IN THE 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.	)	Case No. 2:20-cv-00007-JPJ-PMS

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION IN LIMINE TO EXCLUDE OUT-OF-SCOPE PORTIONS OF PLAINTIFFS' SUPPLEMENTAL EXPERT REPORTS

INTRODUCTION

Contrary to Plaintiffs' characterization of Defendants' Motion in Limine, Defendants' objection is narrow, straightforward, and important: Plaintiffs used the limited process the Court allowed to add new methods, new frameworks, and new lines of analysis that could have been disclosed in 2023 and that the supplemental discovery did not warrant. On March 4, 2026, the Court reopened discovery for a defined and limited purpose. It granted Plaintiffs leave to serve "one Rule 30(b)(6) deposition notice limited to any material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement," ten requests for production and ten interrogatories, and directed that, "[i]f necessary, the parties should provide supplemental expert reports and rebuttal expert reports." ECF No. 524 (Mar. 4, 2026) ("Order") at 2.

In their supplemental expert reports, Plaintiffs have exceeded the deliberately narrow scope of the additional discovery permitted by the Court's Order, which expressly stated that the interrogatories and the requests for production included in that notice, and the (if necessary) supplemental expert reports were "limited to any material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement." *Id.*

Undeterred by that limitation, Plaintiffs have used their supplemental reports as a new opportunity for their experts to present, revise, and/or attempt to strengthen their opinions in ways unrelated to any changes in the Step-Down Program. As explained in Defendants' opening brief: "The problem is not supplementation with genuinely new information. It is Plaintiffs' use of the supplemental-report process to re-present, strengthen, and in some instances subtly expand opinions that were either already disclosed or could have been disclosed in 2023." Defendants' Motion, ECF No. 563 (Aug. 24, 2026) ("Mot.") at 7.

Plaintiffs' supplemental report of Mr. Molter highlights this addition of new opinions and methods. Plaintiffs admit Mr. Molter included a previously undisclosed analysis in his second supplemental report, yet assert that the calculations related to those analyses "were always part of Mr. Molter's analyses." Plaintiffs' Opposition, ECF No. 582 (Sept. 8, 2026) ("Opp'n.") at 8. In other words, Mr. Molter could have included the individualized analysis in his earlier reports. He chose not to do so. He should not now be permitted to use supplemental discovery as an excuse to spring that analysis on Defendants at a late date.[1]

The supplemental reports of Dr. Haney, Mr. Pacholke, and Dr. Hendricks suffer from related, if narrower, defects: Dr. Haney restates his original opinion and relies—not on any changes in the Step-Down Program—but on roughly 100 publications, only three of which he identifies. Mr. Pacholke uses new lockdown figures as a vehicle to re-argue broad 2023 out-of-cell-time opinions. Dr. Hendricks goes beyond updating his opinions in ways relating to recent incidents of self-harm in the Step-Down Program and VDOC's new use of a "Safety Agreement"

[1] In light of Plaintiffs' explanation of Mr. Molter's analysis of the "51 class members," Opp. at 7-8, Defendants withdraw that portion of their motion addressing that analysis and Exhibits 16c, 16d, 16e, and 16f of Mr. Molter's second supplemental report, Mot. at 10-11. That withdrawal does not affect Defendants' other arguments.

in response to those incidents,[2] and uses those updates to re-present or expand his broader 2023 opinions about VDOC's mental-health screening, staffing, treatment, or response to self-harm in ways unrelated to any material post-2023 program change.

Each of Plaintiffs' four experts used the supplemental-report process not to update disclosed opinions in ways related "to any material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement," as required by the Order. Order at 2. The Court should not permit that limited process to substitute for the timely expert disclosures Rule 26 requires.

ARGUMENT

I. The March 4 Order Authorized Targeted Updates for Material Post-2023 Changes, Not New Expert Work That Could Have Been Disclosed in 2023

As noted above, in its relevant Order, the Court granted Plaintiffs leave to serve "one Rule 30(b)(6) deposition notice" which could "not include more than ten requests for production and ten interrogatories." Order at 2. The Court further allowed that, "[i]f necessary, the parties should provide supplemental expert reports and rebuttal expert reports." *Id*. Importantly, however, the deposition notice Plaintiffs were permitted to serve, the interrogatories and the requests for production included in that notice, and the (if necessary) supplemental expert reports were expressly "limited to any material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement." *Id*.

The allowance for supplementation under Rule 26 is likewise limited. Rule 26(e) "envisions supplementation to add additional or corrective information," and to construe

[2] As noted in their Motion, "Dr. Hendricks's supplemental report principally addresses two categories of post-2023 information: recent incidents of self-harm in the Step-Down Program and VDOC's new use of a "Safety Agreement" in response to those incidents. Defendants do not seek to preclude Dr. Hendricks from addressing either category to the extent he ties his opinions to material post-2023 developments." Mot. at 9.

supplementation to apply whenever a party wants to bolster or submit additional expert opinions would wreak havoc in docket control and amount to unlimited expert opinion preparation. *Campbell v. United States*, 470 F. App'x 153, 157 (4th Cir. 2012).[3] Supplementation is "only for the narrow purpose of correcting inaccuracies or adding information that was not available at the time of the initial report." *Mountain Valley Pipeline, LLC v. 8.37 Acres of Land*, *Owned By Terry*, No. 7:20-CV-134, 2020 WL 4810128, at *4 (W.D. Va. Aug. 18, 2020) (quoting *Minebea Co. v. Papst*, 231 F.R.D. 3, 6 (D.D.C. 2005)). It "does not cover failures of omission because the expert did an inadequate or incomplete preparation." *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002).

Both the Order and Rule 26(e) draw a line that governs every issue raised below: an expert may update a previously disclosed opinion to account for information that did not exist, or was not available, when the opinion was first prepared. An expert may not use that same process to disclose, for the first time, a method, framework, or analytical undertaking that the new information did not require and that could have been prepared during the original expert-disclosure period.

Consistent with both the allowances and the limitations of the Order and Rule 26, Defendants do not dispute that this process permitted genuine updates necessary to address material post-2023 developments. Defendants' Motion targets only Plaintiffs' experts' additions

[3] Plaintiffs are correct that *Campbell* addressed a purported Rule 26(e) supplement filed without leave of court. *See* Opp. at 3. But that factual distinction does not resolve this Motion. The March 4 Order authorized supplemental expert reports only within a defined process limited to "material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement." Order at 2. Thus, the question is not whether the Court permitted supplemental reports in the abstract; it is whether the challenged material is a proper response to the material post-2023 Program changes to which the Court limited that process. *Campbell* confirms the relevant principle: supplementation is not a mechanism to bolster or recast prior expert opinions through additional expert work that the authorized supplementation did not require. *See Campbell*, 470 F. App'x at 157.

that reflect new methods, frameworks, applications, or sources that no post-2023 change required and that could have been disclosed during the original expert-disclosure period.

II. Plaintiffs' Experts' Supplemental Reports Are Not Limited to Any Material Changes in the Step-Down Program

A. Molter Used the Supplemental Report to Introduce a New Individualized Analysis

Mr. Molter added new analyses to his second supplemental report. That report contains two new exhibits—16g and 16h—that do not appear in any of his previous reports. Each of these exhibits purports to calculate the time that individuals spent in the Step-Down Program based on three different scenarios. Plaintiffs do not deny these facts. Nor do Plaintiffs argue that the introduction of new information in supplemental discovery either warranted or enabled the new analyses.

Instead, Plaintiffs argue that "these calculations were always part of Mr. Molter's analyses." Opp'n. at 8. But whether Mr. Molter previously performed the analysis is not the point. Whether Mr. Molter ***disclosed*** the analysis in any of his previous reports is. He did not. As admitted by Plaintiffs, Plaintiffs could have disclosed this portion of Mr. Molter's analysis in any of the three expert reports that he submitted during the expert discovery period in 2023, when Defendants had more time to assess and respond to his methodology without the additional burden of trial preparation. Plaintiffs chose not to do so. Instead, Plaintiffs used the supplemental discovery period that they requested from the Court as an excuse to spring the analysis on Defendants on the eve of trial.

Plaintiffs then try to blame the addition of the new analysis on Defendants having "previously complained to the Court" about the lack of an individualized analysis. Opp'n. at 8. This argument only emphasizes the surprise and disruption to Defendants' trial preparation. Defendants' previous position came in the context of pointing out to the Court that, if the Court

were to award damages on a per diem basis—a result Defendants disagree is warranted—Mr. Molter had not provided the analysis necessary for the Court to do so. Defendants' Response to Plaintiffs' Submission Regarding Determination of Damages, ECF No. 461 at 9. In response, Plaintiffs argued that Defendants had the same data relied on by Mr. Molter and its own expert who could analyze the data, ***not*** that Mr. Molter had provided the Court with the requisite information. Plaintiffs' Reply Regarding Determination of Damages, ECF No. 465 at 6. Plaintiffs now, on the eve of trial, finally disclose the information they previously withheld.

Nor does it fix the issue to argue that Mr. Molter provided Defendants with his computer code. Opp'n. at 9. Plaintiffs do not now seek to include Mr. Molter's computer code in his second supplemental report, which still would be new material not previously included in his reports. Plaintiffs seek to include a new analysis that Mr. Molter did not include in his previous reports. No justification exists to permit them to do so.

B. Haney, Pacholke, and Hendricks Present Narrower, Distinct Defects That Warrant Correspondingly Narrow Relief

In addition to the issues detailed below, Plaintiffs' supplemental reports also repeat or reaffirm opinions previously disclosed in 2023. Defendants do not seek to exclude a report's mere summary of a timely disclosed opinion, or an expert's explanation of whether a genuine post-2023 Program development affects such an opinion. But the supplemental process did not authorize an expert to use a new report to introduce a new opinion or basis, or to re-present a broader merits opinion, without a demonstrated connection to a material post-2023 Program change. To the extent Plaintiffs rely on the supplemental reports for such presentation, Defendants preserve that objection; the more specific limitations below address the principal remaining instances.

1. Dr. Haney May Not Use the Supplemental Report to Renew His 2023 Opinions or Rely on an Unidentified Body of Literature

a. Summary of Prior Opinions Untethered to Material Program Changes

Plaintiffs contend that Dr. Haney's summary of his prior opinions provides necessary context and an anchor for his supplemental opinions. Defendants do not seek to exclude a brief summary that orients the reader to a timely disclosed opinion. But Dr. Haney's supplemental report does more. Its "Summary of Prior Opinions," paragraphs 4 through 5(a)–(n) (at 2–7) recapitulates his 2023 opinions, paragraphs 9 and 10 re-state his prior definition of "solitary confinement," and his first point in Paragraph 15 simply repeats his opinion that virtual contact does not substitute for in-person interaction. *See* Mot. Ex. 1 (Haney Supp. Rep.) at pp. 3, 8-12. Plaintiffs identify no material post-2023 change in the Step-Down Program requiring that renewed presentation of those opinions. The Court's Order permitted an update directed to such changes, not a new merits presentation of opinions already disclosed in 2023. Defendants accordingly do not object to a genuinely orienting summary, but preserve their objection to any use of the supplemental report to re-present, strengthen, or newly endorse broader 2023 opinions untethered to a material post-2023 Program change.

b. Haney References 100 Unidentified Studies

Dr. Haney's new literature discussion presents a separate and more concrete problem. Section IV identifies three recent studies and then asserts that "some 100 scientific studies, data-based book chapters, and other treatises published since 2018 that, with the exception of a very few outliers" corroborate his views. *Id.* at ¶ 19. Plaintiffs argue that the reference to approximately 100 sources refers to literature discussed in Dr. Haney's earlier reports. Opp'n. at 5. But that assertion does not cure the disclosure problem. If the approximately 100 sources are among the literature specifically identified in Dr. Haney's 2023 reports, Plaintiffs lose nothing from an order limiting him to the three newly identified studies and the sources itemized in those reports. If they are not, Dr. Haney cannot invoke them at trial as an asserted scientific foundation while

withholding their identity. Rule 26(a)(2)(B)(ii) requires disclosure of the facts or data considered in forming an opinion; sources that are neither listed, cited, nor described cannot be assessed for relevance, methodology, reliability, or the proposition for which they are offered. Mot. at 8-9; *see Akeva L.L.C.*, 212 F.R.D. at 310.

Plaintiffs also contend that the Order did not require Dr. Haney to disregard intervening scientific developments. Opp'n. at 4. Defendants do not contend otherwise, and do not seek to exclude the three recent studies Dr. Haney specifically identifies. But the relevant question is whether the March 4 Order authorized the use of the supplemental-report process to add general scientific literature untethered to a material post-2023 change in the Step-Down Program. It did not. Plaintiffs do not contend that the asserted body of additional literature responds to any such change. Rather, it is offered to reinforce Dr. Haney's unchanged 2023 opinions about the general effects of solitary confinement—the sort of rolling literature update and bolstering that the limited supplemental process did not authorize. *See Campbell*, 470 F. App'x at 157. In any event, Dr. Haney should be precluded from invoking at trial any publication within the asserted body of approximately 100 sources that he did not specifically identify in his reports.

2. Mr. Pacholke May Report New Lockdown Data, But May Not Use It to Re-Present Broader 2023 Out-of-Cell-Time Opinions

Defendants do not dispute that the post-2023 information in Mr. Pacholke's supplemental report—including the new lockdown figures—is a proper subject of supplementation when used to address whether a material change affected his timely disclosed opinions, and Defendants said so in their Motion. *See* Mot. at 9. The difficulty is the use to which those figures and other new materials are put. Section after section of the report opens by reaffirming a 2023 opinion and closes by declaring it unchanged or strengthened—on alleged unnecessary deprivation, Program complexity, ACA standards, the so-called review "gauntlet," discipline and retaliation

accusations, supposed supervisory failures, and the named Plaintiffs' grievances. *See* Mot. at 9-10 (identifying Ex. 3 (Pacholke Supp. Rep.) ¶¶ 7–36, 51–61, 71–76). His renewed discussion of cell design and the use of attack dogs simply cites his Opening Report. *Id.*, citing Mot. Ex. 3 (Pacholke Supp. Rep.) at ¶¶ 68–69.

Plaintiffs answer that a corrections expert had to assess whether recent developments affected his conclusions. Opp'n. at 6. Defendants do not dispute that proposition. Mr. Pacholke may address genuine post-2023 developments and explain whether and how they affect opinions he timely disclosed. But Plaintiffs' characterization of the report as a reaffirmation of existing opinions cannot resolve, in the abstract, whether a particular opinion or its asserted basis was previously disclosed or is properly responsive to a material change in the Step-Down Program. The supplemental process did not permit Mr. Pacholke to offer at trial a new opinion or a new basis for an earlier opinion merely by describing it as confirmation that his prior conclusions remain unchanged or have been strengthened. The issue is not whether he may state that a genuine post-2023 development did or did not affect a timely disclosed opinion; it is whether the particular opinion or asserted basis is actually responsive to such a development. The same limitation applies to new general literature offered to support an unchanged opinion without a demonstrated connection to a material post-2023 Program development. Accordingly, to the extent Defendants object at trial and establish that a proffered Pacholke opinion or its supporting basis was neither disclosed in his original reports nor properly tied to a material post-2023 Program development, the objection should be sustained. Mr. Pacholke should otherwise be limited to the post-2023 facts he identifies—including the new lockdown figures—and opinions properly tied to those facts.

3. Dr. Hendricks May Address the Post-2023 Self-Harm Incidents and the Safety Agreement, But Not Use Them to Re-Present or Expand His Broader 2023 Opinions

Dr. Hendricks may address the recent incidents of self-harm in the Step-Down Program and VDOC's new use of a "Safety Agreement" "to the extent he ties his opinions to material post-2023 developments." Mot. at 9. What the supplemental process did not authorize is the use of those developments "as a vehicle to re-present or expand his broader 2023 opinions about VDOC's mental-health screening, staffing, treatment, or response to self-harm." *Id*. His "Summary of Prior Opinions" restates the 2023 opinions on screening, staffing, and care, Mot. Ex. 2 (Hendricks Supp. Rep.) at pp. 2–3, and he concludes that the new material "provides additional support for certain of those opinions," *id*. at p. 2.

Plaintiffs defend this as background and context and observe that Defendants have known these opinions since 2023. *See* Opp'n. at 5. Defendants do not seek to strike a summary for context, but familiarity with Dr. Hendricks' 2023 opinions does not permit their re-presentation or expansion through a report whose proper office was to address material post-2023 developments. The objection is to generalized clinical exposition on self-harm, and to renewed mental-health opinions, that are *not* tied to the post-2023 incidents, the Safety Agreement, or another material post-2023 program change. That material could have been disclosed in 2023, and the supplemental process was not the occasion to disclose or re-endorse it. *Campbell*, 470 F. App'x at 157.

Dr. Hendricks should be limited to the post-2023 developments he identifies—the recent self-harm incidents and the Safety Agreement—and to opinions properly tied to those developments. Defendants cannot simply rely on Dr. Hendricks' characterization that a given statement merely "provides additional support" for an existing opinion. Whether a particular statement is genuinely unchanged, or is instead a new opinion or a new basis dressed in the language of reaffirmation, cannot reliably be determined from the report alone—and is even harder

to assess as it is offered live, in real time, during trial testimony. Accordingly, to the extent Defendants object at trial and establish that a proffered Hendricks opinion or its supporting basis was neither disclosed in his original reports nor properly tied to a material post-2023 Program development, the objection should be sustained.

III. Plaintiffs Have Not Shown That the Challenged Additions Are Substantially Justified or Harmless

Rule 37(c)(1) requires exclusion unless Plaintiffs show that the challenged late disclosures were substantially justified or harmless. The burden is Plaintiffs', and no showing of bad faith is required. *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003); *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014). In assessing whether a nondisclosure is substantially justified or harmless, the Court considers the surprise to the opposing party, the ability to cure that surprise, the potential disruption of trial, the importance of the evidence, and the explanation for the nondisclosure. *S. States*, 318 F.3d at 597. Plaintiffs have not shown that those factors favor admission of the challenged material.

Plaintiffs cannot carry that burden by observing that Defendants submitted rebuttal reports or, as to Mr. Molter, could have sought further discovery. Defendants do not claim surprise from mere restatements of timely disclosed 2023 opinions. But that is not the challenged material. The surprise is the new work disclosed in June 2026—most clearly, Mr. Molter's previously undisclosed individualized schedules in Exhibits 16g and 16h—and Dr. Haney's asserted reliance on an unidentified body of roughly 100 sources. Those disclosures appeared after the original expert depositions, during a short supplemental process that proceeded from the June 18 disclosures to a rebuttal deadline roughly two weeks later and then to the close of supplemental expert discovery.

That process allowed a response, but it did not restore a fair opportunity to evaluate a new method or analytical undertaking before deposition, examine the expert under oath about its premises and sources, develop targeted rebuttal testimony, and consider Rule 702 issues on a stable disclosure record. As the Fourth Circuit explains, "the ability to simply cross-examine an expert concerning a new opinion at trial is not the ability to cure." *S. States*, 318 F.3d at 598.

Dr. Haney's reliance on an unidentified body of roughly 100 sources presents a related but distinct harm: because those sources are neither listed nor described, Defendants cannot assess their relevance, methodology, or reliability, and Defendants' experts could not address them in rebuttal. Mr. Pacholke's use of the supplemental report to re-present broader 2023 opinions, and Dr. Hendricks' use of post-2023 developments to re-present or expand broader 2023 opinions, present a related problem. Defendants cannot reliably determine from the reports alone which statements and asserted bases are genuinely responsive to new post-2023 facts and which instead repeat, supplement, or expand the prior merits opinions. That determination becomes only harder as testimony is offered live at trial.

Nor have Plaintiffs explained why Mr. Molter's individualized-schedule methodology could not have been disclosed in 2023, particularly after Defendants raised the absence of such an analysis. Plaintiffs' assertion that Mr. Molter had always performed the calculations, and their reference to the production of his computer code, do not explain why the individualized schedules themselves were omitted from his prior reports or why their first disclosure was proper in a supplemental process limited to material post-2023 Program changes. To the extent Plaintiffs contend that any challenged material is important, that consideration does not excuse late disclosure; rather, the greater the importance of the evidence, the greater the need for timely

disclosure so that the opposing party may fairly test and address it. See *Deque Sys. Inc. v. Browserstack, Inc.*, 177 F.4th 585, 596 (4th Cir. 2026).

Plaintiffs have not established a substantial justification for withholding Mr. Molter's individualized-schedule analysis until the supplemental period, particularly after Defendants identified the absence of that analysis in earlier proceedings. Nor have Plaintiffs shown that Dr. Haney may invoke at trial an asserted body of approximately 100 sources that were never specifically identified. The same is true of any portion of Dr. Haney's, Mr. Pacholke's, or Dr. Hendricks's supplemental opinions that is not properly tied to a material post-2023 Program development. The Court should therefore grant the targeted, opinion-specific relief requested below.

IV. The Court Should Grant Narrow, Expert-Specific Relief While Preserving Properly Supplemented Testimony

The requested relief follows the limitation maintained throughout this Reply. Defendants do not seek to exclude any expert or to prevent Plaintiffs' experts from addressing genuine post-2023 developments. Each expert may offer opinions timely disclosed in 2023 as properly updated within the scope of the March 4 Order. Thus, Defendants do not challenge Mr. Molter's updated aggregate analysis under his disclosed methodology for the 939 class members; Dr. Hendricks may describe and evaluate the Safety Agreement within his timely disclosed mental-health opinions; Mr. Pacholke may report and opine on the new lockdown information; and Dr. Haney may rely on the three newly identified studies as well as literature itemized in his 2023 disclosures. Defendants likewise do not press their objection to Mr. Molter's Exhibit 15.

The Court has "particularly wide latitude" under Rule 37(c)(1) to impose relief tailored to the particular disclosure defect. *S. States*, 318 F.3d at 595. The relief requested here is accordingly

limited to the discrete new material and to untethered re-presentation of 2023 opinions that fall outside the authorized supplemental process.

Defendants respectfully request that the Court enter an order:

1. Precluding Mr. Molter's individualized schedules in Exhibits 16g and 16h, while permitting his aggregate analyses timely disclosed and properly updated with the new CORIS data;

2. Barring Dr. Haney from relying at trial on any publication within the asserted body of approximately 100 studies, book chapters, and treatises that he did not specifically identify in his reports; and

3. Providing that, at trial, Defendants may object to any opinion or basis offered by Dr. Haney, Mr. Pacholke, or Dr. Hendricks on the ground that it was not disclosed in that expert's original reports and is not properly tied to a material post-2023 Program development, and that such an objection should be sustained upon that showing—including, for Mr. Pacholke, any re-presentation of his broader 2023 out-of-cell-time opinions untethered to the new lockdown information or another identified post-2023 development, and, for Dr. Hendricks, any generalized clinical exposition or renewed mental-health opinion untethered to the post-2023 self-harm incidents, the Safety Agreement, or another identified post-2023 development.

CONCLUSION

For the foregoing reasons, and those stated in the Motion, Defendants respectfully request that the Court grant the Motion in Limine to the extent set forth above and enter the targeted relief requested.

September 15, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 15, 2026, I electronically filed the foregoing 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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