**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 06-cv-01964-WYD-CBS

STEVEN HOWARDS,

Plaintiff,

v.

VIRGIL D. "GUS" REICHLE, JR., in his individual and official capacity;
KRISTOPHER MISCHLONEY, in his individual and official capacity;
DANIEL MCLAUGHLIN, in his individual and official capacity;
DAN DOYLE, in his individual and official capacity;
ADAM DANIELS, in his individual and official capacity,

Defendants.

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**PLAINTIFF'S OBJECTION TO THE MAGISTRATE JUDGE'S DENIAL OF PLAINTIFF'S RENEWED MOTION TO SERVE SUBPOENA**

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PLAINTIFF, Steven Howards, by and through counsel David A. Lane and Althea S. Licht of Killmer, Lane & Newman, LLP, pursuant to 28 U.S.C. § 636 and Fed.R.Civ.P. 72(a), respectfully submits his Objection to Magistrate Judge Craig B. Shaffer's Denial of Plaintiff's Renewed Motion for United States Marshals to Serve Subpoena[1] and thereby denying Plaintiff's request to depose Vice President Dick Cheney as follows:

## I. INTRODUCTION

This case arises out of an interaction between Plaintiff Steven Howards and Vice President Dick Cheney on June 16, 2006 in Beaver Creek, Colorado. The entire

[1] The title of Plaintiff's renewed motion was based upon Plaintiff's original motion (filed January 24, 2008, doc. #73) in which Plaintiff requested that the U.S. Marshal's serve the subpoena for the deposition of the Vice President due to the representations by counsel for the Office of the Vice President that they would not accept service and the practical considerations of utilizing a private process server. However, Plaintiff will use a private process service if necessary.

interaction lasted less than five minutes, but resulted in Mr. Howards' arrest for "assaulting" the Vice President. According to Mr. Howards' version of the facts, on June 16, 2006, he saw the Vice President in a crowd of people at Beaver Creek Mall. He approached the Vice President, stated that his policies in Iraq were disgusting, patted the Vice President on the shoulder and walked away. Mr. Howards then picked up one of his sons from a piano recital, walked back through the area where Mr. Cheney was standing and was arrested by several Secret Service agents. Mr. Howards was told he was under arrest for "assaulting" the Vice President. Mr. Howards has brought claims under the First Amendment for retaliation for exercising his right of free speech and right to petition the government and for his Fourth Amendment right to be free from illegal searches and seizures.

The facts surrounding what precisely happened that day remain in dispute. Disturbingly, however, is not that Plaintiff and Defendants have differing accounts as to what happened, but that the Defendants in this case have accused each other of lying under oath and altering their stories about what occurred leading to Mr. Howards' arrest. Because the crux of Mr. Howards claims rests upon what occurred between himself and the Vice President, and because of the lack of reliability of the other witnesses and parties in this case, Plaintiff seeks to depose the victim of his alleged crime, Vice President Dick Cheney.

## II. PROCEDURAL HISTORY

On January 24, 2008, Mr. Howards filed a motion with this Court to depose the Vice President regarding the incident on June 16, 2006. On April 15, 2008, Magistrate Judge Shaffer denied Mr. Howards' motion stating that "[p]revious depositions have

identified by name and position individuals who apparently have relevant information that might obviate the need to depose the Vice President." *April 15, 2008 Order*, p. 22 [doc # 111]. On April 29, 2008, Mr. Howards filed an Objection to the Order by Magistrate Judge Shaffer denying his motion to depose the Vice President. *See, Objection* [doc. # 119]. This Objection was never ruled upon. Plaintiff's original Objection was based, in large part, on the Magistrate Judge's requirement that Plaintiff depose other "identifiable sources" before considering a request to depose the Vice President. *See, April 15, 2008 Order,* p. 22.

After taking the required additional depositions, and pursuant to the Magistrate Judge's April 15, 2008 Order, Mr. Howards then re-filed his motion to depose the Vice President on August 11, 2008. On October 21, 2008, Magistrate Judge Shaffer held a hearing on the matter and denied Mr. Howards' second motion to depose the Vice President. This appeal follows.

## II. LEGAL STANDARD

The Federal Rules of Civil Procedure provide that a district court judge shall consider objections to a magistrate judge's order "and shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed.R.Civ.P. 72(a). A judge may appropriately reconsider a pretrial matter "where it has been shown that the [magistrate judge's] order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *Hutchinson v. Pfeil*, 105 F.3d 562, 566 (10th Cir. 1997) ("Review of the magistrate judge's ruling is required by the district court when a party timely files written objections to that ruling, and the district court must defer to the magistrate judge's ruling unless it is clearly erroneous or contrary to law"). Because

Magistrate Judge Shaffer's ruling in this case meets this standard, Plaintiff respectfully requests that the district court set aside the order and grant Plaintiff's request to depose the Vice President.

## III. ARGUMENT

### A. Standard for Seeking Discovery

"The need to develop all relevant facts in the adversary system is both fundamental and comprehensive … The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence." *Simpson v. Univ. of Colo.*, 220 F.R.D. 354, 356 (D.Colo. 2004) (Shaffer, M.J.) (quoting *Taylor v. Illinois*, 484 U.S. 400, 408-09 (1988)). Indeed, the scope of discovery contemplated by the Federal Rules of Civil Procedure is broad:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense … For good cause the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at trial if the discovery appears reasonably calculates to lead to the discovery of admissible evidence.

Fed.R.Civ.P. 26(b)(1). The Rules, however, also provide limitations on discovery. For instance, and pertinent to the instant motion, a court may limit discovery where the burden of the proposed discovery outweighs the likely benefit. Fed.R.Civ.P. 26(b)(2)(C)(iii). As this Court has noted, other factors, such as minimizing the surprises at trial, may also weigh into the court's determination:

> [T]his court is mindful that the discovery procedures in the Federal Rules of Civil Procedures seek to further the interests of justice by minimizing surprise at trial and ensuring wide-ranging discovery of information. Rule 26(b) permits discovery regarding any matter that is relevant to the claim or defense of any party or discovery of any information that appears reasonably calculated to lead to the discovery of admissible evidence. The Advisory Committee Notes to Rule 26 specifically state that discoverable information may include other incidents of the

> same type or involving the same product or information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses.

*Klesch & Co. v. Liberty Media Corp.*, 217 F.R.D. 517, 523-24 (D. Colo. 2003) (Shaffer, M.J.) (allowing a deposition to ensue because the court determined that the witness may have relevant information or, at the very least, information that may lead to the discovery of admissible evidence) (internal citations and quotations omitted); *Montano v. Chao*, 2008 U.S. Dist. LEXIS 85782, *8 (D.Colo. October 23, 2008) ("Colorado courts have noted that in some instances, relevancy is not always a barrier to production. . . .[D]iscoverable information may include . . . information that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses") (internal quotation and citation omitted).

Indeed, this Court has acknowledged the "liberal discovery" contemplated by the Rules of Civil Procedure. *Klesch*, 217 F.R.D. at 524. Accordingly, this Court has held that "[w]hen the discovery sought appears relevant, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the scope of relevance as defined under Fed.R.Civ.P. 26(b)(1), or (2) is of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure." *Id.* at 524 (Shaffer, M.J.).

In the present case, the Magistrate Judge stated in the October 21, 2008 hearing that "[t]he issue is whether or not [the Vice President] should be the subject of a deposition in this case, based on what he knows and the context of the claims and defenses that are currently before the Court." Exh. A**,** *October 21, 2008 Hearing*

*Transcript* ("*Transcript")*, 10:15-20. However, the Magistrate Judge concluded that based upon the claims for relief, "the Vice President doesn't have relevant testimony." Exh. A**,** *Transcript,* 29:9-13. This conclusion is contrary to the facts of this case, the rules governing discovery, and is clearly erroneous.

**B. The Vice President's Testimony is Relevant to Plaintiff's Claims**

Ultimately, this case hinges on whether Defendants acted in retaliatory manner (with respect to his First Amendment claims) and whether Defendants acted unreasonably (with respect to his Fourth Amendment claim). The Vice President can speak to both of these issues, not from the perspective of the officers who arrested Mr. Howards, but from his own perspective as the victim of the crime. Specifically, the Vice President can testify to (1) what Mr. Howards said to him when he (Howards) approached him, (2) the manner in which Mr. Howards approached him, (3) the nature of the physical contact, and (4) whether or not he (the Vice President), or another member of his staff, is responsible for, or has knowledge of, agents subsequently altering their accounts. His testimony is also incredibly valuable for impeachment purposes.

The Magistrate Judge held that his conclusion to deny Plaintiff's motion was based not on the Vice President's title, but was instead based upon Rule 26(b)(2)(C) and whether the burden of the discovery outweighed the benefit. Exh. A**,** *Transcript,* 23:6-12. However, the Magistrate's determination did not involve any balancing at all. He simply concluded, wrongly, that the Vice President has *no* relevant testimony to give. Exh. A**,** *Transcript,* 22:21-25 ("if I thought the Vice President had significant relevant testimony in this case, I wouldn't hesitate for a second to order his deposition"). This conclusion is clearly erroneous.

### 1. Mr. Cheney's Testimony is Relevant to Mr. Howards' Fourth Amendment Claim

As the Magistrate Judge aptly noted, Mr. Howards' Fourth Amendment claim rests on whether or not the arresting officers had probable cause to arrest him. *Beck v. Ohio*, 379 U.S. 89, 91 (1964); *see also,* Exh. A**,** *Transcript*, 14:8-13. However, the Magistrate Judge held that "the Vice President's testimony will have *no bearing* on the probable cause determination in this case." Exh. A**,** *Transcript,*15:15-18 (emphasis added). The Magistrate Judge noted that the probable cause determination involves looking to "what the arresting officer knew," but he completely failed to apply the applicable *objective* probable cause standard. *United States v. Salinas-Calderon*, 728 F.2d 1298, 1301 (10th Cir. 1984) (citing *Beck*, 379 U.S. at 96). Because probable cause is measured by an objective standard, the Tenth Circuit has held that even the arresting officer, himself, need not even believe that probable cause existed for making an arrest. *Id.* Indeed, "[t]he primary concern is whether a *reasonable* officer would have believed that probable cause existed to arrest the defendant based on the information possessed by the arresting officer." *United States v. Valenzuala,* 365 F.3d 892, 896 (10th Cir. 2004) (emphasis added).

Despite this objective standard, the Magistrate Judge credited two of the Secret Service agents, Defendant Reichle's and Defendant Doyle's, deposition testimony, rather than looking to the totality of the circumstances. Exh. A**,** *Transcript* 15:1-3 ("Mr. Reichle very specifically and explicitly in his deposition laid out all of the facts that he relied upon to determine probable cause"); 15:6-10 ("Mr. Doyle says that he believed that there was probable cause. The only statements that Mr. Doyle considered in evaluating probable cause is the statements [sic] he claims he overheard Mr. Howards utter into his

cell phone."). These are the *only* two agents, of the eight that have been deposed, that stated that probable cause existed to arrest Mr. Howards, and only one of whom who actually saw the interaction. In essence, the Magistrate Judge is requiring Plaintiff to rely upon the subjective conclusions, not just of the opposing parties, but the two defendants that stated that probable cause existed, without allowing him the opportunity to obtain the facts from the most reliable witness.

Plaintiff takes issue with the being constrained by the "facts" upon which Defendant Reichle claims he based his probable cause determination. Mr. Reichle did not observe the interaction between Mr. Cheney and Mr. Howards, and testified that he relied, primarily, on what he learned from Defendant Secret Service Agents Doyle, Daniels and McLaughlin. According to Mr. Reichle's testimony, he was told by Defendants Daniels and McLaughlin that Mr. Howards had approached Cheney in an *aggressive* and *threatening* nature and made unsolicited physical contact with Vice President." Exh. B**,** *Reichle Depo*. 22:6-8. However, this account differs from Defendants Daniels' and McLaughlin's written reports submitted after the incident, in which they state that Mr. Howards simply "approached" the Vice President (reporting nothing "threatening" or "aggressive" or even unusual about the incident) and "*placed*" his hand on Mr. Cheney's shoulder.[2] Exh. C**,** *McLaughlin Statement*, p. 2; Exh. D, *Daniels Statement*, p. 2. Importantly, these written reports wholly conflict with their subsequent deposition testimony, in which both Daniels and McLaughlin portray the incident as having a more "aggressive" character. Exh. E, *Daniels Depo.* 41:7-43:14 (alleging that Mr. Howards slapped Cheney's shoulder using "some force" causing

[2] Curiously, the statement provided by Defendant McLaughlin is neither signed nor dated. In addition, these reports are so strikingly similar (practically verbatim) that they certainly raise concerns about their veracity, given that it appears the reports were duplicated as opposed to written independently.

Cheney to "physically react"); Exh. F, *McLaughlin Depo.* 51:7-52:6 ("Mr. Howards was walking with quite a bit of speed. He put his hand out and hit the Vice President -- let me rephrase that. 'Hit' I won't say, but made contact with him with the weight of his body at that speed.").

The sudden change in McLaughlin's and Daniels' accounts of what happened is underscored by the direct (and surprising) attack on, in particular, Defendant McLaughlin's credibility by another agent and Defendant in this case. According to Defendant Reichle, he believes that various agents of the Secret Service may be involved in misconduct regarding this incident. Ex. B**,** *Reichle Depo.* 129:20-130:8. Specifically, Reichle testified that he had asked Defendant McLaughlin why he (McLaughlin) had changed his story about what he saw between Mr. Howards and the Vice President and had asked McLaughlin for his "original statement."[3] Exh. B**,** *Reichle Depo*. 47:22-48:13. According to Reichle, McLaughlin abruptly hung up on him. *Id.* Defendant McLaughlin testified to a very different conversation. Defendant McLaughlin claims that Reichle called him and *told him* to "change [his] statement." Ex. F**,** *McLaughlin Depo.* 134:13-135:17.

Despite these charges of dishonesty and the suspicious varying accounts of what occurred, the Magistrate Judge appears to take Reichle's testimony, regarding the "facts" giving rise to probable cause, at face value, and expects Plaintiff to do the same. Even without the specific and particular credibility concerns raised in the instant case, there are legitimate concerns about relying solely on the arresting officer's recount of the

[3] In addition, Reichle further testified that he had asked his supervisor, Special Agent in Charge Lon Garner, why the intelligence inspection division was not handling this issue and was told not to "go there," generating very real concerns that at least some of the agents have motivations to change their stories or, potentially, had received directives to do so. Ex. B, *Reichle Depo,* 130:16-20.

circumstances giving rise to an arrest. According to the Supreme Court in *Beck*, "[a]n arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck*, 379 U.S. at 96. Such concerns are amplified in the present case, given the patent inconsistencies, charges of fabrication and apparent motives to otherwise revise history. Yet, the Magistrate Judge is compelling Mr. Howards to rely on the subjective notions and hindsight judgment of the arresting officers, without the opportunity to depose the single person who knows the facts.

In addition, the Magistrate Judge improperly speculates as to what testimony Plaintiff would seek from Mr. Cheney, focusing only on the "fact" that none of the agents spoke with the Vice President prior to arresting Mr. Howards. Exh. A, *Transcript* 14:23-15:1; 16:4-8. Credibility issues aside, this incorrectly presumes that the only relevant testimony the Vice President may give pertains to whether they spoke with Cheney in determining whether or not to arrest Plaintiff. This assumption completely ignores the fact that Mr. Cheney is the *victim of the crime.* His knowledge about the events that day extends well beyond simply whether or not a Secret Service agent approached him. It is clear that Mr. Cheney, with direct and personal knowledge as to what occurred between himself and Mr. Howards, has relevant and crucial testimony in this case.

Moreover, there is no reason to suspect that the Vice President's testimony would not have the same guarantees of trustworthiness that any other citizen-witness would have in an assault case. *See, People v. Henry*, 631 P.2d 1122, 1127 (Colo. 1981) ("It is

simply unreasonable to presume, in the absence of any contrary evidence, that the ordinary citizen who fortuitously becomes a victim of a crime is likely to offer false or untrustworthy information to the police)" (citing 1 W. LaFave, SEARCH AND SEIZURE § 3.4 at 586-618 (1978). In sum, because the standard for determining probable cause is an objective one, and because the reliability of the testimony of the Secret Service Agents has been called into question, Plaintiff requests that he be allowed to depose the witness with, not only the most direct and personal knowledge of what happened, but also with no known motive to distort his testimony.

**2. The Vice President's Testimony is Critical to Mr. Howards' First Amendment Claims**

Turning to Mr. Howards' First Amendment claims, Mr. Cheney's testimony is no less relevant. However, the Magistrate Judge continued to apply and rely solely on an erroneous probable cause standard. For the same reasons set forth in Part III(B)(1), failing to apply an objective standard and improperly crediting Defendants' testimony, the Magistrate's decision is clearly erroneous.

In addition the Magistrate Judge completely ignored the other elements of Plaintiff's First Amendment claims. The Tenth Circuit Court of Appeals has held that in the First Amendment retaliation context, a plaintiff must prove that (1) he engaged in a constitutionally protected activity, (2) that the defendant's action caused him an injury that would "chill a person of ordinary firmness from continuing to engage in that activity," (3) that the defendant's action was "substantially motivated" by his exercise of his First Amendment rights, and (4) the defendant lacked probable cause for his arrest. *Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir 2007) (citing *Hartman v. Moore*, 547 U.S. 250 (2006)). Critical to Plaintiff's First Amendment claims is the first element of the

*prima facie* case: that he engaged in a protected activity. Because not all speech is protected by the First Amendment, Plaintiff must establish the content of his speech.

In addressing this element, the Magistrate Judge completely ignored portions of Defendant Reichle's testimony to determine that what Mr. Howards said to the Vice President "did not factor into his [Reichle's] analysis at all" in deciding to arrest Plaintiff. Exh. A**,** *Transcript* 15:4-6. However, this belies Reichle's testimony regarding what both he and Defendant Doyle understood Mr. Howards had said prior to arresting him:

> Q: So he [Howards] came up from behind Cheney and basically gave him a smack in the back, is that what he said, pushed him?
>
> Reichle: Yes. He said something to the effect, something about the Iraq war. I don't know. We -- **we knew it had something to do with Iraq**.
>
> Q: Who told you that it had something to do with Iraq? Because McLaughlin, Daniels were not able to hear it.
>
> A: No. It was -- **it was Agent Doyle**.
>
> Q: Doyle was close enough?
>
> A: He didn't -- **he knew it had something to do with Iraq**, but specifically we don't know.
>
> Q: But did Doyle actually hear the words Steve Howards spoke to Cheney or was he assuming that he was talking about Iraq based on the cellular conversation he talked to him?
>
> A: Well, it was a one-sided verbal altercation. It had something to do with Iraq.
>
> Q: Right. But did Doyle tell you he heard what Howards said to Cheney because he was close enough to Cheney to hear it, or did Doyle tell you, "I assumed he talked to Cheney about Iraq based on what I heard he -- him saying on his cell phone"?
>
> * * *

A: Doyle didn't hear the complete conversation. **The only thing that Doyle was able to ascertain that -- was that it had something to do with Iraq.**

Q: Okay. But my question is, did Doyle hear Howards talking to Cheney, or did Doyle hear Howards talking on his cell phone?

Q: If you know.

A: He heard -- **he heard both.**

Exh. B**,** *Reichle Depo*, 26:17-28: 10 (emphasis added). Yet, the Magistrate Judge completely ignores all of this testimony. Plaintiff is not required to rely solely on the specific portions of the Defendants' testimony that the Magistrate Judge finds credible.

In addition, the Magistrate's conjecture as to the precise testimony the Vice President may or may not be able to provide is complete and utter speculation. Exh. A**,** *Transcript*, p. 22, ll. 21-25 ("if I thought the Vice President had significant relevant testimony in this case, I wouldn't hesitate for a second to order his deposition"). The Magistrate wholly relies on Defendant Reichle's and Doyle's testimony that they did not speak with the Vice President before arresting Mr. Howards. Exh. A**,** *Transcript* 16:4-8. As set forth, *ante*, Plaintiff should not be required to rely on the Defendants' testimony that they did not speak to the Vice President, in light of the allegations of lies and cover-ups revealed in discovery; the Vice President could very well have a different version of the facts. But more importantly, whether or not the arresting officers spoke with the Vice President is not the only relevant testimony the Vice President may have. Rather, as the recipient of Mr. Howards' speech, he is that best source of information regarding what was said by Mr. Howards. This testimony is critical to Mr. Howards' First Amendment claims.

### C. The Vice President's Position Does Not Foreclose Seeking His Deposition In This Case

The Magistrate Judge repeatedly stated at the October 21, 2008 hearing that the Vice President's position as a government official did not at all factor into his analysis: "I don't really much care what Mr. Cheney's position is. It is immaterial to me. Whether he is the Vice President of the United States or a vice president of a local dairy queen." **Exh. A,** *Transcript* 22:8-11; *see also*, 9:13-15 ("at the end of the day this is an issue that isn't really and does not hinge upon who Mr. Cheney is"); 9:21-22 ("It really has nothing to do with who Mr. Cheney is or was or wasn't"). These statements are completely inconsistent with the Magistrate Judge's earlier decision (*see, April 15, 2008 Order* [doc. #111]) in which he clearly considered Mr. Cheney's position relevant to whether his deposition should ensue. Moreover, this is the primary reason for the Non-Party Office of the Vice President's ("OVP") involvement in this case. Because it is unthinkable that the Vice President's title plays absolutely no role in this case, Plaintiff will briefly address this issue.

When the testimony of a high-ranking government official is sought, courts have overlaid an additional burden on the party seeking that testimony: establishing that the official has firsthand knowledge of the claims being litigated and that the information cannot be obtained from any other source. *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007). In his initial objection, filed on April 29, 2008, Plaintiff set forth many cases in which courts allowed the deposition of a high-ranking government official to go forward where the courts found that the government official had personal knowledge of the matter and the information cannot be contained elsewhere. *See, Objection* [doc. #119] p. 10-11.

Courts must look to the circumstances of the particular case to determine whether the deposition is warranted. For example, courts have allowed depositions where there are allegations that the official acted with an improper motive or acted outside the scope of his official capacity. *See, e.g., Bagley v. Blagojevich*, 486 F. Supp. 2d 786, 789 (C.D. Ill. 2007) (permitting deposition where plaintiffs alleged that the Governor ordered their jobs eliminated in retaliation for their attempt to organize on behalf of a union that was a rival to a group that had contributed heavily to his election campaign); *Detoy v. City and County of San Francisco*, 196 F.R.D. 362, 370 (N.D. Cal. 2000) (permitting deposition where the chief of police took the "unusual" step of intervening personally in disciplinary proceedings against a police officer to ensure lighter discipline for the officer); *Virgo Corp. v. Paiewonsky*, 39 F.R.D. 9, 10 (D.V.I. 1966) (permitting deposition of a Governor accused of taking arbitrary actions as a result of Congressional pressures and personal friendships).

The exceptional circumstances of the present case necessitate the Vice President's deposition. Plaintiff has sufficiently established, and it is clear that as the victim of the alleged crime, the Vice President has first-hand knowledge of the facts underlying the claims being litigated. With respect to the second part of this burden – that the information cannot be obtained from other sources – this case involves the exceptional circumstances in which the opposing parties claim that other Defendants are lying under oath and fabricating their version of the facts. Although an argument can be made (and has been made by the OVP) that "other sources" of information exist, when the sources are so tainted by charges of dishonesty, fabrication and improper motive, they can not be deemed "other sources" for the purposes of discovery in this case.

### D. The deposition would not unduly burden the Vice President

Apart from a cursory reference to the "burdens and expenses associated with [the Vice President's] testimony (*see* **Exh. A,** *Transcript*, 29:3-8), the Magistrate Judge provides no balancing of the benefits and burdens in allowing the deposition to go forward. The Magistrate Judge makes no mention of the fact that undersigned counsel has previously given counsel for the Office of the Vice President assurances that approximately only one hour of the Vice President's time would be reasonably necessary to accomplish deposition. *See*, *Response to OVP's Brief Regarding Deposing the Vice President* [doc.#93], p.18, n.2. Conducting such a limited deposition, at the Vice President's residence (or another convenient location), would hardly impose an undue burden on his time. *See, Clinton v. Jones*, 520 U.S. 681, 691-92 (1997) ("[w]e assume that the testimony of the President, both for discovery and for use at trial, may be taken at the White House at a time that will accommodate his busy schedule, and that, if a trial is held, there would be no necessity for the President to attend in person, though he could elect to do so"); *see also, Halperin v. Kissinger*, 606 F.2d 1192, 1211 (D.C.Cir.1979) ("Presidents are scarcely immune from judicial process").

In sum, the Magistrate's improper crediting of the Defendants' testimony (which given the issues already surrounding their credibility is remarkable) and failure to evaluate all of the relevant evidence has resulted in error. The Magistrate's erroneous application of the Rules of Civil Procedure is contrary to the law and the facts of this case. His decision to prohibit the deposition of Mr. Cheney – the victim of the Plaintiff's alleged crime – should be reversed.

WHEREFORE, Plaintiff respectfully requests that the Magistrate's Order be set aside, and the deposition of the Vice President proceed.

Respectfully submitted this 10th day of November 2008.

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**CERTIFICATION PURSUANT TO D.C. COLO. LCivR. 7.1**

Counsel for Plaintiff certifies that he conferred with counsel for Defendants, who take no position on this motion. Counsel also certifies that he conferred with counsel for the Non-Party Office of the Vice President, who opposes this motion.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 10, 2008, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following e-mail addresses:

| | |
|---|---|
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