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' REPLY IN SUPPORT OF THEIR MOTION FOR PROTECTIVE ORDER

Defendants attempt, unsuccessfully, to recharacterize Plaintiffs' Motion as one for a preliminary injunction, even though the relief Plaintiffs request is similar to relief that courts have regularly deemed appropriate for a protective order. Defendants' misdirection should not distract from Defendants' confirmation of the troubling facts giving rise to this Motion, including that the consequence for refusing to sign the Safety Agreement—losing access to in-cell power—is merely punishment wholly unrelated to any individualized risk of self-harm. In fact, this extortionary punishment directly implicates the ability of the Named Plaintiffs and class members to participate in this litigation; it is not merely an evidentiary issue or an attempt to raise new claims in this case. Because a protective order is appropriate and necessary to ensure the proper functioning of this litigation, and Defendants have failed to rebut either the factual or legal basis for such an order, the Court should grant the relief Plaintiffs request.

FACTUAL BACKGROUND

Defendants confirm that they required all prisoners in the Step-Down Program at Red Onion—all of whom are members of the certified classes in this case—to sign the Safety

Agreement. Affidvait of D. Turner, ECF 493-1 ¶ 13 (hereinafter "Turner Decl."). Defendants also confirm that the prison deactivated the power to the cell outlets of those who refused to sign the agreement. *Id.* at ¶ 13, 16. Although not previously known to Plaintiffs, Defendants disclosed that at least four of the men who burned themselves were in the Step-Down Program at the time of those incidents. *Id.* at ¶ 5.

Even though Defendants make clear that the Safety Agreement was a response to those incidents of self-inflicted burns, Defendants do not indicate whether the specific individuals who burned themselves have been asked to sign the Safety Agreement and, if so, whether they have done so. However, Defendants note that none of the individuals who burned themselves was "deemed to be at risk of further self-injurious behavior and, therefore, none were placed on specialized precautions." Affidavit of Denise Malone, ECF 493-2 ¶ 5 (hereinafter "Malone Aff.").

Defendants claim that the Safety Agreement was necessary to prevent further self-harm by prisoners while at the same time asserting that "most of the inmates at ROSP do not present with a demonstrated or otherwise acknowledged risk of self-harm." *Id.* at ¶ 9. In other words, Defendants acknowledge that the Safety Agreement (which does nothing to further safety goals in any event, *see infra* p. 4) sweeps far too broadly. Indeed, Defendants nowhere claim that the specific prisoners whose outlets were powered down for refusing to sign the Safety Agreement present any risk of self-harm generally or self-inflicted burns in particular. Nor do they offer any evidence to contradict class member Sidney Bowman's sworn statement that he has not received any individualized evaluation to determine whether he is in fact at risk of self-harm, such that turning off the power to his cell outlets would be a necessary precaution. *See* ECF 487-2 ¶ 14. Finally, Defendants concede that the power to Mr. Bowman's cell, and the cells of others who

have not signed the Agreement, remains off to the present. *See* 493-1 ¶ 13; *see also* Declaration of Sidney Bowman dated April 10, 2025, attached as Exhibit 2 (hereinafter "Bowman Reply Decl.").

These facts present an inexplicable contradiction: Defendants contend on the one hand that there is low risk of incidents of self-harm among the population at Red Onion and that the recent incidents of self-inflicted burns were not related to mental health concerns, but were motivated by various other complaints. *See* Turner Aff. ¶ 6. On the other hand, Defendants contend that the Safety Agreement is a necessary mental health intervention. *See* Malone Aff. ¶ 6–8. They cannot have it both ways; either VDOC needs to take some action because people in the Step-Down Program are at increased risk of incidents of self-harm (because, as this lawsuit has shown, the Step-Down Program creates a serious risk of psychological harm), or the Safety Agreement is a completely unnecessary intervention because there is little risk of self-harm among the population in the Step-Down Program, and thus the consequence for refusing to sign it is entirely unrelated to mitigating any risk of harm.

Adding to this confusion, Defendants consistently mischaracterize the Safety Agreement as a simple agreement to refrain from using the in-cell outlets to harm oneself, with incentives for sticking to that agreement. But the Safety Agreement speaks for itself; it never mentions either outlets or self-inflicted burns and covers not only acts of self-harm but any "risky behavior" and "actions that could cause injury to myself or others." Turner Aff. at 10-11. It is therefore significantly broader than necessary to address the only problem Defendants have articulated as justification for use of the Agreement: preventing "copy-cat" burn incidents. *See id.* at ¶¶ 8, 11.

Further, Dr. Malone's affidavit characterizes the Safety Agreement as "safety planning." Malone Aff. ¶¶ 7-8. But safety planning and safety contracts are two different things. Safety plans are individualized plans, developed between a patient and their trusted mental health provider, that

contain no element of punishment or consequences if violated, and use no incentives to ensure compliance. Declaration of Dr. Michael Hendricks dated April 12, 2025 ¶ 5, attached as Exhibit 1 (hereinafter "Hendricks Decl."). The Safety Agreement used at Red Onion is not a safety plan, but a safety contract, as evidenced by the clear contractual nature of the document on its face. *See also id.* at ¶ 3.

It is well established that safety agreements or safety contracts are not "evidence-based, effective technique[s] that [are] widely used in the mental health field." Malone Aff. ¶ 7. Rather, they are ineffective at best and harmful in many cases, especially when the agreement is coerced as it was here, and contains threats of punishment for violations.[1] Hendricks Decl. ¶¶ 3-4. These sorts of agreements "directly undermine[] the relationship between the patient and the mental health provider" by creating "a dynamic in the provider-patient relationship wherein the patient may be afraid to disclose thoughts or acts of self-harm and seek treatment, because there is a documented possibility of negative consequences for doing so." *Id.* ¶ 4. When a safety contract is used with someone who has not previously shown any risk of self-harm, it increases "the likelihood of the very self-harm that the contract is intended to prevent." *Id.* ¶ 6. Therefore, "informed mental health providers rarely use safety contracts with patients to address the risk of self-harm." *Id.* ¶ 3.

Further, Defendants' attempts to minimize the impact of the consequence for failing to sign the Safety Agreement are unavailing. Contrary to Assistant Warden Turner's assertions, prisoners are not receiving any accommodations for religious exercise. Most prisoners in the Step-Down Program do not regularly receive pod recreation and, therefore, cannot access religious

[1] Defendants argue that this Safety Agreement has been effective at preventing self-harm at Red Onion. But it is almost nonsensical to claim credit for an intervention in a population that by Defendants' own account does not need such an intervention. Further, it does not appear that the Safety Agreement was presented to the entire population at Red Onion, but rather some subset of the population that includes people in the Step-Down Program. Clearly, the Safety Agreement cannot be said to have been effective at preventing incidents of self-harm in populations that have not signed it (including those in the Step-Down Program who have refused to sign the Agreement but have also not engaged in acts of self-harm).

programming or other televised programs during recreation. Bowman Reply Decl. ¶ 4. Nor is the prison providing televisions outside of cell doors to allow access to religious programming. *Id.* at ¶ 5. And prisoners do not have sufficient access to kiosks to allow them to charge their tablets for use in their cells. *Id.* at ¶ 6. As described in Plaintiffs Memorandum in Support of this Motion, the loss of the use of televisions and tablets results in real hardship and an exacerbation of the already harmful conditions in which people are housed. ECF 487 at 5-6.

ARGUMENT

Plaintiffs request a protective order under any or all of three sources of authority, each of which is well-settled: (1) the Court's inherent equitable powers to prohibit and "prevent abuses, oppression, and injustices" in order to protect the integrity of the judicial process, as recognized by *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984) (internal quotations and citations omitted); (2) the authority to enter a protective order under Fed. R. Civ. P. 26(c) "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"; and (3) the power to enter protective or case management orders under Fed. R. Civ. P. 23(d) to prevent class opponents from engaging in conduct or communication that chills or interferes with participation in the case or threatens the proper functioning of the litigation.

Defendants argue that Plaintiffs must demonstrate that the use of the Safety Agreement or the consequences for refusing to sign it were motivated by an intent to prevent prisoners from participating in this lawsuit—a proposition for which they cite no authority. ECF 493 at 11–12. This mischaracterizes the standard. There is no requirement that Plaintiffs present direct evidence showing Defendants intended for their actions to impede this litigation, nor must Plaintiffs establish that constitutional violations have occurred or that the Defendants' conduct has actually prevented them from participating in the case to warrant a protective order. *See*, *e.g.*, *Ben David v.*

Travisono, 495 F.2d 562, 564 (1st Cir. 1974) ("The findings necessary to support such a protective order are simply that the plaintiffs reasonably fear retaliation and that the court's fact-finding may be materially impaired unless there is provided the tangible protection of a suitable court order.").

In this case, Defendants are forcing prisoners to choose whether to affirm statements they believe are false, or to refuse and live in harsh conditions without access to important sources of communication, education, religious observance, and entertainment. When the statements that prisoners are faced with affirming are ones that contradict their past testimony or potential future testimony, and they refuse to endorse those statements in order to maintain their integrity and credibility, and then suffer a severe consequence, that consequence is a significant burden on their participation in this lawsuit.[2] *See* Bowman Reply Decl. ¶ 7. If class members are dissuaded by those consequences, or the fear of similar consequences in the future, from testifying in this case, that certainly impairs the Court's fact-finding and the proper functioning of this litigation. Defendants present no evidence that would serve to rebut the assertion that its coercive use of the Safety Agreement is not actually burdening Plaintiffs' participation in this lawsuit.

Plaintiffs therefore ask this Court to lift that burden through narrowly tailored requests that fit squarely in the nature of a protective order. Any protective order entered by any court will necessarily prohibit or require certain actions, which does not convert such an order into a preliminary injunction.

The only case relied upon by Defendants in support of their argument that Plaintiffs seek a preliminary injunction acknowledges that what distinguishes a request for a protective order from a request for a preliminary injunction is the scope of relief:

[2] While Defendants represent that they will not seek to use the Safety Agreement as a party admission in this case, there are many other ways in which the Safety Agreement could be used as evidence in this litigation, including for impeachment or as independent evidence that Defendants were not deliberately indifferent to the harms of the Step-Down Program, etc. Thus, Defendants' representations are insufficient to cure the burden on class members.

> Nonetheless, Plaintiff did not merely request an order from the Court discussing the "dos and don'ts" of conduct towards the inmate witnesses, but instead requested relief more commonly sought under a motion for a preliminary injunction: transferring the inmate witnesses to a neutral facility, ordering the inmate witnesses to be guarded by correctional officers that are not privy to the Mitchell litigation, and appointing a special master or guardian to monitor the inmate witnesses' well-being.

Adams v. NaphCare, Inc., No. 2:16-CV-229, 2016 WL 10492102, at *11 (E.D. Va. July 25, 2016), *report and recommendation adopted sub nom. ROXANNE ADAMS, ADMINISTRATOR OF THE ESTATE OF JAMYCHEAL M. MITCHELL, Plaintiff, v. NAPHCARE, INC., et al.*, Defendants., No. 2:16CV229, 2016 WL 4618894 (E.D. Va. Sept. 6, 2016).

Unlike the plaintiff in *Adams*, Plaintiffs here do not request that the Court order any prisoner transfers, staffing changes, or outside monitoring. Instead, Plaintiffs' requests for relief are typical "dos and don'ts of conduct towards inmate witnesses" that are generally included in protective orders governing the conduct of the parties. *Id*. Other courts have ordered similar relief through protective orders intended to protect putative and actual class members from class opponents. In a class action in the prison context, courts may enter an order prohibiting the defendants from taking any actions "that harass, intimidate, or otherwise retaliate against the witnesses who have provided the Court information," including actions that might chill witness testimony, and requiring counsel for defendants to document the steps taken to communicate these prohibitions to their clients. *Parsons et al. v. Ryan et al.*, 2017 WL 3575711, *2 (D. Ariz. July 25, 2017). In *Parsons*, the court's order also required the prison to return one prisoner to her previous cell and to refrain from entering the cell of another prisoner at certain times. *Id.* These orders are in a similar vein to the relief requested by Plaintiffs in its Motion and demonstrate that Plaintiffs' request may be appropriately granted in a protective order.

Courts have also issued protective orders governing communications with parties and witnesses. In *Randolph v. PowerComm Constr., Inc.*, the court barred the defendants "from further communication by telephone, email, in person contact, or any other means with [plaintiffs] and their family members regarding the pending lawsuit, their decision to participate as plaintiffs, or their representation." 41 F. Supp. 3d 461, 467 (D. Md. 2014). Similarly, in *Weckesser v. Knight Enters. S.E., LLC*, the court prohibited "Defendants, their employees, and agents from communication by telephone, email, in person or any other means with the Named Plaintiff, Opt-In Plaintiffs and their family members regarding the pending lawsuit, settlement, their decision to participate as plaintiffs, or their representation." 392 F. Supp. 3d 631, 638 (D.S.C. 2019). And in order to correct misleading communications by a defendant with class members, courts have both prohibited future communications and ordered parties to issue corrective notices. *See Stransky v. HealthOne of Denver, Inc.*, No. 11-cv-02888, 2013 WL 856520, at *8 (D. Colo. March 7, 2013) (ordering such relief and noting that "[c]ourts have ordered a variety of remedial measures for misleading and improper communications, including prohibiting further *ex parte* communications, issuing corrective notices, extending the opt-in period, and awarding attorneys' fees and costs." (citations omitted)).

Plaintiffs' requests for relief are both specific to the facts of the instant situation and are narrowly drawn to address the particular harms that are burdening witness participation in this litigation, and that would continue to do so without relief from this Court. *See Stransky*, 2013 WL 856520, at *7 (in fashioning relief to protect at-risk parties, courts look to the nature of the challenged conduct or communications as well as the context in which they occur.). Relief from this Court is therefore appropriate and necessary in this case.[3]

[3] Defendants also rely on *Adams*, *supra*, to suggest that Plaintiffs have not made the requisite factual showing necessary to support entry of a protective order. But the facts in Adams were highly disputed, whereas here, the

CONCLUSION

Because Plaintiffs have been harmed, continue to be harmed, and fear future harm as a result of their desire to participate in this lawsuit, Plaintiffs respectfully request that this Court grant the relief requested in their Motion.

Respectfully Submitted,

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material facts as alleged by Plaintiffs were not only substantiated by Defendants, but Defendants provided additional facts that further underscore the need for relief. *See Adams*, 2016 WL 10492102, at *13 (the court's conclusion that it had an insufficient factual basis to enter a protective order was "based on several factors, including the overreaching nature of the claims advanced by the inmates, the lack of credible evidence to support many of their claims, and the evidence proffered by the Defendant which directly rebuts many of their claims.").

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Certificate of Service

I hereby certify that on the 12th day of April, 2025, 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.

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