UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

JAC'QUANN (ADMIRE) HARVARD; JEREMIAH HILL; JUAN ESPINOSA; JEROME BURGESS (a/k/a SHAM'LA GOD ALLAH); JAMES W. KENDRICK, JR.; JOHNNY HILL; and TRACEY DEAN on behalf of themselves and all others similarly situated,

Plaintiffs,

vs. CASE NO.: 4:19-cv-00212-MW-MAF

RICKY DIXON, in his official capacity as Secretary of the Florida Department of Corrections, and FLORIDA DEPARTMENT OF CORRECTIONS, an Agency of the State of Florida,

Defendants.
_____/

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

Defendants, Ricky Dixon, in his official capacity as Secretary of the Florida Department of Corrections, and the Florida Department of Corrections ("FDC" or "the Department") (collectively, "Defendants"), pursuant to this Court's order, [D.E. 387], submit this Reply in support of their Motion for Protective Order. [D.E. 383 ("Motion")].

A. Introduction

Plaintiffs in their Opposition to Defendants' Motion, [D.E. 385 ("Response")], fail to overcome the presumption against allowing apex depositions, as they have not demonstrated adequate entitlement to intruding upon these high-ranking officials' time in order to satisfy Plaintiffs' endless quest for discovery they claim will reveal the Department's unconstitutional practices as related to restrictive housing. Accordingly, because Plaintiffs have not met their required burden, this Court should grant Defendants' Motion and prevent the depositions of Secretary Dixon and former Secretary Jones.

B. Argument

i. Plaintiffs' Identified Topics for the Apex Depositions Either Were Subsumed in the Corporate Representative Notices or Should Have Been

The topics Plaintiffs seek to depose the current and former Secretary on either were topics that were subsumed within Plaintiffs' Rule 30(b)(6) notices, or should have been. Under either scenario, Plaintiffs had alternative, less obtrusive means to obtain the information they seek, and the personal views of FDC's current and former Secretary are not at issue in this lawsuit.[1] If Plaintiffs wished to explore these areas, they should have questioned FDC's corporate representatives when given the opportunity.

[1] Secretary Dixon is sued in his official capacity and former Secretary Jones is not a party to this lawsuit.

Plaintiffs cannot point to a corporate representative who said either the current or former Secretary were the *only* individuals with the information sought. *Compare Crouch v. Teledyne Continental Motors, Inc.*, No. 10-00072-KD-N, 2011 WL 13141041, at *2 (S.D. Ala. Mar. 4, 2011) (granting apex deposition "to the extent plaintiffs . . . demonstrated that [corporation's president] [was] identified by his own key employees, [defendant's] Rule 30(b)(6) representatives, as the only person with knowledge of why [defendant corporation] stopped producing and selling the [product] at issue"). Plaintiffs' speculation that former Secretary Jones and Secretary Dixon were possibly alone in meetings or emailed each other does not satisfy Plaintiffs' burden of showing these witnesses have unique knowledge that cannot be obtained through other, less obtrusive means, such as corporate representative depositions, interrogatories, or requests for admissions.

Plaintiffs argue that former Secretary Jones should be deposed because of her knowledge regarding FDC's analysis of restrictive housing and consideration of reforms. Response at 2. The same for Secretary Dixon. *Id.* at 6. Boiled down to its essence, Plaintiffs seem to want the "why" behind FDC's decisions as to restrictive housing, i.e., why FDC implemented the policies it did, why it chose to reject others, etc. But this was a topic seemingly identified in Plaintiffs' Rule 30(b)(6) notice. Namely, topic 7 sought "FDC'S regulations, procedures, post orders, and technical manuals regarding each type of [restrictive housing]

emanating from FDC's Central Office from January 1, 2015, to the present, *including the purpose or justification* for the regulations[] [or] procedures." *See* Pls.' Amended Notice of Rule 30(b)(6) Dep. at 7 (attached as **Exhibit A**) (emphasis added).

Although it is questionable whether such an overly broad topic properly put FDC on notice of each and every subject Plaintiffs now raise, to the extent Plaintiffs believe certain subject areas were covered by their areas of inquiry, then they should have explored these areas in greater detail with the corporate representatives. Or, if Plaintiffs received inadequate responses from FDC's corporate representatives, they should have moved to compel following the deposition. Failure to properly notice a topic and/or ask adequate questions about said topics are not "extraordinary circumstances," nor does it create a "special need" as envisioned by the Eleventh Circuit.

Plaintiffs' claim that they are entitled to testimony directly from the apex witnesses regarding the document entitled, "Analysis of Segregation Processes," is not supported by the record. Plaintiffs had the opportunity to question FDC's corporate representative, Rusty McLaughlin, at length about the document and the actions the Department undertook following issuance of the analysis. *See* McLaughlin Dep. Tr. at 207:8–246:11 (attached as **Exhibit B**). As part of that testimony, Mr. McLaughlin described in detail the work of the long-term

segregation team tasked with studying disciplinary confinement and proposing recommendations for changes. *Id.* at 226:7–249:22. He also testified about the memo that "came out under Mr. Dixon," attached as Exhibit 25 to Plaintiffs' Response. *Id.* at 229:23–233:6, 238:4–240:4, 243:17–244:1. Accordingly, Plaintiffs' suggestion that the former or current Secretary have unique knowledge about the Analysis of Segregation Processes document, the long term-segregation teams, or the 2016 memo changing disciplinary confinement practices is wrong.[2]

In a similar vein, Plaintiffs' Response discusses at length a national survey on restrictive housing that FDC participated in in 2015, and why the current and former Secretary should be required to answer questions about the Department's participation in it. Plaintiffs also claim that former Secretary Jones possesses personal knowledge on FDC's declining to participate in the same national survey in 2017, and that "[n]either of the FDC 30(b)(6) designees . . . was able to testify as to why FDC stopped participating in the survey." Response at 3 n.3.

---

[2] It must also be noted Plaintiffs simply appear dissatisfied with the responses received from members of FDC's restrictive housing teams. For example, Jeffery McClellan, a member of the disciplinary confinement team, clearly stated what this team's goal was and why. *See* [D.E. 385-2 at 71:2–15 (stating the goal was to "[r]educe the amount of disciplinary confinement time for inmates," in order to "reintegrate [inmates] back into population or close management")]. Mr. McClellan elaborated on this rationale, i.e., it "allow[s] them to go back to their work assignments and allow[s] them to have visitation, different privileges." McClellan Dep. Tr. at 53:20–54:5 (attached as **Exhibit E**). Plaintiffs' dissatisfaction with the responses provided—especially in light of Mr. McLaughlin's detailed testimony on the topic—does not justify apex depositions.

To begin, it is not clear that Plaintiffs' 30(b)(6) deposition notice actually included the survey as a topic, *see generally* Ex. A, or, if it did, that Defendants' representatives' responses were inadequate. As to why FDC declined to complete the 2017 survey, corporate representative, David Ensley, explained the difficult task FDC had with fitting the 2015 survey's definitions into FDC's system: "the Liman survey had their definition of what they considered Restrictive Housing under solitary confinement . . . [b]ut . . . the language [did not] match what [FDC] uses." Ensley Dep. Tr. at 23:10–14 (attached as **Exhibit C**). "[I]t took our program areas some time to try and figure out what it is -- which of our categories fit into what they were looking for. So that -- that part of it was -- was not straightforward for us." *Id.* at 23:15–19.

Further, the depositions Plaintiffs cite also reveal alternative means of discovery on the survey rather than forcing the former Secretary to sit for an intrusive deposition. Mr. Ensley testified that he was told by the former Chief of Staff, Steven Fielder, that FDC was not going to participate in the 2017 Liman survey. [D.E. 385-2 at 22:16–23:4]. However, Plaintiffs have not tried to depose Mr. Fielder. Perhaps more importantly, Plaintiffs have not propounded written discovery that easily could have answered the discrete question of why FDC chose not to participate in the later survey.

Moreover, the instances that Plaintiffs argue show Secretary Dixon's intimate involvement in FDC practices regarding restrictive housing for which he may have unique knowledge are both taken out of context and unpersuasive. For instance, Plaintiffs argue multiple FDC witnesses were unable to provide reasons for the implementation and discontinuation of the Alternative Housing Pilot and did not have relevant knowledge to answer. Response at 8 n.6. This is incorrect. Hope Gartman did offer up a proposed reason for the program's discontinuation, *see* [D.E. 385-2 at 43:3–10], and even offered up an individual who would have the personal knowledge required to answer this question. *See id.* at 44:1–4 (stating Rusty McLaughlin, head of Classification Management Bureau Chief, would be the person with knowledge of this matter).

Indeed, the Department produced Mr. McLaughlin as one of its corporate representatives, and he testified at length about the Alternative Housing Pilot and the reasons it was discontinued. *See* Ex. B at 391:18–426:7. As Mr. McLaughlin testified, Defendants produced its files concerning the Alternative Housing Pilot. Accordingly, Plaintiffs could have asked the corporate representative specific questions about anything contained in the many documents about the Alternative Housing Pilot, but failed to do so. Such superficial exploration of the Alternative Housing Pilot during the corporate representative deposition cuts against Plaintiffs' claim that only the apex witnesses can answer questions about the program.

As for Plaintiffs' claim that they need information directly from the apex witnesses regarding the Reduced Restraint Pilot, Response at 8–9, such argument falls flat. First, Plaintiffs could have specifically identified the subject as a topic on their corporate representative notice, but failed to do so. *See* Ex. A. Second, as Exhibit 21 to the Response demonstrates, FDC assigned an entire team to work on the Reduced Restraint Pilot. Plaintiffs however did not depose either of the two team leaders. Plaintiffs deposed only one individual from the Reduced Restraint Pilot team, Angela Gordon, who understandably testified that she could not recall the specifics of the Reduced Restraint Pilot since her participation in it was in 2016. [D.E. 385-2 at 57:10–58:20]. But Plaintiffs failed to show Ms. Gordon any documents, despite the many produced, or to try to refresh her recollection.

For example, even though the Department produced the Reduced Restraint Pilot team's written recommendations to Plaintiffs during discovery (as reflected in Exhibit 21 to the Response), Plaintiffs asked Ms. Gordon during the deposition: "Do you know if the reduced restraint focus group had made any recommendations, whether those would have been documented anywhere?" [D.E. 385-2 at 58:11–13]. The foregoing lack of diligence does not demonstrate that the apex witnesses have unique knowledge about the Reduced Restraint Pilot. And Plaintiffs' failure to notice the issue as a corporate representative topic or to set the

team leaders for deposition show a similar lack of diligence, not a basis to take the former or current Secretary's deposition.

Finally, Plaintiffs have never noticed a 30(b)(6) deposition as to the topic of the New River Step-Down Program. Accordingly, it is absurd for Plaintiffs to suggest that Secretary Dixon is the only witness who has knowledge about the program or its discontinuation. Moreover, Ms. Gartman's fact witness testimony regarding New River shows that such knowledge is not unique to the Secretary. *See* Gartman Dep. Tr. at 52:2–53:25 (attached as **Exhibit D**).

More broadly, what Plaintiffs characterize as alternatives to restrictive housing are tertiary issues that do not justify these intrusive depositions. Just because FDC considered and introduced alternatives to restrictive housing does not mean that FDC's practices were unconstitutional; and such alternatives have little, if any, bearing on FDC's current practices or whether the current conditions of restrictive housing, as "implement[ed]" by FDC, [D.E. 346 at 1 (Plaintiffs' Response in Opposition to Defendant Inch's Motion for Partial Summary Judgment)], violate the Eighth Amendment. Either FDC's practices, as imposed, are cruel and unusual or they are not.

Additionally, assuming Plaintiffs are making an as-applied challenge to the constitutionality of FDC's restrictive housing practices, as argued in their response to Defendants' partial motion for summary judgment—*see id.* ("Plaintiffs claim

that the way [FDC] *implements* [restrictive housing] in its prisons [is unconstitutional]." (emphasis added))—then their Response fails to explain how the proposed apex deposition topics are relevant to whether FDC knew of a substantial risk of serious harm to the Named Plaintiffs.

Simply put, Plaintiffs' Response does not solve the issue Defendants initially pointed to in their Motion, which is that Plaintiffs have not identified a discrete set of deposition topics beyond those which were already extensively covered by FDC's corporate representatives and, instead, seek a do-over with the current and former FDC Secretary. Plaintiffs have not shown either of the sought-after apex witnesses possess unique knowledge that was not already offered and/or is unavailable through other means of discovery. Plaintiffs' dissatisfaction with the responses they received during their Rule 30(b)(6) depositions or their failure to ask the right questions do not create extraordinary circumstances or a special need. As such, this Court should prevent the depositions from occurring.

ii. Plaintiffs Failed to Demonstrate Extraordinary Circumstances or a Special Need

As viewed through the lens of the above-discussed depositions, it is clear Plaintiffs have not demonstrated that "extraordinary" or "exceptional" circumstances or a "special need" exists to overcome the general presumption against calling high-ranking officials as witnesses. *In re United States (Kessler)*,

985 F.2d 510, 512 (11th Cir. 1993); *see also In re United States (Jackson)*, 624 F.3d 1368, 1372–74 (11th Cir. 2010). Plaintiffs have not come close to meeting the high burden for deposing apex officials.

As for the cases Plaintiffs rely on, they are distinguishable from this case. For example, *Kimberly Regenesis, LLC v. Lee County*, No. 2:19-cv-538-SPC-NPM, 2021 WL 5285093, at *5–6 (M.D. Fla. Sept. 29, 2021), is distinguishable both in scope—there, county commissioners versus here, the current and former Secretary of Florida's largest state agency—and also in that the depositions granted were limited to four hours *combined* for deposing three different commissioners—as opposed to the all-day depositions Plaintiffs have proposed for each of the apex witnesses; the depositions were further limited in scope to specific topics, contrary to Plaintiffs' broad request to re-explore topics already (or that should have been) plumbed in their Rule 30(b)(6) depositions.

Plaintiffs also rely on *Plaintiff 1 v. Washington County School Board*, No. 5:07cv194/RS/EMT, 2008 WL 11462924, at *4 (N.D. Fla. Feb. 15, 2008), a case where a party sought to depose the then-current FDC Secretary and former Secretary of the Department of Juvenile Justice. But this case actually supports Defendants' position since there the Court noted that apex depositions should only occur if a party demonstrates it "is necessary in order to obtain relevant information that cannot be obtained from any other source, such as a lesser-ranking

official, and (2) will not significantly interfere with the ability of the official to perform his governmental duties." *Id.* Here, Defendants have shown this information is available from alternative means of discovery and that these depositions will significantly interfere with the current and former Secretary's duties, as both currently serve as high-ranking officials. Moreover, the information Plaintiffs seek was available from lower-ranking officials, by way of Rule 30(b)(6) depositions. Given these realities, as it did in *Plaintiff 1*, the Court should again find apex depositions are unwarranted, given the particular concerns that come with being FDC Secretary. *See id.*

In finding Plaintiffs failed to make the required showing, this Court should also apply the framework it laid out in *Odom v. Roberts*, 337 F.R.D. 359 (N.D. Fla. 2020). Plaintiffs argue this Court "mis-stated the out-of-circuit cases it cited as support for [*Odom*'s] test." Response at 19. This is incorrect: the *Odom* court merely synthesized various holdings from different circuits—in the absence of a binding test endorsed by the Eleventh Circuit—to provide a framework that can be followed to determine whether an apex deposition is warranted. This Court recently applied *Odom*'s framework in determining whether to allow an apex deposition to proceed, *see League of Women Voters of Fla., Inc. v. Lee*, Nos. 4:21cv186-MW/MAF4:21cv187-MW/MAF, 4:21cv201-MW/MJF, 4:21cv242-

MW/MAF, 2021 WL 4962109, at *2 (N.D. Fla. Oct. 19, 2021), and should find it applicable here as well.

iii. Plaintiffs' Proposed Depositions Will Unduly Burden High-Ranking Officials

The proposed depositions would "significantly interfere" with Secretary Dixon and former Secretary Jones, both currently high-ranking officials. *Odom*, 337 F.R.D. at 365. Plaintiffs argue their proposed deposition conditions will not unduly interfere with Secretary Dixon or former Secretary Jones' abilities. Response at 26. However, simply because the depositions have been noticed in advance and will be by video, this does not change the fact that requiring high-ranking officials to prepare and sit for any amount of time is an undue burden and a threat to the separation of powers.

Here, Plaintiffs' Notices of Taking Deposition do not indicate how long they wish to depose the current or former Secretary, and merely state "[t]he deposition will continue from day to day until completed." [D.E. 383-1 at 2, 7]. Further, these depositions list their start time at 9:00 and 11:00 a.m. (for the current and former Secretary, respectively), which would appear to indicate Plaintiffs intend to depose these witnesses for, at a minimum, close to if not more than a full day. *See id.* The Eleventh Circuit has prevented apex depositions under far less severe circumstances and this Court should follow suit. *See In re United States (Kessler)*,

985 F.2d at 512 (finding that requiring high-ranking official to testify by telephone for 30 minutes disrespected the separation of powers); *cf. In re United States (Jackson)*, 624 F.3d at 1373–74 ("[C]ompelling the personal appearance of [a high-ranking official] in a distant judicial district for interrogation by the court for an indefinite period is a far more serious encroachment on the separation of powers.").

Additionally, FDC has not agreed to produce former Secretary Jones—who is no longer a FDC employee—for deposition. Plaintiffs' notice cannot compel the former Secretary to appear for deposition. If a subpoena is served, the Office of the Chief Financial Officer will have the right to move to quash the subpoena and/or otherwise object on separate, independent grounds; they may also provide additional argument and evidence as to the burden a deposition would impose on former Secretary Jones in her current role.

iv. Plaintiffs' Reliance on a Two-Year-Old Discovery Order Is Unpersuasive

Finally, Plaintiffs argue a discovery order from over two years ago, pertaining to *written discovery* and that overruled Defendants' objection to producing "*documents* going back five years" somehow provides grounds for these apex depositions. *See* [D.E. 98 at 8 (emphasis added)]. First, written discovery is vastly different from demanding the current and former highest-ranking FDC official sit for a deposition on material that could—and should—have been covered

during Plaintiffs' Rule 30(b)(6) depositions. Second, this Court is not bound by prior discovery orders, especially since this case has transferred from one judge to another and no final judgment has been entered. *See Tech. Res. Servs., Inc. v. Dornier Med. Sys., Inc.*, 134 F.3d 1458, 1465 n.9 (11th Cir. 1998). Third, the Court's Order was based on written discovery related to FDC's participation in an analysis of its restrictive housing practices. *See* [D.E. 98 at 10 ("Defendants' objections to Plaintiffs' requested timeframe for relevant *documents* is overruled." (emphasis added))]. The Court never considered apex depositions, thus further attenuating any applicability this discovery order has.

C. Conclusion

WHEREFORE, Defendants, Ricky Dixon, in his official capacity as Secretary of the Florida Department of Corrections, and the Florida Department of Corrections, request the Court grant Defendants' Motion for Protective Order, and for any and all further relief this Court deems just and equitable.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(F)

The undersigned certifies that this Reply complies with the word count limitation set forth in Local Rule 7.1(F) because it contains 3,199 words, excluding the parts exempted by said Local Rule.

Respectfully submitted,

/ s / Jeffrey J. Grosholz
DANIEL J. GERBER, ESQUIRE
Florida Bar No. 0764957
SAMANTHA C. DUKE, ESQUIRE
Florida Bar No. 091403
RUMBERGER, KIRK & CALDWELL
Lincoln Plaza, Suite 1400
300 South Orange Avenue (32801)
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: (407) 872-7300
Telecopier: (407) 841-2133
Email: dgerber@rumberger.com
sduke@rumberger.com

and

NICOLE SMITH, ESQUIRE
Florida Bar No. 0017056
JEFFREY J. GROSHOLZ, ESQUIRE
Florida Bar No. 1018568
RUMBERGER, KIRK & CALDWELL
Post Office Box 10507
Tallahassee, Florida 32302-2507
Telephone: (850) 222-6550
Telecopier: (850) 222-8783
E-mail: nsmith@rumberger.com

and

JOSHUA D. LERNER, ESQUIRE
Florida Bar No.: 0455067
RUMBERGER, KIRK & CALDWELL
Brickell City Tower, Suite 3000
80 Southwest 8th Street
Miami, Florida 33130-3037
Telephone: (305) 358-5577

Telecopier: (305) 371-7580
E-mail: jlerner@rumberger.com

**Attorneys for Defendants,
Ricky Dixon and Florida
Department of Corrections**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 7, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: Leonard J. Laurenceau at leo.laurenceau@splcenter.org; Kelly Jean Knapp at Kelly.knapp@splcenter.org; Krista Dolan at Krista.dolan@splcenter.org; Dante Pasquale Trevisani at dtrevisani@floridajusticeinstitute.org; Laura Anne Ferro at lferro@floridajusticeinstitute.org and mllosa@floridajusticeinstitute.org; Marcel A. Lilavois, Jr., at mlilavois@floridajusticeinstitute.org; Kara Sheli Wallis at kwallis@floridajusticeinstitute.org; Andrea Costello at andrea@floridalegal.org; Christopher M. Jones at Christopher@floridalegal.org; Rachel M. Ortiz at rachel.ortiz@floridalegal.org; Alexis Alvarez at alexis.alvarez@floridalegal.org; Rebecca R. Klonel at rebecca.klonel@floridalegal.org; and Lori Rifkin at lrifkin@rifkinlawoffice.com.

/ s / Jeffrey J. Grosholz
DANIEL J. GERBER, ESQUIRE
Florida Bar No. 0764957
SAMANTHA C. DUKE, ESQUIRE
Florida Bar No. 091403

RUMBERGER, KIRK & CALDWELL
Lincoln Plaza, Suite 1400
300 South Orange Avenue (32801)
Post Office Box 1873
Orlando, Florida 32802-1873
Telephone: (407) 872-7300
Telecopier: (407) 841-2133
Email: dgerber@rumberger.com
sduke@rumberger.com

and

NICOLE SMITH, ESQUIRE
Florida Bar No. 0017056
JEFFREY J. GROSHOLZ, ESQUIRE
Florida Bar No. 1018568
RUMBERGER, KIRK & CALDWELL
Post Office Box 10507
Tallahassee, Florida 32302-2507
Telephone: (850) 222-6550
Telecopier: (850) 222-8783
E-mail: nsmith@rumberger.com

and

JOSHUA D. LERNER, ESQUIRE
Florida Bar No.: 0455067
RUMBERGER, KIRK & CALDWELL
Brickell City Tower, Suite 3000
80 Southwest 8th Street
Miami, Florida 33130-3037
Telephone: (305) 358-5577
Telecopier: (305) 371-7580
E-mail: jlerner@rumberger.com

**Attorneys for Defendants,
Ricky Dixon and Florida
Department of Corrections**