UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

MICHAEL HOLGUIN, Plaintiff, v. COUNTY OF LOS ANGELES, et al., Defendants.	No. CV 10-8011-GW (PLAx) **ORDER RE: DEFENDANTS' EX PARTE APPLICATION FOR PROTECTIVE ORDER**

On October 7, 2011, defendants filed an Ex Parte Application ("Application") seeking a protective order barring plaintiff from deposing defendant Sheriff Leroy Baca as well as non-parties Captain John Clark, Undersheriff Paul Tanaka, and retired Commander Dennis Conte. Plaintiff filed an Opposition to the Application ("Opposition") on October 10, 2011.

By way of background, plaintiff first noticed the depositions of Clark, Tanaka, and Conte on September 16, 2011, to occur at the beginning of October. (Declaration of Virginia Keeny in Support of Opposition, at ¶ 14). Due to a scheduling conflict, counsel agreed to postpone the depositions until the last week of October. (Id., at ¶ 15). On September 21, 2011, plaintiff served amended deposition notices for Conte, Clark, and Tanaka, with depositions set for October 25, 2011, and October 26, 2011. (See Declaration of Nathan A. Oyster in Support of Application, Exs.

A-C). On September 29, 2011, plaintiff also served a notice for Sheriff Baca, setting a deposition date of October 28, 2011. (See id., Ex. D).

As an initial matter, plaintiff argues in his Opposition that defendants did not have good cause to file the instant Application on an ex parte basis. (Opposition at 5-8). Defendants contend that they were justified in proceeding ex parte because counsel were unable to reach an agreement about the depositions through the meet and confer process, after which "[d]efendants' counsel would be unable to timely prepare a Local Rule 37-2 joint stipulation with [p]laintiff prior to the October 25 deposition of [Clark]." (Application at 5). While proceeding on an ex parte basis is generally frowned upon (ex parte applications are for extraordinary relief and should be used with discretion (see Mission Power Engineering Co. v. Continental Casualty Co., 883 F.Supp. 488 (C.D. Cal. 1995))), whether the circumstances here qualify as a true emergency is a close call, and the Court will rule on the instant Application, especially since plaintiff has thoroughly briefed the issues presented therein.[1]

Turning to the merits, defendants seek to bar the depositions of Captain Clark, Undersheriff Tanaka, and retired Commander Conte on two grounds: 1. that they are third parties to the case from whom plaintiff seeks information that is not relevant to plaintiff's claims, and thus the depositions would be unduly burdensome; and 2. that they "are or were high-ranking government officials who are not subject to deposition." (Application at 5-8).

As to defendants' relevance arguments, under Rule 26(b)(1) of the Federal Rules of Civil Procedure, discovery is permitted of "any nonprivileged matter that is relevant to any party's claim or defense." As a general matter, Rule 26(b) is to be "liberally interpreted to permit wide-ranging

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[1] The Court notes that the process involved in filing a regularly-noticed motion relating to discovery pursuant to Local Rule 37 usually takes no less than 38 days (10 days from defendants' service of a letter on plaintiff requesting a pre-filing conference until the actual conference; seven days from defendants' delivery of their portion of the joint stipulation to plaintiff until plaintiff delivers his portion of the joint stipulation back to defendants; and 21 days from the filing of the motion until the hearing (see Local Rule 37)). Thirty-eight days from September 16, 2011, the day plaintiff first noticed the depositions of Clark, Tanaka, and Conte, is October 24, 2011. Thus, even if defendants had immediately initiated the process pursuant to Local Rule 37 to seek a protective order, the issue may not have been resolved until just one day before the first scheduled deposition date of October 25, 2011.

discovery of information," even if that information is not ultimately admitted at trial. See Comcast of Los Angeles, Inc. v. Top End International, Inc., 2003 WL 22251149, at *2 (C.D. Cal. July 2, 2003); see also Fed.R.Civ.P. 26(b)(1) ("Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."). Here, the burden is on defendants, as the party resisting discovery, to show that discovery should not be allowed (Comcast, 2003 WL 22251149, at *2 (citing Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975)); it is not up to defendants to decide what plaintiff needs to pursue this action.

Neither is it the role of the Court in this Motion to determine what evidence the District Judge will actually allow in at a trial in this case. See, e.g., Colonial Life & Accident Insur. Co. v. Superior Court of Los Angeles County, 31 Cal.3d 785, 791, n. 8 (1982) (quoting Pacific Tel. & Tel. Co. v. Superior Court, 2 Cal.3d 161, 172-73 (1970) ("[Courts] may appropriately give the applicant [for discovery] substantial leeway, especially when the precise issues of the litigation of the governing legal standards are not clearly established [citation]; a decision of relevance for purposes of discovery is in no sense a determination of relevance for purposes of trial.") (brackets in original)). At the same time, however, the Court is guided by the requirement that "[d]iscovery must be narrowly tailored . . . and must not be a fishing expedition." Zewdu v. Citigroup Long Term Disability Plan, 264 F.R.D. 622, 626 (N.D. Cal. 2010) (citing Groom v. Standard Ins. Co., 492 F.Supp.2d 1202, 1205 (C.D. Cal. 2007)).

In cases involving discovery from third parties, Rules 26 and 45 of the Federal Rules of Civil Procedure control. Exxon Shipping Co. v. U.S. Department of Interior, 34 F.3d 774, 779 (9th Cir. 1994). Under Rule 26(c), a court may, "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including by forbidding the disclosure or discovery. The party seeking to limit discovery has the burden of establishing grounds for the issuance of a protective order. Blankenship, 519 F.2d at 429. Further, a court can quash a Rule 45 subpoena if it subjects a person to undue burden. Fed.R.Civ.P. 45(c)(3)(A)(iv). In reaching its conclusion set forth herein, the Court has balanced the relevance of the discovery sought, the requesting party's need, defendants' reasons for

seeking the protective order and any potential burden on defendants if the depositions are permitted, and the potential hardship to the individuals subject to the subpoena. Heat and Control, Inc. v. Hester Industries, Inc., 785 F.2d 1017, 1024 (Fed. Cir. 1986).

As to retired Commander Conte, while plaintiff states in his Opposition that "[t]he practice by which Sheriff's Deputies fake records, and any measures taken by Defendant Baca and commanding officers John Clark, Dennis Conte, and Paul Tanaka to uncover and/or combat this practice is . . . highly relevant to this matter" (see Opposition at 9), plaintiff does not allege what role, if any, Conte had with regard to the Los Angeles County Men's Central Jail ("MCJ"), and whether he was in that position at the time of the alleged incident giving rise to this cause of action, or any other relevant time period. As such, while defendants have the burden of showing that the discovery of any nonprivileged matter relevant to plaintiff's claim should not be allowed, plaintiff has not even made the threshold showing that the deposition of Conte could lead to the discovery of information relevant to plaintiff's claim. Thus, defendants' Application as to Conte is **granted**.

Plaintiff's Opposition does set forth specific allegations as to Undersheriff Tanaka and Captain Clark. As to Tanaka, plaintiff alleges the following: that he is the highest ranking officer in the Los Angeles County Sheriff's Department ("LASD") after Sheriff Baca; that he oversees the "day-to-day operations" of the department; that as the former "Assistant Sheriff overseeing the Custody and Corrections Division of the Department, [] Tanaka's testimony will be highly relevant to Plaintiff's discovery of the LASD's Internal Affairs investigation process and policy changes, or the absence of policy changes, that have occurred following findings of wrongdoing by Sheriffs Deputies in County Jails." (See Opposition at 12-13). As to Clark, plaintiff alleges that he was "at one time" and until 2006 or 2007 the Captain responsible for MCJ, and that Clark was reassigned within the LASD shortly after instituting a policy to rotate sheriff's deputies at MCJ between floors "to disrupt gang-like activity by Deputies." (Id. at 13). Plaintiff's complaint includes a Monell claim for County liability for the LASD's use of force against inmates, its internal procedures for investigating use of force incidents, and its lack of discipline of problem officers. (Id. at 4-5, 8). Plaintiff's allegations as to Tanaka and Clark are sufficient to reveal that they may possess

information relevant to plaintiff's Monell claim. Moreover, plaintiff states that he has been unable to discover information relevant to this claim through prior interrogatories and depositions. (Id. at 7-8). On the other hand, while defendants cite Rule 45(c)(3)(A)(iv) of the Federal Rules of Civil Procedure for the proposition that the depositions plaintiff seeks will subject those deposed to undue burden, defendants do not specify how they, or Tanaka and Clark, would be burdened by allowing plaintiff to depose Tanaka and Clark. After balancing the factors set out in Heat and Control, the Court finds it inappropriate to bar Tanaka's and Clark's depositions on the ground of undue burden.

Next, defendants seek to bar the depositions of Tanaka and Clark[2] on the ground that they are high ranking officials who are not subject to deposition absent extraordinary circumstances. (Application at 8-11). In support, defendants rely on cases identifying the following as high ranking government officials in the context of discovery and trial testimony: Administrator of the Small Business Administration (Kyle Engineering Co. v. Kleppe, 600 F.2d 226, 228, 231 (9th Cir. 1979)); the mayor of Boston (Bogan v. City of Boston, 489 F.2d 417, 423 (1st Cir. 2007)); the Illinois state attorney general (Stagman v. Ryan, 176 F.3d 986, 994 (7th Cir. 1999), cert. denied, 528 U.S. 986 (1993)); Commissioner of the Food and Drug Administration (In re United States of America, 985 F.2d 510, 512 (11th Cir. 1993) (per curiam), cert. denied sub nom., Faloon v. United States, 510 U.S. 989 (1993)); top Department of Labor officials (Simplex Time Recorder Co. v. Secretary of Labor, 766 F.2d 575, 586 (D.C. Cir. 1985)); and the governor of Missouri (Sweeney v. Bond, 669 F.2d 542, 546 (8th Cir. 1982), abrogated on other grounds, O'Hare Truck Service, Inc. v. City of Northlake, 518 U.S. 712 (1996)). Based on these cases, defendants have not shown that Clark and Tanaka are "heads of government agencies . . . not normally subject to deposition" within the meaning of Kyle Engineering. See Kyle Engineering, 600 F.2d at 231. Because Tanaka and Clark do not qualify as high ranking officials, and because plaintiff has sufficiently shown that Tanaka's and Clark's depositions may allow plaintiff to discover information relevant to his claims, defendants' Application as to Tanaka and Clark is **denied**.

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[2] As the Court is granting defendants' Application as to Conte for the reason discussed supra, it does not include Conte in its discussion of this portion of defendants' argument.

Defendants also seek to bar the deposition of Sheriff Baca on the ground that he is a high ranking official not subject to deposition absent extraordinary circumstances. Case law supports defendants' classification as to Sheriff Baca. See Jarbo v. County of Orange, 2010 WL 3584440, at *2 (C.D. Cal. Aug. 30, 2010) (concluding that the Sheriff of Orange County was a high-ranking government official not subject to deposition absent extraordinary circumstances); Avalos v. Baca, 2006 WL 6220447, at *2 (C.D. Cal. Oct. 16, 2006) (citing Green v. Baca, 226 F.R.D. 624, 648 (C.D. Cal. 2005) (An exception to the general rule on deposing high ranking officials exists for officials who "have direct personal factual information pertaining to material issues in an action . . . [and] where the information to be gained . . . is not available through any other source. Sheriff Baca has answered written interrogatories, there are likely other sources of additional information available, such as lower ranking officials, and it is unlikely that Sheriff Baca has any personal knowledge of the facts surrounding Plaintiff's specific situation.") (internal citation and quotations omitted); see also Slone v. Judd, 2011 WL 1584421, at *1-2 (M.D. Fla. Apr. 26, 2011) (barring the deposition of the sheriff of Polk County, Florida); Gray v. Kohl, 2008 WL 1803643, at *1 (S.D. Fla. Apr. 21, 2008) (finding the sheriff of Monroe County, Florida, "entitled to the heightened protection from discovery often afforded to high ranking officials"). Here, plaintiff has not shown that Baca has "direct personal factual information pertaining to material issues" in this action. See Green, 226 F.R.D. at 648. Further, as the Court is denying defendants' Application as to Tanaka and Clark, plaintiff will have the opportunity to depose these two individuals, and thus he has not convinced the Court that the information to be gained from a deposition of Sheriff Baca "is not available through any other source." See id.

Based on the above, defendants' Application seeking a protective order barring plaintiff from deposing Sheriff Baca and Commander Conte is **granted**, and is **denied** as to Undersheriff Tanaka and Captain Clark.

DATED: October 12, 2011

PAUL L. ABRAMS
UNITED STATES MAGISTRATE JUDGE