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' OPPOSITION TO PLAINTIFFS' MOTION *IN LIMINE* TO EXCLUDE TESTIMONY OF DEFENDANTS' DISCLOSED TRIAL WITNESSES FINK, DANIEL, AND WALTERS

Defendants respectfully oppose Plaintiffs' motion in limine, ECF 557, ("Pls.' Mot.") to preclude potential fact testimony from three Defendants—Virginia Department of Corrections (VDOC) officials Dr. Julie Fink, Anton Daniel, and Joseph Walters—timely identified by Defendants in their pre-trial disclosures (Pls.' Mot. Ex. 1), ECF 557-1. In this suit seeking equitable and declaratory relief against VDOC and various VDOC officials in their official capacities, all three potential witnesses are Defendants in their official capacities. Under Federal Rule of Civil Procedure 25(d), Dr. Fink, Mr. Daniel, and Director Walters were automatically substituted as Defendants, by operation of law, when they assumed the VDOC roles previously held by Dr. Denise Malone, Tori Raiford, and Harold Clarke, respectively, each of whom was previously deposed and also timely identified as a potential witness.

Plaintiffs object that Dr. Fink, Mr. Daniel, and Director Walters were not previously identified as potential witnesses, "including in Defendants' initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1)(A)." Pls.' Mot. at 1. There is a simple explanation for why. None of these

individuals occupied relevant positions then. They only assumed their current positions at VDOC—and, therefore, their roles in this litigation—years after discovery closed.

This is not a case where a previously unknown individual has been introduced with new and surprising subject matter on the eve of trial. It is a case where Plaintiffs are seeking to exclude the current holders of the very official-capacity positions they are suing, whose predecessors were already deposed on the same subject matter, and who were known to Plaintiffs, at the latest, by the supplemental discovery period earlier this year. Indeed, Plaintiffs themselves identified Dr. Fink as a potential witness in four different sets of disclosures dating back to 2021.

Plaintiffs are asking the Court to impose the harshest sanction available under Rule 37(c)(1)—complete exclusion of these three Defendants from testifying at trial—on the basis of a claimed disclosure deficiency that, when examined in the light of the actual record, is either nonexistent, entirely harmless, or substantially justified. The Court should deny their motion.

BACKGROUND

Plaintiffs brought this suit more than seven years ago against VDOC and numerous VDOC officials in their official (and individual) capacities. Official-capacity suits are, in substance, suits against the entity even if the defendants are often individuals. *Kentucky v. Graham*, 473 U.S. 159, 166 (1985); 7C Fed. Prac. & Proc. Civ. § 1960 (3d ed.) (explaining that the named defendant is only a nominal party, and "the real aim of the proceeding" is to reach the governmental body or office). When a named official leaves office, Federal Rule of Civil Procedure 25(d) provides that the successor is "automatically substituted" as a party by operation of law, with no court order required. Fed. R. Civ. P. 25(d). The predecessor leaves the case behind (to the extent he was named in an official capacity) and the successor steps into the same litigation posture.

Dr. Denise Malone (formerly VDOC Chief of Mental Health Services), Tori Raiford (formerly VDOC Statewide Restrictive Housing Coordinator), and Harold Clarke (formerly

VDOC Director) were among the individuals Plaintiffs sued in their official capacities. During the discovery period, Defendants identified each of these witnesses in their initial Rule 26(a) disclosures on September 3, 2021 and their amended initial disclosures on January 31, 2023. *See* Defs.' Rule 26(a)(1)(A) Initial Disclosures (Sept. 3, 2021), Pls.' Mot. Ex. 3; Defs.' Am. & Suppl. Rule 26(a)(1)(A) Initial Disclosures (Jan. 31, 2023), Pls.' Mot. Ex. 4. So did Plaintiffs. *See* Class Pls.' Initial Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) (Sept. 3, 2021) [Ex. 1, attached]; Class Pls.' Am. Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) (Mar. 15, 2023) [Ex. 2, attached]. Plaintiffs deposed all three witnesses. Their depositions covered in depth the very subject matter that is the focus of this litigation—VDOC's policies, programs, practices, and institutional conditions. During this same period (through as recently as May 2026), Plaintiffs listed Dr. Fink in each of their four successive Rule 26(a)(1)(A) disclosures—their initial, amended, second amended, and third amended disclosures—identifying her as an individual with relevant discoverable information. *See* Exs. 1–2; Class Pls.' Second Am. Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) (July 19, 2023) [Ex. 3, attached]; Class Pls.' Third Am. Disclosures Pursuant to Fed. R. Civ. P. 26(a)(1) (May 4, 2026) [Ex. 4, attached].

Over the lengthy pendency of the suit, Dr. Malone, Ms. Raiford, and Director Clarke left their respective positions. Dr. Fink succeeded Dr. Malone, Mr. Daniel succeeded Ms. Raiford, and Director Walters succeeded Director Clarke in their official capacities.[1] These transitions occurred long after Defendants served their initial disclosures and amended initial disclosures—which is why the original Defendants' names, and not their successors', appear in those documents. *See*

[1] Dr. Malone, Ms. Raiford, and Director Clarke remain Defendants in their individual capacities. They also were identified as potential trial witnesses. *See* Pls.' Mot. Ex. 1.

Pls.' Mot. at 2–3, Exs. 3–4 (ECF 557-3, 4). Dr. Fink, Mr. Daniel, and Director Walters did not assume their respective roles until after discovery had ended.[2]

Defendants timely identified all three officials (along with their predecessors) in their Rule 26(a)(3) disclosures. Pls.' Mot. Ex. 1. Plaintiffs then filed this motion.

ARGUMENT

Federal Rule of Civil Procedure 37(c)(1) provides that a party who fails to identify a witness as required by Rule 26(a) or (e) "is not allowed to use that . . . 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). Plaintiffs' motion does not identify any discovery failure triggering this provision. But even if it did, any discovery failure is substantially justified or harmless, and the witnesses should not be excluded.

I. No Rule 26 violation has occurred that could trigger exclusion under Rule 37(c)(1).

Defendants have not committed any discovery failure under Rule 26(a) or Rule 26(e). Director Walters, Mr. Daniel, and Dr. Fink are all party Defendants in their official capacities, having been automatically substituted, by operation of law, in place of the individuals Plaintiffs originally sued. They assumed their roles following the close of discovery, but they were later made known to Plaintiffs as potential witnesses. Indeed, on four occasions in the last five years, Plaintiffs themselves disclosed Dr. Fink as a potential witness.

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[2] Plaintiffs appear to criticize Defendants for not filing amended disclosures during the "supplemental discovery period." Pls.' Mot. at 3. But the Court's order allowing limited supplemental discovery did not require them, *see* ECF No. 524, and Plaintiffs did not ask for them, *see* ECF No. 520. In any event, the witnesses were disclosed during the supplemental discovery period. *See* § I.B, *infra*.

A. All three potential witnesses are official-capacity successor Defendants.

Plaintiffs allege a Rule 26 violation in connection with Defendants' disclosure of the three potential witnesses.[3] But there is no discovery failure stemming from Defendants' initial disclosures under Rule 26(a). Defendants did not identify the witnesses as having discoverable information during the discovery period because they had not taken on their relevant roles until long after it closed.

There also is no discovery failure with respect to supplemental disclosures under Rule 26(e). Rule 26(e)(1)(A) itself provides a threshold defense: the duty to supplement does not apply when the information or witness identity has "otherwise been made known to the other parties during the discovery process or in writing." Fed. R. Civ. P. 26(e)(1)(A). Where this safe harbor applies, no Rule 26(e) violation has occurred. The witnesses here became known when they were automatically substituted as Defendants as a consequence of assuming their official positions at VDOC.

This Court faced a similar situation in *Quesenberry v. Volvo Group North America, Inc. Inc.*, 267 F.R.D. 475 (W.D. Va. 2010) (Jones, J.). In that case, the defendants moved to strike more than two dozen witnesses that the plaintiffs had identified on their witness list less than a month before trial. The first five were plaintiffs who, however, had never been previously disclosed. The Court found no violation under either Rule 26(a) or (e), holding that, "[b]ecause they were named as plaintiffs, these five individuals, though omitted from initial disclosures, did not have to be

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[3] Although Plaintiffs titled their motion as seeking to preclude testimony from "undisclosed" witnesses, this obviously is not a scenario in which a party attempts to rely on a witness at trial who was not timely disclosed as a potential trial witness. *See, e.g.*, *United States v. Holmes*, 670 F.3d 586, 599 (4th Cir. 2012) (affirming exclusion of witness first disclosed mere days before trial). Plaintiffs do not dispute that Defendants timely complied with its obligation to disclose the three potential witnesses under Rule 26(a)(3).

identified in supplemental disclosures." *Id.* at 478. It reasoned that, with respect to "material omissions from initial disclosures, further disclosures are only necessary when the omitted or after-acquired information has not otherwise been made known to the other parties during the discovery process." (quoting 8A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2049.1 (2010) (cleaned up)). The result here should be no different than in *Quesenberry*, as they were substituted as parties to the litigation.

B. Each of the three witnesses was made known to Plaintiffs.

The foundational purpose of Rule 26(a)(1)(A) is to prevent surprise and trial by ambush by ensuring that all parties have advance notice of potential witnesses. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). Accordingly, "[t]here is . . . no obligation to provide supplemental or corrective information that has been otherwise made known to the parties." FED. R. CIV. P. 26(e) advisory committee notes to 1993 amendment. (hereinafter "Rule 26(e) Advisory Committee Notes"). In addition to being official-capacity successor Defendants, Dr. Fink, Director Walters, and Mr. Daniel were all otherwise known to Plaintiffs before now.

1. Dr. Fink

Plaintiffs ask the Court to bar Dr. Fink's potential trial testimony on the grounds that Defendants did not identify her in their Rule 26(a)(1)(A) disclosures. Yet Plaintiffs have known of Dr. Fink's identity and relevance from the very first disclosures in this case. Plaintiffs themselves identified her in each of their own initial, amended, second amended, and third amended Rule 26(a)(1)(A) disclosures—four separate times. *See* Exs. 1–4, attached. According to Plaintiffs' most recent version of those disclosures, Dr. Fink possesses relevant knowledge of the following: "Mental health status and treatment of Class Plaintiffs and/or members of the putative class at Red Onion, Wallens Ridge, or other VDOC facilities, as well as policies and procedures regarding mental health services at those institutions." Ex. 4 at 15.

In these circumstances, they can hardly object to her potential testimony. When a party seeking exclusion has itself repeatedly disclosed the very witness it seeks to bar, Rule 26's purpose is entirely satisfied, regardless of whether the other side separately echoed the disclosure. For instance, in *Dixon Lumber Co., Inc. v. Austinville Limestone Co., Inc.*, 256 F. Supp. 3d 658, 668 (W.D. Va. 2017), where the opposing party had identified a witness in its own initial disclosures, this Court ruled that a party's failure to separately disclose the witness was "clearly harmless" because the basic purpose of Rule 37(c)(1)—preventing surprise and prejudice—was not implicated. *Id.* at 669. So too here: "Since [Plaintiffs] identified [Dr. Fink] as a person likely to have knowledge . . . in its own initial disclosures, it was obviously aware from the beginning that [s]he had discoverable information." *Id. See also V5 Techs. v. Switch, Ltd.*, 334 F.R.D. 615, 622 (D. Nev. 2020) (noting that "courts are particularly disinclined to find a witness disclosure violation when the party seeking sanctions itself previously exposed its own knowledge of the information omitted from formal disclosures"); *cf.* FED. R. CIV. P. 37(c) advisory committee's note to 1993 amendment (identifying "the failure to list as a trial witness a person so listed by another party" as a paradigmatic example of the kind of harmless nondisclosure that should not trigger exclusion).[4]

It is no answer for Plaintiffs to complain that they did not depose Dr. Fink—or, less accurately, to say that they "have not had the opportunity to depose" her. Pls.' Mot. at 1. Having

[4] These authorities refute Plaintiffs' assertion that "[t]he parties initial disclosures are asymmetric . . . . Plaintiffs had no reasonable expectation that a witness they disclosed to support their claims would be used by Defendants to support their defenses." Pls.' Mot. at 5–6. The information relevant to Plaintiffs' claims about VDOC's systemic practices is precisely the information relevant to Defendants' defense of those claims. Plaintiffs' disclosure of Dr. Fink as a person with relevant knowledge is equally notice that she may have evidence bearing on both the claims and the defenses to them.

recognized Dr. Fink's relevance, yet not deposing her during seven years of litigation, Plaintiffs cannot transform their own strategic choice into a disclosure violation by Defendants. Indeed, Plaintiffs' request to exclude Dr. Fink is a request to have it both ways: to disclose a witness as relevant, decline to depose her, and then weaponize Defendants' failure to separately list her as grounds for exclusion.

2. Director Walters

Their protestations to the contrary, Director Walters has been "known" to Plaintiffs for at least several months—a considerable fraction of his short time as Director (and therefore a Defendant). Plaintiffs call "particularly egregious" Defendants' alleged "omission" in not identifying him as a potential witness during the period of "supplemental discovery from March through June 2026 that provided yet another opportunity for Defendants to disclose" him. Pls.' Mot. at 1. But that's what Defendants did.

Plaintiffs lament that Defendants "did not refer to [Director Walters] in the interrogatory responses they served in April 2026," Pls.' Mot. at 4 (citing Pls.' Mot. Ex. 5)—but they neglect to mention Defendants' supplemental responses to the same set of interrogatories, filed June 2, 2026 during the "supplemental discovery" period. Those responses expressly refer to activity undertaken "in January 2026" by "the new director of VDOC, Joseph Walters." *See* Suppl. Objs. & Answers to Pls' Fifth Set of Interrogs. at 10 (June 2, 2026) [Ex. 5, attached].

This is sufficient supplemental disclosure and does not amount to a Rule 26 violation. "The duty to supplement imposed by Fed. R. Civ. P. 26(e)(1) does not require an application of form over substance." *Coleman v. Keebler Co.*, 997 F. Supp. 1102, 1107 (N.D. Ind. 1998). That is why courts refuse to exclude trial witnesses in such circumstances. *See, e.g.*, *Wajcman v. Inv. Corp. of Palm Beach*, No. 07-80912-CIV, 2009 WL 465071, at *5 (S.D. Fla. Feb. 23, 2009) (where individual was identified in interrogatory responses, the plaintiffs "were not obligated to advise

[opposing party] of their intent to call [the individual] as a witness prior to the filing of their trial witness list").

3. Mr. Daniel

The situation with Mr. Daniel is much the same as with Director Walters. Plaintiffs criticize Defendants for not identifying him as a potential witness during the "supplemental discovery" period that lasted through June 2026. Pls.' Mot. at 1. But, again, that is precisely what happened.

Among the supplemental discovery the Court granted Plaintiffs was another Rule 30(b)(6) deposition of VDOC, which was conducted of Amee Duncan on June 5, 2026. In that deposition, Dr. Duncan identified Anto[n] Daniel as "currently the statewide RHU manager." Dep. Tr. (June 5, 2026) at 241:11–13. In addition to clearly stating his role with respect to the Step-Down Program, Dr. Duncan explained, among other things, that Mr. Daniel had "worked hand-in-hand with [certain external] individuals developing programs and things that met our inmates' needs." *Id.* at 15–17. [Portions of Duncan 6/5/2026 Deposition attached as Ex. 6].

Plaintiffs have little grounds to complain now of an alleged Rule 26(e) violation. As the Advisory Committee notes for Rule 26 expressly state, there is "no obligation to provide supplemental or corrective information that has been otherwise made known to the parties in writing or during the discovery process, *as when a witness not previously disclosed is identified during the taking of a deposition*." Rule 26(e) Advisory Committee Notes (emphasis added). *See also W.C. Eng., Inc. v. Rummel, Klepper & Kahl, LLP*, No. 6:17-CV-00018, 2020 WL 534532, at *4 (W.D. Va. Feb. 3, 2020) (quoting *id.*). Thus, courts regularly decline to exclude witnesses whose identities are disclosed through depositions. *See, e.g.*, *Coleman*, 997 F. Supp. at 1107 (noting that "both the Advisory Committee and leading commentators indicate that the incidental discovery, particularly during a deposition, of information ordinarily subject to supplementation satisfies the Rule 26(e)(1) duty as sufficiently as a formal filing").

II. Any disclosure failure was substantially justified or harmless.

For the reasons above, Defendants respectfully submit that no discovery failure occurred at all. Even if the Court were to identify one, however, the failure to disclose in these circumstances is substantially justified or harmless.

A district court has "broad discretion to determine whether a nondisclosure of evidence is substantially justified or harmless," *S. States Rack And Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003), and is "not required to tick through each of the *Southern States* factors," *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014) (emphasis omitted). "Rule 37(c)(1)'s 'basic purpose' of 'preventing surprise and prejudice' should guide the court's inquiry." *Smith v. Loudoun Cnty. Pub. Schs.*, No. 1:15CV956 (JCC/TCB), 2016 WL 9943214, at *1 (E.D. Va. Jan. 21, 2016) (citing *S. States*, 318 F.3d at 596; *Hoyle v. Freightliner, LLC*, 650 F.3d 321, 330 (4th Cir. 2011)). These relevant considerations tip decisively against the drastic remedy of exclusion.

First, any discovery deficiency is harmless in light of the lack of surprise to Plaintiffs. As shown above, Plaintiffs know the institutional roles that the witnesses occupy and they know the subject matters those roles encompass. They explored those topics in depth through depositions of their official-capacity predecessors Dr. Malone, Dr. Raiford, and Director Clarke. Those depositions covered VDOC's institutional policies, programs, and conditions: the precise subject matter that Dr. Fink, Mr. Daniel, and Director Walters, as their successors, would address. Plaintiffs' counsel would hardly be approaching these witnesses in the dark. Indeed, Plaintiffs themselves already are aware of Dr. Fink's relevant knowledge, characterizing it as the following: "Mental health status and treatment of Class Plaintiffs and/or members of the putative class at Red Onion, Wallens Ridge, or other VDOC facilities, as well as policies and procedures regarding mental health services at those institutions." Ex. 4 at 15.

In any event, in these circumstances, Plaintiffs can hardly claim not to have been on notice months ago of the witnesses' positions and their likely relevant knowledge. They should not be heard to complain now that they "have not had the opportunity to depose [them]." Pls.' Mot. at 1. Had Plaintiffs wanted to depose them, they could have taken steps to do so during the supplemental discovery period, by which point they (at the latest) learned of the witnesses' roles. *Smith*, 2016 WL 9943214, at *2 (allowing testimony because, "[a]lthough Defendant did not disclose these witnesses in its Rule 26(a)(1) disclosures, Plaintiff has long been aware of these individuals and the potentially relevant information they possess."); *El Camino Res., Ltd. v. Huntington Nat. Bank*, No. 1:07-CV-598, 2009 WL 1228680, at *2 (W.D. Mich. Apr. 30, 2009) ("In light of the central role of the discovery rules in eliminating surprise in civil matters, the extreme sanction of preclusion is simply not warranted when the importance of the additional witness was already known to the opponent.").

As to Dr. Fink in particular, there is zero surprise. Plaintiffs listed her in their own disclosures four separate times across the pendency of this litigation. They cannot simultaneously claim that her appearance as a potential trial witness is unexpected. *See, e.g.*, *McCowan v. City of Philadelphia*, 603 F. Supp. 3d 171, 187 (E.D. Pa. 2022) (allowing witnesses not disclosed by party to testify at trial, reasoning that "[b]ecause the four witnesses were identified in *Plaintiffs[']* initial disclosures, the City's failure to identify them in its initial disclosures could 'hardly have caused surprise' to Plaintiffs"); *Smith*, 2016 WL 9943214, at *2 ("Plaintiff was the party that identified these witnesses in her initial and supplemental Rule 26(a)(1) disclosures. . . . To the extent Defendant's failure to disclose these witnesses could surprise Plaintiff, Plaintiff could have quickly cured that surprise by consulting its own records regarding these witnesses.").

Second, any deficiency is substantially justified. Defendants have a compelling explanation, grounded in the particular realities of this case, for not listing the three witnesses in their initial disclosures. The official-capacity successor witnesses did not hold their respective offices during the discovery period. Defendants could not have identified them as potential witnesses at a time when they did not yet occupy those roles. This is the definition of substantial justification under Rule 37(c)(1): a party can hardly be faulted for failing to disclose a witness whose relevant status came into existence only after the close of discovery. The circumstances here are the consequence of inevitable personnel changes at a large state correctional agency—not willful concealment or tactical sandbagging. Moreover, with respect to Dr. Fink, Plaintiffs' own repeated disclosure of her relevance made clear she was already known to all parties and that no separate supplementation was required.

Third, the Court should not discount the relevance and importance of the potential witnesses' testimony in the context of this suit, in which Plaintiffs seek prospective injunctive and declaratory relief against VDOC officials in their official capacities. The equitable remedy they request—if granted—runs against the current holders of these positions, not their predecessors. The testimony of current officials about present conditions, current policies, and ongoing practices at VDOC is the most directly probative evidence bearing on whether equitable relief is warranted and what form it should take. Excluding the current officeholders would require the Court to make equitable determinations about an institution's present state based on a record that reflects conditions from years ago, as described by officials who no longer hold these roles. That result would ill serve the interests of justice and the purposes of equitable litigation. Accordingly, if the Court finds a discovery deficiency that was not harmless or substantially justified, Defendants

respectfully submit that a curative remedy be employed rather than exclusion. *See* Fed. R. Civ. P. 37(c)(1) (authorizing a court to impose "other appropriate sanctions" in lieu of exclusion).

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' motion.

Dated: September 8, 2026

Respectfully submitted,

/s/ *Maya M. Eckstein*

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 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*
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