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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

RICHARD O'NEAL, an individual,

 Plaintiff,

 v.

CITY OF PACIFIC, a municipal corporation, et
al.,

 Defendants.

CASE NO. C11-0231RSM

ORDER ON MOTION FOR PARTIAL
SUMMARY JUDGMENT AND TO
COMPEL PRODUCTION OF
DISCOVERY

This matter is before the Court for consideration of plaintiff's motion which he has designated as both a motion for partial summary judgment, and a motion to compel production of discovery. Dkt. # 34. The motion for partial summary judgment on liability is based on the assertion that defendants have failed to timely respond to Requests for Admission and therefore they should be deemed admitted. The motion to compel asks that defendants be ordered to provide complete responses to interrogatories and requests for production within ten days after entry of this Order. Defendants have opposed both motions. For the reasons set forth below, both motions shall be denied.

FACTUAL BACKGROUND

This action arises from an investigatory stop and subsequent arrest. The facts of the arrest are

ORDER - 1

1 for the most part not in dispute; it is the legal consequences of those facts which form the basis of
2 plaintiff's claims. Both sides have submitted a copy of the audio-video recording that was made by a
3 camera situated inside the police car, which has been very helpful to the Court. On the basis of the
4 video and the parties' previous submissions regarding defendants' motion for summary judgment on
5 qualified immunity, the Court has determined certain facts, which shall be summarized.

6 On the evening of January 27, 2008, the City of Pacific Police Department received a report
7 from a citizen of a gray 1990's Chevrolet Astro van which was speeding and swerving as if the driver
8 were intoxicated. The location was given as Ellingson Avenue just off Highway 167. Officer Nixon
9 spotted a van matching the description parked at Giu's Market and contacted Officer Hong. Officer
10 Hong arrived, pulled up behind the van, and activated the video camera. Mr. O'Neal exited the van,
11 talking on his cell phone. The officers asked him to terminate the call, which he did. The officers then
12 explained that they were investigating a report of a gray van matching plaintiff's, which was seen
13 speeding and swerving as if the driver were intoxicated. They asked if plaintiff had been drinking and
14 he responded that he had not. Officer Hong then asked plaintiff for identification. After patting his
15 front pockets, plaintiff responded that he did not have it with him. Officer Hong then asked for
16 plaintiff's name and date of birth. Plaintiff stated his name was "Rick O'Neal" but did not spell it.
17 Officer Hong asked if it were spelled "O'Neil" and plaintiff answered affirmatively. He said his name
18 was actually Richard O'Neil and his middle name was Alonzo. He gave his correct date of birth, but
19 Officer Hong apparently heard it incorrectly. Plaintiff was allowed to leave the scene to go into the
20 market.

21 While plaintiff was in the market, Officer Hong called dispatch to check on warrants or a
22 criminal record for Richard A. O'Neil. The report came back with no record, but a "close hit" for a
23 Kitsap County felony warrant for attempting to elude police, effective December 26, 2007. The name
24 on the warrant was Richard Alonzo O'Neal. When plaintiff returned to the van, he was advised by the
25 officers that he was not free to leave. When asked to spell his name, he answered "O'Neil." He was
26 then asked for his social security number. The number he provided was one digit off from the social
27 security number on the Richard O'Neal warrant. The physical description of the person named in the

1 warrant closely matched plaintiff.

2 Plaintiff stated several times that he was going to leave and walk home, and that he had not
3 broken any law. The officers directed him to stand by the rear of the van and stay there. Plaintiff
4 started to walk away and Officer Hong ordered him to place his hands behind his back for handcuffing.
5 Officer Hong then grabbed plaintiff's left arm and pushed his head down onto the hood of the patrol
6 vehicle. At this time, Officer Hong had plaintiff's left arm in an arm lock, but plaintiff's right arm was
7 free and could not be cuffed by Officer Nixon. In the ensuing struggle to apply the handcuffs, plaintiff's
8 left arm was broken. These events, including the moment when the left arm was broken, can all be seen
9 on the video.

10 Plaintiff filed this complaint in King County Superior Court, asserting three causes of actions:
11 Count One, for negligence against the individual defendants and the City of Pacific; Count Two, a
12 civil rights claim pursuant to 42 U.S.C. § 1983 against all defendants for violation of plaintiff's Fourth,
13 Fifth, and Fourteenth Amendment rights; and Count Three, against the City of Pacific for malicious
14 prosecution. The complaint was removed to this Court on the basis of the §1983 federal claim. The
15 Court has supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. §1367.

16 On February 17, 2012, the Court denied defendants' motion for summary judgment on qualified
17 immunity. Dkt. # 28. The matter is set for trial on March 11, 2013. The parties have each moved for
18 partial summary judgment, which would result in limiting the claims for trial. This Order addresses
19 plaintiff's motions.

20 DISCUSSION

21 I. Motion to Compel

22 Plaintiff's motion includes a motion to compel answers to interrogatories and requests for
23 production which he served on September 7, 2012. Defendants have opposed the motion on the basis
24 that by the response date for the motion, all answers to interrogatories and requests for production had
25 been provided. Dkt. # 38. Plaintiff in reply does not refute this assertion but addresses instead his
26 motion with respect to the Requests for Admission, which shall be considered below.

27 Providing responses to discovery requests after a motion is filed may render the motion moot,

1 but is not a basis for denial of the motion as to the award of costs. Fed.R.Civ.P. 37(a)(5)(A). Instead,
2 the Court shall deny plaintiff's motion to compel for failure to meet the certification requirements of
3 Fed.R.Civ.P. 37 and Local Rule 37. Rule 37 states in relevant part that "[t]he motion must include a
4 certification that the movant has in good faith conferred or attempted to confer with the person or party
5 failing to make disclosure or discovery in an effort to obtain it without court action." Fed.R.Civ.P.
6 37(a)(1). This Court's Local Rule is more specific:

7 Any motion for an order compelling disclosure or discovery must include a certification,
8 in the motion or in a declaration or affidavit, that the movant has in good faith conferred
9 or attempted to confer with the person or party failing to make disclosure or discovery in
10 an effort to resolve the dispute without court action. **The certification must list the date,
11 manner, and participants to the conference.** If the movant fails to include such a
certification, the court may deny the motion without addressing the merits of the dispute.
A good faith effort to confer with a party or person not making a disclosure or discovery
requires a face-to-face meeting or a telephone conference.

12 Local Rule LCR 37(a)(1) (emphasis added).

13 Counsel's certification, stated both in the motion and in a supporting declaration, states in its
14 entirety, "On November 16, 2012, counsel for the parties conducted a Rule 37 conference to discuss
15 dates specific when the Defendants would provide responses to discovery requests propounded to the
16 Defendants by Plaintiff O'Neal." Declaration of Robert Apgood, Dkt. # 35, ¶ 9. This certification
17 identifies neither the method of communication nor the identity of the attorneys participating (each side
18 has two attorneys as counsel of record). It therefore fails to comply with the requirements of Local Rule
19 CR 37, and pursuant to that rule the Court denies the motion to compel. This ruling is not prejudicial to
20 plaintiff, as he does not dispute defendants' representation that discovery responses have now been
21 provided.

22 II. Motion for Summary Judgment

23 Plaintiff has moved for summary judgment on the issue of liability pursuant to Fed.R.Civ.P. 36,
24 on the basis of defendants' failure to timely respond to Requests for Admission ("RA"). Rule 36
25 provides, in relevant part,

26 (1) **Scope.** A party may serve on any other party a written request to admit, for purposes
27 of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating
to:

1 (A) facts, the application of law to fact, or opinions about either; and

2 (B) the genuineness of any described documents.

3

4 (3) ***Time to Respond; Effect of Not Responding.*** A matter is admitted unless, within 30
5 days after being served, the party to whom the request is directed serves on the requesting
6 party a written answer or objection addressed to the matter and signed by the party or its
7 attorney. A shorter or longer time for responding may be stipulated to under Rule 29 or
8 be ordered by the court.

9 Fed.R.Civ.P. 36(a)(1), (3).

10 Plaintiff states that his Requests for Admission were served on defendants on September 7, 2012,
11 and as of the date of filing his motion, December 6, 2012, the answers had not been provided.
12 Defendants did provide answers twelve days later, on December 18, 2012. Nevertheless, plaintiff
13 argues that all matters presented in the RA should be deemed admitted because they were not provided
14 within thirty days as required.

15 In response to this motion, defendants assert that they reasonably believed, based on ongoing
16 communications with plaintiff, that they had an agreement to extend the time to answer the RA. They
17 therefore contend that the RA should not be deemed admitted simply because they were not provided
18 within thirty days.

19 In the alternative, defendants ask that if the RA is deemed admitted by their late response, the
20 admissions be withdrawn pursuant to Fed.R.Civ.P. 36(b). This section states,

21 (b) **Effect of an Admission; withdrawing or amending it.** A matter admitted under this
22 rule is conclusively established unless the court, on motion, permits the admission to be
23 withdrawn, or amended. Subject to Rule 16(e), the court may permit withdrawal or
24 amendment if it would promote the presentation of the merits of the action and if the court
25 is not persuaded that it would prejudice the requesting party in maintaining or defending the
26 action on the merits. . . .

27 Fed.R.Civ.P. 36(b). Although defendants did not note their request as a separate motion on the Court's
28 calendar, they presented the request with six pages of argument to which plaintiff had an opportunity to
respond in his reply. Defendants' request will therefore be considered a proper Rule 36(b) motion for
withdrawal of admissions.

1 As the text of the rule indicates, relief from a deemed admission is appropriate only when (1)
2 presentation of the merits of the action would be served, and (2) the party who obtained the admission
3 would not be prejudiced by the withdrawal. *Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007)
4 (citations omitted). “The party who obtained the admission has the burden of proving that allowing
5 withdrawal of the admission would prejudice its case.” *Sonoda v. Cabrera*, 255 F.3d 1035, 1039 (9th
6 Cir. 2001). A court must consider the two factors set forth in Rule 36(b) when determining whether to
7 grant withdrawal. *Conlon*, 474 F.3d at 625.

8 Rule 36(b) is permissive rather than mandatory with respect to withdrawal. *Id.* at 621. Thus, “in
9 deciding whether to exercise its discretion when the moving party has met the two-pronged test of Rule
10 36(b), the district court may consider other factors, including whether the moving party can show good
11 cause for the delay and whether the moving party appears to have a strong case on the merits.” *Id.*

12
13 “The first half of the test in Rule 36(b) is satisfied when upholding the admissions would
14 practically eliminate any presentation of the merits of the case.” *Conlon*, 474 F.3d at 622 (quoting
15 *Hadley v. United States*, 45 F.3d 1345, 1349 (9th Cir. 1995). Here, the admissions go directly to core
16 issues in the litigation, including the ultimate question of liability. Among the nearly 400 requests
17 propounded by plaintiff are requests that Officer Hong admit that his conduct “knowingly violated
18 and/or recklessly disregarded Plaintiff’s well established Constitutional Rights as provided by the
19 Fourth, Fifth and Fourteenth Amendments of the United States Constitution;” and that Officers Hong
20 and Nixon both admit that plaintiff is entitled to punitive damages for the injuries he suffered as a result
21 of their actions. Declaration of Robert Apgood, Dkt. # 35, Exhibit A, ¶¶ 78, 95; Exhibit B, ¶ 75.
22 Plaintiff’s motion thus constitutes a request to have conclusively determined at this time certain matters
23 that are essentially questions for the jury, such as whether the force applied was reasonable, and whether
24 plaintiff is entitled to punitive damages.¹ Thus, the first prong of the Rule 36(b) test is met.

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26 ¹ The RA also calls for the individual defendants to admit to medical diagnoses of which they
27 may have no actual knowledge, such as “Please admit that Mr. O’Neal suffered fractures of his left
28 humerus and radial nerve palsy as a result of your use of force in arresting him;” and “Please admit that
there is a permanent deformity in the left arm of Mr. O’Neal as a result of the fractures he suffered when

1 As to the second prong, plaintiff has the burden of establishing that he will be prejudiced if the
2 admissions are withdrawn. *Conlon*, 474 F.3d at 622. “The prejudice contemplated by Rule 36 (b) is ‘not
3 simply that the party who obtained the admission will now have to convince the factfinder of its truth.’”
4 *Hadley*, 45 F.3d at 1348 (quoting *Brook Village North Associates v. General Electric Co.*, 686 F.2d 66,
5 70 (9th Cir. 1982). “Rather, it relates to the difficulty a party may face in proving its case, e.g., caused
6 by the unavailability of key witnesses, because of the sudden need to obtain evidence with respect to the
7 questions previously deemed admitted.” *Id.* (internal quotation marks omitted). A lack of discovery,
8 without more, does not constitute prejudice. *Conlon*, 474 F.3d at 624. Prejudice is more likely to be
9 found where the motion for withdrawal is made during trial or when a trial is imminent. *See id.* at 624;
10 *Hadley*, 45 F.3d at 1348.

11 Plaintiff has offered no argument with respect to prejudice he may suffer if the admissions are
12 withdrawn. Plaintiff’s Reply, Dkt. # 40. Instead, he focuses on the untimeliness of the answers, but
13 even in that line of argument he asserts no actual prejudice. The Court finds that defendants have
14 arguably shown cause for their failure to timely respond to the RA, in that they requested additional time
15 to answer the nearly 400 requests. The Court further finds that plaintiff will have no difficulty
16 presenting his case at trial, as both the video and the arresting officers’ testimony will be available for
17 the jury to evaluate. There is no “sudden need” for evidence to establish what was deemed admitted by
18 defendants. Plaintiff has therefore failed to meet his burden of demonstrating prejudice.

19 Even when both prongs of the Rule 36(b) test are satisfied, withdrawal remains permissive.
20 *Conlon*, 474 F.3d at 625. Here, the responses, although untimely, were provided before the close of
21 discovery and well before the March 11, 2013 trial date. Dkt. # 33. It is in the interest of justice to have
22 the question of liability decided on the merits by the jury, rather than by application of a discovery
23 sanction. The Court will accordingly exercise its discretion to GRANT defendants’ motion for
24 withdrawal of admissions. With such withdrawal, no basis remains for plaintiff’s motion for summary
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27 his arm was broken during your arrest of him.” *Id.*, Exhibit B, ¶¶ 44, 49.

1 judgment on liability.

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CONCLUSION

The motion for Partial Summary Judgment and to Compel Production of Discovery (Dkt. # 34) is accordingly DENIED.

Dated this 23rd day of January 2013.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE