

**IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division**

BROOKE WHORLEY, <i>et al.</i> ,	)	
	)	
<i>Plaintiffs,</i>	)	
	)	
v.	)	Case No. 3:20-cv-00255-HEH
	)	
	)	
RALPH NORTHAM, <i>et al.</i> ,	)	
	)	
<i>Defendants.</i>	)	
	)	

JOINT MOTION TO DISMISS AND RETAIN JURISDICTION

Brooke Whorley, Michael Sullivan, Gale Jones, Alonzo Williams, Da’Von Walker, Dwight Horton, Frank Fairchild, Candace Blankenship, Brenda Van Emmenis, Olivia Ivashin, Ennis Stewart, Lartaija Banks, Matthew Mosher, Bruce Harris, Jr., Johnathan McMillan, Milton Williams, Sr., Timothy Brummett, Anthony Vicks, Warren Brooks, Jesse Davenport, Warren Medley-Green, Larog Trowell, Bejamen Fyfe, Antonio Perryell, Donnie Offenbacker, Felipe Franco, and Courtney Stroble (“Plaintiffs”) and Ralph S. Northam, Brian J. Moran, Harold Clarke, Donald Wilmouth, Rick White, Thomas Meyer, Tikki Hicks, Rodney Younce, Tracy Ray, Eric Aldridge, Dana Ratliffe-Walker, Tori Raiford, Tammy Williams, Joseph Bateman, and Phillip White, in their official capacities, (“Defendants”) (collectively, “the parties”), having entered into a Settlement Agreement (“Agreement”), hereby jointly move this Court for entry of an order conditionally dismissing this action, with prejudice, pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure, and move that the Court retain jurisdiction to enforce the Agreement in accordance with its terms. In support thereof, the parties state as follows:

1. The parties participated in settlement conferences conducted by Judge David J. Novak on April 22, April 28, and May 8, 2020. As a result of these negotiations, the parties agreed to resolve Plaintiffs' claims arising under the Eighth and Fourteenth Amendments of the United States Constitution.

2. On May 11, 2020, the parties executed the Settlement Agreement, attached as Exhibit A. Under the Agreement, the parties agreed to full resolution of all issues in the case and agreed to move this Court to dismiss this action and to retain jurisdiction for the limited purpose of enforcing the terms of this Agreement.

3. Pursuant to Paragraphs 1, 8, and 9 of the Agreement, the parties hereby jointly move this Court to dismiss this action with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(2) and move that this Court retain jurisdiction to enforce the Agreement. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994) (recognizing that a federal district court may retain jurisdiction to enforce a "dismissal-producing settlement agreement" in its order); *Columbus-American Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 299 (4th Cir. 2000) (finding that dismissal order stating that "[t]he Court retains jurisdiction to enforce the settlement of the parties" granted the district court jurisdiction to enforce a settlement agreement).

Respectfully submitted,

/s/ Eden Heilman

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Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2020, I electronically filed the foregoing Joint Motion to Dismiss and Retain Jurisdiction with the Clerk of Court using the CM/ECF system, which will send a notice of such filing to all counsel of record.

/s/Eden Heilman
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STIPULATED SETTLEMENT AGREEMENT

This Stipulated Settlement Agreement is entered into by the parties in *Whorley et al. v. Northam et al.*, Case No. 3:20cv00255, currently pending in the United States District Court for the Eastern District of Virginia.

The plaintiffs are twenty-seven individuals incarcerated in the custody of the Virginia Department of Corrections (VDOC): Brooke Whorley, Brenda van Emmenis, Gale Jones, Candace Blankenship, Olivia Ivashin, Lartaija Banks, Alonzo Williams, Ennis Stewart, Felipe Franco, Jesse Davenport, Matthew Mosher, Bruce Harris, Jonathan McMillan, Anthony Vicks, Warren Medley-Green, Antonio Perryell, Da'Von Walker, Warren Brooks, Larog Trowell, Benjamin Fyfe, Michael Sullivan, Courtney Stroble, Dwight Horton, Milton Williams, Frank Fairchild, Timothy Brummett, and Donnie Offenbacher.

The defendants are Ralph Northam, Governor of Virginia; Brian Moran, Secretary of Public Safety and Homeland Security; Harold Clarke, Director of the Virginia Department of Corrections; and the wardens of the following correctional facilities: Virginia Correctional Center for Women, Indian Creek Correctional Center, State Farm Correctional Center, State Farm Enterprise Unit, Haynesville Correctional Center, Coffeewood Correctional Center, Greensville Work Center, Fluvanna Correctional Center for Women, Dillwyn Correctional Center, Caroline Correctional Unit, Deerfield Correctional Center, Patrick Henry Correctional Center, and Augusta Correctional Center. All defendants are named in their official capacities.

The parties to this Agreement believe that, in order to avoid protracted, costly, and time-consuming litigation, it is in their respective interests to resolve the issues in the above-captioned case.

Accordingly, the parties to this Agreement, by and through their respective counsel, jointly stipulate and agree to the following:

1. **Dismissal of Case No. 3:20cv255:** The Plaintiffs shall, by and through their attorneys, cause the Complaint filed in the Eastern District of Virginia, Case No. 3:20cv255, to be voluntarily dismissed, in accordance with the terms of this Agreement, with each side bearing their own fees and costs. The parties consent to the reservation and exercise of jurisdiction by the U.S. District Court over all disputes between and among the Parties arising out of this Agreement.
2. **Dismissal of Harold Clarke from Va. Sup. Ct. Case No. 200551:** Counsel for the Plaintiffs agree to dismiss Harold Clarke, Director of the Virginia Department of Corrections, from the mandamus petition filed in the Virginia Supreme Court, Docket No. 200551. Each side shall bear their own fees and costs.
3. In consideration thereof, Defendants agree to the following:
 - a. **Early Release Plan:** On April 22, 2020, the Virginia General Assembly adopted a Budget Amendment that allows a certain category

of incarcerated individuals to be considered for discharge from incarceration prior to their scheduled release dates during the Governor's declared state of emergency. The Budget Amendment vests the Virginia Department of Corrections with the authority to make discharge determinations for early release. The Virginia Department of Corrections has developed a policy entitled *COVID-19 Response: Inmate Early Release Plan*, to implement the terms of the Budget Amendment. Pursuant to this Agreement, VDOC agrees to amend or otherwise clarify its existing *Early Release Plan* as follows:

- i. The *Early Release Plan*, as adopted, provides that individuals who have less than 12 months remaining on their sentence will be considered for possible release as long as they have not been convicted of a Class 1 felony or a violent sex offense. Among other eligibility criteria, VDOC also requires that the individual have a viable home plan, which means that—as defined in VDOC Operating Procedure 820.2(VII)(A)(1)—the inmate must be able to provide an address where the individual will be able to live without violating any conditions of a court order (*e.g.*, a no-contact order or order not to reside with minor children), and that will adhere to any lease restrictions in terms of the individuals allowed to live in that residence (*e.g.*, restrictions for subsidized housing). Defendants agree to amend the *Early Release Plan* to provide reference to the home plan criteria defined in OP 820.2(VII)(A)(1), and to specify that any address provided may be verified by a local probation and parole officer, rather than the re-entry counselor normally used under OP 820.2(VII)(A)(1). VDOC will also document that, for the purposes of inmates considered for release pursuant to the Budget Amendment or any COVID-19-related conditional pardon, it is suspending the requirement of OP 820.2(VII)(A)(1), which ordinarily specifies that a home plan will not be verified more than 6 months before the individual's anticipated release date.
- ii. Under the *Early Release Plan*, VDOC is also considering an individual's health condition—along with available community resources—when deciding whether to exercise its discretion to release an inmate pursuant to the Budget Amendment. By “health condition,” VDOC specifically agrees to give priority consideration for approval of release to those individuals who have a health condition enumerated by the Centers for Disease Control and Prevention (CDC) as being at higher risk of health complications if that individual were to contract COVID-19.
- iii. Pursuant to this Agreement, VDOC agrees to amend its existing *Early Release Plan* to specify that it will make all

reasonable efforts to review eligible individuals prior to the expiration of the declaration of emergency. If the agency elects not to exercise its discretion to discharge an individual who was potentially eligible for release under the *Early Release Plan*, that inmate will be notified of the decision not to release by written document providing the reason that the inmate is not being released, which will be mailed to the inmate within 48 hours of the final decision not to release. The individual will also be provided with information about requesting a COVID-19-related conditional pardon, in accordance with part 3(b), below.

- iv. VDOC agrees that it will exercise its authority to consider the review and release of eligible individuals on a rolling basis, meaning VDOC will consider those who are or become eligible for release at any point during the period of the emergency declaration, or any emergency declaration that meets the conditions of the Budget Amendment, not just those who became eligible at a static time period when the policy was adopted.
- v. VDOC has disseminated to all incarcerated individuals and staff information about the *Early Release Plan* and requirements for eligibility, and will continue to make such information available as updates or changes may occur. The informational materials include an appeal document that the inmates may use to address disagreements or concerns with their calculations, scores, or assessments on particular criteria described in VDOC's *Early Release Plan*.
- vi. VDOC also agrees to update its COVID-19 webpage to report, on a daily basis, the number of individuals who have been released under the Budget Amendment.
- vii. For the duration of this Agreement, Counsel for the Defendants shall report to the Court and Counsel for the Plaintiffs, on a weekly basis, as follows: (1) the number of individuals reviewed for release; (2) the number of individuals granted release; and (3) the number of individuals denied release.
- viii. VDOC agrees that, if the state of emergency expires, it will continue to review individuals with less than a year remaining on their sentence over the following ninety (90) days to determine whether they might be eligible for release in the event that there is a subsequent declaration of emergency that would revive their authority to release individuals from incarceration under the *Early Release Plan*.

- b. **Conditional Pardons:** The Office of the Secretary of the Commonwealth reviews all pardon petitions on an individual basis so that unique circumstances surrounding an individual's case may be considered. This allows for the Secretary and Defendants to expedite petitions as deemed appropriate, including the processing of conditional pardons requesting release because of the COVID-19 pandemic. Defendants represent and warrant that the Office of the Secretary of the Commonwealth is actively identifying and expediting consideration of petitions that reference medical concerns both related and unrelated to the COVID-19 pandemic.

There are currently no eligibility criteria or restrictions for conditional pardons; petitioners should provide all relevant information, including any medical conditions or other specific health concerns that would factor into the consideration of their petition for clemency. The Defendants and the Office of the Secretary of the Commonwealth agree to prioritize conditional pardons at this time, in order to expedite petitions from individuals currently incarcerated.

Defendants represent and warrant that the Office of the Secretary of the Commonwealth has agreed to consider conditional pardons relating to the COVID-19 pandemic even if the requestor had a previous, unrelated pardon request denied within the preceding 2 years, a factor that would normally result in the automatic denial of the successive petition. Any individual who has a request for clemency currently pending review may supplement their existing application with new information regarding medical conditions or concerns related to the COVID-19 pandemic. By way of this agreement, Defendants agree to provide the Office of the Secretary of the Commonwealth with any assistance that they might need to complete expedited consideration of conditional pardons requesting release because of the COVID-19 pandemic, including—but not limited to—making sure that information about any new procedures is disseminated to inmates within the custody of VDOC.

- c. **Grievances:** Defendants agree to provide written guidance to the grievance coordinators at VDOC facilities, instructing them to prioritize for review any grievances alleging delay in medical assessment or treatment related to COVID-19, as well as any grievances regarding failure to abide by COVID-19-related policies and protocols, such as deficiencies in personal protective equipment ("PPE"), sanitation, or access to personal hygiene or cleaning supplies. Defendants agree to share the proposed written guidance with counsel for Plaintiffs prior to its dissemination. For purposes of this agreement, "grievance" includes both informal complaints and regular grievances. If an inmate complains of symptoms related to COVID-19, a supervisor should meet with the inmate immediately to initiate the

process of referring the inmate to a medical provider for screening. If the supervisor does not believe the reported symptoms qualify for COVID-19, and the inmate disagrees, then the inmate should immediately file an emergency grievance, which will be responded to by a medical provider. Defendants shall continue to document the dates and times of all sick calls and emergency grievances related to medical concerns, the inmate's reported symptoms, the dates and times the inmate is seen by medical professionals, and the outcome, to allow for tracking of the response to complaints of COVID-19 symptoms.

- d. **Medical Co-pays:** Defendants agree to continue, for the duration of this Agreement, the suspension of co-pays for all sick calls, health-related emergency grievances, and medical assessments to ensure cost is not a deterrent to seeking medical care.
- e. **Testing:** Defendants will continue to work with the Virginia Department of Health (VDH) and local health departments to procure and allocate as many tests as possible to VDOC facilities, prioritizing the testing of inmates and staff in VDOC facilities identified by VDH as "outbreak" locations. Defendants agree to report to Plaintiff's counsel, every week, the total number of VDOC inmates tested during the preceding week.
- f. **Hygiene and Sanitation:** VDOC agrees to continue providing all inmates with enhanced access to showers and handwashing opportunities, as well as providing up to two bars of soap per week, free of charge. In accordance with their existing COVID-19 sanitation plan, Defendants shall also continue to require high interval sanitation of all equipment of common usage at all facilities, such as tables and chairs, telephones, video screens, gym equipment, bathrooms, vending machines, microwaves, laundry machines, keyboards, remote controls, and doors. Defendants also agree to continue providing access to cleaning supplies for each housing area, including in quantities sufficient for each inmate to clean and disinfect the floor and all surfaces of their housing unit or cell.
- g. **Laundry:** VDOC shall continue to ensure that the facemasks that have been provided to inmates are laundered daily, and all inmates have access to enough clean clothing to allow them to change clothes on a daily basis. VDOC further agrees that, during the duration of the Agreement, the laundry schedule for bedding shall be amended so that bed linens are laundered twice per week, rather than once per week.
- h. **PPE:** Defendants will continue to ensure that all correctional staff are informed about the types of PPE required to perform the various staff functions; the proper donning, removing, and disposal of PPE; the appropriate receptacles for disposal of PPE; and an explanation of the

related rationale. Defendants shall also continue to communicate expectations around the frequent sanitizing of correctional staff equipment, such as restraints, handcuffs, and other equipment potentially used on multiple inmates.

- i. **Staffing & Inmate Housing:** Defendants agree to continue to restrict the movement of staff from facility-to-facility and building-to-building within facilities, to the greatest extent possible, to minimize the risk of virus transmission by staff. Defendants shall also continue to restrict the transfer of inmates from facility-to-facility unless necessary to transport an inmate for security reasons and/or a pending court appearance. Defendants shall continue to require all staff to wear appropriate PPE when entering an area housing individuals who are suspected or known to have tested positive for COVID-19, and to change their PPE, in compliance with applicable CDC and VDH guidance, when leaving those housing units to limit the risk of exposure to and transmission of the virus. Staff shall document when they enter and leave specific facilities or housing units so that their movements can be retraced in the event of infection. Staff shall wear appropriate protective items at all times in facilities where infection has been confirmed.
- j. **Inmate Education:** VDOC shall continue to educate inmates on the COVID-19 pandemic by providing information about the pandemic, symptoms, virus transmission, and how to protect oneself from the virus. VDOC staff shall continue to post signage and information in common areas that provide (1) general updates and information about the COVID-19 pandemic; (2) information on how inmates can protect themselves from contracting COVID-19; and (3) instructions on how to properly wash hands. Among other locations, signage must be posted in every housing area.
- k. **Confidential Attorney Communications:** VDOC shall continue to ensure that inmates, including those in medical isolation or quarantine, will be provided the opportunity to conduct confidential legal calls, at no cost to the inmate, through the inmate telephone system, and shall continue to require that the facility disable the automatic recording system to ensure that the legal call is not recorded. Such calls shall be permitted to be of sufficient duration to discuss confidential legal matters. Defendants agree to provide written guidance to VDOC facilities requesting that the facilities expedite any request to add an attorney phone number to the automatic block list, which will serve as an additional safeguard to ensure confidentiality of the attorney-client communication. Such guidance will also provide that a request to add an attorney phone number to the automatic block list may be made by an inmate or an attorney. If the facility's telephone provider is causing a delay greater than 48 hours in adding attorney phone numbers to the

block list, the facility shall provide interim access to confidential legal calls by another avenue appropriate in that facility.

1. **Language Assistance:** VDOC agrees to provide language translation services or other accommodations, as necessary, for incarcerated individuals who may not be able to otherwise access any of the written materials discussed in this section.
4. Plaintiffs' counsel shall have reasonable access to the documents and information necessary to properly evaluate whether Defendants are complying with the provisions of this Agreement. Defendants agree to provide counsel for the Plaintiffs with access to policies, procedures, plans, regulations, rules, guidance, or directives implementing the terms of this Agreement. Defendants agree that if there is a material change to the terms of their existing COVID-19 policies and procedures, including but not necessarily limited to the specific policies discussed above, those changes shall be communicated to counsel for the Plaintiffs. The parties shall cooperate as best as possible to accommodate any additional requests for documents and information by Plaintiffs in a timely manner, without unduly burdening Defendants. If the Parties fail to agree, either party may contact Judge David Novak and request mediation of the dispute.
5. In the event that either party fails to substantially comply in some significant respect with this Agreement, counsel shall provide a written statement describing the alleged non-compliance. ("Notice of Substantial Non-Compliance"). The other party shall provide a written response to the Notice of Substantial Non-Compliance within five (5) calendar days from receipt of that Notice. Within five (5) calendar days of receipt of the written response, the parties shall confer in a good faith effort to resolve their dispute informally.
6. In the event that a Notice of Substantial Non-Compliance cannot be resolved informally, counsel for the parties shall request that Judge David Novak mediate the dispute. In the event that Judge Novak is no longer available, the parties shall jointly request the assignment of another Judge or Magistrate Judge. If the dispute has not been resolved through mediation in conformity with this Agreement within 20 calendar days, either party may file a motion to enforce the Agreement in the District Court.
7. Parties to this Agreement are not required to exhaust administrative remedies under 42 U.S.C. § 1997e(a) in order to seek relief pursuant to this Agreement. For all other individuals, a Notice of Substantial Non-Compliance in this matter shall not constitute a substitute for the exhaustion of administrative remedies requirement set forth in 42 U.S.C. § 1997e(a).
8. **Reservation of Jurisdiction:** The parties consent to the reservation and exercise of jurisdiction by the United States District Court for the Eastern

District over all disputes between and among the Parties arising out of this Agreement. In the event the Court finds that either party has not complied with the Agreement, the Court may: (1) require the allegedly breaching party to submit a plan to remedy the deficiencies identified by the Court; (2) require the parties to mediate the dispute, which may result in entry of a supplemental or modified settlement agreement; (3) upon motion of the non-breaching party, declare the settlement agreement null and void; or (4) engage in any other such actions as the Court might deem appropriate to resolve the pending dispute.

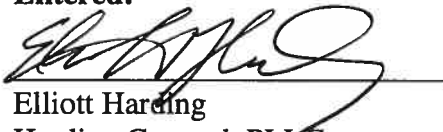
9. **Duration of Agreement:** The parties agree that the Court shall retain jurisdiction to resolve issues arising from implementation of this Agreement, in accordance with paragraph (8), above, until such time as the Court determines that its implementation is no longer necessary, after taking into consideration the spread of the virus in VDOC facilities, the impacts of contamination on the inmate population, and mitigation efforts.
10. **No Admission of Liability:** Plaintiffs acknowledge that this Agreement does not constitute an admission by the Defendants of any: (a) liability; (b) violation of any federal, state or local statute, law, regulation, order or other requirement of law; (c) breach of contract, actual or implied; (d) commission of any tort; or (e) other civil wrong.
11. **Virginia Law Applies:** This Agreement shall be deemed to have been made within the Commonwealth of Virginia and shall be interpreted, construed and enforced in accordance with the laws of the Commonwealth of Virginia.
12. **Attorney's Fees:** The prevailing party may be entitled to an award of attorneys' fees in any action commenced to enforce this Agreement or any provision therein.
13. **Severability:** If one or more provisions of this Agreement shall be ruled unenforceable or void, the parties may enforce the remainder of this Agreement.
14. **Non-Waiver:** Failure of either Party to enforce any provision of this Agreement shall not be construed as a waiver of that or any other provision.
15. **Voluntary Agreement:** The parties have had an opportunity to consult with an attorney before signing this Agreement. The Plaintiffs acknowledge that, in signing this Agreement, they relied only on the promises set forth in this Agreement and not on any other promise made by the Defendants. This Agreement has been entered into freely, knowingly, and voluntarily and not as a result of coercion, duress, or undue influence.
16. **Entire Agreement:** This Agreement constitutes the entire understanding and agreement between the Parties hereto with respect to its subject matter. This Agreement supersedes all other understandings, agreements, communications

or negotiations (whether written or oral) between the Parties hereto with respect to such subject matter. Each party represents, warranties, and covenants that it has the full legal authority to enter into this Agreement and to perform the duties and obligations arising under this Agreement.

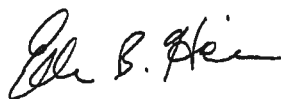
17. **Written Amendment Required:** This Agreement may not be amended, changed or altered, except by a writing signed by the Parties.
18. **Binding Obligations:** This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors, assigns, estate, heirs and personal representatives.
19. **Counterparts:** This Agreement may be executed in counterparts or with electronic signatures, and if so executed each such counterpart shall have the force and effect of an original. A facsimile or copy of an original signature transmitted to the other Party is effective as an original document.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the day and year written below.

Entered:


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5/11/2020
Date


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May 11, 2020
Date

Counsel for Plaintiffs



5/11/2020

Date

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