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

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

Plaintiffs,

v. **Case No. 4:19-cv-212-AW-MAF**

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

Defendants.

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ORDER DENYING MOTION TO LIMIT RULE 34 INSPECTIONS

This lawsuit challenges the Florida Department of Corrections' use of solitary confinement. FDOC has moved to limit the number of Rule 34 facility inspections that Plaintiffs can conduct. ECF No. 312. Plaintiffs have opposed this motion but have offered to limit the number of remaining inspections to seven. ECF No. 320.

On September 14, 2020, the parties filed a stipulation for entry on land for inspection and confidential and privileged client and putative class member interviews (the "inspection stipulation"). ECF No. 157. Until now, the inspection stipulation has governed how the parties handled inspections. So far, eight inspections have occurred pursuant to the stipulation. ECF No. 312 at 3-4. The inspection stipulation states that "[i]t is understood and agreed that Plaintiffs' expert witnesses and representatives will be conducting multiple rounds of inspections."

ECF No. 157 at 1-2. But the stipulation does not limit the number of inspections that may be conducted.

During a February telephonic hearing, Plaintiffs indicated that they expected to conduct twenty additional inspections before the close of discovery. ECF No. 320 at 4-5; ECF No. 312 at 4. This statement prompted several meet and confers between the parties regarding the number of remaining inspections. Plaintiffs initially offered to limit the number of inspections to ten and subsequently offered to limit the number to seven. ECF No. 312 at 5; ECF No. 320 at 7. Defendants initially offered to allow four additional inspections and subsequently offered to allow four full inspections and three tour-only inspections. ECF No. 312 at 6; ECF No. 320 at 6-7. Ultimately, the parties were not able to agree. Now Defendants seek an order preventing Plaintiffs from conducting any further inspections[1] and Plaintiffs request that I order seven more inspections. For the reasons outlined below, Plaintiffs will be permitted to conduct up to seven additional inspections.

Rule 34(a) allows "entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect,

[1] Defendants' motion conceded that "four complete inspections and three partial inspections (tour-only without interview) would alleviate the burden imposed on the Department." ECF No. 312 at 12. Still, at the September 10, 2021 hearing, Defendants clarified that they are seeking to preclude Plaintiffs from conducting *any* additional inspections. Hearing (rough transcript) at 12:10-13:8.

measure, survey, photograph, test, or sample the property or any designated object or operation on it" within the scope of Rule 26(b). Fed. R. Civ. P. 34(a). Rule 26(b) provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b). Thus, the use of inspections under Rule 34(a) is treated the same as other discovery tools. I evaluate the relevance of information to be obtained by the inspection and compare the burden of obtaining it with its potential benefit.

"District courts have broad discretion in fashioning discovery rulings, [but] they are bound to adhere to the liberal spirit of the Federal Rules." *Adkins v. Christie*, 488 F.3d 1324, 1331 (11th Cir. 2007) (cleaned up). "The Supreme Court has stressed on multiple occasions the need to construe the Rules liberally to allow for robust discovery." *Akridge v. Alfa Mut. Ins. Co.*, 1 F.4th 1271, 1276 (11th Cir. 2021) (citing *Hickman v. Taylor*, 329 U.S. 495, 506 (1947); *Schlagenhauf v. Holder*, 379 U.S. 104, 114 (1964)). Discovery of relevant information should be limited only upon a showing of "a burden or an abuse of process sufficient to justify such limitations." *Adkins*, 488 F.3d at 1331; *see also Akridge*, 1 F.4th at 1277 (holding that the district court committed clear error by limiting discovery that was not "being conducted in bad faith or in such a manner as to annoy, embarrass or oppress" or seeking irrelevant or privileged information (quoting *Hickman*, 329 U.S. at 508)).

Defendants argue that the facility inspections are unduly burdensome because of staffing requirements on inspection days and the volume of post-inspection records requests. ECF No. 312 at 9-12. Further, Defendants appear to argue that the inspections were only relevant to class certification and are no longer relevant since Plaintiffs have filed their Motion for Class Certification. *Id.* at 13-14. Plaintiffs contend that the inspections will yield information that is relevant to their substantive claims and seven additional inspections is proportionate to the needs of the case. ECF No. 320 at 11-13. Further, Plaintiffs argue that Defendants are attempting to "unilaterally 'rewrite' the terms of the inspection stipulation to unreasonably obstruct relevant discovery." *Id.* at 10.

Plaintiffs' claims involve allegations that certain policies and practices "subject[] all Plaintiffs and the Class to a substantial risk of serious harm" and that Defendants have "condoned or been deliberately indifferent" to said policies and practices. ECF No. 309 ¶¶ 198-99, 202. Their claims also involve allegations that Defendants "fail[] to ensure that people with disabilities have access to, are permitted to participate in, and are not denied the benefits of, programs, services, and activities provided" and fail to make reasonable modifications. *Id.* ¶¶ 208-209. Inspections that are intended to allow Plaintiffs' experts to "assess all aspects of the operations of restrictive housing" (ECF No. 157 at 1) will clearly generate information that is relevant to these claims. For example, "[t]o establish a policy or

custom [in a § 1983 action], it is generally necessary to show a persistent and wide-spread practice. . . . Normally random acts or isolated incidents are insufficient to establish a custom or policy." *Depew v. City of St. Marys*, 787 F.2d 1496, 1499 (11th Cir. 1986). So Plaintiffs will need to show widespread practices across 57 institutions. The seven remaining inspections cover a cross-section of different FDOC restrictive housing categories where a cross-section of different propoesed subclass members reside. ECF No. 320 at 12-13; *cf.* ECF No. 157 at 1 n.2 ("For the purposes of this Stipulation, restrictive housing is defined as Administrative Confinement, Close Management, Disciplinary Confinement, and Maximum Management . . . .").

These inspections seek information that is relevant to more than class certification. As Defendants acknowledged in the Rule 26(f) Report, there is overlap between class certification and merits discovery in this case. ECF No. 43 at 4-5. But that does not mean that the effective close of discovery was the class certification deadline. Discovery does not close until March 31, 2022 and it is not bifurcated. ECF No. 43 at 4-5; ECF No. 166 at 1.

Given the relevance of the information sought, the burden Defendants describe "is outweighed by the benefit of obtaining a full and accurate understanding of the facts in the pursuit of a just result." *Akridge*, 1 F.4th at 1278. Plaintiffs have

agreed to limit themselves to seven more inspections which restricts the burden on Defendants.

Further, I am not persuaded that the burden Defendants point to warrants altering the parties' existing agreements. Defendants stipulated to "multiple rounds of inspections" (ECF No. 157 at 2) and the joint motion to modify the scheduling order (ECF No. 163) proposed a March 31, 2022 discovery cutoff. The parties also negotiated the total number of interviews that Plaintiffs could conduct during an inspection, which limits the number of health records that Plaintiffs can request after an inspection. ECF No. 157 at 8-9. As Plaintiffs point out, Defendants have previously pointed to the inspection stipulation and argued "[c]ourts cannot add terms, modify, or rewrite agreements entered into between the parties." ECF No. 254 at 43; *see also* ECF No. 179 at 5 (arguing that Plaintiffs should find an expert willing to appear in-person "instead of asking the Court to rewrite the Stipulation"); ECF No. 296 at 13 ("The stipulation is silent as to Rule 35 examinations and places no prohibitions on the Department's expert questioning the Named Plaintiffs about Disciplinary Reports should such examinations occur.").

Defendants' motion to limit the number of Rule 34 inspections (ECF No. 312) is DENIED. Plaintiffs may continue to conduct inspections until the discovery cutoff date up to a maximum of seven additional inspections.

SO ORDERED on October 22, 2021.

s/ *Allen Winsor*
United States District Judge