

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

ARTHUR MCKINNON, *et al.*,

Plaintiffs,

Case No. C21-5097-BHS-MLP

V.

ORDER RE: PENDING MOTIONS

WASHINGTON DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

I. INTRODUCTION

This is a civil rights action brought under 42 U.S.C. § 1983. Currently pending before the Court are the following motions of the parties: (1) Defendant Washington Department of Corrections’ (“DOC”) motion for judgment on the pleadings (dkt. # 28); (2) Plaintiffs’ motion for leave to supplement the pleadings (dkt. # 33); (3) Plaintiffs’ motion for an extension of the pretrial deadlines and for service of subpoenas (dkt. # 37); (4) Defendant DOC’s motion for a protective order (dkt. # 39); (5) Defendant Barry Wilkinson’s motion to compel discovery (dkt. # 44); and (6) Defendants’ motion to reopen discovery (dkt. # 48). The Court addresses each of the pending motions below.

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II. BACKGROUND

Plaintiff Arthur McKinnon is a state prisoner who is currently incarcerated at the Stafford Creek Corrections Center (“SCCC”) in Aberdeen, Washington. He initiated this action in December 2020 by filing in the Thurston County Superior Court a pleading he identified as a civil rights complaint under 42 U.S.C. § 1983 and an anti-discrimination complaint under RCW 49.60. (*See* dkt. # 1-3.) The action was removed to this Court in February 2021, and the Court thereafter screened the complaint in accordance with 28 U.S.C. § 1915A(a). (*See* dkt. ## 1, 11.) The Court determined that Mr. McKinnon’s pleading was deficient in various respects but granted him leave to file an amended complaint. (Dkt. # 11.)

In June 2021, Mr. McKinnon filed an amended complaint, together with his wife, Elise McKinnon. (Dkt. # 12.) They purported to sue Defendants on their own behalf as well as on behalf of their minor child. (*Id.*) Plaintiffs identified the following Defendants in their amended complaint: the DOC; SCCC employees Michael Wayman and Barry Wilkinson; Deputy Director of Prisons Scott Russell; DOC employees Lisa J. Flynn, Belinda Stewart, and Elizabeth J. Hainline; contract mental health counselor Donetta Quinones; and John Does 1-16. (*See id.* at ¶¶ 4-10.)

Plaintiffs alleged in their amended complaint that Defendants Wayman and Wilkinson retaliated against them for exercising their rights to parent their child and to correspond via e-mail. (Dkt. # 12 at ¶¶ 50-54, 69-74.) Plaintiffs also alleged that Defendants Wayman and Wilkinson retaliated against Mrs. McKinnon for exercising her right to appeal the denials of her visitation requests and for breastfeeding the couples' child. (*Id.* at ¶¶ 71-73.) Finally, Plaintiffs alleged that Defendants Wayman and Wilkinson violated their due process rights when

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1 Defendants rejected correspondence between Plaintiffs and removed pictures from Plaintiffs'
 2 respective email accounts without providing written notice or an opportunity to be heard. (*Id.* at
 3 ¶¶ 55-59, 75-79.)

4 As to the remaining individual Defendants, Plaintiffs alleged that Defendants Hainline,
 5 Flynn, and Stewart violated Mr. McKinnon's right to due process and his right to parent when
 6 they denied a visitation application submitted by Mrs. McKinnon, on behalf of their infant son,
 7 without providing Mr. McKinnon notice and a hearing. (Dkt. # 12 at ¶¶ 60-63.) Finally, Plaintiffs
 8 alleged state tort claims against all Defendants for negligent infliction of emotional distress, and
 9 a discrimination claim relating to Mrs. McKinnon breastfeeding the couples' child against
 10 Defendants Wayman, Wilkinson, and the DOC. (*Id.* at ¶¶ 64-74, 80-94.)

11 This Court screened Plaintiffs' amended complaint, as it did Mr. McKinnon's original
 12 complaint, and concluded that Plaintiffs had failed to state a claim upon which relief could be
 13 granted as to Defendants Russell, Quinones, Hainline, Flynn, and Stewart. The Court therefore
 14 issued a Report and Recommendation recommending that the action be dismissed as to these
 15 Defendants and that Plaintiffs be permitted to proceed with their claims against the DOC,
 16 Michael Wayman, and Barry Wilkinson. (Dkt. # 13.) The Honorable Benjamin H. Settle, United
 17 States District Judge, subsequently adopted the Report and Recommendation. (Dkt. # 16.)

18 On October 19, 2021, this Court Ordered service of Plaintiffs' amended complaint on
 19 Defendants Wayman and Wilkinson, the two remaining Defendants who had yet to be served.¹
 20 (Dkt. # 17.) Defendants filed an answer to the amended complaint on December 20, 2021, and on
 21 January 13, 2022, this Court issued a Pretrial Scheduling Order. (Dkt. ## 21, 23.) In that Order,

22 ¹ The DOC was served prior to the case being removed to this Court. (See dkt. # 1 at 2.)
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1 the Court established a deadline of April 13, 2022, for the completion of discovery and a
2 deadline of May 13, 2022, for the filing of dispositive motions. (Dkt. # 23.)

3 **III. DISCUSSION**

4 **A. Motion for Judgment on the Pleadings**

5 Defendant DOC has filed a motion for judgment on the pleadings. (Dkt. # 28.) Defendant
6 argues therein that it is entitled to dismissal of all claims asserted against it because the Court
7 previously dismissed Plaintiffs' state law claims and the only remaining claims against the DOC
8 are federal law claims involving retaliation brought under 42 U.S.C. § 1983. (*Id.* at 4.) DOC
9 argues that it is not a "person" subject to suit under § 1983 and since, in its view, only the federal
10 claims remain, it follows that Plaintiffs have failed to state a claim upon which relief may be
11 granted against the DOC. (*Id.*)

12 Plaintiffs, in their response to Defendant DOC's motion, argue that the Court did not
13 previously dismiss Plaintiffs' state law claims against the DOC, and that they have never
14 asserted a claim under 42 U.S.C § 1983 against the DOC. (Dkt. # 32 at 1-2.) Defendant DOC
15 suggests in its reply brief, as it did in its motion, that *all* of Plaintiffs' state law claims have been
16 dismissed, and it contends that because Plaintiffs' state law claims are based on a theory of
17 vicarious liability it follows that the state law claims against the DOC should be dismissed. (Dkt.
18 # 35 at 1-2.) Defendant then goes on to argue that even assuming the state law claims asserted
19 against the DOC survive the dismissal of those asserted against individual Defendants, the state
20 law claims against the DOC should be dismissed because they fail to state a cognizable claim for
21 relief. (*Id.* at 3-8.)

22 After receiving Defendant DOC's reply brief, Plaintiffs filed an objection and motion to
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1 strike the second section of Defendant's reply because the arguments contained therein
2 pertaining to the substance of Plaintiffs' state law claims were not included in Defendant DOC's
3 original motion. (Dkt. # 46.) The Court concurs that it would be improper to consider the
4 substantive arguments set forth by the DOC for the first time in its reply brief. However, given
5 the current posture of this case, rather than deny Defendant's motion based on what the Court
6 believes is Defendant's erroneous interpretation of the Court's prior rulings, the Court deems it
7 appropriate to give Plaintiffs an opportunity to respond to those arguments. The Court will
8 therefore establish a new briefing schedule for the motion for judgment on the pleadings below
9 and will renote the motion for consideration at a later date.

10 **B. Motion to Supplement Complaint**

11 Plaintiffs move for leave to supplement their complaint with additional claims against
12 Defendants Wilkinson, Wayman, and the DOC arising out of events that Plaintiffs claim have
13 occurred since they filed their amended complaint in June 2021. (Dkt. # 33.) Though Plaintiffs'
14 motion is not a model of clarity, they appear to claim that Defendants Wilkinson and Wayman
15 have continued to retaliate against them because of Plaintiffs' exercise of protected conduct.
16 Plaintiffs identify breastfeeding, corresponding by mail, and filing this lawsuit as the protected
17 conduct at issue, and they assert that adverse action on the part of the Defendants, which
18 Plaintiffs identify as "blocking, interfering, rejecting, [and] censoring communication" between
19 the Plaintiffs, have chilled Mrs. McKinnon's rights as a breastfeeding mother and both Plaintiffs'
20 rights to correspond by mail and seek redress of grievances. (*Id.* at 4.)

21 Rule 15(d) of the Federal Rules of Civil Procedure provides that the court may permit a
22 party to "serve a supplemental pleading setting out any transaction, occurrence, or event that
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1 happened after the date of the pleading to be supplemented.” Supplementation is generally
2 favored as it promotes judicial economy and convenience. *See Keith v. Volpe*, 858 F.2d 467, 473
3 (9th Cir. 1988). However, the district court has broad discretion in determining whether to permit
4 supplemental pleading in a given case. *See id.* at 475. Courts typically consider five factors when
5 assessing the propriety of a motion to supplement: (1) undue delay; (2) bad faith or dilatory
6 motive on the part of the movant; (3) repeated failure of previous amendments; (4) prejudice to
7 the opposing party; and (5) futility of amendment. *Lyon v. U.S. Immig. & Customs Enf't*, 308
8 F.R.D. 203, 214 (N.D. Cal. 2015). Defendants argue that permitting Plaintiffs to supplement
9 their amended complaint to add the new allegations set forth in their motion to supplement
10 would be futile. (Dkt. # 36.) The Court agrees.

11 In order to sustain a cause of action under 42 U.S.C. § 1983, a plaintiff must show that:
12 (1) he suffered a violation of rights protected by the Constitution or created by federal statute;
13 and (2) the violation was proximately caused by a person acting under color of state law. *See*
14 *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9th Cir. 1991). The causation requirement of § 1983 is
15 satisfied only if a plaintiff demonstrates that a defendant did an affirmative act, participated in
16 another’s affirmative act, or omitted to perform an act which he was legally required to do that
17 caused the deprivation complained of. *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981)
18 (quoting *Johnson v. Duffy*, 588 F.2d 740, 743-44 (9th Cir. 1978)). “The inquiry into causation
19 must be individualized and focus on the duties and responsibilities of each individual defendant
20 whose acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v.*
21 *Murphy*, 844 F.2d 628, 633 (9th Cir. 1988). The factual allegations of a complaint must be
22 “enough to raise a right to relief above the speculative level.” *Bell Atlantic Corp. v. Twombly*,
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1 550 U.S. 544, 555 (2007). In addition, a complaint must allege facts to state a claim for relief
 2 that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

3 A viable claim of First Amendment retaliation within the prison context has five basic
 4 elements: “(1) An assertion that a state actor took some adverse action against an inmate (2)
 5 because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s
 6 exercise of his First Amendment rights, and (5) the action did not reasonably advance a
 7 legitimate correctional goal.” *Rhodes v. Robinson*, 408 F.3d 559, 567–68 (9th Cir. 2005). In
 8 order to prevail on a retaliation claim, “a plaintiff must show that his protected conduct was the
 9 substantial or motivating factor behind the defendant’s conduct.” *Brodheim v. Cry*, 584 F.3d
 10 1262, 1271 (9th Cir. 2009) (citation and internal quotation omitted). In addition, a plaintiff
 11 “bears the burden of pleading and proving the absence of legitimate correctional goals for the
 12 conduct of which he complains.” *Pratt v. Rowland*, 65 F.3d 802, 806 (9th Cir. 1995). The Court
 13 evaluates a retaliation claim in light of the deference accorded prison officials. *Id.* at 807.

14 1. *Defendant Wilkinson*

15 Plaintiffs allege in their supplemental complaint that mail sent by Mrs. McKinnon to Mr.
 16 McKinnon via “next day air” was not received until seven days after it had been sent. (Dkt. # 33
 17 at 3.) Plaintiffs attribute this delay to the fact that they sent Defendant Wilkinson their first set of
 18 interrogatories and requests for production in this action approximately a month prior to
 19 experiencing this delay and they thus claim that the delay was retaliatory. (*See id.*) However,
 20 Plaintiffs allege no facts demonstrating that Defendant Wilkinson was in any way responsible for
 21 the delay in Mr. McKinnon receiving his mail, or that service of the discovery requests was the
 22 motivating factor behind whatever unspecified set of circumstances resulted in the delay of Mr.

1 McKinnon's mail.² Plaintiffs have not plausibly alleged a retaliation claim against Defendant
 2 Wilkinson based on the delay in receiving mail.

3 Plaintiffs also allege in their supplemental complaint that on December 20, 2021, after
 4 being served with Plaintiffs' civil action, Defendant Wilkinson "pulled Mr. McKinnon, by
 5 himself, into the staff breakroom area claiming this was a necessary part of the grievance
 6 interviewing process." (Dkt. # 33 at 3.) Mr. McKinnon claims he was "intimidated by Defendant
 7 Wilkinson's actions and was afraid to file further grievances." (*Id.*) Plaintiffs fail to make clear
 8 how simply investigating a grievance, which Mr. McKinnon presumably expected to happen
 9 when he filed it, amounts to adverse action. Plaintiffs also fail to allege facts demonstrating that
 10 service of their civil rights complaint on Defendants, which occurred two months before the
 11 incident alleged here, was the motivating factor behind what Mr. McKinnon found to be an
 12 uncomfortable grievance investigation procedure. Plaintiffs have not plausibly alleged any viable
 13 retaliation claim arising out of the grievance investigation.

14 2. *Defendant Wayman*

15 As to Defendant Wayman, Plaintiffs allege in their supplemental complaint that on
 16 January 22, 2021, Defendant "blocked Mrs. McKinnon from receiving any telephone
 17 communication from [SCCC]." (Dkt. # 33 at 2.) Plaintiffs further allege that a month later, on
 18 February 23, 2021, another DOC staff member told them that Defendant Wayman blocked
 19 Plaintiffs' communication because he believed Mr. McKinnon was violating his judgment and

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 21 2 The Court notes that Plaintiffs, in their pending motion for extension of time, reference another instance
 22 of Mrs. McKinnon sending mail to Mr. McKinnon via "overnight mail" where the mail took five days to
 23 reach Mr. McKinnon. (*See* dkt. # 37 at 4.) Plaintiffs do not suggest that the delay on that occasion was
 retaliatory.

1 sentence by contacting his minor child. (*Id.* at 3.) Plaintiffs maintain that Defendant Wayman
2 had prior knowledge of two amendments to Mr. McKinnon's judgment and sentence which
3 clarified that there was no court order prohibiting such contact. (*Id.*) The record makes clear that
4 these allegations against Defendant Wayman arise out of conduct that occurred well before
5 Plaintiffs submitted their amended complaint for filing on June 25, 2021, and, thus, they fall
6 outside the scope of what is permitted under Fed. R. Civ. P. 15(d).

7 Plaintiffs also allege, with respect to Defendant Wayman, that he accessed Plaintiffs'
8 JPay account on January 7, 2022, and "retroactively rejected and removed from their photo
9 gallery a picture that had already been approved and released by the mail room." (Dkt. # 33 at 3.)
10 The photo at issue was one of Mrs. McKinnon breastfeeding and, according to Plaintiffs,
11 Defendant Wayman deemed this photo to be "sexually explicit." (*Id.* at 3-4.) Plaintiffs note that
12 this mail rejection occurred the day after Defendant Wayman signed his response to Plaintiffs'
13 discovery requests. (*Id.* at 4.)

14 Plaintiffs' suggestion that Defendant Wayman's conduct on January 7, 2022, is somehow
15 tied to their litigation of this civil rights action is speculative at best. And, indeed, that suggestion
16 is undermined to a degree by the fact that two days before Defendant Wayman purportedly
17 removed the photo, members of the SCCC mailroom staff rejected similar photos on similar
18 grounds. (*See* dkt. # 33 at 3, ¶ S10.) Plaintiffs also fail to allege facts demonstrating that the
19 purported removal of a photo that was deemed "sexually explicit" did not advance legitimate
20 correctional goals, which is Plaintiffs' burden in asserting a retaliation claim. Plaintiffs therefore
21 fail to adequately allege a retaliation claim against Defendant Wayman based upon the January
22 7, 2022 rejection of Plaintiffs' photo.

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1 3. *SCCC Mailroom Staff*

2 Plaintiffs allege in their supplemental complaint that SCCC mailroom staff rejected
3 photos from their JPay email account on January 5, 2022, claiming that breastfeeding is
4 “sexually explicit.” (Dkt. # 33 at 5.) The SCCC mailroom staff is not a Defendant to this action
5 and is not an entity subject to suit under § 1983. As explained above, “[t]he inquiry into
6 causation must be individualized and focus on the duties and responsibilities of each individual
7 defendant whose acts or omissions are alleged to have caused a constitutional deprivation.” *Leer*,
8 844 F.2d at 633. Plaintiffs’ failure to identify the individual SCCC employees whose conduct is
9 at issue is fatal to any claim Plaintiffs intend to assert here.

10 4. *Conclusion*

11 Plaintiffs fail to identify in their supplemental complaint any additional, plausible,
12 retaliation claims. And, while Plaintiffs make a conclusory assertion in their motion to
13 supplement that Defendants’ conduct is actionable under Washington’s law against
14 discrimination, RCW 49.60, *et seq.*, they fail to make clear how any of the additional facts
15 alleged therein advance those claims. Accordingly, it would be futile to permit Plaintiffs to
16 supplement their amended complaint.

17 **C. Plaintiffs’ Motion for Extension/Defendants’ Motion for Protective Order**

18 Plaintiffs also move for an eight-week extension of the current pretrial deadlines, and
19 they ask the Court to “accept service of three subpoenas.” (Dkt. # 37.) Plaintiffs indicate in their
20 motion that they have additional discovery they would like to conduct, including a second
21 deposition of Defendant Wayman, a deposition of Defendant DOC’s designated representative in
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1 accordance with Fed. R. Civ. P. 30(b)(6), and service of subpoenas seeking production of
2 documents from three non-parties. (*See id.* at 4-6.)

3 Plaintiffs have not demonstrated that an extension of time is warranted. The record makes
4 clear that Defendant Wayman has already been deposed and Defendants object to a second
5 deposition. (Dkt. # 41, Attach. X.) Because Defendant Wayman has already been deposed, and
6 the parties have not stipulated to a second deposition, leave of court is required before the
7 deposition may be conducted. *See* Fed. R. Civ. P. 30(a)(2)(A)(ii). Plaintiffs have not requested
8 this specific relief from the Court and nothing in the record suggests that an additional deposition
9 of Defendant Wayman is warranted.

10 As to Plaintiffs' expressed desire to take the deposition of Defendant DOC's designated
11 representative in accordance with Fed. R. Civ. P. 30(b)(6), it appears that any such request is
12 premature. In fact, Defendants have filed a motion for a protective order in which they ask that
13 the Court strike Plaintiffs' notice of deposition pursuant to Fed. R. Civ. P. 30(b)(6) on the
14 grounds that the DOC's motion for a judgment on the pleadings is currently pending, the notice
15 does not describe with reasonable particularity the matters for examination, and the notice was
16 not properly served. (Dkt. # 39.) The Court agrees that it would be inappropriate for Plaintiffs to
17 conduct such a deposition until Defendant DOC's motion for a judgment on the pleadings is
18 resolved. The Court therefore deems it appropriate to remote Defendants' motion for a protective
19 order so that it can be considered in conjunction with Defendant DOC's motion for judgment on
20 the pleadings.

21 Finally, with respect to the three subpoenas at issue, Plaintiffs appear to acknowledge that
22 the subpoenas were not served in the manner required by Fed. R. Civ. P. 45, and they ask that the
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1 Court “accept service” of the subpoenas under various provisions of Fed. R. Civ. P. 5(b)(2). (See
2 dkt. # 37 at 1, 6-7.) It is not clear whether Plaintiffs are asking the Court to rule that the manner
3 in which service was effectuated, though improper, was sufficient to require the non-parties to
4 respond, or whether they are asking for some other form of relief in relation to the subpoenas.

5 Federal Rule of Civil Procedure 45 requires “delivering a copy [of the subpoena] to the
6 named person.” Fed. R. Civ. P. 45(b)(1). District Courts are split on whether this rule requires
7 “personal service of a subpoena or whether delivery via certified mail is sufficient.” *Kantor v.*
8 *Big Tip, Inc.*, No. 15-cv-01871, 2017 WL 2634207, at *1 (W.D. Wash. June 19, 2017). Judges in
9 this District have concluded on multiple occasions that Rule 45 does not require personal service
10 because such is not required by the plain language of the rule. *See id.* at *1 (quoting *Tubar v.*
11 *Clift*, No. 05-cv-1154, 2007 WL 214260, at *5 (W.D. Wash. Jan. 25, 2007)); *see also Kleiman v.*
12 *Wright*, No. 20-cv-0593, 2020 WL 2107710, at *2 (W.D. Wash. April 24, 2020). However, in
13 this instance, even assuming personal service was not required, Plaintiffs have clearly not
14 attempted to serve the individuals named in the subpoenas by means reasonably designed to
15 ensure that they receive copies of the subpoenas such as, for example, via certified mail.
16 Plaintiffs provide no authority to support their suggestion that service in accordance with the
17 provisions of Fed. R. Civ. P. 5(b)(2) should be deemed sufficient to satisfy the service
18 requirements of Rule 45.

19 The question that remains is whether Plaintiffs are entitled to additional time to attempt to
20 properly serve their subpoenas. Defendants, in their response to Plaintiffs’ motion for extension
21 of time, argue that the documents being sought by Plaintiffs through their subpoenas are very
22 similar to documentation sought from, and produced by, Defendants during discovery. (Dkt. # 42
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1 at 2-3.) Defendants maintain that even if Plaintiffs were to properly serve their subpoenas on the
2 two non-party DOC employees, they would not receive anything they have not already been
3 provided. (*Id.* at 3.) With respect to the JPay employee, Defendants simply argue that Plaintiffs
4 have had months to serve the subpoena and have not done so, and should not be granted an
5 extension to serve the subpoena at the very end of the discovery period. (*Id.* at 3-4.) Finally,
6 Defendants assert that the information Plaintiffs are seeking by way of the subpoenas, which
7 appears to include photos and emails sent from Mrs. McKinnon to Mr. McKinnon via JPay that
8 were removed or rejected by DOC employees, should already be in Plaintiffs' possession as Mrs.
9 McKinnon should know what she sent to her husband through JPay and Mr. McKinnon should
10 know what materials are in his account. (*Id.* at 4.) Defendants suggest that Plaintiffs should
11 simply be able to "compare notes" to obtain the desired information. (*Id.*)

12 Plaintiffs, in their reply brief, maintain that Defendants have not submitted all relevant
13 responses to Plaintiffs' discovery requests, that they do not, in fact, have all of the information
14 they are attempting to obtain by way of their subpoenas, and that Defendants' suggestion that
15 they can simply "compare notes" and obtain the information they are seeking is incorrect. (Dkt.
16 # 51.) Plaintiffs, however, fail to make clear how serving subpoenas on non-party DOC
17 employees will benefit them as Defendants make clear that the information accessible to
18 Defendants as DOC employees is the same information that will be available to non-Defendant
19 DOC employees. (*See* dkt. # 42 at 3.) With respect to the JPay representative, Plaintiffs'
20 arguments and supporting materials are not sufficiently clear to demonstrate that allowing them
21 additional time at this juncture to correct the service deficiencies in their subpoena will result in
22 production of any additional documents relevant to their claims.

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1 **D. Defendants' Motion to Compel**

2 Defendant Wilkinson moves to compel discovery from Plaintiffs in the form of complete,
3 non-evasive responses to Interrogatory No. 6 and Request for Production No. 4 in Defendant
4 Wilkinson's first set of interrogatories and requests for production to Arthur McKinnon and in
5 Defendant Wilkinson's first set of interrogatories and requests for production to Elise
6 McKinnon. (Dkt. # 44.)

7 Interrogatory No. 6, in each set of discovery propounded on Plaintiffs, stated as follows:

8 **INTERROGATORY NO. 6:** For each and every category of damages
9 you claim Defendants are liable in this matter, please state **for each** Defendant:

10 a) The category of damages claimed;
11 b) State the dollar amount of damages claimed for that category of
12 damages; and
13 c) Show how you calculated dollar amount of damages claimed for that
14 category of damages.

15 (Dkt. # 45, Exs. 1-2.)

16 Mrs. McKinnon provided the following response to this Interrogatory:

17 **ANSWER:** - (a) Emotional distress, harassment, discrimination,
18 intimidation, constitutional categories—see First Amended Complaint. Dkt. 12,
19 (b) up to \$100 trillion to be determined by the jury at trial, and (c) familial
20 connection, memories, heirlooms priceless and irreplaceable to be determined and
21 calculated by jury at trial.

22 **SUPPLEMENTAL ANSWER:** Further responsive information is currently being
23 sought.

24 (See *id.*, Ex. 1 at 2.) Mr. McKinnon provided essentially the same response but did not indicate
25 that additional information would be forthcoming. (*Id.*, Ex. 2 at 2.)

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1 Request for Production No. 4, in each set of discovery propounded on Plaintiffs, stated as
2 follows:

3 **REQUEST FOR PRODUCTION 4:** Please produce the documents or
4 other evidentiary material, unless privileged or protected from disclosure, on
5 which each computation identified in Interrogatory 6 is based, including materials
bearing on the nature and extent of injuries suffered.

6 (*Id.*, Exs. 1-2.)

7 Mrs. McKinnon responded to this request as follows:

8 Objection: This request seeks information that is privileged and protected as
gathered, and opinion, work product and legal strategy obtained in preparation for
9 litigation. Additionally this request is ambiguous as it does not define the term
“computation” and as such may have many meanings.

10 Response: Without waiving the foregoing objections, calculations to be made and
determined by jury at trial.

11 Supplemental Response: Responsive documents are being sought.

13 (*Id.*, Ex. 1 at 3.)

14 Mr. McKinnon’s response was similar:

15 Objections: This request is overly broad and vague and does not define
“computations” which may have many meanings.

16 Response: Without waiving the foregoing objections, calculations to be made and
determined by jury at trial.

18 (*Id.*, Ex. 2 at 2.)

19 Defendant argues that he is entitled to know what damages in each category Plaintiffs
20 intend to seek from the jury, and how they arrived at that number. (Dkt. # 44 at 4.) He further
21 argues that “[s]imply stating that the amount is \$100 trillion without explaining the basis of the
22 number is disingenuous.” (*Id.*)

1 Plaintiffs oppose Defendant's motion to compel, arguing that the motion is moot. (Dkt.
2 # 50.) Plaintiffs maintain that Mrs. McKinnon supplemented her responses to these discovery
3 requests on the day Defendant Wilkinson filed his motion to compel. (*Id.* at 2-3.) Plaintiffs also
4 indicate that at the parties' discovery conference that preceded the filing of the motion to compel,
5 Mr. McKinnon advised Defendant's counsel that he had no other information to provide relating
6 to damages other than what was demanded in Plaintiffs' amended complaint. (*Id.* at 2.)

7 Defendant, in his reply brief, acknowledges that Mrs. McKinnon provided supplemental
8 responses to the discovery requests at issue, but argues the responses were not, in fact,
9 responsive in that Mrs. McKinnon "includes costs within damages and she includes damages for
10 claims that have already been dismissed in this case." (Dkt. # 57 at ¶ 3; *see also* dkt. # 56 at 2.)
11 Defendant notes as well that Mr. McKinnon made no attempt to supplement his responses to the
12 discovery requests at issue here and argues that he should be compelled to do so. (Dkt. # 56 at 2;
13 Dkt. # 57 at ¶ 4.)

14 The Court, having reviewed Mrs. McKinnon's supplemental responses, concurs that they
15 are not, in fact, responsive to Defendant's discovery requests. (*See* dkt. # 50.) In addition, the
16 record makes clear that Mr. McKinnon has not provided supplemental responses and his original
17 responses were clearly deficient. Plaintiffs suggest in their response to Defendant's motion to
18 compel that Defendant is not entitled to the discovery he seeks. (*See* dkt. # 50 at 3-4.) However,
19 Plaintiffs fail to cite any authority to support their position that Defendant is not entitled to the
20 detailed information he seeks regarding damages. Plaintiffs will therefore be required to properly
21 respond to the discovery request at issue here. If Plaintiffs are unclear as to precisely what

1 information Defendant is seeking, they may request an additional discovery conference with
2 Defendant's counsel and request clarification.

3 **E. Defendants' Motion to Reopen Discovery**

4 Defendants also move to reopen discovery for the purpose of conducting Plaintiffs'
5 depositions. (Dkt. # 48.) Defendants explain in their motion that Plaintiffs' depositions were
6 scheduled to occur on April 7, 2022, but the depositions were cancelled after Mr. McKinnon was
7 unexpectedly transported to a medical appointment that day. (*See id.* at 2; dkt. # 49 at ¶¶ 2-3.)
8 The parties were unable to reschedule the depositions prior to the discovery deadline, and
9 Plaintiffs were unwilling to stipulate to an extension of the deadline for the sole purpose of
10 taking their depositions. (*See* dkt. # 48 at 2-3; dkt. # 49 at ¶¶ 6-8.)

11 Defendants indicate in their motion that though they would have benefitted from having
12 Plaintiffs' deposition testimony prior to the dispositive motion filing deadline, they do not
13 believe such testimony will be absolutely necessary for them to file their motion for summary
14 judgment and therefore do not want to extend the dispositive motions deadline in this matter.
15 (Dkt. # 48 at 4.) Defendants do request, however, that if the case survives summary judgment
16 they be permitted to depose Plaintiffs no later than 45 days prior to trial, a date which has not yet
17 been set. (*Id.*) Plaintiffs oppose Defendants' motion but indicate they would be willing to
18 withdraw their objection if the Court were to grant their motion for extension of time and request
19 for service of summons. (Dkt. # 52 at 4.)

20 The Court has already determined that Plaintiffs' requested extension is not warranted,
21 and nothing in their response to Defendants' motion to reopen discovery alters that conclusion.
22 Given the current posture of this case, the Court deems it appropriate to defer a ruling on
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1 Defendants' motion to reopen discovery until it has an opportunity to consider Defendants'
2 anticipated motion for summary judgment. The Court will therefore strike the motion from the
3 calendar without prejudice to refiling after Defendants file their dispositive motion.

4 **IV. CONCLUSION**

5 Based on the foregoing, the Court hereby ORDERS as follows:

6 (1) Plaintiffs are GRANTED leave to file a surreply addressing the arguments set
7 forth by Defendant DOC in its reply brief in support of its motion for judgment on the pleadings
8 pertaining to the cognizability of the state law claims asserted against the DOC. Plaintiffs shall
9 file their surreply not later than **May 27, 2022**. Defendant DOC may file a response to the
10 surreply not later than **June 3, 2022**. Defendant DOC's motion for judgment on the pleadings
11 (dkt. # 28) is RENOTED for consideration on **June 3, 2022**.

12 (2) Defendant DOC's motion for a protective order (dkt. # 39) is RENOTED for
13 consideration on **June 3, 2022**, so that it may be considered in conjunction with Defendants'
14 motion for judgment on the pleadings.

15 (3) Plaintiffs' motions for leave to supplement their complaint (dkt. # 33) and for an
16 extension of time (dkt. # 37) are DENIED.

17 (4) Defendant Wilkinson's motion to compel discovery (dkt. # 44) is GRANTED.
18 Plaintiffs are directed to provide, not later than **June 3, 2022**, clear and complete responses to
19 Defendant's Interrogatory No. 6 and Request for Production No. 4 as to all claims currently
20 before the Court, including Plaintiffs' federal constitutional claims and Plaintiffs' state law
21 claims.

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23 ORDER RE: PENDING MOTIONS

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1 (5) Defendants' motion to reopen discovery (dkt. # 48) is STRICKEN from the
2 calendar without prejudice to refiling once Defendants have filed their motion for summary
3 judgment.

4 (6) The Clerk is directed to send copies of this Order to Plaintiffs, to counsel for
5 Defendants, and to the Honorable Benjamin H. Settle.

6 Dated this 9th day of May, 2022.

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9 MICHELLE L. PETERSON
United States Magistrate Judge