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

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE PLAINTIFFS' EVIDENCE OF COMPENSATORY DAMAGES

The Court has already considered and rejected the same arguments that Defendants now raise in their motion *in limine* in its Opinion and Order as to Cross Motions for Summary Judgment, ECF 516. That alone should resolve the issue.

Defendants have also been aware that Plaintiffs are seeking per diem damages since at least January 2024. This is a well-established method of proving damages for non-economic harm like the constitutional violations at issue in this case. Plaintiffs have disclosed expert testimony regarding the number of days class members spent in the program, and are requesting that the Court, acting as the finder of fact, determine the amount of the per diem rate based on the facts determined at trial. Defendants raised complaints with this damages theory more than two years ago, arguing then—as they do again now—that they had not been supplied with the amount of damages or how it would be calculated. The Court considered these arguments, held that the per diem theory was viable, and concluded that the amount of damages was an issue for trial.

Defendants are now attempting to relitigate that same issue under the guise of a motion *in limine*, which this Court should reject.

Their new motion also fails on its own terms. There is no deficiency with Plaintiffs' initial disclosures. Under well-established authority, parties only need to provide a computation under Rule 26(a)(1)(A)(iii) for economic damages; damages for constitutional injury, as in this case, are non-economic, not quantifiable, and are an issue for the fact-finder. Plaintiffs disclosed all the requisite information: they disclosed the fact that they are seeking per diem damages, the categories of damages they seek (all of which are non-economic) and the day-count input (through expert testimony). The sole aspect not identified is the precise per diem rate, which is not susceptible to calculation, is not a required disclosure, and is something for the Court to determine in its discretion at trial.

ARGUMENT

I. Defendants are trying to relitigate a substantive issue that the Court has already decided under the guise of a motion *in limine*.

The parties fully briefed these issues more than two years ago. During a status conference in January 2024, after the parties had fully briefed summary judgment but before the motions were decided, at Defendants' prompting, the Court invited the parties to submit authority regarding whether the finder of fact may determine the amount of compensatory damages for Plaintiffs' claims. Transcript of Jan. 18, 2024 Status Conference at 12–13, ECF No. 464. Shortly after, Plaintiffs filed a submission collecting caselaw establishing that (1) fact-finders can determine the amount of non-economic damages for constitutional violations based on fact testimony alone (and not expert testimony); and (2) compensatory damages for constitutional claims are frequently calculated on a per diem basis. *See generally* ECF No. 460; *see also* ECF No. 465. In particular, Plaintiffs collected numerous cases where damages were determined in exactly the fashion they

propose here: on a per diem basis, with the per diem rate determined by the fact finder based on proof presented at trial. *See* ECF 460 at 1–5 (collecting cases); ECF 465 at 1–2 (same).[1]

In response to Plaintiffs' submission, Defendants urged the Court to disallow this approach, asserting many of the same arguments that they make in this motion *in limine*, including that Plaintiffs had failed to supply expert testimony or material in their depositions identifying an amount for damages or explaining how the amount should be calculated. ECF No. 461 at 5–9.

After considering this briefing, this Court rejected Defendants' objections, ruling in its summary judgment order that Plaintiffs could seek their compensatory damages on a per diem basis. ECF No. 516 at 19 ("[P]ost-PLRA courts have awarded prisoners compensatory damages on a per diem basis.") (citation omitted). The Court further held that the amount of such damages was a "matter[] for trial." *Id.* Accordingly, the issue that Defendants now raise in the form of this motion *in limine* is one that the Court has already decided and need not rehash—Plaintiffs' per diem damages theory is appropriate and the Court can and should determine the per diem rate based on testimony at trial.

[1] *See also, e.g.*, *Jerrell v. Bradley*, 2011 WL 2182750, at *11 (W.D. Ark. June 6, 2011) (after a bench trial, "award[ing] $100 per day for the one-hundred and forty-seven days" because the jail had not treated an inmate's painful dental problems); *Almighty Supreme Born Allah v. Milling*, 2016 WL 1311997, at *15 (D. Conn. Apr. 4, 2016) (awarding "$175 per day for 358 days" for due process violations to compensate the inmate "for his unconstitutional placement in an environment much more restrictive than general population and for its impact upon him"); *Simmons v. Cook*, 154 F.3d 805, 809 (8th Cir. 1998) (affirming award of $2,000 for 32 hours in unconstitutional solitary confinement); *O'Connor v. Keller*, 510 F. Supp. 1359 (D. Md. 1981) ($100 per day for Eighth Amendment violations); *Maxwell v. Mason*, 668 F.2d 361, 362 (8th Cir. 1981) (same); *Lowrance v. Coughlin*, 862 F. Supp. 1090, 1120 (S.D.N.Y. 1994) ($100 per day for segregative confinement as a result of retaliation); *Smith v. Rowe*, 761 F.2d 360, 368 (7th Cir. 1985) (listing other cases in which the Seventh Circuit has upheld per-day awards for segregated confinement ranging from $129 to $212 as grounds for upholding an award of a $119 per diem as not excessive); *Stevens v. McHan*, 3 F.3d 1204, 1207 (8th Cir. 1993) (listing cases with per-day amounts ranging from $25 to $129 as grounds for deeming a $500 per diem arbitrary and excessive).

II. There is no Rule 26(a)(1)(A)(iii) problem here, and Plaintiffs' damages proposal is routinely used in cases like this.

Having failed to defeat Plaintiffs' damages theory years ago as a matter of substantive law, Defendants now pivot to a procedural exclusion theory, arguing that Plaintiffs' failure to disclose a calculation for their damages under Rule 26(a)(1)(A)(iii) should preclude them from introducing any evidence on compensatory damages at trial. But there is no Rule 26(a)(1)(A)(iii) problem here. Plaintiffs have disclosed exactly how they plan to establish their compensatory damages: they plan to rely on a per diem damages methodology—which has already been accepted by this Court—and they have supplied the day-count input through the report of their expert Russell Molter. The only piece missing is the precise per diem rate, which is not quantifiable and not susceptible to calculation, and therefore does not require pre-trial computation.

As Defendants themselves acknowledge, Rule 26(a)(1)(A)(iii) does not require a computation for non-economic damages, which is exactly what is at issue with the per diem rate. *See* Defs.' Mot. *in Limine* to Exclude Plfs.' Evidence of Compensatory Damages at 10–11, ECF No. 560 ("Mot.") (quoting *Ruddy v. Bluestream Professional Serv., LLC*, No. 1:18-cv-1480, 2020 WL 13694227, at *3 (E.D. Va. July 16, 2020)). In *Ruddy*, for example, a court in this District found that emotional distress and punitive damages were "not calculable under Rule 26" and therefore held that "plaintiff's failure to provide a computation of those damages is not in violation of the Rule." *Id.* at *4; *see also Anderson v. United Parcel Service*, No. 09-2526, 2010 WL 4822564, at *10 (D. Kan. Nov. 22, 2010) (refusing to require computation of damages for emotional suffering because it is "difficult to quantify," "typically considered a fact issue for the jury," and "not subject to the kind of calculation contemplated by Rule 26(a)(1)(A)(iii)"); *E.E.O.C. v. Wal-Mart Stores, Inc.*, 276 F.R.D. 637, 639–40 (E.D. Wash. 2011) (collecting additional cases).

The categories of damages that Plaintiffs have disclosed they are seeking—damages for physical injury, emotional pain and suffering, and loss of liberty, *see* Mot. Ex. 4, ECF 560-4 at 59—fall into this category; they are inherently incapable of precise calculation. *See, e.g.*, *Almighty Supreme Born Allah v. Milling*, 2016 WL 1311997, at *15 (D. Conn. Apr. 4, 2016) (awarding per diem damages for constitutional injury and holding that "[t]he rate cannot be detailed with scientific precision"); *Jerrell*, 2011 WL 2182750, at *11 (similar). These damages are not determined by economic computation, as lost wages may be. Rather, courts determine a reasonable rate in their discretion based on the evidence and comparable awards. *See, e.g.*, *Almighty Supreme Born Allah*, 2016 WL 1311997, at *15 (considering awards in similar cases); *Ismail v. Cohen*, 899 F.2d 183, 186 (2d Cir. 1990) (similar).

This is a well-trodden path; Plaintiffs have already presented the Court with numerous cases showing courts setting a per diem rate themselves at trial or at judgment based on the egregiousness of the injuries alleged and comparator awards—not plaintiffs supplying a calculation in discovery. *See, e.g.*, *O'Connor v. Keller*, 510 F. Supp. 1359, 1375 (D. Md. 1981); *Maxwell v. Mason*, 668 F.2d 361, 362 (8th Cir. 1981); *Lowrance v. Coughlin*, 862 F. Supp. 1090 (S.D.N.Y. 1994); *see also* ECF No. 460 at 2–5 (collecting additional cases).

Given this damages theory, Plaintiffs have fully complied with their disclosure obligations. Plaintiffs have disclosed the categories of compensatory damages that they are seeking: damages for physical injury, emotional pain and suffering, and loss of liberty. Mot. Ex. 4, ECF 560-4 at 59. They also disclosed that they intend to seek damages on a per diem basis, and they disclosed the day-count input through the report of an expert. *Id.*[2] The only piece missing is the precise rate, which the Rule does not require a plaintiff to pre-disclose for this class of damages.

[2] Defendants wrongly state that the report of Plaintiffs' expert Russell Molter contains only averages and aggregate totals. Mot. at 5. In fact, Mr. Molter calculated individualized data on the

Tellingly, Defendants exclusively rely on cases having to do with economic damages. *See, e.g.*, *Intercollegiate Women's Lacrosse Coaches Ass'n v. Corrigan Sports Enters., Inc.*, 698 F. Supp. 3d 814, 818–19 (M.D.N.C. 2023) (requiring a Rule 26(a)(1)(A)(iii) computation disclosure for economic damages arising from a breach of contract claim); *Ruddy*, 2020 WL 13694227, at *3 (requiring a Rule 26(a)(1)(A)(iii) computation disclosure for economic damages including lost wages, lost benefits, and liquidated damages). But those cases have no relevance here, where the damages input at issue is non-economic, which—courts are clear—does not require a computation disclosure.

Defendants assert—without authority—that "[a] per diem theory is the antithesis of an unquantifiable one." Mot. at 11. Of course, once the per diem rate is determined, the amount of damages will be a straightforward calculation. But the only piece of that the Defendants do not have yet is the precise rate, and that is the piece that cannot be calculated in advance of trial and which the Court must determine in its discretion. Nor are Defendants entirely in the dark about what that rate may be: Plaintiffs have already identified, in the February 2024 supplemental briefing, numerous comparable cases supplying comparable awards for the Court to use as guidance in setting the rate in this case. *See generally* ECF Nos. 460, 465 (citing cases with awards ranging from $100 to $212 per day).

Finally, if Defendants believed the Rule 26(a) disclosures were inadequate, the time to raise it was via a motion to compel or at summary judgment; in particular, given the litigation history

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number of days each class member was in the Step-Down Program. *See* Ex. A (Excerpt of June 18, 2026 Molter Report, Second Supplemental Exhibit 16g) at 40–59. Nevertheless, the aggregate number of days class members spent in various phases of the Step-Down Program would determine the overall damages figure. Determining the amount of damages on a per class member basis would involve nothing more than determining how many days out of the compiled aggregate that an individual class member spent in the program.

on this precise issue. Instead, under the guise of an eve-of-trial evidentiary motion, Defendants are seeking a sweeping remedy: an order precluding Plaintiffs from offering at trial any evidence, testimony, or argument regarding an amount of or methodology for calculating compensatory damages. This would be absurdly prejudicial, and Defendants' claim that Plaintiffs would not be left without a remedy because they can seek nominal damages is frivolous, considering the scale of the harm Plaintiffs have suffered. *See, e.g.*, *Wasica Fin. GmbH v. Schrader Int'l, Inc.*, 2020 WL 509182, at *1 (D. Del. Jan. 31, 2020) ("Defendants' motion is essentially a motion for summary judgment, which is not a proper basis for a MIL."); *see also Johns Hopkins Univ. v. Alcon Lab'ys Inc.*, 2018 WL 4178159, at *21 (D. Del. Aug. 30, 2018) ("A motion in limine is not the proper vehicle by which to eliminate issues from a case.").

III. There is no basis under *Southern States* to exclude Plaintiffs' damages evidence at trial.

Because Plaintiffs had no obligation to disclose a precise damages number, there is no basis to invoke Rule 37 sanctions and the entire *Southern States* framework that Defendants invoke is therefore inapposite. *See Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 (4th Cir. 2003) (noting that Rule 37 sanctions apply when a party "fails to disclose information required by Rule 26(a) or 26(e)(1)"). Considering the *Southern States* factors makes this even more clear. *See id.* at 596.

At the outset, applying the factors makes little sense because there is nothing that Plaintiffs have withheld from Defendants. There is no undisclosed damages computation that Plaintiffs are going to surprise Defendants with at trial; Plaintiffs are simply going to present testimony on the harm they suffered, the number of days they suffered it, and ask the court to use its discretion to award a per diem rate—exactly what they have been saying they will do since at least early 2024. Accordingly, there is no unfair surprise or prejudice to Defendants. Defendants acknowledge that

they knew by 2022 that Plaintiffs might seek per diem damages, and they knew no later than the January 2024 status conference and the February 2024 supplemental briefing that Plaintiffs would not offer expert testimony quantifying the rate. ECF No. 460 at 1 n.1; ECF No. 461. That extended actual notice forecloses any claim of surprise.

For the same reason, this evidence will not disrupt trial—there is nothing new or unexpected here that will force Defendants to react on the fly to something they haven't seen before or weren't prepared to respond to. And to the extent Defendants claim any surprise here, there was ample ability for Defendants to cure it: They could have taken whatever discovery they wanted on this, either during the discovery period or during the period when discovery was reopened, and yet they chose not to. Indeed, Defendants declined to take Mr. Molter's deposition during the prescribed supplemental expert discovery period.

Finally, Defendants claim that the importance of the evidence cuts against Plaintiffs and in favor of exclusion. But this merely highlights the extremity of their position. Defendants are proposing on the eve of trial that Plaintiffs be barred from presenting evidence of compensatory damages and are arguing that Plaintiffs will not be without a remedy because they can seek nominal damages. There is absolutely no basis—when Defendants have long known Plaintiffs' damages theory, and have already tried (and failed) to defeat it—to bar Plaintiffs entirely from making their case for fair, just, and reasonable compensation for their injuries.[3]

CONCLUSION

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

[3] Defendants also purport to preserve their arguments on the availability of damages, *see* Mot. at 19 n.5, but (again), the parties already briefed these issues, and the Court rejected Defendants' arguments. *See* ECF No. 516 at 18–19.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of September 2026, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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