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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 ESTATE OF GERARDO CRUZ-
12 SANCHEZ, by and through his
13 successor-in-interest Paula Garcia Rivera,
14 et al.,

14 Plaintiffs,

15 v.

16 THE UNITED STATES OF AMERICA,
17 et al.,

18 Defendants.
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Case No.: 17cv569 AJB (NLS)

**ORDER ON JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE NO. 3**

[ECF No. 86]

21 Before the Court is a Joint Motion for Determination of Discovery Dispute No. 2,
22 filed by Plaintiffs and Defendants CoreCivic, Inc. and C.O. Landin (collectively,
23 “CoreCivic”), regarding Plaintiffs’ Sixth Supplemental Disclosure Statement. ECF
24 No. 86.

25 **I. BACKGROUND**

26 According to the allegations in Plaintiffs’ Third Amended Complaint, the United
27 States arrested Gerardo Cruz-Sanchez in early February 2016 as a material witness to the
28 crime of alien-smuggling. ECF No. 83. He was not charged with a crime, but because he

1 could not afford bail, he was incarcerated in the Otay Mesa Detention Center (“OMDC”),
2 which is run by CoreCivic. The complaint alleges that Mr. Cruz-Sanchez fell sick with
3 pneumonia a few days after being admitted to OMDC and he died while in custody 18
4 days later. Plaintiffs allege that despite Mr. Cruz-Sanchez making multiple complaints to
5 staff and displaying visible signs of illness, Defendant C.O. Landin and other staff failed
6 to provide him with any medical attention. Plaintiffs’ complaint puts forth several causes
7 of action including wrongful death, negligence, violation of the Bane Act, negligent
8 training and supervision, and breach of duty.

9 The parties previously brought a discovery dispute regarding a witness, David
10 McGinnis. ECF No. 67. Mr. McGinnis was the Learning and Development Manager at
11 OMDC for 11 years, including the time during which Mr. Cruz-Sanchez was detained.
12 Plaintiffs deposed Mr. McGinnis and during the deposition, Mr. McGinnis testified that
13 he believed there were understaffing issues at OMDC and that he had personally made
14 written complaints regarding these issues. Plaintiffs subsequently sought discovery
15 targeting the understaffing allegations, and Defendants objected. The Court ruled that
16 some discovery would be permitted into the understaffing issues. ECF No. 68.

17 Relevant to the instant dispute, on August 18, 2018, Plaintiffs deposed Franklin
18 Reid in another unrelated lawsuit that Plaintiffs’ counsel filed against CoreCivic.¹ ECF
19 No. 86 at 7. Mr. Reid is a former CoreCivic detention officer and was one of the
20 transportation officers involved in the other lawsuit. *Id.* Because Mr. Reid was at
21 OMDC around the timeframe that Mr. Cruz-Sanchez was in custody, Plaintiffs’ counsel
22 questioned him regarding staffing issues and whether he remembered Mr. McGinnis, and
23 Mr. Reid gave some statements that Plaintiffs argue support Mr. McGinnis’s testimony
24 and credibility. *Id.* Thus, two days later, on August 20, 2018, Plaintiffs amended their
25 Sixth Supplemental Disclosure Statement and identified Mr. Reid as a potential witness.
26 Plaintiffs state that Mr. Reid is currently expected to testify as to the following:

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28 ¹ The other case is *Dorador-Martinez v. CoreCivic, Inc.* et al, Case No. 18cv534-CAB (BGS).

1 Mr. Reid is expected to testify as to the following matters: In February-
2 March 2016, the Otay Mesa Detention Center was understaffed and the
3 detention officers were forced to do overtime shifts and expected to work
4 overtime when they moved into the new OMDC facility [sic] in late 2015.
5 These factors impacted the OMDC detention officers' ability to ensure the
6 safety of the detainees and inmates. In addition, the understaffing was due to
7 CoreCivic's prioritizing profits over the well-being of OMDC staff and
8 inmate safety.

9 ECF No. 86-2 at 5. Defendants objected to the disclosure as untimely, and while
10 Plaintiffs were able to resolve the government's objection, CoreCivic continued to object
11 to Mr. Reid and brought the instant motion.

12 **II. DISCUSSION**

13 Federal Rule of Civil Procedure 26(a)(1)(A)(i) requires parties to provide
14 information regarding "the name and, if known, the address and telephone number of
15 each individual likely to have discoverable information—along with the subjects of that
16 information—that the disclosing party may use to support its claims or defenses, unless
17 the use would be solely for impeachment." Under Rule 26(e), parties have a duty to
18 supplement these disclosures "in a timely manner if the party learns that in some material
19 respect the disclosure or response is incomplete or incorrect, and if the additional or
20 corrective information has not otherwise been made known to the other parties during the
21 discovery process or in writing."

22 Supplemental disclosures that are made after the close of fact discovery are
23 presumptively untimely. *Obesity Research Inst., LLC v. Fiber Research Int'l, LLC*, No.
24 15-CV-0595-BAS-MDD, 2016 WL 1394280, at *2 (S.D. Cal. Apr. 8, 2016); *Ashman v.*
25 *Solelectron, Inc.*, No. CV 08-1430 JF, 2010 WL 3069314, at *4 (N.D. Cal. Aug. 4, 2010).
26 Courts will consider the following factors in determining if violation of a discovery
27 deadline is justified or harmless: (1) prejudice or surprise to the party against whom the
28 evidence is offered; (2) the ability of that party to cure the prejudice; (3) the likelihood of
disruption of the trial; and (4) bad faith or willfulness involved in not timely disclosing
the evidence. *Obesity Research*, 2016 WL 1394280, at *2 (citing *Lanard Toys v.*

1 *Novelty, Inc.*, 375 Fed. Appx. 705, 713 (9th Cir. 2010)).

2 Here, there is no question that the disclosure came months after fact discovery
3 closed on April 9, 2018. *See* ECF No. 54. The parties also agree that the late disclosure
4 was not due to bad faith or willfulness. ECF No. 86 at 5, 7. However, Defendants argue
5 that they will be prejudiced by the late disclosure of Mr. Reid as they had no opportunity
6 to depose him at this late stage. *Id.* at 5-6. Plaintiffs counter that there will be little
7 prejudice because Mr. Reid’s statements are only made in support of Mr. McGinnis’s
8 sworn testimony. *Id.* at 8. In addition, Plaintiffs state that Mr. Reid’s testimony will
9 support Mr. McGinnis’s credibility as a witness, since Defendants have painted
10 Mr. McGinnis as a “disgruntled” and “hostile” former employee. *Id.* Thus, Plaintiffs
11 argue that Mr. Reid’s testimony is not “new” to CoreCivic. *Id.*

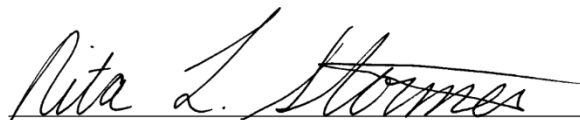
12 First, to the extent that Plaintiffs disclose Mr. Reid to give rebuttal testimony
13 should Defendants attack Mr. McGinnis’s credibility, Rule 26(a) does not strictly require
14 witnesses giving such testimony to be disclosed. *See Kumar v. Williams Portfolio 7, Inc.*,
15 No. C14-657RAJ, 2015 WL 11714566, at *4 (W.D. Wash. Aug. 13, 2015) (Rule
16 26(a)(1)(A)(i) “is relaxed when an individual is not being used to support the disclosing
17 party’s claims or defenses or whose use would solely be for impeachment” and
18 permitting undisclosed witness to testify only as rebuttal witness).

19 For other purposes however, the Court finds that Plaintiffs’ disclosure of Mr. Reid
20 to be too broad as written and may be prejudicial to CoreCivic. Mr. Reid’s proposed
21 testimony is not cabined to information that is necessarily known to CoreCivic. While
22 Plaintiffs represent in this motion to the Court that Mr. Reid’s testimony will only
23 support Mr. McGinnis’s sworn testimony, the disclosure itself does not include this
24 limitation and more generally states that Mr. Reid would testify about OMDC being
25 understaffed, officers being forced and expected to do overtime, and that this was a result
26 of CoreCivic prioritizing profits over safety. Thus, the Court will **STRIKE** Mr. Reid’s
27 disclosure from Plaintiff’s Second Amended Supplemental Disclosure Statement, as
28 written.

1 However, because the Court believes the prejudice as to untimeliness could be
2 cured, the Court will permit Plaintiffs to amend their disclosures, should they choose to,
3 subject to the following limitations on Mr. Reid’s proposed testimony.² If Plaintiffs
4 limited Mr. Reid’s proposed testimony in its Rule 26(a) disclosures to information
5 CoreCivic already has knowledge of—*i.e.*, affirmative testimony only in support of Mr.
6 McGinnis’s testimony, with no new subject matter introduced, or rebuttal testimony
7 should Defendants attack Mr. McGinnis’s credibility—any prejudice to Defendants may
8 be cured. Plaintiffs may amend their Rule 26(a) disclosures no later than **October 1,**
9 **2018**, if they choose. If Plaintiffs elect to amend, they are also ordered to produce to
10 Defendants a copy of Mr. Reid’s August 18, 2018 deposition testimony, if Defendants do
11 not already have a copy in their possession.

12 **IT IS SO ORDERED.**

13 Dated: September 26, 2018

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15 Hon. Nita L. Stormes
16 United States Magistrate Judge
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25 ² The Court emphasizes that it only analyzes the timeliness of Plaintiffs’ disclosure of Mr. Reid on their
26 Rule 26(a) disclosures, under the relevant case law. In other words, these limitations are only for the
27 purpose of excusing an otherwise untimely Rule 26(a) witness disclosure and do not pertain to what
28 testimony will eventually be permitted at trial. This order is without prejudice to Defendants seeking
further relief in the form of an *in limine* motion or otherwise, should they choose to move to preclude or
limit Mr. Reid’s testimony at trial.