

## **Exhibit 3**

IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

Keith Smith, )  
                  )  
                  )  
*Plaintiff-Appellant,* )  
                  )  
                  ) No. 19-2725  
-vs-            )  
                  )  
City of Chicago, *et al.* )  
                  )  
                  )  
*Defendants-Appellees.* )

**MOTION TO STRIKE AND FOR SANCTIONS**

Plaintiff-Appellant Keith Smith, by counsel, moves the Court to strike appellees' brief and supplemental appendix because it contains unredacted personal identification information contrary to Federal Rule of Appellate Procedure 25(a)(5), incorporating the privacy protections of Federal Rule of Civil Procedure 5.2. In addition, the documents containing the personal identification information are not part of the district court record.

Grounds for this motion are as follows:

1. Defendants-Appellees have attached a voluminous collection of police documents as a supplemental appendix to their Response Brief.
2. These documents include reports about the arrest that is the basis of plaintiff's lawsuit (SA 2-23, 46-48), as well as documents recounting plaintiff's complete criminal background. (SA 24-45.) Defendants cannot explain why plaintiff's criminal background has any relevance to this appeal.

3. Defendants did not rely on these documents in the district court nor could they have done so in response to plaintiff's motion to dismiss. *Jackson v. Curry*, 888 F.3d 259, 263 (7th Cir. 2018) (in general, court may not consider evidence outside the pleadings on motion to dismiss).

### **I. Failure to Redact Personal Identity Information**

4. The documents submitted by defendants include plaintiff's unredacted birthdate and home address on multiple pages (Defendants-Appellees SA 2, 7, 9, 10, 16, 19, 21, 24-42, 44, 45, 48) as well as the unredacted birthdate and home address of a man arrested with plaintiff. (Defendants-Appellees SA 16, 19, 21.) These documents also include plaintiff-appellant's social security number. (Defendants-Appellees SA 44-45.)

5. Defendants' conduct violates this court's "Redaction Agreement," to which all users of the Court's online filing system must agree:

**Redaction Agreement**

**IMPORTANT NOTICE OF REDACTION RESPONSIBILITY:**

All filers must redact: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; financial account numbers; and in criminal cases, home addresses in compliance with [Fed. R. App. P. 25\(a\)\(5\)](#), [Fed. R. Civ. P. 5.2](#), [Fed. R. Crim. P. 49.1](#), or [Fed. R. Bankr. P. 9037](#). This requirement applies to all documents, including attachments.

I understand that, if I file, I must comply with the redaction rules. I have read this notice.

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6. The Court should not tolerate defendants' failure to follow this agreement by flouting Federal Rule of Appellate Procedure 25(a)(5).

7. Plaintiff-appellant therefore respectfully requests that the Court strike defendants' brief and supplemental appendix to remove his personal identity information from the Court's public database.

## **II. Improper Attempt to Submit New Evidence on Appeal**

8. The Court will not "admit on appeal any document which was not made a part of the record in the district court." *Borden, Inc. v. F.T.C.*, 495 F.2d 785, 788 (7th Cir. 1974). The Court has carefully limited the exceptions to this rule to cases involving a significant deprivation of liberty. See, e.g., *United States v. Miller*, 832 F.3d 703, 704 (7th Cir. 2016); *Brown v. Watters*, 599 F.3d 602, 604 n.1 (7th Cir. 2010); *Ruvalcaba v. Chandler*, 416 F.3d 555, 562 n.2 (7th Cir. 2005).

9. There is no such deprivation here, and defendants fail to even argue for any new exception to the rule. Instead, defendants argue that they may submit new evidence on appeal because the district court *could* have considered that evidence. (Response Brief 3 n.4.) This is incorrect. See paragraphs 13-17 below.

10. Moreover, if defendants had submitted the police reports to the district court, plaintiff would have responded to the evidence and demonstrated why it should not be considered on defendants' motion to dismiss or,

in the alternative, shown that the information in the police reports on which defendants rely is unreliable. Defendants' gambit is classic sandbagging.

11. The Court should apply the rule that "new evidence may not be presented on appeal," *Hirmiz v. New Harrison Hotel Corp.*, 865 F.3d 475, 476 (7th Cir. 2017), and strike the defendants' submission. *White v. Hefel*, 875 F.3d 350, 358 (7th Cir. 2017) (court erred when it took judicial notice of factual allegations in transcript of guilty plea).

12. The Court should impose an appropriate sanction on defendants because their improper submission goes well beyond police reports about the arrest that is the basis for plaintiff's lawsuit. There is not even an arguable basis for defendants to have submitted plaintiff's entire criminal history as evidence on appeal. (SA 24-45.)

### **III. Improper Attempt to Submit Evidence on a Motion to Dismiss**

13. Finally, the Court should reject the argument that defendants may rely on the reports for the first time on appeal because the reports (including plaintiff's criminal history) were "incorporated" into the complaint. (Response Brief 3 n.4.) This is factually in error.

14. The single reference in plaintiff's Second Amended Complaint to police reports is the following:

9. Defendants Mitchell and Otero memorialized this fabricated story in official police reports and criminal complaints and communicated the fabricated story to prosecutors.

(Plaintiff-Appellant's Short Appendix 36.)

15. This allegation that the reports were fabricated is the opposite of incorporating the reports. Whether the police reports contains true information is a central question to this case; asking the court to rely on the reports at this stage of the case would be “license to ignore the distinction between motions to dismiss and motions for summary judgment.” *Levenstein v. Salafsky*, 164 F.3d 345, 347 (7th Cir. 1998).

16. The “narrow exception” to the rule against consideration of documents submitted in response to a motion to dismiss applies only to documents that are “concededly authentic.” *Tierney v. Vahle*, 304 F.3d 734, 738 (7th Cir. 2002). Plaintiff does not concede the authenticity of the police reports or their accuracy. It would have been improper for the district court to consider the reports on defendants’ motion to dismiss.

17. The Court should therefore reject defendants’ attempt to rely on the documents on appeal.

#### **IV. Conclusion**

Accordingly, plaintiff-appellant respectfully requests that the Court strike appellees' brief and supplemental appendix, order that it be removed from the Court's public database, and impose an appropriate sanction.

Respectfully submitted,

/s/ Joel A. Flaxman  
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