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

Plaintiffs' Opposition, ECF No. 579 ("Opp'n"), does not defend the content of their interrogatory responses. Instead, it relies on depositions, expert reports, and summary judgment briefing to substitute for what Rule 33 and Rule 26(e) required: complete responses to the interrogatories directed to them and timely supplementation. Plaintiffs did neither, and the broader discovery record does not cure that failure.

The Motion should be granted. At a minimum, Plaintiffs should be confined to the specific documents they actually identified by Bates number in their interrogatory responses.

ARGUMENT

I. Plaintiffs Do Not—Because They Cannot—Defend Their Interrogatory Responses.

The most revealing feature of the Opposition is what it does not say. Plaintiffs defend everything about their interrogatory responses except their content.

The Motion put the content of Plaintiffs' responses to Interrogatory Nos. 3, 5, 6, and 12 at issue. Yet nowhere in their Opposition do Plaintiffs identify a single contention those responses actually disclosed: not one condition a specific Plaintiff contends was unconstitutional, not one act

attributed to a specific Defendant on a specific date, not one fact or computation supporting a damages award. That omission is dispositive. Rule 37(c)(1) turns on what Plaintiffs disclosed in their responses—not on how much surrounding litigation activity they can now catalogue.

The reason for that silence is plain: there is no contention in the answers to quote. Had there been, Plaintiffs would have quoted it. Instead, their responses offered only cross-references to pleadings, declarations, and document dumps. Their Opposition defends those responses by pointing to the objections and the broader discovery record rather than to anything the answers themselves say. That is the surest sign that even Plaintiffs recognize the answers contain nothing to defend.

The answers' contents confirm as much. As the Motion showed, Plaintiffs responded to Interrogatory Nos. 3, 5, and 6 (and others) by recycling the identical list of 61 Bates-numbered documents across four structurally different categories of records, then cross-referencing one answer into the next until the chain looped back to that same list. *See* Mot. (ECF No. 559) at 4–5. The Opposition never engages with that point—and its one attempt to defend even a single document proves it.

That attempt is a lone footnote defending a lone document. Plaintiffs point to VADOC-00004605, a 2007 "Double Cell/Dorm Assessment Form," which they say supports a comparison to general-population conditions drawn from paragraph 96 of the Complaint. Opp'n at 11 n.4. But Plaintiffs never identified paragraph 96 specifically. In response to Interrogatory No. 3, they cited paragraphs 94–121 and 134–204—more than one-third of the 274-paragraph Complaint. *See* Mot. at 3. Paragraph 96 does not appear in the responses to Interrogatory Nos. 5 and 6. *Id.* at 3–4. Yet the document whose relevance depends on divining a cross-reference to that single paragraph was listed in response to all three interrogatories and others. Their need to reconstruct a contention

from one buried paragraph to explain one document listed across multiple answers confirms that the responses did not disclose the contention itself. What is more, a theory offered for the first time in an opposition brief is not a disclosed contention; it is the very thing the responses were supposed to reveal and did not.

II. The Interrogatory Answers Are Vital for Defense of Plaintiffs' Money-Damages Claims Against the Individual Defendants.

Plaintiffs' failure to defend their interrogatory responses is especially striking when weighed against what is at stake. Their damages claims—the ones for which they apparently intend to ask the Court to "pick a number" and multiply it by the million or so days their expert says inmates spent in the Step-Down Program—proceed against ten named Defendants ***in their individual capacities***. Under § 1983 each of those individuals "is only liable for his or her own misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). That liability has to be determined "person by person" with "defendant-specific [evidence] of each individual's [culpable] state of mind." *King v. Riley*, 76 F.4th 259, 269 (4th Cir. 2023). But Plaintiffs' interrogatory responses never identified ***what*** any individual Defendant ***personally did*** that was unconstitutional.

Consider Director Clarke. He became VDOC Director in November 2010. He visited Red Onion, identified concerns about administrative segregation, and directed his staff to develop a solution. Although the Step-Down Program was created at his behest, he did not design the Program or run it. His role was oversight and concurrence. So what, specifically, did Clarke personally do to make himself individually liable to every inmate who spent time in the Program? At what moment did he incur that liability? Presumably, Plaintiffs are not planning to argue Clarke is personally liable to them for millions of dollars because he was "generally aware" of the allegedly unconstitutional Program. *See Iqbal*, 556 U.S. at 677 (explaining "mere knowledge" that one's subordinates are engaged in unconstitutional conduct is not enough). So what was the ***act he***

took—not the job title, not the org chart, not the general awareness—that put him on notice of a specific constitutional violation against any specific Plaintiff (or class member)? That is the information Defendants sought in their interrogatories, and Plaintiffs were obliged to provide it.

And Clarke is the Defendant for whom the record is most developed. The same unanswered questions apply with even more force to the other remaining individuals—Robinson, Mathena, Richeson, Ponton, Elam, Manis, Malone, Raiford, and Kiser—each of whom holds a different title and played a different role in the administration of VDOC policies. And ***none of them*** has ever been told what specific act of theirs Plaintiffs contend violated the Constitution. Plaintiffs' interrogatory responses were their opportunity to make those identifications. They did not.

The practical stakes are therefore enormous. Plaintiffs are seeking money damages against these individuals ***personally***—not against VDOC or the Commonwealth. What do Plaintiffs say makes these individuals culpable to the point of the millions of dollars they apparently will ask the Court to impose? Defendants do not know. The interrogatories were designed to elicit precisely that information.

Plaintiffs' refusal to provide it while pursuing life-altering personal liability is not a minor discovery deficiency that can be cured by pointing at the discovery record—a record that contained ***the same deficiencies***. *See* Defs.' Opp. to Pls.' Mot. for Summ. J., ECF No. 402 (highlighting that "Plaintiffs [did] not assert—much less demonstrate with undisputed facts—that *any* individual Defendant 'personally took any particular action or made any relevant decision' that violated any Plaintiff's Eighth Amendment rights") (quoting *Taylor v. Manis*, No. 7:19-CV-00434, 2020 WL 354753, at *1 (W.D. Va. Jan. 21, 2020)).[1]

[1] Plaintiffs might contend at trial, as they did in support of their failed summary judgment motion, that because some Defendants admitted their roles in creating or administering the Step-Down Program, they have conceded personal liability for every constitutional violation that

III. A Motion to Compel is Not a Prerequisite to Exclusion Under Rule 37(c)(1).

Plaintiffs' threshold argument is that Defendants forfeited exclusion under Rule 37(c)(1) by never moving to compel better responses under Rule 37(a). Opp'n at 4–6. That argument fundamentally misunderstands the relationship between Rules 37(a) and 37(c)(1).

Rule 37(c)(1) is self-executing. It provides that a party that "fails to provide information … as required by Rule 26(a) or (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). The "automatic sanction" of exclusion "provides a strong inducement for disclosure of material that the disclosing party would expect to use as evidence." *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595 n.2 (4th Cir. 2003) (quoting Fed. R. Civ. P. 37(c) advisory committee's note to 1993 amendment). The Fourth Circuit has reaffirmed that characterization, again describing the "automatic sanction" of exclusion and giving district courts "particularly wide latitude" to impose it. *Wilkins v. Montgomery*, 751 F.3d 214, 221 (4th Cir. 2014). The sanction requires no finding of "bad faith or callous disregard of the discovery rules"; nondisclosure requires exclusion unless it was substantially justified or harmless. *S. States Rack & Fixture*, 318 F.3d at 596.

Notably, Rule 37(c)(1) contains no prerequisite that the aggrieved party first file a motion to compel under Rule 37(a). This makes sense as a matter of text and structure. Rule 37(a) and Rule 37(c)(1) serve different functions. Rule 37(a) provides a mechanism for obtaining court-ordered compliance with discovery requests. Rule 37(c)(1), by contrast, imposes consequences for

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occurred within it. They have not. Admitting an organizational role is not admitting a constitutional violation. That conflation is precisely the programmatic theory that § 1983 forecloses. *See Iqbal*, 556 U.S. at 677. And it is precisely why Defendants needed Plaintiffs' interrogatory responses to identify the specific individual conduct underlying each individual-capacity claim.

a party's ***failure to supplement*** disclosures as required by Rule 26(e). These are parallel tracks, not sequential steps.

For that reason, it is unsurprising that courts within this Circuit have confronted—and rejected—Plaintiffs' you-should-have-moved argument. *See, e.g.*, *Nance v. Ky. Nat'l Ins. Co.*, No. CV 2:02-0266, 2005 WL 8159348, at *6 (S.D.W. Va. July 28, 2005) (explaining that there is "no need for an order compelling discovery as a prerequisite to imposition of sanctions" and that litigants "should be as complete and thorough as reasonably possible" in making and supplementing disclosures); *Sullivan v. Glock, Inc.*, 175 F.R.D. 497, 505 (D. Md. 1997) (explaining that "a party is not required to file a motion to compel complete disclosures" before invoking "the automatic exclusion provision contained in Rule 37(c)(1)"); *see also Pitts v. HP Pelzer Auto. Sys., Inc.*, 331 F.R.D. 688, 699 (S.D. Ga. 2019) (explaining that "automatic" means exclusion may be imposed without further action "such as through a motion to compel"); *Hovanec v. Miller*, 331 F.R.D. 624, 634 (W.D. Tex. 2019) ("Defendant's failure to move to compel does not excuse Plaintiff from complying with Rule 26(a)."); *City of Owensboro v. Ky. Utils. Co.*, No. CIV.A.4:04CV-87-M, 2008 WL 4542674, at *2 (W.D. Ky. Oct. 8, 2008) (rejecting that argument because Rule 37(a) says a party "may" move to compel and Rule 37(c)(1) is self-executing).[2]

Plaintiffs' cited authorities do not compel a different result. The cases they rely upon—*Bowersox*, *Simpson*, *Liquid Capital Exchange*, *W.R. Grace*—are distinguishable district court opinions from outside this Circuit that have no binding effect on this Court. Many of those cases

[2] Indeed, requiring a motion to compel would create the wrong incentive. As one Maryland federal court observed, counsel who receives incomplete disclosures may be "disinclined to file the motion to compel" because a successful motion could simply give the noncompliant party "another opportunity to get them right" and preserve the evidence for trial. *Sullivan*, 175 F.R.D. at 504; *see also Tip Top Constr. Corp. v. Austin*, 71 V.I. 549, 570 (2019) (quoting *Sullivan*, 175 F.R.D. 497). Rule 37(c)(1)'s self-executing consequence avoids rewarding defective disclosure with a court-ordered second chance.

involve situations where the moving party sought to raise garden-variety discovery disputes for the first time in a motion in limine—not, as here, where a party failed altogether to discharge its independent obligation to supplement under Rule 26(e). The distinction is critical: Defendants are not bringing a belated discovery dispute. They are enforcing the automatic sanction that attaches when a party fails to comply with its supplementation duty.

Moreover, Plaintiffs themselves acknowledge that the duty to supplement under Rule 26(e) is ongoing and independent—which is precisely why a motion to compel is not a prerequisite. Plaintiffs had a ***continuing obligation*** to supplement their interrogatory responses with their actual contentions and damages information as the case developed. They never did so. Their failure to supplement is the trigger for Rule 37(c)(1), not Defendants' decision about whether and when to file a motion to compel.

Plaintiffs' implicit premise—that Defendants should have raced to compel better answers—also ignores the procedural reality. Defendants received the initial objection-laden responses in late 2021. Plaintiffs then served supplemental responses on April 14, 2023—*after* the close of fact discovery on February 28, 2023. Those supplements were not styled as objections; they were affirmatively represented as substantive answers, complete with Bates-numbered document lists and citations to declarations and depositions. Defendants were entitled to treat those supplements as Plaintiffs' final disclosure and to prepare for trial on that basis. Plaintiffs cannot simultaneously serve post-discovery supplements that purport to be genuine answers and then fault Defendants for not seeking a court order demanding even better answers after the deadline to do so has passed.

Nor does Defendants' decision not to seek additional discovery during the 2026 supplemental period help Plaintiffs. That period was opened at Plaintiffs' request. Plaintiffs used

that period to supplement various interrogatory responses—but chose not to supplement their responses to Interrogatory Nos. 3, 5, 6, or 12. That inaction demonstrated the apparent belief that the responses were adequate. Rule 37(c)(1) holds Plaintiffs to that position. Defendants were not required to use the additional period to do Plaintiffs' supplementation work for them.

Moreover, the prejudice Defendants face is measured at the time of trial, not at some earlier point when Defendants might theoretically have sought a compulsion order. The relevant question under *Southern States* is whether Defendants will be surprised by Plaintiffs contentions ***at trial***, and whether that surprise can be cured ***now***. 318 F.3d at 597. As of today, Defendants still do not know which conditions each Plaintiff will contend were unconstitutional, which Defendant is charged with what conduct, on what dates, or what damages any Plaintiff seeks. That informational deficit exists regardless of whether Defendants could have sought an order three years ago. The discovery rules impose the discovery obligation on the party who holds the information, not the party who needs it. *See* Fed. R. Civ. P. 26(e)(1)(A).

Finally, Plaintiffs' characterization of Defendants' motion as "gamesmanship" has it exactly backwards. A motion in limine is the standard procedural vehicle for resolving the scope of trial evidence, and Defendants filed this motion at the required time. The relevant question is whether Plaintiffs met their discovery obligations, not when Defendants sought to enforce the consequences of nondisclosure. Plaintiffs did not supplement their responses for more than three years and now seek to present contentions at trial that their answers never articulated.

IV. Plaintiffs' Objections to the Interrogatories Do Not Excuse Their Failure to Answer.

Plaintiffs next contend their interrogatory objections were "well-founded" and thus relieved them of any further obligation to respond. Opp'n at 8–11. This argument fails for three independent reasons.

First, objecting to an interrogatory does not relieve a party of the obligation to answer. A party may object and answer in the alternative, *see* Fed. R. Civ. P. 33, but an objection alone is not a response. Indeed, Rule 37(a)(4) provides that "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Here, Plaintiffs did not refuse to respond; they purported to answer, but their answers consisted of cross-references to pleadings, declarations, and document lists. Having elected to respond, Plaintiffs cannot now characterize those answers as objection-only responses. As explained above, the answers themselves disclosed no contention Plaintiffs are willing or able to defend.

Second, the interrogatories were not overbroad. Interrogatory Nos. 3, 5, and 6 asked Plaintiffs to identify the factual bases for their specific constitutional claims—claims they chose to bring. Asking a party to state the conditions it contends are unconstitutional, the conduct it attributes to each defendant, and the dates of that conduct does not constitute an improper request for a "narrative account" of the case. It invites Plaintiffs to disclose the case that Defendants must meet at trial. These are the elements of Plaintiffs' own claims. As one district court observed, "[a]n interrogatory may properly inquire into a party's contentions in the case and the factual basis therefor. The defendant is entitled to know the factual basis of plaintiff's allegations and the documents which the plaintiff intends to use to support those allegations." *Wagner v. St. Paul Fire & Marine Ins. Co.*, 238 F.R.D. 418, 426 (N.D. W. Va. 2006) (quoting *Cont'l Illinois Nat. Bank & Tr. Co. of Chicago v. Caton*, 136 F.R.D. 682, 684 (D. Kan. 1991)). Indeed, contention interrogatories exist precisely to "pin down an opponent's legal theories …as well as the primary facts supporting them." *Jayne H. Lee, Inc. v. Flagstaff Indus. Corp.*, 173 F.R.D. 651, 652–53 (D. Md. 1997).

Plaintiffs invoke the proposition that interrogatories "systematically track[ing] all of the allegations" are abusive. Opp'n at 8 (quoting *E.R. v. Beaufort Cnty. Sch. Dist.*, No. 22-CV-04482-DCN, 2023 WL 3605000 (D.S.C. May 23, 2023)). But even that authority recognizes that contention interrogatories "may ask for the material or principal facts that support a particular allegation." *Id.* (quoting *E.R.*, 2023 WL 3605000, at *3). That is precisely what Interrogatory Nos. 3, 5, and 6 do. The interrogatories are not asking for "every fact"; they are asking for each Plaintiffs own contentions as to the claims they have been litigating before this Court for years. Only Plaintiffs can supply that information.

Third, Plaintiffs' contention that the interrogatories were "premature" when served long since expired as a justification. Once they had their position in their hands, Plaintiffs had no excuse for nondisclosure. *S. States Rack & Fixture*, 318 F.3d at 598–99. Indeed, Plaintiffs had their positions well in hand by the time they filed their summary judgment briefing in September 2023, yet they never supplemented their contention interrogatories to say what those contentions were.[3]

V. Other Discovery Does Not Cure Plaintiffs' Failure to Answer.

Plaintiffs further oppose the Motion by claiming that Defendants are "well on notice" of Plaintiffs' contentions through depositions, expert reports, and summary judgment briefing. Opp'n at 2, 9–10. This argument misses the point entirely.

First, the premise underscores the deficiency. If the interrogatory responses themselves adequately disclosed Plaintiffs' contentions, Plaintiffs would not need to point to depositions,

[3] Plaintiffs' reliance on the 1970 advisory committee note—that interrogatory answers "do not ordinarily limit proof"—is misplaced. That note addressed whether answers operate as binding judicial admissions; it says nothing about preclusion for a failure to answer. The automatic-exclusion sanction Plaintiffs say cannot exist was added to Rule 37(c) in 1993, decades after the note they quote. *S. States Rack & Fixture*, 318 F.3d at 595. A note about the effect of answers cannot govern the consequence of non-answers.

expert reports, and summary-judgment briefing to demonstrate that Defendants have "notice." The fact that Plaintiffs must rely on other discovery to fill the gap is proof-positive that the interrogatory responses do not provide the information they were required to disclose. What is more, if Plaintiffs could set forth (as they allege) "in great detail the facts in the record that support their Eighth Amendment and Due Process claims" in summary judgment briefing, Opp'n at 3, they were capable of supplementing their interrogatory responses with the same information. Their failure to do so leaves Defendants without answers identifying the theories Plaintiffs intended to pursue against them at trial.

Second, other discovery cannot cure the specific deficiency at issue. The interrogatories ask Plaintiffs to state their ***contentions***—*i.e.*, to commit to specific theories linking specific conditions to specific defendants on specific dates. Depositions and expert reports may contain ***facts***, but they do not identify which of those facts Plaintiffs will ***contend*** at trial establish each element of each claim against each individual Defendant. Indeed, "[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). The same is true of depositions and expert reports.

Third, the duty to supplement under Rule 26(e) is an independent obligation. It requires that a party correct or supplement its interrogatory responses "in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). Importantly, the rule provides an exception only where "the additional or corrective information has not otherwise been made known to the other parties during the discovery process ***or in writing***." *Id*. (emphasis added). But even under this exception, it is the ***responding*** party's burden to demonstrate that the information was otherwise made known—and Plaintiffs have never argued that their depositions, expert reports, or briefing contain the specific contention-by-

contention, defendant-by-defendant, date-by-date information their interrogatory responses were supposed to disclose.

Fourth, Plaintiffs' comparison to Defendants' responses does not excuse their own nondisclosure. Plaintiffs note that Defendants also relied on Rule 33(d) in responding to contention interrogatories. *See* Opp'n at 11 n.5 & Ex. 1. But Defendants provided narrative answers explaining the bases for VDOC's contentions before invoking Rule 33(d) for supporting documents. For example, one response Plaintiffs criticize for listing Bates-numbered documents begins with a substantive narrative answer identifying the contentions those documents support. *See* ECF No. 579-1 at 5. The three other highlighted responses addressed policies that could be identified from the policies themselves. *Id.* at 21–23 (responses to Interrogatory Nos. 5, 6, and 7). The comparison therefore does not cure the absence of substantive contentions in Plaintiffs' answers.

VI. The *Southern States* Factors Favor Exclusion.

Because Plaintiffs cannot show that their nondisclosure was substantially justified or harmless—a burden that is theirs to carry, *Wilkins*, 751 F.3d at 222—the governing *Southern States* test confirms exclusion. Their treatment of these factors is cursory and unpersuasive.

Surprise. Plaintiffs assert that Defendants "cannot reasonably claim surprise at trial" because of the extensive discovery in this case. Opp'n at 12. Plaintiffs get the legal framework wrong. Surprise under *Southern States* is not measured by the volume of general litigation activity; it is measured by reference to the specific information the nondisclosing party failed to provide. *See* 318 F.3d at 597. The question is whether Defendants know which specific contentions Plaintiffs will advance at trial, not whether Defendants are generally familiar with the subject matter of this case. Of course, Defendants know this case involves the Step-Down Program and conditions at Red Onion and Wallens Ridge. What Defendants do not know—because Plaintiffs

never disclosed it in any discovery vehicle—is which specific conditions each Plaintiff will contend were unconstitutional, which specific conduct each Plaintiff attributes to which specific Defendant, on which specific dates, and what each Defendant should have supposedly done. Because Eighth Amendment liability is individualized, *Farmer v. Brennan*, 511 U.S. 825, 847 (1994), each of the ten individual Defendants must be able to prepare his or her defense tailored to the contentions directed at him or her. None of them can do so, because Plaintiffs never mapped a single contention to a single Defendant.

Plaintiffs also mischaracterize the nature of the surprise by arguing that "Defendants do not point to anything Plaintiffs have put forward that they are seeking to exclude." Opp'n at 12. That argument inverts the inquiry. The entire point of the Motion is that Plaintiffs ***failed to put forward*** their contentions. That is precisely the problem. Defendants cannot identify the evidence they seek to exclude because Plaintiffs never disclosed what it is. If Plaintiffs had disclosed specific contentions tied to specific Defendants, then Defendants could challenge those contentions. Instead, Defendants face the prospect of encountering Plaintiffs' theories for the first time at trial—the paradigmatic surprise Rule 37(c)(1) exists to prevent. The Fourth Circuit found surprise on far less in *Deque Systems*, where the party "offered cursory statements that deferred any responsive answers." *Deque Sys. Inc. v. Browserstack, Inc.*, 177 F.4th 585, 594–95 (4th Cir. 2026).

Ability to Cure. Plaintiffs make a significant concession on this factor: they "agree that reopening discovery at this point is inappropriate and unnecessary." Opp'n at 12. That concession forecloses the only mechanism by which the surprise could be cured. The Fourth Circuit has held that 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 Rack &*

Fixture, 318 F.3d at 598. Plaintiffs try to deflect this factor by blaming Defendants for the inability to cure, arguing that "any claimed prejudice . . . is the result of Defendants' own decisions." Opp'n at 12. But this conflates the first factor (surprise) with the second (ability to cure). The question under the second factor is not ***whose fault*** the surprise is; it is whether the surprise ***can be cured***. *See S. States Rack & Fixture*, 318 F.3d at 597. Plaintiffs' answer to that question—"reopening discovery at this point is inappropriate and unnecessary," Opp'n at 12—is a concession that it cannot. That is all the second factor requires.

Plaintiffs also suggest that if their experts "put forward opinions they have not previously disclosed—which they do not intend to do—Defendants can move to exclude those opinions at trial, as happened in *Southern States*." Opp'n at 13. This argument concedes the framework while misapplying it. The suggestion that Defendants should simply wait until trial to seek exclusion of undisclosed evidence defeats the entire purpose of both a motion in limine and Rule 37(c)(1). A motion in limine exists precisely so that the parties and the Court can resolve evidentiary disputes ***before*** trial—not in real time. Rule 37(c)(1)'s automatic exclusion sanction serves the same function enforces disclosure obligations prospectively so that the opposing party can prepare for trial, rather than make ad hoc objections and litigate the admissibility of evidence mid-trial.

Disruption. Plaintiffs collapse the second and third factors into a single paragraph and appear to believe they have addressed disruption by agreeing that reopening discovery is unnecessary. Opp'n at 12. They have not. The disruption factor asks how allowing the undisclosed evidence would affect the orderly conduct of trial—and here, the answer is: profoundly. If Plaintiffs are permitted to introduce contentions, theories, and evidence they refused to disclose as such, Defendants will be forced to confront them for the first time at trial, without having had any opportunity to develop targeted cross-examination, marshal rebuttal evidence, or prepare

individualized defenses for each named Defendant. The Fourth Circuit affirmed exclusion on precisely this 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.

Importance. Plaintiffs contend that "it is not clear exactly what Defendants seek to exclude, other than the specter of undisclosed evidence that has not yet been brought to their attention." Opp'n at 13. The Motion, however, identifies the categories at issue: (1) evidence, theories, or contentions concerning liability on Counts II and V that were not disclosed in response to Interrogatory Nos. 3, 5, and 6; and (2) evidence or argument concerning the existence or amount of damages that was not disclosed in response to Interrogatory No. 12. *See* ECF No. 559 at 1, 18–21. Plaintiffs' inability to identify the undisclosed proof reflects the underlying deficiency; it does not make the requested relief unclear.

More fundamentally, Plaintiffs' manufactured vagueness about "what is being excluded" reinforces Defendants' argument. The reason Plaintiffs frame the withheld evidence as a "specter" is that ***they themselves never disclosed it specifically***. If Plaintiffs cannot identify what they disclosed, neither can Defendants—and that is the entire problem. The Fourth Circuit has held that the importance factor cuts in favor of the movant, not against him: "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*, 177 F.4th at 596 (citation omitted). The withheld information here goes to the core of Plaintiffs' case—the specific conditions, the specific Defendants, the specific dates, and the specific damages. Its centrality makes timely disclosure ***more*** important, not less.

The importance of what was withheld is magnified by the nature of these claims. As set forth above, *supra* Part II, Plaintiffs' money-damages claims proceed against individually named

Defendants in their individual capacities. The dollar figure Plaintiffs intend to ask this Court to award will not be assessed against VDOC or the Commonwealth; it will be assessed against Clarke, Robinson, Mathena, Richeson, Ponton, Elam, Manis, Malone, Raiford, and Kiser, personally. Each of those individuals is entitled to know what he or she specifically did that warrants that liability. The interrogatories asked Plaintiffs to provide exactly that information. Plaintiffs refused. The importance factor does not merely favor exclusion here—it ***demands*** it. If the withheld information were trivial or obvious, the failure to disclose might be harmless. But the withheld information is the entire basis for potentially devastating personal liability against individuals who have never been told what specific conduct makes them individually responsible. That is as important as undisclosed evidence gets.

Explanation. Plaintiffs' treatment of the fifth factor misapplies *Southern States* in a revealing way. They quote Defendants' own motion for the proposition that "a party's failure to move to compel or to supplement" undercuts its position on the explanation factor, and then assert that "Defendants, not Plaintiffs, dragged their heels." Opp'n at 13 (quoting Mot. at 18). But this reads the relevant passage backwards. The fifth factor asks one question: does the ***nondisclosing party*** have a justification for its failure to disclose? *S. States Rack & Fixture*, 318 F.3d at 597. The burden of establishing that justification is the nondisclosing party's to carry. *See Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 190 (4th Cir. 2017). In *Southern States*, the nondisclosing party was Southern States itself, whose expert formed a new opinion on the first day of trial that was never disclosed. 318 F.3d at 593. Southern States tried to justify the nondisclosure by blaming Sherwin-Williams for delays in producing evidence that would have allowed earlier disclosure. The Fourth Circuit rejected that excuse, writing that Southern States "cannot escape that it failed to file a motion to compel twenty days after it knew Sherwin-Williams would not produce [the

evidence].” *Id.* at 598. And “more important,” Southern States could not “explain why it did not supplement its discovery responses when it knew of” the new opinion. *Id.* In other words, the court was telling the ***nondisclosing party*** that, if it believed the other side’s conduct was the obstacle to timely disclosure, it had an obligation to act on its own behalf—by moving to compel, by supplementing, by doing something—and that its failure to take any corrective step defeated its own justification. The passage has nothing to do with whether the opposing party should have moved to compel; it is about the rule-violator’s failure to act.

That is Plaintiffs’ situation. They are the nondisclosing party, they had the information necessary to answer, and they took no corrective action. The fifth factor asks why they failed to disclose, not why Defendants failed to force them to do so. Standing on an objection after the basis for supplementation arose is not substantial justification under *Southern States*.

VII. Plaintiffs’ Damages Argument is a Non-Sequitur.

Plaintiffs argue that the Court’s summary judgment opinion approved their proposed per-day, per-class-member method of determining damages and therefore rendered their response to Interrogatory No. 12 sufficient. Opp’n at 13–14. That argument conflates the legal availability of a damages methodology with the disclosure of the facts needed to apply it. The Court’s ruling addressed whether Plaintiffs’ proposed method was legally cognizable; it did not identify the period attributable to each Plaintiff, the class membership or duration inputs Plaintiffs would use, the amount sought for any Plaintiff, or the evidence supporting those inputs. Rule 26(e) required Plaintiffs to supplement their response once that information became available. Because they did not, approval of a methodology does not cure the absence of the computation and supporting facts that Defendants needed to test the claim.

The substantive consequences of Plaintiffs’ failure to disclose a per diem rate and computation are addressed separately in Defendants’ Motion in Limine to Exclude Plaintiffs’

Evidence of Compensatory Damages, ECF No. 560. This Motion concerns only Plaintiffs' independent failure to answer and supplement Interrogatory No. 12.

VIII. At a Minimum, Plaintiffs Should Be Held To What They Actually Disclosed.

If the Court declines to bar the undisclosed evidence altogether, it should grant the alternative relief the Motion requested: confine Plaintiffs to precisely what they disclosed. Plaintiffs framed their document lists as mere "examples" reaching materials "including, but not limited to" those listed—reserving an open-ended universe of proof to spring on Defendants at trial. That, by its own terms, is not a full answer. The Court should confine Plaintiffs at trial to the specific documents they identified by Bates number and preclude reliance on (a) any document outside those lists, (b) contentions located only through wholesale cross-references to the Complaint, declarations, or deposition transcripts, and (c) any damages computation not previously disclosed. This asks nothing unfair of Plaintiffs; it holds them to the materials they themselves chose to designate.

CONCLUSION

For these reasons and those in the Motion, Defendants respectfully request that the Court preclude Plaintiffs from offering at trial any evidence, testimony, or argument in support of Counts II and V or their damages that they failed to disclose in response to Interrogatory Nos. 3, 5, 6, and 12. In the alternative, the Court should limit Plaintiffs to the specific documents they identified by Bates number and preclude the categories of undisclosed proof described above.

September 15, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 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