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' RESPONSE TO
PLAINTIFFS' SUBMISSION REGARDING THE DETERMINATION OF DAMAGES

Defendants understood the Court's damages inquiries during the January 18, 2024 Status Conference to focus on ***how***, if necessary, the Court would determine damages to be awarded to individual class members, not ***whether*** the Court, as the finder of fact, could do so—an issue not in dispute. Accordingly, the Court invited Plaintiffs to submit authority to support that awarding a per diem payment would be an acceptable method of determining damages on a class-wide basis.

In response, Plaintiffs fail to identify a single class action where the finder of fact awarded damages to class members on a per diem basis. Further, the cases submitted by Plaintiffs where a fact finder awarded compensatory damages to individual plaintiffs on a per diem basis all predate the Prison Litigation Reform Act of 1996 (PLRA), which significantly limits the types of injury for which Plaintiffs may recover damages. Finally, Plaintiffs' position regarding expert damages testimony directly contradicts the position they took throughout the discovery phase of this litigation and is misleading.

I. The Authority Submitted by Plaintiffs Does Not Support Awarding Damages to Class Members on a Per Diem Basis.

Plaintiffs have not provided the Court any authority supporting the proposition that it should calculate damages on a per-diem basis. As a starting point, Plaintiffs do not assert or provide authority for a per-diem damages calculation for their statutory claims. *See* Plaintiffs' Submission [ECF No. 460]. And although they assert that courts "frequently" calculate compensatory damages for constitutional claims on a per diem basis, *id.* at 4, Plaintiffs have not identified a ***single*** example of such a calculation after enactment of the PLRA, much less an example of such a calculation in a class-action context. Nor have Defendants located any such authority. Instead, Plaintiffs assert, in the most conclusory fashion possible, that nothing in the cases they cite "suggests that the PLRA impacted the fact finder's authority to determine damages," Plaintiffs' Submission at 2, fn. 2. Plaintiffs' assertion misses the point.

The problem for Plaintiffs is two-fold. First, class actions do not provide a vehicle for federal courts to order relief to uninjured plaintiffs. *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 466 (2016) (Roberts, C.J., concurring). "The Judiciary's role is limited 'to provid[ing] relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm.'" *Id.* (quoting *Lewis v. Casey,* 518 U.S. 343, 349 (1996)); *see also TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021) ("[S]tanding is not dispensed in gross; rather, [even class action] plaintiffs must demonstrate standing for each claim that they press ***and for each form of relief that they seek*** (for example, injunctive relief and damages)." (emphasis added)).

Second, the PLRA limits recovery for mental or emotional injury to those instances where an inmate can show physical injury or the commission of a sexual act. 42 U.S.C. § 1997e(e). Thus, although Plaintiffs may indeed "present expert testimony regarding … the significant harmful physical, mental, and emotional effects of solitary confinement," Plaintiffs' Submission at 4, fn.

3—testimony that Defendants' witnesses will refute—that testimony will be immaterial to the issue of damages unless Plaintiffs can establish that ***each class member*** suffered physical injury or the commission of a sexual act as a result of the alleged Constitutional and statutory violations, a claim that Plaintiffs' experts have not made and that is not supported by the evidence.

In Section III of their Submission, Plaintiffs submit as authority only three cases decided after enactment of the PLRA, all from New York district courts, and none on point. The first, *McClary v. Coughlin*, 87 F. Supp. 2d 205 (W.D.N.Y. 2000), involved a single plaintiff seeking damages in a non-class-action context. "The jury was not asked by defense counsel, plaintiff's counsel or the Court to measure plaintiff's damages on a per diem basis," and it is unknown if it did so. *Id.* at 218. Nevertheless, the district court determined that the award was excessive and granted remittitur, without addressing the appropriateness of a per diem award in the first instance. *Id.* at 219. This case, then, does not stand for the broad proposition that per diem compensatory damages awards are always (or ever) appropriate in conditions-of-confinement litigation, and certainly not in a class action context.

Neither of the other two cases, *Parker v. City of N.Y.*, No. 15CV6733, 2018 WL 6338775 (E.D.N.Y. Dec. 4, 2018) or *Miller v. City of N.Y.*, No. 21-cv-2616, 2023 WL 3554444 (S.D.N.Y. April 28, 2023), even involves a finder of fact determining a damages amount. Instead, both cases involve the district court assessing whether to approve a settlement agreement. Plaintiffs' Submission at 5. Thus, even though both cases were class actions where the parties settled on a per diem amount, neither supports the assertion that ***courts*** "frequently" (or ever) calculate compensatory damages for constitutional claims on a per diem basis, much less in the context of a class action.

In contrast, other courts have expressly rejected the concept of awarding imprecise or per diem damages in a class action context, electing instead to decertify damages classes, certified at earlier phases of the litigation, when those plaintiffs ultimately could not identify a viable way to determine compensatory damages on a class-wide basis. In *Thomas v. County of Los Angeles*, 703 F. App'x 508 (9th Cir. 2017), for example, the inmate plaintiffs alleged they had suffered constitutional harm by sleeping on mattresses on the jail floor, and the district court initially certified a compensatory damages class. When later pressed on how damages should be calculated, the plaintiffs asserted that "a standard per diem damages award will be sought" and could "be determined by arriving at a dollar value for a night of unconstitutional floor-sleeping," to "then be multiplied by the number of nights an inmate slept on the floor." *Thomas v. Baca*, No. CV-04-08448, 2012 U.S. Dist. LEXIS 39297, at *6 (C.D. Cal. Mar. 22, 2012). The district court ultimately elected to decertify the damages class, reasoning that, "[g]iven the wide array of variables related to damages, the standardized, per diem approach Plaintiffs suggest would be inappropriate." *Id.* at *7. On appeal, the Ninth Circuit agreed, opining that "the damages suffered by individual class members were insufficiently similar to be established through representative testimony." 703 F. App'x at 511. Other courts have reached similar conclusions. *See, e.g.*, *Pierce v. Cnty. of Orange*, No. CV-01-981, 2004 U.S. Dist. LEXIS 33300, at *23 (C.D. Cal. Feb. 27, 2004) (granting motion to decertify damages class in action brought by pretrial detainees challenging their conditions of confinement under 42 U.S.C. § 1983 and the ADA, where Plaintiffs had proposed "statistical sampling" as a method of determining damages, reasoning that "[i]ssues of damages proof would be highly individualized, and poorly addressed through a sampling," particularly because "[t]here are too many damages variables," and also noting that this method of damages computation would potentially violate the defendants' due process rights by "foreclosing the ability to test the

causation and damages alleged by each class member"), *aff'd*, 526 F.3d 1190, 1200 (9th Cir. 2008); *see also Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1214-15 (10th Cir. 1999) (vacating damages award to an inmate calculated on a per diem basis, reasoning that "the court incorrectly based its award on the abstract value of the constitutional right rather than on the actual injuries [the plaintiff] suffered from the denial of that right"); *accord Cox v. Denning*, 652 F. App'x 687, 692-93 (10th Cir. 2016) (citing *Makin*, rejecting inmate's argument that he should have received a per diem award of damages for each day he was "held under the unconstitutional policy").

Having devoted a majority of their submission to providing authority for the proposition that the Court, as the finder of fact, may determine compensatory damages, Plaintiffs offer no useful guidance regarding how the Court can do so.

II. Plaintiffs' Position Regarding Damages Contradicts Their Position During the Discovery Phase of the Litigation.

Throughout the discovery phase of this litigation, Plaintiffs repeatedly asserted that the computation of damages would be the subject of expert testimony. For example, in each version of their Initial Disclosures, including the most recent, Plaintiffs purported to satisfy their Federal Rule of Civil Procedure 26(a)(1)(A)(iii) obligation with the following statement:

> Computation of damages is premature at this stage in the case. Documents and information, when available, will be provided in conformity with Fed. R. Civ. P. 26(a)(2) governing expert reports and/or any relevant Orders entered by the Court.

Class Plaintiffs' Second Amended Disclosures Pursuant to Fed. R. Civ. P. 26(a)1(1), relevant portions attached as Ex. 1.

Plaintiffs employed a similar tactic in responding to Defendants' Interrogatory No. 12, which asked them to "[s]tate the amount of damages You are requesting and identify with specificity all facts upon which You intend to rely as support for an award of damages in that amount." Class Plaintiff Mukuria's Supplemental Responses to Defendants' Interrogatory Nos. 1

and 12–20, relevant portions attached as Ex. 2, at 20–21. Each Plaintiff initially objected to the interrogatory as a contention interrogatory, asserting as follows:

> Class Plaintiff [] continues to review Defendants' rolling document production, and the parties have yet to designate experts, exchange expert reports, or complete depositions; thus, Class Plaintiff [] does not have the necessary information to make a full, fair and specific answer to this Interrogatory.

Id. at 21.[1] Each Plaintiff subsequently supplemented his responses with the following:

> The amount of damages is to be determined by a jury at trial and is dependent upon a number of factors, including the number of class members and the number of days each class member has spent in solitary confinement. By virtue of their participation in the Step Down program, Class Plaintiff [] and other potential class members have suffered the types of injuries and damages like those well-documented in medical literature …. Class Plaintiff [] continues to review Defendants' rolling document production, and the parties have yet to designate experts, exchange expert reports, or complete depositions; thus, Class Plaintiff [] does not have the necessary information to make a full, fair and specific answer to this Interrogatory.

Id. at 21–22.

Plaintiffs never further supplemented their interrogatory responses. Nor, as they concede, did Plaintiffs submit any expert testimony regarding an amount of damages or the calculation of damages. Plaintiffs' Submission at 1, n. 1.

Nor did Plaintiffs offer any additional material information in their depositions. Most were unwilling or unable to identify an amount for damages or explain how the amount should be calculated. For example, Plaintiff Brooks testified:

> Q Do you believe you should be awarded damages for this case?
>
> A Yes, sir.
>
> Q How much?
>
> A I don't think no amount of money really, but I really can't say at this moment.
>
> Q Do you think you deserve damages for emotional pain and suffering?
>
> A Yes, sir.

[1] Defendants attach only the interrogatory response for Plaintiff Peter Mukuria. All other Plaintiffs' responses to the interrogatory are the same.

Q How much?

A Really can't say at this moment.

Q Do you think you deserve punitive damages?

A Yes, sir.

Q How much?

A Really can't say at this moment.

Q Can you say how you would like to have any of those damages calculated?

A No, sir, not at this moment.

Transcript of Vernon Brooks, Jr. dated March 21, 2023, relevant portion attached as Ex. 3, at 86:22–87:20. Plaintiff Khavkin testified:

Q Okay. Are you seeking money for defendants' contractual, Constitution, and statutory violations, including damages for emotional pain and suffering?

A I'm seeking to go home, sir, but – I don't know what you want me to tell you. I'm concentrating on that right there.

Q And when you say "right there," that right there, you're pointing at Exhibit 7?

A I want a new trial.

Q And that's the other lawsuit that you've brought, correct?

A Yeah.

Q For this lawsuit, what do you want?

A A new trial.

Q The relief that you would like to get out of this lawsuit is a new trial for the charges in Exhibit 7?

A I want to go home, that's what I want.

Q Is that the relief you're seeking in this lawsuit?

A I'm going to let the -- I'm going to let my -- I'm going to let my lawyers decide what they want to do.

Transcript of Dmitry Khavkin, dated March 22, 2023, relevant portion attached as Ex. 4, at 182:18–183:19. And Plaintiff Riddick testified:

Q All right. So for compensation, for the compensatory damages, how much do you feel it would take to compensate you for these issues?

A I don't have a number. I don't have a number. I don't think you can really, you know, give a set number or put a dollar amount on something like that.

***

But, yeah, as far as monetary amount, I can't really put a number on it. I can't put a number on it.

***

Q So if you don't feel like $500,000 would be enough to compensate you, how much do you feel like would be enough to compensate you?

A No number.

Q I'm sorry?

A No number. I'm not going to put a number and say that's enough to compensate me for everything I've been through, you know.

Transcript of Steven Riddick, dated March 23, 2023, relevant portion attached as Ex. 5, at 187:17–188:5, 188:20–189:5, 193:20–194:5; *see also* Transcript of Gerald McNabb, dated April 4, 2023, relevant portion attached as Ex. 6, at 67:6–21, 68:5–21, 69:1–70:14; Transcript of Derek Cornelison, dated April 11, 2023, relevant portion attached as Ex. 7, at 149:7–150:15 ("I'll let my legal counsel determine what's adequate as far as compensation"). Some Plaintiffs offered damages figures, i.e. Transcript of Kevin Snodgrass, dated April 12, 2023, relevant portion attached as Ex. 8, at 116:12–119:2 (asserting that he was entitled to more than $100 million); Transcript of Peter Mukuria, dated March 28, 2023, relevant portion attached as Ex. 9, at 189:4–190:8 (suggesting each class member should receive $30 million); Transcript of Gary Wall, dated March 20, 2023, relevant portion attached as Ex. 10, at 6:14–9:12 (suggesting a minimum of $30,000 per class member), but none were able to explain their method for proposing those figures. Finally, Plaintiffs Cavitt and Hammer suggested widely varying per diem amounts but made clear that those amounts were for emotional pain and suffering and for punitive damages. Transcript of Brian Cavitt, dated March 20, 2023, relevant portion attached as Ex. 11, at 172:17–174:5; Transcript of Frederick Hammer, dated March 21, 2023, relevant portion attached as Ex. 12, at 132:1–133:12, 136:5–137:20. The PLRA, though, cabins damages for emotional pain and suffering, and punitive damages are a separate issue.

Accordingly, having repeatedly asserted that their damages calculation would be subject to expert opinion, Plaintiffs failed to present any such opinion. Nor have they offered any factual basis on which to calculate damages. Having failed to present any basis for a damages calculation, Plaintiffs cannot now simply punt the issue to the Court.

III. Plaintiffs' Assertion Regarding the Expert Testimony They Have Disclosed To Help Inform the Damages Calculation Is Misleading.

Plaintiffs' assertion that they "have an expert who has calculated the number of days that class members have spent in the Step Down Program to help inform the overall damages calculation," *id.*, provides less information than the statement suggests to calculate damages for class members. Setting aside the inherent issues with the calculations performed by Plaintiffs' expert, *see* Defendants' Reply to Plaintiffs' Statement of Genuine Disputes of Material Facts in Opposition to Defendants' Motion for Summary Judgment [ECF No. 417-1] at 3-5, a cursory review of his calculations reveals that he ***did not*** disclose a calculation of the number of days that any individual class member spent in the Step-Down Program or at any phase of the Step-Down Program. ECF No. 400-9. Instead, he disclosed averages and totals for all class members. Accordingly, even if the Court used a per diem method to calculate a total damages amount, it would be unable to determine an amount to award to each, individual class member, creating an issue similar to the one highlighted by Chief Justice Roberts in his concurrence in *Tyson Foods, Inc. v. Bouaphakeo*: "[I]f there is no way to ensure that the [fact finder's] damages award goes only to injured class members, that award cannot stand." 577 U.S. 442, 466 (2016).

IV. CONCLUSION

Plaintiffs' Submission constitutes nothing more than their admission that they have not provided the Defendants or the Court the information necessary to assess their damages claim.

They did not provide it during fact discovery. They did not provide it during expert discovery. And they have not provided it in response to the Court's invitation to submit authority.

February 8, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on February 8, 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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