

David B. Markowitz, OSB #742046
DavidMarkowitz@MarkowitzHerbold.com
Laura Salerno Owens, OSB #076230
LauraSalerno@MarkowitzHerbold.com
Harry B. Wilson, OSB #077214
HarryWilson@MarkowitzHerbold.com
Lauren F. Blaesing, OSB #113305
LaurenBlaesing@MarkowitzHerbold.com
Vivek A. Kothari, OSB #182089
VivekKothari@MarkowitzHerbold.com
MARKOWITZ HERBOLD PC
1455 SW Broadway, Suite 1900
Portland, OR 97201
Telephone: (503) 295-3085
Special Assistant Attorneys General for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION

WYATT B. and NOAH F. by their next friend
Michelle McAllister; KYLIE R. and ALEC R.
by their next friend Kathleen Megill Strek;
UNIQUE L. by her next friend Annette Smith;
SIMON S. by his next friend Paul Aubry;
RUTH T. by her next friend Michelle Bartov;
BERNARD C. by his next friend Ksen Murry;
NAOMI B. by her next friend Kathleen
Megill Strek; and NORMAN N. by his next
friend Tracy Gregg, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

TINA KOTEK, Governor of Oregon in her
official capacity; FARIBORZ
PAKSERESHT, Director, Oregon Department
of Human Services in his official capacity;
APRILLE FLINT-GERNER, Director, Child
Welfare in her official capacity; and OREGON
DEPARTMENT OF HUMAN SERVICES,

Defendants.

Case No. 6:19-cv-00556-AA

**DECLARATION OF LAUREN F.
BLAESING IN SUPPORT OF
DEFENDANTS' OPPOSITION TO
SENATOR GELSER BLOUIN'S
MOTION TO QUASH SUBPOENA**

I, Lauren F. Blaesing, declare as follows:

1. I am a shareholder with Markowitz Herbold PC, attorneys of record for defendants. I am serving as a Special Assistant Attorney General for defendants in the above-referenced matter. I have personal knowledge of the facts set forth herein. I make this declaration in support of Defendants' Opposition to Senator Gelser Blouin's Motion to Quash Subpoena.

2. Attached are true and correct copies of the following exhibits:

Ex. No.	Document Description	Date
1	Plaintiffs' Response to Defendants' Second Request for Production	January 22, 2020
2	Joint Letter to Judge Aiken	September 23, 2019
3	Plaintiffs' Subpoena Duces Tecum to Alvarez and Marsal Holdings, LLC	February 6, 2020
4	Letter from Dawn Post to Dan Skerritt and Timothy Wright	July 14, 2020
5	Letter from Dawn Post to Dan Skerritt and Timothy Wright	December 16, 2020
6	Plaintiffs' Notice Subpoena Duces Tecum to Casey Family Programs	January 14, 2021
7	Letter from Dawn Post to Dan Skerritt and Timothy Wright	July 20, 2020
8	Joint Letter to the Court	July 25, 2022
9	Joint Letter to the Court	January 18, 2023

I declare under penalty of perjury that the foregoing is true and correct.

Executed May 9, 2024, at Portland, Oregon.

s/ Lauren F. Blaesing

Lauren F. Blaesing, OSB #113305

2142751

GREGORY A. CHAIMOV, OSB #822180

gregorychaimov@dwt.com

PAUL C. SOUTHWICK, OSB #095141

paulsouthwick@dwt.com

DAVIS WRIGHT TREMAINE LLP

1300 SW Fifth Avenue, Suite 2300

Portland, OR 97201

Tel: (503) 241-2300

MARCIA ROBINSON LOWRY (*pro hac vice*)

mlowry@abetterchildhood.org

DAWN J. POST (*pro hac vice*)

dpost@abetterchildhood.org

A BETTER CHILDHOOD

355 Lexington Avenue, Floor 16

New York, NY 10017

Tel: (646) 795-4456

EMILY COOPER, OSB #182254

ecooper@droregon.org

THOMAS STENSON, OSB #152894

tstenson@droregon.org

CHRISTINE SHANK (*admission pending*)

cshank@droregon.org

DISABILITY RIGHTS OREGON

511 SW 10th Avenue, Suite 200

Portland, OR 97205

Tel: (503) 243 2081

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

WYATT B. and NOAH F. by their next friend Michelle McAllister; KYLIE R. and ALEC R. by their next friend Kathleen Megill Streck; UNIQUE L. by her next friend Annette Smith; SIMON S. by his next friend Paul Aubry; RUTH T. by her next friend Michelle Bartov; BERNARD C. by his next friend Ksen Murry; NAOMI B. by her next friend Kathleen Megill Streck; and NORMAN N. by his next friend Tracy Gregg, individually and on behalf of all others similarly situated,

Plaintiffs,

Case No. 6:19-cv-00556-AA

**PLAINTIFFS' RESPONSE TO
DEFENDANTS' SECOND REQUEST
FOR PRODUCTION OF DOCUMENTS**

v.

KATE BROWN, Governor of Oregon in her official capacity; FARIBORZ PAKSERESHT, Director, Oregon Department of Human Services in his official capacity; JANA MCLELLAN, Interim Director, Child Welfare in her official capacity, and OREGON DEPARTMENT OF HUMAN SERVICES,

Defendants.

Plaintiffs Wyatt B. and Noah F. by their next friend Michelle McAllister; Kylie R. and Alec R. by their next friend Kathleen Megill Strek; Unique L. by her next friend Annette Smith; Simon S. by his next friend Paul Aubry; Ruth T. by her next friend Michelle Bartov; Bernard C. by his next friend Ksen Murry; Naomi B. by her next friend Kathleen Megill Strek; and Norman N. by his next friend Tracy Gregg, individually and on behalf of all others similarly situated (collectively, “Plaintiffs”), hereby provide Defendants with a response and objection to Defendants’ Second Request for Production pursuant to Rule 34 of the Federal Rules of Civil Procedure, served on December 23, 2019, as follows:

PRELIMINARY STATEMENT

Defendants served their First Request for Production of Documents on August 30, 2019. Plaintiffs challenged that request for production on September 3, 2019. Both parties submitted a joint letter to the court on September 23, 2019, and Judge Coffin conducted a status conference regarding Defendants’ First Request for Production on October 1, 2019. In that conference, the court expressed its unwillingness to deal with “generalities”, telling Defendants that “without a specific breakdown of precisely what it is you are looking for”, “what I have before me is a very generalized description of—well, actually it’s just everything in your files.” Transcript of Oct. 1, 2019 Proceedings at 11. The court went on to explain that “I’m not about to sit down and look at thousands of documents that are in some Next Friend’s file drawer somewhere, which may include everything from cake recipes to the type of material you are looking for. I would like something

that would be more specific and well defined in terms of the category of documents before I would undertake that task.” Transcript of Oct. 1, 2019 Proceedings at 11.

Defendants’ Second Request for Production of Documents, in multiple instances, fails to follow the court’s directives, instead merely recycling the same requests made in Defendants’ First Request—requests which the court has already denied as impermissibly generalized and overbroad. Defendants’ attempts to seek production of “juvenile dependency case files”, “Communications with any third-parties”, and “Notes, court filings, or Medical Records”, for instance, are functionally identical to Defendants’ original request for “[a]ll Documents within the possession, custody, or control of Plaintiffs or their Next Friends related to any of the Plaintiffs, the allegations in the Complaint, or Plaintiffs’ filings in this Action, including but not limited to the Next Friend’s complete case file for their Plaintiff, Communications, court filings, research, notes, and Medical Records.” Defendants’ First Request for Production of Documents at 17. Plaintiffs object to Defendants’ efforts to re-litigate such denied requests.

Plaintiffs also reiterate their objection to Defendants’ requests for materials protected by attorney-client privilege and the work product doctrine. Communications between the attorney-next-friends and the Named Plaintiffs—their clients—are clearly privileged. Further, as Plaintiffs explained in their September 23rd letter, the attorney-next-friend’s materials and third-party communications were made in anticipation of litigation, specifically either each Named Plaintiff’s ongoing juvenile court proceedings or this federal action. Additionally, the non-attorney next friend’s materials and third-party communications were made for the purposes of obtaining legal advice. Because many of Defendants’ requests for production would require the court to do exactly what it has said it will not do—review thousands of pages of materials, much of which is privileged or otherwise not reasonably related to the claims brought in this action—Plaintiffs here have produced or provided privilege logs only to requests that have been appropriately and sufficiently narrowed pursuant to the court’s instructions.

Plaintiffs further object to Defendants’ requests for inappropriate, invasive, or irrelevant

information. Defendants' requests for Communications with media outlets, elected officials, and "social media posts", for example, were already addressed and denied by the court. During the October 1st proceedings, the court specifically questioned the relevance of those requests, stating that "I am not here to preside over public commentary to the media as being something that would be relevant to the trial." Transcript of Oct. 1, 2019 Proceedings at 18. Plaintiffs similarly object to Defendants' irrelevant and protected requests for Communications between, for instance, an attorney and an ethics resource.

To be clear, and to reiterate, Plaintiffs do not intend on using any of the requested Next Friend material in their federal action. Defendants may only obtain discovery "regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case". Fed. R. Civ. P. 26(b)(1). Plaintiffs object to Defendants' requests of the Next Friends as inappropriate and irrelevant, as Defendants have made no showing that their requested materials are relevant to their defense, let alone proportional to the needs of the case. Indeed, Defendants have much of the requested material in their possession, such as in Plaintiff records or Department of Justice attorney files in their underlying juvenile cases, and can obtain them "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A). Defendants' repetitious, overbroad, and irrelevant requests have a harassing effect, and Plaintiffs do not intend to respond to any further requests for discovery of the Next Friends that are not reasonably tailored toward appropriate discovery aims.

GENERAL RESPONSE:

By providing the following information, Plaintiffs do not concede the materiality of the subject to which it refers. Plaintiffs' response is made expressly subject to, and without waiving or intending to waive, any objections as to the competency, relevancy, materiality, privilege, or admissibility as evidence, or for any other purpose, of any of the information produced, or of the subject matter thereof, in any proceeding including the trial of this action or any subsequent proceeding.

Plaintiffs object to Defendants' Second Request for Production to the extent that it demands information that is protected by the attorney-client or work-product privilege, or that constitutes material prepared for litigation purposes. Inadvertent production of any information that is privileged, was prepared in anticipation of litigation, or is otherwise immune from discovery shall not constitute a waiver of any privilege, or of another ground for objecting to discovery, with respect to that information, any other information, or its subject matter, or of Plaintiffs' right to object to the use of any such information during any proceeding in this litigation or otherwise.

Plaintiffs reserve the right to supplement their responses with additional information, if and when such information becomes available to Plaintiffs' counsel. Plaintiffs also reserve their right to object to the future disclosure of any such information.

REQUEST FOR PRODUCTION NO. 59: All Documents within the possession, custody, or control of Michelle McAllister related to Wyatt B. or Noah F., including but not limited to:

- Ms. McAllister's Communications with any third-parties other than DHS about Wyatt B. or Noah F., including but not limited to Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, the Foster Care Ombudsman, Wyatt B.'s or Noah F.'s foster parents or their attorneys, Wyatt B.'s or Noah F.'s attorneys, Wyatt B.'s or Noah F.'s relatives or their attorneys, Court Appointed Special Advocates, or medical or service providers;
- Notes, court filings, or Medical Records; and
- Any retention, retainer, or release agreements between Ms. McAllister and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or attorneys representing Wyatt B. or Noah F.

//

//

//

RESPONSE:

Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

The Foster Care Ombudsman:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

Wyatt B.'s or Noah F.'s foster parents or their attorneys, Wyatt B.'s or Noah F.'s attorneys, Wyatt B.'s or Noah F.'s relatives or their attorneys, Court Appointed Special Advocates, or medical or service providers:

Plaintiffs object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Notes, court filings, or Medical Records:

Plaintiffs object to this request, in its entirety, on the grounds that such Notes were made for the purpose of obtaining legal advice in this federal action, and are therefore privileged. *See* Fed. R. Civ. P. 26(b)(1). This request additionally seeks information, such as court filings and Medical Records, already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Any retention, retainer, or release agreements between Ms. McAllister and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or attorneys representing Wyatt B. or Noah F.:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

REQUEST FOR PRODUCTION NO. 60:

All Documents within the possession, custody, or control of Kathleen Megill Strek related to Naomi B., Kylie R., or Alec R. including but not limited to:

- Ms. Megill Strek's juvenile dependency case files for Naomi B., Kylie R., and Alec R.;
- Communications with Naomi B., Kylie R., or Alec R. related to the allegations in paragraphs 66-73 and 151-180 of the Complaint;
- Communications with any third-parties other than DHS about Naomi B., Kylie R., or Alec R., including but not limited to Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, the Office of Public Defense Services, the Oregonian, elected officials or their staffs, Naomi B.'s, Kylie R.'s, or Alec R.'s foster parents or their attorneys, Naomi B.'s, Kylie R.'s, or Alec R.'s relatives or their attorneys, Court Appointed Special Advocates, the child and adolescent psychiatrist(s) discussed at pages 136-142 of Ms. Megill Strek's deposition, counselors at any facility at which Naomi B., Kylie R., or Alec R. stayed, the Foster Care Ombudsman, the Benton County Consortium, or medical or service providers;
- Notes, court filings, or Medical Records;

//

- The picture taken in court, as discussed at page 37 of Ms. Megill Strek's deposition; and,
- Any retention, retainer, or release agreements between Ms. Megill Strek and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Naomi B., Kylie R., or Alec R. or their agents.

RESPONSE:

Ms. Megill Strek's juvenile dependency case files for Naomi B., Kylie R., and Alec R.:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). This request seeks documents made in anticipation of litigation, specifically the Named Plaintiffs' underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with Naomi B., Kylie R., or Alec R. related to the allegations in paragraphs 66-73 and 151-180 of the Complaint:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege. *See* Fed. R. Civ. P. 26(b)(1). This request seeks privileged Communications between an attorney and her clients in ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

//

The Office of Public Defense Services:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs will produce responsive documents, to the extent they exist, on a rolling basis.

The Oregonian:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). *See* also Transcript of Oct. 1, 2019 Proceedings at 18.

Elected officials or their staffs:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). *See* also Transcript of Oct. 1, 2019 Proceedings at 18.

Naomi B.'s, Kylie R.'s, or Alec R.'s foster parents or their attorneys, Naomi B.'s, Kylie R.'s, or Alec R.'s relatives or their attorneys, Court Appointed Special Advocates, counselors at any facility at which Naomi B., Kylie R., or Alec R. stayed, or medical or service providers:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested third-party Communications were made in anticipation of litigation, specifically the Named Plaintiffs' underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

The child and adolescent psychiatrist(s) discussed at pages 136-142 of Ms. Megill Streck's deposition:

Plaintiffs object to this request pursuant to the work product doctrine. This request additionally seeks information already in Defendants' possession, and which Defendants can

obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs will produce responsive documents, to the extent they exist, on a rolling basis.

The Foster Care Ombudsman:

Plaintiffs object to this request as not reasonably related to any party’s claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object to this request to the extent that it seeks material protected by the work product doctrine. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs will produce responsive documents, to the extent they exist, on a rolling basis.

The Benton County Consortium:

Plaintiffs object to this request as not reasonably related to any party’s claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object to this request to the extent that it seeks material protected by the work product doctrine. Notwithstanding the foregoing objection, Plaintiffs respond as follows: Plaintiffs will produce responsive documents, to the extent they exist, on a rolling basis.

Notes, court filings, or Medical Records:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested Notes were made in anticipation of litigation, specifically the Named Plaintiffs’ underlying, ongoing juvenile court proceedings. This request additionally seeks information, such as court filings and Medical Records, already in Defendants’ possession, and which Defendants can obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs further object on the grounds that Defendants’ request is overly broad, unduly burdensome, and not proportional to the needs to the case.

//

//

The picture taken in court, as discussed at page 37 of Ms. Megill Strek's deposition:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1).

Any retention, retainer, or release agreements between Ms. Megill Strek and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Naomi B., Kylie R., or Alec R. or their agents:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

REQUEST FOR PRODUCTION NO. 61:

All Documents within the possession, custody, or control of Annette Smith related to Unique L., including but not limited to:

- Ms. Smith's juvenile dependency case file for Unique L.;
- Communications with Unique L. related to the allegations in paragraphs 74-93 of the Complaint;
- Ms. Smith's Communications with any third-parties other than DHS about Unique L., including but not limited to Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, the Oregonian, Oregon Public Broadcasting, elected officials or their staffs, social media posts, medical or service providers, including Bob Howe, the Oregon Criminal Defense Lawyers Association, Unique L.'s foster parents or their attorneys, Unique L.'s relatives or their attorneys, or Court Appointed Special Advocates;
- Notes, court filings, or Medical Records; and
- Any retention, retainer, or release agreements between Ms. Smith and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Unique L. or Unique L.'s agents.

//

RESPONSE:

Ms. Smith's juvenile dependency case file for Unique L.:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). This request seeks documents made in anticipation of litigation, specifically Unique L.'s underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with Unique L. related to the allegations in paragraphs 74-93 of the Complaint:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege. *See* Fed. R. Civ. P. 26(b)(1). This request seeks privileged Communications between an attorney and her client in ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

The Oregonian, Oregon Public Broadcasting:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). *See* also Transcript of Oct. 1, 2019 Proceedings at 18.

Elected officials or their staffs:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). *See* also Transcript of Oct. 1, 2019 Proceedings at 18.

Social media posts:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object on the grounds that this request is vague and ambiguous.

The Oregon Criminal Defense Lawyers Association:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Notwithstanding the foregoing objection, Plaintiffs respond as follows: No such documents exist.

Bob Howe:

Plaintiffs object to this request to the extent that it seeks material protected by the work product doctrine. Notwithstanding the foregoing objection, Plaintiffs respond as follows: No such documents exist.

Medical or service providers, Unique L.'s foster parents or their attorneys, Unique L.'s relatives or their attorneys, or Court Appointed Special Advocates:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested third-party Communications were made in anticipation of litigation, specifically the Named Plaintiffs' underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Notes, court filings, or Medical Records:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested Notes were made in anticipation of litigation, specifically Unique L.'s underlying, ongoing juvenile court proceedings. This request additionally seeks information, such as court filings and Medical Records, already in Defendants' possession, and

which Defendants can obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs further object on the grounds that Defendants’ request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Any retention, retainer, or release agreements between Ms. Smith and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Unique L. or Unique L.’s agents:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

REQUEST FOR PRODUCTION NO. 62:

All Documents within the possession, custody, or control of Paul Aubry related to Simon S. including but not limited to:

- Mr. Aubry’s juvenile dependency case file for Simon S. and his file for Simon S. related to this case;
- Communications with Simon S. related to the allegations in paragraphs 94-108 of the Complaint;
- Mr. Aubry’s Communications with any third-parties other than DHS about Simon S., including but not limited to Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, any other Next Friends, medical or service providers, including Dr. Caesar and the psychologist and therapist identified in paragraph 105 of the Complaint, Simon S.’s foster parents or their attorneys, Simon S.’s relatives or their attorneys, or Court Appointed Special Advocates;
- Notes, court filings, or Medical Records;
- The “150 or 200 emails” mentioned on page 14 of Mr. Aubry’s deposition and the Documents and Communications discussed on pages 34-35 and 122-123 of Mr. Aubry’s deposition;

- Documents or files related to Jasper Mountain; and
- Any retention, retainer, or release agreements between Mr. Aubry and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Simon S. or Simon's agents.

RESPONSE:

Mr. Aubry's juvenile dependency case file for Simon S. and his file for Simon S. related to this case:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). This request seeks documents made in anticipation of litigation, specifically Simon S.' underlying, ongoing juvenile court proceedings and his claims in this case. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with Simon S. related to the allegations in paragraphs 94-108 of the Complaint:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege. *See* Fed. R. Civ. P. 26(b)(1). This request seeks privileged Communications between an attorney and his client in ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, any other Next Friends:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

//

//

Medical or service providers, Simon S.'s foster parents or their attorneys, Simon S.'s relatives or their attorneys, or Court Appointed Special Advocates:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested third-party Communications were made in anticipation of litigation, specifically Simon S.'s underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Dr. Caesar and the psychologist and therapist identified in paragraph 105 of the Complaint:

Plaintiffs object to this request on the grounds that it seeks material protected by the work product doctrine. Notwithstanding the foregoing objection, Plaintiffs respond as follows: Plaintiffs have produced a privilege log of the requested Communications excluding those which included DHS and/or the DOJ.

Notes, court filings, or Medical Records:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested Notes were made in anticipation of litigation, specifically the Named Plaintiffs' underlying, ongoing juvenile court proceedings. This request additionally seeks information, such as court filings and Medical Records, already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

The "150 or 200 emails" mentioned on page 14 of Mr. Aubry's deposition:

Plaintiffs object to this request on the grounds that it seeks material protected by the work product doctrine. This request additionally seeks information already in Defendants' possession,

and which Defendants can obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A). Notwithstanding the foregoing objection, Plaintiffs respond as follows: Plaintiffs have produced a privilege log of the requested Communications and have produced all responsive, non-privileged Communications excluding those which included DHS and/or the DOJ.

The Documents and Communications discussed on pages 34-35 and 122-123 of Mr. Aubry’s deposition:

Plaintiffs object to this request on the grounds that it seeks material protected by the work product doctrine. This request additionally seeks information already in Defendants’ possession, and which Defendants can obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A). Notwithstanding the foregoing objection, Plaintiffs respond as follows:

Plaintiffs have produced a privilege log of the requested Communications.

Documents or files related to Jasper Mountain:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested materials were made in anticipation of litigation, specifically Simon S.’s underlying, ongoing juvenile court proceedings.

Plaintiffs further object on the grounds that Defendants’ request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Any retention, retainer, or release agreements between Mr. Aubry and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Simon S. or Simon’s agents:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

REQUEST FOR PRODUCTION NO. 63:

All Documents within the possession, custody, or control of Michelle Bartov related to Ruth T., including but not limited to:

- Ms. Bartov’s juvenile dependency case file for Ruth T.;

- Communications with Ruth T. related to the allegations in paragraphs 109-127 of the Complaint;
- Ms. Bartov's Communications with any third-parties other than DHS about Ruth T., including but not limited to Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, the Oregon State Bar, medical or service providers, including Daisy Giddings, Ruth T.'s foster parents or their attorneys, Ruth T.'s relatives or their attorneys, Rick Dall or Ruth T.'s "psychological father," the press or media, Forest Ridge, Creekside, Ms. Bartov's mother, or Court Appointed Special Advocates;
- The Documents Ms. Bartov reviewed to prepare for her deposition and refresh her recollection as discussed on pages 148-156 of Mr. Bartov's deposition;
- The text messages and voice mails discussed on pages 156-158 of Mr. Bartov's deposition;
- Notes, court filings, or Medical Records; and
- Any retention, retainer, or release agreements between Ms. Bartov and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Ruth T. or Ruth T.'s agents.

RESPONSE:

Ms. Bartov's juvenile dependency case file for Ruth T.:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). This request seeks documents made in anticipation of litigation, specifically Ruth T.'s underlying, ongoing juvenile court proceedings and her claims in this case. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with Ruth T. related to the allegations in paragraphs 109-127 of the Complaint:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege. *See* Fed. R. Civ. P. 26(b)(1). This request seeks privileged Communications between an attorney and

her client in ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

The Oregon State Bar:

Plaintiffs object to this request, in its entirety, to the extent that it seeks material protected by the work product doctrine. Plaintiffs further object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1).

Plaintiffs additionally object to Defendants' call to produce confidential Communications between an attorney and a bar association made for the purposes of obtaining ethical advice, on the grounds that such a request contravenes public policy.

Medical or service providers, Ruth T.'s foster parents or their attorneys, Ruth T.'s relatives or their attorneys, Rick Dall or Ruth T.'s "psychological father," Forest Ridge, Creekside, or Court Appointed Special Advocates:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested third-party Communications were made in anticipation of litigation, specifically Ruth T.'s underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Daisy Giddings:

Plaintiffs object to this request on the grounds that it seeks material protected by the work product doctrine. Plaintiffs further object on the grounds that Defendants' request seeks information already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A). Notwithstanding the foregoing objections, Plaintiffs respond as follows: No such documents exist.

Ms. Bartov's mother:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object to this request on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs to the case. Notwithstanding the foregoing objections, Plaintiffs respond as follows: No such documents exist.

The press or media:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). *See* also Transcript of Oct. 1, 2019 Proceedings at 18.

The Documents Ms. Bartov reviewed to prepare for her deposition and refresh her recollection as discussed on pages 148-156 of Ms. Bartov's deposition:

Plaintiffs object to this request, in its entirety, on the grounds that it is overly broad, unduly burdensome, and not proportional to the needs to the case. This request seeks documents protected by attorney-client privilege and the work product doctrine, as Defendants acknowledged during Ms. Bartov's deposition. This request additionally seeks documents already in Defendants' possession, as Defendants acknowledged during Ms. Bartov's deposition, and which Defendants can therefore obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

The text messages and voice mails discussed on pages 156-158 of Ms. Bartov's deposition:

Plaintiffs object to this request, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: No such text messages exist and Ms. Bartov is no longer in the possession,

custody, or control of the voice mails.

Notes, court filings, or Medical Records:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested Notes were made in anticipation of litigation, specifically the Ruth T.'s underlying, ongoing juvenile court proceedings. This request additionally seeks information, such as court filings and Medical Records, already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Any retention, retainer, or release agreements between Ms. Bartov and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Ruth T. or Ruth T.'s agents:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

REQUEST FOR PRODUCTION NO. 64:

All Documents within the possession, custody, or control of Ksen Murry related to Bernard C., including but not limited to:

- Mr. Murry's notes of his conversation with Bernard C., as discussed at pages 17-19 and 26 of his deposition;
- Mr. Murry's Communications with any third-parties other than DHS about Bernard C., including but not limited to Communications with A Better Childhood, Disability Rights Oregon, or Davis Wright Tremaine LLP, facilities at which Bernard C. has been placed, Bernard C.'s foster parents or their attorneys, Bernard C.'s parents or their attorneys, or Court Appointed Special Advocates;

//

- Documents reflecting the statements and descriptions made by Bernard C. alleged in paragraph 147-148 of the Complaint;
- Notes, court filings, or Medical Records; and
- Any retention, retainer, or release agreements between Mr. Murry and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Bernard C. or Bernard C.'s agents.

RESPONSE:

Mr. Murry's notes of his conversation with Bernard C., as discussed at pages 17-19 and 26 of his deposition:

Plaintiffs object to this request, in its entirety, on the grounds that it seeks material made in anticipation of litigation, specifically this federal action, and which is therefore protected by the work product doctrine. Notwithstanding the foregoing objection, Plaintiffs respond as follows: Plaintiffs have produced a privilege log of Mr. Murry's notes.

Communications with A Better Childhood, Disability Rights Oregon, or Davis Wright Tremaine LLP:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Facilities at which Bernard C. has been placed, Bernard C.'s foster parents or their attorneys, Bernard C.'s parents or their attorneys, or Court Appointed Special Advocates:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested third-party Communications were made in anticipation of litigation, specifically this federal action. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants' possession, and which Defendants

can obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A).

Documents reflecting the statements and descriptions made by Bernard C. alleged in paragraph 147-148 of the Complaint:

Plaintiffs object to this request on the grounds that it seeks material made in anticipation of litigation, specifically this federal action, and which is therefore protected by the work product doctrine. Plaintiffs further object on the grounds that Defendants’ request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants’ possession, and which Defendants can obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A).

Notes, court filings, or Medical Records:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested Notes were made in anticipation of litigation, specifically the Named Plaintiffs’ underlying, ongoing juvenile court proceedings. This request additionally seeks information, such as court filings and Medical Records, already in Defendants’ possession, and which Defendants can obtain “without undue hardship...by other means”. *See* Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs further object on the grounds that Defendants’ request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Any retention, retainer, or release agreements between Mr. Murry and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Bernard C. or Bernard C.’s agents:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

REQUEST FOR PRODUCTION NO. 65:

All Documents within the possession, custody, or control of Tracy Gregg related to Norman N., including but not limited to:

- Ms. Gregg's juvenile dependency case file for Norman N.;
- Communications with Norman N. related to the allegations in paragraphs 181-199 of the Complaint;
- Ms. Gregg's Communications with any third-parties other than DHS about Norman N., including but not limited to Communications with A Better Childhood, Disability Rights Oregon, or Davis Wright Tremaine LLP, the Office of Public Defense Services, the Juvenile Advocacy Consortium, facilities at which Norman N. has been placed, including St. Mary's, any caseworkers or state officials in Idaho, Norman N.'s foster parents or their attorneys, Norman N.'s parents or their attorneys, or Court Appointed Special Advocates;
- Ms. Gregg's emails and Time Matters entries, as discussed on page 88 of Ms. Gregg's deposition;
- Notes, court filings, or Medical Records; and
- Any retention, retainer, or release agreements between Ms. Gregg and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Norman N. or Norman N.'s agents.

RESPONSE:

Ms. Gregg's juvenile dependency case file for Norman N.:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). This request seeks documents made in anticipation of litigation, specifically Norman N.'s underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with Norman N. related to the allegations in paragraphs 181-199 of the Complaint:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege. *See* Fed. R. Civ. P. 26(b)(1). This request seeks privileged Communications between an attorney and

her client in ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Communications with A Better Childhood, Disability Rights Oregon, or Davis Wright Tremaine LLP:

Plaintiffs object to this request, in its entirety, pursuant to attorney-client privilege and the work product doctrine. *See* Fed. R. Civ. P. 26(b)(1); b(3).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

The Office of Public Defense Services:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced a privilege log of Communications.

The Juvenile Advocacy Consortium:

Plaintiffs object to this request as not reasonably related to any party's claim or defense. *See* Fed. R. Civ. P. 26(b)(1). Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced a privilege log of Communications.

Facilities at which Norman N. has been placed, including St. Mary's, any caseworkers or state officials in Idaho, Norman N.'s foster parents or their attorneys, Norman N.'s parents or their attorneys, or Court Appointed Special Advocates:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested third-party Communications were made in anticipation of

litigation, specifically Norman N.'s underlying, ongoing juvenile court proceedings. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case. This request additionally seeks information already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Ms. Gregg's emails and Time Matters entries, as discussed on page 88 of Ms. Gregg's deposition:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). This request seeks documents made in anticipation of litigation, specifically Simon S.' underlying, ongoing juvenile court proceedings and his claims in this case. Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Notes, court filings, or Medical Records:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). The requested Notes were made in anticipation of litigation, specifically the Named Plaintiffs' underlying, ongoing juvenile court proceedings. This request additionally seeks information, such as court filings and Medical Records, already in Defendants' possession, and which Defendants can obtain "without undue hardship...by other means". *See* Fed. R. Civ. P. 26(b)(3)(A).

Plaintiffs further object on the grounds that Defendants' request is overly broad, unduly burdensome, and not proportional to the needs to the case.

Any retention, retainer, or release agreements between Ms. Gregg and A Better Childhood, Disability Rights Oregon, Davis Wright Tremaine LLP, or Norman N. or Norman N.'s agents:

Plaintiffs object to this request, in its entirety, pursuant to the work product doctrine. *See* Fed. R. Civ. P. 26(b)(3). Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents.

REQUEST FOR PRODUCTION NO. 66:

All Documents reviewed or relied upon by the Next Friends to prepare for their depositions taken in this Action.

RESPONSE:

Plaintiffs object to Defendants' request as it seeks information protected by the work product doctrine. Notwithstanding the foregoing objections, Plaintiffs respond as follows:

Plaintiffs object to Defendants' request as to Michelle McAllister, as it seeks information already in Defendants' possession. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced an excerpt of the Plaintiff children's story from the complaint.

Plaintiffs object to Defendants' request as to Kathleen Megill-Strek, as it seeks information already in Defendants' possession. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced an excerpt of the Plaintiff children's story from the complaint.

Plaintiffs object to Defendants' request, in its entirety, as to Annette Smith, as it seeks information protected by the work product doctrine and attorney-client privilege. Plaintiffs further object that Defendants seek information already in Defendants' possession, such as e-court files, or which Defendants have equal access to, such as legal rules and standards. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced an excerpt of the Plaintiff children's story from the complaint.

Plaintiffs object to Defendants' request, in its entirety, as to Paul Aubry, as it seeks information protected by the work product doctrine, such as files related to his Named Plaintiff's juvenile proceedings. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced an excerpt of the Plaintiff children's story from the complaint.

Plaintiffs object to Defendants' request, in its entirety, as to Michelle Bartov. Defendants' request seeks information protected by the work product doctrine, such as her personal notes and files related to her Named Plaintiff's juvenile proceedings. Plaintiffs further object that Defendants seek information already in Defendants' possession, such as all the discovery produced by

Defendants themselves. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced an excerpt of the Plaintiff child's story from the complaint.

Plaintiffs object to Defendants' request as to Ksen Murry, as it seeks information already in Defendants' possession. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced an excerpt of the Plaintiff child's story from the complaint.

Plaintiffs object to Defendants' request, in its entirety, as to Tracey Gregg, as it seeks information protected by the work product doctrine.

REQUEST FOR PRODUCTION NO. 67:

All Documents considered, relied upon, or cited by Plaintiffs' experts in their expert reports at Dkt. 67-1, Exhibits 3-6, including but not limited to all academic journals, books, public records, reports by governmental agencies, news articles, and any other Documents received, reviewed, read, or authored by the expert, before or in connection with the forming of his or her opinion, relating to the facts or opinions expressed within the expert report.

RESPONSE:

Plaintiffs object to Defendants' request as it seeks information protected by the work product doctrine. Notwithstanding the foregoing objections, Plaintiffs respond as follows: Plaintiffs have produced responsive documents and a privilege log.

Dated this 22nd day of January, 2020.

DAVIS WRIGHT TREMAINE LLP

s/ Paul C. Southwick

Gregory A. Chaimov, OSB #822180

Paul C. Southwick, OSB #095141

Tel: (503) 241-2300

Fax: (503) 778-5299

paulsouthwick@dwt.com

gregorychaimov@dwt.com

A BETTER CHILDHOOD

Marcia Robinson Lowry (*pro hac vice*)

mlowry@abetterchildhood.org

Dawn J. Post (*pro hac vice*)

dpost@abetterchildhood.org

355 Lexington Avenue, Floor 16
New York, NY 10017
Tel: (646) 795-4456
Fax: (212) 692-0415

DISABILITY RIGHTS OREGON

Emily Cooper, OSB #182254

ecooper@droregon.org

Thomas Stenson, OSB #152894

tstenson@droregon.org

Christine Shank (*admission pending*)

cshank@droregon.org

511 SW 10th Avenue, Suite 200
Portland OR 97205
Tel: (503) 243 2081
Fax: (503) 243 1738

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFFS' RESPONSE TO DEFENDANTS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS** on:

Renee Stineman, OSB #994610
Carla Scott, OSB #054725
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201
Tel: 971-673-1915
Fax: 971-673-1884
renee.stineman@doj.state.or.us
carla.a.scott@doj.state.or.us

Of Attorneys for Defendants

David B. Markowitz
Anna Marie Joyce
Harry B. Wilson
Laura R. Salerno Owens
Lauren F. Blaesing
Markowitz Herbold PC
1211 SW 5th Ave, Suite 3000
Portland, OR 97204
Tel: 503-295-3085
Fax: 503-323-9105
DavidMarkowitz@MHGM.com
annajoyce@markowitzherbold.com
harrywilson@markowitzherbold.com
LauraSalerno@MarkowitzHerbold.com
LaurenBlaesing@MarkowitzHerbold.com

Of Attorneys for Defendants

☒ by overnight mailing a copy thereof in a sealed, prepaid envelope, addressed to said attorney's last-known address from Portland, Oregon on the date set forth below;

☒ by emailing a copy thereof to the addresses listed above, on the date set forth below.

Dated this 22nd day of January, 2020.

DAVIS WRIGHT TREMAINE LLP

s/ Paul C. Southwick
Gregory A. Chaimov, OSB #822180
Paul C. Southwick, OSB #095141
Tel: (503) 241-2300
Fax: (503) 778-5299
paulsouthwick@dwt.com
gregorychaimov@dwt.com

Attorneys for Plaintiffs

September 23, 2019

Via Email Only

Hon. Ann L. Aiken
U.S. District Court
5500 United States Courthouse
405 East Eighth Avenue
Eugene, Oregon 97401-2706

**Re: Wyatt B., et al. v. Kate Brown, et al.
US District Court for Oregon (Eugene) Case No. 6:19-cv-00556-AA**

Dear Judge Aiken:

Pursuant to the Case Management Order, the parties submit this joint letter setting out their respective positions on a discovery dispute.

Plaintiffs' Position

On August 13, 2019, Defendants' requested the opportunity to depose the next friends in the instant case during the month of September. On August 20, 2019, Plaintiffs' counsel provided the next friends' availability to be deposed. Defendants' counsel immediately responded that the dates and times worked for them and subsequently served notices on August 28, 2019.

Late in the day on August 30, 2019, Defendants' served amended notices of deposition and a request for production of documents, stating: "All Documents related to any of the Plaintiffs, the allegations in the Complaint, or Plaintiffs' filings in this Action, including but not limited to your case file for the Plaintiff(s) you represent, Communications, court filings, research, notes, and Medical Records."

On September 3, 2019, Plaintiffs' counsel notified Defendants' counsel of Plaintiffs' intent to object to the production of the records of named plaintiff children maintained by attorneys in the underlying juvenile cases who are also acting as their next friends. Upon the agreement of all counsel the scheduled depositions were cancelled and rescheduled for dates beginning October 8, 2019. Amended notices and requests for production of documents were served on September 13, 2019, with the same production language, demanding that the deponent produce documents responsive to the request for production no later than October 2, 2019.

The parties have reached an impasse with respect to the production of the attorney next friend files, production of notes taken by the next friend who are not attorney in the underlying juvenile actions, and the scheduling of the depositions, and respectfully request the court's assistance.

I. Defendants are not entitled to non-privileged third-party communications and records which constitute work product

Defendants argue that they are entitled to any third-party communications and records that the attorney next friends obtained. However, these communications and records fall within the work product doctrine. A juvenile case does not have a clear-cut end date for litigation such as when an abuse or neglect finding is made against biological parents or when their rights are

terminated. Litigation is an ongoing issue until the child exits foster care custody and the case is closed. Frequently, “reasonable efforts” are challenged during permanency hearings conducted pursuant to 2017 ORS 419B.470, which implicates federal funding, or some other issue is raised, such as level of care, which necessitates a hearing. As a result, conversations or documents obtained from third parties that Defendants have named (foster parents, group homes, residential facilities, treatment providers, family members, and attorneys of family members) would all fall within the work product privilege as such documents were obtained in advance of the next court appearance in preparation for arguments that may be made including presentation of evidence through documents obtained by third parties. *United States v. Deloitte LLP*, 610 F.3d 129, 137, 391 U.S. App. D.C. 318 (D.C. Cir. 2010).¹

Defendants also state that they are entitled to third-party communications with other attorneys. However, communications such as between the attorneys for the child and the attorney for the biological parents may contain an exchange of information and/or planning of strategy which would similarly fall within this category. *Kintera, Inc. v. Convio, Inc.*, 219 F.R.D. 503, 510 (S.D. Cal. 2003).²

Defendants argue that they need the e-mails and materials from third parties, including its own caseworkers, in order to adequately defend the allegations that the Defendants’ treatment of the Plaintiff children was adequate. Plaintiffs do not intend on using any of this material in the federal case. In any event, Defendants should have evidence in its possession, through the Plaintiff records and DOJ attorney files in the underlying juvenile case, to show the nature of their caseworkers’ efforts. The evidence in Defendants’ own possession should show the diligence, or lack thereof, of their own employees’ efforts, and the next friend files could show only evidence of limited value. Here, Defendants have made no showing that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means. *In re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir. 1994).³

II. Defendants are only entitled to non-privileged documents if they are both relevant and proportional to the needs of the case

Attorney files may contain some materials not covered by attorney-client privilege or the work product doctrine. However, given the nature of those files and this litigation, nearly all responsive, non-privileged documents which amount to thousands of pages will either already be in the state’s possession. (e.g., communications to which state personnel were a party, filed pleadings in the dependency case, discovery received from DHS personnel, discovery produced by Defendants in this matter) or publicly available. Defendants are only entitled to non-privileged documents if they are both relevant *and* proportional to the needs of the case. FRCP 26(b)(1). In determining proportionality, courts must consider, *inter alia*, 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.

¹ When considering whether a document is prepared “in anticipation of litigation,” this Court employs a “because of” test, inquiring “whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation.”

² Interviews with third parties and internal email communications were work-product because they were generated in pursuit of litigation.

³ Party seeking a “third party communication . . . obtained or prepared with an eye toward litigation” must bear the burden described in Rule 26 to obtain it.

Here, Defendants have much greater access to the information relevant to this dispute, as the dispute concerns the systemic policies and practices of DHS. Additionally, the Plaintiffs have significantly fewer resources than Defendants, as the Plaintiffs are children in the foster care system represented on a pro bono basis, while Defendants are state executives and a large state agency represented by at least five Markowitz Herbold attorneys, two experienced attorneys with the Special Litigations Unit and the weight of Oregon DOJ. Moreover, the importance of the responsive, non-privileged documents that may exist in attorney next-friend files is minimal, as Plaintiffs are not relying on information contained in the attorney next-friend files to prosecute this case. Finally, the burden and expense of Defendants' proposed discovery would be significant, as it would require the extensive review of attorney files and would involve innumerable entries in a privilege log. Such entries for DHS records alone would be incalculable. Proportionally, the benefit would only be *de minimis*, if any, to resolution of this class action case.

Defendants have indicated that they are seeking any correspondence that may exist in terms of contact with the press and legislators. Any such documents and communications are irrelevant and are not proportional to the needs of the pending federal action, for any determination of any motion made in that action, are not in itself admissible in evidence, and don't appear reasonably calculated to lead to the discovery of admissible evidence. This request is intended to simply harass the next friends.

III. Defendants are not entitled to the notes of next friends who are not attorneys in the underlying juvenile actions

Two of the next friends are not attorneys in the underlying juvenile cases. Mr. Murry's interview notes constitute work product in the federal case and Ms. McAllister's notes were made for the purpose of obtaining legal advice.

IV. The scheduled depositions should not go forward until the issue of the records has been resolved

Defendants insist that they will go forward with the depositions even if it is not resolved by the time of the production of document which is October 2, 2019. It seems likely that Defendants will seek the opportunity to re-depose the next friends based upon any document production that may occur, depending upon the court's decision. Then which would result in additional time and significant costs for the next friends and Plaintiffs' counsel. As a result, Plaintiffs request that this the court allow for the filing of protective orders if this issue is not decided by September 27, 2019, as the document production is due October 2, 2019, and depositions set to begin on October 8, 2019. *Andrews Kurth Kenyon LLP 1350 I Street, NW, Suite 1100 Wash., DC 20005 Non-Party Movant PHIGENIX, Inc. v. Genentech, Inc. (In re Subpoena to Ping Wang)*, 214 F. Supp. 3d 91, 2016 U.S. Dist. LEXIS 141806, 95 Fed. R. Serv. 3d (Callaghan) 1904.⁴

⁴ Good cause existed to delay the deposition until the resolution of a discovery dispute concerning privilege-waiver issues in the underlying action, consistent with Fed. R. Civ. P. 45(d)(3)(A)(iii), because of risks that the deposition questions would encroach on privileged material and that counsel would be subjected to a second deposition.

Defendants' Position

Defendants have noticed the depositions of seven individuals, who serve as next friends maintaining the suit on behalf of ten plaintiff children. Five of these individuals are also attorneys representing plaintiffs in their juvenile dependency proceedings, which are legally distinct from the plaintiffs' claims in this matter. Defendants seek discovery of the next friends' records.

Defendants address the following disputed issues: (1) plaintiffs refuse to produce **any** documents in the next friends' possession, including non-privileged and non-work product documents, claiming "undue burden," (2) plaintiffs improperly assert work-product protection over third-party communications and records obtained from third parties, (3) plaintiffs refuse to provide privilege logs for withheld documents, as required by Federal Rule of Civil Procedure 26(b)(5), and (4) defendants' position that the depositions of the next friends should go forward as scheduled.

I. The production defendants seek is not unduly burdensome.

Plaintiffs have refused to produce *any* documents from the seven next friends who are the representatives of the ten named plaintiffs. The files at issue are effectively the only documents in plaintiffs' possession directly about the class representatives. In defense of this extraordinary refusal to comply with the fundamental rules of civil procedure, fair play, and due process, plaintiffs' counsel claims that "the burden and expense of Defendants' proposed discovery would be significant[.]" (Sept. 13, 2019, Post Letter, at 2.) The collection, review, and production of documents is not an obligation that plaintiffs can simply choose not to participate in because of an unqualified objection of "burden." The seven next friends are the representatives of the ten named plaintiffs and their documents about plaintiffs go to the very heart of this case. Plaintiffs have made no showing that the volume of documents involved would make production burdensome. (Defendants have already produced over 155,000 pages). Moreover, three law firms represent plaintiffs, including Davis Wright Tremaine LLP, a large national law firm. Plaintiffs' counsel alleges that they are adequate counsel for a state-wide class action, representing potentially thousands of class members. By choosing to file this case against defendants, plaintiffs took on an obligation to comply with the Federal Rules of Civil Procedure, which include the production of documents.

II. Plaintiffs' assertion of work product over next friends' third-party communications is overbroad and unlawful.

Possession of information and documents by a party representative who is also an attorney does not convert all information into work product. Plaintiffs assert documents and communications in the next friends' possession related to third parties in either the state court juvenile court cases or this lawsuit are all work product. This is not the law. Third parties in this context include foster parents, group homes, residential facilities, treatment providers, family members, attorneys of family members, legislators, and members of the press, etc.

Communications with third parties and factual information obtained from third parties (particularly those with distinct, separately represented legal positions) are not protected by work product doctrine. "The work product doctrine . . . protects from discovery documents and tangible things prepared by a party or his representative in anticipation of litigation." *In re Grand Jury Subpoena*,

357 F.3d 900, 906 (9th Cir. 2004). Plaintiffs do not suggest that next friends' communications with third parties were made in preparation for this litigation.

Plaintiffs also incorrectly assert they should not have to produce third-party documents because those documents should already be in defendants' possession. A party is "required to produce documents [they] ha[ve] in [their] possession, custody or control, regardless of whether [they] believe[] [the opposing party] already has those documents." *Andreoli v. Youngevity Int'l, Inc.*, 16-CV-02922-BTM-JLB, 2018 WL 6334284, at *9 (S.D. Cal. Dec. 5, 2018). Further, defendants are aware of the existence of third-party documents in the next friends' possession that defendants do not have. For example, defendants do not have communications between next friends and biological parents' attorney(s) or foster parent(s). Additionally, as to at least one plaintiff, the child's next friend refused to provide information to DHS about a behavioral health provider that the next friend wished the child to see. Plaintiffs have put at issue whether decisions the State has made about treatment for the plaintiff children is adequate. Accordingly, defendants are entitled to discover the bases for plaintiffs' allegations.

Plaintiffs contend that non-privileged information in the next friends' files has no relevance "as Plaintiffs are not relying on information contained in the attorney next friend files to prosecute this case." (Sept. 13, 2019, Post Letter, at 2.) That is not the correct standard (and also undercuts the basic work product standard governing material prepared "in anticipation of litigation"). Rule 26 permits broad discovery of "any nonprivileged matter that is relevant to any party's claim or defense[.]" Fed. R. Civ. P. 26(b)(1) (emphasis added). "Relevant information for the purposes of discovery is information reasonably calculated to lead to the discovery of admissible evidence." *Pitkin v. Corizon Health, Inc.*, 3:16-CV-02235-AA, 2017 WL 6496565, at *5 (D. Or. Dec 18, 2017) (J. Aiken). The party opposing discovery on relevance grounds must show why the requested information is not relevant. *Id.* See also *Survivor Media, Inc. v. Survivor Prods.*, 406 F.3d 625, 635 (9th Cir. 2005) (same).

Defendants seek information reasonably calculated to lead to the discovery of admissible evidence; it is relevant to defendants' defenses, and plaintiffs have not met their burden of showing why the requested information is not relevant. For example, communications that next friends have had with biological parents or with foster families would not be privileged and would be relevant to defendants' assertion that foster care placements have been appropriate.

III. Defendants' proposal regarding a privilege log is reasonable.

The parties agree on the threshold legal premise that attorney-client privileged materials need not be produced in discovery. However, the Federal Rules of Civil Procedure entitle a requesting party to evaluate the claim of privilege. FRCP 26(b)(5). Defendants offered the following compromise to reduce plaintiffs' asserted burden of creating privilege logs:

1. Plaintiffs do not have to produce privilege logs for attorney-client privileged communications or work product documents in the attorney next friends' files from the underlying state court juvenile proceedings; and
2. Plaintiffs will produce privilege logs for all privileged material in their possession (including the next friends' possession) related to this case (that is not solely and exclusively part of their file in the underlying juvenile proceeding) dating from any time in

Page 6

the past and up until the filing of the lawsuit, provided that plaintiffs agree that such date restriction will be reciprocal. In other words, there will be no obligation for defendants to log privileged communications after the date of the filing of the lawsuit.

Plaintiffs rejected this proposal. Defendants ask the Court to order plaintiffs to produce all non-privileged documents in the next friends' possession, along with privilege logs as outlined above.

IV. The next friends' depositions should go forward as scheduled.

Plaintiffs seek to unnecessarily delay the next friend depositions. This will prejudice defendants, thus defendants maintain that the next friend depositions will proceed on the dates noticed even if the discovery issues addressed in this letter have not been resolved before the depositions. The parties agreed to dates for depositions of seven next friends in September. Defendants served deposition notices with a request for production of documents under FRCP 30(b)(2) for the next friends' files. At plaintiffs' request, defendants agreed to postpone the depositions of the next friends to begin October 8, after plaintiffs' written responses are due, while the parties confer on plaintiffs' privilege objections and try to reach resolution. However, it is not practical to postpone the depositions until all privilege and document production issues have been resolved. Defendants need to be able to take depositions and seek discovery, just as plaintiffs are, to prepare for briefing on class certification. To the extent that privilege issues remain after the next friend depositions, the parties can seek further resolution from this Court.

The parties appreciate the Court's attention to this matter.

Very truly yours,

A BETTER CHILDHOOD

ELLEN ROSENBLUM
ATTORNEY GENERAL
FOR THE STATE OF OREGON

By: s/ Dawn J. Post

Marcia Robinson Lowry (*admitted pro hac vice*)
mlowry@abetterchildhood.org
Dawn J. Post (*admitted pro hac vice*)
dpost@abetterchildhood.org
Anastasia Benedetto (*admitted pro hac vice*)
abenedetto@abetterchildhood.org
Tel: (646) 795-4456

DAVIS WRIGHT TREMAINE LLP
Gregory A. Chaimov, OSB # 822180
gregorychaimov@dwt.com
Paul C. Southwick, OSB #095141
paulsouthwick@dwt.com
Tel: (503) 241-2300

DISABILITY RIGHTS OREGON
Emily Cooper, OSB #182254
ecooper@droregon.org
Thomas Stenson, OSB #152894
tstenson@droregon.org
Christine Shank (admission pending)
cshank@droregon.org
Of Attorneys for Plaintiffs

By: s/ Lauren F. Blaesing

David B. Markowitz, OSB #742046
DavidMarkowitz@MarkowitzHerbold.com
Laura Salerno Owens, OSB #076230
LauraSalerno@MarkowitzHerbold.com
Anna M. Joyce, OSB #013112
AnnaJoyce@MarkowitzHerbold.com
Harry B. Wilson, OSB #077214
HarryWilson@MarkowitzHerbold.com
Lauren F. Blaesing, OSB #113305
LaurenBlaesing@MarkowitzHerbold.com
Tel: (503) 295-3085

Special Assistant Attorneys General for Defendants

Carla A. Scott, OSB #054725
carla.a.scott@doj.state.or.us
Renee Stineman, OSB #994610
renee.stineman@doj.state.or.us
Sheila H. Potter, OSB #993485
sheila.potter@doj.state.or.us
Of Attorneys for Defendants

GREGORY A. CHAIMOV, OSB #822180

gregorychaimov@dwt.com

PAUL C. SOUTHWICK, OSB #095141

paulsouthwick@dwt.com

DAVIS WRIGHT TREMAINE LLP

1300 SW Fifth Avenue, Suite 2300

Portland, OR 97201

Tel: (503) 241-2300

MARCIA ROBINSON LOWRY (*pro hac vice*)

mlowry@abetterchildhood.org

DAWN J. POST (*pro hac vice*)

dpost@abetterchildhood.org

ANASTASIA BENEDETTO (*pro hac vice*)

abenedetto@abetterchildhood.org

A BETTER CHILDHOOD

355 Lexington Avenue, Floor 16

New York, NY 10017

Tel: (646) 795-4456

EMILY COOPER, OSB #182254

ecooper@droregon.org

THOMAS STENSON, OSB #152894

tstenson@droregon.org

CHRISTINE SHANK (*admission pending*)

cshank@droregon.org

DISABILITY RIGHTS OREGON

511 SW 10th Avenue, Suite 200

Portland, OR 97205

Tel: (503) 243 2081

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION**

WYATT B. and NOAH F. by their next
friend Michelle McAllister; ET AL.

Plaintiffs,

v.

KATE BROWN, Governor of Oregon in her
official capacity; et al,

Defendants.

Case No. 6:19-cv-00556-AA

**PLAINTIFFS' NOTICE OF SUBPOENA
DUCES TECUM TO ALVAREZ &
MARSAL HOLDINGS, LLC.**

NOTICE OF SUBPOENA *DUCES TECUM* TO ALVAREZ & MARSAL HOLDINGS, LLC
TO ALL PARTIES AND COUNSEL OF RECORD:

PLEASE TAKE NOTICE that, pursuant to and in accordance with Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs Wyatt B, et al., by their attorneys, hereby give notice of the service of a subpoena to Alvarez & Marsal. The subpoena commands Alvarez & Marsal to respond to the following requests for the production of documents identified in Schedule A hereto within thirty (30) days after service of these requests. Wyatt B., et al., further request that Alvarez & Marsal Holdings, LLC produce for inspection and copying those documents or objects that are described in Schedule A hereto by delivering such documents or objects to Paul C. Southwick, c/o Davis Wright Tremaine LLP, 1300 SW Fifth Avenue, Suite 2400, Portland, OR 97201, or another mutually acceptable location.

Dated this 6th day of February, 2020.

DAVIS WRIGHT TREMAINE LLP

s/ Paul C. Southwick

Gregory A. Chaimov, OSB #822180

Paul C. Southwick, OSB #095141

Tel: (503) 241-2300

Fax: (503) 778-5299

paulsouthwick@dwt.com

gregorychaimov@dwt.com

A BETTER CHILDHOOD

Marcia Robinson Lowry (*pro hac vice*)

m_lowry@abetterchildhood.org

Dawn J. Post (*pro hac vice*)

dpost@abetterchildhood.org

Anastasia Benedetto

abenedetto@abetterchildhood.org (*pro hac vice*)

355 Lexington Avenue, Floor 16

New York, NY 10017
Tel: (646) 795-4456
Fax: (212) 692-0415

DISABILITY RIGHTS OREGON

Emily Cooper, OSB #182254
ecooper@droregon.org
Thomas Stenson, OSB #152894
tstenson@droregon.org
Christine Shank (*admission pending*)
cshank@droregon.org
511 SW 10th Avenue, Suite 200
Portland OR 97205
Tel: (503) 243 2081
Fax: (503) 243 1738

Attorneys for Plaintiffs

SCHEDULE A

REQUEST FOR DOCUMENTS

Please see the attached Definitions and Instructions, which apply to the following Requests for Documents.

REQUEST NO. 1:

All documents, communications, and information related to Alvarez & Marsal's work with the State of Oregon, the Oregon Department of Administrative Services, the Governor of the State of Oregon, Markowitz Herbold PC, the Oregon Department of Human Services, and Child Welfare program, by any agent, employee, independent contractor, or representative of Alvarez & Marsal including, but not limited to, Wanda Seiler, Tom Shaffer, Brenden Stallard, Mark Howard, McEnzie Morton, Katherine Stadler, Connor Ginsburg, Sheena Gordon, Deb DeMarco, and Andrew Linski, relating to Oregon's child welfare system, from April 1, 2019 through the present.

DEFINITIONS AND INSTRUCTIONS

1. "Plaintiff" and "Plaintiffs," as used herein refer without limitation to Plaintiffs, their attorneys and agents, and all persons acting on their behalf.
2. "Defendants," as used herein refer to Defendants, their attorneys and agents, and all persons acting on their behalf.
3. "Document" or "documents" has the same meaning as in Fed. R. Civ. P. 34(a)(1)(A).
4. "Communication" as used herein refers to any transmission of information, the information transmitted, and any process by which information is transmitted, and shall include written communications and oral communications.
5. "Relating to," "referencing," "concerning," "surrounding," or "substantiating" as used herein refers to directly or indirectly, or in any way alluding to, responding to, in connection with, commenting on, in response to, about, regarding, announcing, explaining, discussing, showing, describing, studying, reflecting, analyzing, comprising or constituting.

6. “Person” as used herein refers to an individual, firm, partnership, corporation, proprietorship, association, governmental body, or any other organization or entity.

7. Each demand should be considered as including a demand for separate production of all copies and, to the extent applicable, preliminary drafts of documents that differ in any respect from the original or final draft or from each other (e.g., by reason of differences in form or content or by reason of handwritten notes or comments having been added to one copy of a document but not on the original or other copies thereof).

8. Each demand to produce a document or documents shall be deemed to call for the production of the document or documents to the extent that they are in or subject to, directly or indirectly, the custody or control of the party to whom these document demands are addressed, and includes documents in the custody or control of the party’s agents, representatives, predecessors in interest, successors, subsidiaries, parent, experts, persons consulted concerning any factual matter or matters of opinion relating to any of the facts or issues involved in this case, and includes, unless privileged, the party’s attorney.

9. If you object to part of a document request and refuse to produce subject to that part, you should state your objection and produce pursuant to the remainder of that document request. If you object to the scope or time period of a document request and refuse to produce for that scope or time period, you should state your objection and answer the document request for the scope or time period you believe is appropriate.

10. If you claim any privilege against the production of any document or any part of any document sought herein, please provide for said document:

- (a) the type of document (e.g., email, letter, memorandum, note);
- (b) the name, address and telephone number of the person who prepared the document;
- (c) the subject matter of the document;
- (d) the date the document was prepared;
- (e) the intended recipient of the document;

- (f) all persons, firms, or entities who have possession of the document;
- (g) the privilege claimed for withholding the document or part of the document; and
- (h) the factual basis for the claim of privilege or grounds for withholding the document.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFFS' NOTICE OF SUBPOENA DUCES TECUM TO ALVAREZ & MARSAL HOLDINGS, LLC** on:

Sheila Potter, OSB #993485
Renee Stineman, OSB #994610
Carla Scott, OSB #054725
Oregon Department of Justice
100 SW Market Street
Portland, OR 97201
Tel: 971-673-1915
Fax: 971-673-1884
sheila.potter@doj.state.or.us
renee.stineman@doj.state.or.us
carla.a.scott@doj.state.or.us

Of Attorneys for Defendants

Virginia Louie
Associated General Counsel
Alvarez & Marsal Holdings, LLC
600 Madison Avenue
New York, NY 10022
vlouie@alvarezandmarsal.com

Attorneys for Subpoena Witness, Alvarez & Marsal

David B. Markowitz
Anna Marie Joyce
Harry B. Wilson
Laura R. Salerno Owens
Lauren F. Blaesing
Markowitz Herbold PC
1455 SW Broadway, Suite 1900
Portland, OR 97201
Tel: 503-295-3085
Fax: 503-323-9105
DavidMarkowitz@MHGM.com
annajoyce@markowitzherbold.com
harrywilson@markowitzherbold.com
LauraSalerno@MarkowitzHerbold.com
LaurenBlaesing@MarkowitzHerbold.com

Of Attorneys for Defendants

Dan Skeritt, OSB 681519
Tonkon Torp LLP
888 SW 5th avenue, Suite 1600
Portland, OR 97204
Tel: 503-802-2024
Fax: 503-972-3724
Dan.skeritt@tonkon.com

Attorneys for Subpoena Witness, Alvarez & Marsal

☒ by overnight mail, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

☒ by emailing a copy thereof to the addresses listed above, on the date set forth below.

Dated this 6th day of February, 2020.

DAVIS WRIGHT TREMAINE LLP

s/ Paul C. Southwick
Gregory A. Chaimov, OSB #822180
Paul C. Southwick, OSB #095141
Tel: (503) 241-2300
Fax: (503) 778-5299
paulsouthwick@dwt.com
gregorychaimov@dwt.com

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

for the
District of Oregon

Wyatt B. and Noah F. et al.

Plaintiff

v.

Kate Brown, Governor of Oregon in her official
capacity, et al.*Defendant*

Civil Action No. 6:19-cv-00556-AA

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**

To:

Alvarez & Marsal Holdings, LLC

(Name of person to whom this subpoena is directed)

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See attached

Place: Davis Wright & Tremaine LLP
1300 SW Fifth Avenue, Suite 2400
Portland, OR 97201

Date and Time:

03/09/2020 9:00 am

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: _____

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk_____
Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party) _____ Plaintiffs
Wyatt B. and Noah F. et al. _____, who issues or requests this subpoena, are:

Paul C. Southwick, Esq., Davis Wright Tremaine LLP, 1300 SW 5th Avenue, Ste. 2400, Portland, OR 97201
Tel: 503-241-2300; Email: paulsouthwick@dwt.com

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Ex. 3 Blaesing Decl.

Page 9 of 11

Civil Action No. 6:19-cv-00556-AA

PROOF OF SERVICE*(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)*

I received this subpoena for *(name of individual and title, if any)* _____
 on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
 tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
 \$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Print

Save As...

Add Attachment

Ex. 3 Blaesing Decl.

Pag

Reset

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

July 14, 2020

Via Email

Dan Skerritt, Esq.
Carolyn Harris Crowne, Esq.
Timothy Wright, Esq.
Tonkon Torp LLP
888 SW 5th avenue, Suite 1600
Portland, OR 97204

Re: Wyatt B., et al. v. Kate Brown, et al.
US District Court for Oregon Case No. 6:19-cv-00556-AA

Counsel:

Plaintiffs' counsel has been seeking document production from Alvarez and Marsal (A&M) since the end of last year. In fact, there were initial delays while the Defendants' law firm Markowitz and Herbold, PC, explored providing representation to A&M related to the document production and any scheduled depositions. Ultimately, we were advised on January 21, 2020, by Harry Wilson, that A&M planned on hiring separate local counsel. Upon contacting A&M's in-house counsel, we were advised of your involvement on January 24, 2020, and the subpoena was issued February 6, 2020.

Following substantial delays, on April 9, 2020, your office provided the initial hit reports for the search terms related to the crisis work that A&M performed in Oregon. You indicated that your office had to carefully screen the results and perform a quality assurance test before production could begin and each batch released. As a result, production of A&M's internal ESI has moved at a snail's pace with a mere 9,458 documents produced to date. In that same time frame, counsel for the Plaintiffs have received hundreds of thousands of documents in other litigation that they are involved in.

Given counsel's assertion about the careful review that was being conducted, it was surprising to find how few substantive documents were produced. Approximately half of the production appeared to be duplicates of attachments appearing in separate e-mails. This appears to be related to, and compounded by, a complete lack of e-mail threading as was discussed and agreed to during our initial conversations. Moreover, at least 1200 of the documents were calendar invites and v-cards.

Other issues include the production of junk files that inexplicably were not weeded out. In one cluster alone, we found 90 junk ATT files (e.g. AM-ODHS-0001265) as well as documents containing hundreds of pages of unreadable letters, characters and numbers (e.g. AM-ODHS-0013912). In addition, at least 120 documents indicated that the "document could not be imaged" (e.g., AM-ODHS-0002144). Other documents appear to be blank with watermarks on them. A few of them appear to be GIFS which may not be significant but given the production issues is impossible to know although the production of over 20 images such as "Sponge Bob Square Pants" (e.g., AM-ODHS-0002642) certainly suggests that.



As counsel may recall, an issue that came up during our initial conversations was access that the Defendants and A&M had to each other's databases. Initially, concerns were raised about the platform "Box" which counsel ultimately indicated was their misunderstanding after speaking with staff at A&M. Defendants have similarly claimed that A&M did not have access to any state systems and produced A&M documents, namely powerpoints, that were saved in one file. However, based upon review of the few substantive documents that were produced A&M *did* have access to DHS shared folders.

Pursuant to Paragraph 8 of Plaintiffs' counsel subpoena, A&M was directed to produce all documents that are in their custody or control (directly or indirectly), which includes documents in the custody or control of persons A&M consulted concerning any factual matter or matters of opinion relating to any of the facts or issues involved in this case. Accordingly, A&M should have requested and produced all relevant documents in the custody of the expert, and not just A&M's internal documents relating to the expert. Based upon the review of the production to date, it appears that A&M consulted a minimum of two, if not more, experts since A&M lacked substantive expertise in child welfare and foster care.

Since the issuance of the subpoena, your office has generally been non-responsive to requests for information and resistant to conferring despite repeated questions concerning the process that your office has chosen for production. Our analysis of what has been produced to date raises serious issues and concerns and we have no current information on where you might be in the production of internal e-mails let alone all of the correspondence with the Defendants. Accordingly, we demand a conferral this week; otherwise we will take this matter to the Court. We are available tomorrow after 12:00 p.m. PST, Thursday 9:00-10:00 a.m. PST, or Friday anytime after 10:00 a.m. except for 12:00-1:00 p.m. PST.

Regards,

Dawn J. Post
A Better Childhood
(917) 232-1748
355 Lexington Ave., 16th Floor
New York, NY 10017

Cc: Markowitz & Herbold, Department of Justice



December 16, 2020

Via Email

Dan Skerritt, Esq.
 Carolyn Harris Crowne, Esq.
 Timothy Wright, Esq.
 Tonkon Torp LLP
 888 SW 5th avenue, Suite 1600
 Portland, OR 97204

**Re: Wyatt B., et al. v. Kate Brown, et al.
 US District Court for Oregon Case No. 6:19-cv-00556-AA**

Counsel:

A&M has taken the position that documents produced to Plaintiffs may be redacted not only for privilege, but also for relevance. Notably, A&M's position is internally inconsistent given the fact that other chats were fully produced where employees gossiped about their project leader's conduct in another state as well as each other, discussing an educational plan in a separate project, angled to get on the Oregon project, and chatted about their weekends, planned getaways extending their time in Oregon, lost luggage, medications, gifts and music (e.g., AM-ODHS-0018532, AM-ODHS-0033797, AM-ODHS-0034687, AM_ODHS_0036509, AM-ODHS-0037159). Whereas, it is simply incredible to believe that a chat about a meeting with the Governor and dealing with a "CW personnel who sex trafficked a kid" would end so abruptly and transition to personal matters or work on another project necessitating redactions (AM-ODHS-0034785).

As set forth below, such redactions based on relevance are improper. Plaintiffs therefore request the immediate production, in full and without redactions, of all documents that were originally redacted for any reason other than privilege by close of business on Friday.

(a) The Federal Rules of Civil Procedure Do Not Permit Unilateral Redaction Based Upon Non-Responsiveness or Irrelevance

The district court opinions within in the Ninth Circuit that have addressed this issue are in agreement that unilateral redactions based on relevance are improper. *See, e.g., Toyo Tire & Rubber Co., Ltd. v. CIA Wheel Group*, No. SA CV 15-00246-DOC (DFMx), 2016 WL 6246384, at *2 (C.D. Cal. Feb. 23, 2016) ("Separately, the Court agrees with Toyo that CIA may not redact otherwise responsive documents because those documents contain irrelevant material."); *Islander Group, Inc. v. Swimways Corporation*, No. 13-00094 LEK-RLP, 2014 WL 12573995, at *3 (D. Haw. Jan. 28, 2014) ("Given the broad standards of discoverability under federal law, unilateral redactions based on relevance by the producing party is not appropriate."); *Krausz Industries, Ltd. v. Romac Industries, Inc.*, No. C10-1204RSL, 2011 WL 13100750, at *3 (W.D. Wash. Aug. 10, 2011) ("The Court is persuaded by cases that hold that unilateral redactions on the basis of irrelevance or non-responsiveness is improper, especially when a protective order is in place to govern production of confidential



information between the parties.”); *In re iPhone Application Litig.*, No. 11–MD–2250 LHK, 2013 WL 1095456, at *2 (N.D. Cal. Mar. 7, 2013) (“In addition to Apple’s failure to produce responsive documents, this Court is also disturbed by Apple’s position ‘that it may redact information that is not relevant.’ Apple asserts that it can redact irrelevant information ‘as long as there’s a process by which the parties can assess whether there’s a good faith claim of relevance or not.’ Apple’s contention that Plaintiffs must surmise based upon a redaction whether Apple redacted the redacted information in good faith is unpersuasive at best.”); *Live Nation Merchandise, Inc. v. Miller*, Case No. 13–cv–3936 CW (NC), 2014 WL 1877912, at *3 (N.D. Cal. May 9, 2014) (“The Court agrees with Artists that Live Nation’s redactions of otherwise discoverable documents here are unwarranted because Live Nation’s concern about protecting privacy interests and confidential/proprietary information could be addressed through a protective order.”).

Moreover, the majority of courts around the country have held that unilateral redactions based on relevancy are improper. *Engage Healthcare Communications, LLC v. Intellisphire, LLC*, No. 12-cv-00787(FLW)(LHG), 2017 WL 3624262, at *3 (D. N.J. April 26, 2017) (“The majority of cases cited by the parties . . . clearly state that unilateral redactions based on one party’s subjective view of relevancy are improper.”); see also *Burris v. Versa Products, Inc.*, CIV. 07-3938 JRT/JJK, 2013 WL 608742, at *3 (D. Minn. Feb 19, 2013) (“The practice of redacting for nonresponsiveness or irrelevance finds no explicit support in the Federal Rules of Civil Procedure, and the only bases for prohibiting a party from seeing a portion of a document in the Rules are claims of privilege or work-product protection.”) (citing FRCP 26(b)(5)); *In re State St. Bank & Tr. Co. Fixed Income Funds Inv. Litig.*, 08 CIV 0333 RJH DFE, 2009 WL 1026013, at *1 (S.D.N.Y. Apr. 8, 2009) (“[S]uch redactions are generally unwise. They breed suspicions, and they may deprive the reader of context.”).

Additionally, under the Federal Rules, a party must produce “documents,” not parts of documents, and must further “produce documents as they are kept in the usual course of business.” FRCP 34(a)(1)(A); (b)(E)(i). Looking to these Rules, courts throughout the country recognize that a party cannot unilaterally redact pieces of documents for non-responsiveness. See, e.g., *Bonnell v. Carnival Corporation*, No. 13-22265-CIV-WILLIAMS/GOODMAN, 2014 WL 10979823, at *4 (S.D. Fla. Jan. 31, 2014) (holding that defendant “cannot unilaterally redact portions of otherwise discoverable, non-privileged documents based on its own belief that portions of the documents are irrelevant to the claims in this case”); *Melchior v. Hilite International, Inc.*, No. 13-50177, 2013 WL 2238754, at *3 (E.D. Mich. May 21, 2013) (holding a subpoenaed nonparty “cannot unilaterally redact portions of documents based on relevancy grounds”); *Bartholomew v. Avalon Capital Group, Inc.*, 278 F.R.D. 441, 451 (D. Minn. 2011) (“Redaction is an inappropriate tool for excluding alleged irrelevant information from documents that are otherwise responsive to a discovery request. It is a rare document that contains only relevant information. And irrelevant information within a document that contains relevant information may be highly useful to providing context for the relevant information.”).

District courts within the Ninth Circuit have also expressly held that the prohibition on unilateral redactions for relevance applies to the complete redaction of supposedly irrelevant attachments to admittedly relevant emails. See also *Virco Manufacturing Corp. v. Hertz Furniture Systems*, No. CV 13-2205 JAK(JCx), 2014 WL 12591482, at *5 (C.D. Cal. Jan. 21, 2014) (“Further, by failing to produce email attachments, plaintiff has effectively redacted, based upon relevance, portions of documents it otherwise apparently views to be discoverable/relevant/ responsive to defendants’ discovery requests. This Court agrees with those courts which have disapproved of such a practice especially where, as here, a multitude of documents are in issue and a protective order is in place to address concerns regarding privacy and potential misuse of information.”) (citing cases); *Sanchez Y Martin*,



S.A. de C.V. v. Dos Amigos, Inc., No. 17cv1943-LAB (LL), 2019 WL 581715, at *11 (S.D. Cal. Feb. 13, 2019) (“This Court agrees with those courts that have held that emails produced in discovery should be accompanied by their attachments. To do otherwise is effectively a redaction of responsive discovery.”) (internal citations omitted); *Doe v. Trump*, 329 F.R.D. 262, 276 n. 16 (W.D. Wash. Dec. 20, 2018) (“The court's ruling [ordering production of unredacted documents] applies not only to the portions of documents that Defendants redacted based on nonresponsiveness or irrelevance, but also to the attachments to responsive documents that Defendants withheld on the same grounds.”).

(b) The Protective Order Makes Redaction of Non-Privileged Information Unnecessary

The Protective Order in this case sufficiently protects A&M's information from public disclosure. The Protective Order allows for both “Confidential” and “Attorneys Eyes Only” designation of sensitive documents, deposition transcripts, and court documents, which may be filed with the court under seal. In light of these protections, there is no persuasive reason to redact otherwise responsive documents when the information is adequately protected under measures agreed to by the parties. *See Burris v. Versa Products, Inc.*, CIV. 07-3938 JRT/JJK, 2013 WL 608742, at *2 (D. Minn. Feb. 19, 2013) (requiring removal of redactions where “[t]he parties stipulated that the Protective Order the Court entered was sufficient to protect their interests in preventing wider dissemination of sensitive information. . . . This is not a case where the opposing party is a competitor . . . a protective order such as the one the Court entered here will suffice[.]”); *In re State St. Bank & Tr. Co. Fixed Income Funds Inv. Litig.*, 08 CIV 0333 RJH DFE, 2009 WL 1026013, at *1 (S.D.N.Y. Apr. 8, 2009) (“In the case at bar, the stipulated protective order makes it unnecessary to redact any portion of a document on the ground that the portion is non-responsive and irrelevant.”).

Regards,

Dawn J. Post
A Better Childhood
(917) 232-1748
355 Lexington Ave., 16th Floor
New York, NY 10017



MARCIA ROBINSON LOWRY (*pro hac vice*)

mlowry@abetterchildhood.org

DAWN J. POST (*pro hac vice*)

dpost@abetterchildhood.org

ANASTASIA BENEDETTO (*pro hac vice*)

abenedetto@abetterchildhood.org

AARTI IYER (*pro hac vice*)

aiyer@abetterchildhood.org

A BETTER CHILDHOOD

355 Lexington Avenue, Floor 16

New York, NY 10017

Tel: (646) 795-4456

EMILY COOPER, OSB #182254

ecooper@droregon.org

THOMAS STENSON, OSB #152894

tstenson@droregon.org

DISABILITY RIGHTS OREGON

511 SW 10th Avenue, Suite 200

Portland, OR 97205

Tel: (503) 243 2081

PAUL C. SOUTHWICK, OSB #09141

paul@paulsouthwick.com

PAUL SOUTHWICK LAW LLC

8420 N Ivahoe St.

Portland, OR 97203

Tel: (503) 806 9517 *Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
EUGENE DIVISION**

WYATT B. and NOAH F. by their next
friend Michelle McAllister; ET AL.

Plaintiffs,

v.

KATE BROWN, Governor of Oregon in her
official capacity; et al,

Defendants.

Case No. 6:19-cv-00556-AA

**PLAINTIFFS' NOTICE OF SUBPOENA
DUCES TECUM TO CASEY FAMILY
PROGRAMS**

PLEASE TAKE NOTICE that, pursuant to and in accordance with Rule 45 of the Federal Rules of Civil Procedure, Plaintiffs Wyatt B, et al., by their attorneys, hereby give notice of the service of a subpoena to Casey Family Programs. The subpoena commands Casey Family Programs to respond to the following requests for the production of documents identified in Schedule A hereto by February 15, 2021 at 5:00pm PST. Plaintiffs further request that Casey Family Programs produce for inspection and copy those documents or objects that are described in Schedule A hereto by delivering such documents or objects to Emily Cooper, c/o Disability Rights Oregon, 511 SW 10th Avenue, Suite 200, Portland, OR 97205, or another mutually acceptable location.

Dated this 14th day of January 2021.

DISABILITY RIGHTS OREGON

s/ Emily Cooper

Emily Cooper, OSB #182254

ecooper@droregon.org

Thomas Stenson, OSB #152894

tstenson@droregon.org

511 SW 10th Avenue, Suite 200

Portland OR 97205

Tel: (503) 243 2081

Fax: (503) 243 1738

A BETTER CHILDHOOD

Marcia Robinson Lowry (*pro hac vice*)

mlowry@abetterchildhood.org

Dawn J. Post (*pro hac vice*)

dpost@abetterchildhood.org

Anastasia Benedetto

abenedetto@abetterchildhood.org (*pro hac vice*)

Aarti Iyer

aiyer@abetterchildhood.org (*pro hac vice*)

355 Lexington Avenue, Floor 16

New York, NY 10017

Tel: (646) 795-4456

Fax: (212) 692-0415

PAUL SOUTHWICK LAW LLC

Paul C. Southwick, OSB #09141

paul@paulsouthwick.com

8420 N Ivanhoe St.

Portland, OR 97203

Tel: (503) 806 9517

Attorneys for Plaintiffs

SCHEDULE A

REQUESTS FOR DOCUMENTS

Please see the attached Definitions and Instructions, which apply to the following Requests for Documents.

REQUEST NO. 1:

All documents, communications, and other materials relating to Casey Family Programs' work with the State of Oregon, the Governor of the State of Oregon, the Oregon Department of Human Services, the Oregon Child Welfare Program, and Alvarez & Marsal Holdings, LLC, with regard to the Oregon child welfare program and any aspects of that program, including foster care, by any agent, employee, independent contractor, or representative of Casey Family Programs including, but not limited to, Niki LeProhn, Kimberly Ricketts, Sara Munson, Pamela Borth, David Sanders, Annie Marie Ambrose, Roxanna Nowparast, Kali Scholnick, Alan Vietze, and Michael Cull, relating to Oregon's child welfare system, from January 1, 2018 through July 1, 2020.

DEFINITIONS AND INSTRUCTIONS

1. "Plaintiff" and "Plaintiffs," as used herein refer without limitation to Plaintiffs, their attorneys and agents, and all persons acting on their behalf.
2. "Defendants," as used herein refer to Defendants, their attorneys and agents, and all persons acting on their behalf.
3. "Document" or "documents" has the same meaning as in Fed. R. Civ. P. 34(a)(1)(A).
4. "Communication" as used herein refers to any transmission of information, the information transmitted, and any process by which information is transmitted, and shall include written communications and oral communications.
5. "Relating to," "referencing," "concerning," "surrounding," or "substantiating" as used herein refers to directly or indirectly, or in any way alluding to, responding to, in connection

with, commenting on, in response to, about, regarding, announcing, explaining, discussing, showing, describing, studying, reflecting, analyzing, comprising or constituting.

6. “Person” as used herein refers to an individual, firm, partnership, corporation, proprietorship, association, governmental body, or any other organization or entity.

7. Each demand should be considered as including a demand for separate production of all copies and, to the extent applicable, preliminary drafts of documents that differ in any respect from the original or final draft or from each other (e.g., by reason of differences in form or content or by reason of handwritten notes or comments having been added to one copy of a document but not on the original or other copies thereof).

8. Each demand to produce a document or documents shall be deemed to call for the production of the document or documents to the extent that they are in or subject to, directly or indirectly, the custody or control of the party to whom these document demands are addressed, and includes documents in the custody or control of the party’s agents, representatives, predecessors in interest, successors, subsidiaries, parent, experts, persons consulted concerning any factual matter or matters of opinion relating to any of the facts or issues involved in this case, and includes, unless privileged, the party’s attorney.

9. If you object to part of a document request and refuse to produce subject to that part, you should state your objection and produce pursuant to the remainder of that document request. If you object to the scope or time period of a document request and refuse to produce for that scope or time period, you should state your objection and answer the document request for the scope or time period you believe is appropriate.

10. If you claim any privilege against the production of any document or any part of any document sought herein, please provide for said document:

- (a) the type of document (e.g., email, letter, memorandum, note);
- (b) the name, address and telephone number of the person who prepared the document;
- (c) the subject matter of the document;
- (d) the date the document was prepared;

- (e) the intended recipient of the document;
- (f) all persons, firms, or entities who have possession of the document;
- (g) the privilege claimed for withholding the document or part of the document; and
- (h) the factual basis for the claim of privilege or grounds for withholding the document.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing **PLAINTIFFS' NOTICE OF SUBPOENA DUCES TECUM TO CASEY FAMILY PROGRAMS** on:

Julia Woog
Roxanna Nowparast
Casey Family Programs
2001 Eighth Avenue, Suite 2700
Seattle, WA 98121
Tel: 206.282.7300
jwoog@casey.org
rnowparast@casey.org

Of Attorneys for Third Party

☐ by First Class U.S. mail, addressed to said attorney's last-known address and deposited in the U.S. mail at Portland, Oregon on the date set forth below;

☒ by emailing a copy thereof to the addresses listed above, on the date set forth below.

Dated this 14th day of January 2021.

DISABILITY RIGHTS OREGON

s/ Emily Cooper
Emily Cooper, OSB #182254
ecooper@droregon.org
Tel: (503) 243 2081
Fax: (503) 243 1738

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

for the
District of Oregon

Wyatt B. and Noah F. et al.

Plaintiff

v.

Kate Brown, Governor of Oregon in her official
capacity, et al.*Defendant*

Civil Action No. 6:19-cv-00556-AAA

**SUBPOENA TO PRODUCE DOCUMENTS, INFORMATION, OR OBJECTS
OR TO PERMIT INSPECTION OF PREMISES IN A CIVIL ACTION**To: Casey Family Programs attn: Julia Woog, Roxanna Nowparast
2001 Eighth Ave., Suite 2700, Seattle, WA 98121*(Name of person to whom this subpoena is directed)*

☒ **Production:** **YOU ARE COMMANDED** to produce at the time, date, and place set forth below the following documents, electronically stored information, or objects, and to permit inspection, copying, testing, or sampling of the material: See attached

Place: Disability Rights Oregon
511 SW 10th Avenue, Suite 200
Portland, OR 97205

Date and Time:

02/15/2021 5:00 pm

☐ **Inspection of Premises:** **YOU ARE COMMANDED** to permit entry onto the designated premises, land, or other property possessed or controlled by you at the time, date, and location set forth below, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

Place:

Date and Time:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: 01/14/2021

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

s/ Emily Cooper

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing *(name of party)* Plaintiffs
Wyatt B. and Noah F. et al, who issues or requests this subpoena, are:

Emily Cooper, Esq., Disability Rights Oregon, 511 SW 10th Avenue, Suite 200, Portland, OR 97205

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Ex. 6 Blaesing Decl.

Page 8 of 10

AO 88B (Rev. 02/14) Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action (Page 2)

Civil Action No. 6:19-cv-00556-AAA

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____.

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)**(c) Place of Compliance.**

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
 - (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
 - (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
 - (iv) subjects a person to undue burden.
- (B) When Permitted.** To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
- (i) disclosing a trade secret or other confidential research, development, or commercial information; or

- (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

July 20, 2020

Via Email

Dan Skerritt, Esq.
 Carolyn Harris Crowne, Esq.
 Timothy Wright, Esq.
 Tonkon Torp LLP
 888 SW 5th avenue, Suite 1600
 Portland, OR 97204

Re: Wyatt B., et al. v. Kate Brown, et al.
US District Court for Oregon Case No. 6:19-cv-00556-AA

Counsel:

Plaintiffs' counsel are puzzled by counsel's claim that "[y]ou have already received the bulk of our production" as there has been absolutely no production of ESI external to A&M such as e-mails exchanged with the Defendants which one would expect to be voluminous in nature.

Further, your explanation as to why e-mail threading was not conducted, specifically, that "we did discuss that possibility with you early on, but that specification was not included in your production spec sheet and so the system was not set up for that," is suspect as the March 30, 2020 e-mail to you which attached DWT's general specifications specifically stated "[w]e are requesting that A&M produce only last in time (or inclusive) emails." This, in combination with the large number of junk files and duplicates, as well as 120 documents that cannot be imaged, has resulted in less substantive production than we would have expected given how long counsel has taken.

To provide further clarity to Plaintiffs' counsel's last letter, in a project of this nature, we would expect to see extensive notes related to interviews conducted and meetings held. In fact, calendar invites indicate such interviews were conducted and v-cards were, in part, specifically maintained to document who was interviewed (e.g., AM-ODHS-0018575, AM-ODHS-0018445). Chats exchanged between members of the team also detailed, among other things, that notes were taken (e.g., AM-ODHS-0018532) even if just to transcribe for review later given the lack of understanding and, apparently, lack of attention, certain A&M staff had to the subject matter and meetings (e.g., AM-ODHS-0018628). E-mails also documented when such interviews were to take place (e.g., AM-ODHS-0018411). From this list alone, we would have expected to have received notes related to the interviews conducted with Fariborz Pakseresht, Liesl Wendt, Don Erickson, Leah Horner, Marilyn Jones and Jana McLellan. The only individual on this list where notes were provided were with respect to Leah Horner (AM-ODHS-0027439). Other random interview and meeting notes were provided, by way of example, as to Rosa Klein (e.g., AM-ODHS-0000006), Greg Westbrook (e.g., AM-ODHS-0027496), Shannon Biteng (e.g., AM-ODHS-0027534), NASDDS (e.g., AM-ODHS-0020017), legislative strategy (e.g., AM-ODHS-0027689) labor (e.g., AM-ODHS-0023576), and ORCAH (e.g., AM-ODHS-0013806). Given the scope of this work the volume of notes would should be much more substantial than what has been provided.



It is unfathomable that Plaintiffs' counsel should have to advise counsel as to the identity of the consultants and experts that A&M used to further its crisis work in Oregon. This is information that A&M should surely have been able to provide to your office with little effort. Nonetheless, Plaintiffs' counsel provides the following information based upon a review of the documents produced to date. This should not be read as a complete list.

Casey Family Programs appears to have been brought in by A&M to assist given their historical knowledge and work in Oregon (e.g., AM-ODHS-0020177, AM-ODHS-0008275). A&M specifically requested Casey provide research to present to the Governor (e.g., AM-ODHS-0019166). Moreover, Casey's contracted expert Alan Vietze was referenced as a member of A&M's team for purposes of documenting progress status (e.g., AM-ODHS-0006688, AM-ODHS-0021005). A&M also consulted with Dr. Michael Cull who worked with Casey (e.g., AM-ODHS-0028440). Other resources in terms of substantive experts were provided for consultation without specificity (e.g., AM-ODHS-0005924). With respect to training, while Casey did not become an official member of the team, they continued to provide "technical assistance and peer to peer interactions and sharing of information" (AM-ODHS-001551). Casey ultimately decided that they could not have their logo used in conjunction with A&M in the materials produced to the state (AM-ODHS-0019241) but contributed significant resources to A&M nonetheless.

Merlin Weyer from South Dakota was specifically brought in by A&M as a "Child Welfare Technical Advisor" (AM-ODHS-0000173). Other consultants or experts that may have been brought in include, but are not limited to an individual listed simply as Shane AM-ODHS-0020936), Liberty Health Care (e.g., AM-ODHS-0022031) and possibly LMG Public Relations (AM-ODHS-0011535).

With respect to A&M's access to DHS' systems, it is critical to know what was used and saved in order to determine whether everything that should have been produced has been produced not only by A&M but the Defendants as well given that both parties denied access to each other's systems, which is clearly contradicted in the production (e.g., AM-ODHS-0000417, AM-ODHS-0020860, AM-ODHS-0022691).

Regards,

Dawn J. Post
A Better Childhood
(917) 232-1748
355 Lexington Ave., 16th Floor
New York, NY 10017

Cc: Markowitz & Herbold, Department of Justice



July 25, 2022

Dear Judge Aiken:

Pursuant to the Case Management Order, *see* ECF 3 at 2, the parties submit this joint letter setting out their respective positions on a discovery dispute and request a telephonic status conference.

This dispute relates to the production of additional email documents by Defendants. On March 7, 2022, Plaintiffs sent a letter to Defendants requesting email correspondence related to Plaintiffs' Tenth Request for the Production of Documents from January 1, 2020, to present. Defendants object to conducting additional email collection at this juncture in the case while motions are pending that could resolve or significantly narrow the claims. Pursuant to Local Rule 7-1, the parties conferred on March 31, 2022 but were unable to reach a resolution.

Plaintiffs' Position

Plaintiffs respectfully ask this Court to compel Defendants to produce email communications made by Department of Human Services officials since January 1, 2020. Fed. R. Civ. P. 26(b)(1) entitles Plaintiffs to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(e)(1) further requires Defendants to supplement any discovery response that becomes "incomplete or incorrect."

Plaintiffs' last discovery request for electronically stored communications made by Department of Human Services officials was served more than two years ago, with a date range of January 1, 2017, to December 31, 2019. The state of this case has since substantially changed. Class certification briefing and oral arguments have been completed, and Defendants' motion to dismiss has been resolved by this Court. Rebecca Jones Gaston, the Director of Child Welfare, who had just joined Oregon DHS at the time of Plaintiffs' last request, is now expected to step down pending her confirmation to a federal post, with Aprille Flint-Gerner expected to take her place as Interim Director. Defendants object to email production at this juncture.¹

Updated email discovery is not only relevant to Plaintiffs' claims, but essential to demonstrating that Defendants had the requisite awareness to prevail on their claims. In the Ninth Circuit, "[d]ue process requires the state to provide children in its care 'reasonable safety and minimally adequate care and treatment...'" *Lipscomb v. Simmons*, 962 F.2d 1374, 1379 (9th Cir. 1992). To prevail on a claim for failure to meet this duty, a plaintiff must prove that state officials acted with such deliberate indifference to the plaintiffs' liberty interest that their actions 'shock the conscience.' *Tamas v. Dep't of Soc. & Health Servs.*, 630 F.3d 833, 844 (9th Cir. 2010)(*quoting Brittain v. Hansen*, 451 F.3d 982, 991 (9th Cir. 2006)). The deliberate indifference standard, "as applied to foster children, requires a showing of an objectively substantial risk of harm and a showing that the officials were subjectively aware of facts from which an inference could be drawn that a

¹ Defendants contend that ESI is not proportional to the needs of the case while motions are pending before the Court, but it is notable that Defendants themselves are actively pursuing a third-party subpoena for documents in the District of Columbia. *See In re Non-Party Subpoena to the Center for the Study of Social Policy*, Case No. 1:21-mc-00065-TSC (D.D.C)

substantial risk of serious harm existed.” *Id.* at 845. “The second part may be proven by showing (1) that the official was aware of facts from which an inference of risk may be drawn and that the official made that inference, (2) that the official was aware of facts from which an inference of risk may be drawn and that any reasonable official would have been compelled to draw that inference, or (3) that the risk of harm is obvious. *Id.*” *B.K. v. Snyder*, 922 F.3d 957, 968 (9th Cir. 2019). Plaintiffs’ ability to prove their substantive due process claims therefore relies on proving that DHS officials had *knowledge* of the risk of harm to which children in their care and custody are exposed. Accordingly, the requested email communications are directly relevant to Plaintiffs’ burden of proving deliberate indifference.

Notably, courts in similar cases have used emails as evidence in support of “deliberate indifference claim[s].” *Snell v. N. Thurston Sch. Dist.*, No. C13-5786 RBL, 2015 U.S. Dist. LEXIS 143306, at *15 (W.D. Wash. Oct. 21, 2015) (summary judgment on deliberate indifference claim denied in light of emails and other evidence). Emails are also used as evidence in support of claims of unconstitutional policies and practices. *Briggs v. Cty. of Maricopa*, No. CV-18-02684-PHX-EJM, 2021 U.S. Dist. LEXIS 83683, at *6 (D. Ariz. Apr. 30, 2021) (“emails Plaintiffs seek may contain information that will allow Plaintiffs to prove that [defendant] had an unconstitutional policy or practice so persistent and widespread that it constitutes a well-settled policy”).

Further, Plaintiffs have strong reason to believe that the requested email communications contain evidence in support of their claims. The previous ESI production contained statements from high-level ODHS officials, including Rebecca Jones Gaston’s predecessors, Jana McLellan and Marilyn Jones, that are directly relevant to Plaintiffs’ claims. For example, in a May 2019 email regarding placement capacity, Marilyn Jones stated, “[w]e don’t have capacity within the state of Oregon we have kids that will have no place to stay or be able to receive appropriate services.” Wyatt_DHS_2205006 (attached hereto as Exhibit 1). Jana McLellan added, “[s]omehow we need to have the conversation that the option is out of state, or hotel, until capacity is built.” *Id.* In an August 2019 email, Jana McLellan also stated that, “there are needs as A&M has pointed out that the State has not chosen to invest in--by policy and practice--but are treatment needs which our youth have. Sex trafficking and gender transitioning come to mind.” Wyatt_DHS_2538464 (Exhibit 2). Additionally, a March 2018 letter from caseworkers in Gresham to both Marilyn Jones and ODHS Director, Fariborz Pakseresht, stated, “[w]e are drowning in work today. Many of us are carrying 40, 50, and even 60+ cases. It is impossible to keep kids safe with this workload. It is impossible to follow policy with this workload.” Wyatt_DHS_0245552 (Exhibit 3). Defendants also produced numerous emails seeking placement for children that certainly would not be available publicly. For example, a 2018 email, designated Attorneys’ Eyes Only, approved the placement of an eight-year-old child in a hotel because the “state-wide foster home search [yielded] no placements available” and BRS placements also had “none available.” Wyatt_DHS_1011772 (Exhibit 4). *See also*, Wyatt_DHS_0266356 (Exhibit 5), Wyatt_DHS_0266041 (Exhibit 6), Wyatt_DHS_0343975 (Exhibit 7).

Defendants acknowledge the relevance of communications during the past two-and-a-half years of this litigation by citing their accomplishments during this period in their own defense. For example, on November 15, 2021, Defendants stated in oral argument before the Court that Plaintiffs “do[] not address the performance of the Rebecca Jones Gaston administration, two years of performance. The current policies and practices of child welfare are being implemented by

Rebecca Jones Gaston...” Nov. 11, 2021 Tr. 51:11-15. But the most recent ESI Defendants produced stopped at December 31, 2019—approximately one month into Rebecca Jones Gaston’s tenure at DHS. Plaintiffs cannot possibly address information they do not have.

Defendants erroneously object to producing relevant email communications from the past two-and-a-half years, while simultaneously taking the position that Plaintiffs’ claims are supported by old or outdated information. For instance, Defendants’ August 3, 2020, response in opposition to Plaintiffs’ Motion to Certify the class asserts:

- “[T]he State has fully embraced recommendations to improve its child welfare system and has made significant strides in doing so.” ECF 117 at 10.
- “[T]he State has actively been working to improve the system and is seeing the benefits of that work taking hold.” *Id.* at 31-32.

Plaintiffs have narrowed their list of custodians and search terms substantially to address Defendants’ concerns about proportionality and burdensomeness. Plaintiffs have removed 28 custodians and 13 search terms from their list and have not added any new terms or custodians. Further, Plaintiffs indicated during conferrals in March and April that they were willing to work further with Defendants on a narrowed list of custodians and search terms, or on a prioritized list. Plaintiffs sought further conferral on May 31, 2022, and June 7, 2022. However, Defendants responded to Plaintiffs’ proposed ESI list with a June 8, 2022, letter stating that the parties had “sufficiently conferred on this issue.” June 8, 2022, Letter from Lauren Blaesing (Exhibit 8).

The limited email communications that Plaintiffs seek are both relevant to their claims and proportional to the needs of the case. Accordingly, Plaintiffs respectfully request that this Court compel Defendants to produce the requested email communications.

Defendants’ Position

Defendants object to conducting a second email collection at this juncture in the litigation while motions are pending before the Court that could resolve or significantly narrow plaintiffs’ claims. Defendants also object to the scope of plaintiffs’ requested collection because it includes custodians and search terms related to claims that this Court has already dismissed.

“District courts have broad discretion to manage discovery.” *Hunt v. Orange County*, 672 F.3d 606, 616 (9th Cir. 2012). The burden and expense of the proposed discovery should not outweigh its likely benefit, and discovery must be proportional to the needs of the case. Fed. R. Civ. P. 26(b)(1).

At present, plaintiffs’ Motion to Certify as Class Action (Dkt. 64) and defendants’ Motion to Certify Order for Interlocutory Appeal (Dkt. 227) are pending before the Court. Moreover, defendants have moved to dismiss nine of the ten named plaintiffs in this case. (Dkt. 108, Dkt. 184, Dkt. 230, Dkt. 253.) Defendants object to conducting a second email collection until those motions are resolved because the outcomes of those motions could significantly narrow the scope of plaintiffs’ claims and the scope of discovery that is appropriate under Fed. R. Civ. P. 26(b).

Conducting a second email collection, review (including privilege review), and production will require defendants to incur significant expense. Plaintiffs propose collecting emails from 11 custodians, including Governor Brown and ten Oregon Department of Human Services (ODHS) leaders and employees over two and a half years—from January 1, 2020, to present. Plaintiffs’ proposed search terms consist of 46 unique terms and phrases.

Defendants have already produced a significant volume of discovery, including a large email production. Defendants have responded to eleven sets of requests for production, totaling 209 individual requests. Defendants have already produced nearly 400,000 documents (2.8 million pages) to plaintiffs, including approximately 364,000 emails from 40 custodians from ODHS and the Governor’s office for a three-year time period (January 1, 2017 to December 2019). Defendants have continued to supplement discovery and have produced documents on a rolling basis, nearly every month. To date, and not counting productions related to the individual named plaintiffs’ child welfare case files, defendants have made 50 productions. Thus, it is not proportional to the current needs of the case for defendants to incur significant expense to conduct another email collection while there are motions pending that could resolve the case or limit the scope of discovery.

As to plaintiffs’ first reason—that emails are relevant in cases involving deliberate indifference to show that defendants are aware of the problems with the Child Welfare system—the cases plaintiffs cite are distinguishable. For example, *Snell v. North Thurston School Dist.*, No. C13-5786 RBL, 2015 WL 6396092 at *5 (W.D. Wash. Oct. 21, 2015), did not address the scope or timing of discovery or email collections, was not a class action case, and did not involve claims of deliberate indifference to the plaintiff’s rights under the Substantive Due Process Clause. It provides no guidance on the proper scope or timing of discovery in this case.

Similarly, in *Briggs v. County of Maricopa*, No. CV-18-02684-PHX-EJM, 2021 WL 1725553 (D. Ariz. Apr. 30, 2021), the County’s objection to producing emails was not based on the timing of the request. Moreover, the plaintiffs had demonstrated that they had “no other means to obtain the documents that they seek.” *Id.* at *3. Here, unlike in *Briggs*, plaintiffs have not shown that they have no other means of obtaining the evidence they contend exists in emails. Defendants have already produced or publicly released a wide variety of documents showing that ODHS is aware of some of the challenges it has faced and outlined the efforts the agency has taken to address those challenges. In fact, ODHS publishes a Child Welfare monthly progress report capturing the agency’s work and data measures, which overlap with the issues underlying plaintiffs’ claims. Plaintiffs have not demonstrated what else they expect to find or why it is necessary that plaintiffs obtain it at this juncture. Finally, unlike in *Briggs*, defendants do not object to conducting an email collection at all; rather, defendants object to conducting a *second* email collection *right now*, while there are motions pending that could inform the scope of that collection.

Plaintiffs’ second reason—that emails may contain evidence of a lack of placement capacity or caseworker caseloads—is also unavailing. Plaintiffs have served 20 requests for production that pertain to placement capacity, and defendants have already produced 1,312 documents in response to those requests. Plaintiffs have also served 22 requests for production that pertain to

caseworker caseloads, and defendants have produced 1,067 documents in response to those requests. Defendants will continue to supplement document production when they become aware of new responsive documents on those topics.

Plaintiffs' third reason—that defendants have taken the position that plaintiffs' claims are supported by outdated evidence—also does not demonstrate plaintiffs' need for a second email collection now. Plaintiffs are correct that defendants argued at the hearing on plaintiffs' class certification motion that plaintiffs failed to satisfy the requirements of Fed. R. Civ. P. 23(b)(2) because plaintiffs failed to produce evidence of a *current* policy or practice. However, the limited probative value of emails in this case is illustrated by the fact that neither party cited any of the approximately 364,000 emails that defendants produced in their class certification briefing or at the hearing.

Defendants also object to the scope of plaintiffs' request. Plaintiffs' requested collection is overly broad because it contains custodians and search terms aimed at capturing documents that are relevant to claims that have been dismissed. For example, plaintiffs propose searches related to aging-out and transition services from ten custodians. Plaintiffs also propose that defendants collect emails from Rosemary Iavenditti, who is an Operations and Policy Analyst on the Child Welfare youth Transitions team. Ms. Iavenditti is not part of the executive leadership team at Child Welfare; her job pertains specifically to transition age youth. That discovery is overbroad and seeks evidence of claims that have been dismissed. This Court ruled that "the rights asserted by the aging-out subclass" must be dismissed. (Op. and Order at 21, Dkt. 215.)

Plaintiffs also propose searches related to placement capacity, even though this Court ruled that the "right to substantive due process does not . . . extend to placement in an optimal or least restrictive setting, or to the availability of an array of placement options." (*Id.* at 20.) Plaintiffs propose that defendants collect emails from at least four custodians who are not part of the executive leadership team at Child Welfare—Sara Fox, Ahnjene Boleyn, Nancy Cassidy (f/k/a Nancy Allen), and Glenda Marshall—and whose jobs pertain specifically to developing service and placement capacity. Plaintiffs also propose at least eight search terms that pertain to placement capacity. At least one of those search terms is also specifically targeted at seeking emails pertaining to the length of time that a child spends in foster care, even though this Court ruled that "[p]laintiffs' substantive due process claim must therefore be dismissed insofar as it asserts a claim based on a right to 'duration of foster care reasonably related to the purpose of government custody.'" (*Id.*)

This Court should deny plaintiffs' request to compel production of emails. Under Fed. R. Civ. P. 1, discovery rules should "be construed, administered, and employed by the court and the parties to secure just, speedy, and inexpensive determination of every action and proceeding." Here, the burden of collecting and producing discovery rests almost entirely on the defendants—plaintiffs have only produced 205 documents to date, compared to nearly 400,000 documents produced by defendants. Accordingly, for the reasons stated, defendants oppose conducting an expensive and time-consuming second email collection into issues that have been or may soon be dismissed from the case.

Respectfully submitted:

A BETTER CHILDHOOD

By: Marcia Robinson Lowry, Esq.

Marcia Robinson Lowry (*admitted pro hac vice*)

mlowry@abetterchildhood.org

Anastasia Benedetto (*admitted pro hac vice*)

abenedetto@abetterchildhood.org

Aarti Iyer (*admitted pro hac vice*)

aiyer@abetterchildhood.org

Telephone: (646) 795-4456

DAVIS WRIGHT TREMAINE

LLP

P. Andrew McStay, Jr., OSB #033997

andymcstay@dwt.com

William D. Miner, OSB #043636

billminer@dwt.com

Telephone: (503) 241-2300

PAUL SOUTHWICK LAW LLC

Paul C. Southwick, OSB #095141

paul@paulsouthwick.com

Telephone: (503) 806-9517

DISABILITY RIGHTS OREGON

Emily Cooper, OSB #182254

ecooper@droregon.org

Thomas Stenson, OSB #152894

tstenson@droregon.org

Telephone: (503) 243 2081

Of Attorneys for Plaintiffs

ELLEN ROSENBLUM

ATTORNEY GENERAL

FOR THE STATE OF OREGON

By: Lauren Blaesing, Esq.

David B. Markowitz, OSB #742046

DavidMarkowitz@MarkowitzHerbold.com

Laura Salerno Owens, OSB #076230

LauraSalerno@MarkowitzHerbold.com

Harry B. Wilson, OSB #077214

HarryWilson@MarkowitzHerbold.com

Lauren F. Blaesing, OSB #113305

LaurenBlaesing@MarkowitzHerbold.com

Telephone: (503) 295-3085

*Special Assistant Attorneys General
for Defendants*

Vivek A. Kothari, OSB #182089

VivekKothari@MarkowitzHerbold.com

Of Attorneys for Defendants

Carla A. Scott, OSB #054725

carla.a.scott@doj.state.or.us

Sheila H. Potter, OSB #993485

sheila.potter@doj.state.or.us

Of Attorneys for Defendants

January 18, 2023

Dear Judge Aiken:

Pursuant to the Case Management Order (Dkt. 3 at 2), the parties submit this joint letter updating their respective positions on the discovery dispute for the status conference on January 18, 2023.

This dispute relates to the scope of collection and production of email documents by defendants. The parties submitted a joint letter to the Court addressing this dispute on July 25, 2022. The Court then ruled on several pending motions, and the parties spent approximately four months in mediation. On January 11, 2023, plaintiffs modified their requested list of email custodians and search terms.

Plaintiffs now seek emails from 21 custodians applying 25 unique search terms or phrases for a period of a little over three years (January 1, 2020 to present). (*See* Attachment 1: Plaintiffs' Updated Search Terms.) Defendants agree to collect email and produce documents from 17 of those custodians applying 12 search terms. Defendants renew their objection to collecting and producing documents from the remaining four custodians and 13 search terms. Pursuant to Local Rule 7-1, the parties conferred on January 13, 2023, but were unable to reach a resolution.

Because the Court has ruled on the motions that were pending, all but one of defendants' objections raised in the July 25, 2022 joint letter are moot. Defendants' sole objection is that the scope of plaintiffs' requested email collection is overbroad because it includes custodians and search terms related to claims that the Court dismissed in its order and opinion on defendants' motion to dismiss. (Sept. 27, 2021 Op. & Order, Dkt. 215.). Plaintiffs' position is that all proposed custodians and search terms request information that is well within the issues that this Court has upheld in its order and opinion on the motion to dismiss.

Defendants' Position

Plaintiffs' proposed email collection is overbroad and disregards the Court's ruling on defendants' motion to dismiss. The Court's opinion and order dismissed three aspects of plaintiffs' substantive due process claims. (*See* Dkt. 215 at 18-21.) Several of plaintiffs' proposed custodians and search terms aim to capture materials that are relevant only to claims that the Court has dismissed. Accordingly, defendants request that the Court limit the scope of defendants' email collection to just those subjects the Court has determined are part of this case. Accordingly, defendants request the Court prohibit discovery involving the four custodians and 13 search terms listed on defendants' Attachment 2. (*See* Attachment 2: Defendants' Requested Alterations to Plaintiffs' Proposed Email Search.)

"District courts have broad discretion to manage discovery." *Hunt v. Orange County*, 672 F.3d 606, 616 (9th Cir. 2012) (internal quotation marks omitted). The scope of permissible discovery is limited to "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1).

Allowing plaintiffs to expand what will already be a voluminous and expensive email collection to include topics pertaining to claims already dismissed would undermine the Court's ruling that limited

the scope of the claims in this case, and interfere with the “just, speedy, and inexpensive determination” of this action. Fed. R. Civ. P. 1.

Placement Capacity

This Court ruled that the “right to substantive due process does not . . . extend to placement in an optimal or least restrictive setting, or to the availability of an array of placement options.” (Dkt. 215 at 20.) In so holding, this Court relied on the Fifth Circuit’s rejection of claims similar to plaintiffs’ claims, in which the Fifth Circuit held that:

...[C]hildren have no right to a stable environment or a right not to be moved from home to home, despite the significant literature which indicates a traumatic effect of such moves on young children. Even accepting the district court’s—undoubtedly correct—finding that out-of-region placements and suboptimal placements can have negative effects on a child’s psychological health, those negative effects are not constitutionally cognizable harms.

M.D. by Stukenberg v. Abbott, 907 F.3d 237, 268 (internal quotation marks and citations omitted). (Dkt. 215 at 18.) This Court also relied on the Fifth Circuit’s reasoning that “the availability of foster homes, particularly those that provide the most ‘home-like,’ ‘least-restrictive’ environments, is . . . out of the State’s control,” *M.D.* 907 F.3d at 268, and “[a]lthough the state can provide more funding and might improve recruitment efforts, it cannot force people to volunteer as foster parents,” (Dkt. 215 at 19). Accordingly, this Court dismissed plaintiffs’ substantive due process claim “to the extent that it seeks to vindicate a substantive due process right to be housed in the least restrictive setting, or a right to an array of community-based placements.” (*Id.* at 20.)

In light of that ruling, plaintiffs no longer maintain a substantive due process claim based upon defendants’ alleged failure to provide an adequate array (type and quantity) of placement types, including foster (resource) homes, placements at higher levels of care, or placements in optimal or least-restrictive settings (*e.g.* settings that are not a residential or institutional placement or secured facility).

Plaintiffs request emails from three custodians from the ODHS Child Welfare treatment services team—Sara Fox, Nancy Cassidy (f/k/a Nancy Allen), and Glenda Marshall—whose jobs pertain specifically to developing treatment services and placement capacity for children needing higher levels of care, and who are not part of the Child Welfare executive leadership team. Plaintiffs also request three categories of search terms (10 searches total) across a broader list of custodians that pertain to placement capacity. (*See* Attachment 1 at 2-6, search term categories “Placement – Array,” “Placement – Matching,” and “Institutional Placements.”)

These custodians and search terms pertain directly to the substantive due process claim based on the right to a placement array or least restrictive setting that this Court dismissed. These custodians and search terms are not relevant to any other claims in plaintiffs’ complaint, and plaintiffs have not amended their complaint to allege how they would be relevant to the remaining claims.

Length of time in care

This Court also granted defendants’ motion to dismiss on the basis that the Fourteenth Amendment right to substantive due process does not extend to a right not to be retained in ODHS custody for

longer than is necessary. (Dkt. 215 at 20.) The Court ruled that “[p]laintiffs’ substantive due process claim must therefore be dismissed insofar as it asserts a claim based on a right to ‘duration of foster care reasonably related to the purpose of government custody . . . or ‘the right not to be maintained in custody longer than is necessary to accomplish the purpose to be served by taking a child into government custody.’” (*Id.*)

Despite that ruling, plaintiffs request that defendants search emails for the phrase “Delay* /5 permanenc*.” (*See* Attachment 1 at 4.) Permanency is defined as a discharge from foster care to one of five permanent plans: reunification, adoption, guardianship, placement with a fit and willing relative, or another planned permanency living arrangement (APPLA).¹ A child’s time in ODHS’ custody is often referred to as time to permanency. Thus, plaintiffs’ search term is aimed to collect emails discussing any delays that prolonged a child’s time in or exit from ODHS custody, which is precisely the claim that this Court dismissed. Plaintiffs have alleged no other claim relating to timing for children to exit ODHS’ custody.

Aging Out

Lastly, this Court granted defendants’ motion to dismiss plaintiffs’ substantive due process claim related to the rights asserted by the aging-out sub-class. Plaintiffs’ complaint alleged three substantive due process rights on behalf of the aging-out class, and the Court dismissed all three:

[T]he “right to a connection with an adult resource who will maintain a stable, long-term relationship with the child after he or she ages out of the system,” Compl. ¶ 307(c)(iii); the “right to independent living services to prepare to exist foster care successfully,” *Id.* at ¶ 307(c)(i); and “the right to assistance to find lawful, suitable permanent housing that will not result in homelessness upon exit from foster care,” *Id.* at ¶ 307(c)(ii), would obviously be to the benefit of the child and to society at large . . . [and] would be a worthy goal for legislative action. But, unfortunately, they fall beyond the constitutional guarantees of the Fourteenth Amendment and must be dismissed.

(Dkt. 215 at 21.) Although the Court certified the aging-out subclass (Dkt. 275), plaintiffs have not asserted any claims other than those dismissed by this Court solely on behalf of the subclass.

Plaintiffs request email searches for three phrases related to aging-out and transition services. (*See* Attachment 1 at 13.) Plaintiffs also request emails from Rosemary Iavenditti, who is the Independent Living Program Services Coordinator for the Youth Transitions Program. Ms. Iavenditti is not part of the executive leadership team at Child Welfare; her job pertains exclusively to transition-age youth. Because plaintiffs have not alleged any specific claims on behalf of transition-age youth, other than those dismissed, the issue is not directly relevant to any live claims and is outside the scope of permissible discovery.

With the exception of these three areas, defendants agree to collect and produce emails based on plaintiffs’ requested searches and custodians. Defendants have already begun the email collection.

¹ *See* ODHS Child Welfare Federal Performance Measures Dashboard, Terminology, “Permanency,” available at: <https://www.oregon.gov/dhs/Data/Pages/CW-FPMs.aspx#def>.

Plaintiffs' Position

Rule 26 entitles Plaintiffs to discovery “regarding any nonprivileged matter that is relevant to any party’s claim or defense.” Defendants admit their “sole objection” to the disputed custodians and search terms proposed by Plaintiffs is that they are “related to claims that the Court dismissed.” But they do not—and cannot, as they must under Rule 26—demonstrate that those custodians and search terms are not relevant to any of Plaintiffs’ other live claims. Defendants instead merely argue that they should not have to produce discovery if they can allege its relevance to a dismissed claim—even if the discovery is relevant to another claim that has not been dismissed. That is insufficient under the Federal Rules.

Sara Fox

Sara Fox currently acts as Oregon Child Welfare’s Program Manager for Treatment Services. Defendants object to her email collection on the grounds that the Court dismissed “the substantive due process claim based on the right to a placement array or least restrictive setting,” and her “job[] pertain[s] specifically to developing treatment services and placement capacity for children needing higher levels of care.” Defendants only assert in conclusory fashion that she is “not relevant to any other claims in plaintiffs’ complaint.”

Plaintiffs’ Complaint brings claims on behalf of children with physical, intellectual, cognitive, or mental health disabilities, which this Court certified as the ADA Subclass. ECF 275 at 79. Plaintiffs allege that children in the ADA Subclass “are deprived of necessary and appropriate services and treatment to ensure equal access to a stable, family-like foster placement in the least restrictive environment.” ECF 1 at ¶ 15. As Program Manager of Child Welfare Treatment Services, Sara Fox is a relevant custodian. An email sent by Sara Fox herself on September 15, 2019 indicates that her responsibilities include leading initiatives to “create workgroup to develop BRS-level service support for foster parents,” “integrate mental health interventions into the treatment foster care system,” and “create therapeutic foster care.” Wyatt_DHS_2453939 at -941. Plaintiffs’ past email collection from Sara Fox further confirms her as a relevant custodian:

- A March 2019 email from Sara Fox to the Director of the Klamath County Juvenile Department’s Youth Inspiration Program indicates that “CW will be transitioning our youth out of the YIP program” due to “a lack of participation in community activities,” the “lack of incident reporting,” and the failure to “allow for means of egress in a timely manner.” Wyatt_DHS_2482262.
- An email received by Sara Fox in October 2018 discusses the placement of a five-year-old child in a behavioral residential services facility, with one individual on the email indicating that while “[t]he 2 year old children simply cannot enter BRS,” the five-year-old child is “a potential.” Wyatt_DHS_1534135.
- A December 2019 email from Jana McLellan to Sara Fox reveals that Oregon DHS is authorized to spend \$2,179.68 a night “to keep a kid out of [temporary lodging].” Wyatt_DHS_1907151, -152.

Defendants do not, and cannot argue, that email collection from Sara Fox would be overbroad under Rule 26. To the contrary, as Plaintiffs have demonstrated, Sara Fox’s email documents are relevant to Plaintiffs’ live claims.

Nancy Cassidy (f/k/a Nancy Allen)

Nancy Cassidy currently acts as Oregon Child Welfare's Placement Services Manager for Treatment Services. Defendants object to her email collection on the same grounds—that the Court dismissed “the substantive due process claim based on the right to a placement array or least restrictive setting,” and her “job[] pertain[s] specifically to developing treatment services and placement capacity for children needing higher levels of care.” Again, however, Defendants cannot refuse to produce discovery simply by articulating its relevance to a dismissed claim. Defendants do not explain how email collection from Nancy Cassidy is “not relevant to any other claims in plaintiffs’ complaint,” nor can they.

As explained above, Plaintiffs assert live claims on behalf of children with disabilities, and Plaintiffs’ past email collection from Nancy Cassidy confirms her as a relevant custodian:

- In January 2017, Nancy Cassidy received an email from Child Welfare's Assistant Treatment Services Program Manager regarding an 8-year-old child denied mental health services, who stated that “I am not able to express how concerned I am for the mental health needs of youth in this state and their ability to access the needed services in a timely manner.” Wyatt_DHS_0922225.
- In December 2018, Nancy Cassidy sent an email in response to a youth without a placement, stating that “we have too many kids headed for hotel including this one.” Wyatt_DHS_1084122.
- In February 2018, Nancy Cassidy received an email from two nurses in a children's hospital emergency department regarding a 9-year-old child who had been in the emergency room for three weeks and “never has a DHS worker supervising her” because “there is no plan for her (is what we are told every day)...She isn't going to school, interacting with peers, or seeing a therapist...DHS has abandoned a 9 year old, who is under DHS custody, in an emergency room. This is so unacceptable it should be on every news station.” Wyatt_DHS_2272445.

Glenda Marshall

Glenda Marshall currently acts as Oregon Child Welfare's FOCUS (Focused Opportunities for Children Utilizing Services) Coordinator for Treatment Services. According to OAR 413-330-1110, FOCUS funding, which is budgeted within DHS' Treatment Services Program, can be requested by caseworkers to provide services related to “facilitate the child or young adult's well-being by ensuring the child or young adult receives adequate and appropriate services to meet medical, physical, mental health, social, emotional-development, or educational needs.”

As explained above, Plaintiffs assert live claims on behalf of children with disabilities, and Plaintiffs’ past email collection from Glenda Marshall confirms her as a relevant custodian:

- In August 2019, Glenda Marshall attributed the decrease in youth placed out-of-state to the fact that “Nancy and I have been focused on this effort more than we have been able to in the past (I am basically not doing any FOCUS Coordinator work at all).” Wyatt_DHS_2538097.
- In December 2019, Glenda Marshall sent an email regarding a youth placed out-of-state in Idaho, noting that “[t]his is the kid that has been ready to discharge for months but DD says they don't have anything.” Wyatt_DHS_0226697.

- In March 2019, Glenda Marshall received an email regarding a youth in an out-of-state facility who “ha[s] done nothing in school for 4 months” because she was given a pre-algebra book and was told, despite her learning disorder in math, “that she had to complete the work in that book before she could do other work.” Wyatt_DHS_0655792.

“Placement – Array,” “Placement – Matching,” and “Institutional Placements” Search Terms

Plaintiffs’ most recent list of proposed search terms is based on search terms previously negotiated by the parties in early 2020, before this Court’s order on Defendants’ motion to dismiss. At that time, search terms were categorized under headings like “Placement – Array,” “Placement – Matching,” and “Institutional Placements.” Defendants’ objection now to the search terms under those category headings boils down to the fact that they are under those category headings. Defendants do not explain how the search terms to which they object are irrelevant to Plaintiffs’ claims. At most, they argue that the search terms’ category headings have to do with claims dismissed by this Court. Rule 26 does not permit Defendants to withhold relevant discovery on that basis.

The parties agreed on 70 search terms in 2020. Plaintiffs streamlined their current proposal to just 25 search terms, eliminating many in light of this case’s development. The search terms to which Defendants object remain relevant to the merits of Plaintiffs’ live claims. The search terms remaining under “Placement – Array,” for example, were designed to discover materials related to Defendants’ use of temporary placements. *See* ECF 275 at 29 (“When children are taken into custody, they are often left in temporary placements...Children are placed in hospitals, homeless shelters, refurbished delinquency institutions, [and] overcrowded temporary general foster homes.”). The search terms remaining under “Institutional Placements” were also designed to discover materials related to temporary placements. Finally, the search terms remaining under “Placement – Matching,” were designed to discover materials related to Defendants’ failure to provide children placement stability. *See* ECF 275 (“Placement instability...can be ‘jarring and disruptive to children’s emotional health and may leave them anxious, fearful and unable to form and benefit from potential supportive relationships.’”) (citing Puckett Report, at 12).

Rosemary Iavenditti and “Aging-Out” Search Terms

Rosemary Iavenditti currently acts as Independent Living Program (“ILP”) Services Coordinator for Oregon Child Welfare’s Youth Transitions Program. Defendants object to her email collection because “her job pertains exclusively to transition-age youth.” This Court certified the Aging-Out Subclass, which consists of “all members of the General Class who are or will be 14 years old or older, who are eligible for transition services and lack an appropriate reunification or permanency plan.” ECF 275 at 80. Defendants acknowledge that the Court certified the Aging-Out Subclass but make the conclusory pronouncement that the Aging-Out Subclass’ claims were all dismissed by this Court’s order on the motion to dismiss—which extraordinarily suggests that this Court would certify a Subclass that it had previously ruled had no live claims. That is not what this Court did. *See* ECF 275 at 70 (“Those dismissed claims are, plainly, not part of the Court’s analysis. However, with respect to the remaining claims, the Court concludes that Plaintiffs have made a sufficient showing of statewide policies and practices which expose the members of the proposed Aging-Out Subclass to a substantial risk of harm.”). Defendants’ objections to the Aging-Out search terms fail for the same reason. Rosemary Iavenditti and the “Aging-Out” search terms are relevant to the Aging-Out Subclass’ live claims.

As previously mentioned, Plaintiffs have significantly narrowed their custodian and search term list to align with the current needs of the case. Plaintiffs' proposal seeks only 25 search terms from 21 custodians, compared to the 70 search terms from 39 custodians agreed-upon in 2020. All of Plaintiffs' proposed custodians and the search terms that remain are relevant to proving the merits of Plaintiffs' claims, and Defendants' objections have no basis in the Federal Rules.

Respectfully submitted:

A BETTER CHILDHOOD

ELLEN ROSENBLUM
ATTORNEY GENERAL
FOR THE STATE OF OREGON

By: s/ Aarti Iyer

Marcia Robinson Lowry (*admitted pro hac vice*)
mlowry@abetterchildhood.org
Anastasia Benedetto (*admitted pro hac vice*)
abenedetto@abetterchildhood.org
Aarti Iyer (*admitted pro hac vice*)
aiyer@abetterchildhood.org
Tel: (646) 795-4456

DAVIS WRIGHT TREMAINE LLP

P. Andrew McStay, Jr., OSB #
033997
andymcstay@dwt.com
William D. Miner, OSB #043636
billminer@dwt.com
Tel: (503) 241-2300

PAUL SOUTHWICK LAW LLC

Paul C. Southwick, OSB #095141
paul@paulsouthwick.com
Tel: (503) 806-9517

DISABILITY RIGHTS OREGON

Emily Cooper, OSB #182254
ecooper@droregon.org
Thomas Stenson, OSB #152894
tstenson@droregon.org
Of Attorneys for Plaintiffs

By: s/ Lauren F. Blaesing

David B. Markowitz, OSB #742046
DavidMarkowitz@MarkowitzHerbold.com
Laura Salerno Owens, OSB #076230
LauraSalerno@MarkowitzHerbold.com
Harry B. Wilson, OSB #077214
HarryWilson@MarkowitzHerbold.com
Lauren F. Blaesing, OSB #113305
LaurenBlaesing@MarkowitzHerbold.com
Telephone: (503) 295-3085

*Special Assistant Attorneys General
for Defendants*

Vivek A. Kothari, OSB #182089
VivekKothari@MarkowitzHerbold.com
Of Attorneys for Defendants

Carla A. Scott, OSB #054725
carla.a.scott@doj.state.or.us
Sheila H. Potter, OSB #993485
sheila.potter@doj.state.or.us
Of Attorneys for Defendants

Updated
Search Terms

Subject	Search Terms	RFP/Custodian
Child Abuse and Neglect	<ul style="list-style-type: none"> Maltreatment OR abuse w/10 (“care” OR report* or screen* ORinvestigat* OR review* OR track*) 	10 th RFP, Request No. 22 10 th RFP, Request No. 35 10 th RFP, Request No. 36 <ul style="list-style-type: none"> Kate Brown, Governor of Oregon Rebecca Jones Gaston, former Director of Child Welfare Fariborz Pakseresht, Director of DHS Liesl Wendt, Deputy Director of DHS Lacey Andresen, Deputy Director of Program and Practice Aprille Flint-Gerner, Interim Director of Child Welfare Stacey Loboy – Program Manager, Foster Care and Youth Transitions Sara Fox – Program Manager, Treatment Services Nancy Allen – Placement Services Manager, Treatment Services Glenda Marshall – FOCUS Coordinator Deena Loughary – Program Manager, Safety Rosa Klein – Human Services Policy Advisor, Governor’s Office Heidi Beaubriand – Program Manager, Health & Wellness Services

Placement – Array	<ul style="list-style-type: none"> • (unavailab* OR “unable”) w/5 place* • (“high needs” or “special needs”) w/5 (home* OR placement* OR foster) 	<p>10th RFP, Request No. 2 10th RFP, Request No. 4 10th RFP, Request No. 5 10th RFP, Request No. 22 10th RFP, Request No. 35</p> <ul style="list-style-type: none"> • Kate Brown, Governor of Oregon • Rebecca Jones Gaston, former Director of Child Welfare • Fariborz Pakseresht, Director of DHS • Liesl Wendt, Deputy Director of DHS • Lacey Andresen, Deputy Director of Program and Practice • Rosemary Iavenditti – ILP Program & Youth Transition Services • Heidi Beaubriand – Program Manager, Health & Wellness Services • Sara Fox – Program Manager, Treatment Services • Nancy Allen – Placement Services Manager, Treatment Services • Glenda Marshall – FOCUS Coordinator • Billy Cordero – Director, Foster Family Recruitment & Retention • Aprille Flint-Gerner, Interim Director of Child Welfare • Stacey Loboy – Program Manager, Foster Care and Youth Transitions • Kim Keller – Permanency, Program Manager • Garth Taft – Assistant Program Director,
-------------------	--	---

		Resource Management Unit, Temporary Lodging
--	--	---

Placement – Matching	<ul style="list-style-type: none"> • “placement stability” • “placement instability” • “placement matching” • Delay* /5 permanenc* 	<p>10th RFP, Request No. 34</p> <ul style="list-style-type: none"> • Kate Brown, Governor of Oregon • Rebecca Jones Gaston, former Director of Child Welfare • Fariborz Pakseresht, Director of DHS • Liesl Wendt, Deputy Director of DHS • Lacey Andresen, Deputy Director of Program and Practice • Rosemary Iavenditti – ILP Program & Youth Transition Services • Heidi Beaubriand – Program Manager, Health & Wellness Services • Sara Fox – Program Manager, Treatment Services • Nancy Allen – Placement Services Manager, Treatment Services • Glenda Marshall – FOCUS Coordinator • Billy Cordero – Director, Foster Family Recruitment & Retention • Aprille Flint-Gerner, Interim Director of Child Welfare • Stacey Loboy – Program Manager, Foster Care and Youth Transitions • Kim Keller – Permanency, Program Manager • Garth Taft – Assistant Program Director, Resource Management
----------------------	--	--

		Unit, Temporary Lodging
--	--	-------------------------

Institutional Placements	<ul style="list-style-type: none"> • “institutionalization” • (“converted” OR “modified” OR “refurbished”) w/5 (“jail” OR “detention” OR “delinquency” OR “facility”) • temporary w/5 (placement* OR bed) • (“Youth” AND “Plac*”) w/5 (“Homeless” OR “Shelter”) 	<p>10th RFP, Request No. 2 10th RFP, Request No. 32</p> <ul style="list-style-type: none"> • Kate Brown, Governor of Oregon • Rebecca Jones Gaston, former Director of Child Welfare • Fariborz Pakseresht, Director of DHS • Liesl Wendt, Deputy Director of DHS • Lacey Andresen, Deputy Director of
--------------------------	---	---

- | | |
|--|---|
| | <p>Program and Practice</p> <ul style="list-style-type: none">• Rosemary Iavenditti – ILP Program & Youth Transition Services• Heidi Beaubriand – Program Manager, Health & Wellness Services• Sara Fox – Program Manager, Treatment Services• Nancy Allen – Placement Services Manager, Treatment Services• Glenda Marshall – FOCUS Coordinator• Aprille Flint-Gerner, Interim Director of Child Welfare• Stacey Loboy – Program Manager, Foster Care and Youth Transitions• Kim Keller – Permanency, Program Manager |
|--|---|

Caseworker – Caseloads	<ul style="list-style-type: none"> • (caseload OR workload) w/10 (standards) • (“Child Welfare League of America” OR CWLA) w/10 standards 	<p>10th RFP, Request No. 1 10th RFP, Request No. 23 10th RFP, Request No. 24 10th RFP, Request No. 25 10th RFP, Request No. 42 10th RFP, Request No. 43 10th RFP, Request No. 44 10th RFP, Request No. 45</p> <ul style="list-style-type: none"> • Kate Brown, Governor of Oregon • Rebecca Jones Gaston, former Director of Child Welfare • Fariborz Pakseresht, Director of DHS • Liesl Wendt, Deputy Director of DHS • Lacey Andresen, Deputy Director of Program and Practice • Rosemary Iavenditti – ILP Program & Youth Transition Services • Heidi Beaubriand – Program Manager, Health & Wellness Services • Sara Fox – Program Manager, Treatment Services • Nancy Allen – Placement Services Manager, Treatment Services • Glenda Marshall – FOCUS Coordinator • Aprille Flint-Gerner, Interim Director of Child Welfare • Kim Lorz – Program Manager, Training and Workforce Development • Katina Kaehler – Position Management Coordinator
------------------------	---	--

- Adriana Londin –
Position Management
- Nicole Sollenberger –
Position Management
Analyst

ADA	<ul style="list-style-type: none"> • ((“BRS”) OR (“Behavior Rehabilitation Services”)) w/5 “Place*” • (“PRTF”) OR (“PRTS”) w/ 5 “plac*” • Disab* w/5 “plac*” OR “service*” • “assessment*” w/in 5 (“late” OR “delay*”) • eval* w/in 5 (“late” OR “delay*”) • “Disabil*” w/in 10 “unavailable” 	<p>10th RFP, Request No. 2 10th RFP, Request No. 3 10th RFP, Request No. 4 10th RFP, Request No. 28 10th RFP, Request No. 29 10th RFP, Request No. 31 10th RFP, Request No. 40 10th RFP, Request No. 49</p> <ul style="list-style-type: none"> • Kate Brown, Governor of Oregon • Rebecca Jones Gaston, former Director of Child Welfare • Fariborz Pakseresht, Director of DHS • Liesl Wendt, Deputy Director of DHS • Lacey Andresen, Deputy Director of Program and Practice • Rosemary Iavenditti – ILP Program & Youth Transition Services • Heidi Beaubriand – Program Manager, Health & Wellness Services • Sara Fox – Program Manager, Treatment Services • Nancy Allen – Placement Services Manager, Treatment Services • Glenda Marshall – FOCUS Coordinator • Aprille Flint-Gerner, Interim Director of Child Welfare • Stacey Loboy – Program Manager, Foster Care and Youth Transitions • Kim Keller – Permanency, Program Manager
-----	---	---

		<ul style="list-style-type: none">• Garth Taft – Assistant Program Director, Resource Management Unit, Temporary Lodging• Billy Cordero – Director, Foster Family Recruitment & Retention
--	--	--

SGM	<ul style="list-style-type: none"> • (“LGBT*” OR “SGM” OR “transgender” OR “queer” OR “gay” OR “lesbian” OR “bisexual” OR “same-sex”) w/10 (place* OR match* OR “foster home” OR “foster parent” OR train*) • SMYRC • “PRIDE ERG” 	<p>10th RFP, Request No. 5 10th RFP, Request No. 38 10th RFP, Request No. 50 10th RFP, Request No. 51</p> <ul style="list-style-type: none"> • Kate Brown, Governor of Oregon • Rebecca Jones Gaston, former Director of Child Welfare • Fariborz Pakseresht, Director of DHS • Liesl Wendt, Deputy Director of DHS • Lacey Andresen, Deputy Director of Program and Practice • Rosemary Iavenditti – ILP Program & Youth Transition Services • Heidi Beaubriand – Program Manager, Health & Wellness Services • Sara Fox – Program Manager, Treatment Services • Nancy Allen – Placement Services Manager, Treatment Services • Glenda Marshall – FOCUS Coordinator • Aprille Flint-Gerner, Interim Director of Child Welfare • Billy Cordero – Director, Foster Family Recruitment & Retention • Stacey Loboy – Program Manager, Foster Care and Youth Transitions
-----	--	---

		<ul style="list-style-type: none">• Kim Keller – Permanency, Program Manager• Garth Taft – Assistant Program Director, Resource Management Unit, Temporary Lodging
--	--	---

Aging Out	<ul style="list-style-type: none"> • (Service* OR plac* OR plan*) w/5 (“teen*” OR “older” OR “transition age”) • (facilit* OR residential OR institut*) w/10 (teen* OR “older” OR “transition age”) • Homeless w/10 (teen* OR “older” OR “transition age”) 	<p>10th RFP, Request No. 15 10th RFP, Request No. 16 10th RFP, Request No. 18 10th RFP, Request No. 19 10th RFP, Request No. 20 10th RFP, Request No. 39 10th RFP, Request No. 52</p> <ul style="list-style-type: none"> • Kate Brown, Governor of Oregon • Rebecca Jones Gaston, former Director of Child Welfare • Fariborz Pakseresht, Director of DHS • Liesl Wendt, Deputy Director of DHS • Lacey Andresen, Deputy Director of Program and Practice • Rosemary Iavenditti – ILP Program & Youth Transition Services • Heidi Beaubriand – Program Manager, Health & Wellness Services • Sara Fox – Program Manager, Treatment Services • Nancy Allen – Placement Services Manager, Treatment Services • Glenda Marshall – FOCUS Coordinator • Aprille Flint-Gerner, Interim Director of Child Welfare • Billy Cordero – Director, Foster Family Recruitment & Retention • Stacey Loboy – Program Manager, Foster Care and Youth Transitions
-----------	---	--

- Kim Keller –
Permanency, Program
Manager
- Garth Taft – Assistant
Program Director,
Resource Management
Unit, Temporary
Lodging

Wyatt B. et al. v. Brown, et al.

January 18, 2023, Letter

Attachment 2: Defendants' Requested Alterations to Plaintiffs' Proposed Email Search

Defendants object to the following ODHS email custodians:

Sara Fox	Program Manager, Treatment Services Program
Nancy Cassidy (f/k/a Nancy Allen)	Placement Services Manager, Treatment Services Program
Glenda Marshall	FOCUS Coordinator, Treatment Services Program
Rosemary Iavenditti	Independent Living Program ("ILP") Services Coordinator, Youth Transitions Program

Defendants object to the following email search terms and phrases:

Placement – Array	(unavailab* OR “unable”) w/5 place*
	(“high needs” or “special needs”) w/5 (home* OR placement* OR foster)
Placement – Matching	“placement stability”
	“placement instability”
	Delay* /5 permanenc*
	“placement matching”
Institutional Placements	(“converted” OR “modified” OR “refurbished”) w/5 (“jail” OR “detention” OR “delinquency” OR “facility”)
	temporary w/5 (placement* OR bed)
	(“Youth” AND “Plac*”) w/5 (“Homeless” OR “Shelter”)
	“institutionalization”
Aging Out	(Service* OR plac* OR plan*) w/5 (“teen*” OR “older” OR “transition age”)
	(facilit* OR residential OR institut*) w/10 (teen* OR “older” OR “transition age”)
	Homeless w/10 (teen* OR “older” OR “transition age”)