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

MADELINE MENDOZA,	)	
	)	
Plaintiff,	)	
	)	No. 23-cv-2441
-vs-	)	
	)	*(Judge Durkin)*
REYNALDO GUEVARA, *et al.*,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION FOR ENTRY OF A PROTECTIVE ORDER

NOW COME, Defendant Guevara by his attorneys of record, and moves this Court to enter a Protective Order under Fed. R. Civ. P.26(c) and (d). In support of Defendant's Motion Defendant states as follows:

PROCEDURAL BACKGROUND

This case involves the convictions of Plaintiffs, Madeline Mendoza ("Mendoza") and Marilyn Mulero ("Mulero") (collectively "Plaintiffs"), for the murders of Hector Reyes and Jimmy Cruz on May 12, 1992. All parties previously disclosed Jaqueline Montanez ("Montanez") as a witness subject to testify at a deposition and/or trial in their respective R. 26(a) disclosures. Montanez is a friend, fellow gang member, and criminal co-defendant of both Plaintiffs and, like Plaintiffs, was arrested, tried, and convicted for the Reyes/Cruz murders.

On October 17, 2024, Mulero issued a subpoena and notice of deposition setting Montanez's deposition for December 3, 2024. *See* Ex. 1 (Plaintiffs' Subpoena and Notice for Deposition). Along with this notice, Plaintiffs also attached a lengthy sworn affidavit that their counsel procured from Montanez which, in effect, recants prior inculpatory statements she made about Plaintiffs and offers putatively exculpating assertions about the involvement of both

Plaintiffs in these murders. *See* Ex. 2 (Affidavit of J. Montanez). Moreover, Montanez attributes her previous inculpatory statements about both Plaintiffs to police coercion committed by Defendants, including by threats of letting rival gang members commit violence on her and by promising her that she would obtain a lesser criminal sentence. *Id.* Simply stated, there is absolutely no question that Montanez is firmly aligned with Plaintiffs and has apparently given Plaintiffs' attorneys unfettered access to her for the purposes of this case.

After receiving these materials and in accord with the procedures that have been followed by numerous other Courts in this District (both in cases involving Defendant Guevara and others), Defendants requested that Plaintiffs agree that Defendants be given priority over questioning Montanez first at her deposition, as she is an adverse witness to Defendants and firmly aligned with Plaintiffs. During Local Rule 37.2 communications which occurred both over the phone and via e-mail communications, Plaintiffs refused this request. Under well-established law, this Court should grant this protective order and order that Montanez's deposition must proceed with Defendants being permitted to question Montanez first at her upcoming deposition.

FACTUAL BACKGROUND

During the course of the Reyes and Cruz homicide investigation, Defendants located Jacqueline Montanez, after being informed of her involvement with the murders of Hector Reyes and Jimmy Cruz on May 14, 1992. Montanez later stated to police that she walked up behind Hector and shot him once in the back of the head. She also indicated that Plaintiff Mendoza signaled Plaintiff Mulero, at which point Plaintiff Mulero shot Jimmy Cruz in the back of the head. Montanez, along with the Plaintiffs, Mulero and Mendoza, then returned to their car. *See* Ex. 3 (Supplementary Report Re: Jacquline Montanez). Among other claims, Plaintiffs allege all of

Montanez's statements to police were fabricated and/or otherwise coerced by Defendants. See *Mulero v Guevara*, 23 CV 4795, Dckt. No. 1; *Mendoza v. Guevara*, 23 CV 2441, Dckt. No. 26.

Contrary to the version of events she gave to the police in 1992, Montanez's October 10, 2024, Declaration procured by Plaintiffs' counsels states that while Plaintiff Mulero and Plaintiff Mendoza were present, she alone shot and killed Hector Reyes and Jimmy Cruz. Ex. 2, ¶¶ 8-16. Montanez further asserts she "never told Marilyn Mulero or Madeline Mendoza that [she] planned to shoot or kill either Hector Reyes or Jimmy Cruz." *Id.* at ¶ 17. Montanez claims, "Neither Marilyn Mulero or Madeline Mendoza had any knowledge that [I] planned to shoot or kill either Hector Reyes or Jimmy Cruz." *Id.* at ¶ 18.

LOCAL RULE 37.2 COMPLIANCE

On October 24, 2024, and October 29, 2024, the parties exchanged correspondence regarding deposition priority of Jacqueline Montanez. Ex. 4. Pursuant to Local Rule 37.2 the parties held a meet and confer over the telephone on November 19, 2024, to explore resolution of this dispute, to no avail. Plaintiffs refused to allow Defendants to question Montanez first at her deposition. As such, Defendant respectfully seeks the Court's intervention to adjudicate the deposition priority issues here by applying the well-established witness alignment process outlined below.

ARGUMENT

I. Defendants Should Be Allowed First Priority In Questioning Montanez At Her Deposition.

Montanez is not only a friend and fellow gang member of both Plaintiffs but is a central witness in this case and one for whom Plaintffs have repeatedly relied upon to establish their claims of misconduct against Defendants. *See e.g. Mulero v Guevara*, 23 CV 4795, Dckt. No. 1, ¶¶ 3, 22, 23-25, 32-33, 36, 39, 43-47, 50, 109, 114-115; *Mendoza v. Guevara*, 23 CV 2441, Dckt. No. 26 at

¶¶ 13-19. Montanez has given access and a recantation affidavit to Plaintiffs' attorneys and provided putatively exculpating statements in support of Plaintiffs and has blamed Defendants for her prior inculpatory statements. Under well-established law, Plaintiffs are not allowed to simply fire off a deposition notice and lead a favorable witness down the proverbial primrose path to lock in her favorable testimony; rather, as the adverse party, Defendants are allowed first crack at Montanez to test her accusations against them and support for Plaintiffs.

A. That Plaintiffs Fired Off A Deposition Notice First Is Irrelevant

At the outset, the fact that Plaintiffs fired off a subpoena for Montanez has no bearing on whether they should be allowed to ask questions of the deponent first.

Until approximately 1970, "priority in depositions went to the party first serving a notice of examination, absent compelling reasons to the contrary." *See Occidental Chemical Corp. v. OHM Remediation Services*, 168 F.R.D. 13, 14. This has not been the law for over the last fifty years[1]. The change to the federal rules in 1970 abolished *any* sort of "race" to initiate discovery as a means to establish priority. *See* Fed. R. Civ. P. 26(d), advisory committee comments (1970) ("[I]f

[1] *See* Fed. R. Civ. P. 26(d) advisory committee's note (1970) ("The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery" and noting the "priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects."); *Renlund v. Radio Systems Corporation*, 2021 WL 6881287, at *6 (D.Minn. 2021) ("The Court turns first to Plaintiffs' argument that they are entitled to "priority" in taking Defendant's employees' depositions because they noticed them first. But "the 'priority rule' ... —i.e., the first to ask, wins—no longer controls the sequencing of depositions in federal court. And it hasn't been around for quite some time."); *Blackmon v. Bracken Construction Company, Inc.*, 2020 WL 6065520, at *3 (M.D. La. 2020) ("The Court will not recount each side's representations as to the superior timing and legitimacy of its deposition requests. That information is irrelevant, as the 'priority rule' relied on by the parties—i.e., the first to ask, wins—no longer controls the sequencing of depositions in federal court. And it hasn't been around for quite some time. Indeed, the advisory committee notes from 1970—50 years ago— clearly indicate that the priority rule is no longer recognized following the addition of Rule 26(d)."); *Meisenheimer v. DAC Vision, Inc.*, 2019 WL 6619198, at *3 (N.D. Tex. 2019) (rejecting the movant's attempt to invoke the "non-existent he-who-serves-the-first-notice-can-dictate-the-order-of-depositions ... rule[ ]"); *Eckweiler v. NiSource, Inc.*, 2018 WL 6011872, at *2 (N.D. Ind. 2018) ("In the past, priority to question a witness was given to the party who issued the notice of deposition. This rule was abolished in the Advisory Committee Notes to the 1970 Amendments..."); *Brady v. Grendene USA, Inc.*, 2014 WL 4925578, at *4 (S.D. Cal. 2014)("Thus it is clear that Rule 26(d) abolishes the deposition priority rule of the past.");

both parties wish to take depositions first a race results. But the existing rules on notice of deposition create a race with runners starting from different positions.").

B. Witness Alignment Is The Governing Standard For Determining Priority In Questioning A Third Party Witness And That Standard Favor Defendants.

Courts that have decided deposition priority under Fed. R. Civ. P. 26(d) have held that deposition priority should generally be resolved by determining which party intends to affirmatively rely upon the witness to prove their case in chief and then permitting the *opposing party* to ask questions of this witness first. *See, e.g., Lumpkin v. Kononov*, 2013 WL 1343666, at *1-2 (N.D. Ind. 2013). In *Lumpkin*, a plaintiff first issued a deposition notice of the sole non-party occurrence witness to an automobile accident. *Id.* at *1. The defendant objected to this notice and petitioned the court to be able to take priority in deposing this third-party witness because this witness was identified as being aligned with the plaintiff and because he had given prior statements supportive of the plaintiff's claims to plaintiff's attorney. *Id.* Defendant argued that the plaintiff's attorney "already had the opportunity to take [the witness's] statement and discuss the case with him." *Id.* Moreover, the defendant argued that there was a concern under these circumstances "that any testimony [the witness] provides will be scripted." *Id.* Plaintiff, on the other hand, argued that the witness was "an independent fact witnesses and that both parties have an interest in taking his deposition" and that plaintiff should be permitted to proceed first because he noticed the deposition first. *Id.*

The Court in *Lumpkin* sided with the defendant. In so doing, the Court held that the governing standard on priority is as follows:

> "Generally, it is understood that the party who notices a deposition will have priority in asking questions, and that opposing counsel will have priority to question the other side's witnesses. This is because the party whose witness is being deposed generally knows what the witness's testimony will be, and the purpose of the deposition is to allow the other side to find out what the witness knows about the matter." *Id.*

The Seventh Circuit has held that "the obvious purpose" of discovery as a whole is to give the adverse party the opportunity to prepare to poke holes and cross examine an adverse witness. *See Griffin v. Foley*, 542 F.3d 209, 221 (7th Cir. 2008) ("The obvious purpose of discovery is to determine the opinions and positions of the opposition's witnesses and prepare for cross-examination.").

To illustrate this, in *Keith Walker v. City of Chicago*, 21 C 4231, Plaintiffs' counsel successfully obtained priority of a key third-party witness for which Defendants first indicated an intention to depose. *See* Ex. 5 at ¶ 10 (*citing Lumpkin*, 2013 WL 1343666, at *1 ("Mr. Bell is a crucial third-party witness who implicated Plaintiff and helped to cause his wrongful conviction, at the behest of Defendants. Mr. Bell was therefore averse to Plaintiff in his criminal case, and Plaintiff should be given the first opportunity to question Mr. Bell. The fact that Mr. Bell is properly viewed as hostile to Plaintiff is a recognized reason to let Plaintiff question Mr. Bell first at his deposition.")). Similarly, here, Montanez's statements implicate Defendants as helping to cause the wrongful convictions of Plaintiffs. Thus, reason calls for permitting Defendants to question Montanez first at her deposition.

More recently, the Court in *Hernandez v. Guevera*, another reversed conviction case involving Defendant Guevara and where priority over deposition priority was in dispute, applied this approach as well to three witnesses aligned with the plaintiffs there because those persons "had a pre-existing relationship with the plaintiffs," were "expected to identify someone other than the plaintiffs as 'the true perpetrator' of an offense," had provided unfavorable testimony about defendants in the past, and/or had coordinated testimony with the plaintiffs' attorneys in the past. *See Hernandez v. Guevara, et. al.*, 23 CV 1737, Dckt. 98 (attached hereto as Ex. 6)("The prior relationship between the plaintiffs and Mr. Pacheco, as well as the anticipated testimony, warrant

the defendants examining Mr. Pacheco first."). The Court explained that once a party's access to the witness is determined, "then fairness requires giving the party without access the option to go first. Then [I] consider witness alignment, along with other equitable considerations. *Id*. In so doing, the Court also specifically rejected arguments that "first in time, first in right" governed. As here, the plaintiff had sent out deposition notices/subpoenas for various third-party witnesses and claimed that this entitled them to question all of the deponents first. *Id.* Instead, the court found that witness alignment and access should govern priority. *Id.* To that end, the Court held that 3 of the 4 witnesses who were in dispute (and who the plaintiffs had noticed first) were subject to being questioned first at their deposition by defendants. *Id.*

In this case, Montanez has known the Plaintiffs since their teenage years, is a fellow gang member and is expected to provide testimony favorable to them, as discussed above. Indeed, even were there ambiguity about Montanez's alignment before, the fact that she willingly gave a favorable affidavit to these attorneys mere weeks ago makes disposition of this issue on these facts a not particularly close call. Under these circumstances, the Court should permit Defendants to examine her first, as fairness requires giving the party without access to the witness the option to go first.

Moreover, there is no legal basis which permits Plaintiffs to take priority in deposing third-party witnesses simply because they bear the burden of proof or initiated the lawsuit. Courts have consistently rejected this argument. *See* Ex. 6 at 1; *Renlund v. Radio Systems Corporatio*n, 2021 WL 6881287, at *6 (D. Minn. 2021)("[C]ourts have rejected the proposition that the fact that the plaintiff has the burden of proof automatically provides good cause to require the plaintiff to be deposed first..."); *Blackmon*, 2020 WL 6065520, at *4 ("To be clear, there is no general rule that a plaintiff should be deposed first simply because they bear the burden of proof at trial or initiated the lawsuit.").

This would mean that no defendant in a lawsuit would ever have priority in deposing a witness, which is untenable. This issue was, again, explained by Judge Daniel in *Hernandez*:

> The plaintiffs also note that Fed. R. Civ. P. 30(c)(1) requires "the examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence," which they claim dictates that plaintiffs should go first with witnesses they intend to call at trial. But this rule does not address who gets to go first. Many depositions involve individuals subpoenaed by the party that does not intend to call the deponent at trial, yet the rule applies. This undercuts the notion that this rule addresses sequencing. Moreover, if we were at trial, the plaintiffs would go first during their case-in-chief and the defendants would go first during their casein-chief. We are not at trial, and both parties have subpoenaed the same witnesses. Since the goal here is to have the witnesses sit for one deposition despite having received subpoenas from each side, each party could argue that their subpoena is analogous to calling the witness in their case-in-chief and gives them the right to go first. *Id.*

Simply stated, Montanez is firmly aligned with Plaintiffs and Plaintiffs' attorneys have access to her testimony as shown by the procured affidavit.

CONCLUSION

WHEREFORE, Defendants request this Court rule upon witness priority in Defendant's favor and for whatever other relief this Court deems fit.

Date Submitted:

Respectfully submitted,

/s/ Andrea F. Checkai

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