UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
CIVIL MINUTES—GENERAL

Case No.	**8:20-cv-00835-JGB-SHK**	Date:	March 9, 2021
Title:	***Melissa Ahlman, et al. v. Don Barnes, et al.***		

Present: The Honorable	Shashi H. Kewalramani, United States Magistrate Judge

D. Castellanos	Not Reported
Deputy Clerk	Court Reporter

Attorney(s) Present for Plaintiff(s):	Attorney(s) Present for Defendant(s):
None Present	None Present

Proceedings (IN CHAMBERS): ORDER DENYING DEFENDANTS' MOTION FOR PROTECTIVE ORDER PROHIBITING DEPOSITION OF DEFENDANT SHERIFF DON BARNES [ECF NO. 144]

On February 5, 2021, following a hearing with this Court, Defendants Orange County Sheriff Don Barnes ("Sheriff Barnes") and Orange County, California (collectively, "Defendants") filed the instant Motion For Protective Order ("Motion" or "Mot."), seeking to prohibit Plaintiffs[1] from taking the deposition of Sheriff Barnes. Electronic Case Filing Number ("ECF No.") 144, Mot. On February 12, 2021, Plaintiffs filed their Opposition to Defendants' Motion ("Opposition" or "Opp'n"), ECF No. 146, Opp'n, and on February 17, 2021, Defendants filed their Reply ("Reply"), ECF No. 152, Reply. The matter stands ready for decision.

After reviewing the parties' arguments, for the reasons set forth below, the Court **DENIES** Defendants' Motion. Defendants are to produce Sheriff Barnes for deposition in accordance with the Court's instructions set forth in Section III of this Order.

[1] The Court will refer to "Plaintiffs" to include the following: Melissa Ahlman, Daniel Kauwe, Michael Seif, Javier Esparza, Pedro Bonilla, Cynthia Campbell, Monique Castillo, Mark Trace, Cecibel Caridad Ortiz, Don Wagner, and others who are similarly situated in this putative class action.

I. BACKGROUND

A. Procedural History

On April 30, 2020, Plaintiffs filed their Petition for Writ of Habeas Corpus and Complaint seeking injunctive and declaratory relief against Defendants, which included the following five causes of action: (1) unconstitutional conditions of confinement in violation of the Fourteenth Amendment to the U.S. Constitution; (2) unconstitutional punishment in violation of the Fourteenth Amendment to the U.S. Constitution; (3) unconstitutional conditions of confinement in violation of the Eighth Amendment to the U.S. Constitution; (4) discrimination on the basis of disability, in violation of Title II of the Americans With Disability Act; and (5) discrimination on the basis of disability in violation of Section 504 of the Rehabilitation Act. ECF No. 1, Compl. at 58-64.

On June 26, 2020, the District Judge granted in part and denied in part Plaintiffs' Application for a Temporary Restraining Order or Preliminary Injunction, and granted Plaintiffs' Motion for Provisional Class Certification. ECF No. 93, Order Granting Prelim. Inj. and Provisional Class Cert. at 1.

Discovery in this matter is ongoing and Plaintiffs have propounded written discovery and taken depositions of Defendants' witnesses. See ECF No. 146, Opp'n at 4-6; ECF No. 144, Mot. at 2-3. Plaintiffs have deposed eight fact witnesses, including officials from the Orange County Sheriff's Department ("OCSD") and Health Care Agency, and seven witnesses produced by Defendants to speak on the 18 topics set out in Plaintiffs' Federal Rule of Civil Procedure 30(b)(6) ("30(b)(6)") deposition notice. ECF No. 146, Opp'n at 5.

On January 5, 2021, Plaintiffs served a Notice of Deposition on Sheriff Barnes, seeking to depose Sheriff Barnes on February 1, 2021, "after all 30(b)(6) and fact witness depositions were expected to be completed and after requesting significant written discovery." ECF No. 146, Opp'n at 6.; see also ECF No. 144, Mot. at 3. After Defendants notified Plaintiffs that Sheriff Barnes would not be made available for his deposition, Plaintiffs offered to limit Sheriff Barnes's deposition to "5.5 hours and expressed an openness to negotiating a limited set of topics including: (1) Sheriff Barnes'[s] discretionary decision-making, especially with regard to those areas identified by prior deponents; (2) [Sheriff Barnes's] public statements relevant to this case and his statements on OCSD's handling of COVID-19; and (3) contradicting and unclear testimony by [other] 30(b)(6) deponents." ECF No. 146-1, Declaration of Stacey K. Grisby ("Grisby Decl.") at 6-7. On January 26, 2021, the parties met and conferred but "could not reach an agreement." ECF No. 144-3, Declaration of Suzanne E. Shoai at 3. On January 28, 2021, the parties attended a hearing with this Court regarding the dispute of whether Plaintiffs could take Sheriff Barnes's deposition. ECF No. 141, Minutes. The Court ordered a briefing schedule, and also ordered the parties to meet and confer "to discuss any limitations regarding the deposition." Id. On February 1, 2021, both parties met and conferred, but according to Plaintiffs' counsel, Defendants "said they would inform Plaintiffs whether they could agree to compromise on a deposition of limited scope[]" but did not correspond with Plaintiffs any further. ECF No. 146-1, Grisby Decl. at 7. The parties subsequently filed their briefing.

B. Parties' Arguments

1. Defendants' Arguments

Defendants set forth several arguments in support of a protective order preventing Sheriff Barnes from being deposed.

First, Defendants argue that Sheriff Barnes should not be deposed—and a protective order should be issued—because he is subject to the apex deposition privilege as the high-ranking official in the OCSD. ECF No. 144, Mot. at 4-6.

Defendants argue that Sheriff Barnes does not have unique personal knowledge that would warrant his deposition as an apex witness. Defendants add that while Sheriff Barnes had made several public statements, such public statements are "typical for an apex witness" and "does not establish that [Sheriff Barnes] has first-hand, unique and non-repetitive knowledge of the matters at issue[.]" Id. at 7. Defendants argue that statements from Sheriff Barnes's official Twitter page do not represent Sheriff Barnes's unique personal knowledge, but rather are a result of Sheriff Barnes reporting and relaying the OCSD information to the public. ECF No. 152, Reply at 4. Defendants also argue that Sheriff Barnes does not have unique personal knowledge of any purported inconsistencies by the 30(b)(6) witnesses. ECF No. 144, Mot. at 8. Defendants point to the fact that any knowledge Sheriff Barnes possesses would be known more directly by others within the OCSD. ECF No. 152, Reply at 3.

Defendants further argue that, although Sheriff Barnes is "by definition[] and as a matter of law" the chief policymaker for the OCSD, "[Sheriff Barnes] does not participate personally in each decision made regarding the myriad of functions performed by the [OCSD] and he delegates authority to unit commanders who are responsible for the performance of their unit, and who report to him through a chain of command." ECF No. 144, Mot. at 7. Instead, Sheriff Barnes's "knowledge of the [Orange County] Jail conditions at issue in this litigation . . . is overwhelmingly based on information provided to him by his executive command staff." ECF No. 152, Reply at 3.

Second, Defendants question the purpose of the deposition based on "the timing of the service of Plaintiffs' Notice of Deposition of Sheriff Barnes[.]" ECF No. 144, Mot. at 8. Specifically, Defendants point to the fact that Sheriff Barnes was noticed for deposition after only three of Plaintiffs' 30(b)(6) depositions had taken place, and Plaintiffs did not try to seek the information they need from Sheriff Barnes through other discovery methods. Id. at 8-9; see also, ECF No. 152, Reply at 4.

Third, Defendants make a slippery slope argument, stating that "there is no question that a deposition will interfere with Sheriff Barnes'[s] duties[,]" especially if he were required to do so for every case that named him as a defendant. ECF No. 144, Mot. at 9-10.

Finally, Defendants argue that the deliberative process privilege would prohibit the deposition of Sheriff Barnes because the deposition involves "any thought processes behind the Sheriff's policy making[.]" Id. at 11. Defendants argue that "the topics upon which [Plaintiffs] seek to depose [Sheriff Barnes] consist of exactly the type of pre-decisional information that the privilege is designed to protect." ECF No. 152, Reply at 6. Although the deliberative process privilege is qualified, Defendants contend that Plaintiffs have offered nothing "to establish that their alleged need for [Sheriff Barnes's] testimony is enough to overcome [Sheriff Barnes's] interest in non-disclosure[.]" Id.

2. Plaintiffs' Arguments

First, Plaintiffs argue that, "assuming that Sheriff Barnes is a high-level official under the apex doctrine," Plaintiffs should still be permitted to depose Sheriff Barnes because he has unique, personal knowledge, "particularly where policy decisions over which those officials have authority are at issue." ECF No. 146, Opp'n at 8-11. Plaintiffs point out that Defendants "acknowledge that Sheriff Barnes is the ultimate decision-maker in his department[,]" and that Sheriff Barnes is "intimately involved in decisions regarding prisoner releases, policies and practices regarding COVID-19 prevention and mitigation, and policies and practices of enforcement of department policy and discipline for violations." Id. at 8-9. Plaintiffs also allege that Sheriff Barnes's public statements "demonstrates his significant personal knowledge and deep involvement with this case and the issues in controversy." Id. at 9. Plaintiffs distinguish this case from several other apex deposition cases cited by Defendants, noting that in comparison to those cases in which the CEO of large companies made generic business statements regarding their products, Sheriff Barnes here "has made extensive public statements about both the [instant case] and Campbell cases, the [Orange County] Jail's handling of COVID-19, and his department's intentions to not enforce public health orders." Id. at 10.

Second, although Plaintiffs point out that this is not an absolute requirement in considering whether an apex witness should be deposed, Plaintiffs argue that they had already tried to seek the information elsewhere, via "numerous fact and 30(b)(6) depositions and via extensive written discovery." Id. at 11-12. Plaintiffs base their need to depose Sheriff Barnes on previous deposition testimony "identif[ying] Sheriff Barnes as a key decision-maker with unique knowledge" and his testimony would fill the "gaps and contradictions" by other witnesses. Id.

Third, Plaintiffs argue that the deliberative process privilege does not apply to Sheriff Barnes's deposition. Plaintiffs first point out that Defendants have waived any privilege claims because they "failed to assert this privilege when Plaintiffs propounded discovery requests and sought testimony concerning policies and communications regarding COVID-19 in the [Orange County] Jail—some of the very topics [on] which Plaintiffs seek to ask Sheriff Barnes." Id. at 12. Plaintiffs then argue that, regardless, the privilege itself does not apply because "Plaintiffs do not seek pre-decisional or deliberative information." Id. Finally, Plaintiffs argue that, even if the deliberative process privilege applies, it is still a qualified privilege that should be overcome based on Plaintiffs' need for the materials and need for accurate-factfinding. Id. at 13.

II. DISCUSSION

A. General Legal Standards Regarding Discovery

Federal Rule of Civil Procedure ("Rule") 26(b)(2) governs the scope of permissible discovery and provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Relevancy, for purposes of discovery, "has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case." Nguyen v. Lotus by Johnny Dung Inc., No. 8:17-cv-01317-JVS-JDE, 2019 WL 3064479, at *1 (C.D. Cal. June 5, 2019) (internal citations and quotation marks omitted). "Generally, the purpose of discovery is to remove surprise from trial preparation so the parties can obtain evidence necessary to evaluate and resolve their dispute." Duran v. Cisco Sys., Inc., 258 F.R.D. 375, 378 (C.D. Cal. 2009) (internal citations and quotation marks omitted).

Because discovery must be both relevant and proportional, the right to discovery, even plainly relevant discovery, is not limitless. See Fed. R. Civ. P. 26(b)(1); Nguyen, No. 8:17-cv-01317-JVS-JDE, 2019 WL 3064479, at *1. Discovery may be denied where: "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or (iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)." Fed. R. Civ. P. 26(b)(2)(C).

"The party seeking to compel discovery has the burden of establishing that its request satisfies the relevancy requirements of Rule 26(b)(1). The party opposing discovery then has the burden of showing that the discovery should be prohibited, and the burden of clarifying, explaining or supporting its objections." Bryant v. Ochoa, 2009 WL 1390794 at * 1 (S.D.Cal. May 14, 2009). "The party opposing discovery is 'required to carry a heavy burden of showing' why discovery should be denied." Reece v. Basi, 2014 WL 2565986, at *2 (E.D. Cal. June 6, 2014), aff'd, 704 F. App'x 685 (9th Cir. 2017) (quoting Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir.1975)).

"The district court enjoys broad discretion when resolving discovery disputes, which should be exercised by determining the relevance of discovery requests, assessing oppressiveness, and weighing these factors in deciding whether discovery should be compelled."

United States ex rel. Brown v. Celgene Corp., No. CV 10-3165 GHK (SS), 2015 WL 12731923, at *2 (C.D. Cal. July 24, 2015) (internal citations and quotation marks omitted).

B. Analysis

1. Applying The Apex Deposition Standard To Sheriff Barnes

Defendants' main argument for a protective order centers around whether Sheriff Barnes is protected from being deposed because he is an apex witness. See ECF No. 144, Mot. at 5-10.

The applicable standards regarding "apex" depositions are set out in detail in Hunt v. Cont'l Cas. Co., No. 13-CV-05966-HSG, 2015 WL 1518067, at *1–2 (N.D. Cal. Apr. 3, 2015):

> Federal Rule of Civil Procedure 26(c)(1) provides that "[t]he 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 prohibiting a deposition or limiting its scope. Fed. R. Civ. P. 26(c)(1)(A) and (B). "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." In re Transpacific Passenger Air Transp. Antitrust Litig., No. C 07–05634 CRB, 2014 WL 939287, at *1 (N.D. Cal. 2014) (citing Phillips v. GMC, 307 F.3d 1206, 1210–1211 (9th Cir. 2002)). Absent extraordinary circumstances, it is rare for a court to disallow the taking of a deposition. See Blankenship v. Hearst Corp., 519 F.2d 418, 429 (9th Cir. 1975) ("[A] strong showing is required before a party will be denied entirely the right to take a deposition.") (internal quotations and citations omitted); In re Google Litig., No. C 08–03172 RMW, 2011 WL 4985279, at *2 (N.D. Cal. 2011) ("A party seeking to prevent a deposition carries a heavy burden to show why discovery should be denied."); Apple Inc. v. Samsung Electronics Co., Ltd., 282 F.R.D. 259, 263 (N.D. Cal. 2012) ("[I]t is very unusual for a court to prohibit the taking of a deposition altogether absent extraordinary circumstances.") (internal quotations and citation omitted); Powertech Technology, Inc. v. Tessara Inc., No. C 11–6121 CW, 2013 WL 3884254, at *1 (N.D. Cal. 2013) (same).
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> "In determining whether to allow an apex deposition [i.e., the deposition of a high-level executive], courts consider (1) whether the deponent has unique first-hand, non-repetitive knowledge of facts at issue in the case and (2) whether the party seeking the deposition has exhausted other less intrusive discovery methods." Apple v. Samsung, 282 F.R.D. at 263. A district court has broad discretion to determine whether, on the totality of the record, a party seeking a protective order has met its burden of showing good cause to block an apex deposition. See Apple v. Samsung, 282 F.R.D. at 262–263 (finding that upon a party's showing of good cause, the court has discretion to limit or preclude an apex deposition, particularly where the discovery sought can be obtained from a less burdensome source); In Re Google Litig., 2011 WL 4985279 at *2 (finding that when a party seeks to pursue an apex deposition, "the court may exercise its discretion under the federal rules to

> limit discovery" by precluding or limiting the deposition). The party seeking to take such a deposition does not need to prove conclusively in advance that the deponent definitely has unique, non-repetitive information; instead, "where a corporate officer may have any first-hand knowledge of relevant facts, the deposition should be allowed." Grateful Dead Productions v. Sagan, No. C 06–7727(JW) PVT, 2007 WL 2155693, at *1, n. 5 (N.D. Cal. 2007) (emphasis in original) (citing Blankenship, 519 F.2d at 429 and Anderson v. Air West, Inc., 542 F.2d 1090, 1092–93 (9th Cir. 1976)). See also Powertech, 2013 WL 3884254 at *2 (noting that the party seeking deposition "was not required to prove that [deponent] certainly has [relevant] information"). Nor has formal "exhaustion" been viewed as an absolute requirement; instead, exhaustion of other discovery methods is an important, but not dispositive, consideration for a court to take into account in deciding how to exercise its discretion. In re Transpacific, 2014 WL 939287 at *5 (noting that exhaustion of other discovery routes is an "important consideration" but not a necessary precondition to the taking of an apex deposition).

Additionally, as in Hunt, this Magistrate Judge also finds that the burden remains with the party seeking the protective order, in this case Defendants, to prevent the taking of the deposition. 2015 WL 1518067, at *1, n.1.

Here, both parties appear to agree that Sheriff Barnes is a high-level official such that his deposition would be considered an apex deposition. See ECF No. 144, Mot. at 6; ECF No. 146, Opp'n at 8. Therefore, the Court must determine whether (1) Sheriff Barnes is likely to have "unique first-hand, non-repetitive knowledge of facts at issue in this case" and (2) whether Plaintiffs have exhausted other less intrusive discovery methods. See Apple, 282 F.R.D. at 263.

With respect to the first prong, Defendants main argument appears to be that Sheriff Barnes's knowledge of facts at issue in this case comes from various other lower-ranked officials, so Sheriff Barnes himself would not be able to offer unique testimony that isn't already offered and available through various other 30(b)(6) witnesses. See ECF No. 144, Mot. at 7-8. However, based on the current record before the Court, it does appear that Sheriff Barnes is likely to possess unique, first-hand, non-repetitive knowledge of the facts at issue.

The Court first recognizes that this is not a typical civil rights case against a local sheriff's department.[2] Rather, the facts and the procedural history of this case challenges the current policies by Orange County and the OCSD—via Sheriff Barnes—with regard to how COVID-19 is handled within the Orange County Jail. See ECF No. 1, Compl. at 6-9. As made clear in the

[2] Indeed, the Magistrate Judge notes that several of the District Court Judge's rulings have been appealed to the Ninth Circuit, and a request for a stay of the District Judge's ruling has been entertained and ruled on by the United States Supreme Court. See Ahlman v. Barnes, No. 20-55568, 2020 WL 3547960 (9th Cir. Jun. 17, 2020); Barnes v. Ahlman, 140 S. Ct. 2620 (2020); see also ECF No. 99, Order from Ninth Circuit.

briefing, Sheriff Barnes is responsible for determining policies within the Orange County Jail, albeit with the counsel of those in his chain of command. See ECF No. 144, Mot. at 7 ("By definition, and as a matter of law, [Sheriff Barnes] is the chief policymaker for the Department."). Indeed, Sheriff Barnes himself has admitted that he is the individual exercising statutory discretion to release inmates from the Orange County Jail. See ECF No. 146-6, Ex. E at 3. As noted below, Plaintiffs appear to seek factual information surrounding the existing COVID-19 related policies at the Orange County Jail, and the best person to provide such information is the final policymaker, Sheriff Barnes. See Green v. Baca, 226 F.R.D. 624, 649 (C.D. Cal. 2005) (finding that the Los Angeles County Sheriff cannot be precluded from being called as an apex witness because the plaintiff is challenging implementation of jail release policies, which is established and implemented by the Los Angeles County Sheriff).

Defendants argue that Sheriff Barnes's title does not mean that he has the necessary unique knowledge on this issue and he "do[es] not participate personally in each decision made regarding the myriad of functions performed by [the OCSD]." ECF No. 144, Mot. at 7. The record suggests otherwise.

While Sheriff Barnes identifies Assistant Sheriff Joseph Balicki ("Asst. Sheriff Balicki") as an individual who has personal knowledge of the issues at hand, Plaintiffs have provided evidence that Sheriff Barnes is personally involved in and ultimately sets forth COVID-19 related policies. For example, during his deposition, Asst. Sheriff Balicki identified a memo drafted by Sheriff Barnes that "discusses the onset of the pandemic and what actions we will be taking as we move into the pandemic[]", and a Captain Ramirez also testified that Sheriff Barnes is someone who "has the authority to make . . . the guidelines or the qualifications [for release.]" ECF No. 146-5, Ex. D at 2-3. Additionally, in the related state court case, Campbell v. Barnes, No. 30-2020-01141117 (Orange County Superior Court) ("Campbell"), Sergeant Hennessey testified that "over 1,500" inmates were released throughout the pandemic "under [Sheriff Barnes's] discretionary authority[]" and that "the criteria for who is eligible for an early release program is done by the Sheriff." Id. at 4. Finally, Dr. Chiang, one of Defendants' 30(b)(6) witnesses, testified, not surprisingly in response to this once in a century pandemic, that Sheriff Barnes is "involved in the jail's response to COVID-19." Id. at 3.

Moreover, contrary to Defendants' argument that Sheriff Barnes's public statements do not demonstrate unique, personal knowledge, Sheriff Barnes's public statements do suggest that he is well aware of the COVID-19 related policies and implementation in place at the Orange County Jail and more involved than he would otherwise appear to be in a run-of-the-mill civil rights action. For example, Sheriff Barnes issued a letter directly to California's Governor, notifying the Governor of the "reduced" COVID-19 cases and the "series of changes to practices and procedures to mitigate the spread of the virus" in the Orange County Jail.[3] Don Barnes, Letter Re: COVID-19 Response Efforts, Orange County Sheriff's Department (July 7,

[3] The Court notes that Defendants' witnesses appear to indicate that Sheriff Barnes himself issued the letter and that Asst. Sheriff Balicki "do[esn't] know what prompted the sheriff to send this [letter.]" ECF No. 146-5, Ex. D. at 2.

2020) https://www.ocsheriff.gov/sites/ocsd/files/2020-10/Sheriff%20Barnes%20Letter%20to%20Governor%207.7.20.pdf. Further, in response to an order issued in Campbell to reduce the Orange County Jail's population by 50%, Sheriff Barnes issued a statement on December 11, 2020 stating that "[i]f the order stands, it will result in the release of more than 1,800 inmates. Many of these inmates are in pre-trial status for, or have been convicted of, violent crimes and will be released back into the community." Sheriff Don Barnes, Statement, Orange County Sheriff's Department (Dec. 11, 2020), https://www.ocsheriff.gov/sites/ocsd/files/2020-12/20-12-11%20Sheriff%20Barnes%20statement%20on%20court%20ruling_0.pdf. Several days later, on December 16, 2020, Sheriff Barnes followed up via Twitter stating that, "[i]f this ruling is allowed to stand[,] it will potentially result in the release of individuals who have been charged with serious and violent crimes. [] In my view, the release of even one of these inmates is too many. [] *Over the course of the last several months, I have made the decision to release those who have committed low-level offense during the remaining period of their sentences*. This decision allowed us to mitigate the impact of COVID-19 on our jail system and preserve our ability to house dangerous offenders." @OCSheriffBarnes, Twitter (Dec. 16, 2020, 3:59 PM), https://twitter.com/OCSheriffBarnes/status/1339359617881579520/photo/2 (emphasis added). Finally, on January 19, 2021, Sheriff Barnes issued a statement describing the re-arrest of an "inmate ordered released by [the order in Campbell.]" Inmate Released By Judge In ACLU Lawsuit Escapes Electronic Monitoring, Re-Arrest Less Than 24 Hours Later, Orange County Sheriff's Department (Jan. 19, 2021), https://www.ocsheriff.gov/sites/ocsd/files/2021-01/21-01-19%20Inmate%20released%20by%20judge%20in%20ACLU%20lawsuit%20escapes.pdf. The statement provides the following quote from Sheriff Barnes:

> "This inmate was in custody for a violent felony of robbery with a firearm, and despite numerous objections was ordered by a judge to be released," said Sheriff Barnes. "The inmate's subsequent escape from custody then required a manhunt by numerous personnel to locate her, bring her back into custody and return her to jail, where she should have remained in the first place. The known risks to the community associated with the court ordered release demonstrates a blatant disregard for the public's safety."

Id. Sheriff Barnes also specifically noted in the statement that he has "utilized the discretion available to him during a declared emergency [of COVID-19] to release more than 1,500 inmates with less than 180 days left on their sentence who pose the lowest risk to the community." Id.

In looking at Sheriff Barnes's public statements as a whole, it is clear that he was not only involved in setting COVID-19 related policies within the Orange County Jail, but he also has personal knowledge of how COVID-19 is impacting the Orange County Jail.[4] This is unlike cases in which the apex witness is uninvolved with the issues of the case and is merely acting as the face

[4] While Sheriff Barnes has extensively addressed the ongoing proceedings in Campbell, Campbell and the instant case both share common factual basis such that Sheriff Barnes's statements regarding factual issues in Campbell are relevant to this case.

of an entity, making only generalized statements. See Affinity Labs of Texas v. Apple, Inc., No. C 09-4436 CW JL, 2011 WL 1753982, at *3 (N.D. Cal. May 9, 2011) (finding that plaintiff had failed to show that defendant's CEO had unique and personal knowledge of the facts based on the CEO's public statements using phrases such as "innovative," "revolutionary," and "ground breaking" to describe the technology at issue in the patent dispute); Apple, 282 F.R.D. at 265-66 (granting protective order of the defendant's president based on lack of personal knowledge because the public statements made by the president were merely statements voicing a need to remain competitive instead of addressing the specific technology at issue). This matter is also distinguishable from cases in which the apex witness, who is a sheriff, has no connection whatsoever to the factual issues. See K.C.R. v. Cty. of Los Angeles, No. CV 13-3806 PSG(SSx), 2014 WL 3434257, at *7 (C.D. Cal. July 11, 2014) (denying the plaintiffs' motion to compel the Los Angeles County Sheriff's Department Undersheriff for deposition because the plaintiffs failed to show how the Undersheriff was even related to the events of the case, let alone had unique personal knowledge). Rather, in this case, Sheriff Barnes is clearly well-versed on the details of COVID-19 related policies within the Orange County Jail and Defendants have not identified any authority that prohibits an apex witness deposition when the apex witness has made extensive public statements addressing issues of the case.

With respect to the second prong, Plaintiffs have demonstrated that they cannot gather the information from other less intrusive methods. As Plaintiffs have pointed out, Plaintiffs have deposed numerous 30(b)(6) witnesses on the topics that Plaintiffs identified but have faced factual inconsistencies. See ECF No. 146-4, Ex. C (identifying various contradictory witness testimony on 30(b)(6) topics). Indeed, Sheriff Barnes had identified Asst. Sheriff Balicki as an individual with unique personal knowledge, but Asst. Sheriff Balicki either provided contradictory testimony, see id. at 2, or identified Sheriff Barnes as the individual with personal knowledge of the issue, see ECF No. 146-5, Ex. D at 2. Moreover, as Plaintiffs noted, formal exhaustion to seek information elsewhere is not an absolute requirement, see Hunt, 2015 WL 1518067, at *2, and Plaintiffs have demonstrated that they did attempt to do so.

Consequently, the Court disagrees with Defendants and will permit Sheriff Barnes's deposition because, based on the record before the Court, Sheriff Barnes appears to have unique, personal knowledge of the facts of the case and Plaintiffs have been unsuccessful in seeking the information from other less intrusive sources. Nor are there "extraordinary circumstances" that warrant the issuance of a protective order in this case.

Accordingly, and this Court does not take this ruling lightly considering the responsibility that Sheriff Barnes has as the sheriff of the third most populous county in California, the Court **DENIES** Defendants' Motion, but will limit the Plaintiffs' deposition to half a day, of no more than 3.5 hours of question time by Plaintiffs' counsel.

2. Deliberative Process Privilege

In addition to arguing that Sheriff Barnes is an apex deponent protected from being deposed, Defendants also argue that the deliberative process privilege prevents Plaintiffs from taking Sheriff Barnes's deposition. ECF No. 144, Mot. at 10-11.

In Hongsermeier v. Commissioner of Internal Revenue, 621 F.3d 890, 904 (9th Cir. 2010), the Ninth Circuit provided the following guidance regarding the deliberative process privilege:

> [T]he deliberative process privilege permits the government to withhold documents that "reflect[ ] advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated." NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 150, 95 S.Ct. 1504, 44 L.Ed.2d 29 (1975) (quotation marks omitted). Documents must be both "predecisional" and "deliberative" to qualify for this privilege; a document is predecisional if it was "'prepared in order to assist an agency decisionmaker in arriving at his decision,'" and deliberative if its release would "'expose an agency's decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency's ability to perform its functions.'" Carter v. U.S. Dep't of Commerce, 307 F.3d 1084, 1089 (9th Cir. 2002) (quoting Assembly of Cal. v. U.S. Dep't of Commerce, 968 F.2d 916, 920 (9th Cir. 1992)).

As further explained by another Magistrate Judge in this District:

> [I]t is widely accepted that the privilege protects opinions and deliberations, but generally not "facts and evidence." F.T.C. v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984) (citing Environmental Protection Agency v. Mink, 410 U.S. 73, 87 (1973)). However, factual material that "is so interwoven with the deliberative material that it is not severable" may be encompassed by the privilege. United States v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000); see also Enviro Tech Int'l, Inc. v. U.S. E.P.A., 371 F.3d 370, 374-75 (7th Cir. 2004) ("[T]he deliberative process privilege typically does not justify the withholding of purely factual material, nor of documents reflecting an agency's final policy decisions, but it does apply to predecisional policy discussions, and to factual matters inextricably intertwined with such discussions.") (internal citations omitted). "The burden of establishing application of the deliberative process privilege is on the party asserting it." Thomas, 715 F. Supp. 2d [1012,] . . . 1019 [(E.D. Cal. 2010)].

United States ex rel. Poehling v. UnitedHealth Grp., Inc. ("Poehling"), No. CV 16-8697 MWF (SSx), 2018 WL 8459926, at *9 (C.D. Cal. Dec. 14, 2018). Further, "[a]gencies seeking to invoke the deliberative process privilege commonly do so through a combination of privilege logs that identify specific documents, and declarations from agency officials explaining what the documents are and how they relate to the decisions." N.L.R.B. v. Jackson Hosp. Corp., 257 F.R.D. 302, 309 (D.D.C. 2009).

While the deliberative process privilege is usually applied to documents, this Court and others have applied the deliberative process privilege to deposition testimony. See Kay v. City of Rancho Palos Verdes, No. CV 02-03922 MMM(RZ), 2003 WL 25294710, at *16 (C.D. Cal. Oct. 10, 2003) ("Most of the cases dealing with this [deliberative process] privilege involve

documents, although presumably the protection applies analogously to other communications, including oral statements, as well."); Stott Outdoor Advert. v. Cty. of Monterey, No. C06-00891RMWHRL, 2007 WL 460647, at *2 (N.D. Cal. Feb. 7, 2007) ("The [deliberative process] privilege applies to deposition testimony as well as written documents.").

As an initial matter, the Court notes that Defendants have not provided any supporting affidavit or declaration in their briefing to support their assertion of the deliberative process privilege. See ECF No. 144, Mot.; 152, Reply. Moreover, as Plaintiffs argue, there has already been significant discovery in the matter that relates to issues regarding how and when decisions were made in relation to COVID-19 and the Orange County Jail. ECF No. 146, Opp'n at 4-6. Although this is different than a situation where documents are sought and objections can be made to those requests, because Sheriff Barnes does not know precisely what questions will be asked of him in a deposition, Defendants will still need to provide specific objections to the areas of inquiry in order to properly maintain their opposition to providing information that may be protected by the deliberative process privilege. See In re McKesson Governmental Entities Average Wholesale Price Litig., 264 F.R.D. 595, 602 (N.D. Cal. 2009) (finding defendant failed to meet its burden in invoking the deliberative process privilege based on only generalized objections); L.H. v. Schwarzenegger, No. CIVS-06-2042 LKK GGH, 2008 WL 2073958, at *8 (E.D. Cal. May 14, 2008) (finding the defendants have waived the deliberative process privilege because defendants have failed to present declarations to support their claim of the privilege).

At this stage, however, Defendants have not demonstrated that Sheriff Barnes's deposition would be protected by the deliberate process privilege sufficient to warrant the outright prohibition of his deposition. Based on the 30(b)(6) topics identified by Plaintiffs, as well as Plaintiffs' proposed limited topics for Sheriff Barnes's deposition offered to Defendants as a compromise, Plaintiffs appear to be seeking information regarding the current policies already in place at the Orange County Jail. For example, Plaintiffs' 30(b)(6) topics include "COVID-19 testing screening policies, procedures, protocols, and practices for individuals in OCSD custody" and "[p]olicies and procedures . . . for ensuring compliance with the [Orange County] Jail's COVID-19 policies[.]" ECF No. 144-2, Ex. A at 1 (Plaintiffs' 30(b)(6) deposition notice to Defendants). Based on the identified topics by Plaintiffs, it appears that they seek information surrounding Sheriff Barnes's—and OCSD's—final, established policies and the implementation, or lack thereof, of said policies.

Likewise, based on the contradictory statements in the 30(b)(6) depositions, Plaintiffs appear to seek clarification of the established policies in place from Sheriff Barnes. See ECF No. 146-4, Ex. C (chart of contradictory witness testimony for topics including the methodology for calculating total cumulative inmates recovered from COVID-19, policies for COVID-19 testing during new booking quarantine, cohorting detainees recovering from COVID-19, individuals involved in development of release plans, and number of detainee deaths from COVID-19). Such information appears to constitute distinct facts and evidence of existing and final policies that Plaintiffs are challenging in their Complaint to be violative of their constitutional rights. Moreover, Defendants have not identified any topics or line of questioning that suggests Plaintiffs are seeking pre-decisional or deliberative information; rather, Defendants' conclusory

statements that the deliberative process privilege applies is insufficient. See Coleman v. Schwarzenegger, No. C01-1351-TEH, 2008 WL 4300554, at *2 (N.D. Cal. Sept. 11, 2008) (finding the defendants failed to properly invoke the deliberative process privilege with just a "blanket assertion").

To the extent that Defendants are concerned with Plaintiffs' intended line of questioning regarding "Sheriff Barnes'[s] discretionary decision-making," see ECF No. 146-1, Grisby Decl. at 7-8, there is nothing that indicates that Plaintiffs are interested in the pre-decisional communications or deliberations undertaken by Sheriff Barnes before he finalized his policies. As Plaintiffs noted, they are not seeking pre-decisional or deliberative information, see ECF No. 146, Opp'n at 12-13, but rather Plaintiffs are targeting the factual information surrounding the policies established in Sheriff Barnes's discretion, which is not protected by the deliberative process privilege. See Poehling, 2018 WL 8459926, at *9. Finally, to the extent Defendants believe that Plaintiffs' deposition questions seek information protected by the deliberative process privilege, Defendants can freely assert the privilege to Plaintiffs' specific questions during Sheriff Barnes's deposition.[5]

Accordingly, Defendants have failed to demonstrate that the deliberative process privilege prophylactically applies and, therefore, Defendants' Motion is **DENIED** on this basis.

III. CONCLUSION

For the reasons previously set forth, Defendants' Motion For Protective Order is **DENIED** and Defendants are to produce Sheriff Barnes for a time-limited deposition of no more than 3.5 hours of questioning by Plaintiffs' counsel.

IT IS SO ORDERED.

[5] The Court, however, cautions Defendants from making sweeping assertions of the deliberative process privilege to entire lines of questioning, see Coleman, 2008 WL 4300554, at *2, as this may improperly lengthen the deposition and may ultimately result in making Sheriff Barnes available for a second deposition.