IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

NATIONAL FEDERATION OF THE BLIND, *et al.*,

Plaintiffs,

v. Case No. 3:23cv127

VIRGINIA DEPARTMENT OF CORRECTIONS,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION *IN LIMINE* TO EXCLUDE THE EXPERT TESTIMONY OF RICHARD WELLS

The Virginia Department of Corrections ("VDOC" or "Defendant"), by counsel, submits the following Memorandum in support of its Motion *In Limine* to Exclude the Expert Testimony of Richard Wells. In support of its Motion, VDOC submits the Expert Report of Richard Wells as Exhibit 1 ("Wells Report"), the Supplemental Expert Report of Richard Wells as Exhibit 2 ("Wells Suppl. Report"), and the deposition transcript of Richard Wells as Exhibit 3 ("Wells Dep.").

PLAINTIFFS' CLAIMS

This case has been brought by four current VDOC inmates, two former inmates,[1] and one non-profit organization, regarding various accommodations that the incarcerated Plaintiffs allege that they were denied for their vision impairments while they were housed at Deerfield Correctional Center ("Deerfield") and Greensville Correctional Center ("Greensville"). This action currently proceeds on the Plaintiffs' Amended Complaint, in which the Plaintiffs bring claims under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation

[1] As of the date of this filing, Plaintiff Nacarlo Courtney and Plaintiff Kevin Shabazz have been released from VDOC custody.

Act ("RA") against VDOC. (*See* Am. Compl., ECF No. 136.)

This case is currently set for a jury trial to begin on May 20, 2024. In support of their case, the Plaintiffs intend to present the testimony of Richard Wells, and four other experts, at trial. For the reasons explained herein, Defendants submit that Wells' testimony should be excluded, or limited, pursuant to this Court's Scheduling Order, Federal Rule of Evidence 702, and under Federal Rule of Civil Procedure 26.

WELLS' PROPOSED TESTIMONY

Wells is expected to testify regarding VDOC's ADA policies, procedures, and staff training. In his Report, Wells offers the following opinions:

> a. VDOC's written guidelines governing staff ADA/disability-related responsibilities are inadequate, and therefore staff are not aware that VDOC expects them to accommodate individuals with disabilities and ultimately fail to provide effective reasonable accommodations to incarcerated persons with disabilities, including for blind/vision impaired people.
>
> b. VDOC staff are not adequately trained on the requirements of the ADA and VDOC's own ADA-related policies, and VDOC's ADA/disability policies and procedures fall below the ADA's minimum requirements. This contributes to the failure to identify and accommodate people with disabilities, including people with blindness/vision disabilities.
>
> c. VDOC's disability program is inadequately staffed and monitored to ensure effectiveness.
>
> d. VDOC's intake procedures are not sufficient to identify incarcerated persons with disabilities, including people who are blind/ low vision, and does not result in adequate identification of reasonable accommodation needs for those individuals. Further, VDOC's policies and procedures fail to identify and track incarcerated persons with disabilities, including people with vision disabilities to provide adequate accommodations.
>
> e. VDOC's incarcerated person Orientation process is not adequate and does not effectively inform incarcerated persons, including people with vision disabilities, of information regarding ADA/disability rights, policies and procedures, or available accommodations for new (or newly transferred) incarcerated persons at intake. The information Greensville and Deerfield provide to inmates during intake is inadequate to fully inform them on those topics.

f. VDOC's housing placement process for incarcerated persons with disabilities, including for people with vision disabilities, is not adequate and presents safety concerns.

g. VDOC staff are not providing written materials/information in accessible formats to incarcerated persons with disabilities, including people with vision disabilities.

h. VDOC does not provide incarcerated persons with disabilities, including vision disabilities, with equal access to programs, services, and activities.

i. VDOC's grievance procedure/process, and request process (including requests for disability-related accommodations) is inadequate to provide a meaningful complaint and request process that provides for a prompt and equitable resolution to ADA/disability-related complaints/requests.

(Wells Report 8-9.)

NON-SCIENTIFIC EXPERT WITNESS STANDARD

Rule 702 of the Federal Rules of Evidence and the line of cases flowing from the Supreme Court's decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc*., 509 U.S. 579 (1993) govern VDOC's challenge to the admissibility of Wells' testimony. Rule 702 provides that an expert may testify in the form of an opinion if the expert's scientific, technical, or other specialized knowledge will help the jury understand the evidence or determine a basic fact in issue; the testimony is based on sufficient facts or data; is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case. Application of Rule 702 involves two primary inquiries: (1) whether the proposed testimony is reliable; and (2) whether it is relevant. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 141 (1999); *United States v. Forrest*, 429 F.3d 73, 80 (4th Cir. 2005). Before allowing a jury to hear disputed expert testimony, a court must make these inquiries and exercise its gatekeeping function. *Nease v. Ford Motor Co*., 848 F.3d 219, 230–31 (4th Cir. 2017). As noted by the Fourth Circuit, although "Rule 702 was intended to liberalize the introduction of relevant expert evidence," the potentially powerful and persuasive nature of such evidence requires its exclusion when there exists "a greater potential to

mislead than to enlighten." *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 261 (4th Cir. 1999).

A court assessing the relevance of an expert's testimony reviews "whether . . . [it] is sufficiently tied to the facts of the case . . . [and] will aid the jury in resolving a factual dispute." *Daubert*, 509 U.S. at 591 (citation omitted). Expert testimony about matters coming within a jury's knowledge and experience is not helpful and is barred by Rule 702. *Persinger v. Norfolk & W. Ry. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990). For expert testimony to satisfy the "fit" requirement of Rule 702, "[t]here must be a valid connection between the expertise in question and the inquiry being made in the case." *United States v. Velasquez*, 64 F.3d 844, 850 (3d Cir. 1995) (citation omitted).

As the Fourth Circuit noted in *Nease*, the Supreme Court's decision in "*Kumho Tire* [made clear] that *Daubert* was not limited to the testimony of scientists." 848 F.3d at 230. A non-scientist expert, whose opinions arise from his experience, must explain "how his experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts." *Peters-Martin v. Navistar Int'l Transp. Corp*., 410 F. App'x 612, 618 (4th Cir. 2011). Accordingly, an "expert report should be written in a manner that reflects the testimony the expert witness is expected to give at trial." *Sharpe v. United States*, 230 F.R.D. 452, 458 (E.D. Va. 2005). "Expert reports must include how and why the expert reached a particular result, not merely the expert's conclusory opinions." *Washington v. McKee*, No. 4:06cv6, 2006 WL 2252064, at *2 (E.D. Va. Aug. 3, 2006) (internal quotations omitted) (citing *Salgado v. Gen. Motors Corp*., 150 F. 3d 735, 742 (7th Cir. 1998)). A non-scientific expert "cannot ask a court simply to take his or her word for it; rather, he or she must explain how that experience leads to the conclusion reached . . . and how that experience is reliably applied to the facts." *Thomas v. City of Chattanooga*, 398 F.3d 426, 4312 (6th Cir. 2005) (quoting Fed. R. Evid. 702

adv. comm. note). The proponent of expert testimony bears the burden of establishing, by a preponderance of the evidence, that the testimony is admissible in accordance with these principles. *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 199 (4th Cir. 2001) (citation omitted). Finally, "throughout the admissibility determination, a judge must be mindful of other evidentiary rules, such as FRE 403, which permits the exclusion of relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *United States v. Dorsey*, 45 F.3d 809, 813 (4th Cir. 1995), *cert. denied*, 515 U.S. 1168 (1995) (quoting *Daubert*, 509 U.S. at 595).

ARGUMENT

As an initial matter, the Court's Scheduling Order in this case states that "[e]ach party may call only one expert per discipline." (ECF No. 74-1, at 4.) Despite this limitation, the Plaintiffs intend to introduce no less than five experts at trial related to accommodation issues affecting blind and low vision inmates generally.[2] In many areas, the Plaintiffs' experts' testimony overlap with one another. For example, as relevant here, Wells' opinion overlaps with the Plaintiffs' expert Jennifer Kennedy on the issue of housing blind and low vision inmates, as well as with the Plaintiffs' expert Michael Bullis on the issue of VDOC staff training. Wells' opinion also overlaps with Bullis and Kennedy on the issue of providing accessible formats for VDOC's documents and for purposes of VDOC's paper-based processes. For this reason alone, the Plaintiffs' overlapping expert testimony violates the Court's Scheduling Order and some testimony must be excluded.

Further, VDOC requests that the Court exclude Wells' testimony in its entirety because this is simply not the type of case that requires expertise at all, and Wells' testimony is unreliable under the *Daubert* standard for non-scientific experts. The relevant inquiry for the jury in this case

[2] On this day, VDOC submits five separate Motions *in Limine* to exclude the opinions of each of the Plaintiffs' experts.

is whether VDOC has failed to provide reasonable accomodations for the individual incarcerated Plaintiffs for their different levels of vision impairment. Wells' testimony that VDOC's Operating Procedures ("OP"s), policies, procedures, and staff training violate the ADA and RA rights of blind and low vision inmates, generally, will not aid the jury in its inquiry. And, Wells does not explain how and why his non-scientific expertise has led to his various conclusions. His opinion is therefore unreliable under *Daubert*.

Nonetheless, should the Court determine that Wells' testimony should not be excluded outright, the Court should exclude Wells' testimony that VDOC's OPs, policies and procedures are inadequate under the ADA and RA as to blind and low vision inmates generally. Wells' testimony on these issues is unsupported by any identifiable standards, and he has not tied his opinion to the facts of this case because he does not explain how each of VDOC's OPs, policies, and procedures that he opines on are inadequate as applied to each of the individual Plaintiffs.

Likewise, VDOC requests that the Court exclude Wells' testimony that VDOC has failed to properly train its staff and that VDOC lacks adequate staff under the ADA and RA because the Plaintiffs have not pled a failure-to-train claim in this case and, again, Wells has not tied his opinions on staff training to the facts of this case because he fails to identify how any inadequate training resulted in each of the individual Plaintiffs being denied accomodations for their vision.

VDOC also requests that the Court exclude testimony from Wells sourced from any conversation and/or interview that he had with unidentified VDOC inmates, as Wells did not disclose the identity of these individuals in his Report or Supplemental Report, and he was unable to identify these inmates at his deposition. VDOC further respectfully requests that the Court exclude the testimony of Wells on simple matters that do not require any expertise at all, such as the contents of documents, and testimony that is better presented to the jury from the Plaintiffs and

witnesses themselves. And finally, VDOC requests that the Court exclude Wells' legal conclusions as improper expert testimony.

For all of these reasons, and as detailed herein, VDOC respectfully requests that the Court grant its Motion *in Limine* to Exclude the Expert Testimony of Richard Wells.

I. Wells' testimony overlaps with the Plaintiffs' other experts' testimony.

As stated, the Court's Scheduling Order in this case limits the Parties to one expert per discipline. (ECF No. 74-1, at 4.) However, here, the Plaintiffs seek to introduce five experts with overlapping testimony. As relevant here, Wells' opinions overlap with the Plaintiffs' expert Jennifer Kennedy on the issue of housing blind and low vision inmates. Wells opines in his Report that Deerfield's housing for "blind and low vision inmates" is inadequate because it is dormitory style; Wells also opines that VDOC staff must be prepared in an emergency to assist blind and low vision inmates. (Wells Report 58-59.) In Kennedy's Report, she likewise opines that Deerfield's dormitory style housing is concerning for blind inmates and that VDOC staff must be prepared in emergency situations to assist blind inmates. (Kennedy Report 9-11; 18.) Both Wells and Kennedy also opine that VDOC's intake and orientation processes are inadequate for blind and low vision inmates. (Wells Report 49-57; Kennedy Report 16-17.)

Still further, Wells' testimony that staff are not properly trained to provide ADA accommodations to blind and low vision inmates overlaps with the testimony of Plaintiffs' expert Michael Bullis. (Wells Report 27; Bullis Report 14-15.) And Wells' testimony that VDOC fails to provide blind and low vision inmates with accessible documents and/or accomodations to access VDOC's written materials is duplicative of Bullis' and Kenndey's testimony. (Wells Report 61-62; Bulls Report 9-10; Kennedy Report 14.)

The Plaintiffs' duplicative expert testimony violates the Court's Scheduling Order and

must be limited. These experts' proffered testimony substantially overlap with respect to various issues. In order to comply with the Scheduling Order's limitation of one expert witness per discipline, and to streamline the presentation of expert testimony at trial, Plaintiffs should be limited to the testimony of a single expert on these topics.

II. Wells' testimony should be excluded because this case does not require expertise at all, and Wells' testimony does not meet the non-scientific standards of *Daubert*.

Wells' testimony should be excluded in its entirety because this is simply not the type of case that requires expertise at all. This is not a scientific or technical case. The inquiry here is simply whether the Plaintiffs received reasonable accommodations for their visual impairments. Although Wells intends to opine about various VDOC OPs, policies, procedures, and staff training, this proposed testimony will not aid the jury in their inquiry of whether the individual Plaintiffs were each denied reasonable accomodations. *See, e.g, Powell v. Anheuser-Busch Inc*., C.D. Cal. No. CV 09-729-JFW (VBKX), 2012 WL 12953439, at *7 (C.D. Cal. Sept. 24, 2012) (citation omitted) (excluding Plaintiffs' expert testimony in employment disability discrimination case because lay jurors were capable of assessing facts without non-scientific expert's opinion).

In addition, the facts discussed in Wells' report are comprehensible to a layperson and thus do not require expert testimony to assist the jury. To the extent VDOC's policies and training are even relevant to this case, they are simple and straightforward, and a jury will be able to assess their efficacy without expert commentary. Likewise, whether any accommodations would be necessary for the Plaintiffs to access VDOC programs and services, and whether any such accommodations would be reasonable within a prison setting, are matters that can be comprehended by the jury. These facts do not require expert testimony for the jury's understanding. *See Wilson v. Muckala*, 303 F.3d 1207, 1219 (10th Cir. 2002) (affirming district

court's exclusion of human resources expert in gender-based discrimination case where expert was to testify about defendants' response plan in cases of sexual harassment and the reasonableness of the defendants' response to the Plaintiff's claim because the issues "were not so impenetrable as to require expert testimony.")

Further, Wells' testimony is unreliable under the non-scientific *Daubert* standard because he does not explain how and why his experience in prison administration supports his conclusions about VDOC's OPs, policies, procedures, and staff training, and his opinions are unsupported by any identifiable standards. In his Supplemental Report, Wells explains that his opinions,

> come[] from years of experience working in [the California Department of Corrections], with litigation, conducting ADA (and [American Correctional Association] audits), designing training curriculums, serving as a master-trainer, working for almost a decade (post-CDCR retirement) serving as neutral court-appointed ADA/disability monitor for multiple cases and agencies, and serving as an expert witness in numerous ADA-related cases. Based on my experience, with respect to ADA training, I know what works and what does not.

(Wells Supp. Report 10-11.) However, nowhere in his Report or Supplemental Report does Wells explain *how* and *why* his experience has led to his various conclusions, as required by *Daubert*. For example, Wells does not explain how he applied the criteria of the ADA or American Correctional Association audits in which he has partaken to the facts here. Nor does Wells explain what evidence or criteria he examined as a court-appointed ADA/disability monitor and how that compares to VDOC's OPs, policies, procedures, and staffing. Instead, Wells opines that VDOC's OPs, policies, procedures, and staff training are inadequate in his experience. In fact, when asked specifically in his deposition about what industry standards he is aware of when it comes to training policies, Wells was unable to identify any such standards that he considered or applied in forming his conclusions.[3] Wells expects this Court to accept his testimony without having to explain how

[3] The full exchange is as follows:
[Defense Counsel]: Are there any industry-standard training policies that you're aware of?

and why his experience leads to his conclusions. This is inadequate under *Daubert*. *Thomas*, 398 F.3d at 4312.

Finally, to the extent that the Plaintiffs wish to introduce expert testimony as to whether VDOC failed to follow its own policies, "a jury is capable of comprehending the facts and drawing correct conclusions about [VDOC's] actions and policies—or lack thereof—without the assistance of an expert." *Keys v. Washington Metro. Area Transit Auth.*, 577 F. Supp. 2d 283, 286 (D.D.C. 2008); *see Preziosi v. Mansberry*, No. 2:20-CV-1163, 2023 WL 275998, at *3 (W.D. Pa. Jan. 18, 2023) ("[T]he fundamental question is as follows: by simply identifying the relevant DOC policies and explaining that [the Defendants] did not act in accordance with those policies, do the opinions expressed by [the expert] in his report represent admissible expert testimony? The answer to that question is 'No.'").

Any jury empaneled by this Court will be able to assess for themselves whether VDOC has provided reasonable accommodations to the individual Plaintiffs and whether VDOC employees have followed its policies regarding those accomodations. Wells' testimony about VDOC's OPs, procedures, and staff training is not necessary for the jury's inquiry, and it should therefore be excluded in its entirety.

[Wells]: I'm not sure if I understand your question. I've, obviously, reviewed many, many, from many agencies, many curriculum from many agencies. I've developed curriculum and taught curriculum in the ADA arena. And, obviously, I mean, in doing monitoring reviews, in doing audits, through my years of experience in ADA, looking at what works, what's in place, what works, what doesn't seem to work, what the levels of compliance, which obviously, all go back to -- it all starts with training, right? It all starts with having leadership that buys into ADA and having a comprehensive, effective training component. So it's based from my years of experience in dealing with that, if that answers your question.
Wells Dep. 74:2-20.

III. Wells' testimony on VDOC's OPs, policies, procedures, and staff training should be excluded.

a. Wells' testimony about VDOC OPs, policies, and procedures is irrelevant.

Wells opines extensively that VDOC's OPs, intake and orientation procedures, grievance procedure, housing procedures, and accommodations request process are inadequate under the ADA and RA. (Wells Report 11-84.) But Wells' testimony is largely irrelevant. Wells does not explain how each of the OPs, policies, and procedures that he cites are inadequate as applied to each of the individual Plaintiffs in this case and has led each individual Plaintiff being denied any specific accommodation. (*See id*.) Instead, Wells broadly opines on what he considers is the inadequacy of these OPs, policies, and procedures.

For example, in pages 12 through 16 of his Report and in support of his conclusion that VDOC is failing to meet its obligations under the ADA and RA, Wells cites various provisions of VDOC's OPs and provides some commentary on their verbiage. (*See id*. at 12-26.) Wells then makes broad statements such as "[i]n my opinion, academic and vocational recruitment efforts must be equal between incarcerated persons with communication-related disabilities (e.g., blind/vision) and other individuals" and "[i]n my experience, orientation and one-on-one meeting information must be communicated effectively to incarcerated persons with communication-related disabilities, including inmates with vision impairments." (Wells Report 24.) However, Wells does not explain how each of these OPs are inadequate, what standards the policies should or should not be judged against, how and why his expertise led to his conclusion, and what would remedy each of these OPs' inadequacy. And Wells' testimony that various VDOC OPs, policies, and procedures are inadequate to address the needs of blind and low-vision inmates in general is irrelevant to whether the OPs are inadequate as applied to the individual Plaintiffs. *See Faulkner*

v. Lucile Packard Salter Children's Hosp., No. 21-CV-00780-SI, 2023 WL 375686, at *4 (N.D. Cal. Jan. 24, 2023) (explaining that because human resources expert report "fails to draw any connection between human resources policies/practices and defendant's conduct in this case, [the] expert opinion is of no use to the jury."). Wells does not explain how he applied each cited VDOC OP, policy, or procedure to the circumstances of each individual Plaintiff in this case. (*See* Wells Report 12-17.) Instead, he generally opines that the VDOC's OPs, policies, and procedures are insufficient. As such, Wells' testimony does not "fit" the facts of this case and is irrelevant. *Velasquez*, 64 F.3d at 850.

Nonetheless, in the few instances that Wells does relate any of VDOC's OPs or procedures to the collective Plaintiffs, he does so not to criticize VDOC's policies as inadequate under the ADA or RA, but rather to suggest that those policies have not been followed. For example, Wells states that "[w]hen I interviewed the six individual plaintiffs from Deerfield and Greensville, virtually all of them stated that staff do not assist them or provide accommodations for the disabilities[.]" (Wells Report 18.) Wells does not explain which accommodations had been denied to which Plaintiffs. (*See id.*) Likewise, in relation to VDOC OP 801.3, Wells testifies that "[m]ost of the individual plaintiffs that I interviewed stated that they are not regularly receiving this type of information, they cannot see or read the 'Titler' or regular bulletin board, are not being accommodated by staff to read or be made aware of the information, and often miss application deadlines or are not made aware at all of job opportunities or other programs, services, and activities." (Wells Report 20.) Again, Wells does not identify which Plaintiffs informed him that they cannot see or read the Titler board or what jobs or other programs or services they have not been made aware of. (*See id.*) Wells' testimony that unidentified VDOC staff may not be following VDOC's policies will not assist the jury in determining whether VDOC has violated the ADA and

RA rights of the individual Plaintiffs in this case. *Preziosi v. Mansberry*, 2023 WL 275998, at *3.

Glaringly, when pressed in his deposition to specifically identify proposed changes to OP 803.1—the relevant VDOC OP in this case governing inmate disability accommodation requests—Wells was unable to articulate "the point [he] was trying to make" in regard to that OP in his Report.[4] Wells Dep. 37:18-19. And although Wells criticizes VDOC's accommodations request process in his Report (Wells Report 66-68), he does not explain what VDOC documents or evidence he reviewed to form his opinion, why and how VDOC's procedure is inadequate, how to remedy that inadequacy, and how these purported failures relate to the individual Plaintiffs. (*See id.*) Yet again, Wells' prescriptions for the accommodations process is not applied to the facts of this case.

In all, Wells' opinions are irrelevant. Wells fails to explain how each of the OPs, policies, and procedures on which he opines have been applied to each individual incarcerated Plaintiff in this case. Wells' testimony on VDOC's OPs, policies, and procedures should therefore be excluded.

---

[4] The full exchange is as follows:
[Defense Counsel]: Okay. And so we'll just refer to the OP or OP 801.3, just for the disability policy, and be more specific today if it's referring to a different operating procedure. Back to your report here it states, there's no reference or requirement within the OP for the facility ADA coordinator to forward all or virtually ADA/disability-related reasonable accommodation requests to the medical department for determination as to the disability and whether or not to approve such requests. So is it your suggestion here that some language along those lines should be included in the OP?
[Plaintiffs' Counsel]: Objection to form. You can answer.
[Mr. Wells]: And if it's okay, I'm just going to reread this real quick. Okay. And, I'm sorry, sir. Can you repeat your question for me?
[Defense Counsel]: Based on your statement there, is your testimony here that that sort of language should be in the operating procedure?
[Plaintiffs' Counsel]: Objection to form. You can answer.
[Mr. Wells]: I'm going to go back and reread starting on page 12, where I start with Procedure 1, Training Responsibility, if that's okay.
[Defense Counsel]: Sure.
[Mr. Wells]: I don't remember the point I was trying to make here. I'm understanding what I wrote, but I don't recall the point I was trying to make, to get across here. My apologies.
Wells Dep. 36:12-37: 22.

b. Wells' testimony about VDOC staff training is unreliable and irrelevant.

Wells next opines that "VDOC staff are not adequately trained on the requirements of the ADA or VDOC's own ADA-related policies, and VDOC's ADA policies and procedures fall below the ADA's minimum requirements. This contributes to VDOC's failure to identify and accommodate people with disabilities, including people who are blind and low vision." (Wells Report 27.) As an initial matter, the Plaintiffs have not pleaded a failure-to-train claim in their Amended Complaint. (*See* Am. Compl., ECF No. 136); *contra Estate of LeRoux v. Montgomery Cnty*, No. 8:22-CV-00856-AAQ, 2023 WL 2571518, at *17 (D. Md. Mar. 20, 2023) (explaining that the Plaintiff properly pled an ADA failure-to-train claim because it alleged "that the officers were not trained on how to accommodate individuals with disability-based mental health crises."). For this reason alone, Wells' opinion that VDOC's staff training is inadequate is irrelevant. Allowing its presentation at trial would unfairly prejudice VDOC under Federal Rule 403 because the inquiry in this case is whether the individual Plaintiffs have been denied accomodations for their impairments, not whether VDOC has adequately trained its staff on its obligations to "accommodate people with disabilities." Wells' opinion about VDOC's staff training should therefore be excluded. Further, Wells' testimony regarding VDOC's staff training is unreliable and irrelevant.

i. Wells testimony that staff training is inadequate is unreliable.

In support of his conclusion that VDOC fails to properly train its staff on its ADA obligations with respect to blind or low-vision inmates, Wells cites to just a few pieces of evidence in the record: VDOC's ADA Training ELearning Trainer's Checklist, former Greensville Warden Kevin Punturi's deposition, a training roster for VDOC's ADA Staff Conference, and various PowerPoint presentations. (Wells Report 30-31, 33.) However, Wells does not point to any

VDOC inmate who has been denied an accommodation because VDOC staff did not know how to address his or her disability. At most, Wells uses anecdotes offered by Plaintiff Hajacos to support his opinion that VDOC staff need "sensitivity training" regarding disabilities. (*Id*. at 36.) Based on this, Wells concludes that "Mr. Hajacos's experiences confirm for me that VDOC's current staff ADA training is insufficient, and that it is not fostering a culture of compliance with the ADA." (*Id*.) But this limited information from Hajacos does not support Wells' more sweeping conclusion that VDOC's ADA training for staff is so inadequate that inmates *are being denied accomodations*. Wells has simply not offered sufficient evidence to support his opinion that any specific VDOC staff member lacked training regarding VDOC's ADA obligations that resulted in the Plaintiffs each being denied any accommodation. As such, Wells' testimony regarding the alleged inadequacy of VDOC's ADA training for its staff is unreliable. *See Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty*, 402 F.3d 1092, 1113 (11th Cir. 2005) (citation omitted) (excluding expert opinion regarding a jail's inadequate training because it was without foundation and connected to existing data "only by the *ipse dixit* of the expert").

ii. Wells' testimony on VDOC's staff training is irrelevant.

Aside from failing to support his conclusion that VDOC fails to provide adequate ADA staff training, Wells' testimony on this issue is also irrelevant as applied to the facts of this case. As explained herein, the inquiry for the jury in this case is whether the individual incarcerated Plaintiffs were denied accommodations for their different levels of vision impairment. Contrary to this inquiry, Wells seeks to testify that VDOC's ADA training for staff results in blind and low vision inmates generally not receiving accommodations. Wells' testimony does not "fit" the facts of this case and is therefore irrelevant. *See McDowell v. Brown*, 392 F.3d 1283, 1299 (11th Cir. 2004) (explaining that expert testimony does not "fit" with the facts of a case where there is "large

analytical leap must be made between the facts and the opinion.").

IV. Wells' testimony on VDOC's intake and orientation processes is unreliable and irrelevant.

Wells also opines that VDOC's intake and orientation process is not adequate for blind and low vision inmates. (Wells Report 49-57.) However, as applied to the Plaintiffs in this case, this testimony is both unreliable and irrelevant. Wells bases his opinion that VDOC fails to provide adequate orientation processes to blind and low vision inmates on three documents: VDOC's Notice of Rights for Inmates and CCAP Probationers/Parolees with Disabilities (effective November 1, 2022), Greensville Correctional Center Offender Orientation Manual (2017–2018), and Deerfield Correctional Center Offender Orientation Manual (2022–2022).[5] (Wells Report 53-54.) But, as explained in the Amended Complaint, Mr. McCann arrived at Deerfield in 2017, Mr. Shabazz arrived at Deerfield in 2015, Mr. Shaw arrived at Deerfield in 2010, Mr. Courtney arrived at Greenville in 2021, and Mr. Hajacos arrived at Greensville in 2018. (Amend. Compl., ECF No. 136 ¶¶ 9-11, 13-15.) Based on Wells' Report, Wells has not reviewed the Orientation Manuals for the relevant years in which the Plaintiffs McCann, Shabazz, Shaw, and Courtney were received at Deerfield and Greensville, and therefore his opinion about what orientation process they received is unreliable. And, to the extent that Wells seeks to opine that VDOC failed to inform the Plaintiffs about VDOC's accommodation process or failed to provide the Plaintiffs with information regarding who to contact about ADA issues, this testimony is irrelevant. The record in this case is peppered with evidence showing that the Plaintiffs understand how to request accommodations via VDOC's ADA process and who to contact regarding ADA issues. The evidence clearly shows that the individual Plaintiffs understand VDOC's process to request ADA accommodations and

[5] Wells' Report states that he reviewed the "Deerfield Correctional Center Offender Orientation Manual (2022–2022)." (Wells Report 54.) It appears that the referred to "(2022-2022)" is a typo.

know who the ADA coordinators are at their facilities, and they do not allege otherwise.[6] Instead, the Plaintiffs' primary complaint in this case is that their accommodation requests have not been fulfilled. Wells' opinion on VDOC's orientation processes does not "fit" the facts of this case and is therefore irrelevant. *Velasquez*, 64 F.3d at 850.

And, to the extent that Wells seeks to opine, generally, that VDOC's orientation process is inadequate for blind and low vision inmates, again, this is irrelevant as it will not assist the jury in determining whether VDOC has failed to accommodate the individual Plaintiffs. Wells' testimony about VDOC's orientation process should therefore be excluded.

V. Wells' testimony based on conversations with unidentified VDOC inmates should be excluded.

Throughout his report, Wells references "incarcerated persons," "individuals," and "inmates" that he spoke with or interviewed in forming his expert report. (*See, e.g.*, Wells Report 17, 18, 19.) However, Wells does not identify these individuals in this Report and Supplemental Report, and when asked to identify them in his deposition, he testified that he could not recall any names of the inmates with whom he spoke. Wells Dep. 11:6-15. Wells' testimony based upon any conversation or interview with an unidentified VDOC inmates must be excluded. "Even though an expert witness may base his opinion on underlying information, it does not follow that the otherwise inadmissible information may come into evidence just because it has been used by the expert in reaching his opinion." *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1143–44 (4th Cir. 1994). Allowing Wells to testify to the unverified allegations of anonymous inmates would, in effect, lend his own expert credibility to claims that may otherwise not be accepted at face value by the jury.

[6] The Plaintiffs' own Amended Complaint details that the Plaintiffs have requested various accomodations from their facilities' ADA Coordinator. (*See* Am. Compl., ¶¶ 91, 92, 130, 134, 135, 144.)

Moreover, Wells had a duty under Federal Rule 26 to identify the basis of his opinions. "Rule 26 disclosures are often the centerpiece of discovery in litigation that uses expert witnesses." *Saudi v. Northrop Grumman Corp*., 427 F.3d 271, 278 (4th Cir. 2005). "The purpose of Rule 26(a)(2) is to provide notice to opposing counsel—before the deposition—as to what the expert witness will testify." *Ciomber v. Coop. Plus, Inc*., 527 F.3d 635, 642 (7th Cir. 2008). Likewise, the Rule "prevent[s] unfair surprise at trial and [ ] permit[s] the opposing party to prepare rebuttal reports, to depose the expert in advance of trial, and to prepare for depositions and cross-examination at trial." *Minebea Co. v. Papst*, 231 F.R.D. 3, 5–6 (D.D.C. 2005). To that end, the Rule "mandates a complete and detailed report of the expert witness's opinions, conclusions, and the basis and reasons for them." *Ciomber*, 527 F.3d at 642. "A party that fails to provide these disclosures unfairly inhibits its opponent's ability to properly prepare, unnecessarily prolongs litigation, and undermines the district court's management of the case." *Saudi*, 427 F.3d at 278.

Because Wells has failed to identify the VDOC inmates with whom he spoke and which formed the basis of his expert opinions, VDOC is unable to investigate these individuals' allegations. Any testimony from Wells sourced from conversations with nondisclosed individuals or inmates should be excluded.

VI. Wells' testimony about the Plaintiff's allegations should be excluded.

Throughout his Report, Wells also relays information that he gathered from informal conversations with the Plaintiffs. For example, in the portion of his Report wherein Wells opines that "VDOC staff are not providing written materials/information in accessible formats to incarcerated persons with disabilities, including people with vision disabilities," Wells bases his conclusion entirely on information that he has been told by the Plaintiffs. (Wells Report 61-62.) Wells explains that because Mr. Hajacos and Mr. McCann have told him that they have trouble

accessing large print documents and magnifiers, this means that VDOC was "not providing written materials/information in accessible formats to incarcerated persons with disabilities, including people with vision disabilities." But Wells' testimony is simply a recitation of the Plaintiffs' allegations in this case. To the extent that Wells seeks to provide testimony that simply repeats information from the Plaintiffs or other witnesses, this testimony should be excluded. "[E]xpert testimony which merely regurgitates factual information that is better presented directly to the jury rather than through the testimony of an expert witness is properly excluded." *In re C.R. Bard, Inc*., 948 F. Supp. 2d 589, 608 (S.D.W. Va. 2013) (citation omitted). Accordingly, to the extent that Wells seeks to recite information that is best presented directly to the jury from the individual Plaintiffs or other witnesses, this testimony should be excluded. *See id*. (excluding experts' testimony that "merely state[s] what the plaintiffs told" the experts).

VII. Wells' opinions about documents that require no expertise to interpret should be excluded.

As explained herein, VDOC contends that Wells' entire testimony should be excluded because a jury is more than capable of determining for itself whether VDOC has violated its own policies or otherwise failed to provide the individual Plaintiffs with reasonable accommodations. Nonetheless, should the Court decline to exclude Wells' testimony outright, Wells' testimony about various VDOC documents—which a jury is more than qualified of reading and reviewing in evidence at trial—should be excluded.

The Fourth Circuit has "expressly found that in determining whether a particular expert's testimony is sufficiently helpful to the trier of fact to warrant admission into trial, the district court should consider whether the testimony presented is simply reiterating facts already 'within common knowledge of the jurors.'" *Dorsey*, 45 F.3d at 814 (quoting *United States v. Harris*, 995 F.2d 532, 534 (4th Cir. 1993)). In this case, Wells seeks to testify simply about what certain

VDOC documents say. These are matters that are well within the lens of jurors using common sense and their faculties of observation. (*See, e.g,* Wells Report at 14 (explaining that "[b]ased on [Wells'] review of the Notice of Rights document, it does not contain the contact information for the facility ADA Coordinators for Greensville or Deerfield[.]"; Report at 53 (again explaining the content of the Notice of Rights document); Report at 54 (explaining the contents of the Greensville and Deerfield Offender Orientation Manuals); Report at 65 (explaining the contents of VDOC's OP 866.1, Grievance Procedure); Report at 66 (explaining the contents of VDOC's Regular Grievance form); Report at 69 (explaining the contents of VDOC's Informal Complaint form)). Jurors can determine for themselves the content of the various documents read into Wells' Report without the help of an "expert." The Court should exclude Wells' testimony that reads, or interprets, VDOC documents.

VIII. Wells' legal conclusions should be excluded.

Finally, throughout Wells' Report and Supplemental Report, Wells opines that various VDOC OPs, policies, procedures, and staff training "are inadequate" under the ADA, "fall below ADA requirements," and "do not comply with ADA requirements." (Wells Report 11, 27, 66; *see also* Wells Suppl. Report 1-13.) However, expert opinion testimony that "draws a legal conclusion by applying the law to the facts" is inadmissible. *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006); *see also United States v. Barile*, 286 F.3d 749, 760 (4th Cir. 2002) (observing that "[t]he best way to determine whether opinion testimony contains legal conclusions is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular") (internal quotation marks and citation omitted). To the extent that Wells seeks to opine on legal conclusions—i.e. that VDOC's OPs, policies, procedures, or staff training violates the ADA and/or RA—this testimony should be excluded.

CONCLUSION

For all of the reasons detailed herein, VDOC respectfully requests that the Court exclude, or limit, the expert testimony of Richard Wells.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS

By: /s/ Timothy E. Davis
Timothy E. Davis, AAG, VSB #87448
Office of the Attorney General
Criminal Justice & Public Safety Division
202 North 9th Street
Richmond, Virginia 23219
(804) 225-4226
(804) 786-4239 (Fax)
Email: tdavis@oag.state.va.us

/s/ Ann-Marie White Rene
Ann-Marie Rene, AAG, VSB #91166
Office of the Attorney General
Criminal Justice & Public Safety Division
202 North 9th Street
Richmond, Virginia 23219
(804) 371-2084
(804) 786-4239 (Fax)
E-mail: arene@oag.state.va.us

s/ Andrew R. Page
Andrew R. Page, VSB #80776
Assistant Attorney General
Office of the Attorney General
Criminal Justice & Public Safety Division
202 North Ninth Street
Richmond, Virginia 23219
Phone: (804) 692-0618
Fax: (804) 786-4239
Email: arpage@oag.state.va.us

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of April, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record for the Plaintiff.

/s/ Timothy E. Davis

Timothy E. Davis, AAG, VSB#87448
Office of the Attorney General
Criminal Justice & Public Safety Division
202 North 9th Street
Richmond, Virginia 23219
(804) 225-4226
(804) 786-4239 (Fax)
Email: tdavis@oag.state.va.us