

**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.

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION
TO COMPEL THE PRODUCTION OF DOCUMENTS**

Five months after the close of non-expert fact discovery, Plaintiffs have filed yet another untimely motion to compel. It comes mere weeks after this Court denied Plaintiffs' last motion to compel on untimeliness grounds. ECF No. 339. Unchastened, Plaintiffs now demand the additional production of thousands of pages of medical and mental health records from the files of 800 inmates—a production that would be possible only following the burdensome identification, collection, and review of documents by Defendants and numerous VDOC personnel.

Just as Plaintiffs' proclivity for post-discovery motions to compel is nothing new, neither is their interest in these particular documents. When Plaintiffs previously sought them, the Court refused to order their disclosure because of the unwarranted burden it would impose. Plaintiffs' latest motion to compel production of these documents should be denied for this and other reasons.

First, the motion is untimely. The fact that the deadline for non-expert fact discovery passed long ago, on February 28, 2023, alone merits denial. If the Court were to treat the motion as an implicit request for leave to amend the scheduling order—relief that Plaintiffs might have sought but did not—they have not shown good cause for that relief. They appear to argue that the Court's April 12, 2023 class certification order makes the documents newly relevant. But they

even fail to explain why they delayed three-and-a-half months after that order to file this motion.

Second, Plaintiffs have not established a need for or entitlement to any, let alone all, of the ten categories of documents they demand. Plaintiffs claim that the medical and mental health forms they seek may be relevant for defining membership in the Disabilities Classes, but they have yet to explain why they are necessary or how they would be used for that purpose. Contrary to Plaintiffs' assertions, neither Judge Sargent nor Judge Jones has already ordered that these documents be produced, so Plaintiffs cannot rely on prior orders to explain why production is necessary. Nor does Federal Rule of Civil Procedure 23(d) entitle Plaintiffs to these documents, as they assert. Although *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), held that in "appropriate circumstances" a defendant must cooperate in identifying class members (such as by compiling a list of names and addresses) for the limited purpose of sending class notice, it recognized that a request for information that helps "define or clarify issues in the case" is really a discovery request under Rule 26. Rule 23(d) does not open the floodgates again to merits-based discovery, particularly merits-based discovery that Plaintiffs have already been denied.

Finally, even if Plaintiffs had a stronger argument for production, their motion should still be denied in light of the incredibly burdensome obligation it would impose on Defendants and a variety of VDOC staff—an undertaking not at all proportional to the needs of the case. From Plaintiffs' previous demands, the Court is aware of the significant administrative and financial costs entailed in manually searching for and collecting hard copy documents from numerous sources; copying and scanning them; and then reviewing and preparing them for production. Plaintiffs' new focus on ten categories of forms does not appreciably lessen that burden; a manual search of files for approximately 800 inmates obviously would incur significant costs.

For these reasons and those set forth more fully below, the Court should deny the motion.

FACTUAL BACKGROUND

Plaintiffs' brief contains numerous statements that risk misleading the Court about the documents at issue and whether Plaintiffs are entitled to their production. Among other things, Plaintiffs wrongly suggest that the Court has already ordered that the documents be disclosed. The Court has never ordered production of these documents. Nor have Plaintiffs ever explained to Defendants, much less the Court, why production of these specific documents is warranted. For their part, Defendants are not stonewalling Plaintiffs or refusing to provide information necessary for determining the composition of the class—and the communications Plaintiffs attach to their motion prove it.

Defendants provide the following background to correct any misimpression that Plaintiffs' brief may have left on these points.

A. Plaintiffs' previous demands for disclosure of this information were properly denied as unduly burdensome.

Although Plaintiffs' packaging of their request for inmate medical and mental health records is new, their fixation on the documents is not. Plaintiffs first asked for them years ago. Pls.' Mem. of Law in Supp. of Their Mot. to Compel the Production of Med. Records, ECF No. 354 ("Pls.' Br.") at 2–3. Plaintiffs demanded that Defendants produce the full institutional, medical, and mental health records of every inmate who had ever been at Security Level S or 6 at any time since August 1, 2012. Defendants resisted these overly broad and unduly burdensome requests, lodging their objections on these grounds way back in **2019**. *See* ECF No. 282 at 3–4. Notwithstanding these objections, the parties worked out a compromise in **2021** whereby Defendants would produce the requested files, along with certain other data, for a class sample of 70 such inmates (along with the files of the named Plaintiffs). *Id.* at 9–10. Production of an inmate's medical and mental health records required that the inmate consent to the release of the

information. *See* ECF No. 271 at 3–4. Plaintiffs were able to obtain approximately 40 such releases and, thus, currently have access to the complete medical and mental health records (among other files) for about 40 inmates, plus the named Plaintiffs. *Id.* at 5 n.3.

Despite the agreed-upon compromise, Plaintiffs have brought repeated, unsuccessful motions to compel the production of class members’ mental health records. In November 2022, Plaintiffs asked the Court to force disclosure of, among other things, “documents relating to putative class members’ learning, intellectual, developmental or cognitive disabilities or impairments.” ECF No. 212 at 1. Magistrate Judge Sargent denied this motion “concerning [VDOC] inmates who suffer from mental health disabilities” because Defendants already had “responded to plaintiffs’ discovery requests on this subject by providing information and documents consistent with the manner with which the VDOC tracks inmates with mental health conditions.” ECF No. 226 at 1.

Then, in February 2023 (two weeks before the close of non-expert fact discovery), Plaintiffs returned to their overly broad and disproportionate document requests and again moved to compel the production of multiple categories of medical and mental health records, for all putative class members. ECF No. 271 at 1–2.¹ Defendants’ opposition to Plaintiffs’ motion set forth the monumental burden that would be required to comply with Plaintiffs’ requests and explained why Plaintiffs’ requests were not proportional to the needs of the case. ECF No. 282 at 11–15. In light of Defendants’ arguments, in reply Plaintiffs narrowed their demand for medical and mental health records to those belonging to the 30 inmates who had not provided releases. ECF No. 290 at 2; ECF No. 296 at 3.

¹ The “overlap” of that motion to compel to Plaintiffs’ previous motion was not lost on the Court. Pls.’ Br. Ex. 1 (3/10/23 Hr’g Tr.) at 3:10–14.

Magistrate Judge Sargent’s resolution of that motion to compel bears squarely on Plaintiffs’ current motion. After considering the volume of records already produced to Plaintiffs, the associated time and cost to Defendants of doing so, and the additional cost of producing the requested records for 30 additional inmates, Magistrate Judge Sargent was “persuaded that the burden and expense to the [D]efendants of compiling the remaining requested discovery . . . outweighs its likely benefit.” ECF No. 296 at 2. Accordingly, she “den[ied] the Motion insofar as it seeks to order the production of the institutional files and medical records for an additional 30 inmates in the class sample.” *Id.* at 3.²

More than four months later, Plaintiffs have not abandoned their quest for inmate medical and mental health records. Only now, rather than seeking such records for 30 inmates as before, Plaintiffs’ current motion seeks to force Defendants to produce records for the *entire class*, a group of *approximately 800* inmates.

B. This Court has not previously ordered that the records at issue be produced.

Plaintiffs would have the Court believe that Defendants are refusing to comply with previous Court orders requiring that the records Plaintiffs seek be disclosed. *See, e.g.*, Pls.’ Br. at 2 (asserting that the Court “has identified the materials necessary to identify members of the Disabilities Classes, but Defendants refuse to produce those materials . . .”). As shown below, that contention is squarely refuted by the record.

² Plaintiffs seem to find it significant that Magistrate Judge Sargent dismissed Defendants’ privacy concerns, based on the Virginia Medical Records Privacy Act, regarding the production of inmates’ medical records. Pls.’ Br. at 3. But it is immaterial whether Defendants’ concerns were ultimately validated, given Magistrate Judge Sargent’s conclusion that the burden of producing the records was not justified. *See* ECF No. 296 at 2–3.

1. In denying Plaintiffs’ motion to compel class members’ confidential medical and mental health records, Magistrate Judge Sargent did not order the records disclosed upon class certification.

Plaintiffs first claim support from comments Magistrate Judge Sargent made at the March 10, 2023 hearing on Plaintiffs’ motion to compel—or, rather, what they assert she said. According to Plaintiffs, Magistrate Judge Sargent “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.*” Pls.’ Br. at 4 (citing Ex. 1 (3/10/23 Hr’g Tr.) at 6:15–19) (emphasis added). They repeat this reading elsewhere in the brief: “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 7–8 (citing Ex. 1 (3/10/23 Hr’g Tr.) at 6:15–19, 4:1–3) (emphasis added)).

Except that’s not what Magistrate Judge Sargent said. This is what she said:

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 – I mean, folks will have a chance to opt out of this class, I would assume. So that’s just an added concern.

Pls.’ Br. Ex. 1 (3/10/23 Hr’g Tr.) at 6:15–19. Her “assum[ption]” had nothing to do with Plaintiffs’ access to VDOC records. Rather, as she considered Plaintiffs’ motion to compel disclosure of class members’ confidential medical and mental health records, she merely observed that “folks will have a chance to opt out of this class.” *Id.* She explained that was an “added concern” for her because Plaintiffs were demanding (as they are now) the production of such records for *all* class members—including those who may opt out and want nothing to do with this litigation. *Id.* Thus, far from suggesting that class certification would necessarily trigger disclosure of all class members’ confidential medical and mental health records, as Plaintiffs contend, Magistrate Judge

Sargent was saying just the opposite. She was hesitant to order a blanket release of records without knowing who actually consents to be in the class and “want[s] to share their medical records.” *Id.* at 6:12–14.³

The same concern Magistrate Judge Sargent previously expressed with respect to 30 inmates’ records applies with full force to the 800 inmates’ records Plaintiffs now demand. Plaintiffs should not be able, under the guise of determining membership in the Disabilities Classes, to conduct a much larger fishing expedition than the one they were previously prevented from conducting.

2. The class certification order did not order disclosure of the specific records Plaintiffs now demand.

Plaintiffs likewise misconstrue the Court’s order granting class certification. Their brief repeatedly reads the order to mean that Judge Jones considered the particular documents that Plaintiffs seek; concluded they were necessary to identify class members; and ordered that they be produced. *See, e.g.* “Pls.’ Br. at 7 (“In his class certification order, Judge Jones . . . specified the materials necessary to identify the members of [the Disabilities Classes]—*i.e.*, inmate medical records. Defendants’ refusal to produce the records identified in Judge Jones’s order undermines that order”); *id.* at 2 (asserting that “Defendants’ refusal to produce these medical records in the face of the class certification decision is particularly inappropriate”); *id.* at 1 (criticizing Defendants’ position “that they were not required to produce the requested records, notwithstanding Judge Jones’s instruction that such records were necessary”).

³ Another indication that the post-certification “procedure” Magistrate Judge Sargent had in mind was not what Plaintiffs say—*i.e.*, “a procedure’ for Plaintiffs to obtain information about class members’ records” for the purpose of defining class membership, Pls.’ Br. at 4 (citation omitted)—is her comment that the “procedure” would be available “once the class is defined.” Pls.’ Br. Ex. 1 (3/10/23 Hr’g Tr.) at 6:15–16.

The class certification order did none of those things. What Judge Jones said, in finding that the Disabilities Subclasses met Rule 23’s ascertainability requirement, was this:

I also find that class members for both disabilities classes are ascertainable from VDOC records. VDOC policy requires initial mental health screening. Operating Procedure 730.2 at 5, ECF No. 174-61. Additionally, VDOC policy dictates that additional evaluations should be completed at any time deemed necessary. *Id.* at 12. Mental health classifications are supposed to be entered into VDOC’s data keeping system promptly. *Id.* at 18. Moreover, defendants’ discovery responses, as well as other VDOC records, including medical records and mental health services progress notes, indicate that class members can be easily identified.

ECF No. 299 at 17; *see also id.* at 15 (“I find that class members are easily identifiable from VDOC records, satisfying Rule 23’s implicit ascertainability requirement.”).

The Court’s determination that membership in the Disabilities Classes *can be* ascertained does not prescribe *how* it should be ascertained. In particular, the class certification order says nothing about the production of additional documents to Plaintiffs—much less the significant number of confidential medical and mental health records they now demand. *See id.* at 17 (noting that Disabilities Class “members can be easily identified” through “defendants’ discovery responses”). Judge Jones’s passing comment that Disabilities Class members also could be identified through “other VDOC records, including medical records and mental health services progress notes,” *id.*, can hardly be construed as an order to Defendants to hand over to Plaintiffs all such unspecified “medical records” for approximately 800 class members. Nor would the Court have entered such an order without considering the burden and costs of doing so, relative to Plaintiffs’ need for the information.

Indeed, it is a perfectly reasonable conclusion that the Court did not anticipate any further production of documents to Plaintiffs. The Court may have envisioned that Defendants would provide Plaintiffs with the names of class members who, based on VDOC records, meet an agreed

definition for inclusion of Disabilities Classes. Unfortunately, as described below, Plaintiffs have refused to provide any such objective criteria.

C. Defendants have not refused to participate in the identification of class members.

Plaintiffs' brief repeatedly charges that Defendants have blocked Plaintiffs' every effort to identify members of the class. *See, e.g.*, Pls.' Br. at 5–6 (section entitled "Defendants' Refusal to Participate in the Identification of Class Members"); *id.* at 1 ("Defendants have refused to provide" relevant records); *id.* at 2 ("Defendants refuse to produce those materials or otherwise participate in the identification of such Class Members."); *id.* at 3 ("Defendants refused to produce documents in response to *any* of these requests"). That is not so. Plaintiffs themselves admit that "they are currently able to identify all members of the Constitutional Violation Classes," Pls.' Br. at 9 n.3—though they refuse to share with Defendants their methodology for doing so—and that for the Disabilities Classes, "VDOC has provided mental health status codes that can be used to determine which members of the class were classified as MH-2S and higher," Pls.' Br. Ex. 13.

Moreover, the communications between counsel attached to Plaintiffs' brief tell a decidedly different story from the one spun in their brief. The exchange of emails between the parties' counsel from April 21 to May 16, 2023 reveals Defendants' willingness to comply with all comprehensible and reasonable information requests Plaintiffs made. *See generally* Pl. Br. Exs. 10–11, 13. Far from refusing to engage with Plaintiffs, Defendants have been responsive and informative. *See, e.g.*, Pls.' Br. Ex. 11. And when Defendants could not provide requested information, they explained why. *See, e.g., id.* ("Defendants cannot confirm that the lists attached to your earlier email comport with their understanding of the class given the information provided for at least the reasons that Plaintiffs have not identified the methodology used to select the inmates on Plaintiffs' list, and Defendants are unclear what the portion of the class definition 'subject to

any phase of the Step-Down Program’ conveys as conjunctive to ‘at the Level S or Level 6 security levels.’”).

The source of Plaintiffs’ grievance is not Defendants’ lack of responsiveness, but rather Plaintiffs’ own failure to define membership in the Disabilities Classes. In particular, they have refused to propose any objective criteria for identifying Disabilities Class members with a mental health code below MH-2S (the parties agree that inmates with a mental-health code of MH-2S or higher are in the Disabilities Classes). Instead, Plaintiffs filed this motion to compel.⁴

ARGUMENT

Plaintiffs obtained certification of the Disabilities Classes by insisting that membership in those subclasses is readily ascertainable. Almost four months later, they still have not proposed any objective means by which to define membership in the Disabilities Classes. Instead, they demand that Defendants produce thousands more documents, with no explanation of what they’re even looking for. Not only is their motion to compel untimely, they are not entitled to the documents they seek, and production of those document would be unduly burdensome. For all these reasons, the motion should be denied.

I. Plaintiffs’ motion should be rejected as another untimely attempt to obtain fact discovery long after the deadline.

The Court should recognize Plaintiffs’ motion for what it is—an untimely, backdoor attempt to reopen discovery that closed on February 28, 2023—and deny it accordingly.

⁴ As with past motions to compel, Plaintiffs again failed to meet and confer with Defendants regarding this motion, as required by under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 37(a)(1) (a party moving to compel must certify that it “has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action”). But “simply exchanging emails or letters, demanding compliance with discovery requests, or merely stating that the parties have met and conferred”—as Plaintiffs have done here—“do[es] not satisfy Rule 37(a)(1).” *Reed v. Beverly Hills Porsche*, No. 6:17-CV-59, 2017 WL 11495243, at *1 (W.D. Va. Nov. 22, 2017)).

Having recently denied a similar motion by Plaintiffs on untimeliness grounds, *see* ECF No. 339, the Court is well aware of the standard that governs post-discovery motions to compel. “Courts in the Fourth Circuit . . . routinely deny motions to compel that are filed after the discovery deadline when no good cause is shown for their delay,” *id.* at 4;⁵ *see also* *Wootten v. Virginia*, No. 6:14-CV-13, 2015 WL 13658068, at *2 (W.D. Va. June 9, 2015) (courts “generally consider motions to compel untimely when they are filed after the discovery deadline”); *Flame S.A. v. Indus. Carriers, Inc.*, No. 2:13-CV-658, 2014 WL 12547260, at *2 (E.D. Va. July 31, 2014) (“District courts in this circuit deny belated motions to compel filed close to, or after, the close of discovery.”). An untimely motion to compel is “less likely to be considered when,” as here, “the parties have ‘had adequate opportunity to perform all the discovery it needed.’” *Wootten*, 2015 WL 13658068, at *2.

The Court’s amended scheduling order established the close of non-expert fact discovery as February 28, 2023. ECF No. 189. Plaintiffs’ motion, which they filed on July 24, 2023 (nearly five months later), is patently untimely. Plaintiffs can hardly dispute that they have lacked “adequate opportunity” to seek the 10 medical and mental health forms from the time they filed this case in May 2019. Plaintiffs have been aware since **November 2019**, when Defendants served objections to Plaintiffs’ discovery requests, that Defendants opposed producing health-related information for non-Plaintiff inmates. *See* ECF No. 249-4 at 21–25. Indeed, Plaintiffs emphasize that Defendants had “refused to produce documents in response to *any* of” Plaintiffs’ requests for

⁵ The Court cited numerous cases in support: *Emerson Creek Pottery, Inc., v. Countryview Pottery Co.*, 2021 WL 9031156, at *2 (W.D. Va. Dec. 29, 2021); *Powell v. Kamireddy*, 2015 WL 333015, at *4 (E.D.N.C. Jan. 26, 2015) (denying untimely motion to compel when plaintiffs provided no excuse for their failure to file it before discovery deadline); *Greene v. Swain Cnty. P’ship for Health*, 342 F. Supp. 2d 442, 449 (W.D.N.C. 2004) (denying motion to compel filed three weeks after discovery)).

medical or mental health records, including the ten categories of documents sought here, “absent receipt of waivers from putative class members or an order from the Court compelling production.” Pls.’ Br. at 3.⁶

This Court’s decision in *Wootten* is illustrative here. There, the Court denied as untimely a plaintiff’s motion to compel that was filed a mere two weeks after the close of discovery. 2015 WL 13658068, at *1. The Court noted that, in light of the “history of discovery disputes between the two parties and the DMV’s repeated statements that it would not respond to these discovery requests, Wootten should have known to file the motion to compel earlier.” *Id.* at *2. The plaintiff’s “failure to timely file this motion [fell] solely on her shoulders.” *Id.* The same principles apply here, and so should the result.

Plaintiffs have not sought to amend the scheduling order under Rule 16 to obtain the discovery they seek—perhaps because that would require a showing of “good cause” that they cannot make. *See* Fed. R. Civ. P. 16(b)(4). Nevertheless, courts may treat a motion to compel discovery responses filed after the close of the discovery deadline as an implicit request to amend the scheduling order. *See Flame S.A.*, 2014 WL 12547260, at *2 (“implicit in [FBP’s] motion to compel is also a request to amend the scheduling order to reopen discovery”). Even if the Court were to treat Plaintiffs’ motion as a motion to amend the scheduling order, it still must be denied for lack of good cause. *Clark v. Quesinberry*, No. 7:20-CV-00057, 2021 WL 5238599, at *2 (W.D. Va. Apr. 26, 2021) (“The ‘touchstone’ of the Rule 16 good cause requirement is ‘diligence’ and ‘only diligent efforts to comply with the scheduling order can satisfy Rule 16’s good cause standard.’” ((quoting *Faulconer v. Centra Health, Inc.*, 808 F. App’x 148, 152 (4th Cir. 2020))).

⁶ Plaintiffs’ charge is not strictly true, however. Defendants have produced presentations related to metrics/statistics of self-injurious behavior pursuant to requests for such medical related information, as well as the compiled grievance summary report for all class members.

Plaintiffs make no attempt to establish good cause here. To the extent they believe that the granting of class certification provided good cause for post-deadline discovery, that is an argument they should have made when class certification was granted on April 12, 2023—*three-and-a-half months ago*. Less than two weeks before that, Magistrate Judge Sargent had denied Plaintiffs’ previous motion to compel medical and mental health records like those sought in their current motion. See ECF No. 296. They filed no objections to Magistrate Judge Sargent’s order, even though they had time remaining to do so even *after* the class certification order was issued.⁷

II. Plaintiffs are not entitled to the requested discovery.

Plaintiffs offer two reasons why they are entitled to discovery of class members’ medical and mental health records. Their primary contention is that the Court has already ordered that such records be disclosed. As explained above, however, neither Magistrate Judge Sargent’s denial of Plaintiffs’ prior motion to compel medical records (ECF No. 296) nor Judge Jones’s class certification decision (ECF No. 299) can be read to require production of the specific documents they seek. *See* Facts.B *supra*. Indeed, the concern that Magistrate Judge Sargent raised—that the medical records of mere *potential* class members would be disclosed—remains as legitimate and unresolved as before. *See* Pls.’ Br. Ex. 1 (3/10/23 Hr’g Tr.) at 6:15–19.

Plaintiffs’ second contention fares no better. Invoking Federal Rule of Civil Procedure 23(d)(1), which authorizes courts to “issue orders that . . . require giving appropriate notice to some or all class members,” Plaintiffs argue that any records that may facilitate notice to the Disabilities Classes must be disclosed pursuant to that rule. Pls.’ Br. at 8–10. The problem is that,

⁷ Obviously, even if Plaintiffs’ motion could be construed as objections to Magistrate Judge Sargent’s denial of that previous motion to compel (ECF No. 298), the request would be untimely. *See* Fed. R. Civ. P. 72 (a) (objections to magistrate judge’s non-dispositive pretrial rulings must be filed within 14 days).

even if that’s what the rule means—it doesn’t—Plaintiffs have already disclaimed the need for discovery of class members’ medical and mental health records for purposes of class notice. Plaintiffs have said they already know the universe of class members to whom notice will be sent. They have confirmed “they are currently able to identify all members of the Constitutional Violation Classes,”⁸ who will receive notice. Pls.’ Br. at 9 n.3. And because, they emphasize, “the Disabilities Classes are *subsets* of the Constitutional Violation Classes,” *id.*, Disabilities Class members will not receive a separate notice, *see* ECF No. 316-1 at 7–8. Accordingly, no discovery of medical and mental health records is necessary for notice purposes.

In any event, Plaintiffs’ reliance on Rule 23(d)(1) is misplaced, as is their citation to *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978). To Plaintiffs, the Supreme Court’s comment that a district court may use Rule 23(d)(1) to require a defendants to “cooperat[e] in identifying . . . class members,” *id.* at 355–56, is an invitation to expansive discovery. They are wrong. In *Oppenheimer Fund*, the Supreme Court held that Rule 23(d) “authorizes a district court *in appropriate circumstances* to require a defendant’s cooperation in identifying the class members to whom notice must be sent.” *Id.* at 355 (emphasis added). The plaintiffs there asked the district court to order the defendant “to help compile a list of the names and addresses of the members of the plaintiff class.” *Id.* at 342. The Supreme Court found this to be an appropriate “task” that district courts may order a defendant to perform. *Id.* at 355. It reasoned that, in some cases, “the defendant may be able to perform a necessary task with less difficulty or expense than could the representative plaintiff,” and in those instances “the district court properly may exercise its discretion under Rule 23(d) to order the defendant to perform the task in question.” *Id.* at 356.

⁸ Among other things, Plaintiffs’ admission that they can identify “all members of the Constitutional Violation Classes,” Pls.’ Br. at 9 n.3, defangs their faux-complaint that Defendants “declined to assist in identifying members of the Constitutional Violation Classes,” *id.* at 6.

In so holding, the Court distinguished requests for help with administrative tasks—such as providing names and addresses of class members to “facilitate the sending of notice,” which is governed by Rule 23(d)—from requests for information that help “define or clarify issues in the case,” which is a discovery request governed by Rule 26. *Id.* at 350.

Plaintiffs’ motion does not establish “appropriate circumstances” for the use of Rule 23(d)(1). The forced production of thousands of inmate records is clearly not the sort of limited “administrative task” approved in *Oppenheimer Fund*. Nor is Rule 23(d)(1) meant to be an alternative vehicle to Rule 26 for obtaining expansive discovery. *Id.* at 354 n.20 (recognizing that there is “a distinction in principle between requests for identification of class members that are made to enable a party to send notice and requests that are made for true discovery purposes”). The Court should reject Plaintiffs’ belated and improper attempt to relitigate discovery disputes that they have previously—and repeatedly—lost.

III. Production of the documents Plaintiffs demand would be unduly burdensome and not proportional to the needs of the case.

A. Producing the requested documents would be incredibly time-consuming and costly.

Even if Plaintiffs could show an entitlement to the documents they seek—as explained above, Part II *supra*, they have not—requiring Defendants to produce ten categories of health related forms for each of approximately 800 potential class members would impose a significant burden on VDOC.⁹

⁹ The scope of permissible discovery under both Rule 26(b)(1) and Rule 23(d)(1) is informed by the associated burden. *Compare* Fed. R. Civ. P. 26(b)(1) (considering “the parties’ relative access to relevant information” and “the parties’ resources”), *with Oppenheimer*, 437 U.S. at 356 (considering whether defendants can perform a necessary class-notice-related “task with less difficulty or expense than could the representative plaintiff”). Thus, even if the Court could consider a motion to compel the production of merits-based documents under Rule 23, which it

The inmate medical records that Plaintiffs seek are primarily stored only in hard copies, which must be obtained from a variety of sources. Declaration of Toni Ramey (Aug. 7, 2023) (“Ramey Decl.”) [Ex. 1] ¶¶ 6, 12, 13, 14. Some of the hard copy files requested are maintained in storage, which requires additional time to coordinate the retrieval and search for such records from storage. *Id.* ¶¶ 13, 14. Hard copy files need to be located, disassembled, scanned as copies or PDF electronic images, returned to the file, and transmitted to counsel for review for litigation. *Id.* ¶ 7. While Red Onion State Prison (“ROSP”) does have a PDF-scanning capable printer, it is used for many purposes by ROSP personnel, including some that relate to urgent matters, which causes a delay in the processing of legal requests. *Id.* ¶ 11.

Adding to the burden is the fact that only certain employees of VDOC can access these records, and they must balance the retrieval process with their day jobs, which would detract from their time treating inmates and maintaining physical security. *Id.* ¶ 9. The process for retrieving and imaging or printing the medical and mental health files can take a VDOC employee a minimum of 5 to 15 hours per inmate file, depending on the volume of records associated with that inmate. In fact, it could take longer to identify and scan only the 10 specific forms Plaintiffs request because of the added time required for locating the forms, removing them from the files, scanning them, and then placing them back into the files in their correct chronological order. *Id.* ¶ 10. Thus, to retrieve and provide to counsel the 10 specific forms for the approximately 450 of the 800 inmates assumed to be in VDOC custody would take, at minimum, approximately 2,250 – 6,750 hours.

should not, production of the records sought by Plaintiffs is not warranted given the significant difficulty and expense entailed.

For the remaining inmates who have been released from custody or transferred out of state, a group estimated to number 350, the burden of identifying the requested records falls on Defendants' counsel. For those inmates, Defendants' counsel must obtain the medical and mental health files from either VDOC Central Records or VDOC's document conversion services provider, and scan to electronic format if only in hard copy. Declaration of Meghan Podolny (Aug. 7, 2023) ("Podolny Decl.") [Ex. 2] ¶¶ 8, 9. Once obtained, Defendants' counsel would then need to identify and extract the requested forms from the larger file, an effort that is estimated to incur 3 to 6 attorney hours, depending on the size of the inmate record. *Id.* ¶ 10. In terms of cost, this could range from \$1,700 – \$3,500 per inmate file. *Id.* ¶ 10. For an estimated 350 inmates, that would incur an estimated \$600,000 – \$1,225,000 in fees.

There are additional burdens that fall on Defendants' counsel beyond merely identifying the requested forms. *Contra* Pls.' Br. at 11 (expressing disbelief that counsel "needs to 'review' such records before production, instead of simply producing the records"). The retrieval and production process necessarily requires coordination by counsel, as it not an insignificant task to track the files for approximately 800 inmates across multiple institutions. *See generally* Podolny Decl. ¶¶ 7, 13. Some of VDOC's institutions do not have high-speed scanners, so the process for producing responsive documents that are maintained in hard copy form at the institution is for Defendants to retrieve the hard copy, make a physical copy of the document, and mail those documents to counsel, who then would scan them to electronic form. *Id.* ¶ 7. Defendants' counsel then loads the electronic scans to a database for potential production with proper confidentiality designations and Bates numbers, and reviews the documents to ensure what has been requested has been retrieved. *Id.* ¶ 11. Once the requested forms have been identified and separately loaded to a review platform, counsel would then need to review the documents to determine if any

information provided discloses an inmate's HIV status in violation of Virginia Code § 32.1-36.1 or reveals substance-abuse-treatment information in violation of 42 C.F.R. § 2.12,¹⁰ and apply redactions accordingly. *Id.* ¶ 12. Based on their experience with prior productions, Defendants' counsel would need to spend approximately 2–5 hours of time, costing approximately \$1,200 – \$3,000, on each additional inmate in the effort to review and redact the restricted information on the forms Plaintiffs have requested. *Id.* ¶ 12. For 800 inmates, that review effort would incur attorney fees of \$960,000 – \$2,400,000. *Id.* There would also be an additional vendor cost of about \$100/inmate associated with Defendants' vendor's processing and production of those records. *Id.* ¶ 11.

Altogether, the attorney fees that VDOC would incur in retrieving, identifying, reviewing, and producing the requested forms for 800 inmates, and coordination of the same, is estimated to be \$1,670,000 – \$3,750,000. *Id.* ¶¶ 10, 11, 12, 13.

B. The burden of producing the requested records is not proportional to the needs of the case.

Courts will deny a motion to compel the production of documents when the burden and expense to the party of compiling the documents sought outweighs their likely benefit. Fed. R. Civ. P. 26(b)(1). As Plaintiffs are aware, their previous motion to compel these and other medical records was denied on these very grounds. ECF No. 296. That Plaintiffs have narrowed their request from the “*entirety* of Class Members' medical records” to ten categories of forms, *see* Pls.' Br. at 12, does not make their requests proportional to the needs of the case. The burden that

¹⁰ Magistrate Judge Sargent's order concluding that the Virginia Medical Records Privacy Act did not bar production of inmate health information, *see* ECF No. 296, did not address these statutes, let alone find that VDOC did not need to comply with them. Thus, information related to HIV status and substance abuse would need to be redacted.

Plaintiffs seek to place on Defendants remains high, while Plaintiffs have not established a corresponding need for the records.

Plaintiffs cite numerous cases in support of their argument that the burden of producing thousands of inmate medical and mental health records is warranted. *See* Pls.’ Br. at 10–12. But these cases are inapt. Every one of them pre-dates the 2015 amendments to the Federal Rules of Civil Procedure, which newly required that discovery is permitted only if it is “proportional to the needs of the case.” Fed. R. Civ. P. 26(b)(1). As the Fourth Circuit has recognized, proportionality and burden work hand in hand, as “[p]roportionality requires courts to consider, among other things, ‘whether the burden or expense of the proposed discovery outweighs its likely benefit.’” *Va. Dep’t of Corrs. v. Jordan*, 921 F.3d 180, 188–89 (4th Cir. 2019); *see also Kolon Indus., Inc. v. E.I. Du Pont De Nemours & Co.*, No. 3:11CV622, 2012 WL 13036259, at *4 (E.D. Va. Feb. 22, 2012) (denying motion because “the limited benefit of the information sought is certainly outweighed by the demonstrated burden of producing it”). In other words, the proportionality requirement “relieves parties from the burden of taking unreasonable steps to ferret out every relevant document.” *Id.*

Plaintiffs rest their purported “need” for the records on the requirement that they provide notice to class members. But as noted above, Plaintiffs have already confirmed they do not need discovery of class members’ medical and mental health records for the purpose of sending class notice. *See* Part II *supra*; ECF No. 316-1 at 7–8 (Disabilities Class members will not receive separate notice). Nor have Plaintiffs established that the records they seek can identify any purported member of the Disabilities Classes not already identified elsewhere. Defendants have provided Plaintiffs with a spreadsheet that sets forth the mental health (MH) codes for the almost 1,000 inmates listed therein. *See* VADOC-00165197. As Plaintiffs note, “VDOC has provided

mental health status codes that can be used to determine which members of the class were classified as MH-2S and higher.” Pls.’ Br. Ex. 13. *See* ECF No. 299 at 16 (finding, in the class certification order, that the Disabilities Classes include “those inmates classified as M-2S and higher”). Plaintiffs insist that the Disabilities Classes also “encompass[] individuals who are classified by the VDOC at even lower mental health classification codes [than MH-2S],” Pls.’ Br. at 9 n.3 (quoting ECF No. 299 at 16)—but they have not proposed any objective criteria for defining who’s in the Disabilities Classes and who’s not. Rather, Plaintiffs would have Defendants produce, and the parties review, tens of thousands of pages of documents, after which the parties could litigate whether *each* potential class member (with a mental health code of less than MH-2S) has a covered disability.¹¹ Refusing to define the Disabilities Classes, and exploiting that uncertainty to make untimely demands for documents, does not create a need for discovery that the Court should credit.

In any event, it is not clear that the documents Plaintiffs are moving to compel contain the information they seek.¹² When they represented in their reply brief in support of class certification that “mental health forms can be quickly and efficiently reviewed to determine if an individual has an ADA-qualifying disability,” ECF No. 206 at 51, they cited four examples of supposedly relevant documents.¹³ But none of those exhibits indicates that the individual had been diagnosed with or otherwise was experiencing “an ADA-qualifying disability.”

¹¹ After all, Plaintiffs must *prove*, by a preponderance of evidence, that each purported class member has a disability—an element of each class member’s ADA and RA claim.

¹² Plaintiffs are apparently reserving the possibility of demanding more documents: “[O]ur review of the documents that were produced for the class sample members indicates that *at least* the following documents would contain relevant information that could be used to identify the remaining Disability Damages Class members.” Pls.’ Br. Ex. 13.

¹³ ECF No. 206-8 (Wall’s Mental Health Services Progress Notes); ECF No. 206-9 (Riddick’s Mental Health Screening); ECF No. 206-10 (Cavitt’s Mental Health Evaluation); ECF No. 206-11 (Khavkin’s Mental Health Monitoring Report).

For all these reasons, Plaintiffs lack a need for the requested records that justifies the significant burden of producing them.

CONCLUSION

Defendants remain open to reasonable proposals to identify further Disabilities Class members, according to objective criteria. But Plaintiffs' demand for thousands of medical and mental health records, for many hundreds of inmates, is manifestly unreasonable. Their motion should be denied.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 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.

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