UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

JOAN SHELLEY, et al., Plaintiffs, v. COUNTY OF SAN JOAQUIN, et al., Defendants.	No. 2:13-cv-0266 MCE DAD ORDER

On May 22, 2015, this matter came before the undersigned for hearing of defendant's motion to quash. Attorney Mark Connely appeared on behalf of the plaintiffs and attorneys Mark Berry and Matthew Dacey appeared on behalf of the defendants. After hearing argument from the parties, the court took the motion under submission.

BACKGROUND

As previously explained by the assigned District Judge, plaintiffs' complaint seeks to recover damages from the defendant, the County of San Joaquin ("County"), for the alleged violation of the U.S. Constitution during the exhumation of the body of plaintiffs' deceased relative, Jo Ann Hobson. (MTD Ord (Dkt. No. 32) at 1.) The most recent discovery dispute between the parties stems from plaintiffs' issuance of subpoenas, on February 27, 2015, to two California Department of Justice employees, Kaycee Leonard and Erin Brooks, seeking testimony and the production of documents related to "communications and/or correspondence the Missing

and Unidentified Persons Unit of the State of California, Department of Justice" had with the defendant County regarding Jo Ann Hobson and three other identified individuals. (Konz Decl. (Dkt. No. 55-1) at 5.[1]) On March 13, 2015, the Department of Justice objected to the date set for the depositions of its two employees and objected, pursuant to California Penal Code §§ 14204(b) and 14205(f), to the production of documents requested. (Id. at 7-8.) That same day the defendant County filed the motion to quash those same subpoenas. (Dkt. No. 46.)

On May 15, 2015, the parties filed a joint statement regarding discovery disagreement. (JS (Dkt. No. 55.)) The matter came for hearing before the undersigned on May 22, 2015. (Dkt. No. 56.)

ANALYSIS

Defendant's motion seeks to quash plaintiffs' subpoenas as to the depositions of Kaycee Leonard and Erin Brooks and the requested production of documents at those depositions. Defendant argues that "[t]he testimony and documents that the Plaintiffs seek from the DOJ will reveal information about . . . open investigations." (JS (Dkt. No. 55) at 7.) Although not clearly articulated in the joint statement, plaintiffs' counsel informed the court at the May 22, 2015 hearing that plaintiffs are not challenging the DOJ's stated objection to the requested production of documents at the depositions and are now seeking only to depose Leonard and Brooks to, in part, question them based upon documents plaintiffs already possess. Accordingly, only the taking of the depositions of Leonard and Brooks are now at issue before this court.

As the party who moved to quash those depositions, defendant has the burden of persuasion. See Moon v. SCP Pool Corp., 232 F.R.D. 633, 637 (C.D. Cal. 2005); Travelers

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[1] Page number citations such as this one are to the page numbers reflected on the court's CM/ECF system and not to page numbers assigned by the parties.

Indem. Co. v. Metropolitan Life Insur. Co., 228 F.R.D. 111, 113 (D. Conn. 2005). In attempting to satisfy this burden, defendant has raised two arguments.[2]

First, defendant argues that the depositions of the DOJ employees which plaintiffs' seek to take are not relevant to this litigation. Specifically, defendant argues that the "sole issue in this case is whether the COUNTY's recovery of the remains of Jo Ann Hobson from an abandoned agricultural well in February 2012, resulted in a substantive due process violation." (JS (Dkt. No. 55) at 5.) The argument is unpersuasive.

In addition to a substantive due process claim plaintiffs are also proceeding on a claim pursuant to Monell v. Dept's of Soc. Servs. of the City of New York, 436 U.S. 658 (1978), under the theory that defendant's employees, "based on a direct order . . . of the Sheriff . . . [,] ordered the well to be rapidly and completely dug up" in a manner that violated plaintiffs' right to substantive due process. (MTD Ord. (Dkt. No. 32) at 16.) Municipal liability under Monell may be premised upon: (1) an official policy; (2) a "longstanding practice or custom which constitutes the standard operating procedure of the local government entity;" (3) the act of an "official whose acts fairly represent official policy such that the challenged action constituted official policy;" or (4) where "an official with final policy-making authority delegated that authority to, or ratified the decision of, a subordinate." Price v. Sery, 513 F.3d 962, 966 (9th Cir. 2008). Plaintiffs contend that the depositions of DOJ employees Leonard and Brooks may lead to the discovery of relevant evidence showing that the actions taken were part of an official policy or custom.

"The scope of discovery under Rule 26(b) is extremely broad." Burke v. Ability Ins. Co., 291 F.R.D. 343, 348 (D. S.D. 2013). In this regard, "the information must be relevant to a claim or defense, but need not be admissible at trial." Lesti v. Wells Fargo Bank NA, 297 F.R.D. 665, 667 (M.D. Fla. 2014). The undersigned concludes that the depositions which plaintiffs seek may reveal information relevant to their Monell claim. Specifically, those depositions may reveal

[2] In the parties' joint statement, defendant asserted a third argument relating only to the requested production of documents at the depositions. In this regard, defendant argued that the subpoenas seek information "protected pursuant to state statute," as evidenced by the DOJ's reference to California Penal Code §§ 14204(b) and 14205(f). (JS (Dkt. No. 55) at 5-6.) As explained above, however, plaintiffs are not challenging the DOJ's objection to the request for production of documents.

evidence to supports plaintiffs' claim that the defendant's alleged wrongful actions were part of an official policy or custom and not merely accidental.[3]

Defendant also argues that the "discovery at issue falls squarely within the COUNTY's law enforcement privilege." (JS (Dkt No. 55) at 6.) The undersigned also finds this argument to be unpersuasive in the context of the present dispute.

The purpose of the law enforcement privilege is "to prevent disclosure of law enforcement techniques and procedures, to preserve the confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." In re Dep't of Inv. of City of N.Y., 856 F.2d 481, 484 (2d Cir. 1988). But the privilege is not absolute. It is a qualified privilege only that requires the Court to "balance the public interest in nondisclosure against the need of the particular litigant for access to the privileged information." Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1341 (D.C. Cir. 1984). In deciding whether the privilege should apply, courts consider: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking the discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any intradepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; and (10) the importance of the information sought to the plaintiff's case. Frankenhauser v. Rizzo, 59 F.R.D. 339, 344 (E.D. Pa.1973). Here, defendant has failed to address the relevant factors the court should consider in order to determine whether the privilege is implicated by the

[3] As discussed above, the DOJ has not objected to producing the employees for deposition pursuant to plaintiffs' subpoenas..

depositions which plaintiffs seek.

Moreover, before the government may assert the privilege, "the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege." In re Sealed Case, 856 F.2d 268, 271 (D.C. Cir. 1978). See also Hayslett v. City of San Diego, Civil No. 13-CV-1605-W (BGS), 2014 WL 1154314, at *2 (S.D. Cal. Mar. 21, 2014) ("the party invoking the privilege must at the outset make a substantial threshold showing by way of a declaration or affidavit from a responsible official with personal knowledge of the matters to be attested to in the affidavit"); Torres v. Kuzniasz, 936 F. Supp. 1201, 1210 (D. N.J. 1996) ("A claim of executive or law enforcement privilege must be asserted by the head of the agency claiming the privilege after he or she has personally reviewed the material and submitted precise and certain reasons for preserving the confidentiality of the communications."). "Until the claim of privilege has been presented to a district court with appropriate deliberation and precision and the duty of the demanding party to show his or her need for disclosure has been triggered, and until that duty has been discharged by the demanding party, the district court is not equipped to engage in the task of identifying and weighing the competing interests." Friedman, 738 F.2d at 1342.

As has been recognized, "[t]he law enforcement privilege is properly asserted, not to block an entire deposition, but to preclude specific questions if the resisting party adequately demonstrates that the harm to cognizable law-enforcement interests from requiring an answer outweighs the discovering party's need for the information." Pegoraro v. Marrero, No. 10 Civ. 0051 (AJN)(KNF), 2012 WL 1948887, at *8 (S.D.N.Y. May 29, 2012). See also Fonville v. District of Columbia, 230 F.R.D. 38, 46-47 (D. D.C. 2005) ("If . . . defendant . . . believes that the law enforcement privilege protects this information from disclosure defendant may assert the privilege as it relates to specific questions posed during the deposition."); Maher v. Monahan, No. 98 CIV. 2319 (JGK)(M), 2000 WL 648166, at *5 (S.D.N.Y. May, 18, 2000) (the law enforcement privilege is "properly dealt with on a question-by-question basis when the deposition is conducted").

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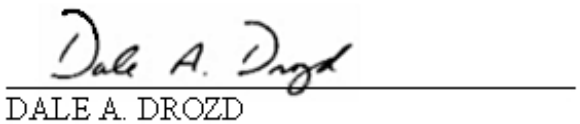
Based upon the parties' joint stipulation and defendant's failure as the party asserting the privilege to do so with the required deliberation and precision, the court at this time is unable to determine if the law enforcement privilege may be appropriately be invoked with respect to any particular question asked at either of these depositions. If, during the course of the depositions counsel for the defendant County or counsel for the deponents believes that the law enforcement privilege protects specific information from disclosure, the privilege may be asserted as to the specific question or questions.[4]

CONCLUSION

For the reasons stated above, the undersigned finds that defendant has failed to satisfy its burden in moving to quash the deposition subpoenas in question. Accordingly, defendant's March 13, 2015 motion to quash (Dkt. No. 46) is denied.

IT IS SO ORDERED.

Dated: June 2, 2015



DALE A. DROZD
UNITED STATES MAGISTRATE JUDGE

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[4] The parties are advised that, calendar permitting, the undersigned is normally available to rule on a dispute that arises during a deposition, as long as the parties are available by telephone during the deposition and both parties agree to abide by the court's ruling on the objection without briefing. If such a dispute arises and the parties wish to contact the undersigned to resolve the dispute the parties may contact the undersigned's courtroom deputy, Pete Buzo, at (916) 930-4128.