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## UNITED STATES DISTRICT COURT

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## FOR THE EASTERN DISTRICT OF CALIFORNIA

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JERMAINE PADILLA,

No. 2:14-cv-01118-KJM-CKD

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Plaintiff,

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v.

ORDER

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JEFFREY BEARD, et al.,

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Defendants.

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This matter is before the court on the motion by plaintiff's counsel for plaintiff's guardian ad litem to testify as a substitute witness in the upcoming trial. Mot. to Substitute Witness, ECF No. 161 (Mot.). Defendants oppose the motion, Opp'n, ECF No. 176, and plaintiff has replied, Reply, ECF No. 182. The court heard argument on the motion on April 7, 2017. ECF No. 248. Having considered the parties' argument and relevant authority, and for reasons explained below, plaintiff's motion is GRANTED IN PART. This order of explanation confirms and explains the minute order issued recently. *See* ECF No. 253.

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I. BACKGROUND

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A. The Parties' Positions

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Plaintiff seeks to have his guardian ad litem, Cynthia Gonzalez, testify at trial regarding her role as guardian ad litem, her relationship with plaintiff, and her knowledge of the effects on plaintiff of the incidents underlying this litigation. Mot. at 3. Plaintiff bases his motion

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1 on Federal Rules of Civil Procedure 26(a)(3) and 37(c)(1), Mot. at 2, and clarifies in reply that he  
2 is seeking to have a “late-disclosed” witness testify at trial. Reply at 2. While he styles his  
3 motion as one to substitute a witness, he argues the motion should be granted if construed as a  
4 motion to identify a new witness. Mot. at 7; Reply at 3. That said, the authority plaintiff cites  
5 addresses primarily requests for substitution of expert witnesses. *See, e.g., McDowell v. Evey*,  
6 No. 95–846, 2000 WL 1371400, \*2 (D. Or. 2000). Neither party has identified any authority  
7 addressing the proposition that one percipient witness may be “substituted” for another. Given  
8 the nature of the motion and the proposed subject matter of Ms. Gonzalez’s testimony, the court  
9 construes the motion as seeking to designate Ms. Gonzalez as a new witness, following the close  
10 of fact discovery.

11 Defendants oppose the motion on grounds that plaintiff’s failure to identify Ms.  
12 Gonzalez sooner violates Federal Rule of Civil Procedure 26(a)(1); they also argue the late  
13 disclosure now is not substantially justified and is not harmless within the meaning of Federal  
14 Rule of Civil Procedure 37(c)(1), given the prejudice defendants say they will suffer if she is  
15 allowed to testify. *See Opp’n generally*. Defendants also argue that Ms. Gonzalez’s testimony is  
16 barred by virtue of the magistrate judge’s order barring plaintiff’s testimony, *id.* at 2, but the court  
17 does not reach that argument given its construction of plaintiff’s motion as seeking to identify a  
18 new witness.

19 **B. Procedural History of Case Scheduling**

20 The court issued an amended pretrial scheduling order on December 3, 2015,  
21 extending the fact discovery cutoff to January 22, 2016, after which date the court provided “[n]o  
22 new discovery shall be permitted.” Am. Status (Pretrial Scheduling) Order at 3, ECF 78. On  
23 January 13, 2016, the magistrate judge extended the fact discovery cutoff to September 30, 2016,  
24 “solely for the purposes of completing three further hours of plaintiff’s deposition.” Order, ECF  
25 98 at 2:16-17. Although this court’s scheduling order did not authorize the magistrate judge to  
26 modify the cutoff date at the time she issued her order, no party objected to the magistrate judge’s  
27 order. The court treats the September 30, 2016 as the last date by which any fact discovery,  
28 however limited, was allowed subject to the scheduling order. The magistrate judge also ordered

1 that if plaintiff did not submit to further deposition by the September 30 date, he would be barred  
2 from testifying at trial. *Id.* at 2. It is undisputed that plaintiff will not testify at trial and so the  
3 court does not consider whether the magistrate judge's order barring his testimony is binding on  
4 this court.

5           The September 30, 2016 cutoff passed without plaintiff's having submitted to  
6 further deposition. Because plaintiff's mental health had deteriorated, as reflected in part by his  
7 not completing his deposition, plaintiff's counsel took steps to identify a guardian ad litem, which  
8 led her to Ms. Gonzalez. Decl. of Lori Rifkin in Supp. Pl.'s Ex Parte App. App't Guardian ad  
9 Litem ¶ 17, ECF 153-1 (Rifkin Decl. I); Decl. of Lori Rifkin in Supp. Mot. to Amend Scheduling  
10 Order<sup>1</sup> ¶¶ 3-4, ECF 161-1 (Rifkin Decl. II). Ms. Gonzalez is an attorney who is plaintiff's cousin,  
11 with a relationship to him more like that of an aunt. Decl. of Cynthia Gonzalez in Supp. Pl.'s  
12 App. App't Guardian ad Litem ¶ 4, ECF 153-2 (Gonzalez Decl.). Plaintiff's counsel avers, as she  
13 repeated at hearing, that she learned of the additional information Ms. Gonzalez possesses  
14 regarding plaintiff only after she contacted her to discuss serving as guardian ad litem. Rifkin  
15 Decl. II ¶ 4. Plaintiff's counsel filed a motion to have Ms. Gonzalez appointed guardian ad litem  
16 on November 18, 2016. *See* ECF 153. On November 22, 2016, she notified defense counsel of  
17 her intent to file the instant motion. Rifkin Decl. II ¶ 6. At the time, trial was scheduled for  
18 January 9, 2017, although the date had not been confirmed. Am. Status (Pretrial Scheduling)  
19 Order at 9. On December 5, 2016, the court vacated the trial date and reset the final pretrial  
20 conference for January 27, 2017, to allow further time to resolve a pending summary judgment  
21 motion. *See* ECF 157. Also on December 5, 2016, plaintiff's counsel offered in an e-mail sent to  
22 defendants' counsel to cover the costs of a deposition of Ms. Gonzalez should defense counsel  
23 wish to take her deposition. Response to Pl.'s App. App't Guardian ad Litem, Ex. A, ECF 159.  
24 Plaintiff's counsel filed the instant motion on December 30, 2016. *See* ECF 161.

25           Trial currently is confirmed to start on April 17, 2017. ECF No. 250.

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<sup>1</sup> The court assumes the caption of the declaration, filed in connection with the motion to  
28 substitute witness, is a misnomer.

1           II.     LEGAL STANDARDS

2           A.   Guardian ad Litem as Percipient Witness

3                     As a threshold matter, the court notes there is no general bar against a guardian ad  
4 litem (GAL) serving as a percipient witness in a proceeding, as long as the guardian does not  
5 have “difficulty” retaining a true dedication to the best interests of the incompetent party. *See*  
6 *Lew Wah Fook v. Brownell*, 218 F.2d 924, 925 (9th Cir. 1955) (assuming without deciding GAL  
7 could serve as percipient witness); *I.P. v. United States*, 2015 U.S. Dist. LEXIS 147100, at \*2–3  
8 (E.D. Cal. Oct. 28, 2015) (plaintiff’s father served both as GAL and percipient witness). Given  
9 that the guardian here has no evident conflict of interest, and that no impediment has been  
10 identified to her maintaining her primary dedication to plaintiff’s best interests if she also testifies  
11 as a percipient witness, the court turns its focus to the issues presented by her late disclosure.

12           B.   Rule 26(a)(3)

13                     Federal Rule of Civil Procedure 26(a)(3) provides for a party to make pretrial  
14 disclosures, other than required initial disclosures and expert disclosures, of “information about  
15 the evidence that it may present at trial other than solely for impeachment.” Fed. R. Civ. P.  
16 26(a)(3)(A). “Unless the court orders otherwise, these disclosures must be made at least 30 days  
17 before trial.” Fed. R. Civ. P. 26(a)(3)(B). Here, as noted above, the court ordered most fact  
18 discovery to be completed by January 22, 2016, with discovery kept open thereafter until  
19 September 30, 2016 for the limited purpose of allowing for completion of plaintiff’s deposition.

20           C.   Rule 37(c)

21                     Federal Rule of Civil Procedure 37(c) provides a narrow exception to the deadlines  
22 contemplated by Rule 26(a): “If a party fails to provide information or identify a witness as  
23 required by Rule 26(a) [ ], the party is not allowed to use that information or witness to supply  
24 evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is  
25 harmless.” Fed. R. Civ. P. 37(c)(1); *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d  
26 1101, 1106 (9th Cir. 2001). This provision is “intended to put teeth into the mandatory . . .  
27 disclosure requirements” of Rule 26. 8B Charles Alan Wright & Arthur R. Miller, *Federal*  
28 *Practice and Procedure* § 2289.1 (3d ed. 2014); *Ollier v. Sweetwater Union High Sch. Dist.*, 768

1 F.3d 843, 861 (9th Cir. 2014). The Ninth Circuit has characterized Rule 37(c)(1) as “self-  
2 executing,” and an “automatic” sanction designed to provide a strong inducement for disclosure.  
3 *Goodman v. Staples The Office Superstore, LLC*, 644 F.3d 817, 827 (9th Cir. 2011). The burden  
4 is on the party facing exclusion to prove the delay was justified or harmless. *Yeti by Molly, Ltd.*,  
5 259 F.3d at 1107.

6 Courts have found substantial justification for a party’s late disclosure of a witness  
7 “if the original witness’s unavailability is beyond the party’s control,” *see Lopez v. I-Flow Inc.*,  
8 No. 08–1064, 2011 U.S. Dist. LEXIS 155826, at \*6 (D. Ariz. May 12, 2011), and the disclosure  
9 is made promptly upon learning of the unavailability, *Fonseca v. Sysco Food Servs. of Ariz., Inc.*,  
10 374 F.3d 840, 846 (9th Cir. 2004). *See also McDowell*, No. 95–846, 2000 WL 1371400, at \*2–3  
11 (late disclosed expert witness allowed where defendants showed original witness unable to testify  
12 due to retirement and health problems; trial starting in three months); *TIC - The Indus. Co.*  
13 *Wyoming, Inc. v. Factory Mutual Ins. Co.*, No. 10–3153, 2012 WL 2830867, at \*8 (D. Neb. July  
14 10, 2012) (allowing late disclosed witness where original witness unavailable due to ethical  
15 conflict beyond plaintiff’s control; trial two months away); *Park v. CAS Enters., Inc.*, No. 08–  
16 385, 2009 WL 4057888, at \*3 (S.D. Cal. Nov. 19, 2009) (allowing late disclosed witness where  
17 original witness unilaterally withdrew due to severe memory issues; trial four months away).  
18 Courts have applied these principles generally, although articulated primarily in cases addressing  
19 the late substitution of expert witnesses, to late disclosure of percipient witnesses. *See, e.g.*,  
20 *Ollier*, 768 F.3d at 863 (citing *Yeti by Molly*, 259 F.3d at 1106).

21 A delay may qualify as harmless as provided by Rule 37(c)(1) if it does not  
22 deprive the opposing party of the opportunity for discovery of what a witness or witnesses may  
23 say during trial testimony, or further discovery based on information that comes to light during  
24 witness depositions. The more witnesses late disclosed, the greater the chance of harm. *Cf.*  
25 *Ollier*, 768 F.3d 843 at 863 (late disclosure of thirty witnesses not harmless because it created  
26 need for depositions and significant additional trial preparation); *Hill v. U.S. Dep’t of Homeland Sec.*,  
27 570 F. App’x 667, 669–70 (9th Cir. 2014) (late disclosure of thirty-five witnesses not harmless  
28 because opposing party deprived of opportunity to conduct discovery to determine which witnesses had

1 useful information and to take depositions; but late disclosure of document harmless because government  
2 had already obtained it by subpoena). The harmless analysis also considers whether the court’s  
3 scheduling order would need to be amended to accommodate the late disclosure. *See Hoffman v.*  
4 *Constr. Protective Servs., Inc.*, 541 F.3d 1175, 1180 (9th Cir. 2008) (“Later disclosure of damages  
5 would have most likely required the court to create a new briefing schedule and perhaps re-open  
6 discovery, rather than simply set a trial date. Such modifications to the court’s and the parties’ schedules  
7 supports a finding that the failure to disclose was not harmless.”); *Wong v. Regents of the Univ. of Cal.*,  
8 410 F.3d 1052, 1062 (9th Cir. 2005) (“[d]isruption to the schedule of the court” that would result from  
9 allowing such witnesses and consequent depositions “is not harmless.”).

10 Rule 37(c)(1) also provides that “[i]n addition to or instead of [the] sanction [of  
11 exclusion], the court, on motion and after giving an opportunity to be heard:

12 (A) may order payment of the reasonable expenses, including attorney's fees,  
13 caused by the failure;

14 (B) may inform the jury of the party's failure; and

15 (C) may impose other appropriate sanctions, including any of the orders [available  
16 when a discovery order has been violated] listed in Rule 37(b)(2)(A)(i)—(vi).

17 Fed. R. Civ. P. 37(c)(1).

### 18 III. DISCUSSION

19 While plaintiff argues that the “30 days before trial” cutoff in Rule 26(a)(3)  
20 effectively provides a last ditch date for disclosure, such a reading of the rule ignores the Rule’s  
21 recognition of the court’s ability to “order otherwise.” Here, the court’s particularized scheduling  
22 orders govern, meaning the only avenue of relief available to plaintiff runs through Rule 37(c)’s  
23 exceptions. The court thus considers whether plaintiff’s late disclosure of Ms. Gonzalez was  
24 substantially justified or harmless or both.

25 Regarding substantial justification, the record before the court supports a  
26 conclusion that Mr. Padilla’s unavailability is beyond counsel’s control. While there were  
27 indications during efforts to complete his deposition in early 2016 that Mr. Padilla might not be  
28 up to that task, plaintiff’s counsel appeared to believe his ability to sit for deposition could be

1 restored such that completion would be possible by the September 30, 2016 date set by the  
2 magistrate judge. *See* Rifkin Decl. I ¶¶ 3, 9–12. Recognizing at some point that Mr. Padilla  
3 would not be able to participate in trial, counsel identified Ms. Gonzalez as a guardian ad litem.  
4 Rifkin Decl. II ¶ 3. In the course of discussing with Ms. Gonzalez her ability to serve in this role,  
5 counsel avers she learned Ms. Gonzalez possessed information regarding Mr. Padilla’s mental  
6 health condition and the events underlying the litigation. *Id.* ¶ 4. In any event, within  
7 approximately six weeks after September 30, 2016, plaintiff’s counsel moved the court to appoint  
8 Ms. Gonzalez as plaintiff’s guardian, and within days notified opposing counsel that plaintiff’s  
9 counsel would seek to have Ms. Gonzalez testify as a percipient witness. ECF 153; Rifkin Decl.  
10 II ¶ 6. Thus, at this point, the defense has been aware of Ms. Gonzalez and plaintiff’s position for  
11 approximately four and one-half months. While the late disclosure came originally at a time  
12 when the trial date was approximately one month away, that date was later continued such that  
13 defendants have had notice of plaintiff’s request to call Ms. Gonzalez as a percipient witness for  
14 more than four times that amount of time. Defendants argue that Padilla’s allegations in his  
15 second amended complaint filed on February 5, 2015, that defendants’ conduct stifled his ability  
16 to sustain a meaningful relationship with his family, SAC ¶¶ 134–138, ECF No. 38, gave rise to a  
17 requirement, in essence, that plaintiff have disclosed Gonzalez previously. On this point, the  
18 court at this stage is not persuaded. Plaintiff himself could have testified on the subject of his  
19 family relations, if he were available, and defendants could have probed the question during  
20 discovery in light of the allegations. On the current record, the court concludes plaintiff’s late  
21 disclosure was substantially justified by Mr. Padilla’s unavailability, confirmed as of September  
22 30, and in light of the relatively prompt notification of the defense thereafter.

23           The court also concludes the late disclosure was harmless. The disclosure involves  
24 a single witness, with plaintiff’s having provided a focused description of the information Ms.  
25 Gonzalez possesses. Since the time she first notified the defense of Ms. Gonzalez on November  
26 22, 2016, plaintiff’s counsel has offered to cover the costs of deposition. The court will in fact  
27 order that all such costs be paid by plaintiff’s counsel. While defendants argue the timing of Ms.  
28 Gonzalez’s disclosure has prevented them from identifying other family members who may

1 dispute her views, including through further discovery, this argument is speculative without  
2 further development. Again, on the current record, the late disclosure was harmless.

3 Finally the court is mindful of the possibility that precluding Ms. Gonzalez's  
4 testimony might have the effect of "summarily resolv[ing] the case in favor of defendants," if she  
5 is the only witness identified who can testify regarding plaintiff's damages. *See TIC - The Indus.*  
6 *Co. Wyoming*, 2012 WL 2830867, at \*8. In this light, the interests of justice weigh in favor of  
7 granting the motion.

8 In sum, the court finds Ms. Gonzalez may testify as a percipient witness at trial  
9 regarding her relationship with plaintiff, and her knowledge of the effects on plaintiff of the  
10 incidents underlying this litigation. The court will not allow her to provide any testimony of  
11 substance regarding her role as guardian ad litem; to the extent the jury needs to be provided  
12 information about her role as guardian ad litem, the court can provide that information in  
13 clarifying instructions after consultation with the parties.

14 The court orders no sanctions at this point other than the payment by plaintiff's  
15 counsel of all costs associated with the deposition of Ms. Gonzalez.

16 IV. CONCLUSION

17 For the foregoing reasons, the court confirms that it **CONDITIONALLY**  
18 **GRANTS IN PART** plaintiff's motion to substitute witness, ECF 161, construed as a motion for  
19 late disclosure of guardian ad litem Cynthia Gonzalez as a percipient witness. The motion is  
20 granted to the extent Ms. Gonzalez may testify at trial regarding her relationship with plaintiff  
21 and any knowledge she has of the effects on plaintiff of the incidents underlying this litigation;  
22 she will not be allowed to provide substantive testimony regarding her role as guardian ad litem.  
23 The motion is granted to this extent on two conditions: (1) that plaintiff make Ms. Gonzalez  
24 available for deposition as reasonably requested by defendants with all attendant costs to be bore  
25 by plaintiff's counsel, and any such deposition to be completed at least two court business days  
26 before plaintiff seeks to call Ms. Gonzalez as a witness during trial; and (2) that upon completion  
27 of Ms. Gonzalez's deposition, defendants may renew their opposition to her serving as a  
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1 percipient witness if in defendants' view the testimony provided during deposition supports such  
2 renewal.

3 IT IS SO ORDERED.

4 DATED: April 12, 2017.

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7 UNITED STATES DISTRICT JUDGE  
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