UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELLIOTT ABRAMS, CRAIG SEEGMILLER, VINCENT GLASS, ROBERT REEVES, and LAMONT HEARD, individually, and on behalf of all others similarly situated,

Plaintiffs,

V

WILLIS CHAPMAN, NOAH NAGY, MELINDA BRAMAN, BRYAN MORRISON, and HEIDI WASHINGTON,

Defendants.

No. 2:20-cv-11053

HON. MARK A. GOLDSMITH

MAG. R. STEVEN WHALEN

DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTIONS (R.41 AND R.42)

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DEFENDANTS' RESPONSE TO PLAINTIFFS' EMERGENCY MOTIONS (R. 41 AND R.42)

Plaintiffs have filed two "emergency motions," to which this brief responds: (1) Plaintiffs' emergency motion for expedited discovery and expedited evidentiary hearing (R. 41, "Expedited Discovery Motion") and (2) Plaintiffs' emergency motion to withdraw stipulation and order (R. 28), requiring response to motion for class certification. (R. 42, "Motion Related to Class Certification Stipulation.") Defendants oppose the first motion, in part, while voluntarily agreeing to some limited, expedited discovery prior to an evidentiary hearing, provided that the ability to obtain limited pre-hearing discovery is reciprocal. Defendants oppose the second motion outright as Plaintiffs have failed to provide a valid basis for withdrawing the prior stipulation and order (R. 28), and there is no resulting prejudice to Plaintiffs by adhering to this previously stipulated order.

I. Defendants' Response to Expedited Discovery Motion.

A. Points of potential agreement.

In seeking "limited expedited discovery" in advance of the evidentiary hearing on Plaintiffs' pending motion for temporary restraining order (TRO), Plaintiffs would impose significant and time-consuming discovery burdens on Michigan Department of Corrections (MDOC) officials already stretched thin in addressing this unprecedented pandemic, while still attempting to carry out its normal day-to-day operations. Most of the limited discovery being sought is unnecessary to the immediate needs of this case and will not meaningfully assist this Court in its deliberations on the TRO motion.

That said, Defendants voluntarily agree to limited depositions (i.e. no more than two hours in length) of the two individuals Plaintiffs specifically requested: namely Director Heidi Washington and Dr. Carmen McIntyre, each of whom participated in the settlement conference in this matter last Thursday and have supplied detailed affidavits in this matter outlining MDOC's COVID-19 response efforts. Defendants obviously intend to call these individuals as witnesses at the evidentiary hearing. Thus, Defendants do not oppose Plaintiffs'

request to depose these two individuals prior to hearing, so long as Defendants are permitted to depose whoever Plaintiffs intend to call as experts at the hearing for a comparable length of time. It bears emphasis, however, that these two MDOC officials are carrying an extraordinary amount of responsibility already in directing and guiding MDOC's COVID-19 response efforts, and it would be counter-productive to impose unnecessary time burdens upon them at this time, especially given their participation in the evidentiary hearing.

Second, Plaintiffs have requested "a listing of the designation of pole barns, the number of cubes in each, the number of bunk beds in each, and the number of inmates in each" (R. 41, ¶6). Defendants have no objection to voluntarily producing this information ahead of the hearing, as it is reasonably accessible. Defendants propose to produce this information to Plaintiffs by Tuesday, June 9, 2020.

Third, Defendants have no objection to providing the names of witnesses they intend to call at the evidentiary hearing and a brief summary of the anticipated subject areas of their testimony, again, provided this requirement is reciprocal. Defendants propose that both sides make this disclosure at least three days prior to the hearing.

B. Points of disagreement.

Defendants object to the remainder of Plaintiffs' requests for expedited discovery as unnecessary prior to the hearing, as they are unlikely to produce evidence material to this Court's deliberations and they are overly burdensome and prejudicial to the Defendants in managing time constraints during this critical time. This is especially true with respect to Plaintiffs' requested site inspection of eight cell blocks at former Jackson Prison and the "prior infirmary/hospital located inside Jackson." (R. 41, ¶6). During the settlement conference, MDOC's Director addressed the issue of reopening certain facilities and explained why these facilities were either unavailable or not viable options, and Defendants had planned to address this in a sur-reply to Plaintiffs' TRO motion, which Plaintiffs opposed. In any event, Plaintiffs seem to imply that MDOC is not being transparent or misrepresenting the facts in this regard, which is untrue.

The Expedited Discovery Motion seeks to inspect eight cellblocks of the Jackson Prisons. (R. 41, ¶6) (listing cellblocks 3, 4, 5, 6, 7, 8, 11 and 12, plus the now demolished infirmary/hospital). The attached Affidavit of Acting Assistant Deputy Director (ADD) Jeremy Bush (Ex.

A) explains why these cellblocks cannot, realistically, be reopened, due primarily to the extreme renovation and upgrade costs that would be associated with restoring these units to a basic industry standard operational and security level.[1] Because most of these units have not housed prisoners for decades, renovation and upgrades would include everything from plumbing, HVAC, re-installing or upgrading basic utilities, installing new security systems and related computer technology, and individual cell upgrades (i.e. locking mechanisms, fixtures and basic equipment). Further, none of these units are currently set up to receive food service, healthcare, mental-health counseling, classroom training, or other programming or services. It is estimated that to bring any one of these units on-line would cost between three and four million dollars, at a minimum, and that this would take at least six months to a year to accomplish. Additionally, in order to meet current security standards, a new perimeter fence (akin to what appears around the nearby RGC Reception Center, see diagram attached to Affidavit of Jeremy Bush) would need to be installed around

[1] Assuming no objections from Plaintiffs' counsel and subject to the Court's permission to file under seal, Defendants are prepared to provide an aerial map identifying the locations of the subject housing blocks and photos illustrating the current conditions within those housing blocks.

these units. That would involve a DTMB design, bidding, and construction process that would take over a year to complete for the fence alone. As for the infirmary and hospital Plaintiffs refer to, those have already been demolished. (Ex. A, Affidavit of Jeremy Bush).

Defendants are prepared to provide further evidence and witness testimony addressing this issue at the evidentiary hearing. However, based on the affidavit of ADD Jeremy Bush, these cellblocks cannot realistically be reopened given the many physical renovations and upgrades required to achieve basic security and industry standards, costs involved, time to complete the construction design and bidding process, and related staffing requirements. Moreover, even if these many obstacles could be overcome, none of this could happen in time to provide any "emergency relief" in response to COVID-19, and MDOC does not have staff for these additional units/facilities. For these reasons, Defendants respectfully submit that if time is truly of the essence, as Plaintiffs suggest, it should not be spent making day trips to Jackson with experts to photograph currently defunct housing units, while tying up Defendants' precious time during a pandemic. To impose this additional burden upon Defendants at this juncture would be

disproportional to the immediate needs of the case and will not meaningfully assist this Court in its deliberations.

Defendants also oppose Plaintiffs' remaining expedited discovery requests; specifically, Plaintiffs' requests for "any writings relating the grievance process that were issued since December 1, 2019" and "all writings in relation to the testing of prison staff." (R. 41, ¶6.) First, these requests are very vague, as currently worded, which makes any response extremely difficult. Moreover, there have been no formal changes in MDOC's Policy Directives or Operating Procedures concerning grievances related to COVID-19, and to the extent any changes are being considered or discussed in this regard, they have not been made publicly available, and concern internal policy decisions. To the extent this Court has questions as to how COVID-19 grievances are being handled, these issues can be addressed through witnesses at the evidentiary hearing.

Finally, as to "all writings in relation to the testing of prison staff," this is not only vague, but extremely overly broad, as it could refer to any and all emails or communications between MDOC officials and staff concerning staff testing, in terms of when and where testing is

being made available, how staff are being encouraged to be tested, or to information that is publicly available, such as CDC Guidelines concerning staff testing. Moreover, MDOC's website is very transparent regarding the issue of voluntary staff testing being made available through the MDOC (as opposed to staff being privately tested through their own medical providers) and Plaintiffs can readily discover how may staff per facility have been tested using MDOC resources, by reviewing MDOC's website, which is updated daily. It is no mystery that Plaintiffs are critical of the fact the MDOC has not attempted to make staff testing mandatory or a condition of employment. However, there is no need for Plaintiffs to review all internal communications concerning staff testing to understand what is and is not currently being accomplished by way of staff testing, and MDOC should not be required to dedicate valuable resources to compile this type of information, beyond what is already publicly available. To the extent this Court has questions considering the current status of staff testing, this, too, can be addressed at the evidentiary hearing.

II. Defendants' Response to Motion Related to Class Certification Stipulation.

Plaintiffs' Motion Related to Class Certification (R. 42) implies, incorrectly, that the stipulated order (R. 28) was negotiated as part of a settlement process. They state that "Plaintiffs agreed, in part, to this stipulation as to filing a response to the motion for class certification to allow flexibility in the settlement proceeding as to the application of any agreement to the MDOC's prisoners who are the proposed class members." (R. 42, ¶5). Plaintiffs further argue that "[b]ecause no aspect of a settlement could be reached, this matter is to be set for an expedited evidentiary hearing which requires Plaintiffs to reevaluate the posture of this litigation including the possible ramification of the stipulation for filing a response to class certification after the injunction motion is resolved." (*Id.*, ¶13).

Neither settlement prospects nor the "posture of this litigation" was a factor in agreeing to the subject stipulated order. Defense counsel's basis for seeking the subject stipulation, communicated by email to Plaintiffs' counsel on May 12, 2020, was short and concise. It stated, "Counsel, since the court will likely resolve most of the issues in

this matter in deciding the TRO Motion, we are seeking your agreement to allow Defendants 14 days AFTER the court decides the TRO to…respond to the Motion to Certify." Plaintiffs' counsel's response was equally concise, by so agreeing without qualification, and the stipulation was circulated, agreed to, and filed without any changes being requested by Plaintiffs' counsel.

While conceding that there is no caselaw supporting their unusual request to withdraw a prior stipulated order (R. 42, ¶10), Plaintiffs now argue that "[i]t is Plaintiff's position that it is best for this litigation that this Court resolve the class action motion at the same time as it resolves the motion for a permanent injunction." (*Id.*, ¶14). Although this shift in Plaintiffs' position is clearly related to the outcome of the settlement conference, the subject stipulated order had nothing to do with settlement. Rather, it continues to serve its intended purpose, which is to allow the parties to focus their efforts on the TRO motion, with the agreement that the Defendants would be allowed 14 days after the Court makes it ruling to respond to the motion for certification.

Plaintiffs have failed to articulate a legitimate basis for withdrawing a previously agreed upon stipulated order. Nor is there

any prejudice in requiring Plaintiffs to adhere to this stipulated order. On the other hand, requiring Defendants to now switch gears and respond to Plaintiff's motion for class certification as Plaintiffs are also pressing for expedited discovery and an expedited evidentiary hearing is prejudicial to Defendants. Furthermore, any issues or questions Plaintiffs may have regarding the application of the Court's ruling on the TRO motion to the class certification motion can be addressed by the Court in its ruling. Plaintiffs' Motion Related to Class Certification Stipulation should be denied.

Conclusion

For the reasons set forth above, Defendants request that this Court deny, at least in part, Plaintiffs' Expedited Discovery Motion, in accordance with the forgoing response, and deny Plaintiffs' Motion Related to Class Certification Stipulation.

Respectfully submitted,

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Dated: June 2, 2020

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2020, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing as well as via US Mail to all non-ECF participants.

/s/Kevin J. O'Dowd
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