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' OPPOSITION TO DEFENDANTS' MOTION FOR PLAINTIFFS TO SUBMIT A TRIAL PLAN

I. INTRODUCTION

Defendants' motion requesting a trial plan is premature and unnecessary at this time. While courts sometimes require parties to submit trial plans in highly complex cases—such as matters involving complicated choice of law issues or proceedings requiring bifurcation—this is not such a case. Instead, this litigation centers on whether the treatment of incarcerated individuals who have participated in a single program within a single prison system violates federal law. Defendants offer no support for the proposition that a trial plan is appropriate—let alone required—in this case.

Defendants' request for a trial plan is also premature. As of the date of this filing, Plaintiffs' motion to reconsider the Court's amendments to the definitions of the disabilities class as well as the parties' respective motions for summary judgment and Daubert motions are pending before the Court. Until those motions are decided, the class definitions remain uncertain, the class representatives remain unnamed, and the scope of the claims to be addressed at trial remain unclear. It makes little sense to require Plaintiffs to draft a trial plan in light of this uncertainty. Instead, these various areas of dispute mean that any trial plan produced by Plaintiffs will be of limited utility to the Court and require multiple revisions before trial.

Plaintiffs are committed to presenting an orderly and efficient case at trial. Indeed, to facilitate such a presentation, Plaintiffs engaged Defendants in discussions designed to streamline trial, including by shortening the length of trial, converting proceedings from a jury trial to a bench trial, and, if necessary, adjusting the trial date so as to provide the parties with adequate time to comply with various pretrial requirements, including the distribution of class notice. Plaintiffs believe that Defendants' cooperation in discussions over trial procedures—not

the preparation of a trial plan—provides the most productive path forward. To that end, Plaintiffs ask the Court to set a status conference to discuss the pre-trial schedule and procedures.

II. ARGUMENT

A. Defendants have refused to engage in substantive discussions regarding trial procedures.

As a threshold matter, Plaintiffs were surprised by Defendants' decision to file a motion for a trial plan. Plaintiffs have been engaging with Defendants for nearly a month to discuss the timing, nature, and scope of trial. On December 11, 2023, for example, Plaintiffs responded to a proposal from Defendants with an email suggesting that the parties agree to convert the proceedings in this case from a jury trial to a bench trial and to shorten the length of trial from six weeks to three. Ex. 1, 12/11/23 Email from G. Greenspan to M. Eckstein. Having received no response to their proposal, Plaintiffs followed up with Defendants on December 19, 2023 to request a meet-and-confer to discuss various options for streamlining trial. Ex. 2, 12/19/23 Email from M. Crowley to M. Eckstein. Defendants informed Plaintiffs that they could not speak about trial procedures for more than a week, in light of the winter holidays, finally agreeing to a meet-and-confer on December 28, 2023. Ex. 3, 12/21/23 Email from M. Eckstein to M. Crowley; Ex. 4, 12/22/23 Email from M. Crowley to M. Eckstein. The day before the parties' scheduled conference, however, Defendants filed the instant motion without first conferring with Plaintiffs. ECF No. 443.

B. A trial plan is unnecessary and inappropriate.

Defendants' brief identifies no binding authority requiring the Court to enter an order requiring a trial plan from Plaintiffs. Nor could they. It is well-established that the neither the Federal Rules nor the Advisory Notes require a plaintiff to submit a trial plan. *See, e.g.*, *Stickles v. Altria Senior Living, Inc.*, No. C-20-9220, 2022 WL 718563, at *1 (N.D. Cal. Mar. 10, 2022)

("Federal law does not require a plaintiff to submit a trial plan during or immediately after the certification stage."); *Chamberlan v. Ford Motor Co.*, 402 F.3d 952, 961 n. 4 (9th Cir. 2005) ("Nothing in the Advisory Committee Notes suggests grafting a requirement for a trial plan onto the rule.").

While courts *sometimes* require plaintiffs to submit a trial plan in complex cases—such as class actions requiring the creation of "subclasses to take into account variations in the substantive laws of all fifty states and the foreign jurisdictions where potential class members may be domiciled," *In re Panacryl Sutures Product Liability*, 269 F.R.D. 586, 588 (E.D.N.C. 2010), or cases requiring bifurcation or other phasing, *Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 548 (E.D. Va. 2000)—this case does not meet those criteria. Instead, this case involves a single prison program—*i.e.*, the Step-Down Program—within a single prison system—*i.e.*, the Virginia Department of Corrections—and can be resolved with reference to a single body of law—*i.e.*, federal law. Nor have Defendants shown how the size of the anticipated classes—*i.e.*, a few hundred individuals—or the number of contemplated sub-classes—*i.e.*, four—merits a trial plan. Put simply, the plan that Defendants request is neither legally required for this case nor practically necessary given the straightforward nature of the disputes at issue.

Instead, Defendants' motion reflects a belated attempt to re-litigate issues decided by the Court at the class certification stage. For example, Defendants claim that a trial plan is necessary to account for changes to the Step-Down Program over time as well as class members' different experiences within the Step-Down Program. ECF No. 443, at 6. But the Court previously rejected the premise of Defendants' argument, finding at class certification that class members'

experiences within the Step-Down Program were *not* materially different. ECF No. 299 at 21. On the contrary, the Court explained that:

> [T]he evidence shows, as demonstrated both by the written policies that make up the Program, the plaintiffs' affidavits, and testimony from those familiar with the Program, that all of the named plaintiffs and absent class members began or will begin at the initial privilege levels of IM0 or SM0 and have experienced or will experience similar conditions of confinement, and uniform barriers to Program progression and review processes tied to the Program.

Id. According to the Court, these similarities are sufficient to "hold[] all the plaintiffs' experiences together." *Id.* Defendants should not be permitted to reargue their opposition to the Court's class certification decision under the guise of requiring a trial plan.[1]

C. Defendants' request for a trial plan is premature.

Even if Defendants' request for a trial plan was proper—which it is not—now is not an appropriate time to order Plaintiffs to prepare a trial plan. The landscape of the upcoming trial remains uncertain given the pending motions for summary judgment filed by both Plaintiffs and Defendants as well as Plaintiffs' pending motion to reconsider the Court's August 8, 2023 order amending its prior certification order. ECF Nos. 359, 379, 380. A decision on the parties' motions for summary judgment could alter, and potentially narrow, the scope of the issues to be litigated at trial, and an order on Plaintiffs' motion for reconsideration may affect the operative class definitions as well as the identity of the class representatives. Indeed, Defendants concede the current uncertainty surrounding the class definitions and class representatives, admitting that

[1] Even if there are *some* differences in class members' experiences within the Step-Down Program due to changes to the program over time, such differences hardly suggest that a single trial of all class members' claims is "[un]manageable," as Defendants' claim. ECF No. 443, at 5. On the contrary, Defendants' own records establish when various policies and procedures were in place, facilitating the presentation of such information to the Court and/or the jury.

"[w]ith Plaintiffs' motion for the Court to reconsider this ruling pending, the class definitions, and the identity of their representatives, remain in a significant state of flux." ECF No. 443 at 4.

It makes little sense to require Plaintiffs to prepare a trial plan without additional clarity as to the membership of the proposed classes or the scope of the claims to be tried. Nor does it make sense for Plaintiffs to draft a trial plan when Defendants will not respond to Plaintiffs' proposals with respect to the appropriate length, format, and timing of trial. Instead of requiring a trial plan, Plaintiffs respectfully request that the Court allow time for the parties to meet and confer over trial procedures. Plaintiffs would also welcome the opportunity to discuss these issues with the Court at a future status conference so that the Court can provide additional guidance to the parties as to how (and when) the trial should proceed. In the interim, Plaintiffs submit that requiring a trial plan at this juncture is unproductive and unnecessary.

III. CONCLUSION

For the reasons set forth above, the Court should deny Defendants' Motion for Plaintiffs to Submit a Trial Plan.

Dated: January 10, 2024

Respectfully submitted,

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Certificate of Service

I hereby certify that on the 10th day of January, 2024, 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/ William O'Neil