

GROUP EXHIBIT 4

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

JACQUES RIVERA,

Plaintiff,

-vs-

REYNALDO GUEVARA, et al.,

Defendant.

Case No. 12 C 4428

Chicago, Illinois
March 12, 2013
9:43 a.m.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MARY M. ROWLAND, MAGISTRATE JUDGE

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1 (Proceedings heard in open court:)

2 THE CLERK: 12 C 4428, Rivera versus Guevara, et al.

3 THE COURT: Sorry to keep you guys waiting.

4 MR. LOEVY: Good morning, your Honor. Jon Loevy for
5 the plaintiff.

6 THE COURT: Good morning.

7 MR. BOWMAN: Locke Bowman also here for the
8 plaintiff.

9 MR. SWAMINATHAN: Anand Swaminathan for the
10 plaintiff.

11 MR. ART: Steve Art for the plaintiff.

12 MR. GIVEN: Good morning, your Honor. Jeff Given on
13 behalf of the City.

14 MS. ROSEN: No.

15 MR. GIVEN: Oh, sorry.

16 THE COURT: You're not Mr. Given?

17 MR. GIVEN: Hard to keep them straight.

18 In this case, I am on behalf of the individual
19 defendants.

20 MS. ROSEN: Good morning, your Honor. Eileen Rosen
21 on behalf of the City.

22 THE COURT: Ms. Rosen, thank you for knowing who's
23 here and why they're here. I need you back in chambers.

24 (Laughter.)

25 THE COURT: All right, people. So here's my feeling.

1 Having litigated this, painfully litigated this myself, I
2 don't think that you have standing to challenge this subpoena,
3 okay? So I'm not going to quash the subpoena. However -- and
4 let me just ask you, do you care that it's on videotape?

5 MS. ROSEN: Not at all.

6 MR. GIVEN: No.

7 THE COURT: Okay. And you're paying for the video
8 taping?

9 MR. BOWMAN: Yes, ma'am.

10 THE COURT: Okay. So do you need my help in figuring
11 out -- knowing that the subpoena is not going to be quashed, I
12 just don't think you have the ability to ask me to do that,
13 and I don't think I can do that unless the guy who got
14 subpoenaed is in here raising -- raising Cain about it.

15 Do you need my help in terms of how this is going to
16 go forward?

17 MS. ROSEN: Apparently.

18 MR. BOWMAN: Yes.

19 THE COURT: Okay. Because I know you're all
20 wonderful lawyers and well regarded.

21 So I'm really torn about it. Tell me about
22 Mr. Lopez. How old is he now?

23 MR. BOWMAN: He's in his late 30s I believe at this
24 point.

25 THE COURT: Okay. And is he working?

1 MS. ROSEN: Yes. Well, at the post-conviction
2 proceeding, he testified that he was working, had a family
3 and --

4 THE COURT: Okay. So he's busy and he's got a life.

5 MS. ROSEN: Yes.

6 THE COURT: Okay. Does he -- who's the lawyer?
7 Because they live in different cities.

8 MR. GIVEN: She used to be in Cleveland, where
9 Mr. Lopez lives. She then moved to Columbus for her job.

10 THE COURT: Okay.

11 MR. GIVEN: And she, I asked her briefly how she came
12 to be Mr. Lopez's lawyer. She said he was a family friend.

13 THE COURT: Okay.

14 MR. GIVEN: That's all I know.

15 THE COURT: I'd really rather get him here for the
16 trial. I mean, I know that I don't have the authority to do
17 that, but that is -- seems way preferable to anything else.

18 MS. ROSEN: That would be our preference, too, and,
19 quite frankly, I mean, I don't know that the door is closed on
20 that.

21 THE COURT: Okay.

22 MS. ROSEN: You know, he came here for the
23 post-conviction hearing.

24 THE COURT: How did you guys arrange that? I assume
25 the Center For Wrongful Convictions did that.

1 MR. BOWMAN: That was -- that was arranged and
2 Mr. Lopez felt very strongly that it was important to come.

3 THE COURT: Okay.

4 MR. BOWMAN: And he came.

5 THE COURT: Okay.

6 MR. BOWMAN: My understanding from Ms. Adams is that
7 that was a very painful experience for him --

8 THE COURT: Okay.

9 MR. BOWMAN: -- and that it's one he does not care to
10 repeat.

11 THE COURT: Okay.

12 MR. BOWMAN: And that's -- you know, obviously none
13 of us wants to close the door; but I think that we have to
14 face the reality here, which is that at the end of the day,
15 none of us has the ability to compel him to come --

16 THE COURT: Uh-huh.

17 MR. BOWMAN: -- and I -- I'm not optimistic.

18 THE COURT: Uh-huh.

19 MR. GIVEN: Judge, if I can just add this. When I
20 first reached out to Ms. Adams, she expressed that she would
21 fight even a deposition, that her marching orders from
22 Mr. Lopez was to fight the deposition, and, in fact, that's
23 changed.

24 She has not objected to this deposition. She
25 accepted service on Mr. Lopez's behalf. She has not moved to

1 quash the original subpoena, so there's no way to know what
2 will happen down the road, whether he will or will not come
3 back.

4 THE COURT: Okay. I -- so I'm inclined to, although
5 this is not really fair to him, but I'm inclined, first of
6 all, to give you more than -- are we on eight-hour rule or
7 seven-hour rule? I should know that.

8 MS. ROSEN: Seven.

9 THE COURT: Yeah. So I'm inclined to give you more
10 than that anyway. I mean, nobody's asking for that, but I'm
11 trying to be fair in how we're going to do this dep.

12 I am concerned that if the jury -- I mean, I'm mostly
13 concerned about the jury, frankly, at this point, and if
14 they've got to watch this thing on video. I was on a jury
15 once, and I had to watch video testimony.

16 So I would like them to get as much as a coherent
17 story as they can, and I don't -- do you agree that it's your
18 role, and I totally respect that, you know, the accusations
19 here are very serious against your clients so you're going to
20 go to the mat on this -- do you -- I mean, are you sort of
21 cross-examining this guy?

22 MS. ROSEN: I don't think we are at all, Judge. I
23 mean, he testified in the post-conviction proceeding that he
24 viewed photographs and picked out the person that he thought
25 did the crime through no coercion. He viewed the first lineup

1 as he describes it and picked out Mr. Rivera.

2 He then was walking down the street and saw somebody
3 else and it dawned on him at that point that maybe he had the
4 wrong guy. He viewed a second lineup and picked Mr. Rivera
5 again. Had a conversation with a white-haired lady where he
6 tried to say it was wrong, but couldn't identify the woman as
7 a police officer, a lawyer, describes her as carrying a
8 Redweld.

9 The reference in the courtroom seems to be like he's
10 referring to, like, lawyers, you know, carry Redwelds. He
11 wasn't even sure who it was that he tried to say it was wrong;
12 but in any event, viewed the second lineup. They said to him
13 in response to the wrong comment don't be afraid, we'll
14 protect you, and then he views the lineup again and picks
15 Rivera and then knowingly testifies in court that it was a
16 lie.

17 He's adamant no police officer coerced him. This is
18 all in the post-conviction. He's adamant that nobody
19 threatened him. They didn't tell him who to pick. You know,
20 from our perspective, you know, we disagree whether or not
21 there was a first lineup or not. We intend to probe that. I
22 don't know that I'd call it a cross-examination. I want more
23 detail about what he's saying. It's not clear. But I don't
24 think we intend -- I mean his testimony is I knowingly lied,
25 okay?

1 Well, I mean, if that's what happened, then that's
2 what happened, and I don't think we're going to say no you
3 didn't.

4 THE COURT: Who put him on in the post-conviction?

5 MR. LOEVY: We did.

6 MR. BOWMAN: And, your Honor, he's our witness.

7 MR. GIVEN: And, your Honor, let me also just add
8 with regard to the cross-examination question, which I would
9 not characterize what we intend to do as cross-examining him
10 at all.

11 Mr. -- from what we know, Mr. Lopez was first
12 contacted by a representative of Northwestern in February
13 of 2010, I believe. Then from 2 --

14 THE COURT: Does that all come in? Kind of how he
15 became a witness who recanted? Is that part of the trial in
16 this case?

17 MR. BOWMAN: Well, you know, there -- in our
18 experience, there have been in the past occasions where that's
19 been an issue. You know, whether it becomes an issue --

20 THE COURT: You mean made an issue by the defendants,
21 or it's an issue that you want to put out there?

22 MR. BOWMAN: It's not -- it may -- you know, I don't
23 know how this is going to play out, your Honor. It may be
24 important for us to tell that piece as part of what we would
25 see as our presentation of this witness who is most definitely

1 our witness.

2 THE COURT: Yeah.

3 MR. BOWMAN: This guy is very clear that he recanted
4 his -- I mean, there is some murkiness about the lineups and
5 the photo arrays and so forth and so on, and each side has its
6 views on that. Our view is that he supports our position that
7 there was a fabrication here and a concealment of a lineup.
8 But putting that aside --

9 THE COURT: Yes.

10 MR. BOWMAN: -- and just focusing on what's
11 undeniable, he tells the white-haired lady and a mustached
12 police officer, who, you know, Guevara has a mustache, that
13 his identification of our client was wrong. He tells them
14 that undeniably, and that --

15 THE COURT: And that's in the post-conviction.

16 MR. BOWMAN: -- fact is not revealed, and all of this
17 is testified about at the post-conviction.

18 MR. GIVEN: Judge, may I, please?

19 THE COURT: You may.

20 MR. GIVEN: Number one, what he just told you is not
21 true. Mr. Lopez did not say he also told the mustachioed man.
22 He said I told the silver-haired lady, and then I saw her go
23 off and talk to somebody, and I don't know what they talked
24 about.

25 But more importantly to the point of this

1 cross-examination and the nature of the background of our
2 desire to question Mr. Lopez.

3 So they find him in February of 2010. From February
4 of 2010 through June of 2010, we don't know how many times
5 they get together and talk with him, but we do know in June
6 of 2010 they come up with an affidavit that they used in the
7 post-conviction. Mr. Lopez signs an affidavit that is part of
8 the post-conviction proceedings.

9 Then we don't know how many times they talked to
10 Mr. Lopez from the point of the affidavit to the point in time
11 when they fly him out for the post-conviction hearing --

12 THE COURT: Right.

13 MR. GIVEN: -- which they put him on. They had an
14 opportunity to examine him for whatever amount of time that
15 they want, under oath, and they do that.

16 We, on the other hand, win. So now this case comes
17 up. I reach out -- I'm told that Mr. Lopez is represented by
18 counsel, so -- and they gave me the wrong contact information,
19 but I find her anyway.

20 So I talk to her and I ask can we have a chance just
21 to talk to Mr. Lopez? She says absolutely not. He's tired of
22 everything.

23 I said, well, my client never had a chance to talk to
24 him, formally or informally. She says, well, I won't agree to
25 an in -- I said, okay, fine. I'd like to then work on taking

1 his deposition.

2 She said, well, I'm going to fight your deposition.

3 I said, well, I hope that doesn't come to that, but
4 I'm going to try to cooperate with you. We'll take his --
5 where would you like his deposition? Would you like it in
6 Columbus? Would you like it in Cleveland? She tells me in
7 Cleveland.

8 THE COURT: Right.

9 MR. GIVEN: I issue the subpoena and, by the way,
10 this notion that there was a manic race is just absurd; and by
11 the way, once I did serve the subpoena in January, it wasn't
12 until last week that they came out with this, oh, well, we
13 need to depose him first. It was always can you give me a
14 date that works for you? And they said, sure, we'll get back
15 to you and never did.

16 So when you talk about cross-examining, the truth is
17 I want to interview this man because I don't know so many
18 things about what he has done, what he said, at the different
19 times that he said it. I don't know about his interactions
20 with the plaintiffs, now plaintiffs in the case, so I don't
21 view it as a cross-examination at all, and he's as important
22 to our case as he is to theirs.

23 MR. BOWMAN: But, but, your Honor, he is -- he is
24 going to be called. If he is available, if he will come, he
25 is going to be called in our case. We are the plaintiff. We

1 have the burden of proof.

2 THE COURT: Yeah, I know about the burden. I'm
3 concerned about the burden. What do you want to say?

4 MS. ROSEN: The only thing I want to add, Judge, is,
5 you know, Mr. Given raised the point this subpoena was issued
6 and served in January, and we were -- the date that we
7 selected was inconvenient for Mr. Lopez. We reached out to
8 plaintiff's counsel and asked them to provide us a date.

9 They did not say at that time no, he's our witness.
10 We think we should go first. None of that conversation was
11 had. We repeatedly asked for dates, and it wasn't until last
12 week, now six weeks or eight weeks later, that this issue
13 comes up.

14 You know, the rules, we noticed him, we subpoenaed
15 him. I've never had a scenario where, you know, a couple
16 months after a subpoena gets served, the other side says,
17 well, it's our witness and we get to go first.

18 THE COURT: Yeah.

19 MS. ROSEN: Now, I appreciate that, you know, there's
20 a possibility that he's not going to come to trial and there's
21 the concern about how the evidence gets presented; but in
22 federal court, we don't have evidence depositions. They're
23 all for one. We read deposition transcripts in all the time.
24 We make video presentations all the time. Nobody wants it to
25 be disjointed.

1 Like Mr. Givens said, we're not interested in
2 cross-examining him. We want his story, and we don't have his
3 story in full.

4 THE COURT: Okay. Here's what I'm going to do. I
5 really appreciate what you're saying, if I thought this man
6 was going to come to testify, I wouldn't -- I would have no --
7 there would be no issue here, okay? You would get to do your
8 job.

9 You noticed it up. It is kind of a first come, first
10 serve in this world, but I am really concerned that they have
11 the burden, okay, and he is going to be probably the most
12 important witness in the case.

13 I mean, you guys all have dogs in the fight, and so
14 your -- your client and your clients, whoever the jury likes
15 and believes is going to be obviously very significant; but
16 this is the only third-party person who's going to come in and
17 say anything.

18 I appreciate your presentation, Mr. Given, but when I
19 hear you talking, I hear you wanting to -- I know you don't
20 want to go after Mr. Lopez, I mean, I'm sure you're going to
21 treat him with all respect, but I do hear you wanting to cast
22 some suspicion on how they found him in February and then
23 somehow they came up with an affidavit --

24 MR. GIVEN: Judge, that's not true at all.

25 THE COURT: -- in June.

1 MR. GIVEN: That is not true at all.

2 THE COURT: So let me just -- so I'm going to do
3 this. I'm going to allow you to present him as your witness,
4 okay? I'm going to allow you to go first, but they get every
5 opportunity to have him as a witness at trial.

6 I mean, I can't -- I'm not -- you don't get
7 six-and-a-half hours and then get 45 minutes at the end.
8 That's not happening.

9 So I would be -- you know, I would like to split it
10 pretty even. I would like it to be five and five. That's
11 really arduous for the witness. And I'm sure this
12 Ms. Whatever her name is is going to have a fit, and she has
13 every right to. I'd rather keep it four and four.

14 MR. BOWMAN: We can live with three-and-a-half and
15 three-and-a-half, Judge.

16 THE COURT: Can you live with three-and-a-half and
17 three-and-a-half? Because I don't want to draw a motion to
18 quash from her, but I want you guys to each have your
19 opportunity. You absolutely have a right to that, and I hope
20 that you can let them lay out that story and then you can go
21 in and fill in those holes.

22 MS. ROSEN: Well, your Honor, can I interrupt for
23 just a second?

24 THE COURT: Yes.

25 MS. ROSEN: If the basis of your ruling is because

1 this is going to be trial presentation, then their questioning
2 has to be direct questions. They can't lead him through the
3 story because they wouldn't be allowed to lead him through the
4 story in front of a jury.

5 THE COURT: Well, do you -- I mean, aren't we in a
6 situation where this has to be trial testimony? I mean, I'm
7 not ruling that it's trial testimony, but I'm being told that
8 this is it. This guy doesn't want to cooperate, and we --
9 he's going to have to be in the courtroom somehow.

10 MS. ROSEN: Well, I don't know that that's -- I don't
11 know that -- A, I don't know that that's definitive that he's
12 not coming.

13 THE COURT: Okay.

14 MS. ROSEN: But if the premise of your ruling is
15 you're concerned that he's not coming and that the jury needs
16 to hear a coherent story, then this deposition has to be taken
17 that way, and they should not be allowed to lead him through
18 it. Then they should ask like --

19 THE COURT: Do you hear her?

20 MS. ROSEN: -- a trial presentation.

21 MR. LOEVY: We are aware of the rules of evidence.
22 You know, there are rules governing depositions. There are
23 rules governing testimony, and we will certainly do it in a
24 way that we believe will be admissible at trial.

25 MR. GIVEN: Which doesn't answer the question, Judge.

1 In fact, they cite Judge Kendall, which was a
2 somewhat inapposite situation, but Judge Kendall even told
3 them in the case that they cited in their brief that they
4 could not ask leading questions. Very simple, no leading
5 questions, not what Mr. Loevy said.

6 THE COURT: Wait, I thought they cited Judge Valdez?

7 MR. BOWMAN: Yeah, and she said no such thing.

8 MR. GIVEN: Okay. Well, in fact, then let me go back
9 because this -- this notion of this race, our respective
10 offices, this is now the --

11 THE COURT: I don't care about -- I don't care about
12 the race, Mr. Given. I mean, I really -- I appreciate that
13 you guys are really passionate about this case. I'm just
14 trying to treat Mr. Lopez with respect and also preserve the
15 testimony for a jury that's going to have a really hotly
16 contested dispute to resolve, okay?

17 So I just want to be, you know, one of the reasons I
18 got out of litigating myself is because I got sick of that
19 kind of stuff, so I'm really -- I don't need to hear anything
20 more about it.

21 MR. GIVEN: Okay.

22 THE COURT: I want you all to kind of inject a little
23 more professionalism back into your communications just
24 because I can tell things are getting very hot, and that's
25 okay, but it's not -- none of that is going to make any

1 difference to me, okay? I just want this testimony to come
2 out in as coherent a fashion as it can come out for the jury,
3 for both of your people, for both of your clients.

4 Go ahead. I know you want to say something.

5 MS. ROSEN: I just want to be clear on whether or
6 not they -- it's clear to them that they have to elicit the
7 testimony in the way that they would be required to elicit the
8 testimony in court.

9 THE COURT: Well, I will tell you if you come in with
10 a video where that isn't happening, you're not going to get to
11 introduce it, so, I mean, you live with your -- you know, make
12 your bed and you lay in it. And I don't know who's the judge?
13 Gottschall?

14 I mean, she's not going to let you bring in a story
15 that's leading. She's just not going to let you do that.
16 She's a very experienced trial judge. So you'd be stupid to
17 do that, but take that at your own risk.

18 MR. LOEVY: Exactly.

19 THE COURT: So here's the order: I'm going to allow
20 the plaintiff's counsel to go first. I'm going to limit him
21 to half of the time, okay? Him or her. We seem to be him.

22 If you -- if the witness agrees to eight hours and
23 you go four and four, that's fine. If the witness won't agree
24 and you go seven hours, I mean it's three-and-a-half and
25 three-and-a-half, whatever it is. You get half the time, and

1 you get half the time, okay?

2 If you can get him to ten hours, that's fine with me,
3 I mean, but that's got to be fine with him obviously.

4 Do you need anything else?

5 Mr. Given, do you want to say anything? Because you
6 look really irritated.

7 MR. GIVEN: No, I'm -- I'm curious -- the problem is
8 this is an ongoing thing between our offices, not just in this
9 case -- and by the way, your Honor, I think we've been very
10 professional in dealing with our disagreements on this.

11 One of my frustrations is throughout over the course
12 of three or four different cases now, the plaintiffs' lawyers
13 keep telling us, well, it's not notice of deposition that
14 counts, it's service of deposition, and the subpoena.

15 So we serve a subpoena, and then they say, well, no,
16 that actually it doesn't count either, so what I was -- what I
17 was ultimately going for was thinking about asking your
18 Honor --

19 THE COURT: Yeah.

20 MR. GIVEN: -- was in moving forward in this case and
21 other cases, I'm struggling to know now what defines when it's
22 my dep versus their dep? Do I have to call them up and say,
23 by the way, I'm thinking of issuing a subpoena for a witness
24 but I want to know if you think it's your witness or he's more
25 your witness than my witness?

1 Because honestly, Judge, there's a lot Mr. Lopez says
2 I actually would like to see bolstered. The fact that he says
3 in the PC that officers did not coerce him, force him, suggest
4 to him or anything else, that's very helpful for us.

5 THE COURT: Yeah, of course.

6 MR. GIVEN: So I don't want to attack him at all. I
7 want him to tell his story again truthfully and so this -- I
8 don't know going forward how, in light of today, what I'm
9 supposed to do in issuing subpoenas anymore and whose dep --

10 THE COURT: Well, I think --

11 MR. LOEVY: Can I speak?

12 THE COURT: Of course, there's nothing -- I'm going
13 to let you speak in a minute. There's nothing I can say about
14 your other cases, obviously.

15 I will tell you I think this is a very peculiar or
16 unique set of circumstances, okay? I mean generally witnesses
17 are pretty clearly defined whose side of the aisle they're
18 sitting on, so I hope this particular issue isn't coming up in
19 all five of your cases or four of your cases.

20 It's not up to Mr. Loevy, I mean, whatever he says
21 about, well, the deposition, the notice rules or the subpoena
22 rules, really not his decision, so I wouldn't -- I wouldn't
23 give that much weight.

24 I think we have a particular circumstance, and I'm
25 telling you if I thought this was a witness who was just

1 coming here, you know, and you guys were doing pretrial prep,
2 dep, you know, discovery kind of thing, I would not be ruling
3 this way, okay?

4 But I think this is significant because you have very
5 strong message from the counsel that this guy wants to be done
6 with this, and he does not want to be bothered with this and
7 we, as a court, don't have power to drag him here. Much my
8 preference to drag him here if I could.

9 So I hope that this ruling doesn't impact any of your
10 other interactions in other cases. I think it's a pretty
11 narrow set of circumstances.

12 Mr. Loevy, do you want to say something?

13 MR. LOEVY: Only if Mr. Given would like to talk
14 about other cases, you know, we have a different view on what
15 he's saying.

16 THE COURT: No, I don't want to hear about other
17 cases.

18 MR. LOEVY: All right.

19 THE COURT: I mean, that's just not -- I don't need
20 to hear that.

21 Okay. I'm kind of hoping that the thing we talked
22 about last time got worked out.

23 MS. ROSEN: It's in the process, Judge.

24 THE COURT: Okay.

25 MS. ROSEN: There is -- I've gone back to my client,

1 and the only way to determine what lineup reports were
2 prepared at any point in time prior to 1996 or so, it requires
3 a manual hand search through all of those files because none
4 of it's put on computer --

5 THE COURT: Yeah, of course.

6 MS. ROSEN: -- until '96 or so.

7 So we had discussions about that. That was my
8 suspicion. It's now been pretty much confirmed that that's
9 the case.

10 We had discussions last week about it. In those
11 discussions when we talked about the universe of files that we
12 were going to pull to look at, plaintiff said that whatever
13 universe we agreed to, whether it be by category or time, that
14 that would be it. So if we agreed to, say, a two-year period
15 of time, we find, you know, one report or none report or ten
16 reports, that's it, defendants couldn't go beyond that because
17 that was the agreement that we reached, and we'd all have to
18 live with what we found.

19 Based on that representation, I have done a little
20 more investigating into this issue sort of more globally to
21 try and ascertain what information is out there about the
22 percentages that occur in research about filler
23 identifications to try and figure out what's a fair --

24 THE COURT: Sample.

25 MS. ROSEN: -- sample.

1 Now, there is this issue, though, Judge. Originally,
2 right, we came here on our motion for protective order to --

3 THE COURT: Yes.

4 MS. ROSEN: -- to strike the requests to admit, and
5 then there was some interrogatories propounded on the topic of
6 production, and the way that that was all styled at that time
7 was produce any report within the 20 years of 1988.

8 Now through discussions that we've been having so
9 that I can figure out what we'd be willing to agree to, even
10 if we were to find a report where a filler was identified, now
11 I'm being told, well, we take the position that there should
12 have been more, so one is not enough.

13 And we'd be free to argue in that scenario that, you
14 know, if you do a hundred lineups, we expect that 10 percent
15 should be filler identification, so if you don't come up with
16 10 percent, then we're going to argue there's a flaw in your
17 practice.

18 If that's where we're going, and that's not how I
19 understood the discovery on the front end, but if that's where
20 we're going, then that sort of changes what I'm willing to
21 agree to because that's a different kind of inquiry.

22 THE COURT: Okay. I'm regretting I asked, but go
23 ahead.

24 MR. LOEVY: Thank you, your Honor.

25 From plaintiff's perspective, it's obviously a very

1 important issue in the case. The issue that you identified
2 with Mr. Lopez was whether there was a first lineup where he
3 picked the wrong guy. We believe what the evidence is going
4 to show is when they did lineups and the suspect picked the
5 wrong guy, they didn't document it.

6 THE COURT: I know your theory.

7 MR. LOEVY: So what we intend to do is take a sample
8 of a time period, and we're frankly prepared to do out toward
9 infinity at our expense. For example, if this happened in
10 1988, we proposed to them how about if we look at '88, '87 and
11 '86.

12 There's only 5 to 800 murders in any given year, so
13 it's a finite amount of data. It would take, you know, days,
14 but probably not weeks, to review those murder files.

15 THE COURT: They have law students, you know.

16 MR. LOEVY: Exactly. We've got an army of
17 assistants. But in a matter of days, but not weeks, we could
18 review a given year and say you know what? Was it 800
19 murders? A quarter--

20 THE COURT: Well, this seems like a trial issue. I
21 mean, you're going to have what you have, right? And they're
22 going to argue to the jury this is ridiculous. You know, they
23 should have had more filler IDs than they have.

24 And you're going to argue to the jury no, this is the
25 national average or whatever evidence you're going to present.

1 I don't know that this is a discovery issue.

2 MS. ROSEN: No, but it dictates this notion of, you
3 know, how far we look, right? Because there's going to be --
4 if it's 800 homicides in a year, not all 800 have lineups,
5 so --

6 THE COURT: Right.

7 MS. ROSEN: Let's say you only have -- out of that
8 800, you only have 400 lineups.

9 THE COURT: But that's all coming in. We looked at
10 400 files.

11 MS. ROSEN: Right, but on any given year, like in
12 year 1988, you can have two filler reports, let's say. In
13 1987, you can have 20. In 1986, you could have ten.

14 If they're going to take the position that the
15 percentage should be higher, then just the averages dictate to
16 me how far I need to look. That's the question.

17 The question is how far do I need to look? And I'm
18 not prepared, as we stand here today, to say I'm going to
19 agree to two years without knowing more about what the rates
20 are and the variables. That's all I'm saying.

21 MR. LOEVY: And here's our point. In response,
22 though, we should agree before we start doing the
23 investigation. Let's say we've started with a two-year period
24 and it broke our way.

25 Let's say in that two-year period there was two

1 fillers, and we have social science that says, hey, they
2 should do fillers at almost the same rate as they do real
3 ones. And the defendants say, well, boy, this one didn't play
4 well for us, let's go back two more years. And that one
5 doesn't play well for them. And then they, say you know what?
6 We want to keep going. Oh, five years ago, there was a whole
7 bunch of fillers. Now we like that universe.

8 We want to avoid that scenario. We are willing to be
9 flexible about the time period chosen as long as it's done
10 blind. We want it to be -- them to have a unilateral option
11 to say, boy, we'd like them to roll the dice again, so --

12 THE COURT: Well, I feel like you're getting a lot
13 because you're getting to dig into these files, okay? I'll
14 just tell you, even though I'm not supposed to give advisory
15 opinions, and I'm probably way out of my -- but if they come
16 back to me and say we, the City, want to go through another
17 hundred files, am I really going to not let them do that? No,
18 I'm not.

19 MR. LOEVY: Can we have the right?

20 THE COURT: I mean, I'm just warning you that if you
21 guys agree to two years, which, I don't know, seems sensible
22 or you agree to three years and they come back -- they're
23 fighting the burden of it -- they come back and say, gee, we
24 want to take on more burden and look at two more years --

25 MR. LOEVY: What if they said --

1 THE COURT: -- does it sound like I'm going to say
2 no, you can't do that? It's their files.

3 MR. LOEVY: What if they didn't even ask you, your
4 Honor? What if they said the two years broke reasonably well
5 our year -- our way. They're going to unilaterally look at
6 two years before that, decide whether they want to disclose it
7 or not and say you know what? This makes our hand better.
8 Plaintiffs, we'll disclose it. If it makes their hand worse,
9 they don't disclose it.

10 THE COURT: Well, I don't -- I'm not worried about --
11 if they do that, then I'm going to be mad.

12 MR. LOEVY: All right.

13 THE COURT: But I don't think they're going to do
14 that. I think they're going to talk to you and try to work
15 out an agreement, and they need your law students.

16 MR. LOEVY: Well --

17 THE COURT: She's not spending whatever she's paid an
18 hour looking through these files, so I'm not worried about
19 that, but I'm not going to say -- you're not even asking me to
20 rule, so I should shut my mouth, but I don't feel like you
21 guys agreed to two rules and that's it, set in stone from now
22 to eternity.

23 If they want to go further, going further is a
24 benefit to them, I mean, it may be. It may not be. Going for
25 them might hurt them more, but if they want to go further,

1 it's their files.

2 MR. LOEVY: Can we go further if we don't like the
3 two years?

4 MS. ROSEN: No one's -- let me just be clear right
5 now. We haven't agreed -- I haven't agreed to anything.

6 THE COURT: Yeah, I understand.

7 MS. ROSEN: So, you know, but we're just trying to
8 get all the ground rules here because they --

9 THE COURT: I mean, it's their burden objection. So
10 when you say to me can we go further, that's a different
11 equation.

12 MR. BOWMAN: Well, Judge, I think the principal
13 concern is that there be transparency.

14 THE COURT: Of course.

15 MR. BOWMAN: And if there -- if they decide to go
16 look at, you know, a hundred more files, we want to know up
17 front that that decision --

18 THE COURT: That seems fair to me.

19 MR. BOWMAN: -- actually been made.

20 MR. LOEVY: That's what I'm saying to me.

21 MS. ROSEN: Your Honor, I've never said that I would
22 go looking at files -- I don't even -- I mean, as we sit here
23 now, we're going to have to come up with a list of all the
24 homicide files --

25 THE COURT: Yeah.

1 MS. ROSEN: -- in a given year. They're going to
2 know what files there are.

3 THE COURT: Well, that seems fair to me. So if you
4 guys agree to two years or three years or whatever it is and
5 you're not happy with the results, whatever side, you know,
6 you're going to talk about that. You're not going to go
7 behind closed doors and look at another year and then pop up
8 and say, oh, by the way, we did another year.

9 But I'm not going to bind them to whatever they
10 agreed to out of the box, but there should be transparency in
11 the process. But they're going to need your help anyways.
12 They're not -- they don't have the person power to go and do
13 that without you, I would think.

14 Okay. I'm not going to ask any more. Good-bye.

15 Should I set a status, or will you just notice up a
16 motion?

17 MR. BOWMAN: We'll find our way back.

18 THE COURT: Okay. I'll see you.

19 MR. LOEVY: Thank you.

20 THE COURT: See you in the spring. Good luck.
21 (Which were all the proceedings heard.)

CERTIFICATE

22 I certify that the foregoing is a correct transcript from
23 the digital recording of proceedings in the above-entitled
matter to the best of my ability, given the limitations of
using a digital-recording system.

24 /s/Kathleen M. Fennell

April 12, 2013

25 Kathleen M. Fennell
Official Court Reporter

Date

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**UNITED STATES DISTRICT COURT
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 5.1.1
Eastern Division**

Jacques Rivera

Plaintiff,

v.

Case No.: 1:12-cv-04428
Honorable Joan B. Gottschall

Reynaldo Guevara, et al.

Defendant.

NOTIFICATION OF DOCKET ENTRY

This docket entry was made by the Clerk on Tuesday, March 12, 2013:

t finds good cause to extend the deposition to 8 hours in this matter. Mailed notice(gel,)MINUTE entry before Honorable Mary M. Rowland: Motion and Status hearing held on 3/12/2013. Defendant's Motion for a Protective Order Quashing Plaintiff's Deposition Subpoena of Orlando Lopez [51] is denied because of lack of standing. Mr. Lopez's deposition to be conducted in Cleveland, Ohio on a mutually agreed date. Deposition to be video taped with expenses of video taping and Court Reporter to be paid by Plaintiff. Because Plaintiff has burden of proof and, at this point, Mr. Lopez is unwilling to appear for trial, Plaintiff will have the first opportunity to question Mr. Lopez. The parties to split the time allowed for the deposition evenly so that Defendants have the same amount of time to question Mr. Lopez. The Cour

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