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' REPLY IN SUPPORT OF THEIR MOTION *IN LIMINE* TO PRECLUDE DEFENDANTS FROM OFFERING TESTIMONY FROM UNDISCLOSED WITNESSES

Defendants' Opposition (ECF No. 576) confirms, rather than refutes, the need for exclusion of testimony from three previously-undisclosed witnesses. Defendants do not dispute that they never identified Mr. Anton Daniels, Dr. Julie Fink, or Mr. Joseph Walters in any Rule 26(a)(1)(A) disclosure. Instead, they offer a series of post hoc justifications that collapse under scrutiny. Tellingly, Defendants' arguments are irreconcilable with their opposition to Plaintiffs' request for supplemental discovery several months ago, where Defendants represented that any changes to the Step-Down Program were minor and vigorously opposed any additional depositions. Having taken that position, Defendants cannot now claim that three undisclosed witnesses who have not been deposed would offer testimony critical to Defendants' defenses that Plaintiffs should have sought during the supplemental discovery period.

Plaintiffs respectfully submit that every factor under *Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592 (4th Cir. 2003) continues to support exclusion.

I. Defendants' "Awareness" Arguments Are Irrelevant Because Plaintiffs Had No Notice These Individuals Possessed Discoverable Information Defendants Intended to Use.

Implicitly acknowledging that they never supplemented their Rule 26(a)(1)(A) disclosures, Defendants spend much of their Opposition arguing that Plaintiffs were "aware" of Mr. Walters and Mr. Daniels because their names were referenced in an untimely interrogatory response and a deposition taken out-of-time by agreement of the parties, and that Plaintiffs "knew" of Dr. Fink because Plaintiffs listed her in their own disclosures. *See, e.g.*, Opposition at 7–9. These arguments miss the mark.

A. The "Notice" Relied Upon by Defendants Occurred After Supplemental Fact Discovery Closed and Was Not a Substitute for Proper Disclosure.

Defendants do not dispute that they failed to supplement their Rule 26(a)(1)(A) disclosures, despite their continuing obligation and ample opportunity to do so. Fed. R. Civ. P. 26(e).[1] Defendants point instead to the "safe harbor" provided by Rule 26(e)(1)(A), arguing that Mr. Daniels and Mr. Walters were "made known" to Plaintiffs through the June 5, 2026 deposition of Amee Duncan and their June 2, 2026 supplemental interrogatory responses. Opposition at 4–5. But Defendants conspicuously omit a critical fact: the timeline. Supplemental ***fact*** discovery closed on May 18, 2026. ECF No. 524 at 2; ECF No. 520.1. Defendants assert that these events occurred during the "supplemental discovery period," *see* Opposition at 8, but fail to mention that the deposition and their supplemental interrogatory responses occurred out of time, after the close

[1] Defendants assert that "Plaintiffs' motion does not identify any discovery failure triggering [the exclusion rule provided by Fed. R. Civ. P. 37(c)(1)]," Opposition at 4, but it does: Plaintiffs' motion explains that Defendants "never supplemented their disclosures to add [the witnesses], as Rule 26(e) required," Motion at 4. *See* Fed. R. Civ. P. 26(e).

Rule 26(e) imposes a continuing obligation to supplement a party's Rule 26(a) disclosures, which Defendants did not meet. For this reason, Defendants' argument that "the Court's order allowing limited supplemental discovery did not require [supplemental Rule 26(a) disclosures]" is beside the point—Rule 26(e)'s obligation to supplement does not require a Court order.

of supplemental ***fact*** discovery and during supplemental ***expert*** discovery.[2] *See* ECF No. 546 (Order extending supplemental expert discovery deadlines). Defendants' untimely interrogatory responses and out-of-time deposition cannot substitute for timely Rule 26(a) disclosures.[3]

This is not a case where Defendants disclosed witnesses during the discovery period (or even supplemental fact discovery period) and Plaintiffs simply chose not to depose them. This is not even a case where Defendants clearly notified Plaintiffs that these three individuals had assumed new roles and would be relied upon by Defendants going forward. It is a case where Defendants chose not to disclose these witnesses throughout the entire matter, including the supplemental discovery period, and where these individuals only happened to be mentioned in passing during a deposition and in an interrogatory response that took place after supplemental fact discovery had already closed. Even if Defendants had indicated at that time an intent to rely on these witnesses to support their case (which they did not), by the time Plaintiffs could have learned anything from the Duncan deposition or supplemental interrogatory responses, there was no remaining fact discovery period in which to serve interrogatories or document requests or to schedule depositions of these witnesses.

Thus, Defendants' suggestion that Plaintiffs should have "taken steps [to depose them] during the supplemental discovery period," Opposition at 11, rewrites the calendar; the "disclosures" Defendants rely on took place after the relevant period ended. Indeed, Defendants' suggestion is illusory: when Plaintiffs requested a supplemental discovery period, Defendants

[2] Defendants had indicated in email correspondence during the supplemental fact discovery period that they intended to supplement their interrogatory responses, but inexplicably did not do so until well after the fact discovery period had closed.

[3] Plaintiffs do not contend that the out-of-time deposition was improper. Rather, Plaintiffs cite the timing to demonstrate that, by the time this information was disclosed, supplemental fact discovery had already closed, leaving Plaintiffs no opportunity to follow up on the information learned through additional document requests or depositions.

"oppose[d] a deposition, additional requests for production, or additional expert discovery." ECF No. 520 at 2. Defendants cannot now say that Plaintiffs should have requested the very discovery that Defendants vigorously opposed.

B. The Witnesses' Status as Substituted Parties Is Not a Substitute for Supplemental Disclosures.

Defendants cite the Court's decision in *Quesenberry v. Volvo Group North America, Inc.*, 267 F.R.D. 475 (W.D. Va. 2010) and argue that because these three witnesses "were substituted as parties to the litigation," Plaintiffs were on notice and Defendants were relieved of their obligation to supplement their Rule 26(a) disclosures. Opposition at 5–6. But *Quesenberry* undermines—rather than supports—Defendants' position.

In *Quesenberry*, the court held that the five named plaintiffs—Mary Quesenberry, Paul Hollandsworth, Walter Viers, Robert Goad, and Shirley Tolbert—"did not have to be identified in supplemental disclosures" because "[t]he defendants were clearly aware of the identity of the class representatives." *Id.* at 478–79. But the individuals at issue here—Mr. Daniels, Dr. Fink, and Mr. Walters—are not named parties in any sense. Even if, as Defendants argue, these three individuals were technically substituted for their predecessors in their official capacities as a matter of law, that substitution occurred without any kind of notice to Plaintiffs: their names do not appear as parties on the docket, Defendants never identified them as substitute parties until Plaintiffs objected to Defendants' trial witness list, and Plaintiffs had no reason to presume they would become trial witnesses. Accordingly, Defendants' argument may have applied to these witnesses' three predecessors, who were named as parties, but the exception the *Quesenberry* court applied to named plaintiffs has no application here.

C. Defendants' Claim That Dr. Fink Was Adequately Disclosed Through Plaintiffs' Own Disclosures Fails.

Defendants argue at length that Plaintiffs cannot be "surprised" by Dr. Fink because Plaintiffs identified her in their own Rule 26(a)(1)(A) disclosures. Opposition at 6–8. But that argument is difficult to reconcile with the central premise of Defendants' Opposition: that Dr. Fink's testimony is relevant because she later assumed a different position and therefore possesses knowledge different from that reflected in Plaintiffs' disclosures. Defendants seek to capitalize on the fact that Dr. Fink's role changed while simultaneously contending that Plaintiffs' earlier disclosure of Dr. Fink in *a different role* provided adequate notice of the testimony Defendants now intend to elicit.

In Plaintiffs' disclosures, Dr. Fink was identified for her knowledge of "[m]ental 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." ECF No. 576-4 at 4. That is the subject matter for which Plaintiffs believed Dr. Fink had information relevant to Plaintiffs' claims—her knowledge as a mental health professional.

That limited scope stands in stark contrast to the broad institutional subject matter known by Dr. Malone—Dr. Fink's predecessor. As an example, when Plaintiffs identified Dr. Malone in their Rule 26(a) disclosures, they disclosed the following subject matter:

> Conditions of confinement at Red Onion and/or Wallens Ridge; behavior, conduct, disabilities, and/or mental health status among Class Plaintiffs and members of the putative class; implementation of the Step-Down Program at Red Onion and/or Wallens Ridge; VDOC policies and procedures pertaining to mental health treatment for VDOC inmates at all institutions, including Red Onion and/or Wallens Ridge; the management and operations of mental-health services at Red Onion and/or Wallens Ridge; mental health services or treatment provided to the Class Plaintiffs and members of the putative class at Red Onion and/or Wallens Ridge; the effect of restrictive housing conditions on prisoners' mental health;

> conditions in Red Onion and/or Wallens Ridge restrictive housing units and treatment of Class Plaintiffs and members of the putative class[.]

See id. at 5. This is far broader than the disclosure Plaintiffs made for Dr. Fink.

Defendants now seek to call Dr. Fink not as the mental health professional Plaintiffs disclosed, but as Dr. Malone's successor—an official-capacity role that Defendants never identified her as filling, and that carries a fundamentally different (and far broader) set of potential testimony subjects, including "VDOC's institutional policies, programs, and conditions." Opposition at 10. Plaintiffs' disclosure of Dr. Fink as a mental health clinician did not put Plaintiffs on notice that Defendants intended to use her as a substitute for Dr. Malone to testify about the full range of institutional policies, programs, and conditions that Dr. Malone addressed in her deposition. Nor should Plaintiffs have been expected to see into the future and divine that Dr. Fink would at some point assume her current role, and that Defendants would then seek to rely on her trial testimony.

This is precisely the kind of situation the Court addressed in *Quesenberry*, where the Court found that the mention of an individual's name in a document did not satisfy the disclosure obligation because it failed to disclose the subjects of information the disclosing party intended to elicit. *Quesenberry*, 267 F.R.D. at 479 n.2.

D. Awareness of an Individual's Existence Is Not the Same as Notice That the Individual Has Discoverable Information Defendants Intend to Use.

Even setting aside the timing problem, which itself is fatal, Defendants' "awareness" argument fails on its own terms. Knowing that a person exists or occupies a certain position is not the same as knowing that a person has discoverable information that the opposing party intends to use to support its defenses. Rule 26(a)(1)(A) requires not only the disclosure of individuals "likely to have discoverable information . . . that the disclosing party may use to support its claims or defenses," but also "the subjects of that information." Fed. R. Civ. P. 26(a)(1)(A). The purpose of

this rule is to ensure that the opposing party knows not merely who exists, but what kind of information they may possess that the disclosing party may rely on. Even if Plaintiffs had been fairly informed of these three individuals' new roles, Plaintiffs had no reason to believe that Mr. Walters, Mr. Daniels, or Dr. Fink possessed any unique or additional discoverable information beyond what their predecessors—all of whom were already deposed—had already provided, or that Defendants would seek to rely on these new witnesses as part of their defense.

The mere mention of two VDOC employees and their titles says nothing about what testimony Defendants expect them to provide and nothing about the subjects of discoverable information they purportedly possess that Defendants plan to use in their defense. This Court in *Quesenberry* rejected the argument that the identification of a witness in a document produced during discovery provided sufficient notice because the document failed to apprise the opposing party of the "subjects of that information" which the individual was knowledgeable about. *See Quesenberry*, 267 F.R.D. at 479 n.2.

VDOC employs over 11,000 individuals[4]; if the mere mention of an employee's name and job title were sufficient to satisfy Rule 26's disclosure requirements, as Defendants suggest, Plaintiffs would be obligated to chase down every VDOC employee whose name surfaced in any discovery response or deposition transcript, investigate whether that person might possess information relevant to Defendants' defenses, and take preemptive steps to depose them—all without any indication from Defendants that they intended to rely on those individuals' knowledge. That is not what Rule 26 requires. The Court came to a similar conclusion in *Quesenberry*, concluding that the mere fact that the witnesses were class members did not excuse the plaintiff's

[4] Virginia Department of Corrections, *available at* https://vadoc.virginia.gov/about/ (last visited Sept. 14, 2026).

failure to serve supplemental Rule 26(a) disclosures identifying them. *Quesenberry*, 267 F.R.D. at 479 ("There were hundreds of class members in this case, and it would have been unreasonable to draw the conclusion that all of them may have had knowledge of relevant events."). The Rule 26(a) disclosure obligation exists precisely so that parties do not have to guess which of an opposing party's thousands of employees might be relied upon in litigation; it is Defendants' burden to identify the individuals they intend to present testimony from, not Plaintiffs' burden to divine that intent from passing references in deposition testimony.

E. Defendants' Arguments Contradict Their Earlier Opposition to Plaintiffs' Request for Supplemental Discovery.

Even if the Court credits the incidental, out-of-time disclosures identified by Defendants, Defendants' own conduct gave Plaintiffs every reason to believe that there were no individuals beyond those previously identified during the initial discovery period, let alone these three specific individuals, who had information on which Defendants would rely, thus warranting additional discovery. Defendants vigorously opposed Plaintiffs' request for supplemental discovery, including specifically opposing additional depositions, representing that very few, if any, material or other changes to the Step-Down Program had been made. ECF No. 520 at 2–3. In the parties' joint status conference agenda, Plaintiffs proposed limited supplemental discovery consisting of a single Rule 30(b)(6) deposition,[5] ten requests for production, and ten interrogatories to address changes that had occurred in the more than three years since the close of discovery. *Id*. at 2. Defendants objected that "extensive additional discovery" was unnecessary, touted the "tremendous efforts" they had already expended in responding to prior discovery, and proposed

[5] Indeed, had Defendants disclosed that they intended to rely on any additional individuals to support their defense—as was their continuing obligation to do under Rule 26—Plaintiffs would have also sought leave to depose these individuals during the supplemental discovery period.

that Plaintiffs be limited to propounding just one additional interrogatory "related to what changes, if any, there have been to the Step-Down Program since the close of fact discovery." *Id*. at 2–3. Defendants expressly "**oppose[d] a deposition**, additional requests for production, or additional expert discovery." *Id*. at 3 (emphasis added).

The unmistakable premise of Defendants' opposition was that any changes to the Step-Down Program were minor and immaterial and that a single interrogatory was sufficient to capture whatever developments had occurred. Having taken that position, Defendants cannot now turn around and argue that three never-disclosed successor officials possess critical testimony about "present conditions, current policies, and ongoing practices at VDOC." Opposition at 12. Assuming that is true, then the Defendants were obligated to supplement their initial disclosures precisely because these individuals possess information not already in the record—and Defendants' failure to do so during the supplemental discovery period (or at any other time) is inexcusable.

Defendants' positions are irreconcilable. Defendants represented that any changes to the Step-Down Program were minor and immaterial—and then, without ever supplementing their disclosures, revealed three undisclosed witnesses whom they now insist possess important information about current conditions at VDOC's facilities. Defendants insist they should be permitted to call these witnesses at trial to testify about current conditions at VDOC's facilities—but took the position that Plaintiffs should not be permitted to depose anyone, let alone these (undisclosed) individuals. Defendants cannot have it both ways. Their contradictory positions underscore that Plaintiffs' motion should be granted.

II. The *Southern States* Factors Favor Exclusion.

A. Surprise

The surprise to Plaintiffs remains complete. Plaintiffs had no advance notice that Defendants intended to rely on these three individuals in support of their defenses. Defendants never identified them in their Rule 26(a)(1)(A) disclosures, and as explained above, the incidental mention of names in a post-discovery-deadline deposition and interrogatory response cannot substitute for the disclosure that Rule 26 requires.

B. Ability to Cure

The surprise cannot be cured at this stage. Defendants first identified these witnesses on August 10, 2026, less than two months before the start of trial. ECF No. 557-1. Both initial and supplemental fact discovery have closed. Curing the prejudice would require reopening discovery for a second time to collect and review documents specific to these witnesses, take depositions, and revisit trial preparation—all in the few weeks that remain and that Plaintiffs must devote to preparing a class trial. This is precisely the kind of disruption that the disclosure rules are designed to prevent. *See Quesenberry*, 267 F.R.D. at 481 ("Certainly, the defendants could not have had time to conduct nineteen depositions without delaying the trial, and rescheduling the trial, as discussed above, would have been highly disruptive.").

C. Disruption to the Trial

Allowing the testimony of three undisclosed witnesses would disrupt the trial. If permitted to testify, the scope of Defendants' examinations would be unlimited, and Plaintiffs would be forced to cross-examine witnesses they have never deposed and whose testimony they have had no opportunity to investigate. This severely undercuts the fairness of trial. *See Quesenberry*, 267 F.R.D. at 481 ("It would also have been highly prejudicial to defendants to allow the testimony of nineteen individuals, none of whom the defendants had had the opportunity to depose.").

D. Explanation for the Failure to Disclose

Defendants still provide no valid explanation for their failure to disclose these witnesses. They had ample opportunity to supplement their disclosures during the supplemental discovery period, particularly given that the entire purpose of supplemental discovery was to account for changes that had occurred since the close of initial discovery. Yet Defendants chose not to, despite Rule 26(e)'s continuing supplementation obligation.

E. Importance of the Testimony

Finally, the asserted importance of the testimony does not counsel a different result. Defendants have not identified any subject that cannot be addressed through the witnesses Defendants did disclose, including the predecessor parties (Dr. Malone, Ms. Raiford, and Director Clarke), and Defendants' 30(b)(6) witness on material changes to the subject Step-Down Program (Ms. Duncan), all of whom were deposed and are already on Defendants' witness list. ECF No. 557-1. To the extent Defendants contend that these witnesses have new testimony about "present conditions" and "ongoing practices," that contention is flatly inconsistent with Defendants' opposition to Plaintiffs' request for supplemental discovery.

III. Conclusion

Plaintiffs respectfully request that the Court grant their motion in limine and preclude Defendants from offering testimony from Mr. Walters, Mr. Daniels, and Dr. Fink.

Dated: September 15, 2026

Respectfully Submitted,

/s/ *Jared Frisch*

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th 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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