

United States District Court  
Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

JACQUELINE ZHANG,  
Plaintiff,  
v.  
COUNTY OF MONTEREY, MONTEREY  
COUNTY RESOURCE MANAGEMENT  
AGENCY, and MONTEREY COUNTY  
PARKS DEPARTMENT,  
Defendants.

Case No. 17-CV-00007-LHK  
**ORDER SUSTAINING DEFENDANTS’  
OBJECTION TO PLAINTIFF’S  
DESIGNATIONS OF MARISCAL  
DEPOSITION TRANSCRIPT**  
Re: Dkt. No. 158

In Defendants’ Objection to Plaintiff’s designation of deposition transcripts, Defendants contend that Plaintiff cannot introduce deposition transcript testimony for Mark Mariscal (“Mariscal”) because Mariscal is not a party to the litigation, Mariscal was not employed by the County at the time of his deposition, and Mariscal will be available to testify at trial. ECF No. 158 at 3.

Federal Rule of Civil Procedure 32 provides that a deposition may be used against a party on three conditions: (1) “the party was present or represented at the taking of the deposition or had reasonable notice of it”; (2) “it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying”; and (3) “the use is allowed by Rule

1 32(a)(2) through (8).” Fed. R. Civ. P. 32(a)(1).

2 Plaintiff contends that Plaintiff may rely upon Mariscal’s deposition transcript for two  
3 reasons. First, Plaintiff contends that she may rely on Mariscal’s deposition transcript as a  
4 deposition for an unavailable witness under Rule 32(a)(4). ECF No. 165 at 1–2. Rule 32(a)(4)  
5 provides, in relevant part, that a party may use the deposition of a witness if the Court finds “that  
6 the witness is more than 100 miles from the place of hearing or trial or is outside the United  
7 States, unless it appears that the witness’s absence was procured by the party offering the  
8 deposition.” Fed. R. Civ. P. 32(a)(4). Plaintiff contends that Mariscal resides in Southern  
9 California, which is more than 100 miles from the place of the trial in San Jose, California.  
10 However, the parties’ joint witness list reflects that Mariscal will testify at trial remotely. ECF No.  
11 145. Mariscal’s testimony will be live, and Mariscal will be subject to cross-examination.

12 The Court notes that Mariscal is appearing remotely during the COVID-19 pandemic. The  
13 San Jose courthouse, where trial will occur, is located in Santa Clara County. In Santa Clara  
14 County, as of June 6, 2021, there have been 119,553 confirmed COVID-19 cases, and 2,143  
15 people have died from COVID-19. Johns Hopkins University, *COVID-19 Status Report, available*  
16 *at <https://bao.arcgis.com/covid-19/jhu/county/06085.html>*. Furthermore, of the jurors who  
17 completed the jury questionnaire and have been summoned for jury selection in the instant case,  
18 over 50% stated that they were concerned about getting sick with COVID-19 if called to serve as a  
19 juror, and slightly under 50% stated that they were uncomfortable being in a very large courtroom  
20 with 20-30 people. *See* ECF No. 190.

21 In order to prevent spread of COVID-19, the Coronavirus Aid, Relief, and Economic  
22 Security (“CARES”) Act authorizes federal courts to hold criminal proceedings remotely as long  
23 as the Court makes certain findings. *See* H.R. 748 § 15002(b)(2). Moreover, General Order 72-6  
24 provides that court proceedings should be held via telephone or videoconference with a limited  
25 number of exceptions. *See* Gen. Order 72-6.

26 The Court notes that 5 out of 18 witnesses in the instant case are testifying remotely,  
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1 including one of Plaintiff’s witnesses. *See* ECF No. 145. These witnesses are testifying live and  
2 will be subject to cross-examination. Accordingly, the Court concludes that these witnesses are not  
3 unavailable under Rule 32(a)(4). Thus, Mariscal is not unavailable under Federal Rule of Civil  
4 Procedure 32(a)(4). *See Rubio v. Smith*, 114 F.3d 1195 (9th Cir. 1997) (noting that “[t]he right to  
5 cross-examination is fundamental to the trial process”); *see also United States v. Swisher*, 360 F.  
6 App’x 784, 786 (9th Cir. 2009) (affirming district court’s ruling to allow witness to testify by  
7 phone).

8           Second, Plaintiff contends that she may rely upon Mariscal’s deposition transcript as a  
9 deposition of a party under Rule 32(a)(3) or as an admission of a party pursuant to Federal Rule of  
10 Evidence 801(d)(2)(A) or (C). ECF No. 165 at 2–3. Rule 32(a)(3) provides that “[a]n adverse  
11 party may use for any purpose the deposition of a party or anyone who, *when deposed*, was the  
12 party’s officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).” Fed. R.  
13 Civ. P. 32(a)(3) (emphasis added). Mariscal himself is not a party to this litigation. Moreover,  
14 when Mariscal was deposed, he was no longer working for the County. Accordingly, he was not  
15 the County’s “officer, director, managing agent, or designee.” Fed. R. Civ. P. 32(a)(3). For the  
16 same reason, Mariscal’s deposition testimony was not an admission of a party pursuant to Federal  
17 Rule of Evidence 801(d)(2)(A) or (C). Thus, Plaintiff may not rely on Mariscal’s deposition  
18 transcript as a deposition of a party under Rule 32(a)(3) or as an admission of a party pursuant to  
19 Federal Rule of Evidence 801(d)(2)(A) or (C).

20           Accordingly, Defendants’ Objection to Plaintiff’s designations of Mariscal’s deposition  
21 transcript is SUSTAINED.

22 **IT IS SO ORDERED.**

23  
24 Dated: June 7, 2021



LUCY H. KOH  
United States District Judge