IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

WILLIAM THORPE, *et al*., *Plaintiffs*, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al*., *Defendants*.	Civil Case No. 2:20-cv-00007-JPJ-PMS

PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM OFFERING TESTIMONY FROM UNDISCLOSED WITNESSES

Plaintiffs respectfully move *in limine* to preclude Defendants from offering testimony from three previously undisclosed witnesses at trial pursuant to Fed. R. Civ. P. 26(a)(1)(A), 26(e), and 37(c)(1).

On August 10, 2026—less than two months before the start of trial—Defendants served their list of trial witnesses pursuant to the Court's scheduling order. ECF No. 524 at 2 (adopting Plaintiffs' proposed deadlines set forth in ECF No. 520-1). On that list, Defendants identified, for the first time, three new witnesses: Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters. Defendants had never before identified these individuals as potential witnesses or as individuals possessing information that Defendants may use to support their claims or defenses, including in Defendants' initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A). This omission is particularly egregious given that the parties engaged in supplemental discovery from March through June 2026 that provided yet another opportunity for Defendants to disclose them, ECF No. 524 at 2, but Defendants chose not to identify these individuals. Plaintiffs have not had the opportunity to depose any of these individuals, and to attempt to do so now would be impractical

given the proximity to trial and resulting disruption to Plaintiffs' pre-trial preparation, as well as the fact that the deadlines to designate deposition testimony for use at trial have passed. All three individuals are currently employed by the Virginia Department of Corrections ("VDOC") and are not new employees. Defendants offer no explanation for their failure to identify these individuals at any earlier point. It is now too late. Plaintiffs respectfully request that the Court preclude Defendants from offering testimony from Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters at trial.

I. BACKGROUND

On August 10, 2026, the parties served proposed witness lists for trial pursuant to the Court's pre-trial exchange procedure. ECF No. 524 at 2. Defendants identified Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters as witnesses they may call live at trial. *See* Ex. 1. The next day, Plaintiffs' counsel emailed Defendants' counsel and asked Defendants to "identify where in their disclosures Defendants believe these individuals were disclosed or confirm that Defendants will remove these witnesses from their witness list and serve a revised list." Ex. 2 at 2. In response, counsel for Defendants asserted the following:

> Dr. Julie Fink appears on each of Plaintiffs' Rule 26(a)(1)(A) Initial Disclosures, Amended Disclosures, Second Amended Disclosures, and Third Amended Disclosures. In addition, Plaintiffs seek equitable relief from Defendants in their official capacities, meaning that Plaintiffs seek equitable relief from the roles currently held by Dr. Fink (Dr. Denise Malone's replacement), Mr. Daniels (Tori Raiford's replacement), and Mr. Walters (Harold Clarke's replacement).

Id. at 1. Defendants indicated that they were unwilling to amend their witness list to remove these individuals. *Id.*

Defendants served their initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A) on September 3, 2021. *See* Ex. 3. These disclosures did not identify Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters. Defendants served amended initial disclosures on January 31, 2023.

See Ex. 4. These disclosures do not identify Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters.

Following summary judgment, the Court scheduled a status conference for March 2, 2026. ECF No. 519. At the request of Plaintiffs, one of the items discussed at the status conference was the need for supplemental discovery to address changes that had occurred in the more than three years since the close of discovery. ECF No. 520 at 2. Defendants largely opposed Plaintiffs' request, including specifically opposing the need for additional depositions. *Id*. at 2–3. The Court approved a limited supplemental discovery period and allowed Plaintiffs to take a single deposition of VDOC's designee under Rule 30(b)(6). ECF No. 524 at 2. Plaintiffs supplemented their initial disclosures on May 4, 2026. At no point during the supplemental discovery period did Defendants amend their initial disclosures to identify Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters.

II. LEGAL STANDARD

A party must identify "the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(A). "If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1).

The Fourth Circuit has instructed that courts should consider five factors to determine whether a party's nondisclosure was "substantially justified or harmless:"

> (1) the surprise to the party against whom the witness was to have testified;
> (2) the ability of the party to cure that surprise;

(3) the extent to which allowing the testimony would disrupt the trial;
(4) the explanation for the party's failure to name the witness before trial; and
(5) the importance of the testimony

S. States Rack And Fixture, Inc. v. Sherwin-Williams Co., 318 F.3d 592, 596 (4th Cir. 2003). The nondisclosing party bears the burden of demonstrating that the nondisclosure was "substantially justified or harmless." *Deque Sys. Inc. v. BrowserStack, Inc.*, No. 1:24-CV-217, 2025 WL 1165865, at *5 (E.D. Va. Jan. 13, 2025).

III. ARGUMENT

Defendants should be precluded from offering testimony from Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters at trial. Defendants never identified these individuals in their Rule 26(a)(1)(A) disclosures at any point during the extensive periods that the parties have engaged in discovery—including the recent supplemental discovery period—and they never supplemented their disclosures to add them, as Rule 26(e) required. Because Defendants failed to identify these individuals in their disclosures, the exclusion rule of Rule 37(c)(1) is triggered automatically, unless Defendants can meet their burden to show that the failure to disclose was "substantially justified or harmless." *Deque Sys.*, 2025 WL 1165865, at *5. They cannot, because each of the five factors the Fourth Circuit has identified—surprise, the ability to cure the surprise, disruption to the trial, the importance of the evidence, and the nondisclosing party's explanation—weighs against them.

First, the surprise to Plaintiffs is complete: until they received Defendants' witness list, Plaintiffs had no idea that Defendants planned to use these individuals to defend against the claims in this case. In addition to failing to include them on their Rule 26(a)(1)(A) disclosures, Defendants did not refer to any of these individuals in the interrogatory responses they served in April 2026, Ex. 5, and Defendants did not serve supplemental responses to Plaintiffs' interrogatories that were

directed to these individuals' predecessors. In the absence of any such disclosure, Plaintiffs had no way of knowing that VDOC believed these individuals were "likely to have discoverable information" that it "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A). As a result, none of these individuals were deposed in this case. If Defendants are permitted to include them on their witness list, the scope of Defendants' examination at trial would be unlimited and Plaintiffs would be forced to cross-examine in the blind. This severely undercuts the fairness of trial and the entire design of federal litigation. *See United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("Modern instruments of discovery . . . together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.").

Second, that surprise cannot be cured at this stage. Defendants first named these witnesses less than two months before trial and after the close of both initial and supplemental fact discovery. Curing the prejudice would require reopening discovery for a second time to collect and review documents related to these three individuals (e-mail discovery has regularly been provided in this matter), taking their depositions, and revisiting Plaintiffs' trial preparation and witness sequencing—all in the weeks Plaintiffs must devote to preparing a class trial. Allowing the testimony would therefore either disrupt the trial schedule or force Plaintiffs to proceed without the discovery the Rules guarantee.

Third, Defendants provide no valid explanation for their failure to name these witnesses before trial. Defendants assert that because one of the individuals, Ms. Julie Fink, was identified in *Plaintiffs'* initial disclosures, Defendants were justified in omitting her from their disclosures. Ex. 2. Not so. The parties' initial disclosures are asymmetric—a party is required to disclose only individuals that a given party "may use to support *its claims or defenses*." Fed. R. Civ. P.

26(a)(1)(A).[1] Plaintiffs had no reasonable expectation that a witness they disclosed to support their claims would be used by Defendants to support their defenses. Defendants cannot remedy defects in their initial disclosures by pointing to Plaintiffs' initial disclosures. *See, e.g.*, *Happy Tax Franchising LLC v. Hill*, No. 19-24539-CIV, 2022 WL 17583543, at *4 (S.D. Fla. Nov. 1, 2022) (refusing to allow one defendant to adopt another defendant's initial disclosures because the party "points the Court to no Federal Rule of Civil Procedure or other authority that permits a party to adopt another party's initial disclosures after they are made.").

Defendants' remaining justification—that because Plaintiffs seek equitable relief against certain Defendants in their *official*[2] capacities, Plaintiffs should have anticipated testimony from whichever individuals currently occupy those roles—is equally unavailing. Rule 25(d) provides for the substitution of a successor as a *party*; it says nothing about who may testify, and it does not relieve a party of its obligation to identify the individuals it "may use to support its claims or defenses." Fed. R. Civ. P. 26(a)(1)(A). Nor does Defendants' theory hold together on its own terms: until now, Defendants never formally identified Mr. Daniels, Ms. Fink, or Mr. Walters as having taken over the roles of Dr. Malone, Ms. Raiford, or Mr. Clarke (all of whom were previously deposed), Defendants never moved to substitute Mr. Daniels, Ms. Fink, or Mr. Walters for their predecessors, never amended their disclosures to identify them, and never identified the subjects of the discoverable information any of them purportedly possesses that Defendants wish to use to support their defense. Rule 26(e) imposed a continuing obligation to supplement Defendants' disclosures "in a timely manner" as those personnel changes occurred, and

[1] If anything, *Plaintiffs'* inclusion of Ms. Fink in its disclosures should have prompted Defendants to update its disclosures to include Ms. Fink, if Defendants believed her testimony supported its claims or defenses.

[2] Because they are substituted as official capacity defendants only, none of these VDOC officials face any potential liability for damages.

Defendants did not do so. The Rules are intended to ensure that Plaintiffs do not have to guess which current VDOC employees Defendants might call at trial, or on what subjects.

Finally, the alleged importance of the testimony does not counsel a different result: Defendants have not identified any subject on which Mr. Daniels, Ms. Fink, or Mr. Walters can testify that cannot be addressed through the witnesses Defendants did disclose in their initial disclosures, including their predecessors, and whom Plaintiffs had the opportunity to depose. Indeed, it has been Defendants' position that the program has remained largely unchanged since discovery first began. ECF No. 520 at 2–3. And Defendants have offered no explanation—let alone a substantially justified one—for waiting until the eve of trial to name three of their own long-time employees as testifying witnesses. Every factor thus favors exclusion.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court preclude Defendants from offering testimony from Mr. Anton Daniels, Ms. Julie Fink, and Mr. Joseph Walters at trial.

Dated: August 24, 2026

Respectfully Submitted,

/s/ *Jared Frisch*

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August 2026, the foregoing was electronically filed 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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