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

In re: WATTS COORDINATED PRETRIAL PROCEEDINGS	)	Master Docket Case No. 19-cv-01717
	)	Judge Franklin U. Valderrama
	)	Magistrate Judge Sheila M. Finnegan

This filing relates to *Baker v. City of Chicago, et al.*, Case No. 16-cv-8940

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO CONDUCT FORENSIC TESTING

During the many years that fact discovery was pending, Defendants never disclosed under Rule 26 that they intended to rely on any of the physical evidence from any of Plaintiff Ben Baker or Clarissa Glenn's arrests. Having not identified the physical evidence during fact discovery, they may not use it now. Indeed, Rule 26 expressly requires that parties identify both "documents" and "tangible things" that they may use to support their claims and defenses. Nor did the Defendants disclose any of the individuals who were involved in storing, moving, or otherwise handling those materials within the Chicago Police Department as witnesses to testify on any of those topics, and so none of those individuals were deposed. The chain of custody sheet for the evidence that Defendants want to test, plastic baggies allegedly recovered from Ben Baker, strongly suggests that the actual baggies were destroyed. Because the evidence and related witnesses were not disclosed during fact discovery, significant questions about the evidence, including whether it is even the same material allegedly recovered from Baker, are unanswered. As a result, Plaintiffs would experience prejudice if the issue were belatedly injected into the case at this stage.

Ignoring the fact that they did not disclose the relevant evidence, the City of Chicago, Philip Cline, Debra Kirby, Karen Rowan, and the Individual Defendants represented by Hale & Monico recently filed a rushed motion to conduct extensive fingerprint and DNA testing on certain unidentified evidence from one of Mr. Baker's arrests. The motion does not cite a single rule of procedure, statute, or legal authority for any purpose. The entire "Discussion" section of the motion is two-pages long, and one of those pages is solely the "Wherefore" clause listing the relief that Defendants seek. The motion does not explain what rule or rules would allow for this testing, why it should be conducted now, or why good cause exists to extend the expert deadlines to allow for the testing and subsequent expert reports.

It is not the Court's or Plaintiffs' job to identify the relevant legal standards and explain why they do or do not apply to Defendants' motion. For this reason alone, Defendants' motion should be denied. There are, however, additional reasons to deny the motion. During the status conference to set a briefing schedule, Defendants essentially admitted that they rushed their motion because they were unlikely to be able to complete the requested testing and produce the reports within the existing expert schedule. Defendants' motion does not acknowledge this timing problem or request an extension, let alone explain why one would be warranted. Nor does the motion address the fact that Defendants failed to disclose that they intended to rely on the physical evidence or address the prejudice that Plaintiffs will suffer if the motion is granted, given that Plaintiffs did not conduct any discovery with respect to the undisclosed evidence.

In short, Defendants have failed to show that testing is warranted or that the Court should extend the expert and *Daubert* schedules to accommodate the testing. By contrast, Plaintiffs would be prejudiced if testing were allowed. The Court should deny Defendants' motion. If, however, the Court grants Defendants' motion, Plaintiffs request that the Court allow them to

conduct their own forensic testing on the same materials that the Defendants seek to test, as well as on the materials allegedly recovered during the December 11, 2005 arrest of Ben Baker and Clarissa Glenn, and they further request an order requiring the Individual Defendants in this case to submit to the collection of their fingerprints and DNA.

ARGUMENT

As discussed in more detail below, Defendants forfeited their argument by failing to cite any legal authority for their requests. Beyond that, the motion fails on the merits.

I. Defendants' failure to identify the relevant legal issues and authorities warrants denial.

"Perfunctory and undeveloped arguments are waived, *as are arguments unsupported by legal authority*." *M.G. Skinner & Associates Ins. Agency, Inc. v. Norman-Spencer Agency, Inc.*, 845 F.3d 313, 321 (7th Cir. 2017) (emphasis added); *see also James v. Cutting Edge Realty, LLC*, 21-CV-03028, 2021 WL 5750175, at *2 (C.D. Ill. Dec. 2, 2021) ("Cutting Edge does not cite any legal authority for the bases it urges, and the motion does not mention Rule 12 as the proper vehicle for dismissal. Instead, Cutting Edge's motion asserts only skeletal, undeveloped, and perfunctory arguments which the Court will not consider. Accordingly, Defendant Cutting Edge's motion to dismiss is denied.") (citations omitted). Similarly, it is not the Court's job "to research and construct the legal arguments open to parties, especially when they are represented by counsel." *United States v. Holm*, 326 F.3d 872, 877 (7th Cir. 2003) (internal quotation marks omitted).

Defendants' motion squarely violates the above principles. Defendants are represented by experienced lawyers. Dkt. 279 at 5-6. Nonetheless, Defendants left it entirely to the Court and Plaintiffs' counsel to identify the potential legal bases for their requests (such as, e.g., compelling Plaintiffs to provide fingerprints, and conducting potentially destructive forensic testing) and

then analyze those bases. That failure to identify, much less apply, the relevant law should result in denial of their motion. *See*, *e.g.*, *James, LLC*, 21-CV-03028, 2021 WL 5750175, at *2 (denying motion that failed to cite legal authority).[1]

II. Relevant legal standards if the Court considers the merits.

If the Court entertains the merits of Defendants' motion despite their complete failure to identify or apply the relevant legal standard, there are a number of legal issues to consider. Plaintiffs provide the relevant background law below and then apply that law to Defendants' motion in the following sections.

First, Rule 26(a)(1) requires parties to disclose "all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment." Fed. R. Civ. P. 26(a)(1)(i). Rule 37 provides that parties who fail "to provide information or identify a witness as required by Rule 26(a) or (e)" may not "use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." Fed. R. 37(c)(1).

Second, Defendants' request for permission to test physical evidence in their possession is treated "as a motion for protective order under Federal Rule of Civil Procedure 26(c)." *Mirchandani v. Home Depot, U.S.A., Inc.*, 235 F.R.D. 611, 613 (D. Md. 2006). Deciding whether to allow testing involves a four-part balancing test that considers:

[1] Defendants' reference to *Smith v. City of Chicago*, No. 21 C 1159, (2022 WL 458729 (N.D. Ill. Feb. 15, 2022) during the status conference to set a briefing schedule on this motion does not solve this problem for Defendants. Not only did they fail to include the case in their brief, but during the status conference they only briefly mentioned it and did not explain how that case applied to or warranted the testing they requested. Nor should the Court consider any attempt by Defendants to identify or analyze the relevant legal issues in their reply brief, having failed to do so in their motion. *Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009) ("the district court is entitled to find that an argument raised for the first time in a reply brief is forfeited").

> 1) Whether the proposed testing is reasonable, necessary, and relevant to proving the movant's case; 2) Whether the non-movant's ability to present evidence at trial will be hindered, or whether the non-movant will be prejudiced in some other way; 3) Whether there are any less prejudicial alternative methods of obtaining the evidence sought; and 4) Whether there are adequate safeguards to minimize prejudice to the non-movant, particularly the non-movant's ability to present evidence at trial.

Id. at 614 (D. Md. 2006) (noting that if evidence was not in moving party's possession it would be treated as request under Rule 34, but same standard would apply); *see also Rivera v. Lake County, Illinois*, 2015 WL 14071796 (N.D. Ill. Jan. 29, 2015) (applying same test and allowing DNA testing of materials that had been previously tested during criminal investigation). Defendants have not suggested a different legal standard would govern requests for fingerprint testing.[2]

Third, Rule 35 governs Defendants' request for an order requiring CPD to provide their expert with Baker's fingerprints or for an order requiring Baker to "submit to Specking Forensics, LLC taking his fingerprints," as well as for an order requiring Baker to submit to that same company taking a DNA swab from him. Dkt. 279 at 5; *see also*, *e.g.*, *Tate v. Doe*, 20-CV-704-JDP, 2022 WL 424989, at *1 (W.D. Wis. Feb. 11, 2022) (collecting cases for proposition that Rule 35 governs request for DNA samples). Courts that have considered similar motions require the moving party to show "that: the DNA evidence is relevant; (2) there is a reasonable possibility that testing will yield a match; and (3) the privacy rights of the individual being tested will not be unduly affected." *Davis v. City of New York*, 13 CV 6260 (RML), 2019 WL 3252747, at *2 (E.D.N.Y. July 18, 2019). The moving party must make a "fairly robust showing" that there is a reasonable possibility that testing will yield a match before courts will order such testing. *Id*.

[2] This case law specifically addresses destructive testing. It is not clear whether Defendants' proposed testing would be destructive, but it appears that at least a portion of it would be. Given Defendants' failure to provide any framework for analyzing their request, Plaintiffs address this case law.

Finally, it was apparent during the status conference to set a briefing schedule on this motion that even if the Court had granted the motion immediately without allowing Plaintiffs to respond, the Defendants would likely have needed an extension of the expert disclosure schedule to complete the testing and prepare expert reports. Federal Rule of Civil Procedure 16 governs the modification or amendment or scheduling orders. When a party seeks to modify a scheduling order, they must establish good cause. *Bowman v. Korte*, 962 F.3d 995, 998 (7th Cir. 2020). The Seventh Circuit has explained "that good cause implies justification rather than excuse (negligence can be excused but not justified)." *Commodity Futures Trading Comm'n v. Lake Shore Asset Mgmt. Ltd.*, 646 F.3d 401, 404 (7th Cir. 2011) (internal quotation marks omitted). "In making a Rule 16(b) good-cause determination, the primary consideration for district courts is the diligence of the party seeking amendment." *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011). Courts must examine the diligence of the party seeking to extend time for discovery because one "the aims of Rule 16 [is] to prevent parties from delaying or procrastinating and to keep the case moving toward trial." *Id*. (internal quotation marks omitted).

A. Defendants' request for testing should be denied because they failed to disclose the physical evidence under Rule 26, and Plaintiffs would be prejudiced by allowing the testing now.

Discovery in the Baker/Glenn case was open for years, both before the Coordinated Proceedings began and as a part of those proceedings. During that multi-year time period, Defendants never disclosed their intention to rely on any of the physical evidence allegedly recovered from Ben Baker or Clarissa Glenn. Instead, the City's disclosures cited documents

only, including inventory reports of physical evidence – evidence that they could have disclosed had they been inclined. Ex. 1 (City of Chicago's January 31, 2017 initial disclosures).[3]

Nor have, or could, the Defendants excuse the failure to identify that evidence in their Rule 26 disclosures by contending that the physical evidence at issue would be used for impeachment, which might have. Quite the opposite: they claim that the evidence is substantive evidence central to the claims in this case. Dkt. 279 at 4; *see also Wilson v. AM General Corp.*, 167 F.3d 1114, 1122 (7th Cir.1999) (evidence that is "part of [Defendants'] primary line of defense" is not considered solely impeachment for Rule 26 purposes); *Beaton v. SpeedyPC Software*, 338 F.R.D. 232, 237 (N.D. Ill. 2021) (same). Defendants' disclosure of inventory reports in their Rule 26 disclosures is further proof that Defendants will not use the physical evidence solely for impeachment purposes. *See*, *e.g.*, *Deese v. Springfield Thoracic & Cardiovascular Surgeons*, 183 F.R.D. 534, 537 (C.D. Ill. 1998) (disclosure of transcript of audio recording in Rule 26 disclosures showed that actual recording was not solely impeachment material). Defendants' failure to disclose their intention to use the physical evidence dooms their motion. *See*, *e.g.*, Fed R. Civ. P. 26(a)(1)(A)(i); *see also* Ex. 2 (Order in *Colyer v. City of Chicago* (N.D. Ill.) noting that Rule 26(a) requires disclosure of physical evidence and Rule 37 provides sanction of barring undisclosed evidence).[4]

[3] Relying on the documents, here the inventory reports listing the evidence that was allegedly recovered, is far different from using the actual physical evidence itself. Indeed, Rule 26(a)(1) specifically requires parties to disclose both documents *and* tangible evidence that they may use to support their claims or defenses.

[4] In *Colyer*, the Court was addressing the failure to list physical evidence on a pretrial exhibit list. Under the plain language of Rule 26, the same standard applies to the failure to disclose the evidence during discovery. The *Colyer* court's order does not suggest that it would have been acceptable to disclose physical evidence for the first time on the pretrial exhibit list; it addressed the issue that the parties presented in that case, which was whether physical evidence could be used at trial.

Also fatal to their position is the Defendants' failure to disclose any of the witnesses who handled, stored, and possibly destroyed any of that evidence as witnesses to testify about those topics. Because Defendants failed to disclose the physical evidence and failed to disclose any relevant fact witnesses who could testify about how and when that evidence was stored, Plaintiffs had no reason to investigate the evidence. Had Defendants indicated that they intended to use the physical evidence and disclosed the relevant witnesses, Plaintiffs would have had the opportunity to depose those individuals to address the chain of custody, determine who touched the evidence, how it was stored over the years, whether it was contaminated, and many other questions.

This is not an academic concern. It is very real. There are important and unanswered questions about the specific evidence that Defendants appear to want to test in this case, including whether it was destroyed or supposed to be destroyed, whether the police department began the destruction process, and who handled the evidence during that process. Indeed, the chain of custody sheets appear to establish that the baggies allegedly recovered from Baker (the material that Plaintiffs believe Defendants want to test) were in fact destroyed: as the following excerpt shows, the chain of custody sheets lists multiple individuals as "destruction" witnesses for items 904976 and 904977, which are purportedly the plastic bags holding the drugs that were recovered from Baker. Ex. 3 (DO-JOINT 008593-DO-JOINT 008614) at DO-JOINT 008599.

904977	11-MAY-18 11:35:32 DISPOSITION RETURNED BY	167 :	LIUTKUS, ANTANAS	17281	4284
904977	11-MAY-18 11:35:32 FIRST DESTRUCTION WITNESS	167 :	LIUTKUS, ANTANAS	17281	4284
904977	11-MAY-18 11:35:32 SECOND DESTRUCTION WITNESS	167 :	NEMETH, LAURA	37927	19756

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This is the same language used on inventory sheets for an earlier arrest of Ben Baker where the material appears to have been destroyed. *Id*. at DO-JOINT 008593-8595. Given that the case centers on allegations that Defendants completely fabricated a drug case by planting evidence on Plaintiffs, questions about the physical evidence that Defendants belatedly seek to test, which were not addressed during fact discovery, should not be lightly cast aside.

In short summary, Defendants never disclosed their intent to rely on the physical evidence, and Plaintiffs did not conduct any of the discovery they would have conducted had Defendants done so. Plaintiffs would therefore be prejudiced if the Court allows the testing now.[5]

B. Defendants' request for testing comes too late, and they have not shown good cause to extend the deadline.

During the status conference to set a briefing schedule on Defendants' motion, the Defendants acknowledged they had a timing problem. They acknowledged that it would take at least one week (if things went according to plan) for their first expert to determine whether there were any latent ridge impressions that could be checked for a match, and it would take at least 2-3 weeks beyond that to complete all of the requested testing. Counsel for Defendants also acknowledged that labs frequently need additional time beyond their original estimates. Thus, even if the Court had immediately granted Defendants' motion, they likely would not have been able to produce a report by their May 13 deadline for expert disclosures. Defendants' brief ignores this issue, instead claiming that it was reasonable to wait this long to ask for testing and

[5] And given all of the competing work and deadlines in this case and the other test cases in the Coordinated Proceedings, including the significant number of depositions in other cases that remain to be taken as a result of Defendants' earlier motion for an extension of fact discovery, as well as the *Daubert* and summary judgment deadlines that Judge Valderrama set in this case, there is no practical opportunity to properly conduct the follow-up discovery that would be necessary if testing is allowed, and certainly no justification for forcing Plaintiff to scramble to try.

suggesting that it is somehow Plaintiffs' responsibility that Defendants did not seek leave to do this earlier. Dkt. 279 at 4.[6]

Without citing any authority, Defendants claim that "it would not have been necessary or appropriate for defendants to seek to conduct this testing earlier," that "[a]ny question of timeliness of defendants is answered by plaintiffs' disclosure of Dr. McCarthy," and that [i]t was appropriate for defendants to wait and see what plaintiffs intended to do before seeking this testing, especially because it is plaintiffs' burden of proof on all issues in this case." Dkt. 279 at 4. None of these arguments are persuasive.

First, although fingerprint and DNA testing is conducted by experts, that hardly means it would have been inappropriate or impermissible to do the testing before Defendants' deadline for expert disclosures. In fact, Defendants (including the City of Chicago, represented by the same lawyers that represent the City in this case) did just that in the case they referenced during the status hearing on their motion. Specifically, in *Smith v. City of Chicago*, Defendants moved for leave to conduct DNA testing approximately one month before fact discovery ended. *Smith*, 2022 WL 458729, at *1. Although the court in that case accepted the argument that the testing was expert discovery and agreed to extend deadlines to accommodate the testing, the fact that the City requested the testing during fact discovery undercuts their unsupported argument that it would not have been appropriate to conduct the testing earlier this case.

Moreover, Defendants' motion would still be too late even if the Court accepts the argument that testing requests should be considered expert discovery. First, as noted above, they never identified the physical evidence during fact discovery, so they are barred from relying it on

[6] During the May 8, 2024 status conference, Defendants indicated that they filed the motion with an eye toward completing the discovery before their expert disclosures were due. But as explained in the text, that does not square with the estimates they gave at the earlier status conference.

in this case. Second, Defendants will not be able to complete the testing and provide reports within the deadline for expert discovery. As Defendants acknowledged during the status hearing on this motion, it would have been unlikely for them to be able to complete the testing and provide reports without getting an extension. This is a problem of Defendants' making. Defendants note in their motion that even if Plaintiffs had agreed to allow them to conduct the testing, they would have needed a Court order. Dkt. 279 at 3. Yet, for unexplained reasons, Defendants waited until April 19 to file that motion despite knowing that their experts would likely not be able to complete the work under the existing discovery schedule even if the Court dropped everything else it was working on and immediately granted Defendants' motion (which would have been a plainly unreasonable expectation).

Defendants' second argument, that their request is timely because it is made in response to the disclosure of Dr. McCarthy, is wrong for a number of reasons. First, Plaintiffs offered to withdraw Dr. McCarthy as a witness if Defendants withdrew this motion. They refused to do so, which conclusively refutes the assertion that Defendants are seeking testing in response to Plaintiffs' disclosure of Dr. McCarthy as an expert witness. Ex. 4 (email string re: Dr. McCarthy). Contrary to Defendnats' assertion otherwise, their motion was never a response to Dr. McCarthy. Indeed, Dr. McCarthy did not view or request the physical evidence, did not conduct any testing, and did not offer any opinions with respect to testing any of the material allegedly recovered from Ben Baker. Rather, she offered a much more general opinion that testing of baggies could have been done in the mid-2000s, a point that is relevant for Plaintiffs' *Monell* claim that that the City failed to properly supervise the officers (for example, by testing all of the evidence allegedly recovered from victims of the Watts team).

Nor was Dr. McCarthy's opinion the first time that this theory was introduced. In fact, Baker and Glenn (and a number of other Plaintiffs) served requests to admit on the City one year ago relating to the City's decision to not test baggies of drugs for fingerprints. Ex. 5 (City Response to Baker April 2023 RTAs). Thus, to the extent that Defendants are trying to maintain that they are seeking testing in response to something that Plaintiffs did, they had no reason to wait until near the deadline for their expert disclosures.[7]

Finally, Defendants' argument that it was reasonable to wait and see what Plaintiffs chose to do is difficult to understand. If Defendants' desire was to test, what action might Plaintiffs have taken that would have resulted in Defendants not requesting testing? Are Defendants really saying that if Plaintiffs had requested testing, the Defendants would not have requested the right to conduct their own testing? That is not plausible, further undercutting the idea that it was reasonable to wait and see if Plaintiffs were going to conduct testing. Along the same lines, Defendants had no reason to believe that Plaintiffs might request testing. Plaintiffs, like Defendants, did not identify any of the physical evidence in their own Rule 26(a)(1) disclosures, and they did not depose anyone involved in handling or storing that evidence, something they would have needed to do if they intended to test the materials.

Even if parties are permitted to conduct forensic testing during expert discovery, that does not mean they are automatically entitled to extensions of the expert schedule to conduct that testing. Here, Defendants have not even tried to show good cause for an extension, and they should not receive one.[8]

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[7] The City also provided binding testimony on this exact topic in November of 2023. Ex. 6 (McCarthy report, citing City's testimony).

[8] Defendants knew or should have known that if they wanted to conduct any forensic testing, they needed to seek leave well before their deadline for expert disclosures. In August 2023, the Court set a

C. Defendants have not met their burden of showing that testing or taking fingerprints or a DNA sample is justified.

Defendants have not met their burden of showing that testing is appropriate, even setting aside all of the issues discussed above. First, they have not established that the testing is reasonable, one of the relevant factors under *Mirchandani* and *Rivera*, because they have failed to explain in any detail what testing they will perform or how it will be performed. To the contrary, the motion only addresses the concept of latent print testing and DNA testing at a high level. *Mirchandani v. Home Depot, U.S.A., Inc.*, 235 F.R.D. 611, 613 (D. Md. 2006). They also have not tried to, and cannot, show that Plaintiffs will not be prejudiced by the testing. As explained above, Plaintiffs will be prejudiced because they did not conduct discovery relating to the evidence that they could have conducted if Defendants had disclosed their intention to rely on the physical evidence (that documents suggest was destroyed, no less) in a timely manner. Nor have the Defendants shown what safeguards will be in place to ensure that Plaintiffs' ability to present evidence at trial will not be impacted by the proposed testing.

Finally, beyond the fact that Defendants have failed to establish that testing the materials themselves is appropriate, they have also not established that it would be appropriate under Rule 35 for the Court to order Ben Baker to submit to an examination to collect his fingerprints and a DNA sample. Again, Defendants do not acknowledge the relevant legal standard, let alone

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June 10 2024 deadline for *Daubert* motions. Dkt. 270. The Court did not initially set interim disclosure deadlines. Therefore, Plaintiffs proposed submitting their own expert reports at the end of February. Ex. 7 (email string referencing expert proposal). Although Plaintiffs made that proposal orally, they are confident that Defendants would not dispute that Plaintiffs proposed a February 2024 expert disclosure deadline. Defendants ignored that request for a significant amount of time. Ex. 7 (email string referencing expert proposal). After multiple attempts to follow up, Defendants proposed a later disclosure schedule, with Plaintiffs' submitting their expert reports at the beginning of April. Plaintiffs quickly responded and suggested that they submit their reports earlier, which would have given the parties a bit more breathing room. Defendants again ignored Plaintiffs' suggestion, and so ultimately Plaintiffs agreed to Defendants' proposed, condensed expert schedule. Ex. 8 (email string re: expert deadlines). Thus, any timing constraints are of Defendants' own making.

explain how their request satisfies that standard. Nor could they satisfy that standard. Most importantly, Defendants have not shown a reasonable possibility that testing the materials will yield a match. To meet that standard, the moving party must make a robust showing, which typically involves showing the appearance of "biological matter … in a place where it would not ordinarily be expected to be found," as well as providing "corroborating testimony explaining how it got there via the putative subject of the testing." *See Davis*, 2019 WL 3252747, at *3-4 (denying testing even though preliminary analysis showed DNA sample on currency, a material "that one would normally expect to harbor human DNA"). Defendants acknowledge that they do not know whether there are any fingerprints or DNA on the material they seek to test, but even if there is such material, it would not be unexpected to find such material on plastic baggies. Thus, Defendants have failed to show good cause to require Baker to submit to a fingerprint or DNA examination.

CONCLUSION

Defendants have not shown that they are entitled to conduct the testing that they seek. Their motion should be denied.

Respectfully submitted,

/s/ Scott Rauscher

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