IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

WILLIAM THORPE, *et al.*,

Plaintiffs,

v. CASE NO. 3:19cv00332

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

REPLY IN FURTHER SUPPORT OF DEFENDANT VIRGINIA DEPARTMENT OF CORRECTIONS' MOTION TO DISMISS

Defendant Virginia Department of Corrections (VDOC) agrees that, typically, courts do not consider extrinsic evidence when resolving the merits of a Rule 12 motion to dismiss. Equally settled, though, is the fundamental and long-standing premise that courts may take judicial notice of their own records. Otherwise, litigants would be free to selectively attach portions of relevant court filings to their pleadings and, through that deliberate omission, thereby escape the confines of Rule 12. The four corners rule was not developed to permit litigants to perpetrate a fraud upon the court, and its exceptions—such as the settled premise that courts may take judicial notice of undisputed evidence in the public record—work in tandem with that doctrine.

Because the 1997 court order vacating the consent decrees is unequivocally a judicial record of which this Court may take notice, it is properly before the Court and may be considered in the context of a Rule 12 motion to dismiss. Because VDOC has not waived its sovereign immunity, any supplemental breach-of-contract state-law claim cannot be heard in this forum.

And because Plaintiffs have not specified what accommodation they requested, that was then refused, the ADA failure-to-accommodate claim fails. For these reasons, and those expressed in more detail in VDOC's initial memorandum in support of motion to dismiss (ECF No. 19), Defendant VDOC respectfully requests that this Court grant its motion and dismiss the agency as a party to this litigation.[1]

A. Courts may take judicial notice of their own records.

Plaintiffs protest at some length that VDOC submitted "extrinsic materials" along with its motion to dismiss. But the exhibits VDOC submitted as attachments to its supporting memorandum (ECF No. 19-01 through 19-11) are, with one exception,[2] judicial records—opinions, orders, and pleadings—from this very Court. Without question, courts may take judicial notice of their own records. *See, e.g.*, *De Bearn v. Safe Deposit & Trust Co.*, 233 U.S. 24, 32 (1914); *Bienville Water Supply Co. v. Mobile*, 186 U.S. 212, 217 (1902). And it is black-letter law that courts may consider "matters of which a court may take judicial notice" in the context of resolving a Rule 12 motion to dismiss. *Tellabs, Inc. v. Makor Issues & Rights Ltd.*, 551 U.S. 308, 322 (2007) ("[C]ourts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, **and matters of which a court may take judicial notice**." (emphasis added)); s*ee also Birmingham v. PNC Bank, N.A.*, 846 F.3d 88, 92 (4th Cir. 2017). Thus, as the Fourth Circuit has recognized, judicial records may appropriately be considered in the context of a Rule 12 motion. *Brooks v. Arthur*, 626 F.3d 194,

[1] By selectively rebutting certain arguments raised in the Plaintiffs' Response in Opposition, VDOC is not abandoning any of the points raised in its initial supporting memorandum.

[2] The one exception is an excerpt from a special grand jury report that was filed, instead, in Virginia state court. (ECF No. 19-11).

200 (4th Cir. 2010); *Andrews v. Daw*, 201 F.3d 521, 524 n.1 (4th Cir. 2000); *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009).

Far from trying to make an "end-run" around the complaint, Plfs.' Mem. in Opp., at p. 3, VDOC provided the referenced, certified court orders to supplement the incomplete record Plaintiffs attached to their initial pleading. Plaintiffs cannot seriously dispute the authenticity of these certified documents, and VDOC is puzzled that Plaintiffs evidently ask this Court to refrain from considering the entire public court record pertaining to the 1981 Mecklenburg litigation.

VDOC submits, therefore, that this Court may consider the submitted judicial records in the context of resolving the instant motion to dismiss, and should reject the Plaintiffs' apparent attempt to blindfold this Court by selectively skewing the historical record of that litigation.

B. VDOC is immune from any breach-of-contract action.[3]

Plaintiffs contend that, by electing to settle the Mecklenburg litigation, VDOC "expressly waived" its Eleventh Amendment immunity, thereby enabling this Court to exercise jurisdiction over the alleged breach of the settlement agreement twenty-two years later. Plfs.' Mem. in Opp., at p. 14. First, because VDOC was not an express party to the settlement agreement, and because state corrections officials lack the authority to waive the immunity of the sovereign, there was no effective waiver of Eleventh Amendment immunity. Second, because the consent decrees were terminated at the defendants' request, any consent-to-suit in the federal courts was effectively withdrawn. VDOC may appropriately assert its immunity as a bar to this later federal action.

[3] VDOC does not abandon its other arguments regarding the legal effect that vacating the consent decrees had on the underlying settlement agreements. Rather than reiterating those points, VDOC relies on its prior briefing on that subject.

The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State." U.S. CONST. amend XI. In this manner, the Eleventh Amendment protects the "integrity retained by each state in our federal system," *Hess v. Port Authority Trans-Hudson Co.*, 513 U.S. 30, 39 (1994), and "its command cannot be disregarded," *Booth v. Maryland*, 112 F.3d 139, 143 (4th Cir. 1997).

A state's claim of Eleventh Amendment immunity raises an issue that is quasi-jurisdictional in nature. Because "a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it," the Eleventh Amendment "enacts a sovereign immunity from suit rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction." *Idaho v. Coeur D'Alene Tribe*, 521 U.S. 261, 267 (1997). That is, "[t]he Eleventh Amendment . . . does not automatically destroy original jurisdiction," but rather, "grants the state a legal power to assert a sovereign immunity defense should it choose to do so." *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998); *see also Biggs v. Meadows*, 66 F.3d 56, 60 (4th Cir. 1995) ("Eleventh Amendment immunity is not truly a limit on the subject matter jurisdiction of federal courts, but a block on the exercise of that jurisdiction.").

Also, as the Supreme Court has cautioned, "a State will be deemed to have waived its immunity only where stated by the most express language or by such overwhelming implication . . . as [will] leave no room for any other reasonable construction." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239-40 (1985) (quotations omitted). Accordingly, waiver of Eleventh Amendment immunity must be "unequivocally expressed," and all ambiguities "must be

construed strictly in favor of the sovereign." *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992) (quotations omitted).

Plaintiffs assert that Eleventh Amendment immunity is an affirmative defense that cannot be resolved in the context of a Rule 12 motion. Plaintiffs are incorrect. As the Fourth Circuit has explained, "although Eleventh Amendment immunity is not strictly an issue of subject-matter jurisdiction, neither is it merely a defense to liability." *Constantine v. Rectors & Visitors of George Mason University*, 411 F.3d 474, 482 (4th Cir. 2005). Emphasizing "the States' unique dignitary interest in avoiding suit," the Fourth Circuit has recognized the importance of "resolv[ing] Eleventh Amendment immunity questions as soon as possible after the State asserts its immunity." *Id.* Here, Defendant VDOC has timely raised its Eleventh Amendment immunity in response to the allegations of the complaint. This Court may consider the merits of that claim.

As an initial matter, even if VDOC officials somehow waived their own immunity by entering into the settlement agreements, VDOC, as an agency, was not a named party to that litigation. Any waiver of immunity, on the part of the agency itself, would have to be implied into the terms of the settlement agreements—documents to which the agency was not a signatory or party. Because the settlement agreement contains no express declaration that VDOC, itself, was waiving its Eleventh Amendment immunity with respect to any subsequent breach-of-contract action, and because the Supreme Court has expressly rejected the concept of constructive consent in the Eleventh Amendment context, the agreements did not validly waive VDOC's Eleventh Amendment immunity. *See Edelman v. Jordan*, 415 U.S. 651, 673 (1974) ("Constructive consent is not a doctrine commonly associated with the surrender of constitutional rights."); *see also Port Authority Trans-Hudson Corp.*, 495 U.S. at 305 ("The Court will give effect to a State's waiver of Eleventh Amendment immunity only where stated

by the most express language or by such overwhelming implication from the text as [will] leave no room for any other reasonable construction.").

Moreover, because state corrections officials did not have the authority to waive the VDOC's Eleventh Amendment immunity, the execution of the settlement agreements could not validly abrogate VDOC's immunity from suit. As one court has observed, although "the Virginia General Assembly has granted certain state officials the power to enter into government contracts and . . . this authority connotes the power to waive the Commonwealth's Eleventh Amendment immunity[,] [t]he court agrees with the Commonwealth that no official in the Department of Corrections . . . has the authority, under Virginia law, to waive the Commonwealth's Eleventh Amendment immunity, and thus the conduct or agreements of those officials could not establish a valid waiver." *Am. Fed'n of State, Cnty. & Mun. Employees v. Virginia*, 949 F. Supp. 438, 443 n.4 (W.D. Va. 1996), *aff'd sub nom. Abril v. Virginia*, 145 F.3d 182 (4th Cir. 1998). As the court went on to explain:

> Virginia zealously guards its sovereign immunity. Virginia courts have "consistently held" that a waiver of sovereign immunity cannot be implied and that statutory language must explicitly and expressly grant consent to suit. The Virginia General Assembly has repeatedly indicated that statutes should not be construed as waiving sovereign immunity. Given the reticence with which Virginia consents to suit in its *own* courts, this court will not accept a less explicit waiver of Eleventh Amendment immunity in federal court. Consequently, any grant of authority to waive immunity to suit in federal court must be explicit and unambiguous. Although the statutes cited by plaintiffs generally authorize certain state officials to participate in federal programs and to comply with conditions placed on that participation, the statutes do not grant authority to consent to suit in federal court. Without that authority, there can be no waiver.

Id. (citations omitted).

Finally, even if the execution of the settlement agreements validly waived VDOC's Eleventh Amendment immunity, when the consent decrees were vacated at the state's request, that request, along with the subsequent order vacating the underlying consent decrees, effectively withdrew VDOC's consent-to-suit. As the Supreme Court has explained, "[t]he contracts between a [sovereign] and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force." *Lynch v. United States*, 292 U.S. 571, 580-81 (1934). Because "consent to sue the [sovereign] is a privilege accorded," that "consent may be withdrawn," and the "sovereign's immunity from suit" thereby resurrected. *Id.* at 581-82; *see also Patchak v. Zinkle*, 138 S. Ct. 897, 912 (2018) (Ginsburg, J., concurring) (noting that the government may withdraw its consent-to-suit and, in doing so, "reinstate sovereign immunity," even as "to pending litigation").

In sum, the Eleventh Amendment immunity issue may appropriately be raised and considered in the context of a Rule 12 motion to dismiss. Because VDOC was not a party to the settlement agreements, and because state officials do not have the authority to waive the sovereign immunity of the state, execution of the settlement agreements did not constitute a valid waiver of the agency's Eleventh Amendment immunity. Finally, even if the execution of the settlement agreements somehow waived VDOC's immunity from suit, when the state moved for, and received, a court order vacating the consent decrees, that action effectively withdrew any consent-to-suit in federal court.

C. This Court lacks supplemental jurisdiction over the state-law breach-of-contract claim.

Plaintiffs assert that "VDOC's Motion . . . concedes that this Court possesses supplemental jurisdiction to enforce the Settlement Agreement." Plfs.' Mem. in Opp. at 17. Plaintiffs are categorically incorrect. Defendant VDOC argued, rather, that even if some basis

for supplemental jurisdiction could be found, VDOC was entitled to Eleventh Amendment immunity, regardless. VDOC did not, and does not, concede that this Court possesses supplemental jurisdiction over the state-law breach-of-contract action—particularly considering that Count I was not actually pled as a state-law claim. And notably, Plaintiffs do not, themselves, articulate an adequate justification for the exercise of supplemental jurisdiction, simply arguing that they believe the issue to be "conceded." *Id.*

Indeed, Plaintiffs failed to cite 28 U.S.C. § 1367, the supplemental jurisdiction statute, in their complaint, nor did they even allege that they were bringing a state-law cause of action.[4] This alone is fatal to their claim. *See, e.g.*, *Musson Theatrical v. Fed. Express Corp.*, 89 F.3d 1244, 1253-54 (6th Cir. 1996) ("Modern pleading rules may be lax, but they still require that a party plead a claim before the court decides it. . . . At a minimum, this requires a plaintiff to identify state claims as such, or to cite the supplemental jurisdiction rule at 28 U.S.C. § 1367.").[5]

D. Any breach-of-contract claim is barred by the five-year statute of limitations.

Plaintiffs contend that VDOC has "conceded" that "all Plaintiffs" have standing to enforce the settlement agreements. Again, VDOC has made no such concession. Rather, VDOC recognizes that the issue of standing involves questions of fact that are not apparent on the face of the complaint—such as whether any of these Plaintiffs were actual class members in the Mecklenburg litigation, a fact that has been alleged, at least as to some of them. VDOC has in

[4] The face of the complaint does not appear to contemplate that Count I be considered a state-law cause of action, as it is titled "Breach of Court-Ordered Settlement Agreement." Once the consent decrees were vacated in 1997, there ceased to be any "Court-Ordered Settlement Agreement."

[5] VDOC additionally notes that this Court would be justified in declining supplemental jurisdiction under 28 U.S.C. § 1367(c), on the grounds that the breach-of-contract claim "substantially predominates" over the asserted federal constitutional claims, 28 U.S.C. § 1367(c)(2), or because "exceptional circumstances" exist, 28 U.S.C. § 1367(c)(4).

no way conceded this point—rather, VDOC simply recognized that a standing argument would be inappropriate to raise in a Rule 12 motion on the present record.

Nevertheless, in an attempt to evade the statute of limitations, Plaintiffs argue that "the date that VDOC instituted the Step-Down Program lacks legal significance" for inmates who were not incarcerated at ROSP and WRSP "in 2012." Plfs.' Mem. In Opp., at 18. To the contrary, the date that the Step-Down Program was enacted is the *only* date that matters, as the complaint expressly claims that it was the decision to adopt this program that allegedly violated the settlement agreements. *See* Compl. ¶¶ 15, 130-133, 224-227.[6]

Nor is the alleged breach the type of "episodic" occurrence that would re-start the statute of limitations each time the Step-Down Program undergoes a minor policy revision. In *Hampton Roads Sanitation Dist. v. McDonnell*, 360 S.E.2d 841 (1987), the Virginia Supreme Court explained that if the allegedly wrongful act is "continuous," and essentially of a "permanent nature," then "the statute of limitations begins to run from the date of the wrongful act." *Id.* at 843. By contrast, if "wrongful acts are not continuous but occur only at intervals, each occurrence inflicts a new injury and gives rise to a new and separate cause of action." *Id.*

Here, Plaintiffs have not alleged that VDOC has applied the Step-Down Program only during certain intervals of time. Rather, the Step-Down Program is alleged to have been in continuous operation since its adoption in 2012. This is not like the circumstances presented in *Hampton Roads*, then, which involved occasional and short-lived discharges of waste in a case

[6] The citation that Plaintiffs provide for this proposition is taken wholly out of context, as it was made by the Virginia Supreme Court in the context of deciding whether a claim for tortious interference with contract—not breach of contract—would lie. The quote, in its entirety, reads: "In the absence of a contractual duty to defend, no cause of action can lie for breach of that alleged duty." *Cartensen v. Chrisland Corp.*, 442 S.E.2d 660, 666 (Va. 1994). And the cause of action referenced is for the tort-related claim of tortious interference with contract, which requires a duty and breach of duty. A breach-of-contract action is, of course, a separate type of claim altogether.

alleging damage to personal property (not breach of contract). It is more akin, rather, to the circumstances addressed in *Fluor Fed. Sols., LLC v. PAE Applied Techs.*, LLC, 728 F. App'x 200 (4th Cir. 2018), a case in which the Fourth Circuit, applying Virginia law, recently explained the difference between an ongoing breach of contract—which has a single accrual date for purposes of the statute of limitations—and periodic breaches, each of which give rise to a new cause of action. There, the Fourth Circuit noted that, "[i]f the alleged breach is a 'single continuous breach,' the limitations period runs from the inception of that breach, even when the breach continues for years." *Id.* at 202. Any subsequent failure to comply with the original contractual obligations "did not constitute *new* individual breaches because it was the initial wrongful conduct . . . that produced the plaintiff's harm." *Id.* at 203.

Similarly, here, VDOC is alleged to have breached its contractual obligation by enacting the Step-Down Program. It is that "initial wrongful conduct" that gave rise to the alleged cause of action. And it is immaterial that not all plaintiffs sustained their "damages" in 2012: "Virginia law makes clear that the running of the statute is not postponed by the fact that the actual or substantial damages do not occur until a later date." *Id.*

For these reasons, and those discussed in more detail in VDOC's initial memorandum in support of its motion to dismiss, Count I of the complaint, even if reconstrued as a state-law cause of action, is barred by the applicable five-year statute of limitations.

E. The disability discrimination claims lack merit.

Plaintiffs re-assert (repeatedly) that the Step-Down Program "discriminates" against them. But this bare allegation is not sufficient to plausibly allege the elements of a disability discrimination claim. As to a disparate treatment claim, Plaintiffs have not alleged sufficient facts from which it could be determined that they are "otherwise qualified" for whatever benefit

or privilege they believe they have been denied. Nor, as previously argued, have Plaintiffs plausibly alleged that VDOC officials intentionally treated them differently from inmates without alleged mental disabilities. The gravamen of a disparate treatment claim is the affirmative decision to treat someone differently—to discriminate against them—on the basis of their disability. Plaintiffs do not plausibly allege that they were deliberately treated differently than non-disabled inmates in the Step-Down Program. Absent unequal treatment, there can be no disparate treatment claim under the ADA or the RA.

With respect to a failure-to-accommodate claim, VDOC maintains that Plaintiffs have not identified the specific accommodation that they believe VDOC should have provided, nor how VDOC should have been aware that they needed this unspecified "accommodation." *See, e.g.*, *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006) ("[T]he ADA's reasonable accommodation requirement usually does not apply unless triggered by a request." (internal quotations omitted)); *Moneyhan v. Keller*, 2015 U.S. Dist. LEXIS 181150, at *10 (E.D.N.C. Feb. 25, 2015) ("Cases involving a potential violation and denial of reasonable accommodations do not trigger the ADA reasonable accommodation requirement unless a request is first made and denied."). For that reason, and those discussed in more detail in VDOC's initial memorandum in support, the Plaintiffs have not alleged a plausible failure-to-accommodate claim within the meaning of ADA or the RA.

CONCLUSION

For these reasons, and those advanced in VDOC's initial memorandum in support of its Rule 12 motion to dismiss, Defendant VDOC respectfully requests that its motion be GRANTED, and that VDOC be DISMISSED as a party to this litigation.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS,
Defendant.

By: /s/

Margaret Hoehl O'Shea, AAG, VSB #66611
Attorney for named Defendants
Office of the Attorney General
Criminal Justice & Public Safety Division
202 North 9th Street
Richmond, Virginia 23219
(804) 225-2206
(804) 786-4239 (Fax)
Email: moshea@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2019, I electronically filed the foregoing Reply in Further Support of Defendant VDOC's Motion to Dismiss with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

Alyson Michelle Cox (VSB #90646)
Daniel Bernard Levin (pro hac vice)
Kristen Jentsch McAhren (pro hac vice)
Maxwell Kalmann (pro hac vice)
Owen Pell (pro hac vice)
Timothy Lawrence Wilson , Jr. (pro hac vice)
White & Case LLP
701 13th Street NW
Washington, DC 20005-3807
alyson.cox@whitecase.com

Vishal Agraharkar (VSB #93265)
Eden B. Heilman (VSB #93554)
American Civil Liberties Union of Va.
701 E. Franklin Street, Ste. 1412
Richmond, VA 23219
(804) 532-2151
vagraharkar@acluva.org
eheilman@acluva.org

Counsel for Plaintiffs

And I hereby certify that I have mailed the document by United States Postal Service to the following non-filing user: N/A

/s/
Margaret Hoehl O'Shea, AAG, VSB #66611
Attorney for named Defendants
Criminal Justice & Public Safety Division
Office of the Attorney General
202 North 9th Street
Richmond, Virginia 23219
(804) 225-2206
(804) 786-4239 (Fax)
Email: moshea@oag.state.va.us