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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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9 **Yvon Wagner**, as the personal
representative of the ESTATE OF ERIC
10 **VOGEL**,

No. CV 07-00819-PHX-EHC

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Plaintiff,

ORDER

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v.

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MARICOPA COUNTY, a political
subdivision of the State of Arizona,
14 **Joseph Arpaio** and **Jane Doe Arpaio**,
husband and wife,

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Defendants.

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The parties' December 18, 2009 Witness List notes that Plaintiff objects to Gerard
19 Sheridan as a trial witness because he was "disclosed by Defendants long after the close of
20 discovery." (Dkt. 179 at 2, n. 1.) Plaintiff stated a similar objection in the parties' Joint
21 Proposed Pretrial Order. (Dkt. 140 at 44-45.) The Court ordered the parties to submit
22 supplemental briefing on Plaintiff's objection to Sheridan. (Dkt. 181 at 2.)

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On January 5, 2010, Defendants filed a "Response to Plaintiff's Objection to Gerard
24 Sheridan." (Dkt. 188.) Defendants argue that disclosure was timely because "Sheridan's
25 identity and expected testimony were disclosed on January 20, 2009, which was 63 days
26 before the original March 24, 2009 trial date and well within the time frame set by the Court
27 and Rule 26(a)(3)(B)." (*Id.* at 2.) Defendants also argue that Plaintiff has not suffered any

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1 prejudice by any lateness in disclosure because the trial date has been continued several times
2 and his disclosure was made nearly a year prior to trial. (Id. at 2-3.)

3 On January 5, 2010, Plaintiff filed a “Supplemental Brief Re Objection to Defendants’
4 Witness Gerard Sheridan.” (Dkt. 191.) Plaintiff argues that Sheridan was improperly
5 disclosed “over a year after discovery ended and six years after agreeing that Sheriff Arpaio
6 was the proper policy maker.” (Id. at 3.) Plaintiff also argues that she will be unfairly
7 prejudiced by Sheridan’s untimely disclosure because it is unclear what Sheridan will testify
8 about, and “Plaintiff prepared her case, including the numerous depositions taken in this
9 matter and the many expert reports, based upon the testimony and reports timely disclosed
10 by Defendants.” (Dkt. 191 at 5-6 (emphasis omitted).)

11 According to Federal Rule of Civil Procedure 26, “a party must, without awaiting a
12 discovery request, provide to the other parties... the name and, if known, the address and
13 telephone number of each individual likely to have discoverable information – along with
14 the subjects of that information – that the disclosing party may use to support its claims or
15 defenses, unless the use would be solely for impeachment.” Fed.R.Civ.P. 26(a)(1)(A)(i). A
16 party “must supplement or correct its disclosure or response... in a timely manner if the party
17 learns that in some material respect the disclosure or response is incomplete or incorrect, and
18 if the additional or corrective information has not otherwise been made known to the other
19 parties during the discovery process or in writing...” Fed.R.Civ.P. 26(e)(1)(A). Rule
20 37(c)(1) “excludes evidence from an untimely disclosed witness unless the parties’ failure
21 to disclose the required information is substantially justified or harmless.” Wong v. Regents
22 of Univ. of Cal., 410 F.3d 1052, 1062 (9th Cir. 2005).

23 Sheridan was disclosed on January 20, 2009. (Dkt. 191-2 at 22 & Dkt. 79.)
24 According to Defendants’ disclosure statement, “Sheridan has been the Chief of Custody for
25 the Maricopa County Sheriff’s Office since 1999” and “is expected to testify regarding the
26 policies and procedures governing the Maricopa County Jails and the administration and
27 operation of the jails.” (Dkt. 191-2 at 22-23.)

1 Defendants properly disclosed Sheridan, pursuant to Rule 26(a)(1)(A)(i).¹ (See Dkt.
2 191-2 at 22-23.) Although the trial was set for March 24, 2009 when Sheridan was
3 disclosed, the trial has been continued several times and is now set for January 26, 2010.
4 (See Dkts. 71, 79, & 185.) After Sheridan was disclosed, Plaintiff did not file a motion to
5 strike Defendants' disclosure as untimely. Thus, Plaintiff has had over a year to investigate
6 and prepare for Sheridan's testimony. Defendants' disclosure statement provides adequate
7 information regarding the general topic (i.e. Maricopa County jail policies and procedures)
8 on which Sheridan has information, allowing Plaintiff an opportunity to determine whether
9 to seek his deposition. (See Dkt. 191-2 at 22.) Moreover, the Court will grant Plaintiff leave
10 to take Sheridan's deposition prior to trial, further minimizing any potential prejudice.
11 Therefore, the Court finds that Defendants' untimely disclosure was harmless.

12 Accordingly,

13 **IT IS ORDERED** that Plaintiff's objection to Gerard Sheridan is **denied**.

14 **IT IS FURTHER ORDERED** that Plaintiff is granted leave to take the deposition
15 of Gerard Sheridan prior to trial.

16 DATED this 11th day of January, 2010.

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20 Earl H. Carroll
21 United States District Judge
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26 ¹Defendants reliance upon Rule 26(a)(3)(B) is mistaken because it provides the
27 deadline for disclosure of evidence, which has **already** been disclosed, that will be offered
28 at trial. See Fed.R.Civ.P. 26(a)(3)(A) (requiring the parties to identify the evidence that they
expect to present and evidence that they may offer if the need arises).