

JENNY M. MADKOUR, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

Christopher A. Gilmore, OSB No. 980570

Senior Assistant County Attorney

501 S.E. Hawthorne Blvd., Suite 500

Portland, Oregon 97214

Telephone: (503) 988-3138

Facsimile: (503) 988-3377

Email: chris.gilmore@multco.us

*Of Attorneys for Defendants Multnomah County,
Michael Reese, Steven Alexander and Jeffrey Wheeler,*

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Portland Division

**THERESA DAVIS, RASHAWD DUHART,
ROBIN LUNDY, and SHAWN
BERGLUND**, individually and on behalf of all
similarly situated individuals,

Plaintiffs,

v.

MULTNOMAH COUNTY, a political
subdivision of the state of Oregon; **MICHAEL
REESE, STEVEN ALEXANDER,
JEFFREY WHEELER and JOHN DOES 1-
50**, acting in concert and in their individual
capacities,

Defendants.

Civil No. 3:20-cv-02041-SB

DEFENDANTS' ANSWER AND
AFFIRMATIVE DEFENSES TO
PLAINTIFFS' FIRST AMENDED
COMPLAINT

In Answer to Plaintiffs' First Amended Complaint, Defendants Multnomah County, Michael Reese, Steven Alexander and Jeffrey Wheeler (hereinafter "Defendants") admit, deny, and allege as follows:

1.

Defendants expressly deny any allegation contained in Plaintiffs' Complaint not expressly admitted herein.

2.

Defendants deny the allegations contained in paragraph 1 to the extent they assert that detainees or inmates "were repeatedly and horrifically tear gassed" or that "Night after night, Multnomah County jail deputies ignored cries for help, stopped responding to emergency calls, and left the men and women trapped in their cells to suffer." Defendants admit that in the summer of 2020 the United States of America was within a global pandemic and that inmates were housed in the Multnomah County Detention Center.

3.

Defendants admit that the subject matter of this case and the venue is properly within the jurisdiction of the United States District Court of Oregon and as such admit paragraphs 2 through 4.

4.

As to paragraph 5, Defendants admit that Plaintiff, Theresa Davis, is a resident of Multnomah County and is incarcerated in the Multnomah County Inverness Jail but otherwise deny that she "exhausted all available administrative remedies prior to bringing this action as described below in paragraphs 76 through 83." As to whether Plaintiff, Theresa Davis, is "a

member of the Class alleged herein” there has been no class certification and as such Defendants are without sufficient information to admit or deny.

5.

As to paragraph 6, Defendants admit that Plaintiff, Rashawd Duhart, was released from custody but without sufficient information to admit or deny whether he is a resident of Multnomah County. As to the allegations that Plaintiff, Rashawd Duhart is “a member of the Class alleged herein” there has been no class certification and as such Defendants are without sufficient information to admit or deny.

6.

As to paragraph 7, Defendants admit that Plaintiff, Robin Lundy is an individual incarcerated at Multnomah County Detention Center. As to whether Plaintiff, Robin Lundy, is “a member of the Class alleged herein” there has been no class certification and as such Defendants are without sufficient information to admit or deny and therefore deny the same. Deny that Plaintiff, Robin Lundy “has exhausted all available administrative remedies prior to bringing this action as described below in paragraphs 89-95.”

7.

As to paragraph 8, Defendants admit that Plaintiff, Shawn Berglund was incarcerated in the Multnomah County Detention Center. As to whether Plaintiff, Shawn Berglund, is “a member of the Class alleged herein” there has been no class certification and as such Defendants are without sufficient information to admit or deny and therefore deny the same. Without sufficient information to admit or deny whether Plaintiff Berglund is not currently incarcerated.

8.

As to paragraph 9, Defendants admit that Multnomah County operates a jail known as the Multnomah County Detention Center and that it is required to provide for the health and safety of the residents, pre-trial detainees and convicted inmates, housed therein.

9.

Admit paragraphs 10 through 12.

10.

Defendants deny that Plaintiffs may add other defendants during discovery to the extent those allegations are past the applicable statute of limitations or to the extent such an amendment is otherwise not permitted as a matter of law and as such deny paragraph 13 in its entirety.

11.

As to paragraph 14, Defendants admit that following the death of George Floyd “people began months of sustained protests in Portland,” that said protests focused at times on the “Multnomah County Justice Center” and that MCDC “houses the headquarters of the Portland Police Bureau, offices of the Multnomah County Sheriff’s Department, and the Multnomah County Detention Center, one of the two county jails.” Defendants are without sufficient information to admit or deny the number of persons and the location of persons involved in the protests on a nightly basis.

12.

Deny paragraphs 15 through 18.

13.

Without sufficient information to admit or deny paragraphs 19 and 20.

14.

As to paragraph 21, admit that the cells of MCDC are individual concrete rooms with solid metal doors, windows that do not open, and food ports which are slots through which food is passed to detainees and inmates which are typically closed. Admit that fresh air is brought in through the ventilation system but deny the remainder.

15.

Deny paragraph 22.

16.

As to paragraph 23, Defendants admit only that these statements are consistent with the website references contained in each footnote for the Centers for Disease Control and Prevention and the Salon media outlet respectively. Defendants admit that the impacts from tear gas may include “excessive tearing, burning, blurred vision and redness of the eyes, runny nose, burning and swelling within the nose, difficulty swallowing and drooling, chest tightness, coughing, choking sensation, wheezing, shortness of breath, burns and rash on the skin, nausea and vomiting.” Defendants are without sufficient information to admit or deny the remainder.

17.

As to paragraph 24, admit that “pepper-spray” and “OC” (oleoresin capsicum) aerosols are chemical compounds derived from chili peppers. Capsaicin is the compound that makes chili peppers spicy hot. There are powder forms of these compounds, as well. Admit that pepper-may cause irritation to the eyes and respiratory system. Without sufficient information to admit or deny whether the effects can last anywhere from 15 minutes to one hour or more.

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18.

Defendants are without sufficient information to admit or deny paragraphs 25 and 26.

19.

As to paragraph 27, Defendants admit that Deputy Kendall Clark was on duty and made her regular rounds but deny the remainder.

20.

As to paragraphs 28 through 30, without sufficient information to admit or deny.

21.

As to paragraph 31, Defendants admit that Jose Palomera was on duty, that he was aware of multiple emergency calls and that he did not answer all of the calls but are without sufficient information to admit or deny the remainder.

22.

As to paragraph 32, Defendants admit that “When Defendant Palomera made his required regular rounds, the men asked him to “let them out of their cells, to open the food ports, to get a doctor or nurse, or to get a sergeant.” Admit that Defendant Palomera responded “No” to some of the inquiries but deny that Defendant Palomera said “It’s just CS gas, there nothing I can do,” “Just take your asses to sleep.” Deny that Defendant Palomera threatened discipline. Admit that Defendant Palomera did not get a Sergeant or provide grievance forms. Admit that Defendant Palomera did not contact medical but instead explained that medical care was on the way. Admit that Defendant Palomera did not open the food ports but instead explained that doing so was a safety hazard. Deny that Defendant Palomera said “Because your skinny ass can fit through and slide out.”

23.

As to paragraph 33, Defendants deny that “the men were left all night to suffer on their own” but are otherwise without sufficient information to admit or deny that any detainee or inmate “lied on the ground, near the “little crack” to breathe,” was “bleeding profusely out of both nostrils,” had “asthma attacks,” or “thought they were going to die” .

24.

As to paragraph 34, Defendants admit that the statements reported in the Oregonian and the Willamette Week are generally consistent with statements made by Communications Director, Chris Liedle.

25.

As to paragraphs 35 and 36, without sufficient information to admit or deny.

26.

Defendants are without sufficient information to admit or deny the allegations in paragraph 37.

27.

As to paragraph 38, Defendants admit that Defendant Amy Hay was on duty and that detainees and inmates were asking for help but otherwise deny the remainder.

28.

As to paragraph 39, Defendants admit that detainees and inmates were seeking help, some pressed the emergency call buttons, and that said call button would ring an intercom at the desk of Defendant Hay, but otherwise deny the remainder.

29.

Defendants are without sufficient information to admit or deny paragraph 40.

30.

As to paragraph 41, Defendants admit that Defendant Aaron Van Houte was on duty and made his regular rounds but otherwise deny the remainder.

31.

Defendants are without sufficient information to admit or deny paragraph 42.

32.

Defendants deny paragraphs 43 through 47.

33.

As to paragraph 48, without sufficient information to admit or deny.

35.

As to paragraphs 49 through 56 asserting allegations in support of a class action Defendants deny and oppose the same and will offer any factual and legal arguments in support thereof as necessary and appropriate prior to certification by the court and consistent with FRCP 23.

36.

As to paragraphs 57 through 66, Defendants deny that any of the allegations are “similar circumstances” to the case at hand and as such are not proper or relevant allegations in support of *Monell* claims and otherwise deny that any involved a constitutional violation or deliberate indifference on behalf of Defendants and as such all of the allegations are denied in their entirety.

37.

As to paragraph 67 asserting allegations relating to Plaintiffs membership in a class, this allegation is denied in its entirety and any opposition or objections thereto with regard to class

certification will be provided at an appropriate time prior to certification by the court and consistent with FRCP 23.

38.

As to paragraph 68, Defendants admit that “Plaintiff Davis has been in the custody of Multnomah County since August 19th, 2019” and that she was in “8D of MCDC on June 26th, 2020” but are otherwise without sufficient information to admit or deny the remainder.

39.

Deny paragraph 69.

40.

As to paragraph 70, Defendants admit that Plaintiff, Theresa Davis, submitted a grievance and that the quotation correctly transcribes the “Complaint” portion of that grievance.

41.

As to paragraph 71, Defendants admit that Plaintiff, Theresa Davis, was transferred to the Multnomah County Inverness Jail but are without sufficient information to admit or deny that “every other woman” was also transferred.

42.

As to paragraph 72, Defendants are without sufficient information to admit or deny whether Plaintiff, Theresa Davis, “receive[d] a response to her July 25th grievance” but deny the remainder.

43.

As to paragraph 73, Defendants are without sufficient information to admit or deny that Plaintiff, Theresa Davis, met with a “corrections counselor” and as such deny. Defendants admit

that the grievance submitted by Plaintiff, Theresa Davis, was stamped with the text quoted therein.

44.

Defendants are without sufficient information to admit or deny paragraphs 74 through 76.

45.

As to paragraph 77, Defendants admit that Plaintiff, Rashawd Duhart, “was in the custody of Multnomah County from April 22nd, 2020 until his release on October 21st, 2020” and present in dorm 7D on July 20, 2020 but otherwise are without sufficient information to admit or deny the remainder.

46.

Defendants admit paragraph 78.

47.

As to paragraph 79, Defendants admit that “Plaintiff Lundy has been in the custody of Multnomah County since April 28th, 2020, housed in dorm 8A of MCDC” but otherwise are without sufficient information to admit or deny the remainder .

48.

As to paragraph 80, Defendants admit that “Plaintiff Lundy is incarcerated at Multnomah County Detention Center” but deny that “Plaintiff Lundy has exhausted all available administrative remedies.”

49.

Defendants admit paragraph 81 except are without sufficient information to admit or deny when Plaintiff, Robin Lundy, received a copy of the form.

50.

Defendants admit paragraphs 82 and 83 only to the extent it accurately states some but not all of the information that is on the applicable grievance form.

51.

As to paragraph 84, Defendants deny that “Jail staff were not immediately forthcoming with the appropriate process” otherwise are without sufficient information to admit or deny the remainder.

52.

Defendants admit paragraphs 85 and 86 only to the extent it accurately states some but not all of the information that is on the applicable grievance form.

53.

As to paragraph 87, admit that Plaintiff Berglund was incarcerated at MCDC during the summer of 2020 but are without sufficient information to admit or deny the remainder.

54.

As to paragraph 88, admit but without sufficient information to confirm or deny whether Plaintiff Berglund "continued to experience symptoms of tear gas exposure” and therefore deny the same.

55.

As to paragraph 89, deny that Plaintiff Berglund was exposed repeatedly to tear gas, every night and every day, without sufficient information to admit or deny whether he immediately experienced uncontrollable coughing and sneezing, and then headache, difficulty breathing, and vomiting or that he has experienced respiratory symptoms since that time.

56.

As to paragraph 90, without sufficient information to admit or deny.

57.

As to paragraph 91, Defendants re-allege the responses set forth above.

58.

As to paragraph 92, the allegations are conclusions of law and as such are an improper, to the extent a response is required Defendants admit Plaintiffs are afforded whatever protections as may apply under state law and the 8th and 14th Amendments but otherwise deny.

59.

Defendants deny paragraphs 93 through 98.

60.

As to paragraph 99, Defendants re-allege the responses set forth above.

61.

As to paragraph 100 the allegations are conclusions of law and as such are improper, to the extent a response is required Defendants admit Plaintiffs are afforded whatever protections as may apply under the 8th and 14th Amendments but otherwise deny.

62.

Defendants deny paragraphs 101 through 104.

63.

As to paragraph 105, Defendants re-allege the responses set forth above.

64.

Defendants deny paragraphs 106 through 109.

65.

As to paragraph 110, Defendants re-allege the responses set forth above.

66.

Defendants deny paragraphs 111 through 118.

67.

As to paragraph 119 realleging the previous paragraphs, Defendants reallege the responses set forth above.

68.

Defendants deny paragraphs 120 through 123.

BY WAY OF FURTHER ANSWER AND AFFIRMATIVE DEFENSES TO
PLAINTIFFS' FIRST AMENDED COMPLAINT, DEFENDANTS' ALLEGE AS FOLLOWS:

69.

**FIRST AFFIRMATIVE DEFENSE
(Lack of Standing)**

Plaintiffs lack standing to bring this class action. Specific objections to certification of the class will be raised in a timely manner at such time as Plaintiffs seek certification from this Court. Because the alleged class representatives did not properly exhaust the available administrative remedies, Plaintiffs failed to properly allege facts that are sufficient to create a class under FRCP 23.

70.

**SECOND AFFIRMATIVE DEFENSE
(Qualified Immunity for Individual Defendants)**

Qualified immunity immunizes the individually named defendants in this case from liability because: (1) the individuals were not 'deliberately indifferent' to the inmates and

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FIRST AMENDED COMPLAINT

detainees and as such their conduct was not unconstitutional, and (2) there is no clearly established case law that would place Defendants on notice that the allegations in this case are unconstitutional. There is no case providing notice on how to respond to tear gas that enters the air system in a jail from the outside during nightly protests while there is an ongoing, deadly, and contagious global pandemic. The individual Defendants in this case are entitled to qualified immunity.

71.

**THIRD AFFIRMATIVE DEFENSE
(Failure to State a Claim Under *Monell* Claim in the Absence of a Constitutional Violation)**

In the absence of any underlying constitutional violation there can be no *Monell* claim. As a result Plaintiffs failed to state a claim for relief under *Monell*.

72.

**FOURTH AFFIRMATIVE DEFENSE
(Failure to State a Claim for Supervisory Liability Based on *Respondeat Superior*)**

To the extent Plaintiffs assert any claims for supervisory liability based on a theory of respondeat superior, there is no such liability under 42 U.S.C. §1983 and as such Multnomah County, Sheriff Michael Reese, Chief Deputy Steven Alexander and Captain Jeffrey Wheeler are not liable as a matter of law and as such Plaintiffs have failed to state a claim for supervisory liability.

73.

**FIFTH AFFIRMATIVE DEFENSE
(Failure to State a Pattern or Practice Under *Monell*)**

Plaintiffs failed to state a claim under *Monell* against the entity, Multnomah County, and any individual Defendants in their supervisory capacity including Sheriff Michael Reese, Chief

Deputy Steven Alexander, and Captain Jeffrey Wheeler. Specifically paragraphs 63 through 72 assert a history of alleged constitutional violations resulting in the death of inmates for methadone overdose, opioid withdrawal, blunt force trauma, pneumonia, and drug overdose. None of the cases that are the basis for the *Monell* claim are similar to the circumstances of this case and as a result the *Monell* claim fails to properly state a claim.

74.

**SIXTH AFFIRMATIVE DEFENSE
(Failure to Exhaust Administrative Remedies Under PLRA)**

Under the Prison Litigation Reform Act, Plaintiffs are required to exhaust all administrative remedies as a prerequisite to initiating a lawsuit.

Plaintiff Theresa Davis failed to exhaust the available administrative remedies as follows:

- The action in this case requests relief from the infiltration of tear gas between May 29, 2020 through July 31, 2020.
- Plaintiff filed a single grievance with regard to the infiltration of tear gas into the jail on July 24, 2020.
- Under the rules governing a grievance, the inmate or detainee is required to:
 - Be specific and factual identifying dates, times, persons involved and the location of the incident;
 - File a grievance within 5 days of the event;
 - Only one grievance can be filed on a single incident;
 - If there is no response to a grievance within the allotted time the inmate may consider the grievance denied;
 - An inmate may appeal a response within five days of the date it is returned or otherwise denied;
 - The appeal shall be to the Facility Commander who has ten working days to respond;

- Final appeal is to the Chief Deputy of Corrections;
 - File a timely appeal at every available grievance level even if you are transferred to a different facility; and
 - Any time limits on appeals are waived only if the grievance involves allegations of sexual abuse.
- Any issue relating to medical issues must be filed as a Medical Grievance with Corrections Health.
 - Any issues involving “an imminent threat to the safety of an inmate” must be submitted as an Emergency Grievance.
 - Plaintiff Theresa Davis failed to:
 - Identify in her grievance any delay in medical care or that it was inadequate;
 - Identify any physical injury that is sufficient to sustain a claim under the 8th or 14th Amendment as alleged in the First Amended Complaint;
 - Identify any of the medical issues listed in paragraph 75 of the First Amended Complaint;
 - File any grievance regarding any events involving the infiltration of gas other than the single grievance filed on July 24, 2020;
 - File an appeal of her single grievance;
 - File a medical grievance relating to any medical issues regarding the effects of tear gas; and
 - File an emergency grievance regarding any issues involving an imminent threat to the safety of an inmate.

As a result of the above, Plaintiff Theresa Davis did not exhaust the administrative remedies under the applicable grievance process for the Multnomah County Detention Center. This failure requires dismissal of this First Amended Complaint as to Plaintiff Theresa Davis.

Plaintiff Robin Lundy failed to exhaust the available administrative remedies as follows:

- The action in this case requests relief from the infiltration of tear gas between May 29, 2020 through July 31, 2020.
- Plaintiff filed a single grievance with regard to the infiltration of tear gas into the jail on October 3, 2020.
- Under the rules governing a grievance, the inmate or detainee is required to:
 - Be specific and factual identifying dates, times, persons involved and the location of the incident;
 - File a grievance within five days of the event;
 - Only one grievance can be filed on a single incident;
 - If there is no response to a grievance within the allotted time the inmate may consider the grievance denied;
 - An inmate may appeal a response within five days of the date it is returned or otherwise denied;
 - The appeal shall be to the Facility Commander who has ten working days to respond;
 - Final appeal is to the Chief Deputy of Corrections;
 - File a timely appeal at every available grievance level even if you are transferred to a different facility; and
 - Any time limits on appeals are waived only if the grievance involves allegations of sexual abuse.
- Any issue relating to medical issues must be filed as a Medical Grievance with Corrections Health.
- Any issues involving “an imminent threat to the safety of an inmate” must be submitted as an emergency grievance.

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Plaintiff Robin Lundy failed to:

- File a timely grievance regarding any events involving the infiltration of gas within the time period that is the subject of this First Amended Complaint;
- Identify any physical injury that is sufficient to sustain a claim under the 8th or 14th Amendment as alleged in the First Amended Complaint;
- Identify most of the medical issues listed in paragraph 88 of the First Amended Complaint;
- File a medical grievance relating to any medical issues regarding the effects of tear gas; and
- File an emergency grievance regarding any issues involving an imminent threat to the safety of an inmate.

As a result of the above, Plaintiff Robin Lundy did not exhaust the administrative remedies under the applicable grievance process for the Multnomah County Detention Center. This failure requires dismissal of this First Amended Complaint as to Plaintiff Robin Lundy.

Plaintiff Rashawd Duhart did not exhaust any remedies under the PLRA because he was not in custody at the time of the filing of the First Amended Complaint. As such, Plaintiff Rashawd Duhart cannot be a representative of the 7D subclass of male detainees and inmates to the extent those other unnamed inmates or detainees are in custody and failed to exhaust the available administrative remedies.

75.

**SEVENTH AFFIRMATIVE DEFENSE
(Failure to State Claim for Emotional Injury)**

The Prison Litigation Reform Act (“PLRA”) bars a prisoner's action for compensatory damages based upon mental or emotional injury suffered while in custody if the “physical injury” is *de minimis*. 42 U.S.C.A. § 1997e(e).

76.

**EIGHTH AFFIRMATIVE DEFENSE
(No Punitives)**

There is no right to punitive damages against an entity under 42. U.S.C. §1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S. Ct. 2748, 2762, 69 L. Ed. 2d 616 (1981).

77.

**NINTH AFFIRMATIVE DEFENSE
(Discretionary Immunity)**

Defendants developed policies and protocols within the Multnomah County Detention Center for purposes of housing inmates, responding to emergencies and addressing the deadly and contagious COVID 19 global pandemic. To the extent any claim for negligence challenges those policy decisions Defendants are entitled to discretionary immunity.

78.

**TENTH AFFIRMATIVE DEFENSE
(Riot Immunity)**

Pursuant to the Oregon Tort Claims Act a local government is immune from suit for “Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.” To the extent that tear gas was required to prevent a “riot, civil commotion or mob action,” Defendants are immune from suit.

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79.

**ELEVENTH AFFIRMATIVE DEFENSE
(Justification)**

To the extent there are any allegations or claims relating to the use of force, such force was justified pursuant to ORS 161.267 to maintain order and discipline in the jail or to prevent serious physical injury to the deputies and other inmates or detainees.

80.

**TWELFTH AFFIRMATIVE DEFENSE
(Oregon Tort Claims Act Limits on Damages)**

The Oregon Tort Claims Act (“OTCA”) is the exclusive remedy for any tort including negligence. The OTCA provides limitations on monetary damages for personal injury as provided under ORS 30.272 that apply to this case with regard to any state law claims. In this case there is a single limit as to damages to the extent there is a continuing tort.

81.

**THIRTEENTH AFFIRMATIVE DEFENSE
(Comparative Fault)**

Plaintiffs’ claims are subject to the comparative fault statute under ORS 31.600 for failing to take reasonable care in addressing any effects from the tear gas including but not limited to:

- Failing to take reasonable steps in requesting emergency health concerns to jail staff or medical staff in a timely manner;
- Failing to take reasonable steps in requesting any medical care that may be needed to address ongoing physical or mental health injuries; and

- Failing to take reasonable steps in filing a timely grievance of incidents involving a failure to address tear gas within the jail.

82.

**FOURTEENTH AFFIRMATIVE DEFENSE
(Right to Amend)**

Defendants reserve the right to amend its answer and add other affirmative defenses through and after discovery.

WHEREFORE, having fully answered Plaintiffs' First Amended Complaint, Defendants respectfully pray for the following:

1. That Judgment enter in Defendants favor and the matter be dismissed with prejudice;
2. That Defendants be granted its costs and recoverable attorney's fees; and
3. That the Court grant Defendants such relief as appropriate in equity and in law.

DATED this 7th day of December, 2022.

Respectfully submitted,

JENNY M. MADKOUR, COUNTY ATTORNEY
FOR MULTNOMAH COUNTY, OREGON

/s/ Christopher A. Gilmore

Christopher A. Gilmore, OSB No. 980570
Senior Assistant County Attorney
*Of Attorneys for Defendants Multnomah County,
Michael Reese, Steven Alexander and Jeffrey Wheeler*