

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
EASTERN DIVISION**

DAVID BONIFACE,
NISSANDÈRE MARTYR, and
JUDERS YSEME,

Plaintiffs,

v.

JEAN MOROSE VILIENA
(a.k.a. JEAN MOROSE VILLIENA),

Defendant.

Case No. 1:17-cv-10477-ADB

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' EMERGENCY MOTION FOR
PROTECTIVE ORDER REGULATING MAY 2020 DEPOSITIONS OF PLAINTIFFS'
DESIGNATED WITNESSES IN HAITI**

Pursuant to Fed. R. Civ. P. 26(c) and this Court's inherent powers, plaintiffs David Boniface ("David"), Nissandère Martyr ("Nissandère"), and Juders Ysemé ("Juders") (collectively "Plaintiffs") hereby submit this memorandum in support of their motion for an emergency protective order regulating the upcoming depositions of Plaintiffs' designated witnesses in Haiti, which are presently proposed to proceed on May 11-15, 2020, to mitigate the risk of serious injury to or death of witnesses, and further witness intimidation.¹ As acknowledged in this Court's protective order, Plaintiffs have demonstrated good cause to

¹ On October 4, 2019, Plaintiffs filed a motion for a protective order to regulate then-anticipated November 2019 depositions in Haiti. Dkts. 86, 87, 87-1, 87-2, 91. Defendant opposed the motion arguing, in part, that the pending interlocutory appeal rendered a protective order unnecessary. Dkt. 88. On November 4, 2019, due to heightened political unrest and instability in Haiti, Plaintiffs filed a Notice of Withdrawal Without Prejudice of Plaintiffs' Emergency Motion for Protective Order Regulating November 2019 Depositions of Plaintiffs' Designated Witness in Haiti, in which they indicated their intent to reschedule the depositions when the security situation sufficiently improved and to do so at a mutually convenient time for all counsel and witnesses. Dkt. 93. On February 19, 2020, the First Circuit Court of Appeals denied Defendant's petition for interlocutory review under 28 U.S.C § 1292(b). Counsel for Plaintiffs are continuing to monitor the situation in Haiti, including any travel restrictions that may be imposed in the future given the current coronavirus pandemic and, if need be, will update their plans, Counsel for Defendant and the Court accordingly.

conclude that defendant, Jean Morose Viliena (“Defendant”), poses a threat to witnesses and should be barred from contacting, threatening or harassing witnesses disclosed in Plaintiffs’ initial disclosures. (Dkt. 80). Plaintiffs hereby request that the Court enter a protective order imposing reasonable deposition restrictions to protect the physical safety of Plaintiffs, the witnesses, and counsel. Specifically, Plaintiffs request that the Court bar Defendant from attending the upcoming depositions of Plaintiffs’ witnesses in person and allow the depositions to proceed at an undisclosed location in Haiti with Defendant’s counsel attending via videoconference and with Defendant neither audible nor visible to the deponent. Plaintiffs agree to be responsible for all logistics and costs associated with the videoconference.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

This case arises from the brutal torture, killing, and persecution of media activists and human rights advocates in the Haitian town of Les Irois between 2007 and 2009. As the former Mayor of Les Irois, Defendant personally led an armed group aligned with his political party in a series of attacks on his critics and perceived political opponents in Les Irois. (Dkt. 1, ¶ 1). The complaint alleges that Defendant and his associates killed David’s younger brother, Ecclesiaste Boniface, tortured and attempted to extrajudicially kill Juders and Nissage Martyr (“Nissage”), and led a campaign of mass arson that burnt down the homes of 36 of Defendant’s perceived political opponents in Les Irois.

Shortly after Plaintiffs filed this lawsuit on March 22, 2017, Nissage, who had appeared to be in good health, died under mysterious circumstances. (Declaration of Juders Ysemé (“Ysemé Decl.”) ¶ 4.) Nissage rapidly and unexpectedly fell gravely ill while he was in front of Juders’ home, and died on his way to the hospital. (*Id.*) Nissandère, Nissage’s son, filed a police report with the prosecutor’s office in Haiti because he believed his father was poisoned. (*Id.*) (No other plausible cause of death has been identified.) This Court has since granted Plaintiffs’ motion to substitute Nissandère as a named plaintiff for his deceased father. (Dkt. 56.)

Following Nissage's death, David and Juders fled Les Irois and went into hiding because they feared for their safety and believed that they were at risk of being further targeted by Defendant and his associates for their involvement in the present lawsuit. (Ysemé Decl. ¶ 5.) Because of their continued fear of retaliation by Defendant, both David and Juders have now been living in hiding—disconnected from their homes, families, friends and support networks—for almost three years.

This Court has previously recognized the grave allegations made against Defendant in this case, which prompted the following warning to Defendant about any attempts to intimidate witnesses in Haiti:

Court: Stay far away. No witness tampering. No trying to contact any witnesses. Nothing to do with getting any witnesses hurt or harmed or made otherwise unavailable. I want you to stay far away.

Mr. Viliena: Okay.

The Court: I'm not suggesting that you had anything to do with this, but I'm just warning you that you should not have anything to do with any witness or give someone the ability to suggest that you're acting inappropriately with regard to these witnesses. Do you understand that?

Mr. Viliena: Okay.

(Declaration of Bonnie Lau ("Lau Decl."), Exhibit 1, Hearing Transcript dated September 7, 2017, 12:1-12:12).

Despite this clear and unequivocal warning from the Court, Defendant returned to Les Irois and actively targeted Plaintiffs for reprisal because of their suit against him. (Ysemé Decl. ¶¶ 9-15.) On August 4, 2019, Defendant delivered a speech on a microphone to a crowd at a soccer match in Les Irois, where he announced that he would be running as a candidate for mayor or deputy now that he no longer had any legal problems. (*Id.* ¶ 10.) Following that meeting, Defendant also spoke with a smaller group of people at his home in Les Irois. (*Id.* ¶ 11.) He told

those in attendance that Nissage was already dead and that David and Juders needed to be killed by any means. (*Id.*) Defendant stated that once David and Juders were dead he would no longer have any problems and would be free to do what he wanted. (*Id.*)

On that same day—August 4, 2019—two men on a motorcycle found David and Juders’ apartment despite the fact that they were in hiding. (*Id.* ¶ 12.) They asked for Juders by name, but Juders did not recognize them and, fearing for his safety, he told them Juders was not there. (*Id.*) The two men left. David and Juders stayed in the apartment that night but did not sleep because they feared people would return to try to kill them. (*Id.*) Their landlord witnessed the two men on the motorcycle and told David and Juders to leave the apartment permanently because he did not want to be involved in any trouble. (*Id.*) The following day, on August 5, 2019, David and Juders immediately left the apartment. (*Id.*)

Defendant’s threats and actions prompted Plaintiffs to move for an emergency Protective Order, which this Court granted on August 8, 2019. The Court found as follows:

Defendant Jean Morose Viliena (“Defendant”) was present in Haiti on or around August 4, 2019 and had contact with former associates during which he discussed harming Plaintiffs. Plaintiffs Boniface and Yseme reasonably fear for their safety and are concerned about retaliation by Defendant. Their fears are based on past dealings with Defendant as well as a recent interaction with men they believe to be Defendant’s associates. In light of the foregoing, the Court concludes that Plaintiffs have demonstrated good cause for a protective order. The Court has previously ordered that Defendant shall have no contact with witnesses. See [ECF No. 78-4 at 5].

[...]

IT IS HEREBY ORDERED THAT:

[...]

- (2) Jean Morose Viliena **shall have no contact with the following witnesses disclosed** in Plaintiffs’ initial disclosures. . .
- (3) Upon application to the Court, Plaintiffs may request that the Court extend this Protective Order to additional witnesses; and,
- (4) Any violation of the Protective Order may result in sanctions.

(Dkt. 80 (emphasis added).)

In spite of this Order and the previous warning by this Court, Plaintiffs learned that on August 9, 2019, *one day* after this Court’s entry of the Protective Order, the men on motorcycles

returned to Plaintiffs' former residence and, on August 12, 2019, Defendant's brother-in-law convened an additional meeting on Defendant's behalf for the specific purpose of discussing the next steps in their plan to threaten or kill Plaintiffs. (Ysemé Decl. ¶¶ 14-15.) Shortly after this meeting, Juders received three anonymous threatening phone calls directing him to stop pursuing the U.S. proceeding. (*Id.* ¶ 15.) As documented in the attached Declaration of Juders Ysemé, Defendant and his associates intimidate and retaliate against those they perceive as opposing Defendant, including potential witnesses. Plaintiffs bring the instant motion in order to prevent intimidation and potential physical harm to witnesses who will testify at depositions in Haiti and to mitigate the severe risks to their safety.

LEGAL STANDARD

Under Fed.R.Civ.P. 26 (c), this Court has the authority to control the scope of discovery and to issue a protective order, for good cause, to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Specifically, Fed.R.Civ.P. 26 (c)(1)(B) and (c)(1)(E) state that such a protective order may specify “terms, including time and place...for the disclosure or discovery” and may designate “the persons who may be present while the discovery is conducted.” The First Circuit has described Rule 26(c) as “highly flexible, having been designed to accommodate all relevant interests as they arise . . . [T]he ‘good cause’ standard in the Rule is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case.” *Gill v. Gulfstream Park Racing Ass'n, Inc.*, 399 F.3d 391, 402 (1st Cir. 2005). Furthermore, this Court has the “inherent powers that are ‘governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.’” *Katz v. Liberty Power Corp., LLC*, No. 18-CV-10506-ADB, 2019 WL 957129, at *1 (D. Mass. Feb. 27, 2019) (*citing Dietz v. Bouldin*, 136 S. Ct. 1885, 1891 (2016)).

In *Ben David v. Trivisono*, 495 F.2d 562, 564 (1st Cir. 1974), the First Circuit upheld a

District Court's Order precluding prison guards from taking adverse action against a class of prisoners who sued alleging improper treatment. *Id.* at 562 (upholding order preventing prison guards "from taking any action in retaliation against plaintiffs and members of plaintiffs' class or of depriving plaintiffs and members of plaintiffs class of any and all rights and privileges on account of plaintiffs and members of their class participating, assisting, or volunteering any facts or circumstances in the furtherance of this lawsuit."). In doing so, the First Circuit affirmed the District Court's "discretionary authority" to enter such an order without an evidentiary finding. *Id.* at 565. As the Court found, an evidentiary hearing was not necessary and "the findings necessary to support such a protective order are simply that the plaintiffs reasonably fear retaliation and that the court's fact-finding may be materially impaired unless there is provided the tangible protection of a suitable court order." *Id.* at 564. *See also Rissman Hendricks & Oliverio, LLP v. MIV Therapeutics, Inc.*, 2011 U.S. Dist. LEXIS 121426, at *15 (D. Mass. Oct. 20, 2011) (finding that affidavits relaying conversations in which threats were made constitute reliable evidence that witnesses were threatened).

This Court has broad authority to designate who may or may not be present at a deposition and the manner in which a deposition may proceed, based upon a finding of good cause. "Under Rule 26(c)(5), ***the court has the power to exclude even a party,***" particularly where the witness is likely to be intimidated and "there is a risk that in [defendant's] presence [the witness] might not testify as fully as he would otherwise." *In re Shell Oil Refinery*, 136 F.R.D. 615, 617 (E.D. La. 1991) (emphasis added); *see also Deluca v. Gateways Inn*, 166 F.R.D. 266, 267 (D. Mass. 1996) (permitting defendant's exclusion from a deposition where his presence might embarrass and intimidate the witness); *Wesselman v. Tyson Foods, Inc.*, 2016 U.S. Dist. LEXIS 163495 (N.D. Iowa, 2016) (holding "good cause can include preventing intimidation of a witness at deposition"); *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973) (upholding a protective order barring defendant from attending a deposition in order to prevent

harassment). While certain courts require a showing of exceptional and compelling circumstances when deciding whether the exclusion of a party from a deposition is warranted, potential intimidation and harassment of witnesses also suffices to meet this heightened standard. *See Laul v. Los Alamos National Labs*, 2017 U.S. Dist. LEXIS 182634, *1 (D. N.M. 2017).

When drafting a protective order, the court should “err on the side of caution,” prioritizing witnesses’ safety over convenience of the parties. *Sexual Minorities Uganda v. Lively*, Civil Action No. 12-30051-MAP, 2014 U.S. Dist. LEXIS 18977, at *5 (D. Mass. Feb. 14, 2014) (noting that the court “err[ed] on the side of caution” in the interest of protecting witnesses when drafting a protective order).

ARGUMENT

I. A PROTECTIVE ORDER IS NECESSARY TO PROTECT IDENTIFIED WITNESSES FROM THE DEFENDANT AND HIS AGENTS.

In issuing its recent Protective Order, the Court found that Plaintiffs demonstrated good cause that Defendant posed a threat to witnesses and barred him from any contacts with any of the witnesses disclosed in Plaintiffs’ initial disclosures. (Dkt. 80). Similarly, the Court should find that Defendant’s long-standing and documented pattern of intimidation and reprisal against those he perceives as opposing him constitute exceptional and compelling circumstances, and amply satisfy good cause, to issue a Protective Order barring him from attending the deposition of Plaintiffs’ designated witnesses in Haiti. The requested Protective Order is necessary to ensure that witnesses and testimony are available at trial so as not to “materially impair[]” the court’s fact finding abilities. *Ben David*, 495 F.2d at 564.

Plaintiffs have provided specific facts, supported by sworn affidavits and third-party documentation, detailing the long-standing and ongoing pattern of threats and intimidation by Defendant and his associates against those who oppose him, including potential witnesses. Defendant’s violations of this Court’s Protective Order and his history of targeting witnesses are

far from inchoate—they represent a very real and potentially deadly course of conduct. As alleged in the Complaint, Clorene Francois, a neighbor of the Boniface family who witnessed the savage killing of Ecclesiaste Boniface, was brutally beaten by members of the KOREGA militia after she was summoned to provide in-court, eyewitness testimony linking Defendant Viliena to the murder. (Dkt. 1, ¶ 63.) Mers Ysemé, the father of Plaintiff Juders Ysemé and a potential witness in this case, was shot in 2015 by Defendant’s associates Meritus Beublack and Agnel Jean when they tried to find Juders on the orders of Defendant in retaliation for Juders’ testifying against Defendant at a criminal hearing in Haiti in 2015. (Ysemé Decl. ¶ 3.) In 2017, Defendant and his associates created a Kill List containing the names of Plaintiffs and several witnesses in this case. (*Id.* ¶ 7). As recently as January 2019, Micheline Boniface, the wife of Plaintiff David Boniface and also a potential witness in this case, was threatened by another one of Defendant’s associates, Jean Louis Bell. (*Id.* ¶ 8.) All of these incidents demonstrate that Defendant has a history of retaliating against those he perceives as opposing him or testifying against him, either personally or through his associates. (*Id.* ¶¶ 12-13.) Indeed, as the Complaint alleges, the killing of David’s brother, Ecclesiaste Boniface, the raid carried out on the community radio station where Nissage and Juders were grievously injured, and the mass arson of 36 homes in Les Irois of Defendant’s perceived political opponents, were all carried out in retaliation by Defendant and/or his associates. (Dkt. 1 ¶¶ 29-39, 40-51, 52-58.)

Defendant’s ongoing threats have repeatedly been documented with third-party human rights organizations. In 2015, the Inter-American Commission on Human Rights (IACHR) ordered the Government of Haiti to immediately provide effective protection to Juders, David and Nissage, along with their families, in light of serious threats of violence by Defendant and his associates. In its ruling, the IACHR determined that precautionary measures were warranted given that the serious and urgent situation presented a risk of irreparable harm to Plaintiffs.

(Ysemé Decl., Exhibit B).² In 2017, following the suspicious death of Nissage the day after the Defendant was served with the Summons and Complaint in this matter, Plaintiffs submitted a follow up letter with the IACHR (*Id.* ¶ 19) and Amnesty International issued an urgent action press release noting the ongoing dangers faced by David and Juders at the hands of Defendant and his associates. (*Id.*, Exhibit A). Following Defendant's most recent visit to Haiti and the protective order issued by this Court, Plaintiffs sent a second update to the IACHR regarding Defendant's actions and Haiti's failure to implement the precautionary measures (*Id.* ¶ 19, Exhibit C) and a third follow-up letter in conjunction with the IACHR's *in loco* visit to Haiti in December 2019 (*Id.* ¶ 19, Exhibit D).

Given his documented history of reprisals against those he perceives as opposing him, Defendant's very presence at the depositions of Plaintiffs' designated witnesses would intimidate the witnesses. (*See, e.g.*, Dkt. 80; Dkt. 1, ¶ 33-38, 43-49.) Defendant's knowledge of the location of the depositions would be equally dangerous for the witnesses and create an undue risk of intimidation, bodily harm, and retaliation against these witnesses.³ As stated in the Complaint, KOREGA provides its members with motorcycles that are used to effect its reign of terror. (Dkt. 1, ¶ 25; Ysemé Decl. ¶ 20.) There are only a few locations in Haiti with the infrastructure and internet connection necessary to support these depositions. (Ysemé Decl., at ¶ 20.) If Defendant knew even the general location of these depositions, it would be a simple matter for his associates to conduct surveillance of these locations via motorcycle and to harass,

² The IACHR granted only 6.6 percent of the 674 requests for precautionary measures it received in 2015, see Statistics of Inter-American Commission on Human Rights, Precautionary Measures Granted / Requests (2019), available at https://public.tableau.com/shared/PBRZ9549R?:display_count=y&:origin=viz_share_link&:embed=y&:showVizHome=no (last visited March 13, 2020).

³ Given the serious risks to witness safety, Plaintiffs are awaiting resolution of their Emergency Motion before issuing deposition notices which would reveal the identity of the deponents. Plaintiffs fully intend to provide reasonable written notice for the depositions to Defendant as per FRCP 30(b)(1).

intimidate, or kill witnesses either before, after, or during their testimony. (*Id.*) Relatedly, there is a real risk that counsel for Defendant, through no fault of their own, could surreptitiously be tracked to the location of the depositions by Defendant or his associates should they travel to Haiti and attend the depositions in person. Defendant's counsel should not be placed in the untenable situation of having to actively avoid being surveilled and followed by their own client or their client's associates when carrying out his representation.

Plaintiffs therefore request that the Court enter a protective order imposing reasonable conditions to protect the physical safety of Plaintiffs' designated witnesses, in accordance with its prior protective order barring Defendant from contacting, threatening or harassing witnesses. (Dkt. 80.) Specifically, Plaintiffs request that the Court bar Defendant from attending the upcoming May depositions in person, and instead, allow the depositions to proceed at an undisclosed location in Haiti with Defendant's counsel attending via videoconference and with Defendant neither audible nor visible to the deponent. This is the only way to ensure that Defendant does not learn of the deposition location and direct his associates to interfere or threaten witnesses, and presents minimal prejudice to Defendant. *See Deluca*, 166 F.R.D. at 267 (finding that exclusion of defendant from a witness deposition was the best way to mitigate the risk of embarrassing and intimidating the plaintiff). The use of videoconference would also ensure that Defendant and his counsel are able to confer together in person during the depositions.

Indeed, courts have found that "[v]ideoconference testimony can be extremely effective." *Goldenson v. Steffens*, No. 2:10-CV-00440-JAW, 2014 WL 3105367, at *5 (D. Me. July 7, 2014). Videoconference technology "allows both parties to see and interact with the witness and is a far cry from a telephone deposition." *Estate of Harvey ex rel. Dent v. Roanoke City Sheriff's Office*, No. CIV.A. 7:06CV603, 2007 WL 2821536, at *3 (W.D. Va. Sept. 26, 2007). Further, videoconferencing is frequently used to minimize prejudice where, as here, there are unique

logistical and security concerns. *See United States v. Hayat*, No. 2:05-CR-0240 GEB DB, 2017 WL 6539610, at *6 (E.D. Cal. Dec. 20, 2017) (“Because this court will hold that these depositions be conducted by video-conferencing, many of the logistical problems are no longer a concern...[and the] safety issue is resolved by the use of video-conferencing.”). Plaintiffs will handle all logistics and pay for all costs associated with the videoconferencing.

This Court has already ordered, on at least two occasions, that Defendant may not have any contact with Plaintiffs or witnesses. The relief requested here is simply a continuation of these orders and is necessary to ensure that they are followed in letter and spirit. This relief is necessary to ensure that witnesses and their testimony are available at trial and to mitigate against the very real risks to their safety should they appear for depositions. Plaintiffs’ request is limited and carefully tailored to present minimal prejudice to all parties while ensuring the safety of witnesses.

For the reasons set forth above, and based on the declarations of Juders Ysemé and Bonnie Lau, Plaintiffs respectfully request that this Court grant their Motion, and enter a Protective Order barring Defendant from attending the upcoming depositions of Plaintiffs’ witnesses in person, and allowing the depositions to proceed at an undisclosed location in Haiti with Defendant’s counsel attending via video-conference and with Defendant neither audible nor visible to the deponent.

Should the Court wish to discuss the requested relief further, or consider imposing alternate conditions and limitations on the May 2020 depositions in Haiti, Plaintiffs would welcome the opportunity for a hearing or telephonic conference.

Dated: March 13, 2020

Respectfully submitted,

DAVID BONIFACE, NISSANDERE
MARTYR, AND JUDERS YSEME

By their attorneys,

/s/ Bonnie Lau

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CERTIFICATE OF SERVICE

I certify that on March 13, 2020, I caused to be filed electronically a true copy of the foregoing document with the Clerk of the Court using the CM/ECF system, which will notify the parties of record via electronic notification.

/s/ ErmelitaP. Gonzalez