IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAC'QUANN (ADMIRE) HARVARD, et al.,

Plaintiffs,

v. **CASE NO.: 4:19cv212-MW/CAS**

MARK INCH, Secretary of Florida Department of Corrections, et al.,

Defendants.
_____/

ORDER ON MOTION TO COMPEL

This Court has considered, without hearing, Plaintiffs' Motion to Compel. ECF No. 65-1. Defendants filed a response opposing the motion. ECF No. 83. Plaintiffs, under Federal Rule of Civil Procedure 37 and Local Rule 26.1, move for an order (1) compelling Defendant Mark Inch and Defendant Florida Department of Correction ("FDC") to produce documents responsive to Plaintiffs' First Request for Production; (2) compelling Defendant FDC to respond to Plaintiff Harvard's First Set of Interrogatories; (3) overruling Defendants' objections; (4) setting deadlines for production; and (5) awarding reasonable fees and costs because Defendants' objections are not substantially justified. ECF No. 65-1, at 1–2. For the reasons provided below, Plaintiffs' motion is **GRANTED**.

I

This is a civil rights case about statewide policies and practices related to isolation promulgated and enforced by Defendants in Tallahassee. Plaintiffs allege that Defendants promulgated a statewide policy and practice of isolating over 10,000 people for at least 22 hours a day in tiny, cramped cells. ECF No. 13, ¶¶ 2, 59, 75. Plaintiffs further allege that this statewide policy and practice exposes all persons in isolation to a substantial risk of serious harm to their mental and physical health in violation of the Eighth Amendment and that policymakers in Tallahassee have exhibited deliberate indifference towards these risks. ECF No. 13, ¶¶ 5, 7, 54, 59, 75, 83. Finally, Plaintiffs allege that Defendants discriminate against people with disabilities through this same policy and practice. ECF No. 13, ¶¶ 8, 151–60.

Plaintiffs served their First Request for Production of Documents ("RFP") to Defendants on August 13, 2019. ECF No. 65-1, at 2–3; ECF No. 83, at 5. In October, Defendants responded with objections and produced limited documents. ECF No. 65-1, at 3. On August 28, 2019, Plaintiff Harvard served her First Set of Interrogatories ("ROG") to Defendant FDC. ECF No. 65-1, at 3. Defendant responded to the interrogatories in October, objecting in part. ECF No. 65-1, at 3. The parties met and conferred on November 12, 2019, to discuss the discovery objections. ECF No. 65-1, at 3. The parties are now at an impasse, and Plaintiffs have, therefore, moved to compel discovery.

II

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . ." Fed. R. Civ. P. 26(b)(1). District Courts have broad discretion to limit discovery where the discovery sought is "unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive." Fed. R. Civ. P. 26(b)(2)(C).

III

First, although Defendants state that they have agreed to produce documents responsive to RFPs 52, 56, 57, 60, and 61 to Defendant Inch, they have lodged objections to these requests. *See* Defendants' Response to RFPs 52, 56–57, 60–61.[1] Therefore, Plaintiffs' motion to compel, as it relates to RFPs 52, 56, 57, 60, and 61 to Defendant Inch, is not moot.

Second, Defendants repeatedly rely on the pre-2015 amendment formulation of Federal Rule of Civil Procedure 26 in objecting on the basis that Plaintiffs' requests are not "reasonably calculated to lead to discovery of admissible evidence." *See* Defendants' Response to RFPs 27, 29, 31, 33, 35, 37, 39, 46–49, 51, 84–89, 92–93, 95–97 to Defendant Inch and ROG 15 to Defendant FDC. Such objections are

[1] Plaintiffs' requests and Defendants' response can be found in ECF No. 65-1, ECF No. 83, ECF No. 83-1, and ECF No. 83-2.

meaningless and without merit.[2] This Court overrules any such objections.

Third, Defendants' objections are not well taken. "The law in the Eleventh Circuit makes clear that boilerplate discovery objections are tantamount to no objections being raised at all and may constitute a waiver of the discovery being sought." *Rivera v. 2K Clevelander, LLC*, No. 16-21437-Civ, 2017 WL 5496158, at *4 (S.D. Fla. Feb. 22, 2017). Here, most of Defendants' objections are boilerplate objections. *See, e.g.*, Defendants' Response to RFP 12 to Defendant Inch ("Defendants further object that 'ALL POLICIES RELATED TO' and 'retention' and 'management' are vague, ambiguous, overly broad and burdensome"); Defendants' Response to RFP 27 to Defendant Inch ("Defendants object to this request as overly broad, not proportional to the needs of this case . . . ."). This Court may overrule such objections on this basis alone. *See* Fed. R. Civ. P. 33(b)(4) and 34(b)(2)(B); N.D. Fla. Loc. R. 26.1(C) ("Boilerplate objections are strongly disfavored."); *see also FDIC v. Brudnicki*, 291 F.R.D. 669, 674 n.4 (N.D. Fla. 2013) ("[T]he form boilerplate objections shall not be considered by the Court and are nullity."); *Walton Constr. Co., LLC v. Corus Bank*, No. 4:10cv137, 2012 WL 13029592, at *1 (N.D. Fla. Apr. 18, 2012) (rejecting boilerplate objections as

[2] "At least one court has imposed sanctions upon an attorney, in part due to the attorney's reliance on 'caselaw that analyzed the version of Rule 26 that existed before the highly publicized amendments took effect on December 1, 2015.' " *Sharbaugh v. Beaudry*, No. 3:16cv126, 2017 WL 5988221, at *2 n.3 (N.D. Fla. May 5, 2017) (quoting *Fulton v. Livingston Fin. LLC*, No. C15-0574JLR, 2016 WL 3976558 (W.D. Wash. July 25, 2016)).

"meaningless").

Boilerplate objections such as "vague," "ambiguous," "overly broad," "not proportional to the needs of this case," or "burdensome," without an explanation, do not inform this Court or Plaintiffs of the justification underlying Defendants' objections. That is to say, boilerplate objections beg the question—why, for example, is the request vague or ambiguous? Further, they do not provide Plaintiffs a reasonable roadmap to correct any defect in their requests before asserting their remedies through a motion to compel. That Defendants subsequently attempt to provide specific objections in its response to Plaintiffs' motion to compel is unavailing. *See Lorenzano v. Sys., Inc.*, No. 6:17-cv-422, 2018 WL 3827635, at *3 (M.D. Fla. Jan. 24, 2018) ("[T]he Court will not rely on Systems' post hoc justifications for its boilerplate objections. To the extent that Systems tried to raise specific objections in its Response, the Court finds that Systems waived these objections."). For these reasons, this Court finds that Defendants have waived their objections and overrules any boilerplate objections contained in Defendants' Response to RFPs 12–19, 21–39, 42–43, 45–49, 51–57, 60–65, 68–76, 84–89, 92–99, 104–05, 107–17, and 136[3] to Defendant Inch and ROG 15 to Defendant FDC.

[3] Defendants also object to RFP 136 to Defendant Inch on the grounds that the request might contain privileged attorney-client and work product information. To the extent Defendants believe that responsive documents may contain privileged information, they need not disclose it. However, Defendants must "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable [Plaintiffs] to assess the claim." Fed. R. Civ. P. 26(b)(5)(A)(ii).

Fourth, Defendants object to certain requests because the response may lead to information that would raise safety and security concerns. *See, e.g.*, Defendants' Response to RFP 12 to Defendant Inch ("Defendants also object based upon the confidentiality, safety, and security issues raised in the general objections to 'policies.' "). This Court entered a Confidentiality Order, ECF No. 58, based on parties' agreement that certain documents may contain information that FDC believes threatens prison safety or security if disclosed without the protections of a confidentiality order. ECF No. 94. Subsequently, this Court denied Defendants' motion for a protective order which sought additional protection for documents that might raise safety or security concerns. ECF No. 94. This Court's Order denying Defendants' request for a protective order demonstrates that there is no good cause to object to Plaintiffs' requests for production or interrogatories based on safety or security. This is because, when entering the Confidentiality Order, "[t]his Court took into consideration Defendants' safety and security concerns and Plaintiffs' interest in conducting full and fair discovery . . . ." ECF No. 94. For these reasons, this Court overrules any safety and security objections contained in Defendants' Response to RFPs 12–15, 22–23, 34–39, 46–49, 53–55, 107–17, and 135–36 to Defendant Inch.

Fifth, Defendants object to RFPs 64–65, 68–76, and 107–17 to Defendant Inch and RFPs 1–5, and 7 to Defendant FDC because the documents are "exempt from public record and/or confidential under 945.10(1)(e) and (h), Fla. Stat., and

119.071(3)a, Fla. Stat." and that Defendants will not produce them "without an agreement and/or order governing confidentiality." Plaintiffs' requests relate to mental or medical care for prisoners. *See, e.g.* Plaintiffs' RFP 64 to Defendant Inch ("ALL POLICIES RELATED TO mental health care for PRISONERS in effect from January 1, 2019, through present."). This Court entered a HIPPA Qualified Protective Order to facilitate the discovery of protected health information. ECF No. 46. Defendants have not moved for a confidentiality order seeking additional protection for information sought by Plaintiffs. Therefore, these objections to RFPs 64–65, 68–76, 107–17 to Defendant Inch and RFPs 1–5, 7 to Defendant FDC are overruled.

Finally, Defendants raise some objections for the first time in their response to Plaintiffs' motion to compel. For example, Defendants object to producing information related to class members before the proposed class has been certified. ECF No. 83, at 6, 32. But, by raising objections for the first time in their response, Defendants have waived them. *See Socas v. Nw. Mut. Life Ins. Co.*, No. 07-20336-CIV, 2008 WL 619322, *6 (S.D. Fla. Mar. 4, 2008) (finding that Plaintiff "waived the argument by mentioning it for the first time in her response to the instant motion to compel and failing to timely raise it as an objection to Northwestern's original request for production.").[4]

[4] Even assuming that Defendants have not waived their class-based discovery objection, it

Based on the foregoing analysis, all of Defendants' objections to RFPs 12–18, 21–26, 28, 30, 32, 34, 36, 38, 52–55, 60–61, 64–65, 68–76, and 135 to Defendant Inch and RFPs 1–5, and 7 to Defendant FDC are overruled. Defendants shall furnish the requested information to Plaintiffs.

IV

The remainder of Defendants' responses can be broken down into objections based on (1) the timeframe covered by Plaintiffs' discovery request, (2) relevance, and (3) self-critical analysis privilege. This Court considers these objections in turn.

A. Timeframe

Defendants generally object to the instruction for a requested timeframe of January 1, 2015, to present.[5] Defendants' principal theory is that documents going back five years are not relevant to this case because Plaintiffs seek injunctive relief and not compensatory damages. *See* ECF No. 83-1, at 2; ECF No. ECF No. 83-2, at 2; ECF No. 83, at 12–14.[6] Defendants' theory misses the point.

---

is invalid. Here, the parties agreed not to bifurcate discovery. ECF No. 93, at 10; ECF No. 85, at 7. This Court will, therefore, not limit class-based or merits discovery until it has ruled on class certification. *See, e.g.*, *Bellenger v. Accounts Receivable Mgmt, Inc.*, No. 19-60205-CIV, 2019 WL 4284070, at *6 (S.D. Fla. Sept. 10, 2019). Additionally, to certify a class, Plaintiffs will need to show numerosity, commonality, and typicality of the proposed class. *See* Fed. R. Civ. P. 23(a). Prohibiting class-based discovery at this juncture would likely preclude Plaintiffs from effectively arguing for class certification.

[5] Plaintiffs initially requested discovery from January 1, 2014, through present. However, after Defendants objected, Plaintiffs offered to modify the request to January 1, 2015. *See* ECF No. 65-1, at 9 n.6.

[6] Defendants also object to the timeframe of Plaintiffs' request because the timeframe is

To succeed on their Eighth Amendment claim, Plaintiffs must prove that Defendants were deliberately indifferent to a substantial risk of serious harm. *Thomas v. Bryant*, 614 F.3d 1288, 1312 (11th Cir. 2010). To prove deliberate indifference, Plaintiffs must show subjective knowledge of the risk on part of Defendants. *Id.* Defendants' subjective knowledge can be proven by presenting evidence showing that the conduct was "longstanding, pervasive, well-documented, or expressly noted by the prison officials in the past" and that Defendants "had been exposed to information concerning the risk, and thus must have known about it." *Farmer v. Brennan*, 511 U.S. 825, 842 (1994).

Plaintiffs' request for discovery dating back five years is calculated to lead to evidence that may show Defendants' deliberate indifference, or lack thereof. As Plaintiffs point out, the timeframe for their discovery request is not arbitrary. Plaintiffs' timeframe stems, in part, from Defendants' participation in a national survey of state prison systems regarding their use of isolation. ECF No. 65-2. Shortly after the survey, Defendants began an "Analysis of Segregation Process." ECF No. 65-3. The analysis looked at "what ha[d] occurred in the past, what [was] taking place [then], changes being implemented . . . as well as recommendations for the

---

overly broad and not proportional to the needs of the case considering the undue burden and expense of discovery. As explained above, such boilerplate objections are disfavored. That Defendants attempt to retroactively explain these objections in their response to Plaintiffs' motion to compel is unavailing. Defendants' boilerplate objections to the timeframe of Plaintiffs' requests are therefore overruled.

future." ECF No. 65-3, at 4. Discovery before, during, and after this analysis may provide evidence showing that unconstitutional isolation was "longstanding, pervasive, [and] well-documented" and that prison officials "had been exposed to information concerning the risk, and thus must have known about it." *Brennan*, 511 U.S. at 842. Discovery may also lead to evidence showing that Defendants disregarded the risk of serious harm by engaging in conduct that is more than gross negligence after having subjective knowledge of the risk. *Thomas*, 614 F.3d at 1312. Limiting the scope of discovery to two years, as Defendants request, would shield Defendants' policy reforms, or lack thereof, during the period where Defendants themselves studied their practice of solitary confinement and recommended changes to their isolation policies and practices.

For these reasons, Defendants' objection to Plaintiffs' requested timeframe for relevant documents is overruled.

B. Relevance

Defendants make several objections based on relevance of the discovery sought by Plaintiffs. This Court tackles each of the relevance-based objections in turn.

Institution-Specific and Inmate-Specific Discovery

Defendants argue that discovery about the creation or implementation of policies, as well as documents, that are institution-specific or inmate-specific are not

relevant. *See, e.g.*, Defendants' Response to RFP 27 to Defendant Inch ("The implementation of policy at the institutional level and on an inmate-by-inmate basis does not address whether the 'overarching policy' is constitutional and/or discriminatory."); Defendants' Response to RFP 47 to Defendant Inch ("Staffing assignments and levels at the institution level do not address whether the 'overarching policy' is constitutional and/or discriminatory"); Defendants' Response to ROG 15 Defendant FDC ("Plaintiffs' request for the number of times during each month that various forms of mental health services were provided to individual inmates is not relevant to the claims being asserted.").

It is true, as Defendants point out, that Plaintiffs' case is about a challenge to overarching state-wide policies and practices and not challenges to a series of distinct incidents. However, that does not mean that the creation or implementation of policies and practices that are institution-specific or inmate-specific are irrelevant. As this Court pointed out in its Order denying Defendants' motion to transfer, without the implementation of policies and practices at their respective correctional institutions, Plaintiffs would have no claims to bring suit. *See Harvard v. Inch*, 408 F. Supp. 3d 1255, 1261–62 (N.D. Fla. 2019).

Plaintiffs bring a § 1983 claim, alleging that Defendants, through policies and practices, written or unwritten, violate their Eighth Amendment Rights and rights protected by the American with Disabilities Act ("ADA") and Section 504 of the

Rehabilitation Act ("RA"). *See* ECF No. 13, ¶¶ 120, 176–202. Defendants' definition of policy, and their basis for objecting, is limited to formal policies. *See* ECF No. 83, at 9 (citing Black's Law Dictionary to define policies as "[a] standard course of action that has been officially established by organization, business, political party, etc."). Based on this definition, Defendants agreed to produce the rule or procedure that constitute the standard course of action that has been officially established by the FDC. *See* ECF No. 83, at 9. But, the definition of policies is not so limited under § 1983. "An action does not need to be official in nature to constitute a policy or custom." *Horn v. Jones*, No. 14-20341-CIV, 2015 WL 3607012, at *8 (S.D. Fla. May 8, 2015). Under § 1983, Plaintiffs "may be able to prove the existence of a widespread practice that, although not authorized by written law or express . . . policy, is 'so permanent and well settled as to constitute custom or usage with the force of law.' " *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1998); *see also Grech v. Clayton Cty., Ga.*, 335 F.3d 1326, 1330 n.6 (11th Cir. 2003) ("A custom or practice, while not adopted as an official formal policy, may be so pervasive as to be the functional equivalent of a formal policy."); *Depew v. City of St. Marys, Ga.*, 787 F.2d 1496, 1499 (11th Cir. 1986) (finding informal policy or custom actionable under section 1983).

Based on the definition of policies and practices set out by the Supreme Court and the Eleventh Circuit, Plaintiffs are entitled to discover more than rules and

procedures officially established by the FDC. Plaintiffs are entitled to discover the implementation of policies that are promulgated at institutional levels to determine whether there is a widespread practice that violates their rights. Additionally, Plaintiffs allege that Defendants fail to properly follow their written policies. For example, Plaintiffs allege that despite FDC's written policies of determining the type of restriction imposed on a prisoner, in practice it determines restriction by staffing availability, housing location, whether someone is in more than one type of isolation at the same time, and other arbitrary reasons. ECF No. 13, ¶¶ 77–82. Based on Plaintiffs' allegations, FDC's official policy might be relevant, but what is equally important is how FDC's policy is implemented at individual correctional institutions. By showing that Defendants fail to follow their formal policy, Plaintiffs may establish that a pervasive custom—functionally equivalent to a formal policy—in practice trumps Defendants' formal policy. Similarly, to establish a persistent and widespread practice, relevant evidence may include facts related to other inmates. *See Smith v. Fla. Dep't of Corr.*, 713 F.3d 1059, 1064 n.7 (11th Cir. 2013). Therefore, Plaintiffs may discover the creation or implementation of policies or documents that are not only institution-specific but also inmate-specific.

For these reasons, Defendants' relevance objections to RFPs 19, 27, 29, 31, 33, 35, 37, 39, 46–59, 51, 84–89, 92–93, 95–96, and 107–17 to Defendant Inch and ROG 15 to Defendant FDC are overruled.

Residential Continuum Care

Defendants object to Plaintiffs' request for various documents and information related to FDC's Residential Continuum Care. *See* Defendants' Response to RFPs 77–78 to Defendant Inch and ROGs 7–8 to Defendant FDC. Residential Continuum Care refers to specialized residential mental health units that work in conjunction with the inpatient system to provide augmented outpatient mental health treatment and habilitation services for inmates with serious psychological impairment associated with a historical inability to successfully adjust to daily living. *See* ECF No. 83, at 65. Residential Continuum Care units include Cognitive Treatment Units ("CTU"), Diversion Treatment Units ("DTU"), and/or Secure Treatment Units ("STU"). *See* ECF No. 83, at 65. Defendants agreed to produce documents and information related to STU but object to producing documents related to CTU and DTU. Defendants argue that CTU and DTU do not relate to any form of restrictive housing, and are, therefore, irrelevant. This Court disagrees.

Discovery of documents and information related to CTU and DTU are relevant to show whether modifications of Defendants' policies and procedures to accommodate people with disabilities would impose an undue hardship or burden or fundamental alteration to Defendants' services, programs, or activities—a defense claimed by Defendants. ECF No. 62 § VIII, ¶¶ 18–19. The discovery of relevant

evidence may help Plaintiffs determine whether Defendants have adequate policies and practices in place to ensure prisoners with disabilities are housed in the most integrated setting appropriate to meet their needs—an argument central to Plaintiffs' claims related to the Eighth Amendment, ADA, and RA . ECF No. 13, ¶ 158. Finally, the documents and information related to CTU and DTU go directly to Plaintiffs' allegation that Defendants isolate people with disabilities because of their disability-related behavior in violation of their rights protected by the ADA and RA. ECF No. 13, ¶ 152.

Defendants' relevance objections to RFPs 77–78 to Defendant Inch and ROGs 7–8 to Defendant FDC are therefore overruled.

Programs or Projects No Longer in Effect

Next, Defendants object to Plaintiffs' request to produce policies and documents related to any pilot projects or programs that attempt to reduce or have the effect of reducing the population of prisoners in isolation. *See* Defendants' Response to RFPs 56–57 to Defendant Inch. Defendants argue that producing documents regarding any program or project that is not in effect is irrelevant because the Plaintiffs seek only injunctive relief. Defendants are mistaken. Discovery may lead to relevant evidence that might show that certain programs or projects Defendants implemented either did or did not result in an undue hardship or burden upon FDC. This discovery is central to Defendants' defense. *See* ECF No. 62 § VIII,

¶ 19. Therefore, Defendants' relevance objections to RFPs 56–57 to Defendant Inch are overruled.

Suspected Suicide, Attempted Suicide, or Suicide by Prisoners

Defendants further object to Plaintiffs' requests for documents related to suspected suicide, attempted suicide, and suicide by prisoners. *See* Defendants' Response to RFPs 94, 97–99, 104–05.[7] Defendants' primary argument is that some of these requests are not limited to prisoners in restrictive housing and are therefore not relevant to this case. To the contrary, these documents are highly relevant to Plaintiffs' claim of heightened risk of suicide for prisoners in isolation and Defendants' deliberate indifference to the heightened risk. Plaintiffs allege that 57% of prisoners who died by suicide in FDC did so while they were in isolation, and that 88% of prisoners who died by suicide had been in isolation at some point during their incarceration. ECF No. 13, ¶ 128. Discovery through this request may lead to evidence that provides a comparison between suicide rates for prisoners who are or were in isolation versus prisoners who were never isolated—a claim that is relevant to Plaintiffs' allegations. Additionally, discovery will likely show, among other things, (1) whether the prisoner was in isolation at the time of suicide or had ever

[7] Defendants also object to RFPs 98 and 99 to Defendant Inch on the grounds that the requests are burdensome. *See* Defendants' Response to RFPs 98–99 to Defendant Inch. However, Defendants have already identified 1,990 and 81 relevant documents for the requests, respectively. It is unclear to this Court why producing these documents would be burdensome. To the extent Defendants object to the timeframe for the requested discovery, this Court overrules that objection. *See Supra* Section IV.A.

been in isolation, (2) the number of times they had been in isolation, (3) the period of isolation they were subjected to, and (4) the time elapsed between any releases from isolation and suicide attempts. This evidence is relevant to Plaintiffs claim that Defendants had subjective knowledge of the risk of suicide for prisoners in isolation, and that Defendants failed to take reasonable measures to address that risk.

For these reasons, Defendants' relevance objections to RFPs 94, 97–99, and 104–05 are overruled.

Third Parties

Defendants object to Plaintiffs' request to produce documents related to isolation that were either provided to or authored by certain third parties. *See* Defendants' Response to RFPs 42–43, and 45 to Defendant Inch. Defendants argue that these documents are not relevant to any claims in this lawsuit. It is unclear why Defendants believe that the request is not relevant given that this lawsuit is about policies and practices of isolation. Plaintiffs allege that Defendants participated in a 2015 survey performed by the Association of State Correctional Administration regarding isolation and later refused to participate in a similar survey performed in 2017. ECF No. 13, ¶ 127. Plaintiffs further allege that both surveys specifically described the harms of isolation. ECF No. 13, ¶ 127. Further, Plaintiffs allege that the American Correctional Association notified Defendants that the size of their isolation cells and their recreational policies violated the association's standards, and

that Defendants admitted to their inadequacy. ECF No. 13, ¶¶ 108–09, 141. Taken together, the documents provided to or authored by these third parties are relevant to Plaintiffs' deliberate indifference claims. Therefore, Defendants' relevance objections to RFPs 42–43, and 45 to Defendant Inch are overruled.

Identification

Finally, Defendants object to ROG 16 to Defendant FDC. In ROG 16, Plaintiffs request Defendants to "Identify at each FACILITY the location of every ISOLATION cell, including the dorm, wing, cell number AND type of ISOLATION." Defendants argue that the information sought is irrelevant to any issues in this lawsuit. This Court agrees with Plaintiffs that the information is relevant to cross-reference the information requested with documents produced in response to RFPs. Documents produced in response to RFPs may include cell numbers, wings, or dorms without identifying whether the location is an isolation cell. Defendants' objection to ROG 16 to Defendant FDC is, therefore, overruled.

C. Self-Critical Analysis Privilege

Defendants object to RFPs 62 and 63 to Defendant Inch based on the self-critical analysis privilege. *See* Defendants' Response to RFPs 62–63 to Defendant Inch. Self-critical analysis privilege has been recognized by some courts in this circuit, *see Reichhold Chems., Inc. v. Textron, Inc.*, 157 F.R.D. 522, 527 (N.D. Fla. 1994), but "has never been fully embraced by courts in our district or circuit."

Burrow v. Forjas Taurus S.A., 334 F. Supp. 3d 1222, 1232 (S.D. Fla. 2018). Defendants do not point to, nor has this Court found, any binding precedent recognizing the self-critical analysis privilege. Additionally, the Eleventh Circuit has expressly rejected peer review privilege, a derivative of self-critical analysis privilege, in the context of civil rights cases. *Adkins v. Christie*, 488 F.3d 1324, 1329 (11th Cir. 2007).

"[P]rivileges contravene the fundamental principle that the public . . . has a right to every man's evidence." *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990). "Accordingly, there is a presumption against privileges which may only be overcome when it would achieve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Adkins*, 488 F.3d at 1328. Creation of an evidentiary privilege depends on "(1) the needs of the public good, (2) whether the privilege is rooted in the imperative needs for confidence and trust, (3) the evidentiary benefit of the denial of the privilege, and (4) consensus among the states. *Id.*

Defendants have the burden to establish self-critical analysis privilege. *Ubiquiti Networks, Inc. v. Kozumi USA Corp.*, 295 F.R.D. 517, 552 (N.D. Fla. 2013) ("The party raising a privilege has the burden of establishing the existence of the privilege."). Defendants have failed to meet this burden. This Court, therefore, finds that self-critical analysis privilege does not apply to the documents requested by

Plaintiffs and overrules Defendants' objections to RFPs 62 and 63 to Defendant Inch.

V

For the reasons provided, all of Defendants' objections to RFPs to Defendant Inch and FDC, and ROGs to Defendant FDC are overruled. The Defendants shall produce the requested discovery.

VI

Plaintiffs request this Court to set deadlines for discovery at issue in their motion to compel. Plaintiffs served their First Request for Product of Documents and Interrogatories in August of 2019. Defendants have had ample time to respond to Plaintiffs discovery request. However, given the concern raised by Defendants that their burden to produce the requested documents will exponentially increase, this Court finds it prudent to give Defendants an additional 30 days to respond to Plaintiffs' discovery requests. Defendant shall, therefore, furnish the requested information to Plaintiffs **within 30 days** of this Order.

VII

Under Federal Rule of Civil Procedure 37(a)(5)(A), when a motion to compel is granted, the Court "*must*, after giving an opportunity to be heard, require the party . . . whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's expenses incurred in making the motion,

including attorney's fees. FED. R. CIV. P. 37(a)(5)(A) (emphasis added). However, the Court "must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or (iii) other circumstances make an award of expenses unjust. Unless one of these conditions is met, an award of expenses is "mandatory." *Se. Asset Recovery Fund GA-4, LLC v. Windolf*, No. 5:13cv222, 2016 WL 7655801, at *1 (N.D. Fla. Apr. 21, 2016) (citing *Devaney v. Cont'l Am. Ins. Co.*, 989 F.2d 1154 (11th Cir. 1993)). Defendants argue that attorneys' fees and costs should be denied because their position was substantially justified. This Court disagrees.

"A position is 'substantially justified' if it results from a 'genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.' " *Id.* (quoting *Pierce v. Underwood*, 487 U.S. 552 (1988)). As outlined above, most of Defendants' objections are either boilerplate objections, based on the pre-2015 amendment formulation of Federal Rule of Civil Procedure 26, or are raised for the first time in their response to Plaintiffs' motion to compel. *See Supra* Section III. Additionally, Defendants withheld several discovery requests based on a narrow definition of "policies," despite clear guidance from the Supreme Court and the Eleventh Circuit. *See Supra* Section IV.B. This Court, therefore, finds that Defendants' objections were not substantially justified. Plaintiffs' motion for

attorneys' fees and expenses is **GRANTED**.

Accordingly, Plaintiffs are entitled to reasonable attorneys' fees and costs for bringing their motion to compel. However, for the purpose of judicial economy, this Court will determine the amount of attorneys' fees and costs at the end of this lawsuit.

For these reasons, it is **ORDERED:**

1. Plaintiffs' Motion to Compel, ECF No. 65-,1 is **GRANTED**.
2. Defendants shall furnish the requested information to Plaintiffs **within 30 days** of this Order.

SO ORDERED on February 7, 2020.

s/Mark E. Walker
Chief United States District Judge