UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

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| WILLIAM THORPE, *et al.*,<br><br>Plaintiffs,<br><br>v.<br><br>VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,<br><br>Defendants. | ) | Civil Action No. 2:20-CV-00007-JPJ-PMS |

**DEFENDANTS' MOTION *IN LIMINE*, AND MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE*, TO EXCLUDE PLAINTIFFS' EVIDENCE OF COMPENSATORY DAMAGES**

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(a)(1)(A)(iii), 26(e), and 37(c)(1) for an order precluding Plaintiffs from offering at trial any evidence, testimony, or argument regarding an amount of or methodology for calculating compensatory damages.

This motion is about trial prejudice: Plaintiffs still have disclosed no per diem rate, no methodology for selecting one, no damages computation, and no evidentiary material tying any number to their claimed injury. Over more than five years of litigation, Plaintiffs repeatedly represented—in their disclosures, interrogatory responses, and discovery objections—that damages would be addressed through expert testimony. But they designated five experts, and not

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

one opined on the amount of compensatory damages or offered any damages computation. Rule 37(c)(1) mandates exclusion of any such evidence or testimony now, and every *Southern States* factor confirms that the failure was neither substantially justified nor harmless.

## BACKGROUND

Plaintiffs, a certified class of inmates, allege that the conditions of confinement in VDOC's Step-Down Program (the "Program") at Red Onion State Prison and Wallens Ridge State Prison violate the Eighth Amendment and that the Program's reviews violate the Due Process Clause. But throughout more than five years of litigation, Plaintiffs have never provided the damages computation required by Federal Rule of Civil Procedure 26(a)(1)(A)(iii).

### A. Plaintiffs' Initial Disclosures and Amended Disclosures

Plaintiffs served their initial Rule 26(a)(1) disclosures on September 3, 2021 (relevant portions attached as Exh. 1). Under the heading "Rule 26(a)(1)(A)(iii): Damages," those disclosures stated only: "Computation of damages is premature at this stage in the case. Documents and information, when available, will be provided in conformity with Fed. R. Civ. P. 26(a)(2) governing expert reports and/or any relevant Orders entered by the Court." Exh. 1 at 45. Plaintiffs served Amended Disclosures on March 15, 2023 (relevant portions attached as Exh. 2), and Second Amended Disclosures on July 19, 2023 (relevant portions attached as Exh. 3). Each contained the identical statement: "Computation of damages is premature at this stage in the case." Exh. 2 at 54; Exh. 3 at 55.

It was not until May 4, 2026—more than five years after the initial disclosures and almost three years after the close of fact and expert discovery—that Plaintiffs served their Third Amended Disclosures (relevant portions attached as Exh. 4), which for the first time referenced a per diem damages theory. Those disclosures stated:

> The plaintiffs seek compensatory damages for constitutional and statutory violations, including damages for physical injury, emotional pain and suffering, and loss of liberty…. As the Court has acknowledged, post-PLRA courts have awarded prisoners compensatory damages on a per diem basis…. Computation of damages will be determined by the finder of fact at trial based upon a number of factors, including the number of class members and the number of days each class member has spent in solitary confinement, as set forth, for example, in the expert reports of Mr. Russell Molter.

Exh. 4 at 59. Even then, Plaintiffs disclosed no per diem rate, no method for deriving one, and no documents or other evidentiary material supporting any calculation.

**B. Plaintiffs' Interrogatory Responses**

Defendants served Interrogatory No. 12 on each named Plaintiff, asking them to "[s]tate the amount of damages [they are] requesting and identify with specificity all facts upon which [they] intend to rely as support for an award of damages in that amount." Every named Plaintiff gave substantially the same response: "The 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." *See, e.g.*, Plaintiff Thorpe's Response to Interrog. No. 12 (Dec. 13, 2021), at 18 (relevant portions attached as Exh. 5).[2] In supplemental responses served February 28, 2023, several Plaintiffs added a laundry list of alleged harms "well-documented in medical literature," including anxiety, depression, Post-Traumatic Stress Disorder, psychosis, hallucinations, insomnia, cognitive decline, and dozens of other mental and emotional conditions. *See, e.g.*, Plaintiff Thorpe's Supp. Response to Interrog. No. 12 (Feb.

[2] The language used in Plaintiff Thorpe's original Response and Supplemental Response to Interrogatory No. 12 is substantively identical across all plaintiffs. This Interrogatory response is defective in its own right, as addressed in Defendants' Motion in Limine to Preclude Plaintiffs from Presenting Evidence or Argument Not Provided in Their Interrogatory Responses.

28, 2023), at 21-22 (relevant portions attached as Exh. 6). Not one Plaintiff identified a dollar amount, a per diem rate, or any methodology for computing compensatory damages.

**C. Named Plaintiffs' Deposition Testimony**

The named Plaintiffs' deposition testimony further confirms the complete absence of any coherent damages theory:

- Plaintiff Brian Cavitt testified he was entitled to $150,000, which he calculated as "about a hundred dollars a day for every day I spent in long-term segregation for four and a half years," attributing approximately one-third to emotional pain and suffering and approximately sixty percent to punitive damages—meaning the vast majority of his own figure was not compensatory. Exh. 7 Relevant Portions of Dep. of Brian Cavitt at 172:4–173:11.

- Plaintiff Peter Mukuria testified he was entitled to $30 million in compensatory damages and that every class member should receive the same amount, regardless of the length of their confinement. He offered no methodology for that calculation. Exh. 8 Relevant Portions of Dep. of Peter Mukuria at 187:14–190:8.

- Plaintiff Frederick Hammer testified that "according to other cases, the average is $500 a day," citing the *Prison Legal News*, and calculated $1.5 million for himself based on 3,000 days. Exh. 9 Relevant Portions of Dep. of Frederick Hammer at 132:19–133:21. But he could not identify the specific cases or whether they involved comparable conditions and acknowledged: "It's not the money with me…. I'm not looking for an amount. I'm looking for a solution to this problem." *Id.* at 140:15–141:17.

- Plaintiff Kevin Snodgrass asserted he was entitled to more than $100 million without explanation. Exh. 10 Relevant Portions of Dep. of Kevin Snodgrass at 116:12–118:20.

- Plaintiff Steven Riddick could not "put a number on it" and speculated that "$500,000 for each individual" might not be enough. Exh. 11 Relevant Portions of Dep. of Steven Riddick at 188:6–189:5, 206:6–20.

- Plaintiff Gary Wall testified he would "let the attorneys decide" the amount; when pressed he suggested "at least $30,000" per plaintiff. Exh. 12 Relevant Portions of Dep. of Gary Wall at 6:19–8:22.

- Plaintiff Vernon Brooks could not say how damages could be calculated. Exh. 13 Relevant Portions of Dep. of Vernon Brooks at 86:22–87:20.

- Plaintiff Derek Cornelison testified: "I don't have a general way to calculate it, like, per day, per hour, per week, per month," and stated his participation "was not for the reasons of obtaining money." Exh. 14 Relevant Portions of Dep. of Derek Cornelison at 149:7–150:8.

- Plaintiff Dmitry Khavkin testified: "I'm seeking to go home, sir" and "I'm going to let my lawyers decide what they want to do." Exh. 15 Relevant Portions of Dep. of Dmitriy Khavkin at 177:11–178:17, 183:6–184:14.

The testimony reflected a range of positions, from no proposed amount to figures such as $30 million per class member, without a common stated methodology.

**D. Plaintiffs' Failure to Designate a Damages Expert**

Throughout the case, Plaintiffs represented—in disclosures, interrogatory responses, and objections—that damages information would be addressed through expert disclosures. Their initial disclosures stated that damages information "will be provided in conformity with Fed. R. Civ. P. 26(a)(2) governing expert reports." Exh. 1 at 45. Their interrogatory objections cited the fact that "the parties have yet to designate experts, exchange expert reports, or complete depositions." Exh. 5 at 18**.** Plaintiffs later designated five experts. None opined on the amount of damages or offered a damages computation. No expert was designated to testify about how to calculate compensatory damages, what per diem rate would be appropriate, or what methodology should govern.

The closest Plaintiffs got was Russell Molter, who analyzed VDOC data on the number of days class members spent in various phases of the Step-Down Program. But he did not compute damages. His report contains only averages and aggregate totals; it provides no damages figure, no per diem rate, and no methodology for converting days of confinement into dollars.

**E. The Per Diem Theory's Origin in Litigation Briefing**

Plaintiffs' per diem theory did not originate in any disclosure or discovery response. It first appeared in a single hedged sentence of their class-certification reply: "Plaintiffs ***may*** seek a per diem damages award of [*sic*] for every day spent in solitary confinement above a certain threshold,

such as the 15-day maximum that other jurisdictions have implemented." ECF No. 206 at 41-42 (emphasis added). But that equivocal statement—a litigation argument about what relief ***might*** be sought was not a damages calculation. To the contrary, Plaintiffs served ***both*** their Amended Disclosures and their Second Amended Disclosures ***after*** making that argument, and in each they continued to represent that "[c]omputation of damages is premature at this stage in the case." Exh. 2 at 54; Exh. 3 at 55.

Plaintiffs later expanded their argument in opposition to Defendants' Motion for Summary Judgment. *See* ECF No. 400 at 79-81. That filing argued that such damages were legally available; it did not identify a proposed per diem rate, methodology, computation, or supporting evidentiary materials.

At the January 18, 2024 status conference, the Court asked what Plaintiffs' damages plan was, explaining: "That has been a matter that has bothered me some, I must admit…. I haven't heard any more about that, frankly. What is your plan in that regard?" ECF No. 464 at 9:9-10 (Jan. 18, 2024 Hr'g Tr.). When the Court asked how any per diem amount would be determined—"Just whatever I thought was appropriate or—"—Plaintiffs' counsel answered: "We will have expert testimony on the amount of damages, so that will be testimony that comes in through the trial." *Id.* at 10:12-16. When the Court asked whether that expert testimony had been disclosed, counsel stated that Plaintiffs had disclosed "an expert that's calculated the number of days that each plaintiff has been in the program but not how much per day, which would be up to the discretion of Your Honor." *Id.* at 12:7-10. Defense counsel responded that "no expert has been disclosed to us who has made any calculation of damages whatsoever or who has suggested what the proper base rate under this, you know, per diem theory should be. ***We've had zero disclosure about what***

***the damages should be, either via an expert or discovery responses***." *Id.* at 11:23–12:3 (emphasis added).

The Court ordered Plaintiffs to "submit to me any authority that you can find that lays on the finder of fact an opportunity to determine some sort of per diem payment for the type of injury, constitutional and statutory, which you're asserting here." *Id.* at 12:24–13:3. Plaintiffs then filed their "Submission Regarding the Determination of Damages" (ECF No. 460), arguing that courts may determine per diem compensatory damages without a damages expert. In a footnote, Plaintiffs stated: "Plaintiffs do not intend to introduce expert testimony on the appropriate per diem amount." ECF No. 460 at 1 n.1. Defendants responded to that point by highlighting its contradiction with every disclosure made to that point regarding the calculation of damages. *See* Defs.' Resp. to Pls.' Submission Re Determination of Damages, ECF No. 461 at 5–9.

The Court ultimately acknowledged that "post-PLRA courts have awarded prisoners compensatory damages on a per diem basis" and denied summary judgment on damages, holding that whether Plaintiffs are entitled to such damages and "the nature of such damages, are matters for trial." ECF No. 516 at 18–20 (citing *Almighty Supreme Born Allah v. Milling*, No. 3:11-cv-668, 2016 WL 1311997, at *15 (D. Conn. Apr. 4, 2016), *rev'd on other grounds*, 876 F.3d 48 (2d Cir. 2017)). Yet as of the filing of this motion, Plaintiffs have not disclosed a per diem rate, a methodology for selecting one, a damages computation applying any rate to class-member data, or evidentiary materials supporting such a computation.

## ARGUMENT

The Court should preclude Plaintiffs from presenting evidence of compensatory damages at trial. Rule 37(c)(1) requires exclusion based on Plaintiffs' wholesale failure to comply with Rule 26(a)(1)(A)(iii). Every *Southern States* factor confirms that the failure was neither substantially justified nor harmless. Plaintiffs bear the burden of showing otherwise, and they cannot.

## I. Rule 37(c) Mandates Exclusion for Failure to Comply with Rule 26(a)(1)(A)(iii).

Rule 26(a)(1)(A)(iii) requires a party to provide "a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material … on which each computation is based." Fed. R. Civ. P. 26(a)(1)(A)(iii). The rule is not aspirational; it is a mandatory, self-executing obligation. The purpose of Rule 26(a) is "to allow the parties to adequately prepare their cases for trial and to avoid unfair surprise." *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396 (4th Cir. 2014). Rule 26(e) further imposes a continuing duty to supplement or correct prior disclosures "in a timely manner" if the party learns they are "incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A).

To satisfy Rule 26(a)(1)(A)(iii), a party must do considerably more than give a number. *See Intercollegiate Women's Lacrosse Coaches Ass'n v. Corrigan Sports Enters., Inc.*, 698 F. Supp. 3d 814, 818–19 (M.D.N.C. 2023) (explaining a compliant disclosure "must be more than a lump sum figure or disclosure of financial documents"). The disclosure 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." *Id.* The very "word 'computation' contemplates some analysis," and a party seeking damages "must explain how it arrived at [its damages] number." *Id.* It follows that neither a bare reference to records and testimony from which the opponent might back into a number nor a mere "theory" of damages recited in a discovery response satisfies the Rule. *See id.* at 819 (explaining a "theory" of damages "is not a computation"); *Ruddy v. Bluestream Pro. Serv., LLC*, No. 1:18-CV-1480, 2020 WL 13694227, at *3 (E.D. Va. July 16, 2020) (explaining that "vague assertions of damages" in interrogatories or depositions do not satisfy Rule 26). The burden rests on the disclosing party to perform the calculation itself—identifying the rate or measure applied, the inputs to which it is applied, and the evidentiary bases

for each—so that the opposing party can test the computation and prepare to meet it at trial. *See Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006).

Plaintiffs' operative disclosure is precisely what the Rule forbids. It recites the categories of damages sought—"compensatory damages for constitutional and statutory violations, including damages for physical injury, emotional pain and suffering, and loss of liberty"—and then expressly defers computation ***to trial***: "Computation of damages will be determined by the finder of fact at trial based upon a number of factors, including the number of class members and the number of days each class member has spent in solitary confinement, as set forth, for example, in the expert reports of Mr. Russell Molter." Exh. 4 at 58–59. That disclosure names categories but computes none. A list of factors that "will be" considered is not "a specific computation of each category" supported by documents; it identifies the variables in an equation, refuses to assign them value, and declines to solve the equation. A plaintiff claiming lost wages could not satisfy the Rule by saying damages will be determined at trial based on salary and missed workweeks without disclosing the salary, the weeks, or the resulting calculation. No court would call that a "computation." *See, e.g.*, *Corrigan*, 698 F. Supp. 3d at 818–19 (rejecting as "plainly inadequate" a disclosure that offered only a "theory" of damages and voluminous records but never "compute[d]" the damages or showed "how [the party] arrived at the damages it seeks"). Plaintiffs' disclosure is worse yet, because one entire side of the equation—the dollar figure against which Molter's day-count calculations will be multiplied—is never described.

In short, deferring the "computation" of compensatory damages to "the finder of fact at trial" is not compliance with Rule 26(a)(1)(A)(iii). It confirms that Plaintiffs intend to reveal their computation only at trial—too late for Defendants to identify, test, or rebut the numbers Plaintiffs intend to seek.

When a party fails to comply with Rule 26(a) or (e), Rule 37(c)(1) provides the self-executing sanction: "the party is ***not allowed*** to use that information or witness to supply evidence … at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1) (emphasis added). This is an automatic sanction: Rule 37 requires exclusion unless the party establishes substantial justification or harmlessness. *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 n.2 (4th Cir. 2003). Critically, exclusion under "Rule 37(c)(1) does not require a finding of bad faith or callous disregard of the discovery rules." *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 330 (4th Cir. 2011) (citing *S. States*, 318 F.3d at 598). The party facing exclusion—here, Plaintiffs—bears the burden of showing that its "nondisclosure of evidence [was] substantially justified or harmless." *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014).

The Fourth Circuit has emphasized that Rule 26 disclosures "are often the centerpiece of discovery in litigation." *Wilkins*, 751 F.3d at 221 (quoting *Saudi v. Northrop Grumman Corp.*, 427 F.3d 271, 278–79 (4th Cir. 2005)). A party that fails to provide these disclosures "unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case." *Id.* For this reason, courts afford "particularly wide latitude to the district court's discretion to issue sanctions under Rule 37(c)(1)." *Deque Sys. Inc. v. Browserstack, Inc.*, 177 F.4th 585, 595 (4th Cir. 2026) (quoting *Saudi*, 427 F.3d at 278–79).

## II. Plaintiffs Cannot Escape Rule 26 by Recasting Their Per Diem Claim as Unquantifiable Non-Economic Damages.

Anticipating exclusion, Plaintiffs may contend that per diem compensatory damages are a form of unquantifiable, non-economic loss—akin to pain and suffering—for which Rule 26(a)(1)(A)(iii) demands no computation. That contention fails.

The exception Plaintiffs would invoke is narrow. Courts excuse a computation only for damages that are inherently incapable of calculation, such as generalized emotional distress, because they "are necessarily vague and are generally considered a fact issue for the jury." *Ruddy*, 2020 WL 13694227 at *3 (quoting *Williams v. Trader Pub. Co.*, 218 F.3d 481, 486 n.3 (5th Cir. 2000)). And even for such damages, the exception presupposes that the party has at least disclosed the category and put its opponent on notice of the basis through discovery. *Id.*

A per diem theory is the antithesis of an unquantifiable one. It is an arithmetic product—a daily rate multiplied by a defined number of days. Plaintiffs themselves describe their damages as turning on "the number of days each class member has spent in solitary confinement," and their expert Mr. Molter supplied that day-count input.[3] Plaintiffs cannot claim in the same breath that their damages are calculable enough to rest on Mr. Molter's day counts yet too intangible to require disclosure of the rate that converts those days into dollars. Having elected a formulaic theory, Plaintiffs were obligated to disclose the rate, the methodology for selecting it, and the evidentiary basis supporting it.

Plaintiffs are also estopped from recharacterizing their damages as non-computable. For five years they represented—in their disclosures, interrogatory responses, objections, and to the Court—that the amount of damages would be established through expert testimony, as set forth

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[3] Defendants separately seek to exclude Mr. Molter's newly-supplied, never-before-disclosed day-count analysis. *See* Defs.' Mot. in Limine to Exclude Out-of-Scope Portions of Pls.' Supp. Expert Reports at Part II.D. That motion and this one are independent, and this motion does not depend on the outcome of that one. If Mr. Molter's day-count analysis is excluded, Plaintiffs are left with neither a rate nor the day-count input a per-diem theory requires, and exclusion of any compensatory-damages evidence follows *a fortiori*. If Mr. Molter's day-count analysis is admitted, Plaintiffs still have never disclosed the per diem rate, the methodology for selecting it, or the evidentiary basis supporting it—*i.e.*, the dispositive variable that converts days into dollars. Either way, Plaintiffs' failure to disclose a damages computation under Rule 26(a)(1)(A)(iii) is complete, and Rule 37(c)(1) requires exclusion.

above. A party that has repeatedly cast its damages as the subject of expert computation cannot, on the eve of trial, avoid disclosure by relabeling those same damages as intangible harms beyond calculation. *See Vir2us, Inc. v. Invincea, Inc.*, 235 F. Supp. 3d 766, 773, 777 (E.D. Va. 2017) (rejecting "shifting justifications" for nondisclosure).

## III. The *Southern States* Factors Confirm That Exclusion is Warranted.

In assessing substantial justification and harmlessness, 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.

*S. States*, 318 F.3d at 597. The first four factors relate primarily to harmlessness; the fifth relates to substantial justification. *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 190 (4th Cir. 2017). The burden of establishing these factors lies with the nondisclosing party. *Wilkins*, 751 F.3d at 222; *see Benjamin v. Sparks*, 986 F.3d 332, 343 (4th Cir. 2021).

While a district court is "not required to tick through each of the *Southern States* factors," *Wilkins*, 751 F.3d at 222, here every factor independently supports exclusion—and the factors in combination make exclusion not merely appropriate, but compelled.

### A. Surprise: Defendants Have Been Entirely Deprived of Any Meaningful Notice of Plaintiffs' Calculation of Damages.

Defendants will be profoundly surprised if Plaintiffs are permitted to present a per diem damages theory they have never computed—because Plaintiffs have never told anyone, including this Court, what their damages claim actually is. The only disclosure that even mentions per diem damages—the Third Amended Disclosures served on May 4, 2026—provides no dollar amount, rate, or methodology. The named Plaintiffs' deposition testimony only deepens the surprise: their

figures range from "I don't know" to $30 million per class member, with no common methodology and no documentary support.

This is not a case where Defendants knew the contours of a damages theory but lacked the final number. Plaintiffs gave Defendants ***nothing*** to test—no rate, no formula, no expert opinion, and no supporting documents. As the Fourth Circuit held in *Deque Systems*, a plaintiff's failure to provide a damages computation until the eleventh hour causes surprise that weighs heavily in favor of exclusion—even when the opposing party knew a damages claim existed. 177 F.4th at 595–96. Here, the disclosure deficit is worse: Plaintiffs have *still* provided no computation.

The reasoning of *Dolan v. Ford Motor Co.*, --- F.R.D. ----, No. 3:23-cv-512, 2026 WL 1230674 (E.D. Va. May 5, 2026), is instructive. In *Dolan*, the district court found that a defendant's failure to disclose the existence of interviews that formed the basis of expert opinions caused cognizable surprise, notwithstanding the defendant's argument that the plaintiff should have anticipated the expert's methodology. The court rejected the notion that prior knowledge of related facts should have put the opposing party on notice: "Plaintiffs should not be expected to have anticipated that [the defense expert] would rely on undisclosed interviews in forming opinions or preparing his reports, or that [the defense expert] would not comply with the clear text of the rules as to disclosure." *Dolan*, 2026 WL 1230674, at *8.

The same logic applies here. Defendants were not required to anticipate that Plaintiffs would present an undisclosed per diem theory simply because damages were generally at issue or mentioned in briefing. General notice of a claim is not notice of the computation, methodology, and evidentiary basis Rule 26(a)(1)(A)(iii) requires. *See also Vir2us*, 235 F. Supp. 3d at 777 (finding actionable surprise even where one party "suspected throughout discovery" that the other was withholding materials).

Nor does Mr. Molter's report cure the surprise. It supplies, at most, one input in a two-variable damages equation: the number of days class members allegedly spent in the Step-Down Program. A per diem theory requires the missing second input—the dollar value assigned to each day. A report identifying days of confinement is not a damages computation unless it also explains the "how" and "why" of converting those days into dollars. Plaintiffs disclosed neither that value nor any methodology or evidentiary basis for selecting it. Without that missing variable, Defendants have no damages computation to test, no target for rebuttal, and no meaningful way to prepare for trial. Defendants should not be forced to reverse-engineer a damages theory Plaintiffs never provided. *See Carr v. Deeds*, 453 F.3d 593, 605 (4th Cir. 2006) ("Every litigant in federal court is plainly entitled under Rule 26(a)(2)(B) to be given the information spelled out therein, and none shoulder the burden to independently investigate and ferret out that information as best they can and at the expense of their client.").

Plaintiffs' course of conduct compounds the surprise. For years, Plaintiffs represented that damages would be addressed through expert testimony, yet none of their five experts opined on the amount of or methodology for calculating compensatory damages. Having led Defendants to expect a damages computation through expert reports, Plaintiffs cannot now fault Defendants for failing to divine one from the record. *Cf. Vir2us*, 235 F. Supp. 3d at 776 (sanctioning party that offered "shifting justifications" for discovery failures).

The Court's summary-judgment order underscores the point. The Court held only that whether Plaintiffs are entitled to compensatory damages, and "the nature of such damages," are matters for trial. ECF No. 516 at 19. But Plaintiffs have never disclosed anything that would describe or identify that "nature": no proposed per diem rate, no explanation whether the rate would be uniform or individualized, no methodology for selecting it, and no evidentiary basis tying

any rate to the alleged injury. The summary-judgment order preserved a damages issue for trial; it did not relieve Plaintiffs of their disclosure obligations or require Defendants to prepare for an undefined damages theory.

**B. Ability to Cure: The Prejudice is Incurable.**

Plaintiffs cannot cure this surprise. Fact discovery is closed. Expert discovery is closed. Defendants have had no opportunity to depose Plaintiffs on a specific damages computation, to retain a rebuttal damages expert, or to challenge the evidentiary basis for any per diem rate. Those lost opportunities matter because the missing per diem rate would have shaped damages discovery, expert rebuttal, cross-examination, and trial strategy.

The Fourth Circuit has repeatedly held that the inability to cure weighs heavily in favor of exclusion. In *Southern States*, the court emphasized that "the ability to simply cross-examine an expert concerning a new opinion at trial is not the ability to cure." 318 F.3d at 598. And as the Court recognized in *Doe by Watson v. Russell County School Board*, "the ability to cure at this stage of litigation seems limited to a continuance, which would be greatly disruptive." No. 1:16-cv-00045, 2018 WL 1128388, at *3 (W.D. Va. Mar. 1, 2018) (Jones, J.).

This case is more extreme than *Southern States* or *Doe by Watson*. In those cases, the nondisclosing party at least offered ***something***—a late opinion or late expert report—that could theoretically be addressed through limited additional discovery. Here, Plaintiffs have offered ***no computation at all***. Requiring Defendants to spend time and resources chasing a damages theory Plaintiffs themselves never articulated would stand Rule 26 on its head. *See Dolan*, 2026 WL 1230674, at *8; *Schmitt-Doss v. Am. Regent, Inc.*, No. 6:12-cv-00040, 2014 WL 3853184, at *15 (W.D. Va. Aug. 5, 2014) (Moon, J.) (excluding damages evidence where late disclosure left insufficient time for competing expert opinions, depositions, and trial preparation).

Plaintiffs also cannot cure the failure by pointing to named-Plaintiff deposition testimony. As detailed above, those witnesses offered scattered, contradictory, and unsupported figures; several disclaimed any ability to calculate damages at all. That testimony confirmed the absence of a Rule 26 computation—it did not supply one. *See Wilkins*, 751 F.3d at 222.

**C. Disruption: Allowing Undisclosed Damages Evidence Would Fundamentally Alter the Trial.**

Allowing undisclosed damages evidence at trial would expand the case beyond what discovery tested. The Court would be asked to assign a dollar value to alleged constitutional injury without any disclosed rate, formula, expert analysis, or supporting evidentiary framework, and Defendants would be forced to respond to a damages theory they could not have prepared to meet. In *Dolan*, the court found disruption where undisclosed testimony would force the factfinder and parties to litigate untested issues at trial, creating confusion and obscuring the merits. 2026 WL 1230674, at *9. The same risk is present here. Without a disclosed damages computation, trial would devolve into satellite litigation over a theory never subjected to discovery.

Plaintiffs may respond that trial will not be disrupted because the record contains extensive evidence of alleged injury. But injury evidence is not a damages computation. It does not disclose the per diem rate Plaintiffs intend to request, whether that rate is uniform or variable, what factors justify it, or what evidentiary basis supports it. Those are the issues that required discovery, rebuttal evidence, expert analysis, and trial preparation.

Nor does the bench-trial setting eliminate the disruption. The prejudice is not limited to the risk of lay confusion; it is the trial-management prejudice of injecting an undisclosed damages methodology after discovery has closed, leaving Defendants without discovery, rebuttal expert analysis, or a defined target for cross-examination. If Plaintiffs intend to ask the Court itself to select a per diem rate, advance disclosure of the proposed rate, methodology, and evidentiary basis

was essential. Without a disclosed computation, Plaintiffs' counsel would be asking the Court to select a per diem rate without any expert testimony, supporting documentation, or disclosed methodology to anchor the analysis—precisely the trial disruption that Rule 26(a) is designed to prevent. *See Russell*, 763 F.3d at 396.

**D. Importance: The Critical Nature of the Evidence Cuts Against Plaintiffs.**

The evidence may be important to Plaintiffs—but that cuts ***against*** them, not ***for*** them. The Fourth Circuit has been emphatic on this point: "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." *Deque Sys.*, 177 F.4th at 596 (quoting *Benjamin v. Sparks*, 986 F.3d 332, 343 (4th Cir. 2021)).

The time to disclose a damages computation was years ago—not on the eve of trial, and certainly not in a form that still supplies no rate, methodology, or supporting documents. Plaintiffs cannot claim damages evidence is critical while treating their disclosure obligation as optional. The more important the evidence, the more egregious the failure to disclose it.[4]

**E. No Justification: Plaintiffs Have No Adequate Explanation.**

Plaintiffs have no adequate explanation for their failure. They had more than five years to provide a damages computation. Their initial disclosures said "[c]omputation of damages is premature at this stage," but that stage passed long ago. Expert reports were exchanged, depositions were completed, and summary judgment motions were briefed and decided—all

[4] 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 by that compensatory damages are not warranted." ECF 1, Compl. ¶ 275.

without any disclosed damages calculation. The belated Third Amended Disclosures still contain none. Exh. 1 at 45.

Courts within the Fourth Circuit have consistently rejected attempts to use late supplementation or post-deadline explanations to excuse discovery failures. *See Disney Enters., Inc. v. Kappos*, 923 F. Supp. 2d 788, 795 (E.D. Va. 2013) (Rule 26(e) does not permit a party to make an "end-run around the normal timetable for conducting discovery.") (internal quotation marks omitted); *Quesenberry v. Volvo Grp. N. Am., Inc.*, 267 F.R.D. 475, 479–80 (W.D. Va. 2010) (excluding twenty witnesses not timely disclosed, finding nondisclosure neither harmless nor substantially justified under *Southern States*). For example, in *Vir2us*, the district court found that a party's excuses for nondisclosure—including that the opposing party had not specifically described the requested documents—"do not constitute a substantial justification for its failure to disclose." 235 F. Supp. 3d at 779. So too here: Plaintiffs' repeated assertions that "computation of damages is premature" do not excuse a half-decade of noncompliance.

Nor is it an answer to say that the finder of fact ultimately determines compensatory damages. Rule 26(a)(1)(A)(iii) applies even when damages are uncertain, difficult to quantify, or ultimately committed to the trier of fact. Plaintiffs did not have to prove damages in their disclosures; they had to disclose a computation—a rate, methodology, and evidentiary basis—so Defendants could prepare to challenge it. Calling damages "premature" does not justify never making that disclosure.

## IV. The Automatic Sanction of Exclusion is Mandatory.

Because the noncompliance is neither substantially justified nor harmless, exclusion is "proper—indeed, mandated." *Deque Sys.*, 177 F.4th at 595. As set forth above, Rule 37(c)(1) provides an "automatic sanction" requiring exclusion absent a showing of justification or harmlessness that Plaintiffs cannot make. *S. States*, 318 F.3d at 596 n.2; *see also Wilkins*, 751 F.3d

at 222; *Campbell v. United States*, 470 F. App'x 153, 156 (4th Cir. 2012) (per curiam) ("[T]he Federal Rules impose an 'automatic sanction' of exclusion of a party's expert witness for failure to adhere to the expert witness requirements set forth in Rule 26(a).").

The Court's broad discretion to impose sanctions is at its zenith here, where the disclosure failure is total and has persisted for more than five years. Every *Southern States* factor compels exclusion, and Plaintiffs cannot meet their burden of establishing otherwise.

## CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter an order precluding Plaintiffs from offering at trial any evidence, testimony, or argument regarding compensatory damages, including specifically:

(1) any damages computation or per diem rate not disclosed in compliance with Rule 26(a)(1)(A)(iii);

(2) any testimony—lay or expert—regarding the dollar value of compensatory damages, the methodology for selecting a per diem rate, or the computation applying any rate to class-member data; and

(3) any argument to the Court inviting it to select a per diem rate, undertake an analysis to determine such a rate, or compute a damages figure that Plaintiffs themselves never disclosed.

A lesser sanction would not cure the prejudice without reopening discovery, permitting new rebuttal analysis, and disrupting the trial schedule Rule 26 was designed to protect. Defendants further request such other and further relief as this Court deems just and proper.[5]

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[5] Defendants expressly preserve arguments on the substantive limitations imposed by 42 U.S.C. § 1997e(e) on the categories of recoverable damages for their proposed conclusions of law. This motion addresses only the threshold disclosure failure under Rule 37(c)(1)—an independent and self-executing ground for exclusion that does not depend on the § 1997e(e) analysis. Plaintiffs never told anyone—not Defendants, not the Court—how much they claim or how they calculate their alleged compensatory damages. That failure requires exclusion regardless of the scope of available relief under § 1997e(e).

Dated: August 24, 2026

Respectfully submitted,

/s/ *Maya M. Eckstein*

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**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. Additionally, the sealed documents have been delivered to all counsel of record via electronic mail.

By: /s/ *Maya M. Eckstein*
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