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 Action No. 2:20-CV-00007-JPJ-PMS

DEFENDANTS' MOTION *IN LIMINE*, AND MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE*, TO PRECLUDE PLAINTIFFS FROM PRESENTING EVIDENCE OR ARGUMENT NOT PROVIDED IN THEIR INTERROGATORY RESPONSES

Individual Defendants Harold Clarke, Randall Mathena, H. Scott Richeson, David Robinson, Henry Ponton, Marcus Elam, Denise Malone, Tori Raiford, Jeffrey Kiser, and Carl Manis (collectively, "Defendants")[1] respectfully move *in limine* under Federal Rules of Civil Procedure 26(e) and 37(c)(1) for an Order prohibiting Plaintiffs from introducing at trial (1) evidence, theories, or contentions concerning liability on their constitutional claims that they failed to disclose in response to Defendants' contention Interrogatory Nos. 3, 5, and 6, and (2) evidence or argument concerning the existence or amount of damages that they failed to disclose in response to Defendants' damages Interrogatory No. 12.

Defendants served contention interrogatories asking Plaintiffs to identify the conditions they claim were unconstitutional, the conduct and dates attributable to each individual Defendant, and the facts and amount supporting any damages. Those interrogatories sought the core of the

[1] The Virginia Department of Corrections is not a party to Plaintiffs' Eighth Amendment and Due Process claims.

case, yet Plaintiffs met them with objections, inappropriate cross-references, and undifferentiated lists of documents labeled as mere "examples." And on damages, they disclosed nothing but the promise that damages would be decided at trial. The result is that, weeks before trial, Defendants still do not know which conditions each Plaintiff contends were unconstitutional, which Defendant is charged with what conduct on what dates, what each Defendant supposedly should have done, or what damages any Plaintiff seeks or how he intends to prove them.

Fed. R. Civ. P. 37(c)(1) does not permit a party to withhold its case throughout discovery and then unveil it at trial. The exclusion it prescribes is automatic and does not require bad faith. That exclusion may be severe—complete preclusion of any liability contention, theory, or damages evidence Plaintiffs did not disclose in their interrogatory responses—but it is a measure of the severity of Plaintiffs' nondisclosure, not a reason to excuse it. Plaintiffs, not Defendants, should bear the consequences of Plaintiffs' discovery failures. At the very least, Plaintiffs must be strictly confined to the specific documents disclosed in their interrogatory answers.

BACKGROUND

Early in this case, Defendants served on each Plaintiff a series of interrogatories intended to discover Plaintiffs' theories, particularly as to their Eighth Amendment and Due Process claims. The purpose of these interrogatories is to put Defendants on notice of the case each of them must meet at trial. Defendants are entitled to this information ***before*** trial, not to receive it for the first time at trial.

A. Plaintiffs' Deficient Responses to Contention Interrogatories Regarding Their Constitutional Claims (Nos. 3, 5, and 6)

Interrogatory Nos. 3, 5, and 6 are contention interrogatories asking Plaintiffs to state the specific factual bases for their Eighth Amendment conditions-of-confinement claim (Count V) and their procedural due process claim (Count II)—including, for each individual Defendant, the

conduct, the dates of notice, the dates of action or inaction, and the specific acts each Defendant allegedly should have taken. Specifically:

> **INTERROGATORY NO. 3**: Identify each aspect of Your conditions of confinement that You contend constitutes cruel and unusual punishment. For each one, explain in detail the basis for the contention, and identify, by Bates number, each document that supports your claim.
>
> **INTERROGATORY NO. 5**: Identify, with specificity, the manner in which You contend that each individual named as a Defendant to Count V of the Complaint was deliberately indifferent to Your conditions of confinement, including the date(s) upon which you contend that they had notice of any alleged deficiencies in Your conditions of confinement, the date(s) upon which they acted (or failed to act), and any action(s) that each named Plaintiff believes each individual Defendant should have taken that would have been sufficient to protect Your Eighth Amendment rights.
>
> **INTERROGATORY NO. 6**: Identify, with specificity, the manner in which You contend that each individual named as a Defendant to Count II of the Complaint violated Your procedural due process rights, including the date(s) upon which you contend that they violated Your right to procedural due process, the date(s) upon which they acted (or failed to act), and any action(s) that You believe each individual Defendant should have taken that would have been sufficient to protect the named Plaintiff's procedural due process rights.

Class Pl. Cornelison's Supp. Resp. to Defs.' Interrog. Nos. 1–3, 5–8, 11, 13, and 15–20 (attached as Exh. 1) at 6, 12, 14.

Named Plaintiff Derek Cornelison's responses to these Interrogatories are reflective of each Plaintiff's responses. In his first response to Interrogatory No. 3 (contentions regarding cruel-and-unusual punishment), Cornelison objected on numerous grounds, including that it "asks for attorney work product" and that "it is a contention interrogatory lacking sufficient justification to warrant a response early in the discovery process and before discovery is completed." *Id.*at 7. He then answered by "direct[ing] Defendants to the allegations in the Complaint, including but not limited to those contained in paragraphs 94–121, 134–204," *i.e.*, more than 100 paragraphs in the 274-paragraph Complaint. *Id.* Cornelison lodged the same objections to Interrogatory No. 5 (contentions regarding each individual Defendant's Eighth Amendment violations), then

"direct[ed] Defendants to the allegations in the Complaint, including but not limited to those contained in paragraphs 127–204"—almost 80 paragraphs—as well as a "fully incorporated" response to Interrogatory No. 4 (contentions regarding minimum changes needed for housing inmates with mental health needs). *Id.* at 12–13.[2] He did the same in response to Interrogatory No. 6 (contentions regarding each individual Defendants' due process violations), this time "direct[ing] Defendants to the allegations in the Complaint, including but not limited to those contained in paragraphs 127–87"—50 paragraphs—as well as the "fully incorporated" response to Interrogatory No. 4. *Id.* at 15.

On April 14, 2023, after the close of fact discovery, Cornelison supplemented his response to Defendants' Interrogatory Nos. 3, 5 and 6. Again, the responses to each were similar:

- In his Supplemental Response to Interrogatory No. 3, Cornelison directed Defendants to (a) "the Affidavit of Derek Cornelison (ECF No. 174.21)"; (b) the entirety of his April 11, 2023 deposition, without identifying any relevant portion of the deposition; and (c) "the various grievances and informal complaints" that Cornelison "has made or submitted to Defendants regarding the conditions of confinement, ***examples*** of which include[d]" a list of 61 bates-numbered documents. *Id.* at 7-8.

- In his Supplemental Response to Interrogatory No. 5, Cornelison directed Defendants to (a) his "Supplemental Responses to Interrogatory No. 2 [identifying individuals with knowledge of conditions he alleges injured him] and Interrogatory No. 3, which are fully incorporated by reference"; (b) his "medical records, ***examples*** of which include[d]" ***the exact same list of 61 Bates-numbered documents*** identified in response to Interrogatory No. 3; and (c) the entirety of his deposition, without identifying any relevant portion. *Id.* at 13-14.[3]

[2] Cornelison's response to that interrogatory, in turn, fully incorporated his response to Interrogatory No. 9, which asked each Plaintiff to identify the minimum changes he contends that VDOC would need to make for housing inmates with his alleged disability. Exh. 1 at 8–9, 20–22.

[3] Cornelison's Supplemental Response to Interrogatory No. 2, which he purported to "fully incorporate[] by reference" into his answer to Interrogatory No. 5, identified "individuals named in "the Affidavit of Peter (sic) Cornelison" and in "Class Plaintiff Cornelison's mental health records, examples of which include" ***the exact same list of 61 Bates-numbered documents*** identified in the Supplemental Responses to Interrogatory Nos. 3 and 5. Exh. 1 at 5–6.

- In his Supplemental Response to Interrogatory No. 6, Cornelison directed Defendants to (a) his "Supplemental Responses to Interrogatory No. 2, Interrogatory No. 3, and Interrogatory No. 5, which are fully incorporated by reference herein"; (b) "the Affidavit of Derek Cornelison (ECF No. 174.21)"; (c) the entirety of his deposition, without identifying any relevant portion of the deposition; and (d) "the various records reflecting Defendants' review of" Cornelison's "security status and/or status in the Step-Down Program, ***examples*** of which include" ***the exact same list of 61 Bates-numbered documents*** identified in the Supplemental Responses to Interrogatory Nos. 2, 3, and 5 (plus five additional documents). *Id.* at 15–16.

In sum, for Interrogatory Nos. 3, 5, and 6, Plaintiffs did four things: they (a) pointed to more than one-third of the paragraphs in their Complaint; (b) referred generally to their declarations; (c) cited the entirety of their deposition transcripts; and (d) pointed to a list of dozens of documents identified merely as "examples." None of these recitations discloses a "contention."

Resort to the documents does not reveal contentions. For starters, it is implausible that the ***same 61 documents*** could simultaneously be "examples" of "mental health records" (Interrogatory No. 2), "various grievances and informal complaints" (Interrogatory No. 3), "medical records" (Interrogatory No. 5), and "records reflecting" VDOC's review of "Cornelison's security status and/or status in the Step-Down Program" (Interrogatory No. 6). Setting that aside, some documents do not appear to even fit those categories. For example, Cornelison identified document Bates-numbered VADOC-00004605 (attached as Exh. 2) in his supplemental responses to each interrogatory, but that document is a "Double Cell/Dorm Assessment Form" dated April 2007—more than five years before the Step-Down Program was implemented and before most Defendants became employees of VDOC. How that document has any relevance to Plaintiffs' constitutional claims is anyone's guess.

Neither Cornelison nor any of the named Plaintiffs have supplemented their responses to Interrogatory Nos. 3 or 6 since their April 14, 2023 supplementations. And only Plaintiff Vernon Brooks supplemented his response to Interrogatory No. 5, adding that VDOC "took away [his]

phone and visitation privileges due to his participation in this class action lawsuit" but "restored" them in April 2026. Pl. Brooks's 2d Supp. Resp. & Objs. to Defs.' 1st Set of Interrogs. (No. 5), at 4 (attached as Exh. 3).

The result is that Defendants—just weeks before trial—***still*** do not know which conditions Plaintiffs contend were unconstitutional, which Defendant is charged with what conduct, on what dates, or what each Defendant supposedly should have done.

B. Plaintiffs' Deficient Response to Damages Contention Interrogatory (No. 12)

Interrogatory No. 12 is a contention interrogatory asking Plaintiffs to state the specific factual bases for their damages. Specifically:

> **INTERROGATORY NO. 12:** State the amount of damages You are requesting and identify with specificity all facts upon which You intend to rely as support for an award of damages in that amount.

Class Pl. Cornelison's Supp. Resp. to Defs.' Interrog. Nos. 1 and 12–20 (attached as Exh. 4) at 21.

Cornelison, again representative of the other Plaintiffs, first responded with an objection only, asserting that the interrogatory was "lacking sufficient justification to warrant a response early in the discovery process and before discovery is completed," and that, because the parties had "yet to designate experts, exchange expert reports, or complete depositions," he did "not have the necessary information to make a full, fair and specific answer." *Id.* at 21.

Cornelison supplemented that response once, on February 28, 2023. But the supplement did not disclose an amount of damages or facts on which he would rely. Instead, it responded "[t]he amount of damages is to be determined by a jury at trial and is dependent upon a number of factors, including the number of class members and the number of days each class member has spent in solitary confinement." *Id.* It then recited a generic catalogue of more than three dozen conditions and symptoms—including "eyesight issues," "depression," "digestive problems," "dizziness," "anxiety," "post-traumatic stress disorder," and "hallucinations"—said to be "well-documented in

the medical literature." *Id.* He tied none of the listed conditions to himself or to any individual Plaintiff. Cornelison identified no damages amount, no computation of any category of damages, and no evidence suggesting any award in any amount. He closed the supplemental response with the same disclaimer as his objection: that, with discovery ongoing and experts not yet designated, he "does not have the necessary information to make a full, fair and specific answer to this Interrogatory." *Id.* at 22.

Neither Cornelison nor any other Plaintiff has supplemented his response to Interrogatory No. 12 since February 2023. Discovery has closed. Expert discovery has concluded. The Court has ruled on the parties' cross-motions for summary judgment. And Plaintiffs' damages disclosure remains exactly where it stood more than three years ago: damages will be decided at trial, based on unspecified facts, for some unspecified amount. As with the liability-based contentions, the result is that Defendants do not know what damages Plaintiffs will seek, how they will calculate those damages, or what evidence they will offer to prove them.

ARGUMENT

I. Plaintiffs' Interrogatory Responses Are, in Law, No Answers At All.

One threshold point motivates this motion: Plaintiffs never answered the interrogatories that matter most. They did not disclose their contentions on liability under Interrogatory Nos. 3, 5, or 6, and they did not disclose their damages under Interrogatory No. 12. Fed. R. Civ. P. 37(a)(4) provides that "an evasive or incomplete disclosure, answer, or response must be treated as a ***failure*** to disclose, answer, or respond." *Nat'l Fire Ins. Co. of Hartford v. Jose Trucking Corp.*, 264 F.R.D. 233, 238 (W.D.N.C. 2010). In such circumstances, courts in this Circuit treat evasive and incomplete interrogatory answers as "no answers at all." *Id.* at 240. Judged by that standard, Plaintiffs' responses to Interrogatory Nos. 3, 5, 6, and 12 are no answers at all.

A. A Contention Interrogatory Cannot Be Answered by Reference to Pleadings, Declarations or Depositions.

An interrogatory answer must stand on its own; it may not send the requesting party into the record to hunt for the response. Courts within this Circuit uniformly so hold. "[T]he point of interrogatories is to obtain a party's admissions and contentions under oath and to narrow the issues," so "simply referring [the opposing party] to whatever it might find" in documents and testimony "does not comply." *Fisher v. Baltimore Life Ins. Co.*, 235 F.R.D. 617, 628 (N.D. W.Va. 2006) (citation omitted). A party's "cursory references to the pleadings, his deposition, and his medical records are not responsive answers." *Smith v. Trawler Capt. Alfred, Inc.*, No. 2:12-CV-2866-DCN, 2014 WL 1912067, at *3 (D.S.C. May 13, 2014); *see also Smith v. U.S. Sprint*, 19 F. 3d 12, 1994 WL 62338, at *4 n.11 (4th Cir. Feb. 28, 1994) (interrogatory responses that refer to a complaint "constitute a failure to respond"); *Herdlein Techs., Inc. v. Century Contractors, Inc.*, 147 F.R.D. 103, 106–107 (W.D.N.C. 1993) (a "responding party may not rely on a general reference to deposition testimony to avoid its duty to answer interrogatories fully and completely"; doing so improperly "contemplates [the requesting party] combing the deposition to determine which [material is] responsive," when the responding party "has the duty to respond fully and completely to each interrogatory").

The defect is acute for contention interrogatories, which ask a party what they contend and why. Only a party can supply that information; no document can do so. "[D]ocuments themselves rarely, if ever, reveal contentions of fact or law. A party reveals its contentions." *U.S. S.E.C. v. Elfindepan, S.A.*, 206 F.R.D. 574, 576 (M.D.N.C. 2002). An interrogatory asking a party to identify what it contends and the bases for that contention is "not answerable by simply referring [the requesting party] to documents" because "[o]nly [the responding party] can provide this information." *Hopper v. Jay Bee Oil & Gas, Inc.*, No. 5:20CV101 (LEAD), 2021 WL 7448645, at

*3 (N.D. W.Va. Dec. 20, 2021). The proper form of response "is a narrative answer, not a reference to documents or objects where the answers might be found." *In re Savitt/Adler Litig.*, 176 F.R.D. 44, 48 (N.D.N.Y. 1997). Pointing to the responding party's own sworn statements does not cure the defect: "it is improper and insufficient for plaintiff to refer to deposition testimony, even her own, in response to an interrogatory." *Id.* at 53 n. 15. The same is true of affidavits. *Elfindepan*, 206 F.R.D. at 577.

Plaintiffs answered Defendants' Interrogatory Nos. 3, 5, and 6 not by stating their contentions and their factual bases, but by incorporating hundreds of paragraphs of their Complaint and entire declarations and deposition transcripts by reference, without identifying a single page. That is not an answer. It is an invitation for Defendants—and the Court—to search hundreds of pages of allegations and testimony and guess which passages Plaintiffs will contend at trial support their case.

Plaintiffs' failure to properly respond to Interrogatory Nos. 5 and 6 is most glaring, as they demand, for each individual Defendant, the dates of notice, the dates of action or inaction, and the specific acts each Defendant should have taken. A general citation to a body of declarations and transcripts cannot map each contention to each Defendant and each date. It leaves each Defendant unable to know what case he or she must meet, just weeks before trial. *See Hartford Cas. Ins. Co. v. MCJ Clothiers, Inc.*, 54 F. App'x 384, 389 (4th Cir. 2002) (affirming preclusion of untimely contention interrogatory response because the failure to provide "the claim's basis prevented [the requesting party] from using discovery fully to prepare its defense").

B. Rule 33(d) Does Not Rescue Plaintiffs' Document Dump, and Their "Examples" Lists Commit Them to Nothing.

Plaintiffs' invocation of Rule 33(d) in response to Interrogatory Nos. 3, 5, and 6 fares no better. These responses are deficient for at least three reasons.

First, Rule 33(d) does not apply to contention interrogatories at all. These interrogatories "do not lend themselves to answer by use of Rule 33(d)" because they seek contentions, not records. *Elfindepan*, 206 F.R.D. at 577; *see also United States ex rel. Landis v. Tailwind Sports Corp.*, 317 F.R.D. 592, 594 (D.D.C. 2016) (holding that Rule 33(d) "cannot be used with respect to contention interrogatories" (quoting *Fleming v. Escort, Inc.*, No. CV 09–105–S–BLW, 2011 WL 573599, at *2 (D. Idaho Feb. 13, 2011)). Rule 33(d) is limited to answers that "may be determined by examining … a party's business records"; a party's contentions are not found in records, and "[o]nly [the party] can provide this information." *Hopper*, 2021 WL 7448645, at *3.

Plaintiffs simply may not answer a contention interrogatory by gesturing at a pile of documents. A party is "under a severe duty to make every effort to obtain the requested information," and improperly relying on "the large volume of documents produced" instead of "providing a specific response" is insufficient under Rule 33. *Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co.*, 246 F.R.D. 522, 529 (S.D. W.Va. 2007). A contention interrogatory exists to "pin down an opponent's legal theories in a case as well as the primary facts supporting them," and an answer that simply invokes the discovery record is nonresponsive. *Id.* A bulk citation to Bates numbers—some of them clearly irrelevant—forces Defendants to guess which documents supply which element as to which Defendant.

Second, Plaintiffs' reference to their lists of documents as mere "examples" is a concession that their responses are incomplete. A Rule 33(d) answer must show "that a review of the documents will actually reveal answers to the interrogatories"; it is not enough to assert that responsive information "may" be found in the designated materials. *Landis*, 317 F.R.D. at 595. A response that points to documents "including, but not limited to" a list is, by its own terms, not a full answer. *Herdlein Techs., Inc.*, 147 F.R.D. at 107. By labeling their lists "examples," Plaintiffs

have told Defendants that the true bases for their contentions lie somewhere beyond the lists—exactly the open-ended, incomplete response the Rules forbid.

Worse yet, it commits Plaintiffs to nothing. The "examples" framing reserves Plaintiffs' right to rely at trial on other, unidentified documents and theories, leaving Defendants to prepare against a moving target. A responding party "must be adequately informed by the opposing party, in response to proper discovery requests, which facts, theories, and documents will likely be relied upon at trial," and is "not required to plan a defense based on all possible documents or information presented during depositions." *Contech Stormwater Sols., Inc. v. Baysaver Techs., Inc.*, 534 F. Supp. 2d 616, 625 (D. Md. 2008); *see also Frontier-Kemper Constructors, Inc.*, 246 F.R.D. at 529.

*Third***,** folding in irrelevant documents confirms that Plaintiffs' answers were never a genuine effort to respond to the interrogatories at all. A party "cannot limit his answers to matters within his own knowledge and ignore information immediately available to him," and if it cannot fully answer "it should so state under oath and … set forth in detail the efforts made to obtain the information." *Nat'l Fire Ins. Co. of Hartford,* 264 F.R.D. at 238 (citation omitted). Padding a response with documents that have nothing to do with the subject matter of the interrogatory is the antithesis of that good-faith duty. Under Rule 37(a)(4), "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Courts in this Circuit accordingly treat evasive and incomplete interrogatory answers as "no answers at all." *See id.* at 240.

The D.C. district court's analysis in *Landis* is instructive. There, the court identified numerous reasons why the respondent's interrogatory responses in that case "vastly exceed[ed] what Rule 33(d) allows." 317 F.R.D. at 594. Among others, the court noted that, because a party is more familiar with his own contentions than the opposing party, the burden cannot be equal, as

required by Rule 33(d). *Id.* Moreover, the defendant in *Landis*, like Plaintiffs here, did not identify the documents in sufficient detail to enable the opposing party to identify them as readily as the citing party. *Id.* In *Landis*, the defendant identified documents that had been produced, including, but not limited to an attached list. *Id.* at 595. Similarly, Plaintiffs here directed Defendants to broadly-worded categories of documents—*e.g.,* "Cornelison's mental health records," "the various grievances and informal complaints Class Plaintiff Cornelison has made or submitted to Defendants regarding the conditions of his confinement," "Cornelison's medical records," "the various records reflecting Defendants' review of Class Plaintiff Cornelison's security status and/or status in the Step-Down Program"—but then set forth ***identical*** bates number listings of "***examples***" of such records. Exh. 1 at 6 (No. 2), 7 (No. 3), 13 (No. 5), 16 (No. 6). The "example" listings do not identify which documents are mental health records, grievances, medical records, or review records, but simply lump them all together. *Id.* Defendants should not be expected to rifle through the many documents listed to determine which Plaintiffs consider a certain category of document. Nor should Defendants be expected to identify ***all*** documents Plaintiffs understand to be in each category, given that Plaintiffs provided only "examples."

C. Plaintiffs' damages response disclosed neither an amount nor any supporting fact.

Plaintiffs' damages response is a non-answer of a different kind. Interrogatory No. 12 asked Plaintiffs to "state the amount of damages [they are] requesting" and to "identify with specificity all facts" supporting an award "in that amount"—a request that mirrors a plaintiff's affirmative obligation to disclose "a computation of each category of damages," with the evidentiary material

on which each computation is based. Fed. R. Civ. P. 26(a)(1)(A)(iii).[4] Such a disclosure "must be more than a lump sum figure or disclosure of financial documents"; it "must state the types of damages that the party seeks, must contain a specific computation of each category, and must include documents to support the computations." *Intercollegiate Women's Lacrosse Coaches Ass'n v. Corrigan Sports Enters., Inc.*, 698 F. Supp. 3d 814, 818–19 (M.D.N.C. 2023) (citation omitted). Plaintiffs supplied none of it. Their lone supplement, served February 28, 2023, stated only that "[t]he amount of damages is to be determined by a jury at trial," depending on "the number of class members and the number of days each class member has spent in solitary confinement," and then listed a catalogue of conditions said to be "well-documented in medical literature." Exh. 4 at 21. Plaintiffs stated no amount, offered no computation, tied no condition to any individual Plaintiff, and identified no supporting evidence. That is "a theory of damages," not a disclosure of one—and a theory that is never computed does not satisfy the disclosure obligation. *Corrigan Sports*, 698 F. Supp. 3d at 819.

The Fourth Circuit confirmed as much earlier this year in *Deque Systems, Inc. v. Browerstack, Inc.*, which affirmed the exclusion of a party's damages evidence where, in response to interrogatories seeking its damages "and how it would calculate those damages," the party "repeatedly failed to make [a] disclosure" and instead "offered cursory statements that deferred any responsive answers." 177 F.4th 585, 591, 594–96 (4th Cir. 2026). The court held that the party "indisputably failed to comply with its Rule 26(a) obligations" and affirmed exclusion of all damages evidence. *Id.* That is precisely what Plaintiffs did here.

[4] Defendants are separately seeking an order to exclude Plaintiffs' evidence of compensatory damages based on their failure to properly disclose information required under Rule 26(a)(1)(A)(iii).

II. The Withheld Information Went to the Heart of the Case, and Rule 37(c)(1) Requires Its Preclusion.

A. The interrogatories tracked the elements of Counts II and V.

These were not peripheral discovery requests. Interrogatory Nos. 3 and 5 track, element for element, what Plaintiffs must prove to hold each Defendant liable under the Eighth Amendment. To satisfy the subjective prong of an Eighth Amendment conditions-of-confinement claim, a plaintiff "must show that 'the official kn[ew] of and disregard[ed] an excessive risk to inmate health or safety.'" *Porter v. Clarke*, 923 F.3d 348, 361 (4th Cir. 2019). A prison official is liable "only if he knows that inmates face a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 847 (1994). Each component of Interrogatory Nos. 3 and 5 maps directly onto that standard: the specific conditions alleged to be unconstitutional; the "notice" dates of each Defendant's knowledge of the risk; the dates each Defendant "acted (or failed to act)"; and the "action(s) . . . [each] Defendant should have taken." Exh. 1 at 6, 12. Because Eighth Amendment liability is individualized, Plaintiffs were required to supply this proof ***as to each named Defendant***. Their refusal to do so leaves Defendants unable to know what case each of them must meet at trial—the precise harm the discovery rules exist to prevent.

Interrogatory No. 6 seeks parallel information for Plaintiffs' Due Process claim: how each Defendant allegedly violated Plaintiffs' due process rights; when; and what each should have done differently. Due process liability is likewise individualized and Plaintiffs' refusal to supply that proof leaves each Defendant unable to know what case each of them must meet at trial.

Interrogatory No. 12 is no less central. Damages are Plaintiffs' own affirmative case. Defendants cannot prepare to contest—through experts, cross-examination, or rebuttal—an award whose amount and factual basis Plaintiffs have kept to themselves. Once again, Plaintiffs would

have Defendants enter the trial blind to the case that will be presented against them on claims seeking to pin individual liability for class-wide harms.

B. Every *Southern States* factor favors exclusion.

Defendants had a right to learn the details of those theories and the facts supporting them during discovery, not at trial. Courts recognize the "basic purpose" of Rule 37(c)(1) as preventing "surprise and prejudice to the opposing party." *Contech, Inc.*, 534 F. Supp. 2d at 622. A defendant is "not required to plan a defense based on all possible documents or information presented during depositions, but rather must be adequately informed by the opposing party … which facts, theories, and documents will likely be relied upon at trial." *Id.* at 625. That prejudice does not depend on whether the case is tried to a jury or the bench: regardless of the factfinder, Defendants cannot prepare to meet contentions Plaintiffs have refused to disclose.

A party that fails to provide information required by Rule 26(e) is "not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Exclusion under this Rule is an automatic sanction that does not require any showing of bad faith or callous disregard of the discovery rules. *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003). In assessing whether a nondisclosure is substantially justified or harmless, the Court applies the five *Southern States* factors:

> (1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Id. at 597. The first four factors "relate mainly to the harmlessness exception," while the fifth—the party's explanation—"relates primarily to the substantial justification exception." *Id.*; *see also Bresler v. Wilmington Trust Co.*, 855 F.3d 178, 190 (4th Cir. 2017) (applying the *Southern States*

factors). The party facing sanctions—here, Plaintiffs—bears the burden of establishing that its nondisclosure was substantially justified or harmless, and the district court exercises "broad discretion" in weighing the factors. *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014). Every factor favors exclusion here.

Surprise. Having been told only that some unspecified subset of a large document population contains "examples" of their proof—and that, on damages, nothing but that a jury would decide—Defendants cannot know which facts Plaintiffs will marshal to establish each Defendant's knowledge, disregard, and failure to act, or to prove any damages award. Every contention and every dollar of damages Plaintiffs offer at trial will thus be information Defendants encounter for the first time—the very "surprise and prejudice to the opposing party" that Rule 37(c)(1) exists to prevent. *Contech*, 534 F. Supp. 2d at 622. The Fourth Circuit found surprise on far less in *Deque Systems*, where the party, asked through interrogatories to disclose its damages and "how it would calculate those damages," "repeatedly failed to make any disclosure" and "offered cursory statements that deferred any responsive answers." 177 F.4th at 594–95.

Ability to Cure. The surprise cannot be cured because discovery is closed. Fact discovery closed on February 28, 2023, and the relevant depositions were completed by April 14, 2023; expert discovery has long since closed; the Court ruled on the parties' cross-motions for summary judgment on January 20, 2026; and trial is set for October 5, 2026. Reopening discovery now would require new interrogatory answers, document review, depositions, expert work and rebuttal, and renewed trial preparation. And "the ability to simply cross-examine … at trial is not the ability to cure," because the disclosure rules are "designed to allow an opponent to examine" a position "for flaws and to develop counter-testimony" in advance, not to force it to test an undisclosed theory in real time. *S. States*, 318 F.3d at 598. The opportunity guaranteed to Defendants by the

discovery rules will be lost if Plaintiffs may reveal their contentions and their damages for the first time at trial, and reopening discovery on the eve of trial to supply what Plaintiffs withheld is not a cure but a reward for the nondisclosure.

Disruption. Allowing Plaintiffs to introduce the undisclosed evidence would leave the Court with two untenable choices. On the one hand, the Court could reopen discovery so Defendants could finally learn, test, and respond to Plaintiffs' theories, which would postpone the October 2026 trial that has already been rescheduled multiple times and render much of the parties' existing trial preparation "obsolete." *S. States*, 318 F.3d at 598. On the other hand, the Court could proceed on the current schedule while Defendants face theories and damages evidence they have never had an opportunity to test. Either course would significantly disrupt the proceedings: the first would require new discovery, expert analysis, and trial preparation, while the second would compromise the orderly presentation of the case. The Fourth Circuit affirmed exclusion on precisely that reasoning in *Deque Systems*, where curing the party's late damages disclosure would have required postponing trial and reopening discovery. *See* 177 F.4th at 595. The disruption here would be no less significant.

Importance. The withheld information is central to every issue remaining for trial: the conditions Plaintiffs contend are unconstitutional, the conduct and dates they attribute to each individual Defendant, the acts they say each Defendant should have taken, and the entire damages case. That centrality does not excuse nondisclosure; it makes timely disclosure more important. Importance "must be viewed from the perspective of both parties" and "the more important the evidence, the more important it is for the proponent to disclose the evidence in a timely manner because it is more likely to prejudice the opposing party." *S. States*, 318 F.3d at 598; *see also*

Deque Sys., 177 F.4th at 596. The centrality of what Plaintiffs withheld is therefore a reason to hold them to their nondisclosure, not to excuse it.

No Justification or Excuse. Plaintiffs have no valid explanation. The contentions and damages were theirs to marshal; expert discovery has long since concluded; and Plaintiffs neither sought relief from the interrogatories nor moved to extend their time to answer them properly. The burden on this factor is Plaintiffs', and they cannot carry it. *Wilkins*, 751 F.3d at 222. Their lone contemporaneous excuse—that the interrogatories were premature—expired as discovery closed and expert reports were exchanged. The Fourth Circuit has treated a party's failure to move to compel or to supplement once it had its position in hand as undercutting the explanation factor. *S. States*, 318 F.3d at 598–99. Plaintiffs had the information necessary to answer because only they know their own contentions. They chose silence for three years, and they cannot now recast that silence as substantial justification.

III. Because Plaintiffs Disclosed Nothing, They Should Be Barred from Offering Any Evidence or Argument on the Claims and Damages These Interrogatories Covered.

When a party discloses nothing, the remedy that fits is the complete one. Rule 37(c)(1) bars a party from using "information" it failed to disclose. Plaintiffs disclosed no contention as to any condition, any Defendant, any date, or any act, and no amount, computation, or fact supporting damages. They therefore have nothing they may properly put before the factfinder on Counts II and V or on damages, and the Court should preclude them from offering any evidence, testimony, or argument in support of those matters.

Courts have granted this precise relief on a motion *in limine*. In *Changzhou Kaidi Electric Co. v. Okin America, Inc.*, the court excluded testimony, evidence, and argument on theories not disclosed in contention interrogatories because "no sanction less drastic than exclusion would remedy the prejudice … without also postponing the trial." 112 F. Supp. 3d 330, 338 (D. Md.

2015). In *Contech*, the court excluded undisclosed evidence under Rule 37(c)(1) after a party "failed to supplement their bare boned initial response in a timely fashion" after initially objecting based on "the need for additional discovery," holding the failure neither substantially justified nor harmless. 534 F. Supp. 2d at 624–25. In *Corrigan Sports*, the court precluded all damages evidence where the party offered only "a *theory* of damages in response to … interrogatories" and never disclosed a computation. 698 F. Supp. 3d at 819–20 (emphasis in original). And in *Deque Systems*, the Fourth Circuit affirmed exclusion of all damages evidence where the party disclosed only that its calculations were "incomplete at this time" and offered "cursory statements that deferred any responsive answers." 177 F.4th at 591, 594–96. These cases confirm that complete exclusion is an appropriate remedy where a party withholds the core of its liability and damages case through the close of discovery.

Plaintiffs' non-answers are no better than the ones in these cases—and *Deque Systems* makes the point with binding force, affirming the exclusion of *all* of a party's damages evidence under Rule 37(c)(1) where the party met damages interrogatories with only cursory deferrals and never disclosed a computation, and holding that exclusion was not merely proper but "mandated" absent substantial justification or harmlessness. 177 F.4th at 594–95. The same complete exclusion should follow. Any lesser remedy would reward Plaintiffs' strategic silence and force Defendants to meet, for the first time at trial, the case Plaintiffs refused to disclose.

IV. In the Alternative, Plaintiffs Should Be Limited Strictly to the Documents They Specifically Identified by Bates Number.

Should the Court decline to bar Plaintiffs' undisclosed contention evidence altogether, it should at a minimum hold Plaintiffs to precisely what they disclosed—and no more. This narrower relief follows from the same principle: a party may rely at trial only on what it actually identified in discovery, and "must be adequately informed by the opposing party … which facts, theories,

and documents will likely be relied upon at trial." *Contech*, 534 F. Supp. 2d at 625. At most, Plaintiffs disclosed the specific documents they listed by Bates number in their supplemental responses to Interrogatory Nos. 3, 5, and 6. The Court should confine Plaintiffs to those specifically enumerated documents and preclude the following three categories of proof Plaintiffs never disclosed:

1. Documents Beyond the Lists. Plaintiffs' interrogatory responses reserved an open-ended universe of documents they may spring as proof at trial. They identified their Bates-stamped documents as mere "examples" and framed the responses as reaching documents "including, but not limited to" those listed. Such a response is, by its own terms, not a full answer, *Herdlein Techs., Inc.*, 147 F.R.D. at 107, and it reserves to Plaintiffs a right to spring other, unidentified documents at trial. Plaintiffs should be barred from relying on any document they did not specifically identify by Bates number—that is, anything outside the enumerated lists.

2. Wholesale Cross-References. Plaintiffs' responses pointed to effectively all of their Complaint, entire declarations, and their complete deposition transcripts without identifying a page. Because a party may not answer an interrogatory "by simply referring [the requesting party] to documents," *Hopper*, 2021 WL 7448645, at *3, Plaintiffs should not be permitted to rely at trial on any contention or fact located only through such a general cross-reference.

3. Damages. Because Interrogatory No. 12 identified no amount, no computation, and no document at all, there is nothing to which Plaintiffs' damages proof can be "limited" as a Rule 37 sanction. As applied to damages, the alternative yields the same result as above: Plaintiffs should

be precluded from offering any evidence or argument concerning the existence or amount of their damages.[5]

This measured alternative is not a concession that anything less than full exclusion would be adequate. It asks nothing unfair of Plaintiffs. Instead, it holds them to their words, requiring them to try their case on the specific materials they chose to designate. If those materials satisfied Plaintiffs' obligations under Rule 26, then Plaintiffs lose nothing. If they do not, that is a consequence of Plaintiffs' own decision to withhold their contentions during discovery.

CONCLUSION

For these reasons, Defendants respectfully request that the Court enter an Order that precludes Plaintiffs from offering at trial any evidence, testimony, or argument in support of their Eighth Amendment or Due Process claims (Counts V and II) or their damages, on the ground that Plaintiffs failed to disclose their contentions and their damages in response to Interrogatories 3, 5, 6, and 12. In the alternative, the Court should limit Plaintiffs at trial to the specific documents they identified by Bates number in their interrogatory responses and preclude Plaintiffs from relying on (a) any document they did not specifically identify by Bates number, (b) the Complaint, their declarations, or their deposition transcripts, and (c) any evidence or argument concerning the existence or amount of their damages.

[5] The exclusion of Plaintiffs' undisclosed compensatory-damages evidence would not leave Plaintiffs without a potential remedy. A plaintiff who establishes a completed constitutional violation but cannot prove compensable injury may seek nominal damages. *See Farrar v. Hobby*, 506 U.S. 103, 112 (1992); *Wilcox v. Brown*, 877 F.3d 161, 169–70 (4th Cir. 2017) (indicating 42 U.S.C. § 1997e(e) does not bar recovery of nominal damages). Indeed, Plaintiffs expressly sought "nominal damages in the event that a trier of fact were to determine that their constitutional rights have been violated but that compensatory damages are not warranted." Compl. ¶ 275.

August 24, 2026

Respectfully submitted,

/s/ *Maya M. Eckstein*

Maya M. Eckstein (VSB #41413)
R. Dennis Fairbanks (VSB #90435)
Kevin S. Elliker (VSB #87498)
HUNTON ANDREWS KURTH LLP
951 E. Byrd St.
Richmond, VA 23219
Ph: (804) 788-8200
Fax: (804) 788-8218
meckstein@hunton.com
dfairbanks@hunton.com
kelliker@hunton.com

Jay Jones
Attorney General of Virginia

D. Patricia Wallace (VSB #92964)
Assistant Attorney General,
Criminal Justice & Public Safety Division

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
Ph: (804) 786-2206
Fax: (804) 786-4239
pwallace@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2026, I caused a copy of the foregoing to be electronically filed using the CM/ECF system, which will send notification to counsel of record of such filing by operation of the Court's electronic system. Parties may access this filing via the Court's electronic system.

By: /s/ *Maya M. Eckstein*
Maya M. Eckstein