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

CLASS PLAINTIFFS' OBJECTION
TO REPORT AND RECOMMENDATION

Class Plaintiffs make the following limited objection to the Report and Recommendation (hereinafter referred to as the "R&R"), issued on September 4, 2020 (W.D. Va. ECF No. 70) under 28 U.S.C. § 636(b)(1) and Rule 72(b)(2) of the Federal Rules of Civil Procedure. Generally, the 89-page R&R thoughtfully considers the Complaint, the parties' submissions, and the prevailing case law, as to all aspects of Class Plaintiffs' claims—but with respect to one claim, the R&R deviates from settled law, fails to properly assess Class Plaintiffs' legal arguments, and therefore cannot withstand *de novo* review. Class Plaintiffs specifically object to the R&R's summary dismissal of the claim for breach of the private settlement agreement in *Brown v. Landon*, No. 81-0853-R (E.D. Va. Apr. 5, 1985) (the "Settlement Agreement") based solely on Defendants' affirmative statute-of-limitations defense.

Defendants' statute-of-limitations defense argues that the only breach to the Settlement Agreement occurred when VDOC adopted the Step-Down Program in August 2012, and it was on this basis that the R&R dismissed the breach-of-contract claim. *See* R&R 70. But, in dismissing this claim, the R&R ignores well-pleaded facts in the Complaint that show that Defendants

breached the Settlement Agreement *after 2012—and after 2015*—including in 2017, when VDOC re-issued the Step-Down Program. Moreover, as alleged in the Complaint, as to certain members of the Class, no breach of contract could have occurred until 2015 or after because they were not subject to the Step-Down Program until that time. Those facts govern Defendants' motion to dismiss based on an affirmative defense. *See Garner v. Higgins*, No. 7:14-cv-00461, 2015 U.S. Dist. LEXIS 16761, at *3 (W.D. Va. Feb. 11, 2015) (noting that a 12(b)(6) motion "invites an inquiry into the legal sufficiency of the complaint").

Defendants' statute-of-limitations defense does not address these alleged facts, and by asserting that the breach is limited to the first breach in 2012, Defendants ignore settled law. Thus, as a matter of law, Defendants have not met their burden to dismiss Class Plaintiffs' breach-of-contract claim in its entirety. *See Goodman v. PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) ("[T]he burden of establishing the affirmative defense rests on the defendant."); *see also id.* (noting that an affirmative defense can only be successful if "all facts necessary . . . '*clearly appear[] on the face of the complaint*'" (quoting *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993)). Accordingly, the R&R's conclusion that the limitations period began to run in August 2012 is supported by neither the record facts (*i.e.*, the well-pleaded allegations in the Complaint), nor by applicable case law. This Court should decline to adopt it.

STANDARD OF REVIEW

This Court's review of the R&R is *de novo*. *See* 28 U.S.C. § 636(b)(1)(C) ("A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made."); *Smith v. GMC*, 376 F. Supp. 2d 664, 666 (W.D. Va. 2005) ("A report and recommendation by a magistrate judge is reviewed *de novo* by this court."). As the R&R pertains to Defendants' 12(b)(6) motion to dismiss, however, this

Court "must 'assume the truth of all facts alleged in the [Class Plaintiffs'] complaint'" (*Express Carwash of Charlottesville, L.L.L.P. v. City of Charlottesville*, 320 F. Supp. 2d 466, 467 (W.D. Va. 2004) (citations omitted)), and construe Class Plaintiffs' allegations "in the light most favorable" to them (*Battlefield Builders, Inc. v. Swango*, 743 F.2d 1060, 1062 (4th Cir. 1984)). Because Defendants' 12(b)(6) motion to dismiss relies on an affirmative statute-of-limitations defense, this Court must reject this defense if "all facts necessary to [Defendants'] affirmative defense" do not "'*clearly appear[] on the face of the complaint*.'" *Goodman*, 494 F.3d at 464 (quoting *Richmond*, 4 F.3d at 250).

Here, Class Plaintiffs do not "merely repeat arguments previously addressed by the magistrate judge," but instead present a "specific objection[]" showing where in the R&R the Magistrate Judge did not apply facts and law to a specific aspect of her holding, as required by Fed. R. Civ. P. 72(b)(2). *O'Connell v. Colvin*, No. 6:13-cv-00035, 2014 U.S. Dist. LEXIS 137744, at *10 (W.D. Va. Sept. 30, 2014).

BACKGROUND

Class Plaintiffs' breach-of-contract claim stems from the following factual allegations. On April 5, 1985, Defendants entered into the Settlement Agreement to resolve *Brown v. Landon*, No. 81-0853-R (E.D. Va. Apr. 5, 1985), a class action challenging Defendants' use of the Phase Program and the Special Management Unit ("SMU") at VDOC's Mecklenburg Correctional Center. *See* Compl. ¶¶ 72-73, 77-78 (E.D. Va. May 6, 2019), ECF No. 1. The Phase Program was a "long-term solitary confinement" regime that "consisted of five levels, with prisoners earning additional privileges at each step, and eligibility for return to the general prison population at the last." *Id*. ¶¶ 57, 60. The SMU was a long-term solitary confinement program for "[p]risoners that

VDOC deemed to be particularly disruptive" who "were not eligible for the Phase Program at all." *Id*. ¶ 56, 65. For these prisoners, solitary confinement was effectively permanent. *See id*. ¶ 56.

In the Settlement Agreement, VDOC stipulated, among other things, that it would "discontinue[] the [P]hase [P]rogram" and "not intend to reinstate any similar program in the future." Compl. Ex. 3 ¶ 1; *see also* R&R 32. VDOC also stipulated that "[t]he Special Management Unit has been and will remain abolished." Compl. Ex. 3 ¶ 3. The Settlement Agreement bound VDOC and the individual Defendants "on a department-wide basis, and as to all successors," respectively. Compl. ¶ 75; *see also* Compl. Ex. 3, at 1. The Settlement Agreement contains no sunset provision; its termination of the Phase Program, "any similar program," and the SMU, was permanent. *See* Compl. Ex. 3 ¶ 1 ("If in the future a similar program is considered by the DOC, before any such program is initiated, the Court . . . will be notified by the DOC."); *id.* ¶ 3 (stating that the SMU "has been and will remain abolished.").

Class Plaintiffs allege that, despite entering into the Settlement Agreement, Defendants announced the "Segregation Reduction Step-Down Program" in August 2012 at two of its super-max institutions—Red Onion State Prison and Wallens Ridge State Prison. Compl. ¶¶ 130, 133. The Step-Down Program, like the Phase Program, is an "incentive based offender management [program]," which "create[s] a pathway for offenders to step-down from [higher security levels] to lower security levels." Defs.' Mem. Supp. Mot. Dismiss 8 (E.D. Va. June 14, 2019), ECF No. 22. Likewise, prisoners in the Intensive Management ("IM") Pathway—much akin to those formerly placed in the SMU—"face permanent solitary confinement and are ineligible for the Step-Down Program or return to the general population." Compl. ¶ 179.

Class Plaintiffs allege that the current Step-Down Program is a "rerun of VDOC's prior failed phase programs," and its IM Pathway the "equivalent" of the SMU, in violation of the

Settlement Agreement. *Id*. ¶¶ 130, 223-30. The Complaint alleges that the Step-Down Program was first introduced in 2012 and has been re-issued several times—in at least 2014, 2015, and as late as 2017—to reflect shifting policy goals and in response to legal challenges. *See id*. ¶ 182 (noting that VDOC "amended" the Step-Down Program after "several legal challenges"); *see also id*. ¶¶ 131, 133, 138, 140-41, 142, 149, 179, 190-92 (citing various iterations of the Step-Down Program). Class Plaintiffs also allege that "[t]he IM program is the equivalent [of] or is similar to the SMU under the Settlement Agreement." *Id*. ¶ 224.

The Complaint also details how certain members of the Class were not subject to the Step-Down Program *for the first time* until 2015 or after. *See id*. ¶ 27 ("Mr. McNabb has spent approximately three years in solitary confinement at Red Onion on the IM Pathway); *id.* ¶ 28 ("Mr. Wall has spent approximately three years in solitary confinement at Red Onion on the IM Pathway."); *id*. ¶ 29 ("Mr. Brooks has spent approximately four years in solitary confinement at Red Onion on the IM Pathway."); *id*. ¶ 31 ("Mr. Cornelison has spent approximately two and one-half years in solitary confinement at Red Onion on the IM Pathway."); *id.* ¶ 34 ("Mr. Riddick has spent over four years in solitary confinement at Red Onion on the SM Pathway."); *id.* ¶ 35 ("Mr. Snodgrass spent approximately four years in solitary confinement at Red Onion on the SM Pathway."); *id*. ¶ 30 ("Mr. Cavitt has spent approximately two years in solitary confinement at Red Onion on the IM Pathway.").

OBJECTION

Defendants' motion to dismiss raises an affirmative statute-of-limitations defense. At the pleading stage, the Court may only credit this defense if the facts alleged, viewed in favor of the plaintiff, plainly show that the claim is untimely. *See Goodman*, 494 F.3d at 464 (explaining it is "rare" that "all facts necessary to [Defendants'] affirmative defense" will "'*clearly appear[] on*

the face of the complaint'" (quoting *Richmond*, 4 F.3d at 250)). Defendants argue that "the alleged 'breach' of the settlement agreement . . . occurred when VDOC first established the Step-Down Program . . . at the latest, in 2012." Def. Mem. Supp. Mot. Dismiss 20 (E.D. Va. May 31, 2019), ECF No. 19. On this issue, in contrast to its thoughtful consideration of Class Plaintiffs' other arguments, the R&R did not address Class Plaintiffs' contentions and instead adopted Defendants' position, concluding that "the breach alleged by the plaintiffs is the adoption of the Step-Down Program, which the Complaint alleges occurred in 2012." R&R 70.

However, this conclusion does not require dismissal of Class Plaintiffs' breach-of-contract claim. *First*, Class Plaintiffs allege that Defendants' adoption of the Step-Down Program in 2012 was only one of several times that Defendants breached the Settlement Agreement over the decade. *See infra* Section I, at 7. Both the Supreme Court of Virginia and this Court have consistently held that intermittent breaches of a contract each give rise to a new cause of action. *Id*. Defendants' argument that the statute of limitations has run on claims arising from the 2012 edition of the Step-Down Program does not answer Class Plaintiffs' allegations regarding Defendants' subsequent, intermittent breaches of the Settlement Agreement. *Second*, Defendants had no contractual duty to potentially hundreds of Class Plaintiffs until years *after* August 2012. The Supreme Court of Virginia, this Court, and the Fourth Circuit have all concluded that a breach-of-contract claim does not begin to run until the defendant breached a contractual obligation to *the plaintiff*. *See infra* Section II, at 8-9. Several of the Named Plaintiffs were first subjected to the Step-Down Program and IM Pathway between 2015 and 2017. *See id.* at 9.

Class Plaintiffs made these arguments in opposition to Defendants' motion to dismiss, but the R&R does not address them. As a matter of law, based on the factual allegations in the Complaint, the Magistrate Judge erred in the R&R's conclusion that all past and future prisoners

accrued legally enforceable rights to sue under the Settlement Agreement the moment that Defendants introduced the first version of the Step-Down Program in 2012. This Court should decline to adopt the R&R on this point.

I. The R&R Does Not Address Class Plaintiffs' Allegations That Defendants Re-Issued The Step-Down Program Several Times Since 2012, Including In 2017

Class Plaintiffs specifically plead that the Step-Down Program was re-issued and modified several times *after 2012*—including as of 2017. *See, e.g.*, Compl. ¶ 182; *see also id*. ¶¶ 131, 133, 138, 140-41, 142, 149, 179, 182, 190-92 (citing various iterations of the Step-Down Program). Indeed, Class Plaintiffs expressly argued that the Defendants may have "re-breached the [Settlement] Agreement when they issued new versions of the Step-Down Program" because the Complaint alleges that "[e]ach version of the Step-Down Program articulated different goals or justifications, may have altered the [Step-Down] Program's Pathways and standards, and modified prisoners' confinement restrictions." Pls.' Mem. Opp'n Mot. Dismiss 30 (E.D. Va. July 9, 2019), ECF No. 26; *see, e.g.*, Compl. Ex. 8 ("September, 2017 [Update]"); Compl. Ex. 10 ("August, 2015 [Update]"); Compl. Ex. 11 ("March 4, 2014 [Update]").

The Supreme Court of Virginia has held that this kind of intermittent harm "gives rise to a new and separate action." *Am. Physical Therapy Ass'n v. Fed'n of State Bds. of Physical Therapy*, 628 S.E.2d 928, 929 (Va. 2006) (holding that a breach-of-contract claim was not a continuous breach where the defendant's breaches of contractual obligations reoccurred intermittently over a seven-year period). This Court is in accord. *See Adams v. Alliant Techsystems, Inc.*, 201 F. Supp. 2d 700, 711 (W.D. Va. 2002) (concluding that the Virginia statute of limitations would not bar claims where they are a result of "a series of wrongful acts"). The R&R, however, never considered this case law.

Moreover, instead of construing Class Plaintiffs' factual allegations "in the light most

favorable" to them (*Battlefield Builders, Inc.*, 743 F.2d at 1061-62), the R&R accepts outright the Defendants' limiting (and legally mistaken) contention that "the alleged 'breach' of the settlement agreement . . . occurred when VDOC first established the Step-Down Program, which the complaint alleges happened, at the latest in 2012" (Def. Mem. Supp. Mot. Dismiss 20, E.D. Va. ECF No. 19). Had the R&R considered Class Plaintiffs' allegations, it would have found that "all facts necessary to [Defendants'] affirmative defense" do not "*clearly appear[] on the face of the complaint*." *Goodman*, 494 F.3d at 464 (quoting *Richmond*, 4 F.3d at 250). It is not clear from the Complaint, for example, whether the 2017 Step-Down Program is sufficiently materially different from the Step-Down Program first adopted in 2012. Such facts "can only be determined after discovery" (Pls.' Mem. Opp'n Mot. Dismiss 30, E.D. Va. ECF. No. 26), requiring that the motion to dismiss Class Plaintiffs' breach-of-contract claim be denied.

II. The R&R Does Not Address The Complaint's Allegations That Several Named Plaintiffs Had No Rights Under The Settlement Agreement In 2012

The R&R also erroneously presumed, without support, that the breach-of-contract claim could only "accrue" at the moment the Step-Down Program was introduced. Although it is Virginia law that the statute of limitations on a contract claim runs five years after the claim "accrued" (Va. Code Ann. § 8.01-246(2)), "[a] right of action *cannot accrue* until there is a cause of action" (*Caudill v. Wise Rambler, Inc.*, 168 S.E.2d 257, 259 (Va. 1969) (emphasis added)). As the Supreme Court of Virginia has stated, there can be no cause of action for breach of contract without a "legally enforceable obligation of a defendant to the plaintiff." *Filak v. George*, 594 S.E.2d 610,614 (Va. 2004). This Court and the Fourth Circuit are in accord. *See Adams*, 201 F. Supp. 2d at 711 (noting that "[a] cause of action does not accrue until all [elements of a contract claim] are present"); *Lekas v. United Airlines*, 282 F.3d 296, 299 (4th Cir. 2002) (a contract action "accrues when it comes into existence as a legally enforceable claim"). Here, Defendants never

disputed that any prisoner subject to the Step-Down Program had standing to allege breach of contract. *See* Pls.' Mem. Opp'n Mot. Dismiss 4 (E.D. Va. June 14, 2019), ECF. No. 23.

Defendants also did not dispute that the Complaint alleges that Defendants first subjected several of the Named Plaintiffs (and potentially hundreds of class members) to the Step-Down Program and IM Pathway five or fewer years before the Class Action Complaint was filed. *See* Pls.' Mem. Opp'n Mot. Dismiss 18, E.D. Va. ECF. No. 23; *see also* Compl. ¶ 27 ("Mr. McNabb has spent approximately three years in solitary confinement at Red Onion on the IM Pathway."); Compl. ¶ 28 ("Mr. Wall has spent approximately three years in solitary confinement at Red Onion on the IM Pathway."); *id*. ¶ 29 ("Mr. Brooks has spent approximately four years in solitary confinement at Red Onion on the IM Pathway."); *id*. ¶ 31 ("Mr. Cornelison has spent approximately two and one-half years in solitary confinement at Red Onion on the IM Pathway."); *id.* ¶ 34 ("Mr. Riddick has spent over four years in solitary confinement at Red Onion on the SM Pathway."); *id.* ¶ 35 ("Mr. Snodgrass spent approximately four years in solitary confinement at Red Onion on the SM Pathway."); *id*. ¶ 30 ("Mr. Cavitt has spent approximately two years in solitary confinement at Red Onion on the IM Pathway."). Yet, the R&R, ignoring these specific factual allegations, not only concludes that the limitations period began to run before these Named Plaintiffs had a right to sue, but also that the limitations period *expired* before potentially hundreds of prisoners accrued any rights under the Settlement Agreement.

The R&R is therefore inconsistent with the facts detailed in Class Plaintiffs' Complaint, based on the language of the Settlement Agreement, that Defendants undertook continuing obligations to "future" prisoners. *See* Compl. Ex. 3 ¶ 1 ("[Defendants have] discontinued the [P]hase [P]rogram and do[] not intend to reinstate any similar program *in the future*." (emphasis added)); *id.* ¶ 3 ("The Special Management Unit has been and *will remain* abolished." (emphasis

added)); *id.* at 1 (stating that the Agreement applies to VDOC and the Named Defendants' "successors in office"). As such, Class Plaintiffs argue that their breach-of-contract claim accrues as to each individual prisoner no earlier than the time of his placement in the Step-Down Program. *See* Pls.' Mem. Opp'n Mot. Dismiss 4, E.D. Va. ECF No. 23 (citing Compl. ¶¶ 74, 76, 79, 83, 130-33). Defendants have not disputed that Class Plaintiffs' allegations are sufficient to establish at this stage that the Settlement Agreement applies to all future prisoners subject to the Step-Down Program or IM Pathway at Red Onion and Wallens Ridge. *See id.* at 18.

Therefore, the R&R erred as a matter of law when it found that the statute of limitations ran on the claims of all class members because it expired as to a subset of them. *Cf. Kerns v. Wells Fargo Bank, N.A.*, 818 S.E.2d 779, 783 (Va. 2018) (noting the distinction between a right of action and a cause of action and addressing the possibility that "'[t]he two may accrue at the same time,'" but "they 'will not of necessity do so'"). While Class Plaintiffs as a whole may have had a *right* of action under breach of contract at the time of the adoption of the Step-Down Program, it was not until each Class Plaintiff was injured by being placed in the Step-Down Program or IM Pathway that his *cause* of action accrued. Accordingly, this Court should not adopt the R&R's conclusions that all Class Plaintiffs' breach-of-contract causes of action accrued at the same time.

CONCLUSION

The R&R contains a thoughtful and thorough accounting of Class Plaintiffs' allegations, the parties' submissions, and the prevailing case law. On one issue, however, it uncharacteristically errs by failing to give Class Plaintiffs' well-pleaded Complaint the weight that, by law, it is due at this stage of the proceedings. For the foregoing reasons, Class Plaintiffs respectfully request that this Court adopt the R&R in all respects *except* for its recommendation to

dismiss Class Plaintiffs' breach-of-contract claim on statute-of-limitations grounds. The Court should likewise deny Defendants' motion to dismiss Class Plaintiffs' breach-of-contract claim.

Dated: September 18, 2020

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2020, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

Dated: September 18, 2020

Respectfully submitted,

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