**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA**
**Big Stone Gap Division**

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| WILLIAM THORPE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,<br><br>Defendants. | ) | Case No. 2:20-cv-00007-JPJ-PMS |

**DEFENDANTS' REPLY IN SUPPORT OF**
**MOTION FOR PLAINTIFFS TO SUBMIT A TRIAL PLAN**

Plaintiffs argue against Defendants' request for a trial plan on two grounds: that this case is really not so complicated, and that any trial plan would be contingent on the Court's forthcoming rulings on class definitions and representatives, summary judgment, and *Daubert*. On the latter point, Defendants agree that some key issues that must inform the trial plan are, right now, unresolved. That is exactly why Defendants did not ask the Court to require Plaintiffs to submit a trial plan *today*. Instead, the Court should require a trial plan as part of any pretrial preparations.[1]

Plaintiffs' other argument against a trial plan is even less availing. They claim that a trial plan is unnecessary because the case involves "incarcerated individuals who have participated in a single program within a single prison system." Pls.' Opp. to Mot. for Pls. to Submit a Trial Plan ("Opp.") at 1, ECF No. 446. Described at a high enough level of generality, any case sounds simple. Just so here.

[1] If the Court continues the trial date, as Plaintiffs request, Defendants propose that a trial plan be submitted 60 days before the final pretrial conference. If the Court is not inclined to continue the trial date, Defendants will be prepared to discuss the timing of Plaintiffs' trial plan at the upcoming status conference.

In reality, this case is about hundreds of inmates who progressed through several privilege levels, along two different tracks, over ten years, in a program undergoing regular review and constant improvement. Plaintiffs allege Constitutional violations and injuries across that decade, and across all the levels and permutations of the Step-Down Program. Their decision to litigate this case as a class action does not absolve them of their evidentiary burden. Nor does the Court's grant of class certification. To the contrary, Plaintiffs now must prove that *all* of the members of each of the classes certified by the Court saw their Constitutional rights violated, across the numerous privilege levels, dual tracks, lengthy time period, and ongoing modification of the Step-Down Program.

Plaintiffs want to prove their claims through common evidence. For the reasons explained in Defendants' opening brief, that will be a complicated, potentially cumbersome process. The trial plan should explain how Plaintiffs propose to structure the proceeding, so that the Court and the parties can try the classes' claims in an efficient manner. That is not an extraordinary request. It is simply good case management, and consistent with the approach of courts across the country (and the drafters of Rule 23).

## ARGUMENT

### I. A Trial Plan Is Necessary and Appropriate.

The Court should order Plaintiffs to propose a trial plan in this case. Plaintiffs argue there is "no binding authority requiring the Court to enter an order requiring a trial plan from Plaintiffs." Opp. at 2. Defendants did not claim otherwise. Instead, Defendants pointed to the broad persuasive authority explaining the benefit of "a trial plan that describes the issues likely to be presented at trial and . . . whether they are susceptible of class-wide proof." Fed. R. Civ. P. 23, Advisory Committee Note (2003 amendments) (noting that "an increasing number" of courts require a party requesting class certification to present a trial plan); *see also*, *e.g.*, Manual for

Complex Litigation (Fourth) 21.142 (2004) (explaining that courts decide how to manage class actions based on, among other things, trial plans). Courts recognize the utility of a trial plan to efficiently manage class actions:

> [T]here is a direct correlation between the importance of a realistic, clear, detailed, and specific trial plan and the magnitude of the manageability problems a putative class action presents. We therefore recommend that district courts make it a usual practice to direct plaintiffs to present feasible trial plans, which should include proposed jury instructions, as early as practicable when seeking class certification.

*Vega v. T-Mobile USA, Inc*., 564 F.3d 1256, 1279 n.20 (11th Cir. 2009).

Plaintiffs concede that trial plans alleviate the considerable manageability problems class actions present but argue no trial plan is necessary here for three reasons. First, Plaintiffs argue they should be excused from a trial plan because Defendants purportedly "refused to engage in substantive discussions regarding trial procedures." Opp. at 2. What Plaintiffs mean by "trial procedures" is the length of trial and whether there will be a jury. Those are both important points—which is why Defendants have, in fact, conferred with Plaintiffs about them, prompting the request for a status conference. But more material to this motion, neither the length of the trial nor the identity of the fact finder addresses the problems that a trial plan is intended to resolve. Plaintiffs' complaint about a "refusal to engage" is a red herring (and wrong).

Second, Plaintiffs argue that a trial plan is not necessary because other Fourth Circuit cases requiring a trial plan were "complex," supposedly unlike this one. Plaintiffs point to *Chisolm v. TranSouth Financial Corp.*, 194 F.R.D. 538 (E.D. Va. 2000) ("*Chisolm II*"), a case involving consumers' purchases of used cars from a dealer. The district court first certified a class in 1999, finding that the plaintiffs had demonstrated, among other things, that class adjudication would be manageable, "[e]ven if the Court later finds that a bifurcated trial is necessary." *Chisolm v. TranSouth Fin. Corp.*, 184 F.R.D. 556, 565 (E.D. Va. 1999) ("*Chisolm I*"). As the case developed, the district court recognized some of the difficulties trial would pose, and directed the parties to

brief the use of subclasses. *Chisolm II*, 194 F.R.D. at 543. The plaintiffs then "proposed three trial plans to the Court, each involving a bifurcated trial process." *Id*. at 544.

Plaintiffs argue that *Chisolm* was worthy of a trial plan, because it "require[ed] bifurcation." Opp. at 3. But that turns things upside-down: the bifurcation was the *result* of the trial plan, not the *reason for* the trial plan. The district court certified the class while recognizing that certification itself cannot resolve the difficulties posed by trial of class claims. So the district court subsequently required the plaintiffs to submit a trial plan, to explain how their already-certified class could try claims on a class-wide basis. The plaintiffs then proposed three different trial plans. The fact that the proposed plans included bifurcation hardly distinguishes that case from the one at bar.

Nor do Plaintiffs address *Amorin v. Taishan Gypsum Co., Ltd.*, 2019 WL 2172707 E.D. Va. May 20, 2019) (cited in Defs.' Memo. in Supp. of Mot. ("Defs.' Br.") at 5, ECF No. 443). That case involved damages calculations for "175 'Virginia Plaintiffs' who are members of a certified class of property owners (or former property owners)" whose property was damaged by drywall manufactured by the defendant. *Id.* at *1. The plaintiff class already had won a default judgment on liability, and all that was left to litigate was their damages under Virginia law. *Id*. Despite that only the issue of damages remained, the district court asked for and then adopted a trial plan to ensure expedited resolution of class damages. *Id*. at *2. That case from the Fourth Circuit—and others Defendants cited from other circuits—upend Plaintiffs' unfounded assertion that this case is "simple" compared to the cases in which courts call for trial plans.

Third, Plaintiffs wholly fail to engage with the factual and legal questions that demand a thoughtful approach to class-wide adjudication. Just by way of example, in their opening brief, Defendants suggested Plaintiffs should explain how they plan to try, on a class-wide basis, their

purportedly common question of "whether the Step-Down Program subjects individuals to indefinite solitary confinement," since a key criterion for that question—time an inmate is allowed to spend outside their cell and opportunities for social interaction—changed significantly, across privilege levels, during the class period. *See* Defs.' Br. at 7. Defendants also asked how the Court can answer the Constitutionality of Defendants' conduct over a decade-long period—with different class members subject to the conduct during different intervals within that decade—since the relevant standards shifted during that period, requiring separate Constitutional analysis applicable to different times (and class members). *Id*. at 8.

Plaintiffs do not so much respond as they deflect. They say that Defendants are merely "re-litigat[ing] issues decided by the Court at the class certification stage," and that Defendants' concerns are invalid because every class member will have, at one time or another, been subjected to conditions at IM-0 or SM-0. Opp. at 3. That badly misses the point. Yes, each class member progressed through the Step-Down Program over time, changing his own standing and level within the Program. But the Program itself was changing over time, so an inmate's experience at SM-0 in 2013 would be significantly different than that of an inmate at SM-0 in 2023.

For example, when the Step-Down Program began in 2012, inmates classified as Security Level S on either the IM or SM pathway were not eligible for an MP3 player. *See* ECF No. 381, Ex. 7 at VADOC-00038017, 38022. By 2017, however, inmates at all privilege levels were eligible to have access to JP5 tablets with audio files, music files, etc. *Id.*, Ex. 11 at VADOC-00053518, 166. The access to commissary items also expanded over time. In 2012, inmates on the IM pathway could spend a maximum of $20 a week when they reached the IM Closed Pod and inmates on the SM pathway could spend a maximum of $30 a week. *See Id.*, Ex. 7 at VADOC-00038016, 38021. By 2020, inmates could each spend up to $45 a week. *Id.*, Ex. 12, at VADOC-

00053716, 53721. Job eligibility also changed, with inmates assigned to Level S of the IM pathway being ineligible for a job until 2014, when inmates at IM2 became eligible. *Id.*, Ex. 8 at VADOC-00002680. As yet another example, the access to phone calls and visitation also expanded over time. In 2012, inmates on the IM pathway received a maximum of five phone calls per month once they reached the IM Closed Pod. *See Id.*, Ex. 7 at VADOC-00038022. By 2015, however, inmates in the IM Closed Pod could receive up to fifteen phone calls per month. *Id.*, Ex. 10, at VADOC-00056840. Finally, access to recreation also evolved over time. In addition to the well-noted increase in time out-of-cell to four hours per day for all inmates in 2019, the type of recreation available to specific privilege levels also changed. For example, beginning in 2020, inmates who reached SM2 could have recreation in unrestrained small groups instead of individually inside of recreation cages. *Id.*, Ex. 12, at VADOC-00053698.

Plaintiffs' burden to prove their claims on a class-wide basis did not *end* with the class certification decision. It *started* then. Defendants simply ask Plaintiffs to provide a roadmap for the trial so that the parties and Court can proceed in an efficient and manageable fashion.

**II. Defendants' Request Is Not Premature.**

Plaintiffs argue that "Defendants' request for a trial plan is premature" because "[t]he landscape of the upcoming trial remains uncertain given the pending motions for summary judgment . . . as well as Plaintiffs' pending motion to reconsider the Court's August 8, 2023 order amending its prior certification order." Opp. at 4. Defendants agree that the claims to be tried, the classes to be bound, and the witnesses to testify are unsettled at the moment. Unknown, for instance, is whether Plaintiffs will seek to name a new representative for one or more of the classes, which would potentially require the Court to reopen fact discovery—and possibly briefing on the individual's typicality and adequacy or summary judgment.

But Plaintiffs, like Defendants, are no doubt preparing for trial, and they must recognize that whether in March or a later date, they will have to try their claims. Defendants' request is for Plaintiffs to propose a trial plan *in advance of trial*, during pretrial proceedings—whether in advance of the current March trial date, or if the trial is continued, 60 days before a final pretrial conference.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court require the Plaintiffs to submit a trial plan.

January 16, 2024

Respectfully submitted,

***/s/ Maya M. Eckstein***

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2024, 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.

By: */s/ Maya M. Eckstein*

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