UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

THE UNITED STATES OF AMERICA, Plaintiff, v. DREW B. MORVANT, D.D.S., and DREW B. MORVANT, A PROFESSIONAL DENTAL CORPORATION, Defendants.	)	CIVIL ACTION No. 93-3251 Section K (1)

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION IN LIMINE TO ADMIT PENA AFFIDAVIT AND VIDEOTAPE

I. INTRODUCTION

Plaintiff, the United States, submits this memorandum in support of its motion in limine to admit into evidence 1) the sworn affidavit and 2) a videotaped oral statement of Ismael Pena, now deceased, on the grounds that they are admissible under the residual hearsay exception, Fed. R. Evid. 804(b)(5).

Plaintiff seeks an order admitting both of these statements into evidence because they are relevant to Dr. Morvant's purported reasons for sending Pena to another dentist during a telephone conversation in February, 1993, and also to the plaintiff's claim for damages to compensate Pena's pain and suffering. Because there are no known witnesses to their telephone conversation and Pena has since died, Pena's account

is the only other personal, first-hand description of the conversation between Pena and Dr. Morvant. In addition, the affidavit and the videotape represent the only personal, first-hand account of how Pena felt about Dr. Morvant's conversation with him and the effect it had on him. Thus, the admission of both statements is necessary to ensure that the jury is presented with all relevant and material facts. Accordingly, for the reasons set forth more fully below, the United States requests that the Court grant its motion in limine.

II. BACKGROUND

In this action brought under title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12181-89, the government alleges that Defendants Drew B. Morvant, D.D.S. and Drew B. Morvant, A Professional Dental Corporation, violated the ADA by refusing to provide dental care to Ismael Pena, xxxxxxxx, and others, solely because they are HIV-positive or have AIDS. In its request for relief, the government seeks, among other things, compensatory relief for Pena and xxxxxxxx.

The government alleges that the following facts are true. Ismael Pena ("Pena") and Patrick Dunne ("Dunne"), who were life partners for 22 years, were long-time dental patients of Defendant Morvant. See Exhs. 1, 4. In November 1992, Dunne went to Morvant's office to have an occlusal night guard fitted. See Exh. 1. During that visit, Dunne informed Morvant that Pena had AIDS. See Exh. 1.

In February 1993, Pena called Morvant's office to schedule a dental cleaning. See Exhs. 1, 2. Later that day, Pena and Morvant had a telephone conversation, during which Morvant told Pena that, because he had AIDS, he could no longer be treated at Morvant's office. See Exhs. 2, 3. Pena was told that he should instead go to another dentist, Dr. Creely Sturm. See Exh. 2. Pena did not go to Dr. Sturm but chose, instead, to have his teeth cleaning performed at the offices of Dr. Hebert. See Exhs. 5, 6.

Xxxxxxxx and his wife, xxxxxxxx, have lived in New Orleans since 1992. See Exh. 10. xxxxxxxx worked in the same building that housed Morvant's practice. See Exh. 7. In June 1993, he made an appointment to have his teeth cleaned at Morvant's office. See Exh. 7. When he arrived at the office, he filled out some papers and was then taken into an operatory by Stacey Brown, a dental hygienist. See Exhs. 7, 8. Brown took an oral medical history from xxxxxxxx, but did not ask him if he had HIV or AIDS. See Exhs. 7, 8. At the end of the oral history, she asked xxxxxxxx if there was anything else about his health that they should know. See Exhs. 7, 8. xxxxxxxx told her that he was HIV-positive. See Exhs. 7, 8. Brown then left the operatory and told Morvant of xxxxxxxx's status. See Exhs. 2, 7, 8. Morvant instructed her to tell xxxxxxxx that, because xxxxxxxx was HIV-positive, he could not be treated at their offices, and that he should make an appointment with Dr. Creely Sturm. See Exhs. 2, 7, 8. xxxxxxxx subsequently visited the offices of Dr. Sturm,

where he had his teeth cleaned. See Exhs. 5, 7, 9.

A. Circumstances Surrounding the Preparation of the Pena Affidavit and Videotape

On May 4, 1993, AIDSLAW of Louisiana Inc., filed a complaint with the Department of Justice on behalf of Ismael Pena, alleging a violation of the ADA. See Exh. 18. The letter alleged that in February 1993, Pena's "long time dentist, Dr. Drew Morvant" refused to treat Pena because he had AIDS and requested that the Department investigate the matter. The letter was received by the Department on May 17, 1993.[1] Id.

On June 30, 1993, a Department of Justice employee attempted to contact Pena regarding his complaint and learned that Pena's health was deteriorating and that he was dying. See Exh. 19. On July 2, 1993, that Department employee spoke with Pena and requested that he prepare a sworn statement and a videotape regarding the alleged discrimination for purposes of the investigation. Id. Pena agreed to do so. Id.

On July 5, 1993, five days after the Department learned of Pena's failing health, and six days before Pena's death on July 11, 1993, Pena prepared a typewritten four-page affidavit describing, among other things, the circumstances surrounding the telephone conversation with Dr. Morvant in February 1993. See Exh. 20. The affidavit stated that Pena had "been asked by the Department of Justice to prepare [a] videotape regarding the

[1] The letter was addressed to the Coordination and Review Section of the Department of Justice and was not forwarded to the Public Access Section until June 1993. See Exh. 19.

events that occurred during the week of February 4, 1993."[2] He stated that he was preparing a videotape "because I know that I may soon be passing into another life and thus unable to testify to the events that have occurred." Id. His affidavit set forth "to the best of my recollection a transcript" of the telephone conversation that he had with Dr. Morvant on or around February 4, 1994.Id. Pena's affidavit alleged that part of the conversation went as follows:

> Morvant: Well, one of the hygienists noticed that you had some thrush in your mouth the last time that you were here. You know, a lot of these girls are of child-bearing age, and they are nervous about AIDS and HIV and we are not really cleaning people's teeth now who have tested positive for the AIDS virus. There is a dentist that I can recommend to you. It's Dr. Kathryn Creely.[3] She's on Magazine Street, [and I remember very distinctly his following comment was] She's a woman but she's still pretty good and she doesn't mind working on AIDS victims. I have the address here for you. I think it will work out best that way because if I tried to get these gals to clean the teeth of patients with AIDS I would be losing a lot of staff and I would have to replace staff on a

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[2] The affidavit consists of: a) introductory remarks concerning the preparation of the videotape and the reason for its preparation; b) a statement regarding the history of his dental care provided by Dr. Morvant; c) a transcript of the February 1993 telephone conversation, as recalled by Pena; d) Pena's reaction to the telephone conversation; and e) an account of a discussion Pena had with Patrick Dunne regarding Dr. Morvant.

[3] Dr. Kathryn Creely is also referred to as Dr. Creely Sturm or Dr. Sturm.

> constant basis.
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> [Pena]: Well, I feel badly because I've always enjoyed coming to your office and it's really too bad you are held hostage by the phobias of your dental assistants. But I appreciate your recommendation and thank you for letting me know.

See Exh. 20.

Pena's affidavit also described his reaction to the telephone call and how he felt about what had transpired. The affidavit continued, in part:

> After the conversation, I sat at my desk for the rest of the afternoon and was unable to do anything else. I guess I was in a state of shock. I felt personally betrayed because I realized that Dr. Morvant no longer wanted me as his patient. I could not eat supper that night.
> . . . For weeks afterwards, I was unable to even try to find another dentist because I was distraught and fearful of another medical rejection. Despite my need to have my teeth cleaned, I was so anxious that I asked Patrick to check out other dentists. I was fearful that I would be rejected again and I did not want to have to go through it again.

Id.

Pena's affidavit was in a narrative form and was dictated by Pena at his home.[4] Pena attested to the truth of the affidavit before a notary public and he signed and initialed it. See Exh. 20.

On July 5, 1993, as indicated by the affidavit, Pena also

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[4] Kenneth Witkowski, a friend of Pena's, testified under oath during his deposition that he helped Pena record his recollection of the telephone conversation by typing it as Pena was telling him "what he said and what Dr. Morvant said." See Exh. 21 at 17-18.. According to Patrick Dunne, Pena organized the video and dictated changes to the initial statement. See Exh. 22 at 79, 84.

recorded his remarks on a videotape. See Exh. 23. The videotape is, substantively, the same account of what Pena said in the affidavit.[5] It was made in the presence of at least two witnesses and is less than seven minutes long.[6]

On July 22, 1993, the Department of Justice notified Dr. Morvant that it had received a complaint alleging that he had refused to provide dental treatment to Pena because of Pena's HIV status and requested that he respond to the allegations. See Exh. 26.[7] On August 10, 1993, the Department received Morvant's response that denied the substantive allegations of Pena's complaint. See Exh. 29.

After the completion of its investigation of the Pena complaint, as well as its investigation of a similar complaint made by xxxxxxxx, the Department of Justice filed the instant action against the Defendants on October 4, 1993.

B. The Relevance of the Affidavit and Videotape

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[5] There are no substantive differences between the affidavit and the videotape. See the transcribed version of the videotape prepared at the request of the Defendants and appended hereto as Exh. 24.

[6] In addition, Pena also signed a declaration, dated July 5, 1993, under penalty of perjury, declaring that he had viewed the videotape and that the facts presented in the videotape were accurate. See Exh. 25.

[7] Subsequently, on July 29, 1993, the Department notified Dr. Morvant that it had received an additional complaint alleging that his office had denied another person, xxxxxxxx, the opportunity to receive dental cleaning because of his HIV status. The Department asked Dr. Morvant to respond to that allegation as well. See Exh. 27. On August 10, 1993, Dr. Morvant denied the substantive allegations concerning xxxxxxxx. See Exh. 28.

The parties agree that Pena and Dr. Morvant had a telephone conversation in February 1993; that Dr. Morvant did not treat Pena after that telephone conversation; and that Dr. Morvant sent Pena to Dr. Creely Sturm after he learned that Pena had AIDS. The affidavit and the videotape reflect these material undisputed facts.

However, the parties do not agree as to why Dr. Morvant sent Pena to Dr. Creely Sturm. Pena's account differs significantly from Dr. Morvant's on the question of why Dr. Morvant sent Pena to Dr. Sturm. In essence, Pena stated that Dr. Morvant's decision was based on the fears of his staff. Dr. Morvant, on the other hand, has denied making such a statement. See Exh. 29. He claims that he "explained to Pena that because of his condition, I was going to refer him to a specialist in our community who would better be able to take care of him with his special needs as a patient with a depressed immune system." See Exh. 30 at 22. Nowhere in Pena's account does he mention such a rationale. Since the affidavit and the videotape are the only first-hand account, other than Dr. Morvant's recollection, of the February 1993 telephone conversation, their admission into evidence is necessary to ensure that the jury will have the opportunity to hear both sides of the story.

III. ARGUMENT

A. The Pena statements fully satisfy the requirements of the residual hearsay exception, Fed. R. Evid. 804(b)(5)

As a threshold matter, there is no dispute that both the Pena affidavit and the videotape are hearsay as defined by Fed. R. Evid. 801(c). They are out-of-court statements made by a declarant, now deceased, and are being offered to prove the truth of certain matters asserted.[8] However, because the affidavit and the videotape are relevant to the issues in this case, the United States seeks an order admitting them into evidence under the residual hearsay exception of Fed. R. Evid. 804(b)(5).

A trial court has broad discretion in rulings on the admissibility of evidence, including rulings on the admissibility of statements under the residual hearsay exception. Rock v. Huffco Gas & Oil Co., Inc., 922 F.2d 272, 277 (5th Cir. 1991); Nowell v. Universal Elec. Co., 792 F.2d 1310, 1315 (5th Cir. 1986), cert. denied, 479 U.S. 987 (1986).

Under the terms of Fed. R. Evid. 804(b), certain statements are not excluded by the hearsay rule if the declarant is unavailable as a witness.[9] Under the residual exception to the hearsay rule, Fed. R. Evid. 804(b)(5), hearsay statements may be

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[8] The government does not intend to offer that portion of the statement and the videotape that pertains to the discussion Pena had with Patrick Dunne regarding Dr. Morvant. See Exh. 20 at pp. 3-4. That part of the statement can be redacted.

[9] The first four exceptions under 804(b) are: (1) former testimony; (2) statement under belief of impending death; (3) statement against interest; and (4) statement of personal or family history.

admitted if the court concludes that the statements meet the following requirements:

> (5) Other exceptions. A statement not specifically covered by the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that: (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by the admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Fed. R. Evid. 804(b)(5).

The forerunner of the residual hearsay exception is generally thought to be a decision by the Fifth Circuit, Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961), an action brought against an insurance company to recover damages sustained to the county courthouse. The Fifth Circuit upheld the trial court's admission of a 58-year old newspaper article as evidence that the courthouse was damaged by a fire in 1901. After concluding that the news account did not qualify under one of the specific hearsay exceptions, the Court of Appeals agreed, nevertheless, that the article was "admissible because it is necessary and trustworthy, relevant and material" to the issue of whether the recent collapse of the building had been caused by lightning or by the earlier fire. Id. at 398.

When Congress adopted the Federal Rules of Evidence, it recognized the need for a flexible approach to hearsay espoused earlier by the Fifth Circuit in Dallas County, i.e., that a hearsay statement which does not fall squarely within one of the specific exceptions, may, under certain exceptional circumstances, still possess sufficient circumstantial guarantees of trustworthiness to warrant its admission into evidence.

> [The residual] exception was designed to protect the integrity of the specifically enumerated exceptions by providing the courts with the flexibility necessary to address unanticipated situations and to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies. . . . [T]he wording of the Rule and the legislative history indicate that Congress intended evidence to be admitted under Rule 803(24) only if the reliability of the evidence equals or exceeds that of the other exceptions to the hearsay rule.

Nowell, 792 F.2d at 1314-1315.[10] (citations omitted); see also U.S. v. Thevis, 84 F.R.D. 57, 61-62 (N.D. Ga. 1979), (aff'd on other grounds, 665 F.2d 616 (5th Cir. 1982), cert. denied, 456 U.S. 1008 (1982). In light of the circumstances described below, there is ample reason for this Court to conclude that the affidavit and the videotape possess sufficient circumstantial guarantees of trustworthiness and that they fully satisfy the requirements of Fed. R. Evid. 804(b)(5) and the underlying purposes of the rule.

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[10] Both Fed. R. Evid. 803(24) and Fed. R. Evid. 804(b)(5) contain the identical language and the "discussion pertaining to one of them is equally applicable to the other." Nowell, 792 F. 2d at 1314, n. 2, citing, J. Moore 11 Moore's Federal Practice, § 803(24)[7] (2d ed. 1982).

1. Pena's affidavit and videotape clearly possess the requisite circumstantial guarantees of trustworthiness

The totality of circumstances surrounding the preparation of Pena's affidavit and the videotape provide ample evidence that both the affidavit and the videotape possess the requisite circumstantial guarantees of trustworthiness. In particular, both statements were: a) made with Pena's knowledge of his impending death; b) made where there was no motive to misrepresent the facts; c) made at the request of the Department of Justice during the course of its initial investigation of Pena's complaint; d) made voluntarily; e) based upon Pena's personal knowledge of what was said during the telephone conversation with Morvant; f) made under oath and under penalty of perjury; and g) were rich in detail.

First and foremost, the fact that Pena prepared the affidavit and the videotape with the knowledge that he "may soon be passing into another life" is compelling evidence that Pena's statements are trustworthy. Although Pena's statements do not qualify as a dying declaration under Fed. R. Evid. 804(b)(2), they possess assurances of truthfulness and reliability equivalent to those that underlie the dying declaration exception.[11] See, e.g., Mattox v. U.S., 156 U. S. 237, 244 (1895)

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[11] The "dying declaration" exception to the hearsay rule, Fed. R. Evid. 804(b)(2), is defined as follows:

> In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning

("[T]he sense of impending death is presumed to remove all temptation to falsehood, and to enforce as strict an adherence to the truth as would the obligation of oath."). See also U.S. v. Mobley, 421 F.2d 345, 347-348 (5th Cir. 1970) (trial court did not err in letting jury hear statement of deceased victim about robbery, given to an FBI agent, where jury was instructed that they could not consider contents of statement unless they found that the declarant knew of his impending death);[12] Gann v. Meek, 165 F.2d 857, 859 (5th Cir. 1948), cert. denied, 334 U.S. 849 (1948) (letter from deceased Marine regarding change in insurance policy admissible hearsay "considering the circumstances under which it was made, is almost equivalent to a dying declaration"). Accordingly, both the affidavit and the videotape satisfy the underlying intent of Congress that residual hearsay statements possess indicia of reliability equivalent to that of another exception under Fed. R. Evid. 804(b). See Nowell, 792 F.2d at 1315.

Coupled with the fact that the dying man was unlikely to fabricate what transpired between him and Dr. Morvant, is the lack of evidence that Pena had even the slightest of motives to

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> the cause or circumstances of what the declarant believed to be impending death.

[12] Cf. Central Freight Lines, Inc. v. N.L.R.B., 653 F.2d 1023, 1026 (5th Cir. 1981) (Board erred in admitting affidavit concerning conversation between manager and deceased employee, absent circumstantial guarantees of trustworthiness equivalent to specified hearsay exceptions, including absence of evidence that deceased employee had belief in his impending death.)

misrepresent what was said in the telephone conversation. In fact, Pena and Dr. Morvant had a long-term professional relationship, Pena liked the staff, and both Pena and Dr. Morvant regarded each other as friends.[13] See Thevis, 84 F.R.D. at 63 (analysis of trustworthy character of hearsay statement should inquire into "the declarant's relationship with the party against whom the statement is offered, and his motive to speak truthfully about the facts observed"); Robinson v. Shapiro, 646 F.2d 734, 743 (2nd Cir. 1981) (not an abuse of discretion to admit the testimony of a decedent's co-worker where the declarant had no reason to lie).

The fact that the affidavit and the videotape were prepared by Pena at the request of the Department of Justice lends additional support to the reliability of the statements. In fact, the Pena statements were prepared at the earliest stage of the investigation into his complaint, before the Department had even notified Dr. Morvant of its investigation or received his response to the allegations. See, e.g., U.S. v. Accetturo, 966 F.2d 631, 635 (11th Cir. 1992) (narrative statement of a victim of extortion given voluntarily to law enforcement authorities who were likely to investigate further was admissible) (cert. denied sub nom. Basha v. U.S., 113 S.Ct 1053 (1993); U.S. v.

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[13] Pena saw Morvant several times a year, felt that he and Dr. Morvant "had a cordial, frank doctor-patient relationship" and "always enjoyed" going to Dr. Morvant's office. See Exh. 20 at 2-3. Indeed, Dr. Morvant described his relationship with Pena in similar terms. Morvant stated he had "good relationship" with Pena and that they "were friends." See Exh. 30 at 17-18.

Chapman, 866 F.2d 1326, 1331 (11th Cir. 1989) (fact that out-of-court statements about defendant were made to police officials by wife who knew police would begin an investigation to ascertain the truth of her statements lends some reliability to the statements) (cert. denied, 493 U.S. 932 (1989).

Moreover, the affidavit and the videotape were dictated and narrated by Pena at his home and were entirely voluntary. Cf. Central Freight Lines, Inc., supra, 653 F.2d at 1026 (affidavit concerning conversation between manager and deceased employee deemed not trustworthy because employee merely signed the affidavit prepared by a board examiner). Furthermore, unlike a situation involving some criminal law enforcement matters, there is no evidence that Pena made the statement in order to curry favor with the Department of Justice or because of any inducements such as a grant of immunity from prosecution. See, e.g., In re Corrugated Container Antitrust Litig., 756 F.2d 411, 415 (5th Cir. 1985)(transcript of a government interview conducted under a grant of use immunity not inherently trustworthy); United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977) (transcript of grand jury testimony inadmissible as lacking circumstantial guarantees of trustworthiness, particularly where there was evidence of prosecutorial pressure).

It is particularly worthy to note that Pena's statements regarding the telephone conversation are based upon factual matters within his personal knowledge and observation, not conjecture. See Thevis, 84 F.R.D. at 63 (analysis of

trustworthiness includes inquiry into declarant's "opportunity to observe the episode set forth in the statement"); cf. Page v. Barko Hydraulics, 673 F.2d 134, 140 (5th Cir. 1982) (hearsay statement was admissible, but Court noted that statement was not based upon the declarant's personal knowledge, was speculation, and had little probative value). In addition, Pena's description of his pain and suffering following Morvant's decision to send him to another dentist is clearly relevant for purposes of proving the claim for compensatory relief. Although other witnesses can testify about how Dr. Morvant's actions affected Pena, the fact is that Pena's account remains the only personal account available.

The fact that Pena attested to the truth of the facts contained in the affidavit and the videotape, and that he reviewed the videotape before attesting to its truthfulness are further indicia that the statements are reliable evidence. See U.S. v. White, 611 F. 2d 531, 538 (5th Cir. 1980) (statement admissible where executed under "an oath subjecting an affiant to the penalty for perjury, [which] tends to impress upon the declarant the seriousness of the statement and the importance of telling the truth") cert. denied, 446 U.S. 992 (1980). See also Accetturo, 966 F.2d at 635 n.8 (11th Cir. 1992) (victim's handwritten statement given to law enforcement officials on a form attesting to its truth was admissible); Copperweld Steel Co. v. Demag-Mannesmann-Bohler, 578 F.2d. 953, 964 n. 16 (3rd Cir. 1978) (admission of a memorandum prepared by attorney

following conversation with key witness who died before trial was not clearly erroneous where statement had been reviewed and adopted by the witness as being his statement and was more probative than any other evidence offered).

Finally, the affidavit and the videotape also contain particular details that lend credibility to the statement. See, e.g., Thevis, 84 F.R.D. at 65 (statements given to FBI and grand jury were "replete with the detail to which only a participant and a confidante would have access.").

Thus, the indicia of the statements' reliability, taken as a whole, more than adequately demonstrate that the Pena affidavit and videotape fully satisfy the express requirements of Fed. R. Evid. 804(b)(5). However, the affidavit and the videotape also possess an added element of reliability because material facts alleged in the statements have been independently corroborated by other evidence, thus bolstering the claim that the statements possess the circumstantial guarantees of trustworthiness.[14]

First, as indicated earlier, the parties agree that Pena and Dr. Morvant had a telephone conversation in February 1993; that Dr. Morvant did not treat Pena after that telephone conversation; and that Dr. Morvant sent Pena to Dr. Creely-Sturm after he learned that Pena had AIDS.

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[14] While corroborating evidence may not be considered in evaluating the "particularized guarantees of trustworthiness" of hearsay statements when the case involves the Confrontation Clause of the Sixth Amendment, Idaho v. Wright, 497 U.S. 805, 822 (1990), such a limitation does not apply in civil cases. See F.T.C. v. Figgie Intern Inc., 994 F.2d 595, 608 (9th Cir. 1993), cert. denied, 114 S.Ct. 1051 (1994).

Secondly, there is independent evidence indicating that Dr. Morvant made similar remarks to Patrick Dunne regarding his reasons for sending Pena to Dr. Sturm. For example, in his deposition, Dunne testified that Dr. Morvant advised him to tell Pena not to mention the fact that Pena had AIDS "to the hygienists because they were very nervous about AIDS." See Exh. 22 at 45. Dunne also recalled that Morvant "went into an explanation that the girls in his office were very nervous about AIDS, that they were childbearing age, that they didn't want to be put at risk, and that he just couldn't clean Ismael's teeth in those circumstances." See Exh. 22 at 48; see also Exh. 31.

Thirdly, there is circumstantial evidence from which inferences can be drawn that Dr. Morvant's staff was concerned about treating HIV/AIDS patients. For example, Dr. Morvant did, in fact, have several staff members of child-bearing age. See Exh. 32 at 127; Exh. 33 at 57; Exh. 34 at 73-74. Moreover, one of the hygienist's testified during her deposition that she believed she was on fertility drugs at the time that she treated Pena. See Exh. 32 at 142-146. A dental assistant stated during her deposition that she guessed she "would be scared" if she had to work with someone with AIDS. See Exh. 33 at 57. She also testified about her concern of her children dying of AIDS. See Exh. 33 at 58-59.

Accordingly, it is abundantly clear that the affidavit and the videotape possess the circumstantial guarantees of trustworthiness and should be admitted into evidence.

2. The Pena statements offer evidence of several material facts

The affidavit and the videotape clearly provide evidence material to resolving the dispute concerning Dr. Morvant's rationale for sending Pena to Dr. Creely-Sturm. The statements bear on whether Dr. Morvant's actions were taken for the reasons he claims, and for purposes of permitting the jury to assess Dr. Morvant's credibility and whether his claims are merely pretextual. The statements also bear directly on the nature and the scope of the injury suffered by Pena.

3. The Pena statements are more probative than any other reasonably procurable evidence

In weighing the probative value of proffered evidence, the court should examine the proponent's need for such evidence. U.S. v. Spletzer, 535 F.2d 950, 956 (5th Cir. 1976). In this case, the admission into evidence of the affidavit and the videotape is necessary because they bear on the disputed issue of Dr. Morvant's reasons for sending Pena to Dr. Creely-Strum. They are, moreover, without a doubt, more probative of what Pena recalled about the telephone conversation than any other reasonably procurable evidence. Indeed, as we continually have stressed, the affidavit and the videotape represent the only personal, first-hand account of what transpired during the February 1993 telephone conversation, other than that of the Defendant, Dr. Morvant. Thus, unless the court admits the statements, the government will be deprived of an opportunity to

provide the jury with a full and complete means by which to determine what transpired and why.

In addition, Pena's testimony regarding Dr. Morvant's actions, and his feelings of betrayal, discrimination, and fears of "another medical rejection" are certainly more probative of material issues of pain and suffering than any other available evidence that the government could possibly procure from secondary sources.

4. The admission into evidence of Pena's statements will best serve the interests of justice

Where, as here, the evidence is conflicting on some relevant issues of fact, the interests of justice require that the affidavit and the videotape be admitted for the jury's consideration. In particular, by admitting the videotape into evidence, the triers of fact will have the opportunity to hear both accounts of the telephone conversation, to judge the credibility of both Dr. Morvant and Pena, to examine the demeanor of both individuals, to draw their inferences about what transpired and why, and to determine the weight to be given the contents of those statements. Cf. Johnson v. Wm. C. Ellis & Sons Iron Works, Inc., 604 F.2d 950, 958-959 (5th Cir. 1979) (district court erred in denying jury an opportunity to exercise its judgement concerning disputed issue when there were facts upon which jurors in the exercise of their impartial judgment might a reach different conclusion).

Admittedly, the Defendants did not have the opportunity to cross-examine Pena about the allegations set forth in his

affidavit and the videotape, the primary rationale for the hearsay rule. However, as we have demonstrated here, the federal courts have admitted hearsay statements, often in the context of criminal cases where the harm of admitting the statement is much greater, because those statements contained sufficient indicia of reliability. Indeed, courts have admitted such hearsay statements in the absence of cross examination. See, e.g., United States v. Ward, 552 F.2d 1080, 1082-1083 (5th Cir. 1977); Barker v. Morris, 761 F.2d 1396, 1401 (9th Cir. 1985) ("Thus, circumstances other than prior cross-examination of the declarant by the defendant can show evidence to be trustworthy to a degree that warrants its submission to the jury.")(cert. denied, 474 U.S. 1063 (1986).

Moreover, many persons who have AIDS and who claim to have been the victims of discrimination have life threatening conditions. Under the best of circumstances, the testimony of such persons regarding their claims of disability discrimination should unquestionably be preserved by deposition in accordance with Rule 27 of the Federal Rules of Civil Procedure, allowing the adverse party an opportunity to cross-examine the deponent. In some exceptional instances, however, such as here, the exigencies of the situation do not lend themselves to preserving testimony by deposition in an adversarial context. In fact, as events unfolded here, there were only eleven days between the time the Department of Justice first contacted Dunne and Pena and the date of Pena's death. See Exh. 19. Moreover, Pena's

statements were prepared at the earliest stage of the Department's investigation and well before this action was filed in October, 1993. The exigencies of the situation simply did not provide a realistic opportunity to obtain an order pursuant to Rule 27. The affidavit and the videotape were the most reasonably procurable evidence at that time and under the circumstances of Pena's impending death. It is precisely in an exceptional situation such as this that the court should rely on the residual hearsay exception to admit trustworthy evidence to facilitate the purpose of the Fed. R. Evidence 804(b)(5): "[the] ascertainment of truth and the fair adjudication of the controversies." Nowell, 792 F.2d at 1314.

5. Plaintiff provided timely notification of its intent to offer the statements

The government clearly has satisfied its notice obligations under Fed. R. Evid. 804(b)(5). See U.S. v. Atkins, 618 F.2d 366, 372 (5th Cir. 1980) (evidence can be admitted under Fed. R. Evid. 804(b)(5) only if the proponent notifies the opposing party of its intention to rely on statements in advance of trial). The Department of Justice provided a copy of the four-page Pena affidavit, the videotape and the accompanying declaration regarding the videotape to the Defendants in January 1994. See Plaintiff's Response to Defendant Morvant's Requests for Production of Documents, Request No. 9. Moreover, on August 2, 1994, the government advised opposing counsel in writing that it intended to offer the statements as evidence. See Exh. 35. Thus, the Defendants have been provided with the particulars of

the statements and have had more than ample notice, in advance of trial, that the government intended to offer the Pena statements.

B. The probative value of the statements is not outweighed by any dangers of prejudice or confusion

Although evidence is relevant, it may nevertheless be excluded in the court's discretion "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

When the probative value of the affidavit and the videotape is weighed against whatever unfair prejudice might ensue as the result of their admission into evidence, it is clear that the probative value, given the facts of this particular case, far outweighs any prejudicial effects.

This is particularly true for both the affidavit and the videotape. Although the videotape presents factual issues in a more emotional context than the affidavit, the videotape is the only way in which Pena will have "his day in court." Pena's delivery of the statement is controlled and matter-of-fact. His appearance is not unpleasant, and his demeanor is calm. In sum, the tape is neither inflammatory nor sensationalized. See, e.g., Walls v. Armour Pharmaceutical, 832 F. Supp. 1505, 1508-09 (M.D. Fla. 1993) (videotaped deposition of child who died from AIDS held admissible in light of detailed limiting instructions and the fact that probative value outweighed prejudice); see also U.S. v. Tibbetts, 646 F. 2d 193, 195 (5th Cir. 1981)

(videotape of talk show during which a tax resister remarked about his reasons for refusing to file tax returns was admissible under Rule 403 to show his motive or intent). Moreover, the presentation of the videotape, which is less than seven minutes, long will not consume any appreciable trial time, and the court may, if necessary, give limiting instructions to the jury regarding the presentation of the videotape.

In addition, the videotape has the greatest potential to clarify issues of fact and to address the evidentiary problem created by Pena's death, namely that his unavailability may unfairly credit Dr. Morvant's version of events unless Pena's videotaped statement is admitted. Accordingly, whatever prejudice might arise by showing the jury the videotape is significantly diminished by the importance that the tape plays in allowing the jury to hear both sides of the story.

IV. CONCLUSION

In light of the totality of circumstances surrounding the preparation of the affidavit and the videotape, the demonstrated trustworthiness of those material statements, the existence of independent corroborative evidence of their reliability, and the fact that these statements remain the only other first-hand account of the Pena-Morvant telephone conversation, and the only first-hand account of how Pena reacted to being sent to another dentist, the United States respectfully requests that this Court grant its motion in limine to admit the affidavit (Exh. 20), the videotape (Exh. 23), and the transcript of the videotape (Exh.

24) into evidence pursuant to the residual hearsay exception of Fed. R. Evid. 804(b)(5).

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