

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

COUNTY OF COOK,)	
)	
Plaintiff,)	
)	
v.)	
)	
BANK OF AMERICA CORPORATION,)	Case No. 14-cv-2280
BANK OF AMERICA, N.A.,)	
COUNTRYWIDE FINANCIAL)	District Judge Elaine E. Bucklo
CORPORATION,)	
COUNTRYWIDE HOME LOANS, INC.,)	
COUNTRYWIDE BANK, FSB,)	
COUNTRYWIDE WAREHOUSE LENDING,)	
LLC, BAC HOME LOANS SERVICING, LP,)	
MERRILL LYNCH & CO., INC., MERRILL)	
LYNCH MORTGAGE CAPITAL INC., and)	
MERRILL LYNCH MORTGAGE LENDING,)	
INC.,)	
)	
Defendants.)	

**DEFENDANTS' MOTION REGARDING DEPOSITION OF
MICHAEL WINSTON AND REQUEST FOR EXPEDITED CONSIDERATION**

The parties are currently briefing Defendants' Motion for Summary Judgment. Defendants expect that the County will rely heavily on a declaration from a former Countrywide employee named Michael Winston in the County's summary judgment opposition brief, due May 14, 2021, because (1) the County's liability expert has already cited Mr. Winston's declaration throughout his expert reports; and (2) the County has described Mr. Winston as a "whistleblower" with important information about Countrywide's operations. Defendants have made extensive efforts to conduct a deposition of Mr. Winston for over a year, but because of the COVID pandemic and Mr. Winston's reported health problems, they have been prevented from doing so. Defendants have scheduled the deposition multiple times, but been forced to cancel it

due to Mr. Winston's counsel reporting his health did not allow for such a deposition to go forward. (Judge Harjani previously gave the parties permission to continue to seek the deposition of Mr. Winston after the close of fact discovery due to his health problems. ECF No. 538.)

Defendants' summary judgment reply brief is due June 4, 2021. If Mr. Winston's health has not improved to the point that he can appear for a deposition by May 21, 2021 (so that Defendants can use it in their reply), Defendants respectfully request that the Court strike or disregard any affidavit from Mr. Winston that the County submits with its summary judgment opposition brief. This is necessary for two reasons. First, at the summary judgment stage a party generally may only offer evidence that can be offered in an admissible form at trial. Here, if Mr. Winston cannot sit for a deposition, there is no indication his apparent beliefs can ever be introduced at trial in an admissible form. Second, granting the requested relief will ensure fundamental fairness to Defendants in this case, as they will have been deprived of the opportunity to confront and cross-examine a witness offering testimony against them. Not being able to depose Mr. Winston is especially problematic given that his declaration is based almost exclusively on vague, generic statements from third parties, and concerns multiple areas of operations that Mr. Winston was not involved in.

In light of the timing, Defendants respectfully request the Court expedite a response by the County by May 7, 2021 (with Defendants submitting a reply by May 10, 2021) and decide this motion as soon as it is feasible to do so.¹ For the Court's convenience, the Defendants have also submitted this date in a proposed order containing an expedited briefing schedule.

¹ Defendants conferred with the County on April 28, 2021 about this motion. The County opposes the requested relief.

BACKGROUND

I. MR. WINSTON HAS FEATURED PROMINENTLY IN THE COUNTY'S FILINGS IN THIS LITIGATION.

Mr. Winston was employed at Countrywide from 2004 to 2008 as a human resources manager. After Countrywide merged with Bank of America, Bank of America determined in 2008 not to retain Mr. Winston and offered him a severance package. Mr. Winston later filed a lawsuit alleging that Bank of America improperly terminated him; he prevailed in a jury trial but the California Court of Appeals reversed the verdict. For over a decade since that reversal, Mr. Winston has written articles and given speeches and interviews highly critical of Countrywide.

The County extensively relied on Mr. Winston throughout this litigation. He first appeared in connection with a motion that the County filed to compel Defendants to add custodians to their ESI searches. In an October 1, 2019 reply brief, the County sought to include several “major players” to ESI searches. ECF 357 (Exhibit 1 hereto) at 5. It supported that request with a declaration stating that the County “has learned from a former, high level, Countrywide employee who is one of the whistleblowers identified in Plaintiff’s motion, that Countrywide’s predatory and discriminatory housing practices were orchestrated by the ‘major players’ at the company.” ECF 357-4 ¶ 5 (Exhibit 2 hereto). The County later told Defendants that Mr. Winston was the “whistleblower” referred to in its brief.

Shortly thereafter, on October 11, 2019, the County served on Defendants its Third Amended Disclosures under Federal Rule of Civil Procedure 26(a), in which it identified Mr. Winston as a former employee of Countrywide likely to have relevant information on the “General Equity Stripping Scheme” alleged in the County’s complaint. Pl.’s Third Am. Disclosures at 27 (Exhibit 3 hereto). The County had not identified Mr. Winston in its prior disclosures.

Mr. Winston's substantive involvement grew in the fall of 2020. On October 25, 2020, he executed a declaration that the County produced to Defendants. Exhibit 4 hereto. Notably, in his declaration Mr. Winston is clear in stating that "I do not have any personal knowledge of targeting or discrimination against minorities in the mortgage loan origination and servicing processes." Decl. ¶ 30 (emphasis added). But he also levels a wide-ranging series of charges against Countrywide's lending policies, practices, and procedures in very stark terms. To take just a few of many possible examples, Mr. Winston claimed that Countrywide "abandoned its underwriting standards in order to increase loan volumes"; "engaged in nefarious behavior" towards borrowers"; "engaged in the abuse of the appraisal process"; and "instructed [employees] to lie to borrowers." Decl. ¶¶ 5, 13, 19, 25.

Mr. Winston's declaration took on added significance for the County in the expert phase of the case. There, the County's liability expert Dr. Gary Lacefield heavily relied on and quoted Mr. Winston's declaration throughout his report to bolster his opinions that Countrywide engaged in improper lending. For example, Dr. Lacefield stated that:

- "Winston's declaration concluded that '...it is my understanding and belief that increased foreclosures were the result of the Defendants' equity stripping schemes such as originating higher cost lien home mortgage loans and second lien home equity loans and lines of credit and servicing those loans in a manner designed to extract maximum revenue on the resulting defaults and foreclosures.'"
- "Winston stated that, 'Based on my experience I can confirm the allegations that Countrywide's entire subprime and higher cost mortgage lending, securitization and servicing operations were geared to exploit borrowers to maximize corporate profits and management's compensation. This was accomplished through Countrywide's practices of originating and servicing predatory subprime and higher cost mortgage loans.'"
- "Winston stated 'Countrywide's originators, underwriters and management knew that certain borrowers had a high probability of defaulting on loans and used shadow guidelines to approve loans to riskier borrowers that would normally not be approved under the Company's regular guidelines.'"

- “Winston stated, ‘Countrywide continuously pushed subprime loans even if the borrower could afford a prime loan.’”
- “Winston stated ‘Countrywide’s improper lowering and circumvention of underwriting standards. Countrywide virtually abandoned underwriting, only caring about the quantity of loans they were issuing not the quality of the loans they were providing to borrowers.’”
- “Winston confirmed appraisal related issues, ‘I can attest both professionally and personally to the allegations in the SAC relating to Countrywide’s inflation of appraisals of property values. Countrywide ignored low appraisals and fostered the fraudulent inflation of property appraisals.’”

Lacefield Rpt. App’x 7 ¶¶ 42–60 (Exhibit 5 hereto).

Finally, Dr. Lacefield similarly used the Winston Declaration as evidence in his rebuttal reports addressing Defendants’ experts:

- “Winston stated that, Countrywide was predatory to an infinite degree, constantly pushing for more fees, more products, more pressure, and using relaxed underwriting standards and lax control.” Lacefield Courchane Rebuttal Rpt. p. 4 (Exhibit 6 hereto).
- “Winston claimed that ‘Because the quality of these loans was so poor and the risk so high that borrowers could not repay them, the strategy inevitably led to very high rates of default among Countrywide loans.’” Lacefield Courchane Rebuttal Rpt. p. 5.
- “Sworn testimony from Defendant’s executives, supervisors, and other key employees revealed that Defendants intentionally did not follow safe, prudent, and reasonable lending practices and procedures.” Lacefield Spolin Rebuttal Rpt. p. 2 (Exhibit 7 hereto) (citing Winston Decl. ¶¶ 13-18).
- “I agree with Mr. Spolin that it does not make sense that Countrywide would focus on maximum production regardless of the borrower’s ability to repay. However, that is exactly what they did based upon sworn statements by former Countrywide executives and staff, confirmed with high foreclosure rate.” Lacefield Spolin Rebuttal Rpt. p. 10 (citing Winston Decl. ¶¶ 5-6, 9-12).
- “My assumptions are backed up by sworn statements from ex-Defendant employees and resulting high foreclosure rate.” Lacefield Spolin Rebuttal Rpt. p. 10 (citing Winston Decl. ¶¶ 5-6, 9-12).
- “If Defendants claim that there existed a ‘business necessity’ for their practices having a disparate impact, sworn testimony from Defendants’ own ex-executives

and supervisory staff tell a different story. For example: Managing Director Michael Winston stated, 'I can personally attest to Countrywide's predatory servicing practices.'" Lacefield Stedman Rebuttal Rpt. p. 3 (Exhibit 8 hereto).

II. DEFENDANTS HAVE BEEN UNABLE TO DEPOSE MR. WINSTON BECAUSE OF COVID AND HIS SERIOUS HEALTH PROBLEMS

To date, Defendants have sought to depose Mr. Winston, but have been prevented from doing so because he has reported experiencing a series of very serious health issues and he has asked not to be deposed while dealing with those health issues. Defendants scheduled his deposition multiple times, but Mr. Winston's condition forced cancellation each time.

Defendants first served Mr. Winston with a subpoena for his deposition testimony on February 5, 2020, and made plans to take his deposition on April 15, 2020. During March 2020, however, COVID hit. The parties paused all depositions in this case while they tried to assess the impact of COVID on the case and further proceedings.

Eventually, the parties agreed to resume depositions entirely remotely starting in June 2020 and to complete fact discovery by August 28, 2020. ECF No. 490. The fact discovery deadline was subsequently extended to September 30, 2020. ECF No. 517.

Counsel for Defendants then reached out to counsel for Mr. Winston to reschedule his deposition. Defendants learned, however, that Mr. Winston was suffering from cancer and could not participate in a deposition. On August 5, 2020 Defendants proposed to the County that Defendants would be willing to forego taking Mr. Winston's deposition if the County would agree not to use him at summary judgment or at trial, but the proposal was not acceptable to the County.

The next day Defendants informed counsel for Mr. Winston about the situation, and it was reported that Mr. Winston was taking so much medication that he could not even participate

in a deposition in which he would type answers in response to questions. However, Mr. Winston thought that his health would improve in September, and so on September 8, 2020 Defendants rescheduled his deposition for September 30, 2020.

On September 29, 2020, counsel for Defendants contacted counsel for Mr. Winston to check on his health and his ability to sit for the deposition the next day. Counsel for Mr. Winston explained that Mr. Winston had had several new surgeries, was in considerable pain, and was having trouble speaking, and requested that the deposition be postponed.

On September 30, 2020, the parties requested Magistrate Judge Harjani to allow a handful of remaining depositions, including the deposition of Mr. Winston, to be taken past the fact discovery deadline, no later than October 30, 2020. ECF No. 526. On October 1, 2020, Magistrate Judge Harjani granted the request. ECF No. 527.

Mr. Winston's health improved in October, and Defendants rescheduled his deposition for October 27, 2020. The day before, counsel for Mr. Winston called to say that Mr. Winston's health again unfortunately took a turn for the worse, but was hopeful that his health would improve at some point to allow the deposition to occur.

On November 10, 2020, the parties filed a joint status report, explaining that Mr. Winston was experiencing health issues that were preventing his deposition. ECF 537. On November 11, 2020, Magistrate Judge Harjani granted the parties leave to take Mr. Winston's deposition outside of the fact discovery period. ECF 538.

Defendants remained in close contact with Mr. Winston's counsel over the next several months, but Mr. Winston's health did not materially improve. It has been reported to Defendants' counsel that Mr. Winston is currently undergoing an intensive treatment regimen which places him in a hyperbaric chamber to correct complications from a prior procedure and

which requires him to be hospitalized, to some extent, every day of the week. Mr. Winston's counsel expects that regiment to continue into at least early May.

In sum, Defendants have worked diligently and cooperatively with Mr. Winston and his counsel to take his deposition, but have not been able to complete the deposition, despite Defendants' best efforts to cooperate with them. In light of Mr. Winston's health concerns, Defendants have also tried to avoid having him partake in a deposition entirely by twice suggesting a compromise to the County that it not use Mr. Winston's declaration in connection with summary judgment or trial but the County rejected this offer. Defendants are therefore constrained to file this motion.

ARGUMENT

I. THE COURT SHOULD STRIKE OR DISREGARD ANY WINSTON DECLARATION IF DEFENDANTS CANNOT TAKE HIS DEPOSITION BEFORE SUBMITTING THEIR REPLY BRIEF.

The County and its expert believe Mr. Winston has information relevant to their case. Despite Defendants' ongoing efforts, Mr. Winston has been unable to sit for a deposition in this case. Defendants hope that Mr. Winston's health improves in the near future so that they can depose him about what he knows. But if Defendants cannot take his deposition in time to rebut his declaration in their summary judgment reply brief, they ask the Court to strike or disregard the declaration when it decides summary judgment. Doing so results from two basic principles.

First, under Rule 56 when parties brief summary judgment they "must set forth evidence that would be admissible if presented in appropriate form at trial." *Sphere Drake Ins. Ltd. v. All Am. Life Ins. Co.*, 300 F. Supp. 2d 606, 614 (N.D. Ill. 2003). Likewise, "[i]n ruling on a motion for summary judgment, the Court *only* considers evidence that would be admissible at trial." *Hartford Fire Ins. Co. v. Taylor*, 903 F. Supp. 2d 623, 640 (N.D. Ill. 2012) (emphasis added); *see*

also *Herrera v. Target Corp.*, 2009 WL 3188054, at *2 (N.D. Ill. Sept. 30, 2009) (refusing to consider evidence on summary judgment that would be inadmissible at trial). And when a witness fails to sit for a deposition, her testimony is not admissible at trial,² including when health issues preclude the deposition.³ In these circumstances, such testimony is not considered during the summary judgment stage. See, e.g., *Sonix Tech. Co. v. Publ'ns Int'l, Ltd.*, 2015 WL 4730155, at *6 (N.D. Ill. Aug. 10, 2015) (“If [the declarant] does not sit for a deposition, the

² *Taylor v. City of Chicago*, 2012 WL 669063, at *2 (N.D. Ill. Feb. 29, 2012) (“[U]nless defendants are provided the opportunity to depose [the witness] sufficiently in advance of trial, he should not be permitted to testify at trial.”); *Vasquez v. Cent. States Joint Bd.*, 2009 WL 1530709, at *4 (N.D. Ill. June 1, 2009) (“[I]f Mr. Ward does not sit for deposition, he surely cannot testify at trial.”); *Stifel, Nicolaus & Co. v. Lac Du Flambeau Band of Lake Superior Chippewa Indians*, 2014 WL 856280, at *1 (W.D. Wis. Mar. 5, 2014) (“witnesses’ affidavits may stand ... if the affiants are available either: (1) for deposition; or (2) for cross-examination at the hearing. If the witnesses are entirely unavailable, however, the court will grant the motion and exclude their affidavits”); *Scozzari v. City of Clare*, 2012 WL 1988129, *2 (E.D. Mich. June 4, 2012) (excluding witness who had been too sick to sit for deposition and where, despite defendants’ diligent efforts to take deposition, plaintiff’s counsel had canceled scheduled depositions: “At this juncture, providing Defendants the ability to depose [the witness] would be an insufficient remedy and striking him as a witness is appropriate. Even if Defendants were to depose [the witness], discovery has closed and they would have no meaningful opportunity to conduct additional investigation and discovery based on the information provided at the deposition.”); *Alleyne v. Zadlo*, 2009 WL 10737129, at *2 (E.D. Pa. Sept. 24, 2009) (“Mr. Patton’s affidavit is not admissible at trial and he will not be permitted to testify at trial unless the defendants have an opportunity to depose him prior to trial.”); *Zoch v. Daimler, A.G.*, 2018 WL 4610569, at *11 (E.D. Tex. Sept. 25, 2018) (“If Defendants intend to offer Dr. Caulfield’s opinions at trial, Dr. Caulfield must be deposed in order to provide Plaintiff an opportunity to prepare an effective cross-examination. Otherwise, Defendants must go without the testimony or find a suitable substitute who can be deposed in time for trial.”).

³ See, e.g., *IDS Publ’g Corp. v. Reiss Profile Eur., B.V.*, 2017 WL 4217156, at *2 n.2 (S.D. Ohio Sept. 19, 2017) (“affidavits by deceased individuals are not admissible at trial because [d]efendants would not have an opportunity to cross-examine the declarants If a declarant was not deposed, his or her statements cannot be converted in a form appropriate for trial”) (internal citations and quotation marks omitted); *Bortell v. Eli Lilly & Co.*, 406 F. Supp. 2d 1, 8–9 (D.D.C. 2005) (granting defendants’ motion for summary judgment and refusing to consider affidavits submitted by plaintiff; without affiants’ availability to testify and undergo cross-examination either at trial or in a pre-trial deposition due to their death or dementia, the court could “not credit the affidavits as anything more than inadmissible hearsay”).

Court will not consider his declaration in connection with Defendants' motion for summary judgment.”); *Henry v. Outback Steakhouse of Fla., LLC*, 2017 WL 1382292, at *2 (E.D. Mich. Apr. 18, 2017) (“In this situation, where one party has been in continued contact with non-party affiants but the other party has been denied the ability to question their statements, the Court finds that . . . the affidavits should be stricken Accordingly, the Court will not consider the affidavits . . . on summary judgment.”).⁴

Here, Mr. Winston has serious health problems. Each time Defendants have scheduled his deposition, those health issues have forced Defendants to later cancel the deposition. No indication exists at the present that Mr. Winston’s health will improve, and so he would not be able to testify at trial. As a result, his declaration cannot be used at the summary judgment stage.

Second, basic fairness requires striking the affidavit if Defendants cannot depose Mr. Winston. This Court and other federal courts possess inherent power “to protect the integrity of their judgments and the proceedings before them.” *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1200 n.2 (7th Cir. 1996). “District courts also have the inherent power to . . . preserve public confidence in the fairness and integrity of judicial proceedings.” *Tucker v. John R. Steele & Assocs., Inc.*, 1994 WL 127246, at *4 n.3 (N.D. Ill. Apr. 12, 1994); *see also Miller v. Lenz*, 2009 WL 3172151, at *2–3 (N.D. Ill. Oct. 2, 2009) (same). “Indeed, the ‘court’s power to remedy unfair litigation practices and preserve judicial integrity is broad[] in scope.” *Costello v.*

⁴ *Cf. Russell v. Harms*, 397 F.3d 458, 467 (7th Cir. 2005) (affirming district court’s refusal to consider a late-filed affidavit submitted by plaintiff in opposition to defendant’s summary judgment motion, reasoning “defendants had no opportunity to depose [the affiant] on its contents”); *Novak v. Bd. of Trustees of S. Ill. Univ.*, 777 F.3d 966, 972–74 (7th Cir. 2015) (district court acted “well within its discretion” when it found prejudice and excluded the plaintiff’s expert at summary judgment when defendants “had no opportunity to depose” him); *Malone v. Ameren UE*, 646 F.3d 512, 515–16 (8th Cir. 2011) (district court did not abuse its discretion by excluding affidavits in its ruling on defendant’s motion for summary judgment, reasoning defendant “had no opportunity to depose the witnesses”).

Poisella, 291 F.R.D. 224, 230 (N.D. Ill. 2013) (quoting *Lahr v. Fulbright & Jaworski, LLP*, 1996 WL 34393321, at *3 (N.D. Tex. July 10, 1996)).

These concerns exist in abundance here. Mr. Winston levels very serious charges at Countrywide yet Defendants have not been afforded an opportunity to depose him to explore the basis, if any, for his assertions. The problem is exacerbated because the County's expert, Dr. Lacefield, relies at length on Mr. Winston's declaration in his expert reports as support for his opinion that Countrywide engaged in improper mortgage lending. In these circumstances basic fairness dictates that, if Defendants cannot depose Mr. Winston by May 21, 2021, the Court strike or disregard any declaration from Mr. Winston (or reliance by Dr. Lacefield on Mr. Winston) that the County uses in its summary judgment opposition brief.

Allowing the County to use Mr. Winston's declaration without providing Defendants a chance to depose him would be especially prejudicial to Defendants given the nature of the declaration itself. Rather than convey specific facts about particular loans, Mr. Winston repeatedly relies on vague, unsupported and generic statements:

- Relating conversations with unnamed "mid-level employees," Winston Decl. ¶ 6;
- Relating undated conversation with former employee, *id.* ¶ 10;
- "Countrywide's originators, underwriters and management knew that . . ." *id.* ¶ 11;
- "It was common practice for Countrywide to place their [sic] interests above their borrowers' interests," *id.* ¶ 13;
- "Countrywide placed immense pressure on underwriters," *id.* ¶ 17;
- "Countrywide issued loans to borrowers that simply should not have been made," *id.* ¶ 18;
- "It was commonplace and well-known to the Company's mid and senior level management . . ." *id.* ¶ 20;
- "Countrywide's senior most management clearly knew that . . ." *id.* ¶ 21;

- Relating comments from two unnamed employees. *id.* ¶ 31.

Unexamined declaration testimony by Mr. Winston would be further prejudicial because Mr. Winston worked in human resources, not any substantive part of Countrywide.⁵ He never, for example, worked in marketing, pricing, underwriting, servicing, foreclosures, or anything else having to do with mortgage loans. Nonetheless, Mr. Winston purports to opine on virtually every aspect of Countrywide's lending operations, such as –

- the quality of underwriting guidelines;
- credit approval decisions;
- the sale of loans to third parties;
- fees and charges when borrowers obtained loans;
- compensation policies for loan originators;
- the manner in which appraisers valued property;
- servicing of loans after origination.

Winston Decl. ¶¶ 6, 7, 11, 12, 16, 19, 26.

Finally, and perhaps most troubling, Mr. Winston's declaration goes further, stating that he has read the County's complaint and can "confirm" or "attest" that various allegations are "true" or "accurate." Winston Decl. ¶¶ 8, 9, 10, 13, 14, 15, 17, 18, 19, 25. But, as noted above, Mr. Winston had no substantive role at Countrywide that would have allowed him to make these kinds of factual determinations, providing further basis for why these kinds of generalized statements require detailed inquiry at a deposition.

* * *

⁵ Winston Decl. ¶ 4 (Mr. Winston a human resources executive "responsible for organization integration, succession planning, performance leadership, leadership development, and strategic change management").

The County has chosen to rely heavily on Mr. Winston throughout its case, and will undoubtedly rely on him again in its summary judgment opposition. Defendants only request the opportunity to defend against Mr. Winston's attacks through a deposition and, if that is not possible, to have the Court disregard his unexamined testimony.

The County has suggested that Defendants depose Mr. Winston by written questions. Given the nature of his current treatment regimen, it does not appear that this would be an option. But the larger problem is that while a deposition by written questions is possible in some cases, it would largely be ineffective here given the breadth and scope of Mr. Winston's declaration, his repeated use of vague, generic statements throughout, his acrimonious departure from Countrywide, his many statements about the company after he left, his adversarial posture, and the complexity of the issues in this case. *See, e.g., Stanek v. St. Charles Cmty. Unit Sch. Dist. #303*, 2020 WL 1304828, at *5 (N.D. Ill. Mar. 19, 2020) (denying plaintiff's motion for a protective order requiring defendants to take plaintiff's deposition by written questions; "[a] deposition by written questions would prejudice [D]efendants by depriving their counsel of" the opportunities "to provide clarification, rephrase their questions, and to immediately pursue follow-up lines of inquiry concerning events that took place as long ago as 2009"); *id.* (explaining that "[t]he 'limited circumstances under which depositions by written questions have been considered appropriate include 'where the issues to be addressed by the witness are narrow and straightforward and the hardships of taking an oral deposition would be substantial'"); *id.* (written deposition questions are "not suitable for a situation where the witness is hostile and the testimony is likely to be controversial"); *P.H. Intern. Trading Co. v. Christia Confezioni S.p.A.*, 2004 WL 2538299, at *1–2 (N.D. Ill. Sept. 24, 2004) (granting plaintiff's motion to compel deposition via oral testimony; "proceeding on written interrogatories denies [P]laintiff's counsel

the opportunity to ask follow-up questions, observe the witness's demeanor, or evaluate his credibility Additionally, taking the deposition by written questions provides 'an opportunity for counsel to assist the witness in providing answers so carefully tailored that they are likely to generate additional discovery disputes.'"); *Mader v. Motorola Inc.*, 1993 WL 499710, at *5–6 (N.D. Ill. Dec. 2, 1993) (denying plaintiff's motion for protective order to prevent defendant from continuing its questioning of a nonparty in person and instead use written questions; it is "important to at least have had the opportunity to confront [the nonparty] face-to-face when eliciting testimony that may later be offered against it at trial").

CONCLUSION

For these reasons, Defendants respectfully request that, the Court grant this motion and issue an order that if Mr. Winston cannot sit for a deposition by May 21, 2021, it will strike or disregard any declaration by Mr. Winston which the County submits with its summary judgment opposition brief.

Respectfully submitted,

Dated: April 29, 2021

/s/ Ryan Dunigan

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2021, I caused a true and correct copy of the foregoing to be served upon counsel of record as of this date by electronic filing.

/s/ Ryan Dunigan
One of the attorneys for Defendants