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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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20

Case No.: 17cv569 BEN (NLS)

**ORDER ON JOINT MOTION FOR
DETERMINATION OF DISCOVERY
DISPUTE NO. 2**

[ECF No. 67]

21 Before the Court is a Joint Motion for Determination of Discovery Dispute No. 2,
22 filed by Plaintiffs and Defendant CoreCivic, Inc. (“CoreCivic”), which addresses the
23 parties’ dispute regarding Plaintiffs’ Requests for Production Nos. 174-179. ECF No. 67.

24 **I. BACKGROUND**

25 According to the allegations in Plaintiffs’ Second Amended Complaint, the United
26 States arrested Plaintiff Gerardo Cruz-Sanchez in early February 2016 as a material
27 witness to the crime of alien-smuggling. ECF No. 41 ¶ 1. He was not charged with a
28 crime, but because he could not afford bail, he was incarcerated in the Otay Mesa

1 Detention Center (“OMDC”), which is run by CoreCivic. *Id.* The complaint alleges that
2 Mr. Cruz-Sanchez fell sick a few days after being admitted to OMDC. *Id.* ¶¶ 1, 14, 24.
3 Despite repeated requests for medical attention, he was never seen by a doctor, only
4 given Ibuprofen and an allergy medication, and sent back to his cell each time with no
5 further tests performed. *Id.* ¶¶ 27-49. His condition quickly deteriorated to the point
6 where he was coughing up blood, unable to talk or swallow food, and developed
7 shortness of breath, respiratory distress, and wheezing. *Id.* ¶¶ 53, 55-58. Despite his
8 condition and complaints by his cellmate, Defendant C.O. Landin and other staff failed to
9 provide him with any medical attention. Finally on February 26, his cellmate brought
10 him to the common area to eat and it was only after Mr. Cruz-Sanchez coughed up blood
11 at a table that he was taken to CoreCivic’s medical facility, seen by a doctor, and sent to
12 Scripps Mercy Hospital in Chula Vista, California. *Id.* ¶¶ 72-78. He died three days
13 later. *Id.* ¶ 80. Plaintiffs’ complaint puts forth several causes of action including
14 wrongful death, negligence, negligent training and supervision, and negligent infliction of
15 emotional distress.

16 Relevant to the instant discovery dispute, on April 5, 2018, Plaintiffs deposed
17 David McGinnis. ECF No. 67 at 3. Mr. McGinnis was the Learning and Development
18 Manager at OMDC for 11 years, including the time during which Mr. Cruz-Sanchez was
19 detained. *Id.* During this deposition, Mr. McGinnis testified that he believed there were
20 understaffing issues at OMDC and that he had personally made written complaints
21 regarding these issues. *Id.* at 4-5. The day after the deposition, Plaintiffs served
22 Requests for Production Nos. 174-179, targeting the information revealed during the
23 deposition. *Id.* at 7. Defendants objected to the requests on timeliness grounds, and the
24 parties met and conferred the next business day. *Id.* Plaintiffs also served a third-party
25 subpoena on Mr. McGinnis, seeking his copies of the same documents. *Id.* CoreCivic
26 contacted Mr. McGinnis and instructed him not to produce any documents under that
27 subpoena in light of the instant motion. *Id.*

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1 **II. DISCUSSION**

2 **a. Timeliness**

3 As a threshold matter, Defendants object to Plaintiffs’ RFPs 174-179 on timeliness
4 grounds. ECF No. 67 at 8-14. Defendants argue that fact discovery would have to be
5 reopened to allow for this discovery and Plaintiffs have not shown good cause to do so.
6 Moreover, Defendants argue that Plaintiffs would need to amend their complaint to add a
7 theory of understaffing in order for the information they are seeking to even be relevant,
8 and the time for amendment has passed.

9 Defendants are correct that the RFPs are untimely as served. The Court’s
10 scheduling order states that fact discovery must be completed by the fact discovery cutoff
11 date and “completed” means that the discovery “must be initiated a sufficient period of
12 time in advance of the cut-off date, so that it may be completed by the cut-off date, taking
13 into account the times for service, notice and response as set forth in the Federal Rules of
14 Civil Procedure.” ECF No. 28 at 2. Fact discovery closed on April 9, 2018 (ECF No. 53
15 at 2), so it is clear that the RFPs served on April 6, 2018 were not initiated in time, given
16 the response period as set for in Rule 34(b)(2)(A).

17 Thus, Plaintiffs would have to establish good cause in order to permit the
18 discovery. Under Rule 16(b), the scheduling order may be modified to permit this
19 discovery only upon a showing of good cause. *Johnson v. Mammoth Recreations, Inc.*,
20 975 F.2d 604, 609 (9th Cir. 1992). To determine if good cause exists, the court’s primary
21 focus is on the movant’s diligence in seeking the amendment. *Id.* (“Good cause” exists if
22 a party can demonstrate that the schedule “cannot reasonably be met despite the diligence
23 of the party seeking the extension.”). Courts may consider the following factors in
24 evaluating diligence: “(1) that [the party] was diligent in assisting the Court in creating a
25 workable Rule 16 order; (2) that [the party’s] noncompliance with a Rule 16 deadline
26 occurred or will occur, notwithstanding her diligent efforts to comply, because of the
27 development of matters which could not have been reasonably foreseen or anticipated at
28 the time of the Rule 16 scheduling conference; and (3) that [the party] was diligent in

1 seeking amendment of the Rule 16 order, once it became apparent that she could not
2 comply with the order.” *Mondares v. Kaiser Found. Hosp.*, No. 10-CV-2676-BTM
3 WVG, 2011 WL 5374613, at *2 (S.D. Cal. Nov. 7, 2011) (citation omitted).

4 Plaintiffs argue that they were diligent because as soon as the allegations of
5 understaffing came to light in Mr. McGinnis’s deposition, they immediately sought
6 discovery from Defendants, engaged in meet and confers in an attempt to resolve the
7 issue, and brought this motion soon thereafter when no resolution was reached. ECF No.
8 67 at 7. Defendants do not dispute this timeline, but instead argue that Plaintiffs were
9 careless in pursuing discovery because they learned of Mr. McGinnis’s identity and
10 position at OMDC on November 14, 2017 and learned on January 18, 2018 via an
11 interrogatory response that he may have documents related to training of CoreCivic staff,
12 but failed to take his deposition and seek documents from him until early April. ECF No.
13 67 at 9-10.

14 Defendants’ argument, while applicable to the issue of *training*, does not address
15 why Plaintiffs should have known that Mr. McGinnis would have any information related
16 to *understaffing*. The fact that Plaintiffs stated that they expected Mr. McGinnis to testify
17 “as to the actual training received by CoreCivic employees, including Defendant Landin”
18 at the time they noticed his deposition supports their position—that Plaintiffs were not
19 aware of any understaffing concerns or that Mr. McGinnis would have any information
20 on understaffing before his deposition. Thus, the Court finds that Plaintiffs have
21 established good cause to extend fact discovery to cover the discovery requests for the
22 issues related to Mr. McGinnis’s allegations of understaffing.

23 Lastly, Defendants argue that Plaintiffs would need to amend their complaint to
24 add specific allegations of understaffing because it is a separate issue from inadequate
25 training and the deadline to amend pleadings has long passed. ECF No. 10-11.
26 Plaintiffs’ complaint includes separate causes of action for (1) negligence against the
27 various Defendants (claims 2 and 6), and (2) negligent training and supervision against
28 the various Defendants (claims 3 and 8). ECF No. 41. The allegations under negligence

1 accuse Defendants of failing to provide reasonable care for the medical needs of
2 detainees, including that they failed to “treat[], manage[], supervise[]” Mr. Cruz-
3 Sanchez’s health condition. Furthermore, the allegations for inadequate training include
4 allegations of inadequate supervision. Defendants do not explain why understaffing
5 issues would not be covered under these allegations, and the Court does not see any
6 reason why they would not and why amendment of the complaint would be necessary.

7 Accordingly, the Court will permit the requested discovery related to understaffing
8 concerns, in accordance with the relevance limitations as set forth below.

9 **b. Specific Requests for Production**

10 Federal Rule of Civil Procedure 34 allows a party to request that another party
11 “permit the requesting party or its representative to inspect, copy, test, or sample
12 [documents] in the responding party’s possession, custody, or control.” Fed. R. Civ. P.
13 34(a)(1). If the producing party objects in whole or in part to the request, it must “state
14 with specificity the grounds for objecting to the request, including the reasons.” Fed. R.
15 Civ. P. 34(b)(2)(B).

16 The scope of information discoverable under Rule 34 is governed by Rule 26,
17 which permits discovery of “any nonprivileged matter that is relevant to any party’s
18 claim or defense and proportional to the needs of the case, considering the importance of
19 the issues at stake in the action, the amount in controversy, the parties’ relative access to
20 relevant information, the parties’ resources, the importance of the discovery in resolving
21 the issues, and whether the burden or expense of the proposed discovery outweighs its
22 likely benefit.” Fed. R. Civ. P. 26(b)(1). Information need not be admissible to be
23 discoverable. *Id.*

24 **1. Request Nos. 174, 175, and 176**

25 Request No. 174 asks for:

26 Produce all documents that David McGinnis provided to CoreCivic
27 employees in San Diego relating to his claims that the Otay Mesa
28 Detention Facility was understaffed. This request should include but
not be limited to the “ethics complaints” that Dr. McGinnis described

1 in his deposition testimony on April 5, 2018.

2 Request No. 175 asks for:

3 Produce all documents that David McGinnis provided to CoreCivic's
4 national or corporate offices relating to his claims that the Otay Mesa
5 Detention Facility was understaffed. This request should include but
6 not be limited to the "ethics complaints" that Dr. McGinnis described
in his deposition testimony on April 5, 2018.

7 Request No. 176 asks for:

8 Produce all documents that David McGinnis provided via any
9 CoreCivic "ethics hotline," or similar system (including by email or
10 online portal) relating to his claims that the Otay Mesa Detention
11 Facility was understaffed. This request should include but not be
12 limited to the "ethics complaints" that Dr. McGinnis described in his
deposition testimony on April 5, 2018.

13 Each of these requests seeks written documents whereby Mr. McGinnis made complaints
14 to CoreCivic regarding understaffing issues at OMDC. Defendants object that Mr.
15 McGinnis does not have any specific knowledge about whether the facility would have
16 been understaffed during the time period Mr. Cruz-Sanchez was detained because Mr.
17 McGinnis was on medical leave from January 27 to April 26. Mr. Cruz-Sanchez was
18 admitted to the facility on February 10 and left the facility when he was finally sent to the
19 hospital on February 26.

20 The Court finds that these requests target information that is relevant to at least
21 Plaintiffs' claims of negligence. While Mr. McGinnis was on leave during the exact
22 period that Mr. Cruz-Sanchez was detained, his long employment with OMDC and his
23 presence at the facility two weeks prior to when Mr. Cruz-Sanchez entered provides
24 sufficient basis for Plaintiffs to request discovery into this subject matter. In order to
25 balance this with the proportionality requirements of Rule 26, the Court will narrow these
26 requests and impose a temporal limitation.

27 Accordingly, the Court **GRANTS IN PART AND DENIES IN PART** the motion
28 to compel as to Requests Nos. 174, 175 and 176. CoreCivic shall produce written

1 complaints (including any supporting documents) submitted by Mr. McGinnis during the
2 period of six months before the date Mr. Cruz-Sanchez was admitted (i.e., August 10,
3 2015 to February 10, 2016) to CoreCivic employees in San Diego, CoreCivic’s national
4 or corporate offices, or any CoreCivic “ethics hotline,” or similar system (including by
5 email or online portal), relating to his claims that the Otay Mesa Detention Facility was
6 understaffed, and CoreCivic’s responses to these written complaints, if any.

7 **2. Request No. 177**

8 Request No. 177 asks for:

9 Produce all documents that David McGinnis provided to any
10 CoreCivic employee or entity (as described in RFP’s 174-176 above)
11 relating to his claims that he was retaliated against for reporting
12 understaffing issues at CoreCivic. This request should include but not
13 be limited to the “ethics complaints” that Mr. McGinnis described in
14 his deposition testimony on April 5, 2018.

15 This RFP targets documents specifically related to possible retaliation against Mr.
16 McGinnis. One of Defendants’ concerns with this discovery is that Mr. McGinnis may
17 be a disgruntled employee who has issues with CoreCivic separate from the incident at
18 issue in this case with Mr. Cruz-Sanchez. ECF No. 67 at 13. The Court finds that this
19 RFP seeks information too far removed from the incident relating to Mr. Cruz-Sanchez
20 and **DENIES** the motion to compel as to Request No. 177.

21 **3. Request No. 178**

22 Request No. 178 asks for:

23 Produce all documents that David McGinnis provided to any
24 CoreCivic employee or entity (as described in RFP’s 174-176 above)
25 relating to his claims that CoreCivic did not prioritize training of its
26 employees.

27 This RFP targets documents related to whether training was prioritized by CoreCivic and
28 does not relate to allegations of understaffing. Allegations of inadequate training was
part of the first complaint filed by Plaintiffs and Plaintiffs knew months ago that Mr.
McGinnis was the Learning and Development Manager at CoreCivic. Thus, the Court

1 finds that there is no good cause to permit this request at this late hour. The Court
2 **DENIES** the motion to compel as to Request No. 178.

3 **4. Request No. 179**

4 Request No. 179 asks for:

5 Produce all documents in CoreCivic’s possession that either support
6 or refute Mr. McGinnis’s claims regarding CoreCivic’s understaffing,
7 retaliation, and training deficiencies, as described above, and as
8 described in his deposition testimony on April 5, 2018. This request
9 should include, but not be limited to, documents that CoreCivic
believes impeach Mr. McGinnis’s claims substantively, or his
credibility generally.

10 This request, as written, is too broad. First, the request targets documents related not
11 only to understaffing, but also training deficiencies and retaliation. For the reasons stated
12 above, the Court **DENIES** this request for any document related to training or retaliation.

13 As to understaffing, the Court will **GRANT IN PART AND DENY IN PART**
14 this request. The request for “all documents” that “support or refute” Mr. McGinnis’s
15 claims of understaffing is still too broad and not proportional to the needs of the case.
16 However, information about staffing, including staffing numbers and a description of the
17 types of personnel present,¹ in the areas where Mr. Cruz-Sanchez may have been
18 witnessed in his condition and the medical facility, are relevant to the allegations of
19 understaffing. The Court will order CoreCivic to produce documents sufficient to show
20 how the J-Pod open-bay dorm rooms (including room 106 where Mr. Cruz-Sanchez was
21 housed) and the medical facility were staffed during the period spanning from November
22 11, 2015 to February 29, 2016.

23 **c. Subpoena to Mr. McGinnis**

24 The last issue the parties bring in their motion is whether the third-party subpoena
25 that Plaintiffs issued directly to Mr. McGinnis will be permitted. ECF No. 67 at 3. After
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27
28 ¹ For example, whether the staff count consisted of correctional officers, nurses, physician’s assistants,
doctors, or similar information.

1 Plaintiffs sent the requests above to Defendants and Defendants objected to them,
2 Plaintiffs also subpoenaed Mr. McGinnis, attaching the same requests. ECF No. 67 at 7.
3 CoreCivic contacted Mr. McGinnis and instructed him not to respond because it intended
4 to quash the subpoena. *Id.*

5 A court must modify or quash a subpoena that subjects a person to undue burden.
6 *See Fed. R. Civ. P. 45(d)(3)(A)(iv).* In evaluating whether a subpoena is unduly
7 burdensome, “the court balances the burden imposed on the party subject to the subpoena
8 by the discovery request, the relevance of the information sought to the claims or
9 defenses at issue, the breadth of the discovery request, and the litigant’s need for the
10 information.” *Wahoo Int’l, Inc. v. Phix Doctor, Inc.*, No. 13CV1395-GPC BLM, 2014
11 WL 3573400, at *2 (S.D. Cal. July 18, 2014) (citation omitted).

12 As a preliminary matter, the Court notes that Mr. McGinnis has not moved to
13 quash the subpoena. However, a party may challenge a subpoena issued to a third-party
14 if that party has a “personal right or privilege relating to the information sought.” Since
15 documents sought from Mr. McGinnis could contain information regarding staffing at
16 CoreCivic’s facility and other such information gained by Mr. McGinnis through his
17 employment with CoreCivic, the Court will consider Defendants’ motion to quash the
18 subpoena to Mr. McGinnis.

19 The Court has already ruled above that certain documents responsive to the
20 requests for production are relevant, and has narrowed the scope of the requests to be
21 proportional to the needs of the case. Defendants have not put forth any argument as to
22 the burden imposed on Mr. McGinnis, as he would be the party producing the documents.
23 Defendants argue that the information Mr. McGinnis has may contain CoreCivic’s
24 confidential or privileged information. The Court fails to see what privileged information
25 would be in Mr. McGinnis’s possession, responsive to the request for his written
26 complaint regarding understaffing. And to the extent such documents would have
27 confidential information, these documents are to be produced under the Protective Order
28 already entered in this case. *See* ECF No. 21.

1 Thus, the Court **GRANTS IN PART AND DENIES IN PART** Defendants'
2 request to quash the subpoena to Mr. McGinnis. The motion to quash as to RFPs 174,
3 175, and 176 is denied in part, subject to the following limitations: Mr. McGinnis shall
4 produce written complaints (including any supporting documents) that he submitted
5 during the period of six months before the date Mr. Cruz-Sanchez was admitted (i.e.,
6 August 10, 2015 to February 10, 2016) to CoreCivic employees in San Diego,
7 CoreCivic's national or corporate offices, or any CoreCivic "ethics hotline," or similar
8 system (including by email or online portal), relating to his claims that the Otay Mesa
9 Detention Facility was understaffed, and CoreCivic's responses to these written
10 complaints, if any, in his possession. The motion to quash as to RFPs 177, 178, and 179
11 is granted.

12 **III. CONCLUSION**

13 For the foregoing reasons, Plaintiffs' motion to compel documents responsive to
14 RFP Nos. 175-179 is **GRANTED IN PART AND DENIED IN PART**, as set forth
15 above. Defendant CoreCivic and Mr. McGinnis shall produce the documents ordered
16 above within **30 days** of the date of this order. Fact discovery is extended only for this
17 limited purpose. All other dates and deadlines shall remain as previously set.

18 Dated: May 14, 2018

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20 Hon. Nita L. Stormes
21 United States Magistrate Judge
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