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

MADELINE MENDOZA, Plaintiff, -vs- REYNALDO GUEVARA, *et al.,* Defendants.	)	No. 23-cv-2441 Judge Thomas M. Durkin Magistrate Judge Young B. Kim
MARILYN MULERO, Plaintiff, -vs- REYNALDO GUEVARA, *et al.,* Defendants.	)	No. 23-cv-4795 Judge Thomas M. Durkin Magistrate Judge Young B. Kim

PLAINTIFFS' RESPONSE TO DEFENDANT GUEVARA'S MOTION FOR ENTRY OF PROTECTIVE ORDER

Plaintiffs Madeline Mendoza and Marilyn Mulero, through their respective counsel, respond to Defendant Reynaldo Guevara's Motion for Entry of a Protective Order as follows:

I. INTRODUCTION

Jacqueline Montanez is a central figure in this case and was identified by all parties in their Rule 26(a)(1) disclosures. With an impending fact discovery deadline and much to accomplish, counsel for Marilyn Mulero contacted and subsequently issued a subpoena for Ms. Montanez's deposition so she could be deposed before the fact discovery deadline. Neither defendant Guevara, nor any other defendant, has subpoenaed Ms. Montanez. Defendant Guevara now

insists that he must be allowed to question Ms. Montanez first and seeks a protective order. Guevara ignores several other recent rulings within this district rejecting the arguments he raises here in other "*Guevara* cases." The Court should deny Guevara's motion for several reasons.

First, and critically, Plaintiffs intend to call Ms. Montanez in their case-in-chief and must be permitted to preserve her trial testimony in a coherent form to aid the jury's understanding of the evidence. Allowing Guevara to question first at deposition would cause her testimony to come out backwards as compared to how it would be presented at trial. This is especially important because Mulero's counsel believes that because of a recently diagnosed personal health issue, Ms. Montanez may be unavailable to testify at trial.[1] In that event, the testimony Plaintiffs would present on direct examination would have to be cobbled together from the video, or, in all likelihood, after Defendants' examination of her, Plaintiffs' counsel would first address whatever needed to be addressed on cross and then, awkwardly, transition to a full direct examination of Ms. Montanez just to be sure they had a clean record for trial. Then Defendants would cross-examine Ms. Montanez again, likely repeating many of the same questions already asked during their direct. It would be inefficient, disjointed, and would almost certainly increase the length of the deposition. As in several other *Guevara* cases within this District, this risk of prejudice is too great, and under such circumstances, Plaintiffs should be permitted to question first.

Second, Guevara misrepresents the record in asserting that Plaintiffs "fired off a deposition notice first." (Dkt. 87 at 4.) Ms. Montanez had been identified by all parties in their Rule 26(a)(1) disclosures by March 26, 2024. Plaintiff waited until October 16, 2024 to subpoena Ms. Montanez. It is incorrect to describe this as "firing off a subpoena," as Guevara now claims. (Dkt. 87 at 4.)

[1] Plaintiffs will share their knowledge of this issue at the hearing on defendant's motion.

Guevara's lack of diligence is inconsistent with his claimed need to be the first to question Ms. Montanez.

Finally, Guevara argues that Ms. Montanez's "alignment" with Plaintiffs necessitates that they be permitted to question Ms. Montanez first. Notably, Defendants took the opposite position when they opposed Plaintiffs' Motion to Quash a subpoena for Ms. Montanez's IDOC records, arguing that the contentious relationship between Ms. Montanez and Ms. Mulero, including Ms. Montanez celebrating Ms. Mulero's death sentence, and history of making statements that implicated Ms. Mulero in these murders, provided them with a basis to explore this third-party witness's IDOC records. (Dkt. 69 at 4-5.) For this reason, and for those described below, it cannot be said that Ms. Montanez is "firmly aligned with Plaintiffs." (Dkt. 87 at 2, 8.)

II. BACKGROUND

A. Jacqueline Montanez is not "aligned" with any party.

Guevara asserts that Ms. Montanez is Plaintiffs' "friend" who is "firmly aligned with Plaintiffs." (Dkt. 87, at 2, 8.) Defendant is unable to support this fanciful argument with anything other than groundless speculation. On the contrary, the record is replete with evidence that Ms. Montanez is antagonistic towards Plaintiffs.

In opposing Plaintiff's motion for a protective order over Ms. Montanez's IDOC files, Defendant pointed to an (unfounded) allegation that Mulero had solicited a third-party, Joan Roberts, to kill Ms. Montanez, and also cited to Ms. Montanez's inculpatory statements about Plaintiffs. (Dkt. 69 at 4-5; Exhibit 1, Trans. of May 15, 2024 Hrg., at 08:24-09:09.) Defendant also cited statements by Ms. Montanez that she was "happy" that Ms. Mulero had been sentenced to death, and that the "bitch (Ms. Mulero) deserved it." (Dkt. 69 at 4-5.) Guevara is now taking the

opposite position, asserting without record support that Ms. Montanez and Plaintiffs are "friends" who are "firmly aligned."

As Defendant knows, Ms. Montanez has made several inculpatory statements against Ms. Mulero over the years, including a sworn statement that Ms. Mulero shot and killed Jimmy Cruz and a video-recorded statement that Ms. Mulero murdered both Hector Reyes and Jimmy Cruz. (*See* Exhibit 2, Jacqueline Montanez Statement of May 14, 1992, at JGS_M.Mendoza 9542-44; Exhibit 3, Montanez Video Interview of February 22, 2005.) Guevara fails to mention these facts, instead acting as though the affidavit is the only statement Ms. Montanez has made. If the affidavit aligns Ms. Montanez with Plaintiffs, then the statements mentioned above align her with Defendants.

B. Guevara failed to exercise any diligence in subpoenaing Ms. Montanez for deposition.

Plaintiffs filed their respective complaints on April 19 and July 24, 2023, both of which set forth allegations about Ms. Montanez's involvement in these murders. The cases were subsequently consolidated for discovery,

Neither Defendant Guevara now any other defendant made any effort to subpoena Ms. Montanez for deposition. Plaintiffs, on the other hand, worked diligently to secure Ms. Montanez's deposition, met with her, and secured an affidavit of her current recollection. At the same time, Plaintiffs' counsel learned of a serious personal health issue that created a reasonable possibility that Ms. Montanez will not be available for trial. Because Plaintiffs' counsel do not represent Ms. Montanez, nor control her, on October 16, 2024, they issued a subpoena for her deposition for December 3, 2024.

Thereafter, Defendants requested to question Ms. Montanez at her deposition first based on her purported "alignment." The parties conferred on this subject and Plaintiffs advised the

defense that their cited authority did not support their position, but in fact, supported Plaintiffs having priority at the deposition. Notably, while Plaintiffs' subpoena was issued on October 16, 2024, Guevara waited more than a month, until November 22, 2024, to file the present motion.

III. LEGAL STANDARD

Guevara cannot dispute that he failed to diligently pursue Ms. Montanez's deposition. Instead, Guevara suggests that Plaintiffs' diligence is meaningless, and he should be awarded priority questioning. It is noteworthy that Defendants (and their same counsel) have advanced the opposite position in several recent cases, where they asserted that they should question a witness first because they had either communicated their intent to take the deposition first[2], or because they subpoenaed the deposition first.[3] That defendant Guevara is now taking the opposite position belies this argument.

Rather, Federal Rule 26(d) authorizes the court to order the sequence of discovery. When presented with the same issue here (including in other *Guevara* cases), courts in this jurisdiction have considered a multitude of factors, including:

a. Whether the witness would be called in plaintiff's case-in-chief, requiring that the testimony be preserved for trial; (*see* Exhibit 7, *Flores v. Guevara,* 23-cv-1736 (N.D. Ill.), Dkt. 64 (Order of January 2, 2024) (Judge Tharp ruling that that plaintiff may be the first to question various key witnesses because plaintiff would be the first to call them in their case-in-chief at trial));

b. The party who first served and noticed the deposition subpoena; (*see* Exhibit 8, *Rivera v. Guevara,* 23-cv-1743 (N.D. Ill.), Dkt. 80 (Order of January 22, 2024) (holding that "[p]laintiff noticed and served the Rule 45 deposition subpoenas first and that fact *has some persuasive power*") (emphasis added); Exhibit 6, *Reyes v. Guevara,* 18-cv-1028 (N.D. Ill.), Dkt. 140 (Order of July 31, 2019) (holding that "the party

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[2] Group Exhibit 4, *Rivera v. Guevara*, 12-cv-4428 (N.D. Ill.), Trans. of March. 12, 2013, Hrg., at 10:18-12:22; Group Exhibit 5, *Walker v. Burge, et al.*, 21-cv-4231 (N.D. Ill.), Dkt. 222 (Joint Motion) at ¶ 17.

[3] Exhibit 6, *Reyes v. Guevara,* 18-cv-1028 (N.D. Ill.), Dkt. 140 (Order of July 31, 2019).

> who served the notice of deposition first will be permitted to conduct the questioning first.")); and

c. Witness alignment. *See Lumpkin v. Kononov*, 2013 WL 1343666 (N.D. Ind. 2013) (allowing defendant priority questioning in a vehicular collision case based on the witness and plaintiffs' *familial* relationship.)

Plaintiffs submit that the facts presented here weigh heavily in their favor and they should be entitled to preserve Ms. Montanez's critical testimony for the jury in a clear and coherent fashion by questioning Ms. Montanez first, as they would in their case-in-chief.

IV. ARGUMENT

A. Plaintiffs will call Ms. Montanez in their case-in-chief and have a reasonable basis to believe that she may not be available for trial.

Ms. Montanez has advised counsel that she is suffering from serious health issues and may not be available for trial. This fact necessitates that Plaintiffs question Ms. Montanez first. If Ms. Montanez were to become unavailable for trial, her deposition testimony would be played by video to the jury in lieu of live testimony. If Defendants question first, and Plaintiffs second, then the testimony will be backwards, will need to be heavily edited for trial, and result in a disjointed transcript that is confusing to the jury. This is exactly why Federal Rule of Civil Procedure 30(c) dictates that "[t]he examination and cross examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615." Fed. R. Civ. P. 30(c)(1). To proceed otherwise would severely prejudice the Plaintiffs by effectively preventing them from presenting critical testimony to the jury in a clear and coherent fashion.

Defendants cannot dispute the critical nature of Ms. Montanez's testimony as to both the murders and her first-hand knowledge of Defendants' alleged misconduct. In fact, Guevara's own counsel acknowledged this during a May 15, 2024, hearing before this very court:

> "[Ms. Montanez is] going to be the witness in this case. I mean, **she's their most important witness**. And I would argue she might even be our most important

> witness in that sense. So the idea that there are all kinds of other third-party witnesses is a bit of a canard here because she's not just any old witness, **she's the person they're hinging their entire case on exculpating them**."

(Exhibit 1, Trans. of May 15, 2024, Hrg., at 09:25-10:06) (emphasis added).

Defendant Guevara's position makes Plaintiffs bear the risk of a disjointed, incomplete, and incoherent transcript should Ms. Montanez be unavailable to testify at trial. As noted above, given the circumstances, if Guevara's motion was granted, Plaintiffs would have no choice but to take the following approach to ensure a clean transcript they can use at trial:

- Defendants examine Ms. Montanez;
- Plaintiffs cross-examine and/or rehabilitate Ms. Montanez based on Defendants' examination;
- Plaintiffs awkwardly pivot to a complete a direct examination (which is the only way to ensure a complete, coherent record);
- Defendants cross-examine Ms. Montanez (inevitably asking many of the same questions already answered during their initial examination);
- Plaintiffs re-direct and/or rehabilitate Ms. Montanez based on Defendants' (second) cross-examination.

Courts in this District have repeatedly rejected this approach, concluding that plaintiffs may question third-party witnesses first under such circumstances, even when they have not first subpoenaed their depositions. For instance, in *Rivera v. Guevara,* the same defendants as in this case took the position that they should be allowed to question a witness first because they had issued the subpoena. Judge Rowland, however, specifically focused on the plaintiff's burden to prove his case and on the importance of the third-party witness at issue. (Group Exhibit 4, *Rivera v. Guevara*, No. 12-cv-4428 (N.D. Ill.), Trans. of March 12, 2013, Hrg., at 14:4-14:12, Dkt. 54 (Order of March 12, 2013) (finding that despite the fact defendants first served the deposition

subpoena, the court was "really concerned that [plaintiff] has the burden [] and [this witness was] going to be probably the most important witness in the case," and thus, ruling that plaintiff should question first.))

Similarly, in *Flores v. Guevara*, the defendants objected to the plaintiff questioning a third-party witness first because, as here, the defense claimed the witness was aligned with the plaintiff. (Exhibit 7, *Flores v. Guevara,* 23-cv-01736 (N.D. Ill.), Dkt. 64 (Order of January 2, 2024). Over the defendants' objection, Judge Tharp ruled that the plaintiff may question first because he would be the first to call the witnesses in his case-in-chief at trial. *Id.* (*See also* Group Exhibit 5, *Walker v. Burge*, 21-cv-4231 (N.D. Ill.), Dkt. 222 (Joint Motion) at ¶¶ 10, 17, Dkt. 223 (Order of July 7, 2023) (allowing plaintiff to question "crucial third-party witnesses" first, even when plaintiff had not first subpoenaed the deposition); Group Exhibit 9, *Hernandez v. Guevara,* 23-cv-1737 (N.D. Ill.), Dkt. 83 (Plaintiff Motion to Compel) at 11-12, Dkt. 98 (Order of January 5, 2024) at 2-3 (Judge Daniel allowing plaintiff to question witness Daniel Violante first, whom plaintiff had subpoenaed first, who had provided favorable and unfavorable testimony to both sides, was a critical witness that plaintiff would call in their case-in-chief, such that if he were to become unavailable, plaintiff would be severely prejudiced if they could not preserve his testimony in an organized and coherent fashion by conducting an initial trial exam.))

In short, the critical nature of Ms. Montanez's testimony, Plaintiffs' intention to call Ms. Montanez in their case-in-chief, together with the reasonable possibility that Ms. Montanez may not be available for trial, weigh heavily in Plaintiffs' favor.

B. Plaintiffs were diligent in subpoenaing Ms. Montanez for deposition and should be afforded priority in questioning her first.

Plaintiffs are the only parties to demonstrate diligence in serving Ms. Montanez with a deposition subpoena. Plaintiffs are not arguing that the first to notice should necessarily dictate

priority in questioning when there is a "race" in getting a subpoena out. But that is not the case here and the Court should not disregard Plaintiffs' diligence.

Defendants disclosed Ms. Montanez as a witness in their initial Rule 26 disclosures on February 22, 2024, and by May 15, 2024, defendants recognized that Ms. Montanez was the most important witness in the case. (Exhibit 1, Trans. of May 15, 2024, Hrg., at 09:25-10:06.) Yet, Defendant Guevara did nothing to subpoena Ms. Montanez for deposition. It was only after nearly eight months of defense inaction that Plaintiffs' served Ms. Montanez with a deposition subpoena. Defendants now ask the Court to ignore their inaction and leapfrog Plaintiffs' diligence. Courts adjudicating similar disputes, however, have appropriately rewarded the diligence of the party that has gone out and perfected service of a subpoena on a witness, allowing them to question first. *See, e.g., Occidental Chem. Corp. v. OHM Remediation Services*, 168 F.R.D. 13, 14 (W.D.N.Y. 1996) (holding that where two subpoenas were served, the first served takes priority.)

Defendants rely on *Lumpkin v. Kononov*, 2013 WL 1343666 (N.D. Ind. 2013) for the proposition that being the first to serve a deposition subpoena is irrelevant when it comes to questioning priority. Defendants' reliance is misplaced.

Lumpkin arose from a vehicular collision where the sole witness to the collision was the plaintiff's brother-in-law. Defense counsel indicated an intent to issue a deposition subpoena to the witness, but plaintiff's counsel objected because the parties had yet to hold their Rule 26(f) discovery conference. Defense counsel then agreed to postpone the deposition until after the discovery conference. Then, following the conference, plaintiff's counsel issued his own subpoena and sought to question the witness first. In ruling that the defendant should have priority under those facts, the *Lumpkin* court relied on the familial relationship between the plaintiff and the witness, that this relationship provided plaintiff with access to the witness that defendant did not

have, and the gamesmanship of plaintiff in leapfrogging the defendant's subpoena after the Rule 26(f) conference. Here, there is no familial relationship between Ms. Montanez and Plaintiffs (rather, as discussed above, there is evidence suggesting that their relationship has been contentious over the years). Further, Plaintiffs have not engaged in any gamesmanship in serving Ms. Montanez with a deposition subpoena, but merely demonstrated diligence in obtaining her deposition.

This factor also weighs in favor of Plaintiffs being awarded priority in questioning Ms. Montanez. (Exhibit 8, *Rivera v. Guevara,* 23-cv-1743 (N.D. Ill.), Dkt. 80) (holding that "[p]laintiff noticed and served the Rule 45 deposition subpoenas first and that fact *has some persuasive power*") (emphasis added); Exhibit 6, *Reyes v. Guevara,* 18-cv-1028 (N.D. Ill.), Dkt. 140 (Order of July 31, 2019) (holding that "the party who served the notice of deposition first will be permitted to conduct the questioning first.")

C. Ms. Montanez is not "aligned" with Plaintiffs.

As discussed above, it cannot be said that Ms. Montanez is aligned with any party in this case. That Guevara speaks only to her affidavit, ignoring the other inculpatory statements Ms. Montanez has made against Plaintiffs — all of which they will undeniably use during her deposition — is truly disingenuous. Plaintiffs submit that alignment is a neutral factor. (Group Exhibit 10, *Martinez v. Guevara*, 23-cv-1741 (N.D. Ill.), Dkt. 109 (Plaintiff Motion to Compel) at 11, Dkt. 116 (Defendants' Response) at 17-21, Dkt. 124 (Order of January 29, 2024) (plaintiff allowed to question third party witness Melloney Parker first, rejecting defendants' argument that the witness's affidavit corroborating her plaintiff's version of events aligned her with the plaintiff); Group Exhibit 9, *Hernandez v. Guevara,* case no. 23-cv-1737 (N.D. Ill.), Dkt. 83 (Plaintiff Motion to Compel) at 11-12, Dkt. 98 (Order of January 5, 2024) at 2-3 (plaintiff allowed to question third

party witness first when witness recanted on his prior testimony against plaintiff, meaning that he had given favorable and unfavorable testimony to both sides); Group Exhibit 5, *Walker v. Burge, et al.*, 21-cv-4231 (N.D. Ill.), Dkt. 222 (Joint Motion) at ¶ 18, Dkt. 223 (Order of July 7, 2023) (court allowing plaintiff to question third party witness first despite the witness recanting his prior identification of the plaintiff in multiple affidavits that plaintiff attached to his petition for a certificate of innocence.)) This is because recanting a prior statement does not alter the equities, as Defendants will still use the prior statements and testimony to impugn the Plaintiffs and elicit testimony against Plaintiffs.

V. CONCLUSION

Guevara bases his argument that he should question Ms. Montanez first on her purported "alignment" with Plaintiff, relying heavily on Ms. Montanez's recent affidavit. However, recent case law in this district makes clear that when there is both exculpatory and inculpatory statements (and even recantations), there is not witness alignment sufficient to justify one party getting priority in questioning. That is especially true here where if Defendants question Ms. Montanez first, her deposition will necessarily become redundant, unduly lengthy, and especially burdensome on an already sick witness. Plaintiffs should be permitted to question Ms. Montanez first.

Dated: November 27, 2024

Respectfully submitted,
[signatures on next page]

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