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

Defendants submit this reply to Plaintiffs' Response to Defendants' Statement Regarding Proposed Class Representatives and Notice (ECF No. 316-1). This reply addresses only arguments made for the first time in Plaintiff's Response.

First, Plaintiffs assert that Defendants' statement was a motion for reconsideration in disguise, because Defendants renewed their objection to the typicality and adequacy of the named Plaintiffs (including Mukuria and Wall) to represent the classes. Plaintiffs' assertion is incorrect. In its April 12, 2023 class certification ruling, the Court directed Plaintiffs to select a single representative for each class, and "advise the court … of such selections and the qualifications for class representative of each such person selected, for approval and designation by the court." ECF No. 299 at 42. The Court further authorized "Defendants [to] respond to class counsel's suggested class representatives." *Id*.

That is all Defendants did—"respond to class counsel's suggested class representatives." Defendants do not agree Mukuria and Wall are adequate class representatives; that was Defendants' position before the Court ruled on class certification, and it remains Defendants'

position today. In explaining why Mukuria and Wall are not "qualifi[ed]," and why the Court should not "approv[e] and designat[e]" them as class representatives, Defendants were doing exactly what the Court explicitly authorized—responding to class counsel's statement.

Plaintiffs complain that Defendants' brief was "not an appropriate vehicle" to make the points Defendants made, and was not "procedurally proper." Pls.' Stmt. on Class Reps. and Notice at 1-2, ECF No. 316-1. But Defendants are under no obligation to agree with or accede to Plaintiffs' recommendation—to the contrary, Defendants arguably had to stand on their objection to preserve the issue for appeal. Regardless, Defendants had a right to respond to Plaintiffs' arguments about why, in their view, Mukuria and Wall are "qualifi[ed]" to serve as class representatives (they are not). ECF No. 299 at 42.

Second, Defendants are right that Mukuria and Wall are not adequate class representatives. Defendants respond here to the only new argument Plaintiffs make: the suggestion that the Court conclusively determined Wall is disabled. ECF No. 316-1 at 4.

At the class certification stage, the Court was entitled to determine mixed questions of law and fact. But at trial, Wall will have to meet his burden of proving disability (as will every other purported member of the Disabilities classes). "To make out a violation of the ADA, a plaintiff must show that: (1) he has a disability…." *Richardson v. Clark*, 52 F.4th 614, 619 (4th Cir. 2022) (citing *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005)).[1] If Wall fails to meet that burden, he will lose his ADA and Rehabilitation Act claims. If he is class representative, the rest of the class will lose along with him. Class Counsel selected Wall, knowing his class membership will be in dispute at trial. The Court should

[1] *See also Halpern v. Wake Forest Univ. Health Sciences*, 669 F.3d 454, 461 (4th Cir. 2012) (Rehabilitation Act "require[s] plaintiff to demonstrate the same elements [as the ADA] to establish liability").

exercise its independent judgment on whether Class Counsel are putting the interests of the Disabilities classes at risk for some unknown litigation advantage.

Third, Plaintiffs argue that their proposed class notice includes information identified in Rule 23(c)(2)(B), and "[n]othing more is required." ECF No. 316-1 at 6. Plaintiffs concede that the Federal Judiciary Center (FJC) developed and published a checklist and guide for class notices, which Class Counsel ignored. *Id*. Plaintiffs assert they were right to do so, citing *Good v. American Water Works Co.*, 2016 WL 5746347, at *5 (S.D. W.Va. Sept. 30, 2016), for the proposition that the FJC's guidance does not "supplant the notice requirements set out in Rule 23." But Plaintiffs miss a critical point in *Good*—that "[w]hile Rule 23 provides the general process to follow in providing notice to absent class members, it does not purport to detail every requirement necessary to satisfy due process."[2] *Good*, 2016 WL 5746347, at *5 (citing *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1104 (5th Cir. 1977)).

Class counsel may be satisfied that after cutting-and-pasting language from the Court's opinion into a class notice, "nothing more is required." Nevertheless, the Court should consider if the average recipient of the notice will understand, for instance, whether he "suffer[s] from mental health disabilities and [is] qualified as [an] individual[] with disabilities under either the Americans with Disabilities Act or the Rehabilitation Act." Proposed Notice at 3, ECF No. 310-1. Class Counsel may know the criteria for "qualified individuals" under the ADA and Rehabilitation Act off the tops of their heads. The potential class members likely do not.

[2] The Court should also bear in mind the procedural posture of *Good*. There, the parties agreed to a settlement class, and the parties and the Court agreed on a class notice. *Id*. at *2. Then, on the last day before the opt-out/objection deadline for the class settlement, a class member filed an objection attacking the class notice. *Id*. Thus, the Court was considering the sufficiency of a notice it had already approved, to which both parties had agreed, and which class members had received.

Fourth, Plaintiffs' brief scratches the surface of the problems with their plan to notify potential members of the Disabilities classes. Plaintiffs assert it is not their fault they do not know who is in the Disabilities classes, and that perhaps they could know, if Defendants had produced every institutional file and medical record for hundreds of inmates since 2012. ECF No. 316-1 at 8. Plaintiffs demanded those materials during fact discovery, and Magistrate Judge Sargent denied their request on burden grounds. *See* ECF No. 296. Plaintiffs did not object to Magistrate Judge Sargent's decision, but now they explicitly ask the Court to reverse Magistrate Judge Sargent's ruling and order Defendants to produce the records she denied. ECF No. 316-1 at 9. Having opened their brief by claiming Defendants were impliedly seeking reconsideration of the class certification order, Plaintiffs close their brief by expressly seeking reconsideration of a discovery order. The Court should decline to do so, because Plaintiffs' request is untimely, improper, and unsupported by any rebuttal of Defendants' evidence regarding burden. *See* Fed. R. Civ. P. 72 (a) (objections to magistrate judge's non-dispositive pretrial rulings must be filed within 14 days).

Plaintiffs fall back on the language from the class certification decision that "the members of the Disabilities Classes 'can be easily identified' based on VDOC records, including medical records and mental health services progress notes.'" *Id*. at 8 (quoting ECF No. 299 at 17). Plaintiffs do not explain to the Court the nature and extent of the records they believe necessary for that process. Class Counsel identified some of the types of documents in an email to Defendants' counsel.[3] Class Counsel stated that their

[3] Class Counsel could have easily provided the list of these exemplar documents to the Court: the email at issue was part of a lengthy email exchange between Class Counsel and Defendants' counsel; Class Counsel included other portions of that exchange as Exhibit 1 to the O'Neil Declaration (ECF No. 317-1, Exh. 1, Pageid# 8084-89).

> review of the documents that were produced for the class sample members indicates that ***at least*** the following documents would contain relevant information that could be used to identify the remaining Disability Damages Class members:
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> - "At Risk" Offender Notification (MH14A) (e.g., VADOC-00066737);
> - Mental Health Serious Mental Illness Determination forms (e.g., VADOC-00064873);
> - Mental Health Clinical Supervisor – External Review (e.g., VADOC-00067623);
> - Mental Health Coding Classification Update (OP730.2, attachment 4/MH18) (e.g., VADOC-00064124);
> - Mental Health Screening (730_F12/MH 14) (e.g., VADOC-00064138);
> - Mental Health Appraisal (MH17) (e.g., VADOC-00065835);
> - Mental Health Monitoring (e.g., VADOC-00064869);
> - Psychiatry Progress Notes (e.g., VADOC-00158639);
> - Intrasystem Medical Transfer Review (Form DOC 726-B); and
> - Change of Medical Classification - C&R 7a, 270.2 att.2

See 5/16/2023 W. O'Neil Email to T. Waskom, attached as Exhibit 1 (emphasis added). This is Plaintiffs' proposed *starting point* for determining whether *each* Constitutional Violation Damages Class member is also a member of the Disabilities Damages Class. Defendants already have explained to Plaintiffs (and this Court) the hundreds of hours and tens of thousands of dollars it would require to collect, review and produce such documents, which primarily are maintained in hard copy on site at prison facilities. *See, e.g.*, ECF Nos. 313, 282. The inordinate burden of the task was a basis for Judge Sargent's decision rejecting Plaintiffs' motion to compel such information. ECF No. 296.

Plaintiffs refuse to acknowledge that in this case, determination of Disabilities class membership will require each potential class member to *prove* an element of his claim to a fact-finder. Instead, Plaintiffs' counsel proposed that the parties should use the thousands of documents they demand to "work collaboratively … in identifying members of the Disabilities Damages Class." *Id*. Defendants have cooperated in the litigation process, but they are not required to "work collaboratively" against themselves in proving elements of Plaintiffs' merits

case. Defendants have no greater obligation to do that then they have to waive their objections to Plaintiffs' proposed class representatives.

Dated: June 6, 2023

Respectfully submitted,

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