GROUP EXHIBIT 10

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

JOHN MARTINEZ, *Plaintiff*, *v.* REYNALDO GUEVARA, *et al.,* *Defendants*.	Case No. 23 C 01741 Hon. Judge Thomas M. Durkin District Judge Hon. Judge Sheila M. Finnegan Magistrate Judge **JURY TRIAL DEMANDED**

MOTION TO COMPEL DEFENDANTS TO PROCEED WITH THIRD PARTY DEPOSITIONS

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INTRODUCTION

Plaintiff John Martinez, by and through his undersigned counsel, respectfully moves this Court to: (a) compel Defendants to provide dates of availability for the depositions of Melloney Parker, Jesus Fuentes, and Jose Tinajero; and (b) affirm that Plaintiff may question those deponents first at the deposition.

Plaintiff files this motion with a simple request: to apply the Federal Rules of Civil Procedure in straightforward fashion and permit Plaintiff to go forward with the depositions of several third party witnesses he has prioritized for service of deposition subpoenas out of the dozens of witnesses in the case.

The central dispute is questioning priority. Plaintiff's position is that he should get to go first because he subpoenaed and noticed the depositions first. Even if the equities of each witness are considered, they are all witnesses Plaintiff will call in his case-in-chief, and so Plaintiff will be prejudiced if they become unavailable for trial and Plaintiff is forced to present deposition testimony in which Plaintiff was not able to question the witnesses first.

There is no basis to switch the order of questioning of these witnesses. Defendants' position is that "witness alignment" should determine questioning priority, such that a party should get to depose those witnesses that are "hostile" to them. But even that vague criterion does not favor Defendants. Regardless, during the conferral process Defendants identified which, of the witnesses that Plaintiff had first served, they believed they nonetheless should get to question first: they identified only two (Melloney Parker and Jose Tinajero) of the three witnesses that Plaintiff had served. Although that should have presumably narrowed the range of disputes, so that Plaintiff could go forward with the remaining deposition (Jesus Fuentes) while the parties confer about their remaining disputes, Defendants refused to permit the depositions to go forward or to offer dates of availability. The Court should thus require Defendants to propose deposition dates for the witness over which there is no

dispute (Jesus Fuentes), and resolve on the merits the parties' dispute over the remaining deposition of Melloney Parker.

The conferral process on this issue has been lengthy. Plaintiff has made every effort to confer and reach compromises on both questioning order and timing of these depositions, but those efforts have not succeeded. More than three months after the conferral process began, Defendants keep moving the goalposts, Defendants refuse to propose deposition dates, and depositions are delayed indefinitely. The parties are now at impasse.

STATEMENT OF FACTS AND LOCAL RULE 37.2 STATEMENT

A. Plaintiff serves deposition subpoenas and seeks to question those witnesses first based on first service.

This case has been ongoing since March 2023, and discovery commenced thereafter. Dkt. 1. Plaintiff issued written discovery in July 2023, the parties collectively identified dozens of witnesses on their Rule 26 disclosures on August 8, 2023, and Defendants sent written discovery beginning in mid-August 2023.

To ensure that Plaintiff could timely question three critical third-party witnesses that he intends to call in his case in chief, Plaintiff Martinez prioritized serving the witnesses with deposition subpoenas. Specifically, well after discovery had commenced, on August 25 Plaintiff provided Defendants with proper notice of subpoenaed depositions for Melloney Parker and Jesus Fuentes, along with proofs of service; and served notice of his motion to depose an incarcerated witness, Jose Tinajero, which was subsequently granted. All three witnesses are third parties who implicated Plaintiff in the underlying crime, and who Plaintiff believes gave false statements implicating him based on improper police coercion.

Plaintiff informed Defendants that the noticed dates were placeholders, and that, if Defendants were unavailable, Plaintiff was willing to work with Defendants to ensure that the depositions took place on dates convenient to the witnesses and all counsel. *See* Group Ex. 1 (Aug 28

email of A. Prossnitz). Plaintiff asked Defendants to provide their availability on the subpoenaed dates and provide alternatives as requested. *Id.*

B. Defendants lodge an across-the-board objection to all depositions served by plaintiffs in seven Guevara cases and claim "witness alignment" should dictate questioning priority.

After receiving Plaintiff's deposition notices, Defendants did not provide their availability or propose alternative dates, as requested. Rather, in early September Defendants, along with the defendants in other recent Guevara cases (represented by the same sets of counsel for the City and its officers), lodged an across-the-board objection to all of the depositions subpoenaed and noticed in August and September 2023 by the Guevara plaintiffs in seven cases.[1] The Guevara defendants claimed that the depositions in this case could not go forward because they disputed—across all seven Guevara cases—that the Guevara plaintiffs were entitled to question first any witnesses that they had served and noticed.

At the same time, on August 28, 2023, Defendants in this case and other recent Guevara cases sent out their own deposition notices for additional witnesses (without underlying service of deposition subpoenas).[2] Defendants in this case noticed depositions (without service) for six witnesses: Thomas Kelly, Esteban Rodriguez, Margarita Casiano, Angel Serrano, Manuel Rodriguez, and Jesus Fuentes.[3]

Plaintiff Martinez, along with the other Guevara plaintiffs, explained that he was entitled to first question Parker, Fuentes, and Tinajero, whose testimony he had prioritized in order to meet his

[1] The seven Guevara-related lawsuits are for the following Plaintiffs: (1) Gamalier Rivera, (2) Eruby Abrego, (3) John Martinez, (4) Juan & Rosendo Hernandez, (5) Edwin Davila, (6) Julio Lugo, and (7) Johnny Flores.

[2] Notably, none of the Defendants in any of the seven recent Guevara case has provided any proof of service for any depositions. E.g., Aug. 29 Email of R. Brown; Sept. 28 Email of R. Brown. Thus, Plaintiff assumes that their noticed witnesses have not yet been served.

[3] Plaintiff had been trying to find Mr. Fuentes for weeks and eventually got him served on September 17, 2023, and provided noticed of same on September 20, 2023. So, while Defendants sent notice first, Plaintiff had already been trying to serve him, and in fact did serve him first.

burden to prove his claims. Plaintiff explained his position that service of a deposition subpoena determined questioning priority, and that he had served the witnesses first. Group Exhibit 1 (Sept. 5 Email of A. Swaminathan; Sept. 12 Email of A. Swaminathan). Plaintiff further explained that even if the equities as to each witness were considered individually, they weighed in his favor, as he had (a) served and noticed the depositions first: (b) intended to call those witnesses in his case-in-chief in light of his burden of proof; (c) doing so would aid the jury's comprehension of the evidence at trial should the witnesses become unavailable, and/or (d) the third party witnesses had given testimony against him in his criminal case, or participated in the police investigation against him.

During the parties' first meet and confer on October 5, Defendants articulated their view that "witness alignment," and not service of a deposition subpoena or notice of a deposition, should dictate questioning priority across all of the Guevara cases. Group Exhibit 1 (Oct. 5 Email of A. Swaminathan). Despite repeated requests, Defendants refused to identify which depositions the Guevara Plaintiffs served and noticed that Defendants objected to on "witness alignment" grounds, including whether that included Parker, Fuentes and Tinajero.

C. Defendants refuse to proceed with the depositions Plaintiffs served and noticed absent an across-the-board agreement on depositions in all seven Guevara cases.

Defendants refused to proceed with any depositions without a global agreement. Group Exhibit 1 (Oct. 11 Email of A. Romelfanger). The parties thus exchanged emails and conferred for an additional two months. Group Exhibit 1. Defendants first insisted on an exchange of lists of served and/or noticed witnesses on which each party claimed questioning priority. Group Exhibit 1 (Sep. 22 Email of Tim Scahill). Plaintiff expressed concern that the exchange would serve only to delay negotiations but agreed to proceed as Defendants wanted Group Exhibit 1 (Oct. 5 Email of A. Swaminathan). The parties exchanged lists on October 11. Group Exhibit 1 (Oct. 11 Email of A. Swaminathan, Oct. 11, 2023 Email of A. Romelfanger).

Anticipating more delay, before the parties' conferral Plaintiffs had asked Defendants in

advance to "be ready to discuss compromises and agreements to get to resolution, now that the parties have exchanged lists." Group Ex. 1 (Oct. 18 Email of A. Swaminathan). Yet on the call, even though the Guevara plaintiffs proposed trades, the Guevara Defendants stated they needed additional time to confer internally before negotiation. Group Ex. 1 (Oct. 20 Email of A. Swaminathan). More than a week passed without Defendants providing dates for another call, despite Plaintiffs' requests. *Id.* (Oct. 26 Email of A. Swaminathan) ("Counsel, we have been extremely patient. By tomorrow, please provide dates you are available early next week.").

On October 27, Defendants finally responded, but rather than offer dates or specific witness compromises, proposed an entirely different process: a draft, during which the parties would alternate requests for depositions that Plaintiffs had prioritized for service, without regard for Plaintiffs' timely service of subpoenas for witnesses key to their case-in-chief, and also without regard for "witness alignment." Group Ex. 1 (Oct. 27, Email of T. Scahill). After additional defense delay (Group Ex. 1 (Oct. 27 Email of T. Scahill to Nov. 7 Email of T. Carney), during a November 7 conference, Plaintiffs objected to the draft proposal as prejudicial, and Defendants finally agreed to commence witness-specific negotiations. Group Ex. 1 (Nov. 8 Email of R. Brown).

Despite repeated requests by Plaintiff, Defendants did not provide dates of availability for a next conference until November 15. *See* Group Ex. 1 (Nov 15 Email of T. Carney). The parties conferred on November 16, during which time Plaintiffs proposed certain trades and the parties agreed to exchange written proposals on November 17. Defendants offered a single global resolution in their November 17 proposal. Group Exhibit 1 (Nov 17 Email of T. Scahill). The Guevara Plaintiffs provided a comprehensive November 17 proposal that included a global resolution, as well as numerous individual case resolutions, including in this case. *See* Group Exhibit 1 (Nov 17 Email of A. Swaminathan. After multiple requests by the Guevara Plaintiffs, the Guevara Defendants finally responded on December 1 with a blanket rejection, indicating that they would not agree either to the

global or individual proposals, declining to propose any counters, and stating that the parties were at impasse. Group Exhibit 1 (Dec. 1 Email of T. Scahill).

D. Defendants' own proposals for resolution have not claimed either Fuentes for their side, and Defendants' proposal includes a one-for-one exchange in this case that Plaintiff accepted.

Notably, none of the parties' proposals have allocated Jesus Fuentes to Defendants. For their part, in each of Defendants' proposals, they have not claimed they should be entitled to question them first. *See* Group Ex. 1 (November 17 Email of T. Scahill; Nov. 8 Email of T. Scahill; Oct. 11 Email of A. Romelfanger) (stating only that Defendants wanted questioning priority over Ms. Parker and Mr. Tinajero). So, from Plaintiff's perspective, there does not appear to be any dispute regarding Mr. Fuentes and Plaintiff should be permitted to go forward with his deposition. Yet, Defendants have refused to go forward.

With regard to the remaining two witnesses in dispute, Parker and Tinajero, Plaintiffs' November 17 proposal for this case included an offer to simply let Defendants go first with Tinajero. And, to bring this issue to resolution without the need for additional delay, Plaintiff offered to let Defendants also go first with Mr. Fuentes, and all five of the witnesses Defendants noticed without service. In other words, Plaintiff's proposal was that Plaintiff would go first with *one witness*, Melloney Parker, and Defendants could go first with *the seven other witnesses the parties had noticed so far*. Group Ex. 1 (Nov. 17 Email of A. Swaminathan). Defendants' December 1 email rejected that agreement.

E. Defendants have refused to provide a timeline for when they agree depositions can proceed.

Defendants have also stated vaguely with respect to all depositions, across all of the Guevara cases, that they cannot go forward "until we obtain the documents necessary for us to examine these witnesses from entities such as the State's Attorney, defense attorneys, Cook County Clerk and Court Reporters." Group Ex. 1 (Oct. 11 Email of A. Romelfanger). In response, Plaintiff has repeatedly explained that he was amenable to Defendants' thoughts regarding when to conduct the specific

depositions of certain individual witnesses, but that he would not agree to indefinitely delay all depositions given how long this case has been in discovery, the current discovery deadline, and Defendants' delay in seeking discovery that they now claim is critical to proceed with depositions. To date, Defendants still have not identified specific depositions that they insist should be delayed, or provided particular reasons, or offered their own proposed timeframe for the depositions. Group Ex. 1 (Oct. 13 Email of R. Brown) ("[A]s we have indicated repeatedly, we are willing to work with you as to dates, but we need your cooperation in disclosing availability, regardless of who questions first at the deposition.").

Instead, the Guevara defendants have simply self-helped themselves to a months-long delay in proceeding with depositions. After more than three months of trying to work with Defendants to reach a compromise so these depositions can proceed, the parties are at impasse.[4]

ARGUMENT

Plaintiff has served the witnesses at issue first, and in order to meet his burden of proof is likely to call every one of these witnesses in his case in chief. Every legal principle that potentially applies here justifies Plaintiff questioning these witnesses first. Accordingly, this Court should compel Defendants to provide dates of availability for the depositions of Melloney Parker, Jesus Fuentes, and Jose Tinajero without further delay; and affirm that Plaintiff may question those deponents first at the deposition.

I. Plaintiff Served First and So Should be Permitted to Question these Witnesses First.

Plaintiffs' position is simple: for the witnesses Plaintiff has prioritized and served first, he should be able to question them first. Courts adjudicating similar disputes have appropriately rewarded the diligence of the party that has gone out and perfected service of a subpoena on a witness, allowing

[4] This dispute is being litigated across the various cases involving Defendant Guevara that were filed in early 2023, and Plaintiff's counsel is filing nearly identical motions to this one across those cases.

them to question first. *See, e.g.*, *Occidental Chem. Corp. v. OHM Remediation Services*, 168 F.R.D. 13, 14 (W.D.N.Y. 1996) (holding that where two subpoenas were served, the first served took priority). Plaintiff seeks to apply that simple principle here, and on that basis the motion should be granted.

To be clear, Plaintiff's position is that service—not notice—should control the sequence of questioning. If notice controlled, then in each case a party could simply send out a notice for all of the important witnesses in the case and go first. Taken to its extreme, it would be a race to see which party was quicker to push "Send" after completing the Rule 26(f) conference, or perhaps which party's packets of email data happened to traverse the internet faster. In addition, a party could simply notice as many depositions as it likes and then indefinitely delay (or fail) in serving them, self-helping themselves to delay and/or the strategic sequencing of depositions as they choose.

Both the Federal Rules and caselaw recognize the problem with relying on notice, making clear it is not the favored approach. *See* Fed. R. Civ. P. 26, 1970 Committee Comments ("This new provision is concerned with the sequence in which parties may proceed with discovery and with related problems of timing. . . A priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects. . . . . Subdivision (d) is based on the contrary view that the rule of priority based on notice is unsatisfactory and unfair in its operation."); *Lumpkin v. Kononov*, 2013 WL 1343666, at *1 (N.D. Ind. 2013) ("Under the federal rules, a discovery priority is not established based upon which party noticed a deposition first."); *U.S. v. Bartesch*, 110 F.R.D. 128, 129 (N.D. Ill.,1986) ("[I]t is clear that the priority rule, which confers priority on the party who first serves notice of taking a deposition, is abolished by Rule 26(d).").

Moreover, Defendants have rejected Plaintiff's offer—purely for purposes of achieving a global compromise, not based on governing law—that the parties agree that first notice governs deposition priority. Thus, no party argues in this litigation that first notice should dictate.

Nevertheless, to the extent courts have sometimes looked to notice to govern the order of questioning, *see e.g.*, *Tate v. City of Chicago*, No. 18 C 7439, 2020 WL 5800817, at *2 (N.D. Ill. Sept. 29, 2020), Plaintiff first noticed the depositions of the witnesses at issue in this motion. So, applying a criteria based on notice also supports Plaintiff questioning these third party witnesses first.

II. The Equities Favor Plaintiff Questioning these Witnesses First.

Even applying a case-by-case consideration of the equities, Plaintiff should get to question each of these witnesses first.

First, Plaintiff bears the burden of proof, and intends to call each of these witnesses in his case-in-chief at trial, cross-examining them where necessary about their past statements procured during Defendants' investigation. Federal Rule of Civil Procedure 30(c) dictates that "[t]he examination and cross examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615." Fed. R. Civ. P. 30(c)(1). On this basis alone, Plaintiff should be permitted to question these witnesses first at a deposition.

Second, Plaintiff should be allowed to question the witnesses first because it will aid the jury's comprehension of the evidence at trial. In the event that these witnesses are unavailable for trial, their deposition testimony may be read at trial in lieu of live testimony. If Defendants have questioned first, and Plaintiff second, then the testimony will be backwards and will need to be heavily edited for trial. In such circumstances, judges in this District repeatedly have allowed plaintiffs to question witnesses first, even when they have not first served them or noticed their depositions. *E.g.,* Group Ex. 2, *Walker v. Burge*, No. 21 C 4231 (N.D. Ill.), Dkt. 222 (joint statement of dispute) & Dkt. 223 (Order of July 7, 2023); Group Ex. 3, *Rivera v. Guevara*, No. 12 C 4428 (N.D. Ill.), Trans. Of March 12, 2013 Hrg. & Dkt. 54 (Order of March 12, 2013). In *Rivera*, Judge Rowland specifically focused on the plaintiff's burden to prove his case and on the importance of the third-party witness at issue over all other collateral issues. *See* Ex. 3, at 14:10-12 (finding that despite the fact defendants first served the

deposition subpoena, the Court was "really concerned that [Plaintiff] has the burden [] and [this witness was] going to be probably the most important witness in the case."). Accordingly, even using Defendants' preferred "witness alignment" framework, Plaintiff would have priority to question these witnesses first.

Indeed, this dispute is being litigated across the various cases involving Defendant Guevara that were filed in early 2023, and Plaintiff's counsel is filing nearly identical motions to this one in those cases. Across these cases there are a number of key third party witnesses that are out of state or move regularly. Elderly witnesses are also a central concern, as this case arises from a criminal investigation and prosecution that commenced many decades ago. Such witnesses are likely, and in some cases certain, to be unavailable for trial, and thus their deposition testimony will be what the jury hears. In Plaintiff's experience, a deposition in which Defendants question first, eliciting the witness's testimony after long periods of questioning on background and other extraneous matters, and in non-chronological order, after which Plaintiff follows up with questions afterwards, will create a transcript that is disjointed and confusing to the jury. Plaintiff would be severely prejudiced, effectively prevented from presenting critical testimony to the jury in a clear and coherent fashion during his case-in-chief.

Third, in most cases, the witnesses at issue either provided a statement to the police incriminating Plaintiff, testified against Plaintiff in his criminal case, participated in the police investigation against Plaintiff, or are hostile to Plaintiff, which are additional recognized reasons to let Plaintiff question them first at their depositions. *See Lumpkin v. Kononov*, 2013 WL 1343666, at *1 (N.D. Ind. Apr. 3, 2013) ("[T]he party whose witness is being deposed generally knows what the witness's testimony will be, and the purpose of the deposition is to allow the other side to find out what the witness knows about the matter."). In some cases, the witnesses have more recently recanted their prior statements incriminating Plaintiff, but that does not alter the equities; Defendants will still use their past statements and testimony to impugn Plaintiff and in that way use these witnesses to elicit

testimony against Plaintiff. Group Ex. 2 at pg. 15 (Order in *Walker*). And again, regardless of whether these witnesses later recanted or not, Plaintiff will call them in his case-in-chief.

Applying these factors here, the equities also favor Plaintiff being able to question these witnesses first. All three witnesses at issue identified Plaintiff as the perpetrator, implicating him during police interviews, at his criminal trial, or both. After her interactions with Defendant Guevara, Parker identified Plaintiff and her testimony was the critical testimony against Plaintiff at trial. Jesus Fuentes likewise identified Plaintiff in a lineup (after previously telling police that he did not see anything). Neither of them has ever recanted their prior statements implicating Plaintiff, making them witnesses that are "hostile" to Plaintiff by Defendants' own standard. Mr. Tinajero, meanwhile, was Plaintiff's co-defendant and remains incarcerated for this crime. He gave a statement implicating Plaintiff in the crime. If any of these witnesses were to become unavailable at trial, Plaintiff would be prejudiced if he could not preserve their testimony, in an organized and coherent fashion, by conducting an initial trial exam. And these are all critical witnesses in Plaintiffs case-in-chief.

Finally, we note that Plaintiff's and Defendants' counsel in this case have all litigated against each other in many other cases. And it is true that in various cases, the attorneys on both sides of this case have taken the contrary position on this issue. *See, e.g.*, *Reyes v. Guevara*, No. 18 C 1028 (N.D. Ill.) (Dkt. 140) (the law firms representing the Defendants in this case insisting they should get to question first because they subpoenaed the deposition first, and the law firm representing Plaintiff in this case arguing that the equities favored Plaintiff questioning first; Defendants' counsel prevailed); Group Ex. 3, *Rivera v. Guevara*, No. 1:12-cv-04428 (N.D. Ill.) (Dkt. 51 & Trans. of March. 13, 2013 Hrg.) (the law firms representing the Defendants in this case insisting they should get to question first because they subpoenaed the deposition first, Plaintiff's counsel in this case arguing that the equities favored Plaintiff questioning first; Plaintiffs' counsel prevailed); Group Ex. 2, *Walker v. Burge, et al.*, No. 21 C 4231 (N.D. Ill.) (Dkts. 222 & 223) (Defendants' law firm insisting they should get to question first

because they communicated an intention to take the deposition first, and Plaintiff's law firm arguing that the equities favored Plaintiff questioning first; Plaintiff's counsel prevailed). This history between counsel merely highlights two points: (1) because counsel for the Guevara plaintiffs and the Guevara defendants have argued that service should be the primary factor in deciding which party gets to question a witness first, as Plaintiff has proposed here, Plaintiff should get to question these witnesses first; and (2) even applying the equities, Plaintiff should get to question these witnesses first.

III. Defendants' Proposals Are Not Workable.

Defendants at one point insisted that the parties simply engage in a back and forth "draft" to pick witnesses; this proposal prejudices Plaintiff and is unfair. As discussed above, such a process does not follow any of the frameworks discussed above, and instead throws them all out the window in favor of a tit-for-tat process that will inevitably result in Defendants being able to take depositions first of witnesses that Plaintiff served first, and for whom the equities strongly favor Plaintiff being able to question first. Notably, Plaintiff prioritized and moves here only with regard to three third party witnesses that he intends to call in his case in chief. They are all appropriately questioned first by him. Defendants' draft proposal would have allowed Defendants to inevitably ask questions first of witnesses critical to Plaintiff's prosecution that are out of state or are otherwise likely to be unavailable at trial, which would irredeemably prejudice Plaintiff in presenting his case to the jury.

Defendants' proposed draft also presupposes that each side would take the same number of depositions, but in these wrongful conviction cases plaintiffs almost always take more depositions because they have the burden of proof and are the ones who need to develop evidence of constitutional misconduct. There are also many categories of witnesses over whom the parties almost never have disputes: for example, defense counsel has historically agreed that plaintiffs can go first with third party officers with limited involvement in the homicide investigation, and plaintiffs have historically agreed that defendants can go first with defense attorneys and damages witnesses, for

example. A draft would merely create more opportunity for gamesmanship. In any event, the Guevara defendants ultimately abandoned this proposal during the parties' conferrals.

To the extent Defendants wanted to exchange lists and make trades, the Guevara plaintiffs tried that too, but it did not result in an agreement, despite the that fact that plaintiffs' final offer gave defendants four witnesses they had served and noticed first, in exchange for just two witnesses defendants had noticed (but not served) first; that offer was rejected. Looking at just this case, Plaintiff agreed to a compromise in which, if Defendants simply allowed him to go forward with the single deposition of Melloney Parker, he would let Defendants go first with the other two witnesses he had served first (Jose Tinajero and Jesus Fuentes), *as well as* the five witnesses Defendants noticed first (Thomas Kelly, Esteban Rodriguez, Margarita Casiano, Angel Serrano, Manuel Rodriguez). That is, one witness for Plaintiff, seven for Defendants. Defendants refused that compromise. They have repeatedly moved the goalposts, and ultimately rejected every compromise offered.[5]

It also bears mentioning: the approach Plaintiff has taken is measured, and allows each party to identify critical witnesses and pursue their depositions. Plaintiff did not go out and serve everyone, or insist that he should go first with every critical witness. Likewise, Plaintiff did not serve and notice these depositions minutes after the start of discovery, but weeks later, over a period of several weeks during which Defendants had every opportunity to do the same thing.[6] Plaintiff identified a few witnesses that he felt were critical to his case (and did not simply notice up others that he wanted to take, but that he could not yet locate for service), and left many other important witnesses in the case

[5] That offer remains on the table, and in Plaintiffs' view a fair compromise that should resolve this motion so the parties can proceed with depositions without further delay.

[6] Defendants will likely argue that several weeks passed from the time that Plaintiff served subpoenas on some of the witnesses, to the time Plaintiff issued a notice for those witnesses, in some cases resulting in the notice going out after the return date on the subpoena. This is true, but it is of no moment: Plaintiff made clear that the return dates on the subpoenas were mere placeholders, and that Plaintiff would of course work with Defendants on identifying mutually agreeable dates, as the parties have always done in these cases.

that could be served by Defendants if they chose (and indeed, Defendants immediately noticed a number of depositions as soon as it received Plaintiff's notices and proofs of service).[7]

IV. Defendants Should Not be Permitted to Indefinitely Delay Depositions.

Plaintiff is also concerned that this dispute has become a process of endless delay. Plaintiff noticed these depositions in August 2023. When Defendants objected, Plaintiff agreed to confer but repeatedly requested that the process move expeditiously so depositions would not be delayed. Instead, the process has now dragged on for three months, as Defendants have continuously moved the goalposts during the conferral process, preventing the narrowing of disputes but ensuring additional delay. Now, Defendants insist that even when this dispute is resolved, they will not agree to dates for any depositions to proceed while various third-party subpoenas are pending. There is no basis for this sequencing of depositions after Defendants unilaterally decide they are satisfied that they have all the documents they want—particularly when Defendants have had the opportunity to pursue subpoenas for months.

"Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interest of justice: (A) methods of discovery may be used in any sequence; and (B) discovery by one party does not require any other party to delay its discovery." Fed. R. Civ. P. 26(d)(3). Plaintiff is of course willing to work with Defendants on scheduling, and for example Plaintiff assumes Defendants will want Plaintiff's prison file, medical records and other documents before they

[7] Defendants' decision to simply notice up the depositions of six witnesses who all implicated Plaintiff in the crime, to varying degrees, is problematic. Plaintiff had been actively looking for many of these witnesses for weeks and in some cases months, but had yet to locate them and so did not notice them up. But upon receiving Plaintiff's notice of witnesses served Defendants simply noticed them up. It is unclear whether Defendants are now insisting that they should get to depose them first (even though they acknowledge in correspondence that notice should not dictate). If they are, that would be contrary to every standard above, and that they have argued during the conferral process: they have not served them first, based on "witness alignment" they are hostile to Plaintiff, as Plaintiff's counsel almost always does in wrongful conviction trials he will call these witnesses in his case in chief whether they ultimately provide favorable testimony or not (for example, to demonstrate that their identifications are inherently unreliable and could only have been fabricated by Defendants). But that is not the issue before the Court on this motion.

take Plaintiff's deposition, which Plaintiff will, of course, accommodate. But there is no basis to put off the depositions of third party witnesses, including the three witnesses at issue here. This case was filed in March 2023, and the fact discovery deadline is February 23, 2024. Plaintiff has produced the entire set of post-conviction documents in his possession months ago, including the entire criminal trial record, transcripts, police reports and witness statements. The City has produced its homicide investigation files. There is no reason depositions of third parties cannot proceed. If Defendants had certain documents they wanted via third party subpoenas, they could have issued those subpoenas many months ago. Instead, Defendants continue to issue new subpoenas as recently as the last few weeks, and now insist they want answers to those subpoenas before depositions go forward. This is a recipe for endless delay. Because of this pending dispute, no depositions have yet occurred in this case. There is much to do, and we should get started now.

CONCLUSION

For the reasons set forth above, Plaintiff requests that the Court compel Defendants to comply with the deposition subpoenas Plaintiff has served and noticed, permit Plaintiff to question those witnesses first, and promptly provide dates on which those depositions case proceed.

RESPECTFULLY SUBMITTED,

/s/ Annie Prossnitz
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CERTIFICATE OF SERVICE

I, Annie Prossnitz, an attorney, hereby certify that on December 6, 2023, I caused the foregoing motion to be filed using the Court's CM/ECF system, which effected service on all counsel of record.

/s/ Annie Prossnitz
One of Plaintiff's Attorneys

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

JOHNNY FLORES, *Plaintiff,* v. REYNALDO GUEVARA, et al. *Defendants.*	)	Case No.: 1:23-cv-01736 Honorable John J. Tharp Jr.
JUAN HERNANDEZ and ROSENDO HERNANDEZ *Plaintiffs,* v. REYNALDO GUEVARA, et al. *Defendants.*	)	Case No. 23-CV-1737 Hon. Jeremy C. Daniel Magistrate Judge Heather K. McShain
JOHN MARTINEZ, *Plaintiff,* v. REYNALDO GUEVARA, et al. *Defendants*	)	Case No. 23-CV-1741 Hon. Thomas M. Durkin Magistrate Judge Sheila M. Finnegan
GAMALIER RIVERA, *Plaintiff,* v. REYNALDO GUEVARA, et al *Defendants.*	)	Case No. 23 C 1743 Hon. Edmond E. Chang Hon. Sunil R. Harjani

DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL AND CROSS MOTION FOR PROTECTIVE ORDER [1]

[1] Defendants have filed the same Response and cross motion in the four cases in which similar motions were filed. *See Rivera v. Guevara, et al.*, 23 CV 1743, Dckt. No. 66, *Martinez v. Guevara, et al.*, 23 CV 1741, Dckt. No. 109, *Hernandez v. Guevara, et al.*, 23 CV 1737, Dckt. No. 83, *Flores v. Guevara, et al.,* 23 CV 1736, Dckt. No. 56. Because these Motions concern global issues and because of the intimation that the judges overseeing these cases may coordinate the general disposition of these motions, Defendants have filed a joint submission addressing all cases at once. *See Martinez*, Dckt. No. 113 (granting request for joint response to Plaintiff's motion to compel); *Rivera*, Dckt. No. 70 ("The Court has already stated that the parties may file their briefs in conjunction with the dates set by the other judges identified in the motion. Those judges have already taken the lead in setting briefing schedules and/or motion hearings and this Court will follow their lead."); *Rivera*, Dckt. No. 67 ("The Court is aware that this motion [66] has been filed in other Guevara cases. The parties may file the same briefs in this case that they filed in other cases. No matter, this Court will likely follow the lead of the other judges considering the matter and follow their ruling.").

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CASES

RULES

NOW COME Defendants and for their Response to Plaintiffs' Motion To Compel Defendants To Proceed With Third Party Depositions and Cross Motion for Protective Order under Fed. R. Civ. P. 26(c) and (d), state as follows:

INTRODUCTION

The Motion filed in this case (and the others filed in the three other cases at the same time) (*see Rivera v. Guevara, et al.*, 23 CV 1743, Dckt. No. 66, *Martinez v. Guevara, et al.*, 23 CV 1741, Dckt. No. 109, *Hernandez v. Guevara, et al.*, 23 CV 1737, Dckt. No. 83, *Flores v. Guevara, et al.,* 23 CV 1736, Dckt. No. 56) are unnecessary and the issues here could have (and should have) been resolved months ago. Unfortunately, Plaintiffs' counsel refused to agree to resolution of this dispute consistent with the approach *they themselves* successfully advocated for in the past in other cases involving the same attorneys and same Defendants. Instead, Plaintiffs insist on attempting to cobble together a series of contradictory legal arguments that they themselves specifically disavowed in numerous other cases with the admitted intent of attempting to secure their right to question, more or less, every key witness across eight similar cases by firing off a coordinated "e-mail blast" of placeholder deposition notices at the outset of the cases. Despite Defendants' best efforts to negotiate a fair resolution to this dispute and bring these issues swiftly to a close, Plaintiffs in these cases have elected to file these series of Motions involving this Court.

The parties can and should resolve this in the way proposed by Defendants here (and during the pre-Motion conferral process) and proposed by Plaintiffs' counsel in the *Reyes v. Guevara* and *Solache v. Guevara* matters (discussed below). Specifically, this Court should order the parties to hold a witness draft process and alternate picks. Defendants request that this Court enter this relief pursuant to Fed. R. Civ. P. 26(c)(B) and (C) and 26(d) across the cases references herein. In the alternative, Defendants request that this Court adjudicate the deposition priority issues here by applying the well-established witness alignment process outlined below.

PROCEDURAL BACKGROUND

The above-captioned matter is one of eight recently filed cases filed by the law firm Loevy and Loevy against Defendants Reynaldo Guevara, the City of Chicago, and various other individuals. *See Rivera v. Guevara, et al.*, 23 CV 1743, *Martinez v. Guevara, et al.*, 23 CV 1741, *Hernandez v. Guevara, et al.*, 23 CV 1737, *Flores v. Guevara, et al.,* 23 CV 1736, *Lugo v. Guevara, et al.* 23 CV 1738, *Gecht v. Guevara, et al.,* 23 CV 1742, *Davila v. Guevara, et al.*, 23 CV 1739, *Abrego v. Guevara, et al.*, 23 CV 1740.

On the afternoon of August 25, 2023, over an approximately 10-minute period, and in most cases before Defendants' even filed their answer to Plaintiffs' complaint, Plaintiffs' attorneys in these cases sent out coordinated "e-mail blasts" noticing up 15 depositions cherry-picked by Plaintiff as the central witnesses across these cases. This was followed up in the week or so thereafter by numerous other deposition notices and subpoenas of the same basic ilk. It is wholly undisputed that this tactic was an intentional strategy designed for the sole purpose of attempting to save their place "in line" to claim the right to question these key witnesses first at their depositions. Indeed, Plaintiffs have now admitted that this was, indeed, their goal and intent, specifically, to attempt to lock in deposition priority by rushing out placeholder notices/subpoenas so they could claim "first in time" priority in these depositions. *See Rivera*, Dckt. No. 66 at 1, 2-3, 7-9; *Martinez*, Dckt. No. 109 at 1, 2-3, 7-9*; Hernandez*, Dckt. No. 83 at 1-3, 7-9*; Flores*, Dckt. No. 56 at 1-3, 8-9.

Suspecting (correctly) that this was what was afoot, Defendants attempted to confer with Plaintiffs' counsel globally across these cases about the proper way to sequence depositions that would not result in one side being allowed to "dibs" all the key witnesses simply by firing off meaningless "placeholder" paperwork at the beginning of each case. *See Hernandez*, Dckt. No. 83-1 at 15-16; *Flores*, Dckt. No. 56-1 at 9-10; *Rivera*, Dckt. No. 66-1 at 9-10; *Martinez*, Dckt. No. 109-1 at 8-9. Defendants advised Plaintiff that "first in time, first in right" had long been replaced under the Federal Rules of Civil Procedure, stating:

> When your office issued a flurry of subpoenas all at once with highly unrealistic dates, this practice seemed to us to be little more than gamesmanship designed to attempt to secure your place in line with all the most important witnesses so you could get first crack at questioning them. This belief was confirmed by your e-mail which seeks our agreement that the parties should proceed in this fashion with respect to priority and your admission that the dates on your subpoenas are "placeholder" dates. We are, of course, willing to have a discussion regarding deposition priority and scheduling on all of these cases. However, we cannot agree to your "footrace to service" proposal to govern deposition priority. It is our position that priority in questioning witnesses should be governed by the nature of the witness's current anticipated testimony as opposed to simply looking to which party happened to fire off a placeholder subpoena or notice first at the very beginning of the case. This is not only the most fair way to proceed in these cases but is, in fact, the way that the Rules are designed to operate.

Id.

In Defendants' view, the *only* possible way for the parties to reach any sort of accord on these issues would be if the parties reached some agreement on the rules to apply to the dispute. In other words, the parties must be speaking the same language in order to work through a substantive dispute. Suffice it to say, Plaintiffs did not agree to these very basic parameters. Instead, as Plaintiffs do here, Plaintiffs provided a litany of alternative legal standards they claim applied to resolving this dispute (each supporting their right to claim first priority on these witness depositions). *See Hernandez*, Dckt. No. 83-1 at 16-17, 32, 35; *Flores*, Dckt. No. 56-1 at 11-12; *Rivera*, Dckt. No. 66-1 at 11-12; *Martinez*, Dckt. No. 109-1 at 12-13. If they noticed or served the witness first, they argued, "first in time, first in right" should apply. *Id.* If they did not, they argued witness alignment should apply. *Id.* If neither fit their goal, they argued that they had the burden of proof in the case and so they should get to go first since that is how the future trial might proceed:

> Plaintiffs articulated their view that (a) service of subpoenas should dictate, and have also proposed a compromise: (b) first notice. Defendants do not agree to either. Plaintiffs believe that even under other standards, including (c) witnesses Plaintiff intends to call in his case-in-chief and in light of his burden to prove his claims, (d) aiding the jury's comprehension of the evidence at trial and avoiding prejudice to Plaintiff should the witnesses become unavailable; and (e) whether the witnesses were aligned with the prosecution of Plaintiffs, Plaintiffs should be able to question the witnesses first…"

Id.

Because there was an inability to even agree on the basic parameters of this discussion, Defendants suggested deciding issues of witness priority based on a framework that did not require any agreement on the substantive standards at all. Specifically, Defendants suggested simply taking turns selecting witnesses one by one with alternating choices:

> [G]iven the widely divergent starting points on the list exchange, we are not particularly optimistic that a fruitful give and take negotiation on witnesses is going to result in a whole lot of movement on these witnesses. There will inevitably be intractable disagreements on certain witnesses, agreements reached on some witnesses may be impacted as a result of a lack agreement on others, and the parties will end up spending much time and effort litigating these disputes before seven different judges. Again, given the extensive amount of substantive work to be done, we want to avoid this as I'm sure you do as well. Accordingly, after discussing internally among defense counsel, we think the parties should consider simply resolving this issue globally across all of these cases through a third party witness draft with alternating picks between the sides with first pick to be decided by random selection (i.e. coin flip or other such device). As you are aware, a similar process was done in the Reyes/Solache cases. This process will resolve these issues with quickness and efficiency and will avoid the inevitable disputes that will arise through a more substantive negotiation. We would then follow a similar procedure for other depositions in these cases as needed as discovery progresses.

See Hernandez, Dckt. No. 83-1 at 47-48; *Flores*, Dckt. No. 56-1 at 41-42; *Rivera*, Dckt. No. 66-1 at 39-40; *Martinez*, Dckt. No. 109-1 at 43-44. Plaintiffs rejected this proposal out of hand. It remains unclear why. *See supra* Part I. This procedure was not only used successfully in two other cases involving the same attorneys and same Defendants but, indeed, this was a process that was *proposed by* the same Plaintiffs' attorneys here. *Id.*

While Plaintiffs spend a great deal of the briefs in these cases going point by point and witness by witness on these negotiations over these last few months, none of this is particularly germane to disposition of these issues now because Plaintiffs have elected to have the Court decide this matter instead of resolving it amongst the parties as it should have been long ago. These negotiations are irrelevant at this point because they were not fruitful. Defendants' position, as set forth below, is that this Court should determine witness priority based on a witness draft or, in the alternative, assessing witness alignment of each witness based on the facts on the case.

However, one point needs to be clarified in particular. Specifically, Plaintiffs repeatedly lean upon the unsuccessful attempt to do piecemeal witness "trades" before the filing of these Motions to claim that Defendants did not make "claims" for certain witnesses or another or conceded that Plaintiffs could have first priority on these witnesses. *See Rivera*, Dckt. No. 66 at 2-7; *Martinez*, Dckt. No. 109 at 2-7*; Hernandez*, Dckt. No. 83 at 2-6*; Flores*, Dckt. No. 56 at 2-6. This is most certainly not the state of these negotiations and Defendants explicitly explained this to Plaintiffs. Defendants made it quite clear that the attempt at making trades was being done only as a means to attempt to globally resolve these issues but, if unsuccessful, the parties were back to square one where witness priority would either need to be determined by draft or by having the Court rule on witness alignment on a witness-by-witness basis. *See Rivera*, Dckt. No. 66-1 at 29 ("Note, this list is being provided as an attempt to negotiate and resolve a dispute. Thus, we have intentionally narrowed our claims for the purposes of attempting to reach a mutually acceptable resolution. Obviously, if we cannot reach some sort of agreement on this issue and Plaintiffs stick to their insistence that they be given priority on all of these witnesses, we reserve the right to petition the court to set priority for these depositions as well as ones we have proposed voluntarily permitting Plaintiffs to take the lead on."); *id.* at 39 ("If we cannot reach an agreement across the board, we are still possibly heading toward an impasse on all witnesses at issue."); *id.* at 86 ("[A]s we have articulated many times, we believe reaching a global resolution of these issues across these cases is the best way for us all to move forward quickly and efficiently. It does not appear that we have made much substantive headway in that endeavor as the parties appear too entrenched in their positions on many issues and many witnesses."); *Hernandez*, Dckt. No. 83-1 at 36; *Flores*, Dckt. No. 56-1 at 31; *Martinez*, Dckt. No. 109-1 at 33.

Defendants provide their positions across the cases and witnesses below given the filing of this Motion on these specific witnesses by Plaintiffs. However, numerous other witnesses not

addressed in Plaintiffs' Motions remain very much in dispute amongst the parties and have not been "agreed" on as suggested by Plaintiffs in any way.

ARGUMENT

THIS COURT SHOULD RESOLVE DEPOSITION PRIORITY DISPUTES BY ORDERING A WITNESS DRAFT OR, IN THE ALTERNATIVE, ASSESSING WITNESS ALIGNMENT

Plaintiffs are essentially asking this Court to apply a long moribund rule to deposition sequencing by making up a litany of alternative contradictory standards to attempt to reserve their right to depose all the important witnesses in these cases first. Even worse, Plaintiffs are asking this Court to stamp its judicial imprimatur on their naked gamesmanship in discovery which is both unprecedented and will have ill-effects transcending the cases at issue on these motions. This will, unfortunately, become the "new norm" if this is allowed to transpire in these cases. Perhaps worst of all, however, Plaintiffs' counsel is advocating for legal positions in this case that they themselves have repeatedly and openly argued *are inappropriate in other cases* and are refusing to engage in a cooperative process for completing third party depositions in favor of a "heads I win, tails you lose" series of contradictory arguments.

This matter should never have ended up before this Court and need not detain this Court long. This Court should order the parties to quickly and efficiently resolve this dispute by ordering the parties to allocate witness priority of the many witnesses in this case by simply allowing this to proceed in an even-handed "witness draft" format as was done in the *Reyes v. Guevara* and *Solache v. Guevara* cases. This was conducted at Plaintiffs' counsel's own urging in those cases and is the most efficient and fairest way to resolve this dispute here. In the alternative, this Court should address the specific witnesses in these motions using the applicable witness alignment standard.

I. This Court Should Order The Parties' To Conduct A Witness Draft To Resolve These Matters As Was Done In *Reyes* and *Solache*.

Because of the sheer breadth of the witnesses at issue and the highly fact specific inquiry that would be required to address all the witnesses implicated by motion practice, the issue of deposition priority in this case (as well as the others in which these negotiations were subject to global discussion) should be resolved by a third-party witness draft process. This is not only within the power of this Court to order but it is also the quickest, easiest, and fairest way to resolve all these issues so that the parties can efficiently proceed with discovery. This Court should enter this relief pursuant to Fed. R. Civ. P. 26(c)(B) and (C) and 26(d) on the same parameters agreed in the *Reyes* and *Solache* cases.

Defendants proposed that the issue of deposition priority should be resolved simply by holding a "witness draft" for third party witnesses where each side would alternate picking witnesses to determine priority in questioning.[2] This proposed process was used successfully in another set of reversed-conviction cases involving many of the same parties and many of the same attorneys (including Plaintiffs' same attorneys in this case) (*DeLeon-Reyes v.* Guevara, 18 CV 1028 and *Solache v. City of Chi.,* 18 CV 2312) and, indeed, was a process that was proposed initially by the very same Plaintiffs' attorneys on this case who now oppose it.

Plaintiffs rejected this proposal out of hand claiming it "prejudicial" and refused to consider it despite Defendants bringing it up as a solution on several different occasions (both over the telephone and in writing).[3] In their motions, Plaintiffs' counsel acknowledge Defendants' witness draft

[2] As with *Reyes* and *Solache* discussed below, Defendants also suggested a few carve outs for people on both sides who would be exempt from the draft such as those depositions Defendants should have priority on, e.g. family members and damage witnesses of Plaintiff and other persons who have pending or forthcoming lawsuits against Defendants; and those depositions Plaintiffs should have priority on, e.g. non-defendant police officers and the like).

[3] Plaintiffs' suggestion that Defendants "abandoned" this process is, of course, totally untrue. Plaintiffs made it clear that they would not agree to this under any circumstances and so Defendants continued to attempt to try to find common ground. But the idea that this was ever taken off the table or otherwise retracted by Defendants in any way, shape, or form, is just not so.

proposal in this case, admit they rejected it, and claim the proposal is "prejudicial" to Plaintiffs. *Martinez*, Dckt. No. 109 at 5, 12-13; *Rivera*, Dckt. No. 66 at 5, 12-13; *Hernandez*, Dckt. No. 83 at 5, 12-13; *Flores*, Dckt. No. 56 at 5, 12-13. Plaintiffs do not explain what is prejudicial about this method. *Id.* And Plaintiff certainly do not explain why they themselves advocated for this process in the *Reyes* and *Solache* cases if it was such a font for prejudice to them. Indeed, Plaintiffs do not engage on this case at all in their Motions (despite Defendants explicitly referring to this process during the conferral). This silence is deafening under the circumstances and proves without doubt that Plaintiffs are simply attempting to game the system in these cases to secure their priority to depose all the key witnesses in these cases.

In the *Reyes* and *Solache* cases, it was Plaintiffs' counsel who proposed the exact same procedure as Defendants propose here. And it was also Plaintiffs' counsel who complained that Defendants had unreasonably rejected this process as a means of resolving third party deposition disputes.

When Defendants filed a similar motion to the one Plaintiffs filed here, Plaintiffs' counsel stated:

> It is unfortunate that Defendants chose to file this motion, rather than confer about a fair and orderly process for taking third party depositions that would have avoided the need for court intervention…Indeed, contrary to Defendants' characterization, once it was clear that the parties had a dispute about deposing the five third party witnesses at issue, Plaintiffs immediately proposed that the parties confer in order to find a fair and orderly way to serve and depose third parties that both sides want to depose. Plaintiffs subsequently proposed that for any third parties that both sides want to depose, the parties take turns picking third parties to depose first. Ex. 2, at 5. Defendants rejected this offer, and instead counteroffered with what turned out to be a poison pill: that they pick four witnesses first, and then Plaintiffs could pick four witnesses next (but there were only five total witnesses in dispute). Plaintiffs indicated that this was not a reasonable effort at compromise, but that Plaintiffs were still willing to negotiate. Ex. 2, at 1. Defendants responded by filing this motion.

See Ex. 1. Indeed, in that very same motion, Plaintiffs complained that Defendants had unilaterally began issuing deposition notices and subpoenas for key witnesses without conferral about who should be given priority in questioning those same witnesses. *Id.* at ¶¶ 5-7, 14. To that end, in that same Motion, pursuant to Fed. R. Civ. P. 26(d), Plaintiffs "maintain[ed] that the appropriate approach here

is the one Plaintiffs proposed: following the Court's instruction to 'work together' and reach agreement on a reasonable procedure like the one Plaintiffs offered [referring to the one by one witness draft]. This Court has discretion to control the mode and order of examination of witnesses, and to direct the parties to follow such a procedure." *Id.* at ¶ 13.

In advocating for this witness draft process, Plaintiffs' counsel specifically excoriated the "unworkable" nature and impropriety of the exact same tactics that they themselves engaged in in this case. Specifically, Plaintiffs' counsel argued that:

> Defendants' proposed rule—a "race to notice"—is unworkable. If simply issuing notices of deposition unilaterally (or stating an intention to do so) grants the right to go first, then the side with more information would win every time. And that side would have every incentive to simply notice all third parties, with virtually no downside other than the 15 minutes it takes to draft a notice including every third party whose name shows up in the case.

Ex. 1 at ¶ 15. Yet, that is exactly what Plaintiffs are advocating for here. Because Plaintiffs and their attorneys (who are often the same attorneys representing them in these cases) have been involved in the underlying post-conviction criminal process for years before the civil case is filed, they are always the party "with more information" on witness locations. As noted below, in many instances, Plaintiffs specifically capitalized on that information to locate and serve third party witnesses.

After Magistrate Judge Harjani implored the parties to attempt to seek common ground to resolve witness priority issues after the filing of these motions, the parties jointly agreed to resolve the matter through the witness draft that Plaintiffs had proposed in that case. *See* Ex. 2 at 1-2. To wit:

> The parties have conferred and agreed that, for purposes of determining which side will go first in questioning certain third parties, the parties would take turns picking witnesses. The parties applied that procedure for the disputed deponents, as well as other related third party family members of the victims and suspects. The parties agreed that the procedure would not apply to certain categories of third party witnesses, such as damages witnesses and non-defendant police officers, and that the parties would confer again as to those witnesses, if needed.

Magistrate Judge Harjani later complimented the parties for "the parties' work to resolve this dispute through mutual cooperation and with professionalism" through the witness draft process. *See* Ex. 3.

This Court should order the parties to engage in this same process here pursuant to Fed. R. Civ. P. 26(c) and (d). *See* Fed. R. Civ. P. 26(c)(B) and (C) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following… specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery…[or]…prescribing a discovery method other than the one selected by the party seeking discovery…"); Fed. R. Civ. P. 26(d)(3)("Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice…methods of discovery may be used in any sequence."). This Court has extremely broad discretion in controlling and modifying discovery for the purposes of efficiency and to resolve unnecessary disputes. *See Crawford-El v. Britton*, 523 U.S. 574, 598 (1998); *Patterson v. Avery Dennison Corp.,* 281 F. 3d 676, 681 (7th Cir. 2002). Moreover, the Court has the power to modify even technically proper discovery in order to ensure that the parties are not subjected to any undue burden or expense. *See Nixon v. Haag*, 2009 WL 2026343, * 2 (S.D. Ind. 2009).

II. Witness Alignment Is The Governing Standard For Deposition Priority And Should Be Applied Across The Board To The Witnesses In This Case.

If the Court is not inclined to adopt a witness draft method, this Court should enter orders establishing priority based upon witness alignment to all of the depositions noticed or subpoenaed by all parties in this case.

A "first in time, first in right" standard is contrary to existing law. Until approximately 1970, "priority in depositions went to the party first serving a notice of examination, absent compelling reasons to the contrary." *See Occidental Chemical Corp. v. OHM Remediation Services*, 168 F.R.D. 13, 14

(W.D.N.Y.,1996) *citing Prodear, S.A. v. Robin International Cinerama Corporation*, 32 F.R.D. 434, 434 (S.D.N.Y.1963); *Comercio E Industria Continental, S.A. v. Dresser Industries, Inc.*, 19 F.R.D. 265, 266 (S.D.N.Y.1956).

However, this has not been the law for the last 50+ years. *See* Fed. R. Civ. P. 26(d) advisory committee's note (1970) ("The principal effects of the new provision are first, to eliminate any fixed priority in the sequence of discovery" and noting the "priority rule developed by some courts, which confers priority on the party who first serves notice of taking a deposition, is unsatisfactory in several important respects."); *Lumpkin v. Kononov*, 2013 WL 1343666, at *1 (N.D. Ind. 2013) ("Under the federal rules, a discovery priority is not established based upon which party noticed a deposition first, but rather, Rule 26(d) authorizes the court to order the sequence of discovery upon motion."); *United States v. Bartesch*, 110 F.R.D. 128, 129 (N.D. Ill. 1986) ("Therefore, it is clear that the priority rule, which confers priority on the party who first serves notice of taking a deposition, is abolished by Rule 26(d)."); *Renlund v. Radio Systems Corporation*, 2021 WL 6881287, at *6 (D.Minn. 2021) ("The Court turns first to Plaintiffs' argument that they are entitled to "priority" in taking Defendant's employees' depositions because they noticed them first. But "the 'priority rule' ... —i.e., the first to ask, wins—no longer controls the sequencing of depositions in federal court. And it hasn't been around for quite some time."); *Blackmon v. Bracken Construction Company, Inc.*, 2020 WL 6065520, at *3 (M.D. La. 2020) ("The Court will not recount each side's representations as to the superior timing and legitimacy of its deposition requests. That information is irrelevant, as the 'priority rule' relied on by the parties—i.e., the first to ask, wins—no longer controls the sequencing of depositions in federal court. And it hasn't been around for quite some time. Indeed, the advisory committee notes from 1970—50 years ago—clearly indicate that the priority rule is no longer recognized following the addition of Rule 26(d)."); *Meisenheimer v. DAC Vision, Inc.*, 2019 WL 6619198, at *3 (N.D. Tex. 2019) (rejecting the movant's attempt to invoke the "non-existent he-who-serves-the-first-notice-can-dictate-the-order-of-

depositions ... rule[ ]"); *Eckweiler v. NiSource, Inc.*, 2018 WL 6011872, at *2 (N.D. Ind. 2018) ("In the past, priority to question a witness was given to the party who issued the notice of deposition. This rule was abolished in the Advisory Committee Notes to the 1970 Amendments..."); *Brady v. Grendene USA, Inc.*, 2014 WL 4925578, at *4 (S.D. Cal. 2014)("Thus it is clear that Rule 26(d) abolishes the deposition priority rule of the past."); *Occidental Chemical Corp. v. OHM Remediation Services*, 168 F.R.D. 13, 14 (W.D.N.Y. 1996) ("[T]he priority rule, which conferred priority on the party who first served notice of taking a deposition, was abolished by Fed.R.Civ.P. 26(d) in 1970.").

Plaintiffs' "first in time to *serve process*" (as opposed to issuing a notice under Fed. R. Civ. P. 30) method must be rejected. Plaintiffs cite no authority for this proposition. The change to the federal rules in 1970 abolished *any* sort of "race" to initiate discovery as a means to establish priority. *See* Fed. R. Civ. P. 26(d), advisory committee comments (1970) ("[I]f both parties wish to take depositions first a race results. But the existing rules on notice of deposition create a race with runners starting from different positions."). The suggestion that one type of race is okay and the other is not ignores that the purpose of the rule change. *Id.* Beyond this, service is obviously an inferior way of marking priority in the first place because Rule 45 does not even require notice for deposition subpoenas at all. *See* Fed. R. Civ. P. 45(a)(4). It would be a truly strange holding that parties would be able to mark their place in a priority line for discovery with an opposing party via serving papers that the opposing party is not even given notice of. This would also be an exceedingly wasteful process which would involve opposing parties hiring two sets of process servers literally racing to serve the same witness at the same time. This would also be completely disrespectful of these third-party witnesses to have multiple sets of process servers harassing them at their homes attempting to serve them first. Suffice it to say, if there was any authority supporting this, Plaintiffs would have cited it. They have not because there is none.

Federal Rule of Civil Procedure 30(a) and 30(b)(1) are the applicable rules for noticing *all depositions* in civil cases. While Rule 30(a) provides that "[t]he deponent's attendance *may be* compelled by subpoena under Rule 45," there is, in fact, no requirement whatsoever that a subpoena be issued for deposition at all much less that it be served before a party's notice under Rule 30(b)(1) is considered valid. *See DIRECTV, LLC v. Spina*, 2016 WL 11458295, at *1 (S.D. Ind. 2016) ("It is not necessary to serve a subpoena on a person that voluntarily appears for a deposition."). And, of course, there are consequences for failing to serve a third-party witness who later does not appear at a deposition already baked into Rule 30 itself. *See* Fed. R. Civ. P. 30(g)(2). In short, Rule 45 is essentially a meaningless event as far as deposition priority is concerned. It is a means to compel attendance of a reluctant witness, not to provide notice to an opposing party of an intent to depose. And, again, it would truly be an odd result that the service of a deposition subpoena *for which no notice is even required* would be a relevant event for providing notice. This suggestion is yet another attempt by Plaintiffs to make things up as they go along to try to justify their attempt to call "dibs" on all the important witnesses in a case.

Second, there is also no authority whatsoever supporting that Plaintiff should be permitted priority in deposing third party witnesses simply because Plaintiff bears the burden of proof and will present evidence first at trial. *See Renlund v. Radio Systems Corporatio*n, 2021 WL 6881287, at *6 (D. Minn. 2021) ("[C]ourts have rejected the proposition that the fact that the plaintiff has the burden of proof automatically provides good cause to require the plaintiff to be deposed first…"); *Blackmon*, 2020 WL 6065520, at *4 ("To be clear, there is no general rule that a plaintiff should be deposed first simply because they bear the burden of proof at trial or initiated the lawsuit."). That would mean that no Defendant in a lawsuit would ever get priority for any witness, which is simply untenable.

Plaintiffs also attempt to cobble together a theory that witness might die or otherwise become unavailable so Plaintiff should be permitted to go first with these depositions so he can present a more cogent presentation at trial. There is a possibility of this happening in every case, but this possibility is

not *carte blanche* for a plaintiff to get first crack at every witness during discovery or speculate that every key witness *might* die so they should get first crack at questioning. *Martinez v. Coloplast Corp.*, 2021 WL 486927, at *3 (N.D. Ind. 2021) ("Plaintiff argues that she should be permitted to take preservation depositions [of her experts] . . . . [Plaintiff] gives a number of reasons why her experts might not be available to testify at trial and asserts that her preferred order of deposition is preferable in case the experts are unavailable and the depositions are used at trial. . . . The Court does not see any reason to deviate from the typical order of depositions in this case: Defendants may conduct a discovery deposition of Plaintiff's expert witnesses, and need not be bound by Plaintiff's guess that she may need a preservation deposition at some point in the future."). The federal rules do not distinguish between discovery and evidentiary depositions, so Plaintiff can use any portion of any deposition at trial in this case regardless of who asks the questions. *Holt v. Lewsader*, 2021 WL 4080782, at *3 (C.D. Ill. 2021) ("Although Illinois courts distinguish between discovery and evidentiary depositions, the Federal Rules of Civil Procedure make no such distinction."); *Quirin v. Lorillard Tobacco Co.*, 2015 WL 13883090, at *5 (N.D. Ill. 2015); *McCloud v. Goodyear Dunlop Tires North America, Inc.*, 2006 WL 1791162, *2 (C.D. Ill. 2006); *Petition of U.S. for Perpetuation of Testimony of Thompson*, 1995 WL 599061, at *1 (N.D.Ill.,1995).

Courts that have decided deposition priority under Fed. R. Civ. P. 26(d) have held that deposition priority should generally be resolved by determining which party intends to affirmatively rely upon the witness to prove their case in chief and then permitting the *opposing party* to ask questions of this witness first. *See, e.g.*, *Lumpkin v. Kononov*, 2013 WL 1343666, at *1-2 (N.D. Ind. 2013). In *Lumpkin*, a plaintiff first issued a deposition notice of the sole non-party occurrence witness to an automobile accident. *Id.* at *1. The defendant objected to this notice and petitioned the court to be able to take priority in deposing this third-party witness because this witness was identified as being aligned with the plaintiff and because he had given prior statements supportive of the plaintiff's claims

to plaintiff's attorney. *Id.* at *1. Defendant argued that the plaintiff's attorney "already had the opportunity to take [the witness's] statement and discuss the case with him." *Id.* Moreover, the defendant argued that there was a concern under these circumstances "that any testimony [the witness] provides will be scripted." *Id.* Plaintiff, on the other hand, argued that the witness was "an independent fact witness and that both parties have an interest in taking his deposition" and that plaintiff should be permitted to proceed first because he noticed the deposition first. *Id.*

The Court sided with the defendant. In so doing, the Court held that the governing standard on priority is as follows:

> Generally, it is understood that the party who notices a deposition will have priority in asking questions, and that opposing counsel will have priority to question the other side's witnesses. This is because the party whose witness is being deposed generally knows what the witness's testimony will be, and the purpose of the deposition is to allow the other side to find out what the witness knows about the matter.

Id. The Seventh Circuit has held that "the obvious purpose" of discovery as a whole is to give the adverse party the opportunity to prepare to poke holes and cross examine an adverse witness. *See Griffin v. Foley*, 542 F.3d 209, 221 (7th Cir. 2008) ("The obvious purpose of discovery is to determine the opinions and positions of the opposition's witnesses and prepare for cross-examination.").

Plaintiffs acknowledge they have repeatedly relied upon the general framework set forth in *Lumpkin* to argue for their priority to take the depositions of adverse witnesses. *See Rivera*, Dckt. No. 66 at 11, *Martinez*, Dckt. No. 109 at 12, *Hernandez*, Dckt. No. 83 at 12, *Flores v*, Dckt. No. 56 at 12. To illustrate, in *Keith Walker v. City of Chicago*, 21 CV 4231, Plaintiffs' counsel in this case successfully obtained priority of a key third-party witness for which Defendants first indicated an intention to depose. *See* Ex. 4 at ¶ 10 (*citing Lumpkin*, 2013 WL 1343666, at *1 ("Mr. Bell is a crucial third-party witness who implicated Plaintiff and helped to cause his wrongful conviction, at the behest of Defendants. Mr. Bell was therefore adverse to Plaintiff in his criminal case, and Plaintiff should be

given the first opportunity to question Mr. Bell. The fact that Mr. Bell is properly viewed as hostile to Plaintiff is a recognized reason to let Plaintiff question Mr. Bell first at his deposition.")).[4]

Plaintiffs' argument for priority of all witness depositions is that all witnesses are arguably adverse to them in some way. Witnesses who have implicated their clients in criminal activity are adverse because they accused them of crimes. At the same time, they argue, witnesses who they procured recantations from in their post-conviction proceedings also are adverse to them because they *previously* implicated their clients in crimes. Plaintiffs have even suggested that a criminal co-defendant who has a pending post-conviction claim reliant upon alleged misconduct of Defendants in this case is somehow adverse to him because this person gave a now-recanted confession years ago implicating him in a crime. And, as a fallback, when there is no colorable claim of adversity either way, Plaintiffs revert to claiming that they might need to preserve this testimony in some way for trial so they should get to go first on that basis as well even if the witnesses are so firmly against Defendants as to be indisputable. Again, this tactic of "heads I win, tails you lose" simply cannot be tolerated.

There must be a two-way street across all the cases at issue and must be at the expense of Plaintiffs giving up priority on those witnesses who appear to be currently in their camp.

A. Witnesses in *Martinez*.

This case involves Martinez's conviction for the beating death of Daniel Garcia on October 12, 1998. Martinez seeks priority in questioning witnesses Melloney Parker, Jesus Fuentes, and Jose Tinajero. Melloney Parker and Jose Tinajero are firmly aligned with Martinez and, thus, Defendants should be permitted priority in deposing these witnesses under the governing standards. It is doubtful that Jesus Fuentes is adverse to Martinez given the allegations in this case. However, Defendants are

[4] It was later discovered through recorded prison phone calls that Mr. Bell was anything but an adverse witness to plaintiff Walker. They were friends frequently in contact at the time Walker was trying to secure a Certificate of Innocence (COI) and Walker convinced Mr. Bell to lie on the affidavit that Mr. Bell signed, which was then used by Walker to support his petition for a COI. Priority was then shifted back to Defendants as a result. *See* Walker, 21 CV 4231, Dckt. No. 275.

willing to compromise priority on deposing Mr. Fuentes provided they are given priority on Melloney Parker and Jose Tinajero.

1. Melloney Parker.

On August 8, 2023, Martinez disclosed Parker in his Rule 26(a) disclosures, but failed to provide any contact information for her. *See* Ex. 5. On August 25, 2023, Martinez provided the parties with a notice of deposition and a deposition subpoena that set Parker's deposition for September 18, 2023. *See* Ex. 6. Parker's address listed on the subpoena was 3329 W. Schubert Avenue in Chicago, Illinois, but according to the proof of service she was served at yet another different address (8249 S. Maryland in Chicago, Illinois). *Id.*

According to Martinez, "[a]fter her interactions with Defendant Guevara, Parker identified Plaintiff and her testimony was the critical testimony against Plaintiff at trial." *Martinez*, Dckt. No. 109 at 11. Martinez also states that Parker has never "recanted" this testimony. *Id.* at 12 ("Neither of them [referring to Parker and Fuentes] has ever recanted their prior statements implicating Plaintiff, making them witnesses that are 'hostile' to Plaintiff by Defendants' own standard."). Martinez is well-aware that this is simply not an accurate description of Ms. Parker's likely deposition testimony in this case. Rather, there is no doubt that Melloney Parker is firmly currently aligned with Martinez. Indeed, this case is very close to the facts of *Lumpkin* which is relied on by both parties.

Martinez claims the State's entire criminal case against him "hinged on the testimony of Melloney Parker" and his fabrication claim against the Defendants is based on Parker's alleged fabricated identification of Martinez and his co-defendant, Jose Tinajero, as the offenders who were involved in the beating of the victim, Daniel Garcia, and her alleged fabricated handwritten statement in which she also implicated Martinez and Tinajero. *Martinez*, Dckt. 70 (Martinez's First Amended Complaint) at ¶¶ 46-58, 81. Martinez claims that Parker identified Martinez because Defendants told

her that he committed the crime, kept her at the police station for a long period of time and used a pending arrest warrant to pressure her to adopt their false statements. *Id.* at ¶¶ 57-58.

During the Garcia homicide investigation, Defendant Guevara traced a 911 call about the beating of Garcia back to Parker. When Defendant Guevara inquired about the 911 call Parker made, she informed him that she had seen a group of male Hispanics punch and kick Garcia in the alley from the front window of her apartment. Ex. 7 (Supplementary Report Re: Witnesses Melloney Parker and Margarita Casiano) at 2-3. She told Defendant Guevara that she recognized the person who yelled out "where's my money?" and who began punching the victim as a local "gang banger" who drove a grey car. *Id.* On January 24, 1999, Defendant Guevara went to Parker's apartment and showed her a photo array consisting of six black and white mugshots. *Id.* at 2. Parker identified the mugshot of Jose Tinajero as the person who yelled at Garcia and began punching him. *Id.* A few weeks later, Defendant Guevara went back to her apartment with additional photo arrays, but she told him she would not make any more identifications. *Id.* However, on or around February 8, 1999, when Parker went to Area Five Detective Division to view a lineup containing Kelly, Martinez, Tinajero and Serrano, she identified Tinajero and Martinez as two of the people she observed beating Garica in the alley. Ex. 8 (Supplementary Report Re Line Up).

Later, on the same date, Parker signed a handwritten statement which was prepared by the Felony Review Assistant State's Attorney. In Parker's handwritten statement, she stated that she saw Tinajero and the other male Hispanics in the alley kick and punch Garcia in the alley. Ex. 9 (handwritten statement of Parker) at 4. She further stated that she identified Martinez as one of the male Hispanics who she saw beating Garcia, but she did not recall how many times she saw Martinez punch him. *Id.* at 5.

On July 12, 2001, Parker was called to testify at Martinez's criminal trial by the state. At trial, she testified she did not see the faces of anyone who kicked or punched the victim, and identified

Martinez and Thomas Kelly as two people she saw before the beating began of the victim in the alley. Ex 10 (7/12/04 Transcript of Proceedings in People v. John Martinez, No. at 99 CR 6197) at 88:15-89:24). Contrary to Defendant Guevara's police report, Parker also testified that she did not identify anyone from a photo array that she was shown at her apartment. *Id.* at 90:7-23. She further testified that when she looked at a photo array at the police station, she identified one person as being in the alley that evening, but she wasn't sure if she saw that person in court. *Id.* at 91:10-92:21. She also testified she was not sure if she identified two or three people from a lineup, but when she was shown the photograph of the lineup in court, she testified that she recognized two people from the photograph as being in the alley and beating up the victim. *Id.* at 94:12-16. She testified that the contents of her handwritten statement had to be true, but she didn't remember the night of the incident. *Id.* at 96:16-97:1; 115:1-12. Given Parker's confusing testimony at court, and her inability to recall the events in the alley at the time of trial, she can hardly be characterized as a favorable witness to the Defendants.

A year later, Parker testified again at a hearing for a new trial (which was denied). Ex. 11 (01-17-23 Order in People v. John Martinez, No. 99 CR 6197) at 6. Parker testified that a few months after Garcia was beaten in the alley, Det. Guevara and his partner came to her apartment and told her that her outstanding arrest warrant for possession "would be quashed" if she looked at the pictures and told them if any of them were the people she had seen that night. *Id.* at 6. According to Parker, the detectives showed her numerous photos and she identified 2 or 3 people from the photographs including Martinez. Despite her testimony about Det. Guevara's comment about her outstanding arrest warrant, she testified that her identification of Martinez was based on her observations and not based on any threats. *Id.* She further testified at the hearing, that Det. Guevara did not make any threats to her with reference to the warrant. *Id.*

Once again, Parker's testimony is confusing, but it hardly aligns with Defendants' version of events. Her testimony suggests that Det. Guevara brought up her outstanding arrest warrant and promised to have it quashed in exchange for her identifications. This version of events put her squarely in Martinez's camp as Martinez contends that her identification was fabricated and that Defendants used the pending warrant to "pressure her into adopting their false statements, telling her that they would have the warrant quashed if she went along with them." *Martinez*, Dckt. 70 at ¶ 58.

Despite Parker's hazy memory at the time of the Martinez's criminal trial in 2001 about the night in question, Parker was able to recall her interactions with the police when she was interviewed almost 15 years later by Martinez's investigator. In support of Martinez's First Supplement to Amended Petition for Post Conviction Relief, Martinez attached an affidavit from Exoneration Project investigator Eladio Valdez attesting to his interactions with Parker in August 2016 during which Parker allegedly recanted her identification of Martinez as the offender. Ex. 12 (Affidavit of Eladio Valdez).

According to Valdez, he, and Martinez's post-conviction attorney, went to Parker's home and Parker informed them at the time she witnessed the crime in October 1998, she "could not make out the faces of the people involved" in the beating. Ex. 12 at ¶ 6. Valdez' further claimed that Parker told them Defendant Guevara told her there was a warrant for her arrest and so "she had to go with him to the police station to provide information regarding the beating she had seen." *Id.* at ¶ 8. According to Valdez' affidavit, Guevara told Parker he would take care of the arrest warrant if she provided the information that he wanted her to provide, and she believed if she didn't identify anyone from the lineup, Guevara would arrest her on the warrant. *Id.* at ¶¶ 9, 14. Valdez also contends that Parker told him that prior to the lineup, Guevara told Parker that the offenders who beat up Garcia were in the lineup because the police had searched their homes and found bloody boots that were used in the beating. *Id.* at ¶ 10. Valdez claimed Parker told him that she picked people in the lineup that she had

seen in the alley even though she had not been able to "make out the faces of the people involved" and her ability to the view the offenders was limited because she saw the incident from her "3rd floor apartment window," "late one night," while "it was dark and there was a tree" in the way. *Id.* at ¶¶ 6, 11. She also told Valdez that she was forced to stay at the police station for "too long." *Id.* at ¶ 13. Valdez also claimed Parker declined to sign an affidavit about the circumstances surrounding her identification of Martinez unless she "saw dollars signs" and/or was "treated… to lunch." *Id.* at ¶ 18. The statements attributed to Parker in Valdez' affidavit are clearly favorable to Martinez, they undermine Parker's credibility, and more importantly, they corroborate Martinez's testimony at his trial that he went to look at the victim on the ground in the alley after the beating. Ex. 13 (07/13/01 Transcript of Proceedings in People v. John Martinez, No. at 99 CR 6197) at 227:3-228:10. Given Valdez' affidavit, it appears that Parker will be a witness for Martinez and there is no doubt that she is an adverse witness for the Defendants.

2. Jose Tinajero.

Martinez's attempt to claim priority over Mr. Tinajero as a witness aligned with Defendants is even less persuasive than Ms. Parker. According to Martinez, "Mr. Tinajero, meanwhile, was Plaintiff's co-defendant and remains incarcerated for this crime. He gave a statement implicating Plaintiff in the crime." *See Martinez,* Dckt. No. 109 at 12. Martinez admits that he previously agreed to allow Defendants to proceed first with Mr. Tinajero's deposition. *See Martinez,* Dckt. No. 109 at 6 ("Plaintiffs' November 17 proposal for this case included an offer to simply let Defendants go first with Tinajero. And, to bring this issue to resolution without the need for additional delay, Plaintiff offered to let Defendants also go first with Mr. Fuentes, and all five of the witnesses Defendants noticed without service.").

Tinajero's name first came up in the homicide investigation that resulted in Martinez's charges when he was named by witness Margarita Casiano sometime in late 1998. Ex. 7 (Supplement Report

Re: Witness Melloney Parker and Margarita Casiano). At that time, Dets. Guevara and Halvorsen were assigned to process an unrelated shooting and while talking to a witness (Margarita Casiano), they learned she had knowledge about the murder of Garica. *Id.* Dets. Guevara and Halvorsen later interviewed Casiano, and Casiano told Dets. Halvorsen and Guevara that she is drug user, and she buys drugs from Latin Kings at a dope spot at Whipple and Armitage. *Id.* She further relayed that sometime in October 1998, she went to the alley, and she heard four members of the Latin Kings, who she knew as Toy (Jose Tinajero), Johnny (John Martinez), Rabbit (Angel Serrano) and Snoopy (Thomas Kelly), all laughing and giggling about a Mexican man they had beaten up and left in the alley. *Id.* She heard them say that the Mexican man had failed to pay for his drugs the night before. *Id.* The detectives determined that Toy was Tinajero and showed his mugshot to Casiano, who confirmed that it was Toy. *Id.*

Tinajero was first identified as being involved in the October 12, 1998 beating death of Daniel Garcia by witness Melloney Parker. On January 24, 1999, Defendant Guevara showed Parker a photo array and Parker identified Tinajero as the man she heard yell out "where's my money" and who started the fight in the alley with Daniel Garcia. Ex. 7 (Supplementary Report Re: Witnesses Melloney Parker and Margarita Casiano). On February 6, 1999, Parker identified Tinajero and Martinez as two of the men she saw beating up Garcia in the alley. *Id.*

Subsequently on February 7, 1999, Tinajero was arrested by Defendants Mohan and Troche and they questioned him about the beating of the victim in the alley, but Tinajero claimed he did not recall this incident. Ex. 14 (Supplemental Report Re Jose Tinajero, John Martinez & Thomas Kelly Statements 02-9-99). Later in the day, Guevara informed Tinajero that he had been identified as one of the people involved in beating Garcia and that Garcia had died as a result of the beating. *Id.* at 4. According to the police report, Tinajero responded that he was not the only person involved in the beating, and implicated Angel Serrano, Thomas Kelly and Martinez as the other offenders.

Later on the same date, February 7, 1999, Tinajero gave a court reported statement before two Assistant State's Attorneys and Guevara. Ex 15 (Court Reported Statement of Jose Tinajero, 02-07-99). In the court reported statement, Tinajero reported that he was in the alley with Martinez, Thomas Kelly, and Angel Serrano, when Garcia approached them and asked to buy drugs. *Id.* at 8. According to Tinajero's court reported statement, after they tricked Garcia to admit that he was in a rival gang, Tinajero took Garcia's wallet, punched him, and ran away to his girlfriend's grandmother's house, which was nearby. *Id.* at 9-11. Tinajero claimed that he saw the other men beating Garcia. *Id.* at 11-12.

On February 8, 1999, Tinajero was placed in an eleven-person lineup, along with Serrano, Martinez, and Kelly, which was viewed by witnesses Melloney Parker and Esteban Rodriguez. Ex. 8 (Supp Report Re Lineup Viewed by Parker and Rodriguez 02-9-99). Parker did not identify Kelly or Serrano in the lineup, but she did identify Tinajero and Martinez as two of the offenders who beat up Garcia. *Id.* Rodriguez identified Tinajero, Martinez and Kelly as three of the offenders who beat up Garcia. *Id.*

Tinajero recanted his court reported statement at a pretrial suppression hearing, and claimed he provided a false statement because Guevara threatened him and made him believe he would be able to go home if he gave a statement. Ex. 16 (Petition for Post-Conviction Relief in *People v. Jose Tinajero*, No. 99 CR 6197-01 at ¶¶ 63-66). Tinajero also testified at the pretrial hearing that "he felt physically threatened and that Guevara continued questioning him despite his request for a lawyer." *Id.* at ¶66. The court denied Tinajero's suppression motion, and at trial, his court reported statement was introduced into evidence through the testimony of an Assistant State's Attorney. *Id.* at ¶67.

Tinajero, Kelly and Martinez were tried at the same time (Kelly and Martinez opted for a bench trial before Judge Salone). Tinajero was convicted by a jury of first-degree murder, aggravated battery and robbery and Judge Salone sentenced him to concurrent terms of 30 years for murder and 10 years

for robbery. Ex. 16 at ¶¶ 75-76. Tinajero remains incarcerated for this crime but is attempting to have his conviction vacated.[5] (Dckt. 92). He is currently represented by Attorney Joel Flaxman.

In July 2023, Tinajero filed a successive petition for post-conviction relief in which he relies on "three types of newly available evidence," including "evidence raising serious doubts about Guevara's investigation in the form of his own testimony…" and "the recent ruling setting aside co-defendant Martinez's conviction." Ex. 17 at ¶ 84. Tinajero explicitly relies on the vacating of Martinez's conviction as a basis for vacating his own conviction; and thus, is clearly aligned with Martinez. *Id.* at ¶ 97. Given the representations in Tinajero's successive petition for post-conviction relief and the claims made of police misconduct, there is no doubt that he is a hostile witness against Defendant Guevara and the other police officer defendants, and that Defendants should be entitled to question him first.

3. Jesus Fuentes.

Martinez's claim to priority on Jesus Fuentes is a retraction of the negotiation of the parties before the filing of this Motion. *See* Martinez, Dckt. No. 109 at 6. Moreover, it bears noting that Martinez concedes that Defendants noticed the deposition of Mr. Fuentes first in this case. *Id.* at 3. However, Martinez attempted to "leapfrog" this notice by sending out a different notice for Mr. Fuentes for an earlier deposition date. *Id.* This leapfrogging is exactly the problem with the first in time operation that Plaintiffs propose – it lends to this race by Plaintiffs to re-notice depositions and confusion among witnesses who may already be wary and anxious of being deposed, receiving multiple notices for multiple dates. Nonetheless, if Defendants are allocated the above two witnesses, they are willing to concede adversity on Mr. Fuentes. However, in the event this Court determines "first in

[5] In fact, the Defendants are currently in a dispute with the Cook County State's Attorney over the production of their file on the Garcia murder because of Kelly's and Tinajero's post-conviction motions. The Cook County State's Attorney is currently refusing to tender the file on the basis that Kelly's and Tinajero's post-conviction motions has essentially "re-opened" the underlying criminal case.

time applies," Defendants obviously have priority over this witness and should be allowed to question first.

B. Witnesses in *Flores*.

This case involves Flores's conviction for the November 22, 1989 murder of Jeffrey Rhodes. *See Flores*, Dckt. No. 1. Flores seeks priority over two witnesses: Scott Thurmond and Tony Valdez.

Unlike other matters, Flores did not seek to take priority on any depositions of any witnesses after the parties exchanged written discovery. Rather, it was Defendants who first noticed the deposition of Scott Thurmond on August 28, 2023. This deposition was scheduled to proceed on November 8. *Id.* Nevertheless, after receipt of Defendants' notices of deposition, Flores decided that he should take priority on Thurmond and issued a "leapfrog" notice of depositions Thurmond on September 5 for Thurmond's deposition to proceed on October 3, 2023, before Defendants' scheduled deposition date. Ex. 18. Flores later amended this notice to proceed on October 30, 2023, still before Defendants' subpoenaed deposition date. Ex. 19. Again, this increases confusion, and likely anxiety and hostility of witnesses, who are being given multiple dates for depositions from multiple parties.

In any event, in the event witness alignment is applied evenly across the board in these cases, Defendants are willing to concede adversity to Flores for Mr. Thurmond. However, if "first in time" is deemed to carry the day, Defendants obviously must be given first priority in deposing Mr. Thurmond given that they noticed his deposition first.

Mr. Valdez, however, is clearly adverse to Defendants and aligned with Flores. Specifically, the sole purpose of Mr. Valdez's testimony is to attempt to impeach the other witness they have claimed priority over, Mr. Thurmond.

Flores called Mr. Valdez as a witness during his case in chief at his criminal trial. Ex. 20 at 243:5-8. Mr. Valdez testified that he owned the restaurant that Mr. Thurmond ran into on the date of

incident. *Id.*, 243:18-244:3, 245:14-22. When Mr. Valdez approached Mr. Thurmond, he could smell alcohol and he appeared drunk and disheveled. *Id.*, 246:11-12, 248:11-16. He claimed that contrary to Mr. Thurmond's testimony, he allowed Mr. Thurmond to use the telephone. *Id.*, 246:23-247:2. Mr. Valdez said Mr. Thurmond was not able to reach the police and Mr. Valdez asked Mr. Thurmond to leave the restaurant. *Id.*, 249:1-8. As Mr. Thurmond was walking out the door, Mr. Thurmond's friend walked in. *Id.*, 249:13-19. Mr. Valdez saw Mr. Thurmond's friend and immediately called 911. *Id.*, 249:20-23. Mr. Valdez later retracted that testimony, saying the friend was laying against the front of his building, and when Mr. Valdez saw him, he called 911. *Id.*, 252:15-23. Mr. Valdez also denied that anyone punched Mr. Thurmond. *Id.*, 253:20-22.

The only reason Flores would call Mr. Valdez is to call into question the reliability of Mr. Thurmond's testimony. Mr. Valdez is expected to testify Mr. Thurmond was intoxicated at the time he claimed to see Flores shoot Mr. Rhodes. Accordingly, Defendants should be allowed to take priority in questioning Mr. Valdez.

C. Witnesses in *Juan and Rosendo Hernandez*

The Hernandez brothers, Juan and Rosendo, were convicted on June 27, 1997, for the shooting murder of Jorge Gonzelez. They claim that Defendants fabricated police reports documenting the chain of events. Additionally, Defendants allegedly created a deliberately suggestive photo array containing the pictures of Juan and Rosendo Hernandez, and allegedly manipulated the witnesses to identify the Plaintiffs. Plaintiffs were released from prison on July 21, 2022, after their post-conviction hearing in June 2022.

Hernandezs' Motion seeks an order giving them priority on the deposition of nine (9) witnesses: Daniel Violante, Jesus Gonzalez, Jose Gonzalez, Juan Cruz, Marybel Arroyo, Nancy Gonzalez, Nelson Pacheco, Jondalyn Fields, and Fred Rock. That motion is perhaps the clearest example of a plaintiff "wanting his cake and to eat it too" in his analysis. Specifically, Hernandez's

claim adversity over both a recanting eyewitness (Daniel Violante) as well as several non-recanting eyewitnesses (Jesus Gonzalez, Jose Gonzalez, Juan Cruz, Marybel Arroyo, Nancy Gonzalez). The Hernandez brothers also claim adversity of witnesses whose sole role in this case are putative Fed. R. Evid. 404(b) witnesses who claim knowledge of misconduct of Defendant Guevara and Defendant Bemis in other cases (Jondalyn Fields, and Fred Rock), one of whom is a former client of the Loevy law firm (Ms. Fields). The brothers also claim priority over another person who they claim has knowledge about the identity of the supposed "real killer" in the underlying murder (Nelson Pacheco). Barring any further disclosure of evidence of recantations, Defendants are willing to concede adversity with Jesus Gonzalez, Jose Gonzalez, Juan Cruz, Marybel Arroyo, and Nancy Gonzalez only if the Hernadez's concede adversity over the sole recanting eyewitness, Daniel Violante.

Moreover, there is no credible argument that Hernandezs' putative Fed. R. Evid. 404(b) witnesses are adverse to the brothers. Indeed, that contention is an absurdity. Nor is there any credible argument that a supposed "real killer" is an any way adverse to the Hernandez brothers (who claim factual innocence in this case). Under the circumstances, this is a highly favorable dispensation for Hernandez's, and the only one that has any degree of consistency to the requisite legal standards in play on this case.

1. Daniel Violante.

According to Juan and Rosendo Hernandez, "[w]ith the exception of Daniel Violante, none of these witnesses have recanted prior testimony incriminating Plaintiffs, and remain 'hostile.' Mr. Violante recanted his testimony at Plaintiffs' post-conviction hearing, and thus he has provided testimony both favorable and unfavorable to both sides. And meanwhile he is a critical witness that Plaintiffs will certainly call in their case-in-chief." *Hernandez*, Dckt. No. 83 at 11.

Daniel Violante was best friends with the victim, Jorge Gonzalez, and was an eyewitness to the shooting. Ex. 21 (6/6/22 PC Hearing) at 121-22, 123-24. During the investigation into Jorge

Gonzalez's murder, Violante identified Juan and Rosendo Hernandez in a photo array and in a lineup as the shooters. *Id.* at 151-54, 159-60, 168-71. Violante testified at Juan Hernandez's criminal trial and at both of Rosendo Hernandez's criminal trials, and under oath, positively identified them as the shooters. *Id.* at 151-54, 157-61, 168-72.

In 1998 or 1999, however, Violante signed an affidavit authored by the brothers' criminal attorney, Kent Brody, because it was Violante's "gut feeling" that he did not "think it was them that committed that crime." Ex. 21 at 133-35, 143-48, 162-63, 171. Violante asserted in the affidavit that he accused them out of retaliation. *Id.* at 147.

The Hernandez brothers then called Violante during their June 2022 post-conviction evidentiary proceedings. During those proceedings, Violante testified that at the time of the shooting, contrary to his criminal trial testimony, he in fact could not see anyone's faces because it was too dark and it occurred too fast. Ex. 21 at 123-24. He claims that he did not see anything. *Id.* at 143. He testified, contrary to his criminal trial testimony, that he told the police that he could not recognize anyone from the shooting and did not recognize anyone in the photo array. *Id.* at 125-26, 127, 173. He testified he did not remember picking the brothers out of a lineup. *Id.* at 150.

In May 1998, Violante claimed he was approached by a "man" with the typed up the affidavit indicating that he wished to drop charges against Juan and Rosendo Hernandez, recanting his prior eyewitness identification testimony. *Id.* at 143-147.

Under these circumstances, there is simply no credible argument that Mr. Violante is adverse to the brothers. Rather, as a recanting witness who has retracted statements he gave to Defendants, he is firmly in Hernandezes' camp.

2. Nelson Pacheco.[6]

[6] For what it's worth, Mr. Pacheco was one of the witnesses Plaintiff conceded to Defendants during the meet-and-confer discussions. *See Hernandez,* Dckt. No. 83 at 6.

Juan and Rosendo Hernandez claim of priority over the deposition of Mr. Pacheco is even less persuasive. According to the Hernandezes, "Pacheco will testify about who the true perpetrator of the crime was." *Hernandez*, Dckt. No. 83 at 12. What Plaintiffs means by this is that Pacheco will insinuate that someone other than the brothers were the perpetrators. Insofar as the brothers claim innocence as the basis for their claims, there is no world in which such testimony could be considered remotely adverse to them.

Pacheco was called to testify by Plaintiffs at their June 7, 2022, Post Conviction Hearing. Ex. 22 (6/7/22 PC Hearing) at 7. In 1997, Pacheco was a member of the Latin Eagles street gang. *Id.* at 8-9. Pacheco claims that one evening during the summer of 1997 he observed an individual he knew as "Will Kill" (aka William Vilaro) while driving on Kilbourn and Palmer *Id.* at 8-11. Vilaro's windshield was "busted up." *Id.* at 12, 24-25. Vilaro waived at Pacheco and gestured to Pacheco to follow him. *Id.* at 12, 22.

Eventually, Pacheco pulled over and Vilaro got into his car. Ex. 22 at 12-13. Vilaro was sweating badly, he seemed scared and nervous, and he was carrying a gun. *Id.* at 13, 24. Pacheco knew he had a gun. *Id.* at 24. Pacheco asked him what happened and Vilaro told him that he shot some people at Mobile and Dickens, but Pacheco told him to be quiet because he did not want to hear about that. *Id.* at 14, 24-27. Pacheco then took Vilaro to the park where he got out and left. *Id.* at 15. Pacheco later saw that the car Vilaro had been driving and left on the street, had been burned. *Id.* at 15.

Pacheco knew Juan Hernandez, they had "a good respectable, friendship." Ex. 22 at 20-21). Juan Hernandez's reputation had a reputation as being a money maker, not a gang banger. *Id.* at 21.

Juan Hernandez and Pacheco overlapped in Division IV in Cook County sometime between the murders and 2015. During that time Juan Hernandez was a barber and spoke with Pacheco. Ex. 22 at 30. When Juan Hernandez told him why he was locked up, Pacheco told him "that's not you. You didn't do that" and Hernandez responded, "I need your help." *Id.* at 30-31. Pacheco was later

contacted to testify by a lawyer, Dan Stohr, in 2014 or 2015. *Id.* at 30-31, 33. Stohr told Pacheco that they needed his part. *Id.* at 31. He was told that his story being out could help the Hernandez brothers. *Id.* at 31. Stohr was persistent after Pacheco said that he was not into testifying. *Id.* at 33. Pacheco then signed an affidavit for Stohr in 2017. *Id.* at 33.

Pacheco is both a favorable witness for Plaintiffs as well as a person with a prior relationship with them, and thus adverse to Defendants.

3. Fred Rock.

The Hernandezes' claim over priority over Mr. Rock is completely baseless in every respect. They admit that the sole purpose of this testimony is to attempt to introduce unrelated acts of misconduct against Defendant Guevara and to attempt to establish Defendants' motive to wrongfully convict the brothers. *Hernandez,* Dckt. No. 83 at 10-11 ("Fred Rock is particularly important to presenting Plaintiffs' theory about why they were wrongfully targeted and framed by Defendants Guevara and Miedzianowski. More specifically, Defendant Miedzianowski is now serving a life sentence in federal prison for running a criminal enterprise out of the Chicago Police Department; the United States' star witness against Miedzianowski was Fred Rock, who had been working with him in the drug trade. Fred Rock has testified that just a few weeks before Plaintiffs were arrested and charged for murder, Defendant Miedzianowski told Defendant Guevara, in the presence of Fred Rock, to frame Juan Hernandez for a murder."). Thus, Plaintiffs appear to concede adversity to Defendants, as they must.

4. Jondalyn Fields

Ms. Fields is also indisputably adverse to Defendants. According to Juan and Rosendo Hernandez, "Jondalyn Fields corroborates Rock's testimony about Defendants Guevara and Miedzianowski's plan to frame Plaintiff…" *Hernandez,* Dckt. No. 83 at 12. Even worse, Ms. Fields is

a former client of the brothers' counsel (Loevy & Loevy) in a separate police misconduct lawsuit. *See* Ex. 23.

D. Witnesses in *Rivera*.

Rivera seeks priority over Madilyn Burgos, Reinaldo DeJesus and Nicholas Gonzalez. None of these witnesses are remotely adverse to Rivera. One of them (Madeline Burgos) is Rivera's relative, was disclosed as a damage witness, and was listed as to be contacted through Rivera's counsel in Rivera's Fed. R. Civ. P. 26(a) disclosures. The other two witnesses are people that Rivera has specifically intimated are involved as the "real killers" in the underlying crime for which he was convicted.

1. Madeline Burgos

According to Rivera, "Madelyn Burgos is an alibi witness who will testify to Plaintiff's whereabouts on the day of the crime to help demonstrate that he is innocent and that the identifications of him Defendants obtained are false; she is a primary witness in Plaintiff's case in chief." *Rivera*, Dckt. No. 66 at 11. This alone is reason enough to establish she is not adverse to Rivera. However, Madelyn Burgos is also the sister-in-law of Rivera. Ex. 24 at 723. She was additionally disclosed as a witness who may have information "about Plaintiff's wrongful prosecution, conviction, and incarceration, the damages that Plaintiff suffered and continues to suffer as a result." *See* Ex. 25. Rivera's disclosures state that Burgos may be contacted via Rivera's counsel.

2. Reinaldo DeJesus and Nicholas Gonzalez.

DeJesus and Gonzalez are people that Rivera intends to offer as putative "real killers" so he can establish his own innocence. They are not remotely adverse to his claims.

Reinaldo DeJesus (aka "Butchie") and Nicholas Gonzalez (aka "Nick") are brothers. Ex. 24 at 724. DeJesus was the leader of the Insane Unknowns street gang. Ex. 26. Gonzalez was his younger brother. During investigation of the Ramos homicide, the oldest brother of the victim (Miguel

Gonzalez aka "Killer Boy") told detectives that the victim "had a beef with the section leader of the Unknowns" who was identified as "Butchie." Ex. 27-29. The detective's theory was that as a result of this "beef" "Butchie" ordered the hit. *Id.* DeJesus and Gonzalez were arrested by the 25th District gang team for disorderly conduct on April 22, 1996. Ex. 26. Photographs were taken of both individuals. *Id.* On April 23, 1996, Detectives had witness Richardini Lopez view photographs of known gang members from the Insane Unknowns. Ex. 24 at 724. Among these photographs were DeJesus and N. Gonzalez. *Id.* According to the police, neither DeJesus nor his brother were identified as the shooter. *Id.*

The idea that an alternate suspect would be adverse to Rivera is absurd. Defendants would never call anyone at trial to attempt to prove that someone other than Rivera was the killer. Rivera would be relying upon these individuals to attempt to insinuate that they, not him, were responsible for the murder. These individuals are clearly adverse to Defendants under the circumstances.

CONCLUSION

Wherefore Defendants pray this Court enter a Protective Order Pursuant to Fed. R. Civ. P. 26(c) and (d) or, in the alternative, rule upon witness priority in the above cases as describe herein, and for whatever other relief this Court deems fit.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois − CM/ECF NextGen 1.7.1.1
Eastern Division

John Martinez

Plaintiff,

v.

Case No.: 1:23−cv−01741
Honorable Thomas M. Durkin

Reynaldo Guevara, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Monday, January 29, 2024:

MINUTE entry before the Honorable Sheila M. Finnegan: Plaintiff's motion to compel Defendants to Proceed with Third Party Depositions [109] is granted in part and denied in part. Plaintiff shall examine Melloney Parker and Jesus Fuentes first at their respective depositions, while Defendants shall examine Jose Tinajero first at his deposition. Given the 2/27/2024 deadline for completing non−Monell fact discovery, the parties are to promptly confer on the scheduling of these depositions. Telephone status hearing is set for 2/20/2024 at 10 a.m. At that hearing, the Court will provide specific reasons for its decision beyond those provided during the 1/10/2024 hearing, particularly as to Ms. Parker and based on Plaintiff's post−hearing supplement to the motion [123]. The toll−free number for the hearing is 877−336−1831, access code 5995354. Participants are directed to keep their device muted when they are not speaking. Audio recording of the hearing is not permitted; violations of this prohibition may result in sanctions. Mailed notice (sxw)