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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Darren Udd, et al.,
10 Plaintiffs,
11 v.
12 City of Phoenix, et al.,
13 Defendants.

No. CV-18-01616-PHX-DWL
ORDER

14
15 Pending before the Court is Plaintiffs Darren and Amy Udd’s (collectively, “the
16 Udds”) motion to supplement their Mandatory Initial Discovery Pilot (“MIDP”)
17 disclosures and the summary judgment record. (Doc. 120.) Defendants Mary Roberts and
18 the City of Phoenix (collectively, “Defendants”) oppose this motion. (Doc. 123.) For the
19 following reasons, the motion will be granted in part and denied in part.

20 **BACKGROUND**

21 The full factual and procedural history of this case is set out in the Court’s March
22 31, 2020 order. (Doc. 122.) To briefly summarize, Darren Udd formerly worked as a
23 homicide detective for the Phoenix Police Department (“PPD”). (*Id.* at 1.) The PPD
24 conducted a criminal investigation of Darren for time theft. (*Id.* at 2.) After a six-month
25 investigation—which Darren claims was retaliatory, discriminatory, and methodologically
26 flawed—was unable to account for Darren’s missing hours, Assistant Chief Roberts
27 submitted his case to the Maricopa County Attorney’s Office (“MCAO”), which declined
28 to prosecute because there was no reasonable likelihood of conviction. (*Id.* at 7-8.) A
separate criminal investigation into the Udds’ unauthorized use of a parking pass concluded

1 in the same manner. (*Id.* at 7, 9.) Darren retired during the subsequent administrative
2 investigation into allegations that he (1) failed to complete his full duty shifts and (2)
3 parked his city vehicle at his residence. (*Id.* at 8-9.) One focal point of the Udds' claims
4 is that the "incident reports" summarizing the criminal investigations into both Darren and
5 Amy falsely stated they had been arrested, which was due to a "bug" in the PPD software
6 requiring administrators to check the "arrested" box whenever an investigation was
7 submitted to a prosecutor's office, regardless of whether the party was arrested. (*Id.* at 10-
8 11.)

9 On September 13, 2018, the MCAO determined, based on information provided by
10 the PPD, that Darren's name would be placed on the *Brady* list. (Doc. 105-1 at 193.)
11 However, on October 12, 2018, the MCAO changed course and determined that Darren's
12 name would be removed from the *Brady* list. (*Id.* at 196.) The Udds acknowledged in their
13 MIDP disclosures and in their response to Defendants' motion for summary judgment that
14 Darren's name had been removed from the *Brady* list. (Doc. 120 at 3; Doc. 105 at 13.)

15 On March 18, 2020, the Court provided the parties with a tentative ruling on their
16 cross-motions for summary judgment (as well as two other motions). (Doc. 115.)

17 On March 20, 2020, the Udds filed the present motion. (Doc. 120.)

18 On March 23, 2020, the Court heard oral argument concerning the four motions
19 addressed in the tentative order. (Doc. 121.)

20 On March 31, 2020, the Court issued a 65-page order resolving the four motions.
21 (Doc. 122.) In that order, the Court noted:

22 On March 20, 2020, Plaintiffs filed a motion to supplement the summary
23 judgment record with evidence that Darren's name was not, in fact, removed
24 from the *Brady* list. Because this motion is not yet fully briefed, the Court
25 will not address it now. The parties may address the summary judgment
26 ramifications, if any, of Plaintiffs' supplementation request in their yet-to-
27 be-filed response and reply briefs.

28 (*Id.* at 11 n.4.) The order went on to discuss Darren's referral for inclusion on the *Brady*
list as a potential adverse employment action and an instance of defamation. (*Id.* at 33-34,
39, 46.) The order additionally concluded that, because the Udds had not produced any

1 non-speculative evidence of economic harm based on Defendants’ inaccurate checking of
2 the “arrested” box in the incident reports, Darren’s negligence claim did not survive
3 summary judgment. (*Id.* at 48-50.)

4 On April 3, 2020, Defendants filed a response to the Udds’ motion to supplement.
5 (Doc. 123.)

6 On April 10, 2020, the Udds filed a reply. (Doc. 124.)

7 DISCUSSION

8 The Udds seek to supplement their MIDP disclosures and the summary judgment
9 record with evidence that Darren’s name was not, in fact, removed from the *Brady* list.
10 (Doc. 120.) The evidence they seek to introduce is an online news article posted by ABC
11 Channel 15 on February 20, 2020, entitled “Database shows every Arizona law
12 enforcement official tracked for ‘integrity’ concerns.” (Doc. 120-1 at 2.) That news article
13 contains a link to a database and the version of the article attached to the exhibit contains
14 a list of officers that includes Darren’s name. (*Id.* at 4.) The Udds make this motion
15 without reference to the Federal Rules of Civil Procedure, and neither party suggests what
16 legal standard is applicable.

17 I. Motion To Supplement Summary Judgment Record

18 The Udds claim the new evidence is relevant to their remaining defamation claim
19 and their now-dismissed negligence claim. (Doc. 124 at 5-6.) Defendants argue the
20 evidence is irrelevant, unreliable, and inadmissible. (Doc. 123 at 6-10.)

21 “Evidence is relevant if (a) it has any tendency to make a fact more or less probable
22 than it would be without the evidence; and (b) the fact is of consequence in determining
23 the action.” Fed. R. Evid. 401. In deciding whether to grant a motion to supplement the
24 record, district courts consider whether the evidence the party is seeking to admit is relevant
25 and also consider whether the motion is made in good faith and whether allowing
26 supplementation would unfairly prejudice the non-moving party. *Roosevelt Irrigation*
27 *Dist. v. Salt River Project Agric. Improvement & Power Dist.*, 2017 WL 2721437, *3 (D.
28 Ariz. 2017). *See also George v. Nw. Mut. Life Ins. Co.*, 2011 WL 3881476, *4 (W.D.
Wash. 2011) (granting a motion to supplement where the new evidence was “directly

1 relevant to the central issues in this matter,” “disregard[ing] it simply because it was
2 discovered outside the discovery period would not serve the interests of justice,” and there
3 was no evidence that the moving party “acted in bad faith in failing to bring the [evidence]
4 to the Court at an earlier date”). Whether to grant a motion to supplement is within a
5 district court’s discretion. *Resilient Floor Covering Pension Tr. Fund Bd. of Trs. v.*
6 *Michael’s Floor Covering, Inc.*, 801 F.3d 1079, 1088 (9th Cir. 2015) (reviewing denial of
7 a motion to supplement for abuse of discretion).

8 The Court will decline to supplement the summary judgment record with the
9 proffered evidence. Whether Darren’s name continued to be included on the *Brady* list is
10 of no consequence to the March 31, 2020 order. The Court concluded in the order that
11 neither party was entitled to summary judgment on the Udds’ defamation claim because
12 triable fact issues remained as to whether the statements in the incident reports were
13 privileged and whether they conveyed a defamatory meaning. (Doc. 122 at 44-46.)
14 Consequently, there was “no need to address the parties’ remaining arguments concerning
15 . . . the *Brady* list.” (*Id.* at 46.) Because the Court did not need to address the *Brady* list
16 issue in connection with the Udds’ defamation claim, it follows that whether Darren’s name
17 remains on the list is of no consequence to the summary judgment outcome as to that claim.

18 This evidence also doesn’t compel a different disposition of the Udds’ negligence
19 claim. The Court stated that for the Udds’ negligence claim to survive summary judgment,
20 they “needed to show, without conjecture or speculation, that the allegedly tortious conduct
21 relating to the arrest records actually caused them to suffer economic harm.” (*Id.* at 48.)
22 The Udds contend the inclusion of Darren’s name on this list is “undeniably devastating”
23 and that learning his name remains on the *Brady* list is “not theoretical or speculative
24 worries of potential future damages.” (Doc. 124 at 5-6.) But absent from the motion to
25 supplement is any non-speculative evidence that Darren’s alleged continued inclusion on
26 this list has caused him actual economic harm. There is, for example, no evidence that
27 Darren sought but failed to secure work as a private investigator due to the potential client’s
28 belief he’d be subject to impeachment at a theoretical future trial due to his name’s
inclusion on the list. Nor is there any evidence that, in general, being included on the list

1 impairs a former law enforcement officer’s future earning capacity. Moreover, it is unclear
2 why the presence or absence of Darren’s name on the list would have any impact on an
3 opposing party’s ability to impeach him in a theoretical future trial—the *conduct* that
4 resulted in Darren being considered for inclusion on the *Brady* list remains discoverable
5 and Darren has presented no evidence that, but for the inclusion of his name on the list,
6 that conduct would be off-limits for impeachment purposes. Finally, the evidence that is
7 already part of the summary judgment record—the October 2018 letter from the MCAO
8 stating that Darren’s name would be removed from the *Brady* list—suggests that the
9 database published by the news station is either outdated or inaccurate.

10 The evidence the Udds seek to introduce does not, in short, alter the Court’s earlier
11 conclusion that Darren failed to present non-speculative evidence of economic damages
12 sufficient to survive summary judgment on his negligence claim. Accordingly, the motion
13 to supplement the summary judgment record will be denied.

14 II. Motion To Supplement MIDP Responses

15 The Udds also seek to supplement their MIDP disclosures with this new evidence.
16 (Doc. 120.) Their original MIDP disclosures indicated that Darren’s name was removed
17 from the *Brady* list in 2018 and the proposed revision would state that his name remains
18 on the list. (*Id.* at 3.) Defendants oppose this request on the grounds that the evidence is
19 not relevant to any remaining triable claims and further that the evidence is inadmissible
20 and unreliable. (Doc. 123 at 6-10.)

21 The MIDP requires parties to provide information relevant to the parties’ claims and
22 defenses, whether favorable or unfavorable, and regardless of whether they intend to use
23 the information in presenting their claims and defenses. “The duty to provide mandatory
24 initial discovery responses . . . is a continuing duty, and each party must serve supplemental
25 responses when new or additional information is discovered or revealed.” General Order
26 17-08. The MIDP also directs courts to set deadlines for final supplementation of MIDP
27 responses. *Id.* However, scheduling orders issued before the final pretrial conference
28 “may be modified upon a showing of ‘good cause.’” *Johnson v. Mammoth Recreations,*
Inc., 975 F.2d 604, 608 (9th Cir. 1992). Good cause in this context is primarily a question

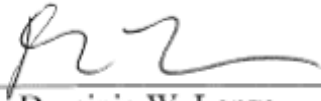
1 of diligence. *Id.* at 609. Finally, production of information under the MIDP “does not
2 constitute an admission that information is relevant, authentic, or admissible.” General
3 Order 17-08.

4 Here, the scheduling order set the deadline for final supplementation of MIDP
5 disclosures for June 26, 2019. (Doc. 29 at 2.) However, the Udds could not have become
6 aware of this new evidence before February 20, 2020. Moving to supplement the record
7 to include this new evidence less than a month after discovery suggests the Udds were
8 diligent. The Udds’ motion to supplement their MIDP disclosures will therefore be
9 granted.

10 Defendants’ concerns about relevance, reliability, and admissibility are not without
11 merit. Defendants point out that maintenance of the *Brady* list is the province of
12 prosecutors’ offices, rather than the PPD, and thus the failure to remove Darren’s name has
13 no relevance to whether the City published false information about Darren. (Doc. 123 at
14 6.) The provenance of this specific list—published, as Defendants point out, by an entity
15 that is not a party to this suit—is rather murky. (*Id.* at 9.) The presence of Darren’s name
16 on the list is at odds with other evidence, raising questions about this new list’s accuracy.
17 But General Order 17-08 makes clear that MIDP disclosures are not an admission of
18 relevance, authenticity, or admissibility. So, although the Udds may supplement their
19 MIDP disclosures with this evidence, this decision is without prejudice to Defendants’
20 ability to seek exclusion of the evidence at trial.

21 Accordingly, **IT IS ORDERED** that the Udds’ motion to supplement the summary
22 judgment record and their MIDP disclosures (Doc. 120) is **granted in part and denied in**
23 **part.**

24 Dated this 17th day of April, 2020.

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Dominic W. Lanza
United States District Judge