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 EXPERT TESTIMONY OF RICHARD SUBIA

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 Subia. In support of its Motion, VDOC submits the Expert Report of Subia as Exhibit 1 ("Subia Report") and the deposition transcript of Subia as Exhibit 2 ("Subia 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 various 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.[2] (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 Subia. However, as explained herein, Subia's testimony should be excluded, or limited, pursuant to this Court's Scheduling Order and Federal Rule of Evidence 702.

SUBIA'S PROPOSED TESTIMONY

Subia is expected to testify regarding ADA accommodations for blind and vision impaired inmates. In his report, Subia offers the following opinions:

> (1) Based on [Subia's] experience, VDOC has failed to provide appropriate accommodations for blind and vision impaired inmates in accordance with the ADA.
>
> (2) Based on [Subia's] experience, VDOC has failed to identify specific concerns related to auxiliary aids and assistive technology that would pose a threat to security in the correctional setting;
>
> (3) Based on [Subia's] experience, VDOC must put a policy or procedure in place for evaluating whether an accommodation poses a threat to security and for documenting those determinations; and
>
> (4) Based on [Subia's] experience, VDOC should identify and maintain a list of assistive technology that inmates can maintain on their person, including within their assigned housing, for use at their leisure.

(Subia Report 4.)

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, 589–93 (1993) govern VDOC's challenge to the admissibility of Subia's testimony. Rule 702 provides that an expert may testify in the form of an opinion if the expert's scientific, technical, or other specialized

[2] The Plaintiffs also initially brought claims under the Virginians with Disabilities Act but those claims have since been dismissed by the Court. (ECF No. 253.)

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 ADA issues affecting blind and low

vision inmates.[3] In many areas, the Plaintiffs' experts' testimony overlap with one another. For example, as relevant here, Subia's opinion overlaps with the Plaintiffs' expert Richard Wells on the issue of VDOC failing to provide accomodations for blind and low vision inmates.[4] (Wells Report 27-36; Subia Report 4-7.) Likewise, Subia's opinion that VDOC fails to provide blind and low vision inmates with adequate assistive technology in their housing units overlaps with the similar testimony of Plaintiffs' expert Curtis Chong. (Subia Report 27-36; Chong Report 6-9.) For this reason alone, the Plaintiffs' overlapping expert testimony violates the Court's Scheduling Order and some testimony must be excluded.

In addition, VDOC requests that the Court exclude Subia's testimony in its entirety because this case is simply not the type of case that requires expertise at all. Subia seeks to opine, generally, that VDOC and other prisons can safely and securely provide accomodations and specific assistive devices for blind and vision impaired inmates generally. (Subia Report 4.) But the relevant inquiry for the jury in this case is whether VDOC has failed to provide reasonable accomodations for the individual incarcerated Plaintiffs. Subia's generalized testimony will not assist the jury with that inquiry.

Second, Subia's testimony is unreliable and irrelevant. Subia himself opines that "accommodations decisions need to be made on a case-by-case basis depending on the particular needs of the incarcerated person with a disability." (Subia Report 63.) Yet, *not once* in his Report does Subia offer an opinion as to how any of the accomodations or devices that he recommends would benefit any of the individual Plaintiffs, nor how VDOC has denied the individual

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

[4] Well's Expert Report and Supplemental Report have likewise been filed on the docket on this day as Exhibits to VDOC's Motions *in Limine* to Exclude his testimony.

incarcerated Plaintiffs any accommodation. In fact, Subia does not explain how *any* VDOC inmate has been denied an accommodation at all. Subia does not support his own conclusion that VDOC is failing to accommodate any inmate with evidence; it is therefore unreliable and irrelevant and should be excluded.

VDOC also requests that the Court exclude testimony from Subia sourced from any conversations and/or interviews that he had with unidentified VDOC inmates, as Subia did not disclose the identity of these individuals in his Report and he was unable to identify these inmates at his deposition. To the extent that Subia seeks to opine on any information that he has learned directly from the Plaintiffs or other witnesses, that testimony that is better presented to the jury from the Plaintiffs and witnesses themselves. Finally, VDOC requests that the Court exclude Subia's 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 Subia.

I. Subia's 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, Subia's opinion overlaps with the Plaintiffs' expert Richard Wells on the issue of VDOC failing to provide accommodations for blind and low vision inmates. (Wells Report 27-36; Subia Report 4-7.) Likewise, Subia's opinion that VDOC fails to provide blind and low vision inmates with adequate assistive technology overlaps with the testimony of Plaintiffs' expert Curtis Chong. (Subia Report 27-36; Chong Report 6-9.)

The Plaintiffs' duplicative expert testimony violates the Court's Scheduling Order and must be limited. 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. Subia's testimony should be excluded in its entirety because this case does not require expertise at all.

Even putting aside the fact that Plaintiffs' expert testimony overlaps, VDOC requests that the Court exclude Subia's testimony entirely because this is simply not the type of case that requires expertise at all. This case does not require determination of scientific or technical issues. The inquiry here is simply whether VDOC provided the individual Plaintiffs with reasonable accommodations for their vision impairments. Although Subia intends to opine that VDOC has failed to provide blind and low vision inmates with reasonable accommodations, Subia does not once identify in his Report nor deposition a *single* inmate, much less the Plaintiffs, who has actually been denied an accommodation. (See Subia Report 1-21.) This case simply requires the jury to determine whether VDOC has failed to accommodate the individual incarcerated Plaintiffs, and therefore does not require Subia's testimony that unidentified blind and low vision inmates require assistive technology.

Further, to the extent that the Plaintiffs wish to introduce evidence that 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) (excluding expert expected to testify that the defendant "failed to take adequate steps to prevent the unlawful employment practices against Plaintiff [] and regarding the deficiencies of [defendant's] policies and procedures with regard to the pervasive work gender discrimination and retaliatory and sexual hostile work environment in the record"); *Preziosi v. Mansberry*, No. 2:20-CV-1163, 2023 WL 275998, at *3 (W.D. Pa. Jan. 18, 2023) (excluding Subia's testimony and

explaining that "the 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 or not VDOC has provided reasonable accommodations to the individual Plaintiffs and whether or not VDOC employees have followed VDOC policies regarding those accommodations. Subia's testimony is not necessary for the jury's inquiry, and it should therefore be excluded in its entirety.

III. Subia's testimony is unreliable and irrelevant and should be excluded.

Subia's testimony is also unreliable and irrelevant and should therefore be excluded for these reasons. Subia's opinion is that VDOC has failed to accommodate blind and low vision inmates. But his testimony is unreliable because he does not identify any specific inmate, much less any of the individual Plaintiffs, who has been denied an accommodation at all. (*See* Subia Report 1-21.) Subia himself opines that "accommodations decisions need to be made on a case-by-case basis depending on the particular needs of the incarcerated person with a disability." (Subia Report 63.) But instead of identifying specific inmates for whom VDOC has failed to accommodate, he makes broad generalizations, for instance that "[a]lthough Deerfield has a policy that lists pre-approved accommodations for visually impaired inmates, these identified accommodations are clearly not sufficient to provide blind inmates with equal access to programs, services, and activities, and only two of these items—the SARA and the audiobooks—would require a security evaluation." (Subia Report 12.) Subia does not explain why Deerfield's accommodations are inadequate, nor does he explain which of the Plaintiffs or other inmates require additional accommodations. There is simply too great a gap in the specifics of Subia's

testimony and his conclusions, making his testimony unreliable. *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.").

Next, in his Report, Subia goes on to list some assistive devices that he believes VDOC can provide to inmates safely and securely in prison: the omniReader, Amigo HD, Ruby 10, and Topaz Ultra. (*Id*. at 12-17.). He does not explain that any VDOC inmate has ever requested any of these devices or whether VDOC has reviewed or denied and request for these devices. (*See id*.) Instead, it appears that Subia simply states, as a general matter, prisons can make these devices safely available to inmates. (*See id*.) But because he does not identify any VDOC inmate who requires these devices or has requested these devices, nor relate how VDOC has considered or denied these devices, Subia's testimony regarding these assistive devices is irrelevant and unreliable. *See, e.g, Naeem v. McKesson Drug Co.*, 444 F.3d 593, 608 (7th Cir. 2006) (explaining that human resources expert's "opinions in court were not tied to specific portions of the policy manual, and appeared to be general observations regarding what is normal or usual business practice.[ ] As such, his testimony did not meet the requisite level of reliability.")

IV. Subia's testimony based on conversations with unidentified VDOC inmates should be excluded.

As explained, Subia does not identify any specific inmate who has been denied an accommodation for his vision by VDOC. (*See* Subia Report 1-21.) Nonetheless, in his deposition, Subia testified that he spoke with some VDOC inmates but could not recall the names of these individuals. Subia Dep. 11:5-14; 52:19-23. To the extent that any of Subia's testimony is based upon any conversation or interview with an unidentified VDOC inmates, this testimony 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).

Moreover, Subia 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 Subia has wholly failed to identify the VDOC inmates with whom he spoke but apparently bases part of his expert opinions, VDOC is unable to investigate these individuals' allegations and their statements to him. Subia failed to disclose the identities of these VDOC inmates and therefore any testimony of his sourced from conversations with these individuals should be excluded.

V. Subia's testimony about the Plaintiffs' allegations should be excluded.

To the extent that Subia seeks to provide testimony based upon any facts or allegations that he has learned from the individual Plaintiffs or other witnesses themselves, 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), *on reconsideration in part* (June 14, 2013). Accordingly, to the extent that Subia seeks to recite information that is best presented directly from the individual Plaintiffs or other witnesses, this testimony should be excluded as it is best presented directly to the jury from the Plaintiffs or witnesses themselves. *See id.* (excluding experts' testimony that "merely state[s] what the plaintiffs told" the experts).

VI. Subia's legal conclusions should be excluded.

Finally, throughout Subia's Report, he opines that VDOC "has failed to provide appropriate accommodations for blind and vision impaired inmates in accordance with the ADA." (Subia Report 4-7.) 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 Subia seeks to opine on the legal conclusion that VDOC has violated the ADA, this testimony should be excluded.

CONCLUSION

For these reasons, the Court should exclude the testimony of Richard Subia.

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

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 2321
(804) 225-4226
(804) 786-4239 (Fax)
Email: tdavis@oag.state.va.us