

Plaintiffs ask this Court to deny Defendants’ request for leave to file an amended answer to assert three affirmative defenses based on arguments that Defendants have known that Plaintiffs are pursuing claims under Title II of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act (“RA”) from the time this lawsuit was filed, and that Defendants were made clear about the scope of these claims from Plaintiffs’ discovery responses. Plaintiffs are wrong. Their opposition fails to account for the facts that (1) the purported expert report they submitted by Richard Wells (the “Wells Report”) on May 26, 2023 greatly expands the scope of the relief they seek by and through their ADA and RA claims beyond anything contemplated by the Complaint and Plaintiffs’ discovery responses, and more alarming, (2) the Wells Report asserts new theories of liability. Thus, good cause exists to amend the scheduling order so that Defendants can assert the statutory affirmative defenses of fundamental alteration, undue burden, and direct threat. Furthermore, Plaintiffs will not be prejudiced in the least if leave to amend is granted because they already possess much of the discovery needed to rebut these affirmative defenses.

expert discovery does not close for another 6 weeks (and could be reasonably extended by agreement if sought), and trial is not set to begin until March 18, 2024.

ARGUMENT

I. Good Cause Exists Because Plaintiffs' Expert Report Greatly Expands the Scope of The Relief They Seek Under The ADA and RA And Alleges New Theories Of Liability That Were Not Identified In Plaintiffs' Complaint Or Discovery Responses.

Plaintiffs contend that Defendants cannot establish good cause because they “have known about the existence and scope of Plaintiffs’ ADA and RA claims since Plaintiffs filed their complaint in 2019.” Pls’ Opp’n at 1. Defendants have certainly known that “Plaintiffs are asserting ADA and RA claims since Plaintiffs filed their complaint more than four years ago.” *Id.* at 6. However, the scope of the relief Plaintiffs seek under the ADA and RA, as announced in the Wells Report, goes well beyond the allegations in Plaintiffs’ Complaint.

Plaintiffs acknowledge in their Opposition that their ADA and RA claims on behalf of a subclass of inmates with mental health disabilities are based on three theories: Defendants’ alleged “(i) failure to provide proper services to inmates with mental health disabilities, (ii) selection of criteria that disproportionately prevent inmates with mental health disabilities from progressing through the Step-Down Program, and (iii) failure to reasonably accommodate disabled inmates.” Pls’ Opp’n at 2. Plaintiffs’ Complaint, however, *does not* allege that VDOC violates Title II because of VDOC’s alleged failure to: [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] While none of these alleged ADA deficiencies are identified in the Complaint, the Wells Report spills substantial new ink addressing them, providing notice to Defendants for the first time on May 26, 2023 that they are part of Plaintiffs’ case. It cannot be said that Defendants should have known that Plaintiffs would pursue these allegations based on the Complaint. *See Franklin Livestock, Inc. v. Boehringer Ingelheim Vetmedica, Inc.*, No. 5:15-CV-00063-BO, 2016 WL 7613690, at *2 (E.D.N.C. Sept. 26, 2016) (court found good cause because that it had “no reason to believe that defendant should have known of the basis for the defenses it now wishes to assert before the scheduling order deadline”).

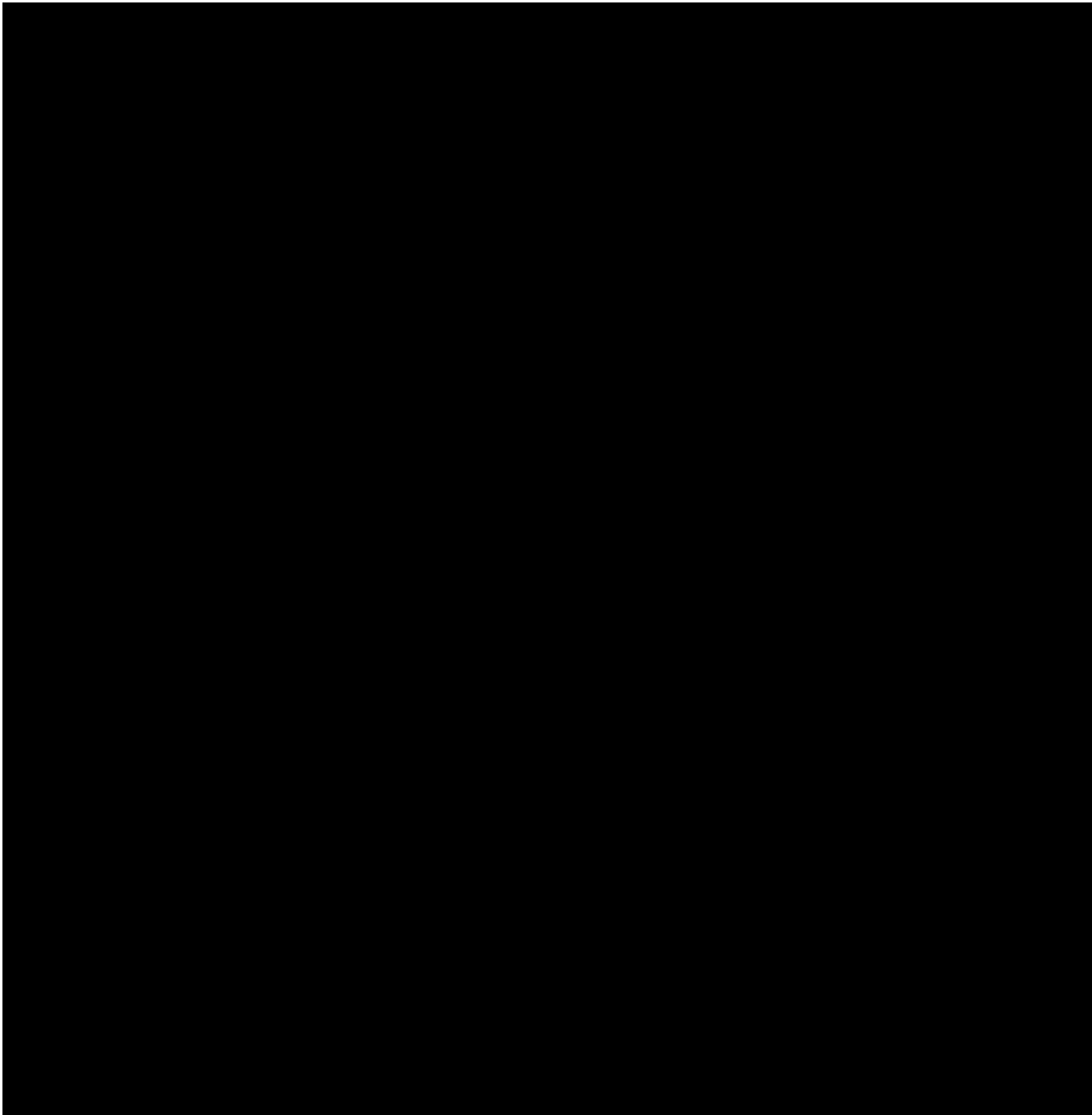
The same is true with respect to Plaintiffs’ interrogatory responses. Plaintiffs assert that Wells’ assertions about the alleged inadequacies of VDOC’s policies and practices relating to the ADA and RA, as well as the specific relief Plaintiffs seek for these claims, were “disclosed to Defendants in interrogatory responses served in 2022.” Pls’ Opp’n at 1. Plaintiffs further state that the “deficiencies identified in Mr. Wells’s report are substantially identical to those Plaintiffs identified in their interrogatory responses.” *Id.* at 7.

This assertion is simply not true. Plaintiffs’ interrogatory responses “identified 16 proposals that they believe would ‘cure the constitutional and statutory deficiencies with the Step-Down Program as it relates to individuals with mental health disabilities.’” Pls’ Opp’n at 3 and Ex. 3.¹ As with their Complaint, Plaintiffs’ interrogatory responses focused on, and are limited to,

¹ While Plaintiffs contend these 16 proposals are not limited to their Eighth and Fourteenth Amendment claims but also apply to their ADA and RA claims because these proposals address the Step-Down Program’s “constitutional and *statutory* deficiencies” (Pls’ Opp’n at 3) (emphasis in original), it is apparent that Plaintiffs are referring to 42 U.S.C. § 1983, which they cite for both their Eighth and Fourteenth Amendment claims, and not the ADA or RA. *See* Dkt. No. 1, ¶¶ 231-249.

restrictive housing and the Step-Down Program, which is the “program, service, and activity” that Plaintiffs claim they were denied the ability to participate in and benefit from because of their alleged disabilities. Pls’ Opp’n at 3-5 (identifying the 16 proposals).

The Wells Report recommendations and allegations go well beyond the interrogatory responses and are not “substantially identical.” As Wells states in his “Conclusions,” 



[REDACTED]

[REDACTED] the remaining topics that Wells opined on are not encompassed by Plaintiffs' interrogatory responses.²

Plaintiffs' arguments that their Interrogatory responses are duplicative of the Wells Report are not persuasive. For instance, Plaintiffs' Interrogatory response that VDOC should "evaluate all individuals *placed in segregation* for signs or symptoms of mental disabilities" is not the same as Wells' allegation that [REDACTED]

[REDACTED] Pls' Opp'n at 8 (emphasis added). Likewise, meaningfully reviewing "the necessity of long-term segregation for prisoners with signs or symptoms of mental disabilities with greater frequency," as stated in Plaintiffs' Interrogatory responses, is not the same as Wells' allegation that VDOC's [REDACTED] *Id.* It simply cannot be said that Plaintiffs' 16 bullet point proposals, which all relate to restrictive housing and the Step-Down Program, "provided more than enough information for Defendants to plead affirmative defenses relevant to Plaintiffs' ADA and RA claims" that would address the allegations raised in the 160-page Wells Report, which covers every aspect related to application of the ADA and RA in VDOC's system for all incarcerated persons, not just those who are eligible for the Step-Down Program.

Moreover, *Plaintiffs conceded in their interrogatory responses that the scope of the relief they seek would not be fully formed until expert discovery concluded.* Pls' Opp'n, Ex. 3 at 4. Plaintiffs stated that "[f]urther and complete discovery, including expert discovery, is necessary in

² Even at that, Plaintiffs' interrogatory responses targeted specific elements of the Step-Down Program while the Wells Report is open-ended.

order for Class Plaintiff Wall to fully understand how VDOC policies and procedures currently operate, and to be in a position to suggest minimum changes with further specificity.”³ *Id.* Thus, it is not fair to say that Defendants knew or should have known of all relief Plaintiffs would seek solely based on their interrogatory responses when Plaintiffs expressly stated that they would not be able to identify the relief they would seek “with further specificity” until expert discovery concluded. Clearly, Plaintiffs have just now stated for the first time the full scope of the relief they seek for their ADA and RA claims through the Wells Report, and that supports finding good cause to grant Defendants leave to amend their answer.

Granting leave the amend under these circumstances is not unusual. Other courts similarly have found that good cause exists when plaintiff purports to assert new theories of liability through an expert report. *See Michel v. United States Customs & Border Prot.*, No. 16CV277-GPC(RBB), 2017 WL 3605332, at *2 (S.D. Cal. Aug. 22, 2017). In *Michel*, the defendant sought leave to amend its answer to assert “sophisticated user” and “sophisticated intermediary” affirmative defenses after it learned that plaintiff “had altered her failure to warn theory of liability.” *Id.* at *1. In its motion, defendant alleged that it was “only after Plaintiff served her expert reports . . . that she appears to have asserted an altered theory of liability that [defendant] failed to instruct law enforcement officers and agents as to the characteristics of [defendant’s] non-defective product.” *Id.* The court held that defendant acted diligently in seeking relief and established “good cause” to modify the scheduling order so that defendant could assert new affirmative defenses in light of plaintiff’s expert report, which sought to add new alleged theories of liability. *Id.*; *see also Henderson v. GATX Corp.*, No. 809-CV-2312-T-33AEP, 2012 WL 868779, at *2 (M.D. Fla. Mar. 14, 2012) (held, “a January 24, 2012, expert report revealing a new theory of the case when the

³ The same statement was made in every named plaintiff’s interrogatory responses.

trial is scheduled to take place in May 2012, provides good cause for amendment of the Answer”)

Here, the Wells Report raises a slew of new theories that Plaintiffs presumably will try to use as the basis for liability and remedy under the ADA and RA. As set forth above, Wells alleges that Defendants violate ADA Title II and the RA because [REDACTED]

[REDACTED] None of these alleged theories are supported by Plaintiffs’ Complaint or Interrogatory responses. They first appeared in the May 26, 2023 Wells Report. In cases where defendants “did not know about the allegations that the plaintiffs may rely upon until during the discovery process,” including allegations raised for the first time in expert reports, good cause exists to amend the answer. *Grill v. Aversa*, No. 1:12-CV-120, 2014 WL 198805, at *4 (M.D. Pa. Jan. 15, 2014) (held, defendants established good cause to amend answer as they “represented that they discovered numerous facts during the course of extensive discovery practice that warrant amendment in order to add affirmative defenses,” including “during the course of reviewing the plaintiffs’ expert reports,” which were submitted late in discovery). Good cause plainly exists here.

II. Plaintiffs Will Not Be Unduly Prejudiced If Defendants Are Granted Leave To Amend Their Answer To Assert The Three Additional Affirmative Defenses.

Once Defendants satisfy the good cause standard under Rule 16, as they have done here, leave to amend an answer should be permitted under Rule 15 unless the proposed amendment “would be prejudicial to the opposing party, there has been bad faith on the part of the moving party, or the amendment would be futile.” *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002). Plaintiffs argue that they would be prejudiced if Defendants are granted leave to amend the answer

to assert three affirmative defenses. They do not contend that Defendants acted in bad faith or that the amendments would be futile.

Because it is “axiomatic that almost every amendment ... results in some prejudice,” district courts in the Fourth Circuit hold that “the relevant test is whether the opposing party would suffer ‘undue prejudice.’” *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, No. 2:09-cv-185, 2011 WL 13229623, at *2 (E.D. Va. Mar. 11, 2011) (emphasis added). According to Plaintiffs, allowing Defendants to amend their answer will be prejudicial “because it significantly limits Plaintiffs’ ability to develop evidence in response to Defendants’ new defenses.” Pls’ Opp’n at 11. Defendants respectfully disagree.

Plaintiffs argue they will be prejudiced because “fact discovery closed over four months ago, and Plaintiffs can no longer obtain factual evidence to rebut Defendants’ new defenses.” Pls’ Opp’n at 11. This is not the case. Plaintiff acknowledge that the expert discovery deadline does not close until August 16, 2023 – more than six weeks from now. *Id.*; see Dkt. No. 328. Experts have not been deposed, which will provide Plaintiffs with the opportunity to explore these defenses, and Plaintiffs can file a rebuttal report in which they will be able to rebut these defenses.

Furthermore, courts find there is no prejudice under Rule 15 if the newly asserted affirmative defenses are based on documents already within plaintiff’s possession. *See Builders Mut. Ins. Co.*, 2011 WL 13229623, at *3–4 (plaintiff failed to “demonstrate that it would suffer undue prejudice should the Court grant [defendant’s] motion to amend its answer” because new affirmative defense “is based on documents within [plaintiff’s] possession and have already been exchanged during discovery”). Plaintiffs acknowledge that they have served discovery requests related to VDOC’s policies and procedures and that these documents have been produced. Pls’ Opp’n at 6-7. Wells’ Expert Report identifies [REDACTED]

Additionally, Defendants produced financial and budgetary documents relevant to their affirmative defenses. “In other words, very little—if any—new discovery is required in order for” Plaintiffs “to rebut” Defendants’ affirmative defenses. *Rhone-Poulenc Agro S.A. v. Monsanto Co.*, 73 F. Supp. 2d 537, 539 (M.D.N.C. 1999) (granting motion to amend answer).

Finally, trial in this case is not set until March 18-April 26, 2024. Dkt. No. 189. Courts find that there is no prejudice when the amended answer is served well in advance of trial. *See Harvester, Inc. v. Rule Joy Trammell + Rubio, LLC*, No. 3:09-cv-358, 2010 WL 11566521, at *1 (E.D. Va. July 13, 2010) (finding no prejudice in allowing answer to be amended where trial was set “a full two months away”). Thus, a trial setting more than 8 months away, where Plaintiffs have time to conduct expert discovery, to the extent they do not already possess the necessary documents and discovery to rebut these defenses, will not result in any prejudice to Plaintiffs, much less “undue prejudice.” Likewise, given that the Court has already set trial for six weeks, the addition of the statutory fundamental alteration, undue burden, and direct threat affirmative defenses will not result in a lengthier trial. *See Builders Mut. Ins. Co.*, 2011 WL 13229623, at *2 (undue prejudice can be shown if amendment results in “added expense and the burden of a more complicated and lengthy trial”).

CONCLUSION

For the reasons set forth above, and set forth previously in its Motion, Defendants have made the required “good cause” showing to satisfy all requirements under Rules 16(b) and 15(a) request that the Court grant their motion to amend the scheduling order and to amend their Answer to assert the affirmative defenses of fundamental alteration, undue burden, and direct threat.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 3, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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