

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re: WATTS COORDINATED
PRETRIAL PROCEEDINGS

)
) Master Docket Case No. 19-cv-01717
)
) Judge Franklin U. Valderrama
)
) Magistrate Judge Sheila M. Finnegan
)

**DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFFS’ MOTION TO BAR
THE TESTIMONY OF MICHAEL FITZGERALD AND JOHN HENEGHAN**

Defendants City of Chicago (“City”), Philip Cline, Debra Kirby, and Karen Rowan, Alvin Jones, Robert Gonzalez, Miguel Cabrales, Douglas Nichols, Jr., Manuel Leano, Brian Bolton, Kenneth Young, Jr., Elsworth Smith, Jr., Ronald Watts and Kallatt Mohammed, for their Response in Opposition to Plaintiffs’ Motion to Bar the Testimony of Michael Fitzgerald and John Heneghan, state as follows:

BACKGROUND AND ARGUMENT

During fact discovery, plaintiffs issued a Rule 30(b)(6) notice of deposition on a variety of topics regarding the City’s policies and practices. (Ex. 1, Plaintiffs’ Rule 30(b)(6) Notice at 3). Relevant to this motion, paragraph 13 of plaintiff’s notice stated, in part, as follows:

13. The City’s (a) written and unwritten policies, practices, and customs and (b) training in effect from 1999-2011, relating to each of the following:
 - a. Preparation and approval of arrest reports and related reports (such as vice case reports and inventory sheets), including but not limited to the role of each officer who is listed on such a report, as well as who is supposed to sign such reports, and the use of quotation marks on reports.
 - b. The use in official reports of abbreviations such as R/O and A/O instead of listing participating officers by name.
 - c. Completion of the “Complaint for Preliminary Examination,” including but not limited to the role of each officer whose signature appears on the Complaint.
 - f. Responsibilities of tactical teams operating in the Second District and/or the Ida B. Wells housing development.

- g. Responsibilities of sergeants overseeing tactical teams operating in the Second District and/or the Ida B. Wells housing development.
- j. The collection, inventory, and testing of suspected narcotics.
- k. The collection and inventory of money from individuals who are arrested or detained.

The City produced Lt. Michael Fitzgerald as its representative to discuss these topics (subject to a few exceptions) at a deposition in compliance with Rule 30(b)(6). Plaintiffs took Lt. Fitzgerald's deposition on March 6, 2024 and he answered all of plaintiff's questions as reflected in his 223 page transcript. (See Ex. 2, Lt. Fitzgerald's deposition transcript).

In addition, plaintiffs sought a City representative to discuss the City's policies and practices regarding the "fingerprinting of evidence in narcotics cases, including, but not limited to, fingerprinting packages and or baggies that contain alleged narcotics." The City produced Evidence Technician John Heneghan on that topic in a state court case, *Waddy v. City*, 19 L 10035, but the parties agreed that his testimony would apply to the Watts Coordinated Proceedings, including this case. Plaintiffs took E.T. Heneghan's deposition on November 7, 2003 and he answered all of plaintiff's questions as reflected in his transcript. (See Ex. 3, E.T. Heneghan's deposition transcript).

Defendants' opinion witness disclosures were due on May 13, 2024 in this case. Defendants do not necessarily think that Lt. Fitzgerald and E.T. Heneghan's Rule 30(b)(6) testimony constitutes expert testimony that must be disclosed under Rule 26(a)(2)(C). However, out of an abundance of caution, defendants disclosed Lt. Fitzgerald and E.T. Heneghan's Rule 30(b)(6) testimony as potential opinion testimony under Rule 26(a)(2)(C) in the event plaintiffs objected to their testimony at trial as opinion testimony and claimed it was not disclosed. (Ex. 4, defendants' Rule 26(a)(2) disclosures). During the meet and confer process, defendants notified plaintiffs of their reason for this disclosure.

Plaintiffs have now filed a Motion to Bar any opinion testimony of Lt. Fitzgerald and E.T. Heneghan. However, Plaintiffs do not raise any *Daubert* issues *per se* that would require that this motion be brought at this time under the Court's scheduling order. (Dkt. 270). More specifically, plaintiffs do not contend that Lt. Fitzgerald and E.T. Heneghan are not qualified or employed an unreliable methodology. Instead, plaintiffs claim that any opinion testimony should be barred because they are not on "notice" of what expert testimony might be elicited and they "can only speculate about what these witnesses' opinions may be." (Motion at 3, 6).

Plaintiffs' motion should be denied. Plaintiffs are obviously on notice of Lt. Fitzgerald and E.T. Heneghan's testimony: they drafted and issued the Rule 30(b)(6) notice, took the depositions, asked the questions at the depositions, and ordered the transcripts of the depositions. Plaintiffs do not need to speculate about what opinions, if any, that these witnesses might offer, as they issued the notice and elicited the testimony.

Moreover, since plaintiffs framed the Rule 30(b)(6) topics and asked the Rule 30(b)(6) questions, they do not need to guess whether or not any of Lt. Fitzgerald and E.T. Heneghan's testimony actually constitutes expert testimony under Rule 702. They know because they made the inquiries. If called to testify at trial, Lt. Fitzgerald and E.T. Heneghan's testimony will be limited to the topics outlined in plaintiffs' Rule 30(b)(6) notice. As noted, defendants do not necessarily believe that testimony is expert testimony, but it was reasonable and appropriate for defendants to disclose Lt. Fitzgerald and E.T. Heneghan under Rule 26(a)(2)(C) out of an abundance of caution to preclude the type of argument plaintiffs now advance before the court. The law does not permit plaintiffs to issue a Rule 30(b)(6) notice and ask questions of a corporate representative on the one hand, but then turn around and preclude defendants from relying on that witness at trial under the guise of a failure to disclose on the other hand.

The cases plaintiffs cite do not deal with Rule 30(b)(6) witnesses at all or have anything to do with Rule 30(b)(6). As such, they are inapposite and irrelevant. Defendants' disclosures were more than sufficient to put plaintiffs on adequate notice, as the disclosures included the very testimony that plaintiffs' elicited on the specified topics. Moreover, even if defendants' Rule 26 disclosures *could* be deemed deficient (and they should not be), any such deficiencies are overcome by a lack of prejudice, surprise, or bad faith, rendering them harmless.

Plaintiffs cite *Martinez v. Garcia*, 2012 WL 12878716, at *1, and *DeLeon-Reyes v. Guevara*, 2023 WL 358834, in an attempt to support their position that inadequate Rule 26 disclosures require attorneys to engage in "speculation" and "guesswork," even though neither of those cases involved a Rule 30(b)(6) deposition that the plaintiffs wrote, noticed, and took. (Motion at p. 5-6). *Martinez* and *DeLeon-Reyes* are not instructive on the facts of this case. Here, plaintiff's Rule 30(b)(6) notice, Lt. Fitzgerald and E.T. Heneghan's depositions, and/or defendants' disclosures provide the full list of topics that specify where testimony *may* be considered opinion testimony, if any. Further, plaintiffs are fully aware of how both Lt. Fitzgerald and E.T. Heneghan will testify on the specified topics, as well as the basis for their testimony. Indeed, it was plaintiffs who introduced these topics during the depositions and it was plaintiffs who elicited the answers from Fitzgerald and Heneghan on the topics. (Ex. 2, dep. of Michael Fitzgerald at 42:18–43:21, 73:3–80:6, 111:11–23, 111:8–118:19, 168:6–21, 197:3–17, 200:9–19, 218:9–17 (arrest reports), at 43:22–51:24, 53:11–54:15, 57:16–59:17, 69:10–71:17, 101:3–107:25, 129:7–12, 209:4–214:17 (vice case reports), at 174:17–179:1, 181:21–187:20, 190:11–192:6, (inventory).

In short, the "guesswork" that was alleged in *Martinez* is absent here. Instead, Plaintiffs undoubtedly gathered more (and more detailed) information in their depositions of Lt. Fitzgerald and E.T. Heneghan than they "would have received in a typical Rule 26(a)(2)(C) disclosure."

Gecker as Tr. for Collins v. Menard, Inc., No. 16 C 50153, 2019 WL 4166859, at *2 (N.D. Ill. Sept. 3, 2019) (finding that because the defendant deposed Dr. Rees, any Rule 26 disclosure question “has not stymied Defendant's ability to mount a defense to Plaintiff's claims in this case. All parties are *on notice* as to the anticipated subject matter and scope of Dr. Rees's potential trial testimony,” making any Rule 26 violation “harmless.”) In their depositions and from plaintiff’s Rule 30(b)(6) notice, both Lt. Fitzgerald and E.T. Heneghan give ample testimony to put plaintiffs on notice of the subject matter on which they may present evidence under Rules 702, 703 or 705, if any, as well as the facts and opinions to which they are expected to testify. Accordingly, to the extent plaintiff or defendants elicit testimony from Lt. Fitzgerald or E.T. Heneghan that would require a Rule 26(a)(2)(C) disclosure, such disclosure was made abundantly clear via the disclosures and Lt. Fitzgerald’s and E.T. Heneghan’s testimony during their depositions.

In sum, Lt. Fitzgerald and E.T. Heneghan were both identified and deposed and both provided testimony specifically requested by plaintiffs’ 30(b)(6) notice. Defendants’ Rule 26 disclosures were proper under Rule 26(a)(2)(C)(ii), as the witnesses were disclosed with a full list of topics upon which they might testify. Although Lt. Fitzgerald’s and E.T. Heneghan’s testimony is Rule 30(b)(6) fact testimony and likely not opinion testimony, defendants made these Rule 26(a)(2)(C) disclosures out of an abundance of caution to prevent the very type of argument plaintiffs are now raising. For all the foregoing reasons, defendants request that this Court deny Plaintiffs’ Motion in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **July 1, 2024**, I electronically filed the foregoing **Defendants' Response in Opposition to Plaintiffs' Motion to Bar or Limit the Testimony of Michael Fitzgerald and John Heneghan** with the Clerk of the Court using the ECF system, which sent electronic notification of the filing on the same day to counsel of record.

s/ Daniel M. Noland
