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

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' DISCLOSURE AND SUPPLEMENTAL DISCLOSURE OF EXPERT TESTIMONY OF DR. TAMA S. CELI

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I. INTRODUCTION

Defendants made a tactical choice to treat Dr. Tama S. Celi as a hybrid witness in order to shield her opinions and supporting documents from the disclosure requirements of Rule 26(a)(2)(B). Notwithstanding Dr. Celi's employment by VDOC, her work on this case does not qualify for treatment as a hybrid witness because her rebuttal opinions respond to Plaintiffs' expert and are not within her normal course of duty at VDOC. In order to gloss over how little Dr. Celi's opinions relate to her normal work, Defendants seek to transmute her from a witness they previously argued "has little relevance to the litigation other than with respect to VADOC00037970 [Inmate Data Spreadsheet]," ECF No. 375-5 at 1, to "an actor with regard to the occurrences from which the tapestry of this lawsuit was woven," Opposition to Plaintiffs' Motion to Strike ("Opposition") at 15. Dr. Celi's deposition testimony demonstrates that Defendants' recharacterization is baseless.

Defendants also deny that Dr. Celi's opinions were developed "solely for the purpose of this case." *Id.* at 15. The Disclosure and Supplemental Disclosure of Expert Testimony of Dr. Tama S. Celi (collectively "the Disclosures") tell a wholly different story. Each of Dr. Celi's opinions inherently relates to and explicitly critiques Mr. Molter's opinions, methodology, and alleged inconsistencies. Dr. Celi's rebuttal opinions could not therefore have been developed for any purpose other than this litigation. That Dr. Celi deals generally with inmate data in her job for VDOC, projecting future bedspace and performing other analyses, does not transform her litigation-induced opinions into fact testimony developed independently of this litigation.

Recognizing the weakness of their factual and legal arguments, Defendants implore the Court to allow Dr. Celi's testimony because Defendants' failure to follow the clear directive in Rule 26(a)(2)(B) was either justified or harmless. Defendants argue, for instance, that Dr. Celi's testimony regarding "how the data is maintained and what the data means" will be helpful to the

Court. *Id.* at 18. Yet nowhere in the Disclosures do Defendants state that Dr. Celi will testify on these vague topics. If Defendants attempt to argue that the Disclosures inherently disclose these topics, such an argument proves Plaintiffs' point: Defendants' failure is not substantially justified or harmless in part because the Disclosures' high-level and vague summaries of Dr. Celi's opinions allow Defendants to define on the fly the scope of her opinions, just as they have done in their Opposition.

The Court should reject Defendants' post-hoc rationalization of their tactical choice not to provide an expert report on behalf of Dr. Celi. Defendants cannot deny Plaintiffs the opportunity to examine "a complete statement of all opinions [Dr. Celi] will express and the basis and reasons for them" and "the facts or data considered by the witness in forming them." Fed. R. Civ. P. 26(a)(2)(B).

II. ADDITIONAL FACTUAL BACKGROUND

Defendants include facts in their Opposition regarding Dr. Celi's class certification declaration and her Rule 30(b)(6) deposition, purporting to show that Plaintiffs have long been aware of Dr. Celi's opinions and that her rebuttal expert opinions stem from her duties at VDOC. These characterizations of Dr. Celi's prior testimony are inaccurate, as her disclosed expert testimony is wholly distinct from her prior testimony in this case.

A. Dr. Celi's declaration at the class certification stage

In support of class certification, Plaintiffs submitted a declaration from a data analyst, Peter Graham, who calculated the average time that inmates in the Step-Down Program spend in solitary confinement. *See* ECF. No. 174-59, Decl. of Peter Graham. In response, Defendants submitted a declaration from Dr. Celi critiquing Mr. Graham's methodology. *See* ECF No. 194-2, Decl. of Tami S. Celi . In her declaration, Dr. Celi explained (implicitly, without mentioning Mr. Graham) that Mr. Graham had incorrectly calculated the length of stays in

solitary confinement because he failed to accurately account for release data. Dr. Celi explained, "When an inmate is released from VDOC custody, his Security Level is not changed in CORIS unless and until the inmate is returned to VDOC"; therefore, "when an inmate has a Release Date in CORIS that falls between the Start Date and the End Date with a given Security Level, the Release Date must be taken into account to calculate accurately the length of stay at that Security Level in VDOC custody." *Id.* ¶¶ 7–8. Mr. Graham's allegedly erroneous assumptions regarding the interaction of security-level and release-date data were the sole subjects of Dr. Celi's class certification declaration.

B. Dr. Celi's Rule 30(b)(6) deposition and testimony

During fact discovery, Plaintiffs served a Rule 30(b)(6) deposition notice for VDOC. Among the topics were (1) the "maintenance of offender data" and (2) "[t]he origin, variables, and data elements" of the Inmate Data Spreadsheet. Ex. 8 at 8. VDOC designated a different employee, Ms. Sheila Crenshaw, to testify regarding the "maintenance of offender data." Ex. 9. Defendants designated Dr. Celi to testify regarding the "origin, variables, and data" in the Inmate Data Spreadsheet. *Id.*

Despite being designated, Dr. Celi was unable to explain the meaning of the vast majority of the variables in the Inmate Data Spreadsheet. *See, e.g.*, Ex. 10 at 62:11–63:5 ("Q. . . . are there any [inmate internal status IDs] that you are familiar with and could give a definition or brief explanation . . . ? A. Honestly, I would not be comfortable doing so . . . .") (emphasis added). Dr. Celi testified that her analyst team created the spreadsheet, which was "created solely for the purposes of this litigation." Ex. 10 at 24:17–19, 26:12–13. She also testified that the data she uses during her regular duties with VDOC "is not structured like [the Inmate Data Spreadsheet]," as the spreadsheet data is "flatten[ed]" and "different" from what the data structure that she works with for VDOC. *Id.* at 45:14–18.

C. Defendants' Disclosure and Supplemental Disclosure of Dr. Celi

Unlike Dr. Celi's class certification declaration, the Disclosures deal with and critique only Mr. Molter's calculations and assumptions. As Defendants acknowledge, the Disclosures summarize Dr. Celi's testimony as relating to and being inherently intertwined with Mr. Molter's opinions and testimony, including (1) "Mr. Molter's reliance on mean as the measure of central tendency," (2) "[t]he effect of Mr. Molter's reliance on mean rather than median," (3) "[t]he absence of any statistical basis for [Mr. Molter] reporting the aggregate number of days that all class members were in the Step-Down Program," and (4) "[i]nconsistencies in Mr. Molter's reported methodology and the results in his report." Opposition at 6–7.

III. ARGUMENT

Defendants bear the burden of showing that Dr. Celi's proposed testimony falls within the narrow scope of Rule 26(a)(2)(C). *Holmes v. Maersk A/S, Co.*, 2022 WL 686791, at *6 (D.S.C. Mar. 8, 2022) ("A party seeking to avoid producing an expert report bears the burden . . . ."). Defendants have not met their burden.

A. Defendants retained or specially employed Dr. Celi in this case

The crux of the legal dispute between the parties is essentially whether an employee can *ever* be "retained or specially employed to provide expert in [a] case." Fed. R. Civ. P. 26(a)(2)(B). Governing Fourth Circuit case law—and the majority of cases nationwide—show that employees can, indeed, function as retained expert witnesses. Defendants do not engage with the case law that Plaintiffs cited in their opening brief; rather, Defendants cite decades-old district court cases that represent the minority rule.

As Plaintiffs explain in their opening brief, a witness must serve an expert report if the expert is "[1] one retained or specially employed to provide expert testimony in the case or [2] one whose duties as the party's employee regularly involve giving expert testimony." Fed. R.

Civ. P. 26(a)(2)(B). The structure of the rule shows that an expert witness who falls into *either* of these categories must serve an expert report. *See* Opening Br. § IV.A.1. Defendants do not dispute that reading of the plain language of the rule. Defendants, however, argue that Dr. Celi, as an employee, cannot be "retained or specially employed" within the meaning of Rule 26.

Fourth Circuit law forecloses that argument. In *Timpson*, the court explained that witnesses are "retained or specially employed" if their "opinion testimony arose 'not from [their] enlistment as an expert but, rather, from [their] ground-level involvement in the events giving rise to the litigation.'" *Timpson v. Anderson Cnty. Disabilities & Special Needs Bd.*, 31 F.4th 238, 253 (4th Cir. 2022) (quoting *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 6 (1st Cir. 2011)). The court did not note the existence of another category of hybrid witnesses, ones who have no "ground-level involvement in the events giving rise to the litigation" but nonetheless are employees of the party for whom the expert plans to testify.

Timpson does not create another category of hybrid witnesses because the rule itself creates no such category, as the majority of courts have concluded, particularly within the Fourth Circuit. *See, e.g.*, *Bierman Family Farm, LLC v. United Farm Family Ins. Co.*, 2018 WL 1352966, at *1 (D. Md. Jan. 17, 2018) (An employee is a retained expert "[t]o the extent that employees provide expert testimony beyond the scope of knowledge they gained from their normal course of duty"); *Vigilant Ins. Co. of N.Y. v. McKenney's, Inc.*, 2011 WL 2415005, at *4 (D.S.C. June 10, 2011) (An employee "must submit a report regarding any opinions formed specifically in anticipation of the litigation, or otherwise outside the normal course of a duty"); *Nat'l R.R. Passenger Corp. v. Railway Express, LLC*, 268 F.R.D. 211, 214 (D. Md. 2010).

Defendants' cases are both inapposite and distinguishable. For example, in *EEOC v. Huntington Ingalls, Inc.*, the court held that two employees were not required to serve expert

reports "given the *nature* of [the employees'] testimony" and its relationship to their "*personal* experience with the health and safety standards of the shipyard." 2018 WL 6272891, at *4 (E.D. Va. Nov. 29, 2018) (emphasis added). The court did not excuse the employees from serving expert reports simply because they were employees of the defendant. The remaining cases Defendants cite—*Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co.*, 68 F.R.D. 397, 407 (E.D. Va. 1975), *Navajo Nation v. Norris*, 189 F.R.D. 610, 612 (E.D. Wash. 1999), and *Allstate Ins. Co. v. Nassiri*, 2011 WL 2975461, at *8 (D. Nev. July 21, 2011)—predate *Timpson* and are incompatible with it. Those cases represent (at best, given the five decades since *Virginia Electric* was decided) the minority view and do not comport with governing precedent.

B. Defendants' proposed bright-line rule for in-house experts should be rejected.

Defendants propose a bright-line rule that employees cannot be "retained or specially employed." Defendants' arguments are incorrect. Defendants contend, for instance, that "[i]f 'specially employed' included a general employee who also provides expert testimony, it would subsume the term 'one whose duties as the party's employee regularly involve giving expert testimony,'" making "[t]he second half of the sentence [in Rule 26(a)(2)(B)] redundant." Opposition at 12. Not so. An employee can be "specially employed" as an expert on a one-time basis and therefore fall outside the category of employee "whose duties as the party's employee *regularly* involve giving expert testimony." In other words, "specially employed" and "regularly [employed as an expert]" are not synonymous with one another, and the requirement that *both* types of expert witnesses serve a report does create any redundancy under Rule 26(a)(2)(B).

Indeed, Defendants' argument would lead to absurd results. Defendants' bright-line rule—whereby an employee cannot be considered an expert unless she "regularly" provides expert testimony—would incentivize and allow large corporations and entities, like VDOC, to

find experts within their ranks to shield expert testimony from scrutiny until trial. For instance, in a case such as this, rather than retain an outside psychiatrist to conduct psychiatric evaluations and prepare a full report, correctional departments could use an in-house psychiatrist to do precisely the same evaluations. Under Defendants' logic, the in-house psychiatrist could shield all but a high-level summary of his or her opinions from discovery. Rule 26(a)(2)(B) and (C) do not endorse such a strategy.

C. Defendants' attempt to argue that Dr. Celi has a direct connection to the facts underlying this case is contrary to the record.

Defendants also attempt to justify their failure to serve an expert report by arguing that Dr. Celi is "an actor with regard to the occurrences from which the tapestry of this lawsuit was woven." Opposition at 15 (quoting *Downey v. Bob's Discount Furniture Holdings, Inc.*, 633 F.3d 1, 4 (1st Cir. 2011). Defendants' argument strains credibility.

First, Defendants argue that Dr. Celi may permissibly testify as a hybrid fact and expert witness because she has "use[d] . . . inmate data has for years" in connection with her work at VDOC. *Id.* at 15. That may be true, but Dr. Celi's proposed opinions do not simply *use* inmate data; her opinions critique Mr. Molter's opinions and her analysis was developed solely for this litigation. Further, Dr. Celi's testimony confirms that she does not use inmate data to perform the types of analyses she plans to critique—*i.e.*, analyses related to inmates' lengths of stay in the Step-Down Program. *See, e.g.*, ECF No. 375-6 at 91:14–93:22 ("Q. Have you ever researched or calculated the average or median time it takes inmates to complete the step-down program? A. Like I said, it's possible we may have in the past, but off the top of my head I'm not recalling doing it."). Because Dr. Celi is performing analyses specifically for Defendants' use at trial, she is acting as an expert—not a hybrid—witness. Defendants' arguments to the contrary and Dr. Celi's deposition testimony (at best) illustrate that Dr. Celi is qualified to serve as an expert

witness for Defendants. Defendants therefore retained her to critique Plaintiffs' analytical report and develop opinions for this litigation.

Relatedly, Defendants argue that Dr. Celi's opinions are appropriate because she is merely opining on "the data *in* the Inmate Data Spreadsheet." Opposition at 14. This is utterly divorced from the language Defendants' use to describe her opinions, all of which relate to and critique expert opinion testimony offered by Plaintiffs' expert, Mr. Molter. Dr. Celi's opinions do not relate generally to inmate data; her opinions are laser focused on the assumptions and methodologies that Mr. Molter employed in his expert report.

Second, Defendants claim that Dr. Celi's opinions were not developed for this litigation. *Id.* at 15. But Defendants do not and cannot explain how Dr. Celi's opinions regarding "Mr. Molter's reliance on mean as the measure of central tendency," "[t]he effect of Mr. Molter's reliance on mean . . . inflates the 'average' duration of an inmate's stay at a particular level in the Step-Down Program," "[t]he absence of any statistical basis for [Mr. Molter] reporting the aggregate number of days that all class members were in the Step-Down Program," and alleged "[i]nconsistencies in Mr. Molter's reported methodology" were developed independent of this litigation. *Id.* at 6–7. Of course, they were not. On the contrary, Dr. Celi's opinions were developed solely to rebut Mr. Molter's expert opinions in connection with this case.

D. Defendants erroneously assume that if a witness is characterized as a hybrid witness, that witness may testify about opinions formed for purposes of litigation.

Even if Dr. Celi could be properly construed as a hybrid witness (she cannot), Defendants erroneously assume that if a witness is characterized as a hybrid witness, that witness may testify *carte blanche* about anything related to his or her expertise, including opinions formed for the purpose of litigation. That is not the law. As the Fourth Circuit has held, even hybrid witnesses may testify only regarding opinions formed prior to litigation. In *Morris v. Bland*, the court held

that two physicians "were fully permitted to discuss their examination of [the patient] and their diagnoses or findings," but their testimony was disallowed as to opinions "not formed during the course of treatment" because "a physician is exempt from this written report requirement only as to opinions formed during the course of treatment." 666 Fed. App'x 233, at *239 (4th Cir. 2016). Other courts have concluded likewise. *See, e.g.*, *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011) (collecting cases).

Dr. Celi may have qualified as a hybrid witness regarding calculations she performed for the Virginia General Assembly, if any, about the average amount of time an inmate stays in solitary confinement, *see* Ex. 10 at 91:22–92:6, if Defendants had included such details in her Supplemental Disclosure. Defendants took a different tack, however, serving an expert summary solely critiquing Plaintiffs' expert report. Under Fourth Circuit law, Dr. Celi's theoretical ability to qualify as a hybrid witness under some circumstances is insufficient to permit her to testify about later-formed opinions developed solely for this litigation.

E. The *Southern States* factors weigh in favor of excluding Dr. Celi's proposed testimony.

If the Court determines that Rule 26(a)(2)(B) obligated Defendants to serve an expert report on behalf of Dr. Celi, Rule 37(c)(1) mandates exclusion unless Defendants can establish that their failure was "substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003) ("[I]t is the obligation of the party facing sanctions for belated disclosure to show that its failure to comply . . . was either justified or harmless.") (first alteration original) (quoting *Wilson v. Bradlees of New England, Inc.*, 250 F.3d 10, 21 (1st Cir. 2001)). Defendants have not shown that their failure was justified or harmless, let alone *substantially* justified or harmless. Fed. R. Civ. P. 37(c)(1).

The surprise to the party against whom the evidence would be offered: Defendants have failed to show that Dr. Celi's testimony was not a surprise to Plaintiffs. Defendants contend that Dr. Celi's testimony was not a surprise because "Plaintiffs have deposed Dr. Celi about her opinions[,] and about the facts of this case, on two separate occasions." Opposition at 15. Defendants' argument is groundless. As explained, Dr. Celi's Rule 30(b)(6) testimony was on wholly separate topics than the Disclosures. The Disclosures summarize Dr. Celi's proposed critiques of Mr. Molter's report, which did not exist when Plaintiffs deposed Dr. Celi as VDOC's corporate witness. Further, Plaintiffs had the opportunity to depose Dr. Celi on her expert opinions only after receiving Defendants' Disclosures. Such an opportunity cannot therefore be a factor in determining whether Dr. Celi's proposed testimony was a surprise.

The ability of that party to cure the surprise: Defendants contend that they have essentially already cured any surprise because "Dr. Celi's opinions here are targeted on a handful of issues, and her Expert Disclosure and expert deposition covered them sufficiently." *Id.* at 16. Defendants' *ipso dixit* assertion regarding sufficiency does not suffice. Rule 26 requires that an expert serve a report that includes "a complete statement of all opinions the witness will express and the basis and reasons for them" and the "facts or data considered by the witness." Fed. R. Civ. 26(a)(2)(B). Defendants cannot claim that Defendants' Disclosures, which provide only high-level summaries of Dr. Celi's opinions and are almost entirely devoid of any analysis (i.e., the "reasons" for her opinions and the "facts or data" she considered) are a sufficient substitute for a full expert report. Otherwise, when pressed, Defendants would have simply served a full report rather than refusing and serving only a supplemental disclosure.

Further, Plaintiffs' opportunity to depose Dr. Celi does not substitute for a proper report under Rule 26(a)(2)(C). Plaintiffs had no opportunity to examine Dr. Celi's full opinions,

reasons, and methodology before her expert deposition—and therefore depose her as a genuine expert. Again, this is because Plaintiffs only received summaries of Dr. Celi's opinions, with little to no disclosure of her "reasons for those opinions," "the facts or data" she considered, or her methodology. Fed. R. Civ. P. 26(a)(2)(B). Indeed, Defendants even refused to produce the underlying calculations for Dr. Celi's opinions despite demanding the same materials from Plaintiffs' expert. If a deposition could cure the failure to provide an expert report, particularly in light of the bare-bones nature of the Supplemental Disclosure, the failure to follow Rule 26(a)(2)(B) could always be cured any time that expert was subsequently deposed, gutting Rule 26(a)(2)(B) and rendering Rule 37(c)(1) toothless.

The extent to which allowing the evidence would disrupt the trial: Defendants contend that trial is not scheduled until March so there would be time for Dr. Celi to provide a full report and be deposed. While under normal circumstances Plaintiffs would welcome a full report and an opportunity to depose Dr. Celi on her full opinions, doing so now would take away precious time and resources from trial preparation. Although ordering Defendants to comply with Rule 26(a)(2)(B) may not disrupt the trial schedule, such an order would be highly prejudicial, requiring Plaintiffs to conclude expert discovery during a demanding stage of the case.

The importance of the evidence: The Court and jury have no need for Dr. Celi's trial testimony. The Court and jury will hear from Mr. Molter, who calculated the median and mean length of inmate stays at each security level and painstakingly described each of his assumptions. Defendants may cross-examine him if they believe that his calculations are erroneous.

Further, Defendants argue that "Dr. Celi's testimony will aid the Court in understanding how the data is maintained and what the data means." Opposition at 17. Nowhere do the

Disclosures state that Dr. Celi plans to testify about "how the data is maintained and what the data means." Defendants are simply redefining Dr. Celi's testimony on the fly in an effort to show importance. Indeed, when Plaintiffs served a Rule 30(b)(6) topic on the maintenance of CORIS data, Defendants designated another VDOC employee, Ms. Sheila Crenshaw, on the topic. Defendants have no need for Dr. Celi to explain how the data is maintained and cannot, given the complete silence on the topic in the Disclosures, explain "what the data means." In any event, pure factual testimony regarding CORIS data storage and maintenance would not be precluded by an order forbidding Dr. Celi's proposed opinion testimony.

The non-disclosing party's explanation for its failure to disclose the evidence: Shortly after Defendants initially served the Disclosure of Dr. Celi, Plaintiffs objected to Defendants' failure to follow Rule 26(a)(2)(B), citing to Defendants many of the same cases cited in Plaintiffs' opening brief. *See* ECF No. 375-3. The parties subsequently met and conferred. *Id.* at 3–5. Defendants chose to ignore the overwhelming majority of case law, including from the Fourth Circuit, in favor of following a few (in most instances, decades-old) cases espousing a minority view. Further, as even Defendants concede, "good faith alone does not excuse a violation of Rule 26(a)'s disclosure obligations." Opposition at 18. Defendants' intentional choice to gain a tactical advantage does not make their failure substantially justified or harmless.

CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully request that the Court grant their Motion to Strike Defendants' Disclosure of Expert Testimony of Dr. Tama S. Celi and Defendants' Supplemental Disclosure of Expert Testimony of Dr. Tama S. Celi.

Dated: October 24, 2023

Respectfully Submitted,

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