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.

REPLY IN SUPPORT OF THE DEFENDANTS' MOTIONS IN LIMINE TO EXCLUDE THE PLAINTIFFS' EXPERT TESTIMONY[1]

The Virginia Department of Corrections ("VDOC" or "Defendant"), by counsel, submits the following Reply in Support of its Motions *In Limine* to Exclude the Plaintiffs' Expert Testimony. In support of its Reply, VDOC submits the Plaintiffs' Responses to VDOC's Request for Admissions that were propounded in this case as Exhibit 1.

ARGUMENT

I. Systemic-wide injunctive relief is not available in this case and expert testimony in support of such relief is therefore irrelevant.

This case is not a class action. Plaintiffs are six current and former VDOC inmates and a non-profit organization, the National Federation of the Blind of Virginia ("NFB-VA"). In support of their case-in-chief, the Plaintiffs intend to introduce voluminous expert testimony on various

[1] VDOC initially filed five separate Motions *In Limine* to Exclude the Expert Testimony of each of the Plaintiffs' proposed experts. (*See* ECF Nos. 279, 281, 283, 285, and 287.) Thereafter, the Plaintiffs were granted leave to file one combined Response in Opposition to VDOC's Motions, and VDOC has sought leave from the Court to file one combined Reply in Support of its Motions. (*See* ECF No. 299.) Accordingly, VDOC submits this single Reply in support of its Motions *In Limine* to Exclude the Expert Testimony of the Plaintiffs' Proposed Experts.

issues affecting blind and low vision individuals generally, which they have argued is necessary because they seek systemic injunctive relief from VDOC and "thus the inquiry is broader than whether VDOC provided the individual Plaintiffs with reasonable accommodations for their vision impairments." (ECF No. 293, at 18.) But the Plaintiffs are incorrect. Systemic injunctive relief is not available to the Plaintiffs under the Prison Litigation Reform Act ("PLRA") and therefore testimony in support of such unavailable relief is irrelevant. The limited inquiry for trial is whether VDOC accommodated the individual incarcerated Plaintiffs and NFB-VA's members, and expert testimony on issues affecting blind and low vision people, generally, is not relevant to this inquiry.

Systematic injunctive relief for blind and low vision inmates in VDOC custody is not available to any of the Plaintiffs here, including the NFB-VA. As explained by the Court, the NFB-VA has standing to seek injunctive relief for its members. *Nat'l Fed'n of the Blind of Virginia v. Virginia Dep't of Corr.*, 2023 WL 6812061, at *8 (E.D. Va. Oct. 16, 2023). However, the only inmate NFB-VA members which the Plaintiffs have identified in this litigation are Plaintiffs McCann, Shabazz, Shaw, and Stravitz. (Amen. Compl., ECF No. 136 ¶ 17.) Because there is no evidence here of any other NFB-VA members in VDOC custody, NFB-VA's standing is limited to that of these member-Plaintiffs.

In addition, because Mr. Courtney and Mr. Shabazz have been released from VDOC custody, there is no viable injunctive relief available as to them. *Rendelman v. Rouse*, 569 F.3d 182, 186 (4th Cir. 2009). The Plaintiffs have also dismissed Mr. Stravitz's and Mr. Courtney's claims for injunctive relief. (ECF No. 248.) Accordingly, under the PLRA, injunctive relief is only available if there is a finding that VDOC has violated the rights of Plaintiffs McCann, Hajacos, and/or Shaw and the Court orders such relief that "is narrowly drawn, [and] extends no further than necessary to correct the violation of the Federal right[.]" 18 U.S.C. § 3626(A)(1)(a).

Injunctive relief is therefore only available for Plaintiffs McCann, Hajacos, and/or Shaw in this case, and there is no VDOC-wide injunctive relief available to the Plaintiffs.

Nonetheless, in response to VDOC's Motions *In Limine*, the Plaintiffs appear to concede that the vast majority of their experts do not opine on VDOC's failure to accommodate the individual Plaintiffs at all. (*See* ECF No 293, at 21.) Instead, the Plaintiffs argue that because they seek systemic relief for blind and low vision inmates, the Court should allow extensive expert testimony about the importance of mobility and orientation training, technology, blindness skills, and other issues affecting blind and low vision people generally. (*Id*. at 21-22.) But Plaintiffs' proposed expert testimony about blind and low vision individuals and their needs is irrelevant. As explained in VDOC's Motions *In Limine*, the inquiry for the jury in this case is whether VDOC has violated the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA") rights of the individual Plaintiffs. Only after a finding of such a violation, may the Plaintiffs, including the NFB-VA, then be entitled to injunctive relief to correct that violation, so long as that relief is narrowly tailored to that particular Plaintiff. 18 U.S.C. § 3626(A)(1)(a). Although the NFB-VA has standing on behalf of its inmate members, it is limited in the relief that it may seek for its members under the PLRA. Systemic injunctive relief is not available in this case and therefore the Plaintiffs' extensive expert testimony in support of such relief and on issues affecting blind and low vision people generally is irrelevant. Plaintiffs' proposed expert testimony about blind and low vision people and their general needs should therefore be excluded.[2]

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[2] Practical considerations also counsel limiting the scope of the Plaintiffs' expert testimony. In their response to VDOC's Motions *In Limine*, Plaintiffs argue that their experts' proposed testimony does not violate the Court's Scheduling Order because, although their multiple experts touch upon similar issues, their testimonies relate to distinct disciplines. (ECF No. 293, at 10–16.) Even if the Court were to accept this characterization of the proposed expert testimony, the issue remains that this case must be tried within one week. In order to facilitate timely presentation of the evidence at trial, the Court should still limit expert testimony that substantially overlaps in its subject matter.

II. Plaintiffs do not refute that their proposed experts Wells and Subia violated Rule 26 and therefore their testimony must be excluded.

In their response to VDOC's Motions *In Limine*, the Plaintiffs do not refute that their proposed experts Richard Wells and Richard Subia violated Federal Rule of Civil Procedure 26 by failing to identify the VDOC inmates with whom they spoke and whose allegations support their proffered opinions. (*See* ECF No. 293, at 33.) Instead, the Plaintiffs argue that any such non-disclosure was *de mininis* and that VDOC "points to no portion of Mr. Wells's [and Mr. Subia's] report where [they] re[ly] solely upon information from unidentified prisoners to reach [their] conclusions." (*Id*. at 33-34.) But that is exactly the problem with Wells and Subia's non-disclosure. VDOC is unable to probe and rebut Wells and Subia's testimony. Wells and Subia both spoke with unidentified inmates during their tours of Deerfield and Greensville and then formed opinions about VDOC's obligations under the ADA and RA based upon those conversations. Because it is unclear what part of their opinions and/or Reports were based on these conversations—and because neither Wells nor Subia identify the inmates with whom they spoke—both Wells' and Subia's testimony must be excluded.

Federal Rule of Civil Procedure 26 provides that the disclosure of an expert witness "must be accompanied by a written report" that is prepared and signed by the expert witness. Fed. R. Civ. P. 26(a)(2)(B). An expert report "must contain" a variety of information, including "the facts or data considered by the witness in forming [his or her opinions]." Fed. R. Civ. P. 26(a)(2)(B)(ii); *see also SSS Enters, Inc. v. Nova Petroleum Realty, LLC*, 533 Fed. App'x 321, 323 (4th Cir. 2013). The disclosure requirements of Rule 26 are self-executing; the rule mandates what the expert report must contain. Fed. R. Civ. P. 26(a)(2)(B); *JJI Intern., Inc. v. Bazar Grp*., Inc., C.A. No. 11–206ML, 2013 WL 3071299, at *4 (D.R.I. Apr. 8, 2013) ("The requirement is self-executing and does not

countenance selective disclosure."). Under the Rule, the term "facts or data" is interpreted broadly. As the Advisory Committee Notes make clear:

> The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Fed R. Civ. P. 26 advisory committee notes, 2010 amendments.

Here, both Subia and Wells failed to disclose the VDOC inmates with whom they spoke. The allegations of these unidentified inmates form at least part of the basis for their reports and opinions. VDOC cannot investigate these claims without knowing the identities of the inmates who made them, and as such are unable to meaningfully rebut them. Because both Wells and Subia's Reports and opinions violate Rule 26 in failing to provide this information, their testimony must be excluded.

III. Plaintiffs fail to identify how their expert, Richard Wells, has applied his non-scientific knowledge to the facts of this case.

Plaintiffs argue that their proposed expert, Richard Wells, satisfies the non-scientific *Daubert* standard. (ECF No. 293, at 19-20.) But the Plaintiffs do not explain how so. Instead, the Plaintiffs argue that Wells' experience in prison administration meets the *Daubert* standard (*See id.*) But as explained in VDOC's Motion *In Limine*, Wells does not explain *how* his experience has led to his conclusions. For example, he has not 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. Wells does not meet *Daubert*'s non-scientific standard for expert testimony, and his opinions should therefore be

excluded at trial.

IV. Plaintiffs' expert Richard Subia opines on technology that none of the Plaintiffs have requested to use, and therefore his opinions regarding that technology are irrelevant.

Because the majority of the Plaintiffs' proposed experts do not provide testimony related to any of the individual Plaintiffs at all, their testimony is irrelevant. Plaintiffs' expert Richard Subia exemplifies the irrelevancy of such testimony. Subia opines about a variety of technology that he avers VDOC can provide to blind and low vision inmates. Specifically, Subia opines that prisons can provide the following assistive devices to blind and low vision inmates: an omniReader, an Amigo HD, a Ruby 10, and a Topaz Ultra. (ECF No. 282-1, at 12-19.) However, the Plaintiffs have admitted in this case that they have never even requested the use of these devices at Deerfield and Greensville, and VDOC therefore never denied the Plaintiffs the use of these devices. (*See* Ex. 1.) Subia's testimony is therefore entirely irrelevant and should be excluded, as VDOC cannot be said to have failed to accommodate the Plaintiffs by not providing them with devices that the Plaintiffs never requested. Subia's testimony is irrelevant and should be excluded.

CONCLUSION

For these reasons and the reasons detailed in all of VDOC's Motions *In Limine* to Exclude the Plaintiffs' Expert Testimony, VDOC respectfully requests that the Court exclude, or limit, the Plaintiffs' presentation of expert testimony in this case.

Respectfully submitted,

VIRGINIA DEPARTMENT OF CORRECTIONS

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CERTIFICATE OF SERVICE

I hereby certify that on the 29th 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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