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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Devin Andrich,
10 Plaintiff,

No. CV-17-00173-TUC-RM

ORDER

11 v.

12 Kevin Dusek, et al.,
13 Defendants.
14

15 Pending before the Court is Defendants' "First Motion for Extension of Time of
16 Deadlines" (Doc. 92), Plaintiff's "Motion to Strike Reply to Response to Motion" (Doc.
17 97), and Defendant's "Motion to Supplement Defendants' Reply to Plaintiff's Response to
18 Their Motion for Extension of Time (Doc. 108). Also before the Court is a dispute as to
19 whether Plaintiff may depose Defendant Charles Ryan, the Director of the Arizona
20 Department of Corrections.

21 **I. Background**

22 Plaintiff was formerly incarcerated at the Arizona State Prison Complex. (Doc. 74.)
23 In his fourteen-count Second Amended Complaint, Plaintiff alleges numerous violations
24 of his constitutional rights stemming from the conditions in which he was confined while
25 incarcerated. (*Id.*) Named defendants include several correctional officers, including
26 sergeants, as well as Arizona State Prison Complex Warden Alfred Ramos and Arizona
27 Department of Corrections Director Charles Ryan. (*Id.*) Defendants pled numerous
28 affirmative defenses, including Plaintiff's alleged failure to exhaust administrative

1 remedies and qualified immunity. (Docs. 76, 82.) The Court’s December 3, 2018
2 Scheduling Order (Doc. 84) provided for discovery to end on May 31, 2019.

3 **II. Motion for Extension of Time (Doc. 92)**

4 On May 29, 2019, Defendants filed a Motion for Extension of Time (Doc. 92),
5 seeking extensions of deadlines established in the Court’s December 3, 2018 Scheduling
6 Order (Doc. 84.) Defendants request a thirty-day extension of the deadlines to complete
7 discovery, file dispositive motions, and file a joint proposed pretrial order. (Doc. 92.)¹
8 Plaintiff responds by apparently requesting a longer extension, stating that “Defendants’
9 proposal offers no window for the parties to resolve discovery disputes”; however, Plaintiff
10 does not propose an alternative timeline. (Doc. 93.) As good cause exists for an extension
11 of the deadlines to complete discovery, file dispositive motions, and file a joint proposed
12 pretrial order, and Plaintiff does not oppose an extension of the deadlines, the Court will
13 grant Defendants’ Motion for Extension of Time (Doc. 92).

14 **III. Motion to Strike Reply (Doc. 97) and Motion to Supplement Reply (Doc.
15 108)**

16 On May 30, 2019, the parties and the Court’s law clerk held a telephonic conference
17 to discuss a dispute as to the deposition of Director Ryan. At that time, Defendants’
18 “Motion for Extension of Time” (Doc. 92) for discovery was pending before the Court.
19 During the telephonic conference, the parties represented to the Court that the dispute as to
20 Director Ryan’s deposition was ready for resolution by the Court without further briefing.
21 Nevertheless, later that day, Plaintiff submitted written argument regarding the disputed
22 deposition of Director Ryan in the form of a “Response to Defendants’ Motion for
23 Extension of Time.” (Doc. 93.) Defendants then filed a “Reply to Plaintiff’s Response to
24 Their Motion for Extension of Time” (Doc. 94), in which they addressed with extended
25 argument the issue of the disputed deposition and requested “the Court to issue a protective
26 order so that Director Ryan not be required to appear for a deposition.” (Doc. 94.) Plaintiff

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28 ¹ Defendants also requested an extension of the deadline to respond to discovery requests
(Doc. 92), but the parties subsequently reached an agreement amongst themselves
resolving the issue of the discovery response deadline (Doc. 99).

1 then filed a Motion to Strike Defendants' Reply (Doc. 97), arguing that Defendants' motion
2 for a protective order in the guise of a Reply was procedurally improper. The Motion to
3 Strike generated a Response from Defendants (Doc. 98), a clarification by Plaintiff (Doc.
4 99), and Plaintiff's Reply to Defendants' Response to the Motion to Strike. (Doc. 100).
5 Defendants subsequently filed a "Motion to Supplement Defendants' Reply to Plaintiff's
6 Response to Their Motion for Extension of Time," in which they present "newly-
7 discovered evidence" relevant to "whether ADC Director Ryan should be required to give
8 a deposition in this case." (Doc. 108.)

9 The Court will grant Plaintiff's Motion to Strike (Doc. 97) and order Defendants'
10 Reply to Plaintiff's Response to Defendants' Motion for an Extension of Time (Doc 94)
11 stricken. The Court issued a Scheduling Order in this case on December 3, 2018. (Doc.
12 84). That Order provides instructions for handling discovery disputes in this matter. (*Id* at
13 4(d)). The Order provides that the parties "shall not file written discovery motions without
14 leave of Court." (*Id.*) It further provides that upon providing a summary of a discovery
15 dispute to the Court's law clerk, the Court may "set a telephonic conference, order written
16 briefing, or decide the dispute without conference or briefing." (*Id.*) In this instance,
17 Defendants have violated the Court's Scheduling Order by submitting extended briefing
18 pertaining to a discovery dispute without prior leave of Court. Defendants' Reply to
19 Plaintiff's Response to Defendants' Motion for an Extension of Time (Doc. 94) will
20 therefore be stricken.

21 As the Reply (Doc. 94) that Defendants seek to "supplement" in Defendants'
22 Motion to Supplement (Doc. 108) will be stricken, the Motion to Supplement will be
23 denied as moot.

24 **IV. Deposition of Charles Ryan**

25 Plaintiff noticed Director Ryan to appear at a deposition on May 31, 2019, but
26 agreed during the May 30, 2019 telephonic conference to stay that notice pending the
27 Court's resolution of the propriety of the deposition. Plaintiff asserts that he has a right to
28 depose Director Ryan because he is a named defendant. Defendant argues that Director

1 Ryan should not be made to appear for a deposition because he is a high-ranking
2 government official who does not possess knowledge directly relevant to Plaintiff's action.

3 **A. Legal Standard**

4 A district court may limit discovery "to protect a party or person from annoyance,
5 embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). The need
6 to limit the use of subpoenas served on high-ranking government officials was recognized
7 by the Supreme Court in *United States v. Morgan*. 313 U.S. 409, 421-22 (1941). Following
8 *Morgan*, courts have developed limits on depositions of individuals at the "apex" of
9 government or corporate hierarchies, holding that such "apex depositions" may be
10 precluded by the Court under Rule 26(c) where the discovery sought "can be obtained from
11 some other source that is more convenient, less burdensome, or less expensive." *Apple Inc.*
12 *v. Samsung Elecs. Co.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012). The Ninth Circuit has noted,
13 in particular, that "[h]eads of government agencies are not normally subject to deposition."
14 *Kyle Eng'g Co. v. Kleppe*, 600 F.2d 226, 231 (9th Cir. 1979) (citing *Peoples v. U.S. Dep't*
15 *of Agric.*, 427 F.2d 561, 567 (D.C. Cir. 1970)).

16 On the other hand, courts may allow depositions of top government officials "where
17 the official has first-hand knowledge related to the claim being litigated." *Bogan v. City of*
18 *Boston*, 489 F.3d 417, 423 (1st Cir. 2007). *See, e.g., Union Sav. Bank of Patchogue, N.Y.*
19 *v. Saxon*, 209 F. Supp 319, 319-20 (D.D.C. 1962) (directing the Comptroller of Currency
20 to submit to deposition where plaintiff alleged, on information and belief, that he was
21 personally involved in the challenged agency decision); *Am. Broad. Cos. v. US. Info.*
22 *Agency*, 599 F. Supp. 765, 769 (D.D.C. 1984) (ordering Director of United States
23 Information Agency to sit for a deposition for questioning regarding relevant documents
24 the Director himself created).

25 In addition to personal knowledge, courts allowing the deposition of top government
26 officials have also generally required "a showing that the information gained from such
27 deposition is not available through any other source." *Church of Scientology of Bos. v.*
28 *I.R.S.*, 138 F.R.D. 9, 12-13 (D. Mass. 1990). Although there may be "no absolute

1 requirement that a party exhaust all alternative, ‘less burdensome’ means of discovery
2 before proceeding with the deposition of a high ranking government official,” *Eng v. City*
3 *of Los Angeles*, No. CV 05-2686 MMM, 2007 WL 9729101 at *9 (C.D. Cal. Apr. 5, 2007),
4 the Court discerns a general principle requiring a litigant seeking to depose a high-ranking
5 official to first make a good-faith attempt to obtain the information elsewhere.

6 For example, in *Bogan v. City of Boston*, the First Circuit affirmed the district
7 court’s issuance of a protective order precluding the deposition of the Mayor of Boston,
8 even though it was alleged that the Mayor had particularized knowledge relevant to the suit
9 against him. 489 F.3d 417, 423-24 (1st Cir. 2007). In that case, plaintiffs alleged that the
10 Mayor ordered plaintiffs’ home be subjected to a city inspection as part of a scheme to
11 force plaintiffs to sell their property to benefit an economic development project. *Id.* at 421.
12 In support of their bid to depose the Mayor, plaintiffs offered written evidence of his
13 personal involvement in the form of a note written by a city inspector to the effect that the
14 inspection had been ordered by the Mayor’s office. *Id.* at 423. Notwithstanding this
15 evidence of the Mayor’s personal involvement, the court found that the plaintiffs’
16 “argument founder[ed] because they did not pursue other sources to obtain relevant
17 information before turning to the Mayor.” *Id.* at 424. In particular, the court noted that
18 plaintiffs “failed to pursue discovery from . . . any of the Mayor’s aides. It is certainly likely
19 that at least one of these employees was involved and could have clarified the Mayor’s
20 role.” *Id.*

21 Synthesizing the above cases, the Court concludes that two considerations should
22 guide the decision as to whether Director Ryan should be subject to deposition. First, the
23 Court must consider whether Director Ryan has personal knowledge of facts relevant to
24 the instant action. Second, the Court must also consider whether Plaintiff, as the party
25 seeking to depose Director Ryan, has made a good faith effort to seek the information from
26 other reasonably available sources. *See Apple Inc.*, 282 F.R.D. at 263 (“In determining
27 whether to allow an apex deposition, courts consider (1) whether the deponent has unique
28 first-hand, non-repetitive knowledge of the facts at issue in the case and (2) whether the

1 party seeking the deposition has exhausted other less intrusive methods.”) (citations
2 omitted); *see also Coleman v. Schwarzenegger*, Nos. CIV S-90-0520 LKK JFM P, C01-
3 1351 TEH, 2008 WL 4300437, at *3 (E.D. Cal. Sept. 15, 2008) (considering both “the
4 personal knowledge of facts” of the official to be deposed and whether “such information
5 cannot be obtained by other means.”)

6 **B. Discussion**

7 Here, the Court finds that Plaintiff has adequately alleged that Director Ryan has
8 first-hand knowledge related to the claims against him. This Court previously dismissed as
9 futile Plaintiff’s official capacity claims against Director Ryan but found that Plaintiff’s
10 claims in Counts Thirteen and Fourteen adequately stated claims against Director Ryan in
11 his personal capacity. (Doc. 73.) Those claims allege that Director Ryan “has issued
12 instructions through the ADC chain of command or directly to officers” both “to withhold
13 long-sleeve shirts, sweaters, stocking caps or coats . . . when inmates participate in out-of-
14 cell recreation time in freezing or near freezing temperatures” (Doc. 66-1, ¶ 165), as well
15 as to the effect “that inmates housed in detention/segregation units shall have cells with
16 constant illumination twenty-four (24) hours a day, seven (7) days a week.” (*Id.* ¶ 175.)
17 Director Ryan clearly has knowledge of facts directly related to these allegations, which
18 concern his own personal involvement in plaintiff’s alleged mistreatment. In further
19 support of his allegation that he suffered unconstitutional conditions of confinement at the
20 direction of Director Ryan, Plaintiff has offered an “Arizona Department of Corrections
21 Inmate Grievance Appeal Response,” apparently signed by Director Ryan and upholding
22 the decision to have plaintiff placed in segregation. (Doc. 97-1).

23 The Court, however, finds that Plaintiff has not at this time adequately pursued
24 readily available alternative sources for information related to Director Ryan’s orders
25 regarding plaintiff’s conditions of confinement. The parties have already agreed upon a
26 framework for the deposition of five other government officials, including the warden and
27 a sergeant at Arizona State Prison Complex, where plaintiff was formerly incarcerated.
28 (Doc. 99). Plaintiff also states that the parties have agreed upon a timeline for service of

1 written discovery responses, including written responses to interrogatories previously
2 served on Director Ryan. (*Id.*) The Court therefore finds that it appropriate to issue a
3 protective order under Rule 26(c) to preclude the deposition of Director Ryan at this stage
4 of the litigation. Plaintiff is directed to make every effort to obtain the necessary
5 information regarding Director Ryan’s role in the alleged mistreatment of Plaintiff through
6 the upcoming depositions and written discovery. If, after further discovery, Plaintiff still
7 believes that deposing Director Ryan is necessary, Plaintiff is directed to file a written
8 motion for the Court’s consideration explaining what information is sought and why it
9 cannot be obtained elsewhere.

10 Accordingly,

11 **IT IS ORDERED** that Defendants’ Motion for Extension of Time (Doc. 92) is
12 **granted**. Deadlines from the Court’s Scheduling Order (Doc. 84) are extended as follows:

- 13 1. The deadline for completion of discovery is extended to **July 12, 2019**.
- 14 2. The deadline for filing dispositive motions is extended to **August 12, 2019**.
- 15 3. The deadline for filing a joint proposed pretrial order is thirty (30) days after
16 resolution of any dispositive motions filed or, if no such motions are filed, **August**
17 **26, 2019**.

18 **IT IS FURTHER ORDERED** that Plaintiff’s Motion to Strike (Doc. 97) is
19 **granted**. The Clerk of Court shall Strike “Defendant’s Reply to Plaintiff’s Response to
20 Their Motion for Extension of Time” (Doc. 94) from the record.

21 **IT IS FURTHER ORDERED** that Defendants’ Motion to Supplement
22 Defendants’ Reply to Plaintiffs’ Response to Their Motion for Extension of Time (Doc.
23 108) is **denied** as moot.

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