

**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.

Civil Case No. 2:20-cv-00007-JPJ-PMS

**CLASS PLAINTIFFS' OBJECTION TO ORDER GRANTING DEFENDANTS'
MOTION FOR LEAVE TO FILE AN AMENDED ANSWER**

Plaintiffs William Thorpe, Frederick Hammer, Dmitry Khavkin, Gerald McNabb, Gary Wall, Vernon Brooks, Brian Cavitt, Derek Cornelison, Peter Mukuria, Steven Riddick, and Kevin Snodgrass, by and through their attorneys, respectfully object to the July 7, 2023 Minute Order by Magistrate Judge Sargent granting Defendants’ Motion for Leave to File an Amended Answer, ECF No. 350.

INTRODUCTION

Four months after the close of fact discovery, Defendants filed a motion seeking leave to assert three new affirmative defenses against Plaintiffs’ claims under the Americans with Disabilities Act (“ADA”) and Section 504 of the Rehabilitation Act (“RA”). Ex. 1 (Defs.’ Sealed Mot. for Leave to Amend). Although the time for filing motions to amend had long passed, Defendants argued that their motion should be granted because it was supposedly impossible for them to determine the applicability of their new defenses until after Plaintiffs served an expert report from their ADA expert, Richard Wells. *Id.* at 1, 4.

Plaintiffs opposed Defendants’ motion, including because the existence and scope of Plaintiffs’ ADA and RA claims have been apparent since Plaintiffs filed their complaint in 2019. Moreover, as Plaintiffs explained in their opposition to Defendants’ motion, the information that Defendants claim to have learned from Mr. Wells’s report—*i.e.*, the policies and practices that Plaintiffs contend are “insufficient” under the ADA and RA, and the “specific relief” they seek pursuant to this lawsuit—was disclosed to Defendants in interrogatory responses served in 2022. Ex. 2 (Pls.’ Sealed Opp’n to Defs.’ Mot. for Leave to Amend), at 7–10. Tellingly, Defendants made only passing reference to those interrogatory responses in their motion. Ex. 1, at 7, n.1.

On July 7, 2023, Magistrate Judge Sargent granted Defendants’ motion via a minute order (the “Minute Order”). ECF No. 350. That minute order—which reads in its entirety, “The

Defendants’ Answer is amended to add the Amended Affirmative Defenses attached as Exhibit C to the Motion”—provided no legal or factual analysis in support of Judge Sargent’s ruling. The Minute Order made no finding, for example, that Defendants satisfied the “diligence” standard under Federal Rule of Civil Procedure 16, much less explain the basis for such a finding. Nor did it explain how Defendants supposedly satisfied the operative standard under Federal Rule of Civil Procedure 15, which requires Defendants to show that Plaintiffs are not prejudiced by their late amendment. Here, Plaintiffs are plainly prejudiced by Defendants’ assertion of three new affirmative defenses *after* the close of fact discovery, as Plaintiffs have been denied the opportunity to investigate the factual underpinnings of those defenses. While Defendants claim that Plaintiffs can make up for lost time during *expert* discovery, that is simply not true. None of Defendants’ experts meaningfully opines upon Defendants’ new defenses, nor is expert discovery the proper vehicle through which to elicit *factual* evidence.

Because Judge Sargent’s Minute Order does not accord with the relevant standards under Federal Rules of Civil Procedure 15 and 16—and contradicts the factual record—Plaintiffs respectfully request that the Court vacate the July 7, 2023 Minute Order and deny Defendants’ motion for leave to amend.

FACTUAL BACKGROUND

A. Procedural History

On May 6, 2019, Plaintiffs filed a putative class action complaint, alleging violations of their constitutional and statutory rights. ECF No. 1. Among other causes of action, Plaintiffs’ complaint asserted claims under the ADA and RA on behalf of putative classes of inmates with mental health disabilities (the “Disabilities Classes”) based on 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

Defendants’ Step-Down Program, and (iii) failure to reasonably accommodate disabled inmates. *Id.* ¶¶ 202, 214–17, 220, 251–58, 260–64. Plaintiffs’ complaint identified Gary Wall, Brian Cavitt, Steven Riddick, and Dmitry Khavkin as putative class representatives for the Disabilities Classes. *Id.* ¶ 214.

The Court entered a scheduling order on May 4, 2020, setting a deadline of June 1, 2021 for the completion of non-expert fact discovery. ECF No. 56, ¶ 10. The scheduling order further specified that any motion “to amend the pleadings must be filed prior to the cutoff date for non-expert fact discovery.” *Id.* ¶ 8. The Court subsequently extended the written discovery deadline to February 28, 2023, and the deposition deadline to April 14, 2023. ECF Nos. 189 & 262.

On September 14, 2021, Defendants served their First Set of Interrogatories and Requests for Production on Plaintiffs, which included several requests related to Plaintiffs’ ADA and RA claims. ECF No. 340-1. For example, Defendants’ Interrogatory No. 4 asked Plaintiffs to “[i]dentify, with specificity, the minimum changes that You believe the Virginia Department of Corrections would need to make to its policies or procedures for housing inmates with mental health needs, in order to protect that [sic] Your Eighth and Fourteenth Amendment rights.” *Id.* at 3. Similarly, Interrogatory No. 9 asked Plaintiffs to “[i]dentify, with specificity, the minimum changes that You believe the Virginia Department of Corrections would need to make to its policies or procedures for housing inmates with Your disability, in order to protect Your Eighth and Fourteenth Amendment rights.” *Id.* at 5.

Plaintiffs responded to Defendants’ interrogatories on November 29, 2021, and supplemented their responses on June 6, 2022. ECF Nos. 340-2 & 340-3. As relevant here, in response to Interrogatory Nos. 4 and 9, the representatives of the Disabilities Classes—Messrs. Wall, Cavitt, Riddick, and Khavkin—identified 16 proposals that they believed would “cure the

constitutional and statutory deficiencies with the Step-Down Program as it relates to individuals with mental health disabilities.” ECF Nos. 340-3, at 2–5.¹ Specifically, Messrs. Wall, Cavitt, Riddick, and Khavkin stated that Defendants should:

- Provide adequate and regular assessment of mental health disabilities;
- Promptly and adequately evaluate all individuals placed in segregation for signs determine the appropriateness of their placement in light of any signs or symptoms of mental disability;
- Meaningfully and regularly evaluate all individuals placed in segregation for signs or symptoms of mental disabilities, and consider the results of such evaluations in determining whether and for how long an individual will be held in segregation;
- Meaningfully review the necessity of long-term segregation for prisoners with signs of symptoms of mental disabilities with greater frequency, giving special consideration to the impact of segregation on the mental health and wellbeing of prisoners with mental disabilities;
- Grant mental-health providers and medical staff autonomous or meaningful decision-making authority relating to the housing assignment, classification, progression, and retention of prisoners in and through the Step-Down Program, including prisoners with mental disabilities;
- Provide meaningful real-time access to mental-health providers, treatment, and medicine, including for both acute and chronic care;
- Perform mental health evaluations, therapy, and treatment in a confidential setting;
- Provide consistent and meaningful group therapy and group programming in long-term segregation, including to individuals with mental disabilities;
- Provide reasonable alternatives to long-term segregation to individuals with mental disabilities, including diversion of individuals with mental disabilities, including intellectual disabilities, from progression programs (like the Step-Down Program) in appropriate cases;
- Provide a clear, transparent, and achievable means for prisoners with mental disabilities to progress out of segregation;

¹ While Defendants’ Interrogatory Nos. 4 and 9 asked Plaintiffs to identify the ways in which the Step-Down Program violated Disabilities Class Members’ “Eighth and Fourteenth Amendment rights,” Plaintiffs’ responses addressed the Step-Down Program’s “constitutional and *statutory* deficiencies.” See ECF No. 340-3, at 2 (emphasis added).

- Modify the restrictions and privileges of segregation for people who have mental disabilities;
- Accommodate prisoners with mental disabilities who are nonetheless retained in long-term segregation with fewer restrictions, including but not limited to, more out-of-cell time, increased mental health treatment and other programming, relaxation of strict property restrictions, and a reduction in the use of strip searches;
- Not evaluate prisoners who face difficulties completing tasks such as the Challenge Series or workbook series, or complying with behavior goals, because of a mental disability on the same criteria as prisoners without those disabilities or barriers, and when such prisoners fail to complete programming, not continue to hold them in long-term segregation;
- Accommodate prisoners who cannot comply with institutional rules due to their mental disabilities within the disciplinary infraction categories of the Step-Down Program, accounting for the unique stressors that segregation causes;
- Have mental health staff formally review disciplinary infractions to determine whether the violations are related to a prisoner's mental disability, as well as whether it is necessary to place the prisoner in segregation in response to the violation; and
- Otherwise make allowances for the particular circumstances of prisoners with mental disabilities.

*Id.*²

After the close of fact discovery, Plaintiffs timely served their expert reports, including a report from their ADA expert, Richard Wells. Ex. 4 (Wells Report). In his report, Mr. Wells analyzed Defendants' Step-Down Program and opined on the ways in which it fails to adequately and appropriately serve inmates with mental health disabilities. In doing so, Mr. Wells specified a list of "[r]easonable accommodations for incarcerated persons with mental health disabilities"

² Plaintiffs served two additional supplement responses to Defendants' interrogatories, on February 28, 2023, and April 14, 2023, respectively. These supplemental responses did not update Plaintiffs' responses to Interrogatory Nos. 4 and 9, but they repeated the answers that Plaintiffs served on June 6, 2022. Because Defendants received Plaintiffs' answers to Interrogatory Nos. 4 and 9 *multiple* times, they plainly knew about Plaintiffs' responses.

as well as a list of the various aspects of the program that fail to satisfy the requirements of the ADA and RA. *Id.* ¶¶ 15, 196.

B. Defendants’ Motion

On June 12, 2023, Defendants moved to amend their answer to assert three new affirmative defenses related to Plaintiffs’ ADA and RA claims: “fundamental alteration, undue burden, and direct threat.” Ex. 1, at 1. Recognizing that their motion was untimely under the operative scheduling order, Defendants argued that leave to amend should be granted because Mr. Wells’s report “specified for the first time the extensive and specific relief [Plaintiffs] seek for their claims under Title II of the [ADA and RA].” *Id.* Incredibly, Defendants claimed that the nature and scope of Plaintiffs’ ADA and RA claims could not be discerned from Plaintiffs’ interrogatory responses, *id.*, notwithstanding that those responses identified (as requested by Defendants’ own interrogatories) the reforms to the Step-Down Program that Plaintiffs believed would “cure the constitutional and statutory deficiencies with the Step-Down Program as it relates to individuals with mental health disabilities,” ECF Nos. 340-3, at 2–5.

Three business days after Defendants’ motion was fully briefed, and without any opportunity for argument, Judge Sargent entered the Minute Order granting Defendants’ motion. ECF No. 350.

LEGAL STANDARD

Federal Rule of Civil Procedure 72(a) provides that a district judge should “modify or set aside” a ruling by a magistrate judge if it is “clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A). Where, as here, a magistrate judge fails to explain the reasoning behind her ruling, the district court must carefully scrutinize the ruling to ensure that it is reasonably based on the factual record and accords with the governing legal standard. *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 2021 WL 5826786, at *1

(W.D.N.C. Dec. 8, 2021) (declining to defer to a magistrate judge’s findings “in the absence of a ruling from [the magistrate judge] that explains his reasoning”); *see generally United States v. Wooden*, 693 F.3d 440, 454 (4th Cir. 2012) (clear error occurs when court fails “to at least consider evidence”).

Here, Defendants’ motion for leave to amend is governed by two separate Federal Rules of Civil Procedure: Rule 16, which requires “good cause” to amend a pleading after the deadline set forth in the operative scheduling order, and Rule 15, which permits amendments to the pleadings only “when justice so requires.” Defendants’ motion satisfies neither standard.

With respect to Rule 16, this Court has explained that the “good cause” standard is a “stringent” one. *Doe v. Sutton-Wallace*, 2019 WL 5088769, at *3 (W.D. Va. Oct. 10, 2019). To establish good cause, the movant “‘must show that, despite due diligence, it could not have reasonably met the scheduled deadlines.’” *Southern v. Bishoff*, 675 F. App’x 239, 249 (4th Cir. 2017) (quoting 3 James Wm. Moore et al., *Moore’s Federal Practice* § 16.14[1][a], p. 16–75 (3d ed. 2016)). As courts in this Circuit have explained, “the touchstone of ‘good cause’ is diligence.” *Burton v. United States*, 199 F.R.D. 194, 197 (S.D. W.Va. 2001) (internal quotation marks and alteration omitted). If the party seeking an extension “was not diligent, there is no ‘good cause’ for modifying the scheduling order and allowing the party to file a motion to amend its pleading.” *Karlo v. Pittsburgh Glass Works, LLC*, 2011 WL 5170445, at *3 (W.D. Pa. Oct. 31, 2011) (alteration and citation omitted). Instead, once the movant’s lack of diligence is established, “the inquiry should end.” *Id.*

In addition to carrying its burden to demonstrate “good cause,” a movant must also establish that amendment is appropriate under Rule 15. As is relevant here, a motion for leave to amend should be denied under Rule 15 “when the amendment would be prejudicial to the

opposing party.” *Franks v. Ross*, 313 F.3d 184, 193 (4th Cir. 2002). Courts routinely hold that motions for leave to amend are prejudicial when filed after the close of fact discovery. *See, e.g., Mayfield v. Nat’l Ass’n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 379 (4th Cir. 2012) (affirming denial of motion for leave to amend pleadings where “a significant amount of discovery has already been conducted”); *Union Pac. R. Co. v. Oglebay Norton Minerals, Inc.*, 2017 WL 10841702, at *7 (W.D. Tex. Nov. 15, 2017) (denying motion for leave to amend pleadings after the close of fact discovery because opposing party “has not performed discovery” with respect to such claims).

ARGUMENT

I. The Minute Order’s Failure to Consider Plaintiffs’ Evidence and Properly Apply Rule 16’s “Good Cause” Standard Merits Vacatur.

Under Rule 16, untimely motions to amend may be granted only if the movant was diligent in pursuing its claims or defenses. *Southern*, 675 F. App’x at 249. Here, the Minute Order makes no factual findings related to Defendants’ purported diligence, nor does it explain if (or how) Defendants complied with Rule 16’s good cause standard. The record shows that they did not.

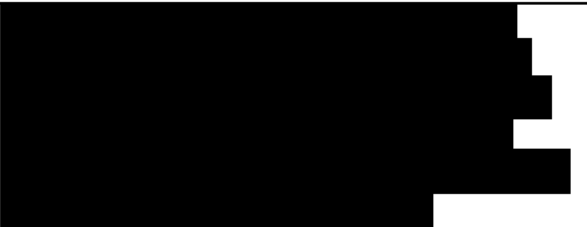
Defendants’ motion hinges on the argument that, before Plaintiffs’ ADA expert served his expert report, Defendants “did not know that Plaintiffs would serve a purported expert report from an individual purporting to opine on the requirements of the ADA Title II and the RA, whether VDOC meets those requirements, and if not, what extensive and specific relief Plaintiffs claim is warranted.” Ex. 1, at 6. This is disingenuous. Defendants have been on notice that Plaintiffs are asserting ADA and RA claims since Plaintiffs filed their complaint more than four years ago. ECF No. 1, ¶¶ 202, 214–17, 220, 251–58, 260–64 (alleging that Defendants violate the ADA and RA by, among other things, “fail[ing] to account for prisoners’ mental illness in

periodic review of their solitary confinement,” failing to “provide mentally ill prisoners or prisoners with mental health disabilities with alternative means to progress out of solitary confinement,” and failing to provide “equal access to prison activities, programs, and services”). Moreover, Defendants plainly knew (or should have known) that Plaintiffs would offer evidence in support of their claims over the course of discovery. Indeed, Plaintiffs served numerous discovery requests—including requests for production, interrogatories, and requests for admission—concerning Defendants’ policies and procedures for identifying and tracking inmates with mental health disabilities as well as any accommodations granted to such individuals in the Step-Down Program. *See, e.g.*, ECF No. 340-4, at 5–9; ECF No. 340-5, at 6–8; ECF No. 340-6, at 8–9; ECF No. 340-7, at 8–21.

To the extent Defendants’ argument is based on their claimed surprise that Plaintiffs would serve an expert report in support of their claims—a puzzling proposition—this also does not establish good cause. A party almost never knows the identities of the opposing party’s experts—or the subject of their testimony—until the expert disclosure deadline. And here, there is no dispute that Plaintiffs complied with the relevant deadlines for disclosing expert witnesses. *See, e.g., Bonsera v. Penn. Nat’l Mut. Casualty Ins. Co.*, 2021 WL 825917, at *2 (S.D. Ohio Mar. 4, 2021) (denying motion to amend answer based on information purportedly disclosed in expert report); *F.D.I.C. v. Horn*, 2015 WL 1611995, at *12 (E.D.N.Y. Apr. 8, 2015) (same).

Nor does the content of Mr. Wells’s report provide any basis to establish good cause to amend the scheduling order. Defendants contend that, before Mr. Wells served his report, they did not know the ways in which Plaintiffs would claim the Step-Down Program violates the ADA and RA. ECF No. 331, at 7. But the deficiencies identified in Mr. Wells’s report are

substantially identical to those that Plaintiffs identified in their interrogatory responses. The following chart illustrates the overlap:

Deficiencies Identified in Mr. Wells's Report ³	Deficiencies Identified in Plaintiffs' Interrogatory Responses ⁴
	"[VDOC should] [m]eaningfully and regularly evaluate all individuals placed in segregation for signs or symptoms of mental disabilities, and consider the results of such evaluations in determining whether and for how long an individual will be held in segregation."
	"[VDOC should] [m]eaningfully review the necessity of long-term segregation for prisoners with signs or symptoms of mental disabilities with greater frequency, giving special consideration to the impact of segregation on the mental health and wellbeing of prisoners with mental disabilities."
	"[VDOC should] [p]rovide a clear, transparent and achievable means for prisoners with mental disabilities to progress out of segregation." "[VDOC should] [m]odify the restrictions and privileges of segregation for people who have mental disabilities." "[VDOC should] [a]ccommodate prisoners with mental disabilities who are nonetheless retained in long-term segregation with fewer restrictions" "[VDOC should] [a]ccommodate prisoners who cannot comply with institutional rules due to their mental disabilities within the disciplinary infraction category of the Step-Down Program"

³ See Ex. 1, at 7 (quoting Ex. 4, ¶ 15).

⁴ See ECF No. 340-3, at 2–5.

Deficiencies Identified in Mr. Wells's Report ³	Deficiencies Identified in Plaintiffs' Interrogatory Responses ⁴
[REDACTED]	"[VDOC should] [h]ave mental health staff formally review disciplinary infractions to determine whether the violations are related to a prisoner's mental disability"

Likewise, Defendants contend that they "did not know the extensive relief [Mr.] Wells would recommend in his report with regard to the scope of the accommodations sought." ECF No. 331, at 6. But once again, the accommodations that Mr. Wells proposes are substantially identical to those that Plaintiffs requested in their interrogatory responses. For example:

Accommodations Proposed in Mr. Wells's Report ⁵	Accommodations Proposed in Plaintiffs' Interrogatory Responses ⁶
[REDACTED]	"Grant mental-health providers and medical staff autonomous or meaningful decision-making authority relating to the housing assignment . . . of prisoners in and through the Step-Down Program, including prisoners with mental disabilities." "Provide reasonable alternatives to long-term segregation to individuals with mental-health disabilities"

⁵ See Ex. 1, at 6 (quoting Ex. 4, ¶ 196).

⁶ See ECF No. 340-3, at 2–5.

Accommodations Proposed in Mr. Wells's Report ⁵	Accommodations Proposed in Plaintiffs' Interrogatory Responses ⁶
[REDACTED]	“Modify the restrictions and privileges of segregation for people who have mental disabilities.” “Provide meaningful real-time access to mental-health providers, treatment, and medicine, including for both acute and chronic care.” “Accommodate prisoners with mental disabilities who are nonetheless retained in long-term segregation with fewer restrictions, including but not limited to, more out-of-cell-time, increased mental health treatment and other programming, relaxation of strict property restrictions, and a reduction in the use of strip searches.”
[REDACTED]	“Provide adequate and regular assessment of mental disabilities.” “Meaningfully and regularly evaluate all individuals placed in segregation for signs and symptoms of mental disabilities” “Have mental health staff formally review disciplinary infractions to determine whether the violations are related to a prisoner's mental disability”
[REDACTED]	“Perform mental health evaluations, therapy, and treatment in a confidential setting.”
[REDACTED]	“Accommodate prisoners who cannot comply with institutional rules due to their mental disabilities within the disciplinary infraction category of the Step-Down Program, accounting for the unique stressors segregation causes.”
[REDACTED]	“Otherwise make allowances for the particular circumstances of prisoners with mental disabilities.”

As these charts show, Defendants' claim that leave to amend should be granted because Mr. Wells “asserts new theories of liability” and “greatly expands the scope of the relief

[Plaintiffs] seek,” Ex. 3, at 1, is demonstrably false. As a threshold matter, contrary to Defendants’ assertion, Mr. Wells is not asserting any “theories of liability” in his report—“new” or otherwise. Instead, Mr. Wells is opining upon Defendants’ policies and practices with respect to identifying, monitoring, and (as appropriate) accommodating individuals in VDOC’s Step-Down Program with mental health disabilities. As he explains in his report, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 4, ¶ 13.

Nor does Mr. Wells’s report “expand the scope of the relief” Plaintiffs seek in this long-running litigation. Defendants claim, for example, that Mr. Wells has extended the scope of the case because his report [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Ex. 4, ¶ 11. Defendants’ attempt to ascribe opinions to Mr. Wells that he does not offer in his report should not be credited.

Finally, Defendants argue that leave to amend should be granted because they did not know “all [of the] relief [that] Plaintiffs would seek” until expert discovery began. Ex. 3 at 6. That, of course, is not the operative standard. Instead, “a motion to amend should be made as soon as the necessity for altering the pleading becomes apparent,” *Deasy v. Hill*, 833 F.2d 38, 41 (4th Cir. 1987), which occurs when the “moving party [learns] of the underlying conduct giving rise to a claim [or defense],” *Green v. AMF Bowling Centers, Inc.*, 2020 WL 6204297, at *4 (D.

Md. Oct. 21, 2020). Here, there can be no credible dispute that Plaintiffs’ complaint—and certainly their interrogatory responses—put Defendants on notice of potential defenses based on fundamental alteration, undue burden, and direct threat. Indeed, it strains credulity to think that Defendants did not know that it could be *costly* or *administratively burdensome* to implement certain changes to the Step-Down Program until after Plaintiffs served their expert report. It is similarly specious for Defendants to claim that they had no idea about the applicability of a *direct threat* defense—which limits ADA relief insofar as requested alterations “pose[] a direct threat to the health or safety of others,” 28 C.F.R. § 35.139—in a lawsuit challenging policies related a prison’s solitary confinement program.

The Minute Order did not address any of this evidence or case law. Because both the record and the legal standard make clear that Defendants were on notice of the potential applicability of their defenses well before Mr. Wells served his expert report, the Minute Order is both clearly erroneous and contrary to law. *See, e.g., United States v. Span*, 789 F.3d 320, 325 (4th Cir. 2015) (“[C]lear error occurs when . . . factual findings are against the clear weight of the evidence considered as a whole.” (internal quotation marks and citation omitted)); *Wooden*, 693 F.3d at 454 (clear error occurs where court fails to “at least consider [a party’s] evidence, and account for it”); *Bruce v. Hartford*, 21 F. Supp. 3d 590, 594 (E.D. Va. 2014) (“contrary to law” standard is identical to “de novo” review). Defendants’ motion for leave to amend should be denied.

II. The Minute Order’s Failure to Address the Prejudice to Plaintiffs and the Class from Defendants’ Untimely Amendment Merits Vacatur.

Separate and apart from Defendants’ failure to establish good cause for amending their answer, Defendants’ motion should be denied because their untimely amendment “would be prejudicial to [Plaintiffs].” *Franks*, 313 F.3d at 193. Once again, the Minute Order makes no

mention of the evidence or argument that Plaintiffs introduced in opposition to Defendants' motion, nor does it explain whether (or how) Defendants comply with Rule 15's standard. Because it contradicts both the record and the law, the Minute Order is clearly erroneous and contrary to law.

As explained above, Defendants' proposed amendment is prejudicial because it significantly limits Plaintiffs' ability to develop evidence in response to Defendants' new defenses. Fact discovery closed over four months ago, and thus Plaintiffs can no longer obtain factual evidence to rebut Defendants' new defenses. In similar circumstances, courts have not hesitated to deny motions for leave to amend. *See, e.g., Mayfield*, 674 F.3d at 379 (affirming denial of motion for leave to amend where "a significant amount of discovery had already been conducted"); *Union Pac. Rr. Co.*, 2017 WL 10841702, at *7 (denying motion for leave to amend after the close of fact discovery because opposing party "has not performed discovery" with respect to new claims). The Minute Order cannot be squared with these cases.

In their briefing before Judge Sargent, Defendants claimed that Plaintiffs are not prejudiced by their late amendment because Plaintiffs already possess the documents they need to rebut the new defenses. Ex. 3, at 8. But the Federal Rules require parties to timely plead their claims and defenses so that their *opponents* can determine the documents they need to prove their respective cases and propound discovery to obtain such documents. Fed. R. Civ. P. 26(b)(1). Defendants' argument also elides the fact that Plaintiffs were denied the opportunity not just to obtain documents in discovery, but also to *depose witnesses* concerning Defendants' affirmative defenses. Depositions are a "critical discovery tool" that facilitate the development of evidence. *Monster Daddy, LLC v. Monster Cable Prods., Inc.*, 2013 WL 12143962, at *3 (D.S.C. Apr. 23, 2013). For this reason, courts routinely deny motions for leave to amend that

are filed after the close of fact discovery. *See, e.g., Reed v. Columbia St. Mary's Hosp.*, 915 F.3d 473, 481–82 (7th Cir. 2019) (reversing district court decision granting motion for leave to amend answer where defendant argued that plaintiff was on notice of new affirmative defense due to documents produced in discovery); *Leskovisek v. Ill. Dep't of Transp.*, 2020 WL 5249118, at *4 (C.D. Ill. Aug. 10, 2020) (denying motion for leave to amend answer where defendants argued that there would be no prejudice from amendment because “Plaintiffs were aware of the type of facts in Defendants’ control that would constitute” the defense). Once again, the Minute Order conflicts with these cases.

Defendants also contend that Plaintiffs are not prejudiced by their untimely amendment because “the expert discovery deadline does not close until August 16, 2023.” Ex. 3, at 8. But Defendants conveniently fail to mention that their various experts do not meaningfully opine upon Defendants’ new defenses in their respective reports. More fundamentally, Defendants’ arguments about experts assume that Plaintiffs do not need any *facts* to rebut Defendants’ new defenses. This, again, is not true. Defendants’ undue burden defense, for example, involves “a multi-faceted, fact-intensive inquiry, requiring consideration of: (1) financial cost; (2) additional administrative burden; (3) complexity of implementation; and (4) any negative impact which the accommodation may have.” *Nat’l Fed. of the Blind, Inc. v. Lamone*, 438 F. Supp. 3d 510, 530 (D. Md. 2020). An expert is not an appropriate witness through which such facts can be introduced or interrogated in advance of trial. Accordingly, the “fix” that Defendants propose to address their late amendment is untenable.

By permitting Defendants to plead affirmative defenses at this late stage, the Minute Order forces Plaintiffs to rebut the defenses without the benefit of fact discovery. This ruling is contrary to well-established case law highlighting the importance of fact discovery and

underscoring the impropriety of amending pleadings once such discovery is unavailable. The Minute Order should be reversed.

CONCLUSION

For all of these reasons, the Minute Order should be reversed, and the Court should deny Defendants' motion.

Dated: July 21, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2023, I filed via CM/ECF and electronically mailed the foregoing Objection to Order Granting Defendants' Motion for Leave to File an Amended Answer to the following:

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