.S. at 355 & n.23 (citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1101–02 (5th Cir. 1977) (collecting cases)).

A court may “require a defendant’s cooperation in identifying the class members to whom notice must be sent.” *Id.* Such orders are especially appropriate where, as here, the information needed to identify class members is in a defendant’s sole control. *See, e.g., Peoples v. Wendover Funding, Inc.*, 179 F.R.D. 492, 496 (D. Md. 1998) (“The Court possesses the authority and discretion to compel Defendant to produce information necessary for the Court to discern the class membership because Defendant alone possesses the relevant information . . .”). Here, Plaintiffs cannot identify the universe of Disabilities Class Members without the requested medical records, and it is undisputed that such records are within Defendants’ sole possession. Defendants should be required to produce those records so that *all* parties—both Plaintiffs and Defendants—can satisfy their obligations under Rule 23(d).³

³ Plaintiffs note that they are currently able to identify all members of the Constitutional Violation Classes based on the definitions of those classes. While the Disabilities Classes are *subsets* of the Constitutional Violation Classes, Plaintiffs cannot identify all of the members of the Constitutional Violation Classes who are *also* members of the Disabilities Classes without the requested medical records. Plaintiffs are able to identify the class members who had mental health classifications of M-2S and above, but as Judge Jones explained, “the statutory definition [of “disability”] encompasses those inmates classified as M-2S and higher based on the definitions within the VDOC’s own classification policy, and *likely encompasses individuals who are classified by the VDOC at even lower mental health classification codes.*” ECF No. 299, at 16 (emphasis added). Plaintiffs cannot identify “individuals who are classified by the VDOC at even lower mental health classification codes” without the requested medical records.

Importantly, Defendants’ obligations under Rule 23(d) are independent of their obligations under Rule 26(b)(1). As the Supreme Court has explained, “Rule 23 . . . vests power in the district court to order one of the parties to perform the tasks necessary to send notice,” irrespective of whether that party can be required to perform such tasks pursuant to Rule 26. *Oppenheimer Fund*, 437 U.S. at 354–55. Because Defendants’ obligation to participate in the identification of Class Members exists *independent* of their obligations to respond to discovery requests, Defendants cannot hide behind a discovery ruling to avoid their obligations at the class certification stage.

III. The Purported Burden of Producing the Requested Medical Records Does Not Justify Defendants Withholding Such Documents.

Any argument that Defendants should not be required to produce the requested records based on the purported “burden” of collection and production is meritless.

First, the Federal Rules of Civil Procedure allow a party to withhold responsive documents on burden grounds *only if* “the burden or expense of the proposed discovery outweighs its likely benefit.” FED. R. CIV. P. 26(b)(1). “The mere fact that responding to a discovery request will require the objecting party to expend considerable time, effort and expense consulting, reviewing and analyzing huge volumes of documents and information is an insufficient basis to object to a relevant discovery request.” *Cappetta v. GC Servs. Ltd. P’ship*, 2008 WL 5377934, at *3 (E.D. Va. Dec. 24, 2008) (internal quotation marks and citation omitted).

Here, Judge Jones has determined that members of the Disabilities Classes can be “easily identified” through a review of “VDOC records, including [inmate] medical records.” ECF No. 299, at 17. Based on Judge Jones’s determination regarding how the parties can identify Class Members, Defendants cannot credibly argue that the burden of producing the requested records

“outweighs its likely benefit.” *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 303–06 (S.D.N.Y. 2012) (finding no undue burden where production would require several hundred hours of work in litigation where the information requested “is central to the [party’s] claims” and “the financial stakes . . . are high”); *Whitlow v. Martin*, 263 F.R.D. 507, 512 (C.D. Ill. 2009) (“[T]he relevance of [the requested] documents provides good cause for their production even if they are not readily accessible.”).

Second, the burden arguments that Defendants advanced in connection with Plaintiffs’ prior motion to compel are specious and self-serving. For example, in opposition to Plaintiffs’ motion, Defendants represented that it would take “approximately 10 hours of attorney time, and cost approximately \$6,000,” to “locate, arrange for copying, review, and produce [each] inmate’s hard copy records.” ECF No. 282-1, ¶ 9. Defendants fail to explain, however, why the outside law firm they hired to defend this matter—as opposed to VDOC record keepers—should be the ones to “locate” inmate medical records. Nor do Defendants explain why that outside law firm needs to “review” such records before production, instead of simply producing the records as they are kept in the ordinary course of business. Indeed, courts routinely reject parties’ insistence on reviewing documents before production, especially where, as here, there are no privilege concerns.⁴ *See, e.g., Bell Inc. v. GE Lighting, LLC*, 2014 WL 1630754, at *12 (W.D. Va. Apr. 23, 2014) (“Courts in this district have found that it is untenable for a party to insist on individually reviewing all documents for privilege and responsiveness, rather than producing documents under a protective order with a claw back provision.”); *Adair v. EQT Prod. Co.*, 2012

⁴ Plaintiffs note that the production of Class Members’ medical records will be subject to the terms of the protective order in this case, ECF No. 62, ¶ 5(c), obviating any confidentiality concerns.

WL 2526982, at *5 (W.D. Va. June 29, 2012) (rejecting argument that “the only reasonable search for privileged and responsive documents is done by human beings on an individual document basis”).⁵

Finally, Defendants’ burden arguments ring hollow given Plaintiffs’ repeated offers to narrow their request for medical records to discrete categories of documents relevant to inmates’ mental health. Indeed, on May 16, 2023, Plaintiffs offered to narrow their request for the *entirety* of Class Members’ medical records to 10 discrete medical forms for each Class Member. Ex. 13, 5/16/2023 E-mail from W. O’Neil to T. Waskom. Defendants’ refusal to engage with Plaintiffs regarding the burden of producing *this* universe of documents, which is narrowly tailored to address the issue at hand, is unreasonable.

CONCLUSION

For all of these reasons, Plaintiffs’ motion should be granted.

⁵ Defendants also fail to explain why the Court should credit their attorneys billing \$600 per hour for document review and production, when this Court has previously held that rates between \$215 and \$350 per hour are reasonable in this District. *Hammer v. Johnson Senior Ctr., Inc.*, 2021 WL 7541180, at *4 (W.D. Va. Dec. 20, 2021) (collecting cases).

Dated: July 24, 2023

Respectfully submitted,

/s/ Jared Frisch

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Certificate of Service

I hereby certify that on the 24th day of July, 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.

/s/ Jared Frisch