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

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| DERRICK SCHAEFFER,<br><br>Plaintiff,<br><br>v.<br><br>CITY OF CHICAGO, OFFICER JAMES A. BRANDON #7634, OFFICER MARIO PEREZ #18936, OFFICER JAMES KINSEY # 16189, and DETECTIVE JOCELYN GREGOIRE-WATKINS, #20974,<br><br>Defendants. | ) | 19 C 7711<br><br>Judge Robert M. Dow Jr.<br><br>Magistrate Judge Jeffrey T. Gilbert |

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL**

Defendant City of Chicago, by and through its attorney, Mark A. Flessner, Corporation Counsel for the City of Chicago, and Defendants James Brandon, Mario Perez, James Kinsey, and Jocelyn Gregoire-Watkins, by through one of their attorneys, Evan K. Scott, Assistant Corporation Counsel for the City of Chicago, (collectively, "Defendants") hereby submit the following response to Plaintiff's Motion to Compel (ECF No. 54):

**INTRODUCTION**

Plaintiff moves this Honorable Court to compel Defendants to produce criminal transcripts from Plaintiff's own underlying criminal proceedings that bring rise to the present lawsuit. Plaintiff's motion has two problems that should cause it to be denied. First, Plaintiff misconstrues the applicable case law. Defendants are under no obligation to produce to Plaintiff hard copies of transcripts based on the Federal Rules of Civil Procedure and relevant case law. Defendants' position is that, whenever possible, parties should obtain copies of court hearing transcripts directly from the court reporter upon the payment of that reporter's reasonable fees. Plaintiff has not provided a single case in which a court has ordered a party to turn over a transcript that was equally

available to it. Instead, Plaintiff attempts to rely on ephemeral, non-controlling case law from several courts outside of the Seventh Circuit to justify his position that "[c]ourts have repeatedly rejected the 'equally available' objection, describing it as 'insufficient to resist a discovery request.'" *See* Motion to Compel, at ¶ 6 (internal citations omitted). The reality is that there is no strong indication from the courts, one way or the other, that Defendants are required to turn over criminal court transcripts when there are methods for procuring said transcripts that are equally available to Plaintiff. Second, Plaintiff's position would potentially have troubling implications for litigation where a party could shift costs by requiring opponents to pay for and produce transcripts that are equally available. For these reasons, Defendants respectfully request the Court deny Plaintiff's Motion to Compel.

## PROCEDURAL HISTORY

Plaintiff Derrick Schaeffer ("Plaintiff") initiated this civil rights action on November 21, 2019, alleging that the individual defendants' conduct in connection with his arrest on February 1, 2017 violated his constitutional rights. (*See generally* Complaint, ECF No. 1). Plaintiff also brought forth a state law malicious prosecution claim against Defendant City of Chicago. (*See id.*). On February 14, 2020, Defendants served their answers to Mandatory Initial Discovery Pilot Project requests, which stated that among the documents that they had in their possession were 22 transcripts from approximately 22 court hearings in Plaintiff's criminal case. Defendants further stated, "Defendants object to producing them, as they are equally available to Plaintiff and the dissemination of them through Defendants would deprive the court reporter of income to which he or she is entitled." On April 24, 2020, Plaintiff's counsel wrote to ask defense counsel for authority supporting these objections. On May 13, 2020, the former lead attorney for the Individual Defendants responded and offered to discuss matters further. On August 14, 2020, Plaintiff filed

a Joint Status Report that represented the parties had come to an impasse regarding a discovery dispute and that further attempts to resolve with respect to Local Rule 37.2 would be futile. (*See* ECF No. 52 at 2). On August 21, 2020, Plaintiff filed the present motion seeking to compel defendants to produce transcripts from Plaintiff's underlying state court criminal proceedings. (*See* ECF No. 54).

## ARGUMENT

### I. PLAINTIFF'S MOTION SHOULD BE DENIED FOR MISCONSTRUING CASE LAW

Plaintiff's motion is predicated on the notion that because Defendants have in their custody 22 transcripts from court dates in Plaintiff's criminal case, Defendants are required to produce a physical copy of those items. However, that is not the case.

The standing order for the Mandatory Initial Discovery Pilot Project includes mandatory initial discovery requests. The third request states in relevant part, "List the documents, electronically stored information ("ESI"), tangible things, land, or other property known by you to exist, whether or not in your possession, custody or control, that you believe may be relevant to any party's claims or defenses. . . . For documents and tangible things in your possession, custody, or control, you may produce them with your response, or *make them available for inspection* on the date of the response, instead of listing them." (emphasis added). There is nothing in the standing order that requires Defendants to do more than identify documents and make them available for inspection. Should Plaintiff's counsel wish to inspect the 22 court transcripts, defense counsel will arrange for such an inspection. Similarly, Federal Rule of Civil Procedure 34 allows for inspection of records rather mandating actual production of them.

Plaintiff does not cite to any rules or offer any case law suggesting that Plaintiff is entitled to receive, at no cost, a copy of criminal court transcripts in Defendants' possession. Nor does

Plaintiff deny that the transcripts are equally available to him. Nor does Plaintiff state any steps that he may have taken, if any, to obtain the transcripts—of which both parties agree are responsive to discovery, could potentially determine the validity of Plaintiff's legal assertions in his Complaint, and arguably should have been reviewed by Plaintiff's counsel before filing suit in good faith. Plaintiff is represented by highly sophisticated counsel that specializes in federal civil rights cases, and the notion that Defendants are required to supply Plaintiff with information equally available to both parties does not serve the interests of justice. Barring documents and materials that are exclusively possessed by the Defendants, Plaintiff should be tasked with gathering the information he believes will best prove his case.

Rather, Plaintiff cites to a number of non-binding and distinguishable cases about discovery having nothing to do with court transcripts. Plaintiff cites to *St. Paul Reinsurance Co. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 514 (N.D. Iowa 2000). But that case involves a request for "all documents identified, or relied on, in your answers to Counterclaim Plaintiff's First Set of Interrogatories Directed to Counterclaim Defendant" rather than court transcripts. Next, Plaintiff cites to *S2 Automation LLC v. Micron Tech., Inc.*, 2012 WL 3656454, at *37 (D.N.M. Aug. 9, 2012). ECF No. 54 at p. 2. But *S2 Automation* discusses timesheets for employees. Likewise, Plaintiff's citation to 8 WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 2014 is unavailing because the entry discusses matters in general terms. Plaintiff further cites to other inapposite cases: *Hill v. Gonzalez*, 2015 WL 1657781, at *6 (E.D. Cal. Apr. 14, 2015) (objection concerning Plaintiff's medical records rather than court transcripts); *Charter Practices Int'l v. Robb*, 2014 WL 273855, at *2 (D. Conn. Jan. 23, 2014) (objection to documents online being equally available overruled); *Hill v. Asset Acceptance LLC*, 2014 WL 3014945, at *7 (S.D. Cal. July 3, 2014) (in which information about debt collection practices was sought).

There are few, if any, published cases in the Seventh Circuit that address the exact issue before the Court. Most discovery disputes regarding transcript production involve deposition transcripts taken in the same case at issue. Here, the transcripts in dispute relate to Plaintiff's criminal court proceedings which brought forth the present case. Defendants believe there is legal and equitable justification to preclude Defendants from producing the transcripts at issue. Specifically, there is no inherent injustice in Defendants' decision not to share criminal court transcripts with Plaintiff.

In support of the Motion to Compel, Plaintiff seeks to dispel the duties placed upon litigants in the Federal Rules of Civil Procedure by asserting that "[n]early all documents in police misconduct cases are 'equally available' through subpoena, Freedom of Information Act requests, or public record searches." *See* Motion to Compel, at ¶ 7. First, it is untrue that such documents are equally available. Almost by definition, a plaintiff would be making these subpoenas, FOIA requests and public record searches of the defendant's records. Such records are more available to defendants than plaintiffs. Second, Defendants here are not attempting to interject such an objection. What matters here is if the court transcripts are equally available to Plaintiff. They are.

Plaintiff next points out that Defendants have asked in their requests for production items that include transcripts and that Plaintiff has freely provided those items. *See* Motion to Compel, at ¶¶ 8-10. The fact that Plaintiff has provided Defendants with similar items at no expense to Defendants is appreciated, but it in no way obligates Defendants to do likewise. Indeed, if Plaintiff had simply listed these items and informed Defendants where to obtain them at their own cost, Defendants would simply have done so.

Plaintiff next tries to claim that Defendants' citation to Federal Rule of Civil Procedure 26 is unimportant because Defendants have conceded that the transcripts are relevant to the issue and

in Defendants' possession. *See* Motion to Compel, at ¶ 11. Once again, Plaintiff misconstrues the law and the facts. Defendants have not conceded that the materials are relevant; their inclusion in Defendants' MIDPs concedes that they "may" be relevant. As a matter of fact, the content of the transcripts generally are not relevant within the meaning of Federal Rule of Evidence 401, which is to say that they generally do not provide any information that make any of Plaintiff's claims or Defendants' defenses more likely to be true. But even accepting *arguendo* that all are relevant, Defendants' citation to Federal Rule of Civil Procedure 26 is based on the notion that courts contemplate the parties' ability to access materials as one of the grounds on which materials may be discovered. In this case, Plaintiff has the undisputed ability to access these materials independent of Defendants. He simply chooses not to.

Plaintiff then cites a Tenth Circuit case to assert his position that court reporters do not own a copyright on the transcripts they create at legal hearings, and therefore are not entitled to compensation for their time and effort to transcribe these hearings. *See* Motion to Compel, at ¶ 12. However, Defendants never insinuated that court reporters own a copyright in their transcripts, nor make mention of that in their responses to the Mandatory Initial Discovery Requests. In fact, the case cited by Plaintiff involved a court reporter who demanded payment from a litigant who obtained the relevant transcripts ***through a public records request*** (*see United Trans. Union Local 1754 v. City of Albuquerque*, 352 Fed. App'x 227, 229 (10th Cir. 2009))—ironically the same method by which Plaintiff does not bother to try or provide explanation as to why he cannot. "While [*Albuquerque*] supports the notion that parties might lawfully be able to access transcripts without paying additional court reporter fees in some circumstances, it does not support Plaintiff's position that she is, in essence, entitled to an offset due to Defendant's refusal to share." *Young v. United Parcel Service, Inc.*, 2014 WL 858330 at *3 (D. Md. Mar. 4, 2014).

Plaintiff next attempts to raise two more non-issues in this case: that Defendants are not bound by contract from providing Plaintiff with copies of the transcript for free and that private contracts cannot bind non-parties. *See* Motion to Compel, at ¶ 13. Defendants concede that they are not bound by any contract to any court reporting service which precludes them from disseminating the transcripts they purchased here, nor do they dispute that private contracts cannot modify the Federal Rules of Civil Procedure. "Nevertheless, it is typical that the court reporter be paid by each party receiving a copy of a transcript." *See Young*, 2014 WL 858330 at *3. Illinois law explicitly authorizes an official court reporter to charge a page rate for the preparation of court proceedings. 705 ILCS 70/5. Federal law includes a similar provision for official court reporters transcribing federal court proceedings. 28 U.S.C.A. § 753(f). To require Defendants to produce the transcripts Plaintiff seeks would deprive the individual court reporters of a statutorily authorized source of income.

Plaintiff is ultimately not penalized or prejudiced by Defendants' refusal to produce criminal transcripts. Indeed, "[t]here is no inherent injustice in Defendant's decision to not share deposition transcripts with Plaintiff—to the contrary, it is the norm that both parties pay the costs associated with deposition transcripts they believe to be 'reasonably necessary' to prove their case." *LaVay Corp. v. Dominion Federal Sav. & Loan Ass'n*, 830 F.2d 522, 528 (4th Cir. 1987). In fact, "[t]he general rule, established by the Federal Rules of Civil Procedure, is that a party must obtain copies of deposition transcripts directly from the court reporter upon payment of a reasonable charge, and not from opposing counsel or the court." *Schroer v. United States*, 250 F.R.D. 531, 537 (D. Colo. 2008). While Defendants acknowledge that deposition transcripts are not at issue in the present matter, it is this principle upon which Defendants believe they should not be compelled to turn over the underlying criminal court transcripts.

Plaintiff claims his position is "consistent with the rules for transcripts of proceedings in federal court, which are made publicly available 90 days after transcription without further payment to the court reporter." *See* Motion to Compel, at ¶ 14. It should be noted that the transcripts at issue here are from state court proceedings, and that there is no parallel state requirement that transcripts be made publicly available without further payment to the court reporter. Even accepting *arguendo* Plaintiff is correct, it is irrelevant to the notion of whether Defendants can and should be compelled to provide Plaintiff a copy of 22 transcripts in this case. Consistency with the rule that federal transcripts should be publicly available through the Clerk's Office does not address the issue of whether one party in litigation should be required to provide, at no cost, all transcripts it possesses when transcripts are equally available to both parties through other means.

Plaintiff finally argues that "Defendants' position is contrary to federal procedure" and cites to the need to file transcripts publicly as part of *habeas corpus* petitions and summary judgment motions. *See* Motion to Compel, at ¶ 15. Once again, Plaintiff brings up an irrelevant and easily distinguishable argument. That parties must provide the Court with transcripts in support of their attempts to invoke the Court's authority in a public context has nothing to do with the present matter before the Court.

## II. PLAINTIFF'S POSITION HAS TROUBLING IMPLICATIONS

Plaintiff does not deny that the records at issue are equally available to him. He simply wishes to avoid the expense of paying for them. But such costs are part of litigation.

If taken to its logical extreme, Plaintiff's position would allow a party to sit back and wait for its opponent to order hearing transcripts in the underlying case, deposition transcripts in the underlying case, or virtually any other set of materials. Then the party could request those materials

and move to compel their production while avoiding the cost (and indeed, possibly seeking the costs of pursuing the motion to compel as a sanction).

Plaintiff's position would incentivize a "race to the bottom" in violation of the spirit of the Federal Rules of Civil Procedure by encouraging each party to wait for the other to order and pay for the transcripts and to then request those transcripts from the ordering party. The Court should discourage such a perverse race from occurring. If Plainiff has a prevailing case, he can order the transcript at his own expense, win, and Defendants will be taxed as part of a bill of costs. If Plaintiff does not—and here, Defendants contend he does not—he should not get to avoid having to pay the price for the litigation he seeks to pursue. The Seventh Circuit has held, "Just as non-indigent litigants must consider the relative merits of their lawsuit against the pain an unsuccessful suit might inflict on their pocketbook, so must prisoners…learn to exercise discretion and judgment in their litigious activity and accept the consequences of their costly lawsuits." *McGill v. Faulkner*, 18 F.3d 456, 460 (7th Cir. 1994). That admonition applies equally well to non-prisoner parties like Plaintiff.

## CONCLUSION

**WHEREFORE**, for the foregoing reasons, Defendants respectfully request that this Honorable Court deny Plaintiff's Motion to Compel and for any other relief this Court deems just.

Respectfully submitted,

*/s/ Evan K. Scott*
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**CERTIFICATE OF SERVICE**

I hereby certify that on September 18, 2020, I served a copy of **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO COMPEL** upon Plaintiff via his attorney of record by causing it to be filed by the CM / ECF system.

*/s/ Evan K. Scott*
Assistant Corporation Counsel