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, *et al.*,

Defendant.

MEMORANDUM IN SUPPORT OF DEFENDANT'S
MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF CURTIS CHONG

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 Curtis Chong. In support of its Motion, VDOC submits the Expert Report of Chong as Exhibit 1 ("Chong Report").

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. (*See* Am. Compl., ECF No. 136.) In their Amended Complaint, the Plaintiffs bring claims under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act ("RA") against VDOC. (Amend. Compl. ps.

[1] As of the date of this filing, Plaintiff Nacarlo Courtney and Plaintiff Kevin Shabazz have been released from VDOC custody. Further, although Wilbert Rogers was initially a Plaintiff in this case, he has since been dismissed from this case. (ECF No. 198.)

23-27.)

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 Curtis Chong, and four other experts, at trial. However, as explained herein, Chong's testimony should be excluded, or limited, under the Court's Scheduling Order and Federal Rule of Evidence 702.

CHONG'S PROPOSED TESTIMONY

Chong is expected to testify regarding technology for blind individuals. In his report, Chong offers the following opinions:

> (1) Based on [Chong's] experience, technology plays an important role in blind individuals' ability to write and receive information;
>
> (2) Based on [Chong's] experience, blind prisoners at Deerfield Correctional Center and Greensville Correctional Center do not have adequate access to common technologies used by blind individuals, hindering their ability to fully and independently participate in a number of aspects of prison life;
>
> (3) Based on [Chong's] experience, VDOC must provide blind inmates access to common technologies used by blind individuals and provide them with training and support so they can use these technologies effectively; and
>
> (4) Based on [Chong's] experience, VDOC must implement an accessible, electronic means of completing, submitting, and reading frequently used forms and documents.

(Chong 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 Chong'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 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*, 848 F.3d at 230, the Supreme Court's decision in "*Kumho Tire* [made clear] that *Daubert* was not limited to the testimony of scientists." 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 generally.[2] In many areas, the Plaintiffs' experts' testimony overlap with one

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

another. For example, as relevant here, Chong's testimony overlaps with Plaintiffs' expert Richard Subia's opinion that VDOC fails to provide blind and low vision inmates with adequate assistive technology.[3] (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.

Even putting aside the redundancy of Plaintiffs' expert testimony, the Court should exclude Chong's testimony in its entirety because this is simply not the type of case that requires Chong's expertise at all. The relevant inquiry for the jury in this case is whether VDOC has failed to provide reasonable accomodations for the individual Plaintiffs for their various levels of vision impairment while incarcerated at Deerfield and Greensville. Chong's testimony that blind individuals may require technology for use in everyday life will not help the jury with its inquiry, and any jury is more than capable of understanding that blind individuals may require technological assistance.

Further, Chong's testimony is unreliable. Throughout his Report, Chong generally opines that blind individuals require certain technologies that are compatible on commercially available products like iPads and iMacs and theorizes that VDOC is able to provide inmates with similar technology on its JPay tablets. Chong provides no explanation for his theories regarding the JPay tablets or VDOC's technological capabilities. Chong's testimony is therefore unreliable.

Chong's testimony is also irrelevant. Chong does not explain why the individual Plaintiffs in this case—with their unique vision impairments—require the technology that he describes or how they have been denied that technology. In fact, Chong acknowledges that Greensville and Deerfield offer several of the technologies that he opines about, but he does not explain how this technology is not available to the Plaintiffs or how they have otherwise been denied its use.

[3] Subia's Report has likewise been filed on the docket on this day as an Exhibit to VDOC's Motion *In Limine* to Exclude his testimony.

Chong's testimony is therefore irrelevant.

Finally, Chong's proposed testimony is largely a recitation of the Plaintiffs' allegations in this case. In his Report, Chong merely repeats what the Plaintiffs themselves have alleged throughout this lawsuit. At trial, this information should come directly from the Plaintiffs and individuals witnesses themselves. Chong's testimony should therefore be excluded.

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 Curtis Chong.

I. Chong'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, Chong's testimony overlaps with the Plaintiffs' expert Richard Wells' testimony 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, Chong's testimony overlaps with Wells' testimony on the issue of blind and low vision inmates requiring accomodations to access VDOC's paper-based processes. (Wells Report 61-62; Chong Report 8-10.) And, Chong's testimony overlaps with Plaintiffs' expert Richard Subia's opinion that VDOC fails to provide blind and low vision inmates with adequate assistive technology. (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.

[4] Wells' Report and Supplemental Report have likewise been filed on the docket on this day as Exhibits to VDOC's Motion *In Limine* to Exclude his testimony.

For this reason alone, the Plaintiffs' overlapping expert testimony violates the Court's Scheduling Order and some testimony must be limited.

II. Chong's testimony should be excluded in its entirety.

Even putting aside the fact that Plaintiffs' expert testimony overlaps, VDOC requests that the Court exclude Chong's testimony entirely because this is simply not the type of case that requires expertise at all. This case does not require any determination of scientific or technical issues. The inquiry here is simply whether VDOC provided the individual Plaintiffs with reasonable accomodations for their vision impairments. Although Chong intends to opine about the importance of technology for blind individuals and describes certain types of technology available generally (*see* Chong Report 1-12), this is not relevant to the inquiry of whether the individual Plaintiffs were each denied reasonable accommodations. Chong's testimony is unnecessary in this case because any jury empaneled by this Court is perfectly capable of understanding that assistive technology may be required for some blind or low vision people and Chong's testimony will not aid the jury in understanding how the individual Plaintiffs, specifically, require or were denied that technology. Chong's testimony should therefore be excluded on this basis. *See, e.g,*, *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 expert's testimony "was not so impenetrable as to require expert testimony.")

III. Chong's testimony is irrelevant.

Throughout his Report, Chong mentions only one of the individual Plaintiffs, Mr. Shabazz. (*See* Chong Report 9.) And, a bit ironically, as to Mr. Shabazz, Chong explains that Mr. Shabazz

has access to the SARA Scanner, a type of technology that Chong identifies as being helpful for blind individuals. (*See id.*; see also Chong Report 6-7.) But nowhere in Chong's Report does Chong identify how any of the Plaintiffs require any additional specific technology. (*See* Chong Report 1-12.) Although Chong opines that blind individuals require technology in their everyday lives, he does not explain how this applies with respect to the individual Plaintiffs or what sort of technology each of them, individually, requires. Nor does Chong opine that VDOC has denied any of the individual Plaintiffs necessary technology for their vision. In fact, Chong acknowledges that Greensville and Deerfield offer several of the technologies that he opines about, but he does not explain how this technology is not available to the Plaintiffs or how they have otherwise been denied its use. (*See* Chong Report 7-8.) As such, Chong's testimony does not fit the facts of this case and it is irrelevant. *Velasquez*, 64 F.3d at 850 (3d Cir. 1995). Chong's testimony should be excluded on this basis.

IV. Chong's Testimony about JPay devices is unreliable and speculative.

To the extent that Chong seeks to testify about JPay tablets used by VDOC inmates, his testimony on this topic is unreliable and speculative, and therefore must be excluded. Chong testifies that:

> It is my understanding that the JPay tablets use the Android operating system, meaning that, at a minimum, the TalkBack screen reader—the built-in Google screen reader included on Android devices—could be installed (or enabled) on the JPay tablets to determine if this screen reading program would be beneficial for blind prisoners. The Android operating system used on the JPay tablets is not the most current version available from Google, and thus, more information needs to be obtained about the viability of Google's TalkBack screen reader, which has undergone several updates over the years of its existence.

(Chong Report 7.)

Chong provides no basis for this alleged technical knowledge and he does not provide any reference or citation to the evidence in this case that VDOC's JPay tablets are Android devices.

(*See id*.) In fact, in the list of documents that Chong reviewed for his Report, Chong lists a website link to SECURUS JP6 device(s) from the State of Washington's Department of Corrections. (Chong Report 4.) To the extent that Chong bases his opinion about VDOC's JPay tablets from the information he received from this website from the Washington Department of Corrections, his testimony on VDOC's JPay tablets is unreliable and speculative, at best. *Tyger Constr. Co. v. Pensacola Constr. Co*., 29 F.3d 137, 142 (4th Cir. 1994) (explaining that "[a]n expert's opinion should be excluded when it is based on assumptions that are speculative and are not supported by the record."); *see Mathias v. Michael Eaves Shoemaker*, No. CV 15-2261, 2017 WL 3592457, at *3 (D. Md. Aug. 21, 2017) (excluding expert's opinions where expert did not opine on facts, but only possibilities).

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

Chong's Report is largely a recitation of the Plaintiffs' allegations in this lawsuit. (*See* Chong Report 6-12.) For example, in his testimony about the JPay tablets and VDOC's paper processes, Chong merely repeats what the Plaintiffs themselves have alleged throughout this lawsuit, namely, that the tablets and VDOC's paper processes are inaccessible. (*See id*. at 6-9.) However, "expert 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 Chong seeks to recite information about VDOC's JPay tablets, VDOC's paper-based processes, or the Plaintiffs' other allegations in this case, that testimony should come from the individual incarcerated Plaintiffs or other witnesses. *Id*. (excluding experts' testimony that "merely state[s] what the plaintiffs told" the experts). Chong's testimony wherein he seeks to recite the Plaintiffs' allegations should be excluded.

CONCLUSION

For these reasons, the Court should exclude the testimony of Curtis Chong.

Respectfully submitted,

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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.

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