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 **CLASS ACTION**

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT REGARDING PROPOSED CLASS REPRESENTATIVES AND NOTICE

Plaintiffs submit the following response to Defendants' Statement Regarding Proposed Class Representatives and Notice, ECF No. 313.

I. Defendants' "Renew[ed] . . . Objection" to the Court's Class Certification Order Is Procedurally Improper and Should Be Rejected on the Merits.

Defendants' response to Plaintiffs' Statement is not a response to Plaintiffs' plan of class notice, but rather a backdoor attempt to relitigate the merits of the Court's class certification decision. As Defendants acknowledge, the Court has already considered the parties' arguments with respect to certification and "held that 'the plaintiffs have sufficiently established Rule 23(a)'s [requirements] for all four proposed classes.'" ECF No. 313, at 1 (quoting ECF No. 299, at 27). Defendants nonetheless argue that the certification decision is wrong; that Plaintiffs failed to establish typicality, adequacy, and ascertainability under Rule 23; and that the Court should reconsider its decision *sua sponte*. *Id.* at 2–3 & n.1. Defendants' request should be rejected.

As a threshold matter, Defendants' submission—styled as a response to Plaintiffs' proposed plan of notice—is not an appropriate vehicle to object to the Court's certification

decision. Defendants, of course, could have filed a motion for reconsideration or petitioned the Court of Appeals for interlocutory review. *See* Fed. R. Civ. P. 54(b); Fed. R. Civ. P. 23(f). Defendants did neither. Having decided not to avail themselves of the appropriate procedural mechanisms for addressing their concerns, Defendants should not be allowed to hijack a discussion about how to provide adequate notice to the members of the certified classes to instead relitigate issues related to whether those classes should have been certified in the first place.

Even if Defendants' request were procedurally proper, there is no basis for the Court to reconsider its decision. Motions for reconsideration "are disfavored," *Warner v. Centra Health, Inc.*, 2020 WL 9598944, at *1 (W.D. Va. Dec. 21, 2020), and will be granted "only sparingly," *Downie v. Revco Disc. Drug Ctrs., Inc.*, 2006 WL 1171960, at *1 (W.D. Va. May 1, 2006). To prevail, a movant must point to "(1) an intervening change in the law, (2) new evidence that was not previously available, or (3) [the need to] correct[] a clear error of law or to prevent manifest injustice." *Wootten v. Virginia*, 168 F. Supp. 3d 890, 893 (W.D. Va. 2016). A motion for reconsideration is emphatically "*not* . . . an opportunity to relitigate issues already ruled upon because a party is dissatisfied with the outcome." *Regan v. City of Charleston, S.C.*, 40 F. Supp. 3d 698, 702 (D.S.C. 2014) (emphasis added).

Here, Defendants do not satisfy the reconsideration standard, nor do they even attempt to do so. Defendants do not point to any "intervening change in the law" or "new evidence" that would merit reconsideration. Nor is it necessary for the Court to revise its decision to correct "a clear error of law or to prevent manifest injustice." Instead, Defendants' submission is simply an "attempt[] to put a finer point on their old arguments and dicker about matters decided adversely to them." *Evans v. Trinity Indus., Inc.*, 148 F. Supp. 3d 542, 546 (E.D. Va. 2015) (internal

quotation marks, alterations, and citation omitted). Defendants' "renew[ed] . . . objection" should be rejected.

II. Messrs. Mukuria and Wall Are Qualified to Serve as Class Representatives.

Defendants object to the appointment of Messrs. Mukuria and Wall as class representatives because, in their view, "[Mr.] Mukuria is neither a typical nor an adequate representative of the Constitutional Violation classes, and [Mr.] Wall is neither a typical nor an adequate representative of the Disabilities Classes." ECF. No. 313, at 1. Defendants' arguments are meritless.

With respect to Mr. Mukuria, Defendants object to his appointment as a class representative because he purportedly "completed the Step-Down Program in 2020 and has been housed in a Maryland correctional facility since 2021." *Id.* at 1–2. But neither of these facts disqualifies Mr. Mukuria from representing the classes. That Mr. Mukuria is currently housed at a Maryland facility does not preclude him from serving as the representative of the Constitutional Violation Damages Class, which is defined as "[a]ll persons who *at any time from August 1, 2012, to the present* . . . have been subject to any phase of the Step-Down Program." ECF No. 299, at 36 (emphasis added). Nor does it disqualify him from serving as the representative for the Constitutional Violation Injunction Class. As Plaintiffs explained in their opening Statement, the fact that a class representative is no longer subject to the program or practice he challenges does not render his claim moot if the claim is "capable of repetition, yet evading review." ECF No. 310, ¶ 4 (quoting *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). Here, Mr. Mukuria's claim plainly meets this standard, particularly because VDOC has discretion to remove a prisoner from the Step-Down Program at any time. *Id.* Tellingly,

Defendants make no attempt to distinguish *Gerstein* and its progeny in their response to Plaintiffs' Statement.

Defendants' arguments with respect to Mr. Wall are even more spurious. Indeed, this Court has already held that Mr. Wall "ha[s] sufficiently established that [he is a] member of the disabilities classes [that he] purport[s] to represent." ECF No. 299, at 26. In response to Plaintiffs' Statement, Defendants claim that Mr. Wall is an inadequate class representative because he "has never received a mental-health classification of MH-2S or higher." ECF No. 313, at 2. But such classification is not a prerequisite to class membership. To the contrary, the Court has held that the Disabilities Classes "likely encompass[] individuals who are classified by . . . VDOC at even lower mental health classification codes." ECF No. 299, at 16. That Mr. Wall has not been classified as MH-2S or higher is not a basis for denying his application to serve as a class representative.

Finally, Defendants argue that Messrs. Mukuria and Wall cannot serve as class representatives because they are insufficiently familiar with the Step-Down Program. ECF No. 313, at 2. This hardly deserves a response. Messrs. Mukuria and Wall have spent a collective 16.5 years in the Step-Down Program and are thus intimately aware of the many ways in which the program violates inmates' constitutional rights. To the extent that Defendants are concerned that Messrs. Mukuria and Wall will not be able to testify about *current* conditions within the Step-Down Program, this is no basis to reject them as representatives. *See Scott v. Clarke*, 61 F. Supp. 3d 569, 590 (W.D. Va. 2014) (holding that satisfaction of Rule 23's adequacy requirement "turns on two inquiries—whether the named plaintiffs have interests conflicting with those of absent class members; and whether class counsel are competent to conduct the class action and fairly represent the interests of the class"). Plaintiffs will present many other witnesses at trial—

including both fact and expert witnesses—who can testify about current conditions. Contrary to Defendants' suggestion, there is no requirement that Plaintiffs prove their entire case through the testimony of their officially designated class representatives. *See, e.g.*, *Gunnells v. Healthplan Servs., Inc.*, 348 F.3d 417, 430 (4th Cir. 2003) ("It is hornbook law . . . that in a complex lawsuit . . . the representative need not have extensive knowledge of the facts in order to be [an] adequate representative.").

III. The Proposed Notice Satisfies the Requirements of Due Process.

Defendants next contend that that Plaintiffs' proposed form of Notice is deficient because it "does not include elements typically required of a class notice" or "explain how [it] satisfies those requirements." ECF No. 313, at 3. Defendants misunderstand the relevant standard.

To be clear, Plaintiffs' proposed Notice satisfies each of the requirements specified in Federal Rule of Civil Procedure 23(c)(2)(B). Specifically:

- The Notice describes "the nature of the action." Fed. R. Civ. P. 23(c)(2)(B)(i). It informs class members that this is a "class action lawsuit" that "challeng[es] the Virginia Department of Corrections' and individual defendants' (collectively, 'VDOC') policy and practice of holding people in long-term solitary confinement." ECF No. 310-1, ¶ 2.

- The Notice sets forth "the definition[s] of the class[es] certified." Fed. R. Civ. P. 23(c)(2)(B)(ii). The Notice lists the definitions of each of the four classes that were certified by the Court. ECF No. 310-1, ¶ 7.

- The Notice describes the "class claims, issues, or defenses." Fed. R. Civ. P. 23(c)(2)(B)(iii). The Notice states that Plaintiffs' lawsuit alleges that "VDOC has violated incarcerated persons' rights by using vague and subjective criteria to evaluate whether and how those persons may (or may not) progress through the Step-Down Program," that "VDOC's Step-Down Program subjects incarcerated persons to cruel and unusual punishment," and that "VDOC has violated the [Americans with Disabilities Act] and [the Rehabilitation Act] by holding incarcerated persons in solitary confinement who have mental health disabilities." ECF No. 310-1, ¶ 3.

- The Notice informs class members that they "may enter an appearance through an attorney if the member so desires." Fed. R. Civ. P. 23(c)(2)(B)(iv). Specifically, the

Notice states: "[Y]ou may . . . enter an appearance in this case through another attorney of your choice, but this will be at your own expense." ECF No. 310-1, ¶ 12.

- The Notice states that "the court will exclude from the class any member who requests exclusion." Fed. R. Civ. P. 23(c)(2)(B)(v). Specifically, the Notice states: "IF YOU DO NOT WISH TO BE A MEMBER OF A DAMAGES SUB-CLASS, YOU MAY OPT OUT OF THAT SUB-CLASS." ECF No. 310-1, ¶ 13.

- The Notice discloses "the time and manner for requesting exclusion." Fed. R. Civ. P. 23(c)(2)(B)(vi). The Notice states: "To opt out [of the Class], you must mail a written request clearly stating that you wish to opt out of one or more of the Damages Sub-Classes, sent no later than" a date to be specified by the Court, "and addressed to" Class Counsel. ECF No. 310-1, ¶ 13. The Notice further states that requests for exclusion "must state your name and address, and include the name and number of this case." *Id.*

- Finally, the Notice discloses "the binding effect of a class judgment on [class] members." Fed. R. Civ. P. 23(c)(2)(B)(vii). Specifically, the Notice states: "IF YOU DO NOTHING, YOU WILL REMAIN A MEMBER IN ONE OR MORE OF THE DAMAGES SUB-CLASSES. You will then be eligible to share in the benefits of any Court-approved settlement or judgment favorable to any Damages Sub-Class(es) of which you are a member. You will also be bound by any judgment if VDOC wins on the damages claims." ECF No. 310-1, ¶ 11.

Nothing more is required under the Federal Rules of Civil Procedure. While the Federal Judicial Center provides "suggestions" about additional information that can be included in a class notice, such suggestions "do not supplant the notice requirements set out in Rule 23." *Good v. Am. Water Works Co.*, 2016 WL 5746347, at *8 (S.D. W.Va. Sept. 30, 2016).

Defendants' additional objections to the proposed Notice are equally meritless.

First, Defendants are wrong that the Notice is not "written in plain English" and is "[in]comprehensible." ECF No. 313, at 8. The proposed Notice describes the classes and claims using language that is substantially identical to the Court's class certification order. *Compare* ECF No. 299, at 11 (plaintiffs allege that "defendants have violated inmates' liberty interest in avoiding long-term solitary confinement by using vague and subjective criteria . . . .") *with* ECF No. 310-1, ¶ 3 (plaintiffs allege that "VDOC has violated incarcerated persons' rights by using vague and subjective criteria . . . ."). Surely this language is "comprehensible" to Defendants,

and Plaintiffs submit that it will be "comprehensible" to class members. In any event, if any class member has questions about the Notice, they may contact Class Counsel, as the Notice directs them. ECF No. 310-1, ¶ 14 ("If you have questions, please contact Class Counsel by mail or telephone using the contact information below . . . .").

Second, Defendants' complaint that the Notice is deficient because it does not separately identify members of the Disabilities Damages Class, ECF No. 313, at 4, is misplaced. As Defendants acknowledge, the proposed Notice will be sent to all members of the Constitutional Violation Class, which, by definition, includes all members of the Disabilities Damages Class. Because "every member of the Disabilit[ies] Damages Class is also a member of the Constitutional Violation Damages Class," Plaintiffs have ensured that all members of the Disabilities Damages Class will be sent the Court-approved Notice. *Id.* at 5.

Third, Defendants contend that because Plaintiffs do not intend to send a *separate* notice to Disabilities Damages Class members, certain "recipients of the proposed Notice will wrongly assume they are members of the Disabilities Damages Class." *Id.* at 6. This concern is misplaced. The purpose of providing notice of a pending class action is to inform class members that someone has filed a lawsuit on their behalf, and that, if they do not want another person to litigate their claims, they may opt out of the certified classes. *See, e.g.*, *Phillips Petrol. Co. v. Shutts*, 472 U.S. 797, 812 (1985) (holding that "notice should describe the action and the plaintiffs' rights in it" and provide an absent plaintiff "with an opportunity to remove himself from the class by executing and returning an 'opt out' . . . form"). Where a list of recipients includes all known class members, the fact that certain individuals on the list may *not* be class members (and thus need not receive notice) is unimportant. *See, e.g.*, *Marcaz v. Transworld Sys., Inc.*, 201 F.R.D. 54, 61 (D. Conn. 2001) (approving plan of notice that proposed sending notice

to an overinclusive list of recipients because the list "indisputably contain[ed] the universe of class members"). After all, non-class members who receive notice are not entitled to recover from a judgment or settlement simply because they received notice. Nor is there any harm if such individuals purport to opt out of a class of which they are not a member.

That Defendants' concerns are misplaced is underscored by the fact that it is highly unlikely that certain individuals will want to opt out of the Constitutional Violation Damages Class while remaining in the Disabilities Damages Class (or vice versa). That is the only scenario in which there could be any potential issue with serving a single class notice, yet Defendants do not explain why a class member would want to opt out of one class but not the other, and Plaintiffs cannot think of any. In any event, the fact that an individual may mistakenly think he is a member of the Disabilities Damages Class and opt out of that class is immaterial, as he would not be able to recover on the disabilities claims anyway.[1]

Defendants' real objection to the Plaintiffs' plan of notice seems to be that Plaintiffs have not supplied Defendants with a list of Disabilities Damages Class members so that Defendants "may develop affirmative defenses" to Plaintiffs' claims. Declaration of William E. O'Neil ("O'Neil Decl."), Ex. 1 (5/10/23 Email from T. Waskom to W. O'Neil). But this is a problem of Defendants' own creation. As the Court explained in its class certification decision, the members of the Disabilities Classes "can be easily identified" based on "VDOC records, including medical records and mental health services progress notes." ECF No. 299, at 17. For

[1] Defendants also contend that Plaintiffs must separately identify members of the Disabilities Damages Class because Plaintiffs must "tell the Court the percentage of each class that received individual notice." ECF No. 313, at 6. But there is no such requirement under the Federal Rules. To the contrary, the Fourth Circuit has made clear that Plaintiffs need not "identify every class member at the time of class certification." *Krakauer v. Dish Networks, L.L.C.*, 925 F.3d 643, 658 (4th Cir. 2019) (cleaned up).

this reason, Plaintiffs twice served discovery requests—first in 2019 and again in 2021—seeking class members' medical records so that they could identify putative class members with mental health disabilities. Defendants objected on the basis that, at the time the requests were served, a class had not been certified. *See, e.g.*, O'Neil Decl., Ex. 2 (Defs.' Objs. To Pls.' First Set of RFPs), at 20–21 (refusing to produce documents "relating to the mental health of Class Members" on the ground that "class certification might be denied"). And Magistrate Judge Sargent agreed, denying Plaintiffs' motion to compel on that basis. ECF No. 296. But Magistrate Judge Sargent did *not* hold that Plaintiffs were barred from pursuing their request for medical records *after* certification. Indeed, Magistrate Judge Sargent has consistently indicated that Plaintiffs are entitled to additional discovery after the class certification stage. *See, e.g.*, O'Neil Decl., Ex. 3 (1/9/23 Hr'g Tr.), at 6:2–7 (indicating that "if Judge Jones should certify the classes as defined now by the plaintiffs," the Court "could allow additional discovery"); *id.* at 56:21–57:8 (explaining that it was "too early to rule on" the parties' discovery disputes because "it's very difficult for me to properly craft what the discovery will be when I don't yet know what, if any, class is going to be certified"). Now that a class has been certified, Defendants should be ordered to respond to Plaintiffs' requests for class members' medical records.

Even in the absence of an award of additional discovery, Defendants should be required to provide the medical records necessary to identify Disabilities Class members. As the Supreme Court explained in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978), the Federal Rules of Civil Procedure "authorize[] a district court to order a defendant to provide information needed to identify class members to whom notice must be sent." *Id.* at 355. As the Court has already explained, members of the Disabilities Classes "can be easily identified" based on

"VDOC records." ECF No. 299, at 17. Now that a class has been certified, Defendants should be required to produce them.

IV. Plaintiffs' Proposed Plan of Notice Should Be Approved.

Finally, Defendants object to Plaintiffs' proposed plan of notice, pursuant to which Plaintiffs ask the Court to approve (i) VDOC's distribution of the Court-approved Notice to class members within VDOC custody; and (ii) Plaintiffs' distribution of the Court-approved Notice to class members outside of VDOC's custody. ECF No. 310, ¶¶ 8–10. Defendants' objections to this plan of notice are unavailing.

As a threshold matter, Defendants have repeatedly refused to meet and confer with Plaintiffs in good faith over a proposed plan of notice. For example, on April 21, 2023, Plaintiffs requested that Defendants provide them with lists of class members who are "currently in VDOC custody," who are "state-responsible but who are currently incarcerated in facilities other than VDOC facilities," and who are "no longer in VDOC custody." O'Neil Decl., Ex. 4 (4/21/23 Email from W. O'Neil to M. Eckstein). Defendants refused to provide that information. O'Neil Decl., ¶ 8. Plaintiffs then provided Defendants with lists of class members that *they* generated and asked Defendants to confirm that their lists accurately reflect class members within and without VDOC custody. O'Neil Decl., Ex. 5 (5/4/23 Email from W. O'Neil to T. Waskom). Once again, Defendants refused to confirm the lists' accuracy. O'Neil Decl., Ex. 6 (5/12/23 Email from D. Fairbanks to W. O'Neil). Defendants' refusal to engage in the identification of class members or assist in the notice process flies in the face of their obligations under binding Supreme Court precedent. *See, e.g.*, *Oppenheimer Fund*, 437 U.S. at 355.

In any event, Plaintiffs' proposed plan of notice is adequate. As explained in their Statement, Plaintiffs propose that Defendant VDOC "distribute the Court-approved Notice to

class members . . . currently in [its] custody," and that Plaintiffs mail the Court-approved Notice to class members outside of VDOC's custody, with "VDOC supplying class members' last known addresses." ECF No. 310, ¶¶ 8–11. Contrary to Defendants' assertion, there is not some unaddressed third category of class members "in [the] custody of other states, under the Interstate Compact." ECF No. 313, at 8. As Defendants are well aware, Virginia prisoners housed outside of the Commonwealth pursuant to the Interstate Compact remain *Virginia* prisoners. *See* Va. Code Ann. § 53.1-216 (explaining that any interstate compact into which Virginia enters must specify that any inmates Virginia sends to other States "shall at all times be subject to the jurisdiction of the sending state" and that "the receiving state [shall] act . . . solely as agent for the sending state"). In any event, Plaintiffs have informed Defendants that they will agree to mail the Notice to class members held in non-VDOC facilities if VDOC informs Plaintiffs who these class members are and in what facilities they reside. O'Neil Decl., ¶ 11. To date, Defendants have refused to provide such information. *Id.*

Defendants also complain that Plaintiffs do "not intend to retain an administrator to oversee [class] notice." ECF No. 313, at 8. But an administrator is not necessary in this context. The four Classes comprise fewer than 800 individuals, the vast majority of whom reside in VDOC facilities. Accordingly, Defendants need only mail notice to a few hundred class members—a task they are more than capable of handling, and one that would be made overly complicated and expensive by retaining a class notice administrator.

Defendants also claim that Plaintiffs' proposal to "locate class members' last known addresses via skip-tracing or a similar service . . . is not a [viable notice] plan." *Id.* Respectfully, it *is* a plan—and one that has been endorsed by federal courts across the country. *See, e.g.*, *Bellinghausen v. Tractor Supply Co.*, 306 F.R.D. 245, 253–54 (N.D. Cal. 2015) (holding that

"system of providing notice" that relied on "skip trac[ing]" to determine class members' addresses "was reasonably calculated to provide notice to class members and was the best form of notice available under the circumstances"); *O'Connor v. AR Resources, Inc.*, 2010 WL 1279023, at *6 (D. Conn. Mar. 30, 2010) (holding that plan of notice in which "class counsel will be responsible for the administration of the class, including mailing notices to the class members [and] skip-tracing to locate class members whose notices are returned without forwarding addresses . . . is the best notice practicable under the circumstances"); *Ruiz v. Trugreen Landcare, LLC*, 2008 WL 11338881, at *3 (C.D. Cal. 2008) (endorsing plan of notice in which plaintiffs agreed to "[p]erform standard skip tracing on all Class Members whose initial mailing is returned 'undeliverable'").

In sum, Defendants' objections to Plaintiffs' plan of notice are meritless and should be rejected.

CONCLUSION

For all of these reasons, Plaintiffs' proposed Notice and plan of notice should be approved.

Dated: May 25, 2023

Respectfully submitted,

/s/ Megan A. Crowley

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