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2
3 UNITED STATES DISTRICT COURT
4 NORTHERN DISTRICT OF CALIFORNIA
5

6 **JAMAL RASHID TRULOVE,**

7 Plaintiff,

8 v.

9 **MAUREEN D'AMICO, MICHAEL JOHNSON,**
10 **ROBERT McMILLAN, AND JOHN EVANS, ET**
11 **AL,**

12 Defendants.

Case No. 16-cv-050 YGR

PRETRIAL ORDER NO. 7
DENYING DEFENDANT'S MOTION TO
PRECLUDE PLAINTIFF FROM ADMITTING
PORTIONS OF TRIAL TESTIMONY AND
RULING ON OBJECTIONS TO DESIGNATIONS
OF LUALEMAGA DEPOSITION TRANSCRIPT

Dkt. No. 436

13 Defendants have filed a belated motion in limine to preclude plaintiff from introducing
14 portions of witness Priscilla Lualemaga's testimony at the preliminary hearing and trials in the
15 underlying criminal case. The parties have indicated that Lualemaga will be unavailable for
16 purposes of testifying at the trial of this civil action. Her deposition testimony in this matter will
17 be presented in lieu of her live testimony as a result. For the reasons stated herein, the Court
18 **DENIES** the motion to exclude the trial and preliminary hearing testimony. In addition, as stated in
19 the attached Appendix A, the Court Sustains In Part and Overrules In Part the parties' objections
20 to their respective designations of Lualemaga's deposition testimony.

21 Defendants contend that the criminal trial testimony plaintiff seeks to admit is not offered
22 for impeachment of Lualemaga's deposition testimony, nor is it offered as inconsistent with her
23 deposition testimony. Thus, defendants argue, the prior testimony is hearsay and not subject to
24 any exception under the Federal Rules of Evidence, including Rule 801(d)(1)(A)¹ (prior sworn
25 testimony inconsistent with current testimony), Rule 613 (prior inconsistent statements), and Rule
26 804(b)(1) (former testimony).² Defendants further argue that, while the prior testimony is relevant

27 ¹ Defendants cite Rule 804(d)(1)(A) which the Court interprets as a typographical error
28 since no such section exists.

² Defendants seek to admit limited portions of Lualemaga's testimony for rehabilitation.

1 to the issue of whether certain evidence was “material” for purposes of plaintiff’s Brady and
2 Tatum claims, it would be unduly prejudicial to permit only portions of Lualamaga’s testimony to
3 be offered in isolation, i.e., without submitting to the jury the entire transcripts of both criminal
4 trials for context.

5 Plaintiff counters that the testimony he seeks to admit is not hearsay because it is not being
6 offered for the truth of the matters to which she testified, but instead to demonstrate its falsity.
7 Plaintiff further argues that the prior testimony is subject to the hearsay exceptions in Rules
8 804(b)(1) and 801(d)(1) in any event. Plaintiff intends to offer portions of Lualemaga’s sworn
9 testimony to: (1) establish the evidence that he contends caused him to be prosecuted in violation
10 of his constitutional rights; (2) provide those portions on which Lualemaga was questioned during
11 her deposition and which were inconsistent with her trial testimony; and (3) for excerpts from the
12 second trial, to establish the truth of certain details of her testimony relevant to the investigation or
13 for impeachment purposes.

14 As to the first category, the prior testimony is not being offered for its truth, but to show
15 that the statements were made, and their effect on the listeners, i.e., the juries in the criminal trials
16 before whom the testimony was made, resulting in plaintiff’s conviction at the first trial, and his
17 prosecution and acquittal in the second. Thus, they are not subject to exclusion as hearsay. See
18 United States v. Kirk, 844 F.2d 660, 663 (9th Cir. 1988) (prior trial testimony of witnesses in
19 timeshare fraud/RICO action was not hearsay per rule 801(c) because testimony regarding
20 misrepresentations was not admitted for truth but “to establish that the statement was made or to
21 demonstrate the effect the statement had on the hearer”).

22 Likewise, the second category of testimony, proffered in conjunction with Lualemaga’s
23 deposition testimony answering questions about it, is not properly excluded as hearsay. During
24 her deposition, Lualemaga was asked to read her prior trial testimony and then answer questions
25 about it. Including the testimony on which she was questioned will make the deposition testimony
26 understandable. It is not being offered for its truth but to provide that context, or to show that it is

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28 (Motion at 2, n.1.)

1 inconsistent with Lualemaga’s deposition testimony in this action. Further, even if the prior
2 testimony were offered for its truth, it would meet the hearsay exceptions in Rule 801(d) to the
3 extent it shows Lualemaga’s trial testimony was inconsistent with her deposition testimony. Rule
4 801(d) provides that:

- 5 [a] statement that meets the following conditions is not hearsay:
6 (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to
7 cross-examination about a prior statement, and the statement:
8 (A) is inconsistent with the declarant’s testimony and was given under penalty of
9 perjury at a trial, hearing, or other proceeding or in a deposition;

10 Thus, the Court will not bar plaintiff’s introduction of Lualemaga’s trial testimony offered for
11 purposes of providing context for the deposition testimony, or to contradict that deposition
12 testimony, on hearsay grounds.

13 The third category offered by plaintiff is certain portions of Lualemaga’s testimony at the
14 second trial. These portions are being offered for their truth, or for impeachment of subsequent
15 statements about her view on the night of the murder. Specifically, plaintiff seeks to introduce
16 statements from the second trial which indicate that Lualemaga’s window was closed on the night
17 of the murder, and describe how closely she viewed the wall of photos at the police station. Rule
18 804(b) provides that the rule against hearsay does not exclude testimony if the declarant is
19 unavailable and the statement is former testimony that: “(A) was given as a witness at a trial,
20 hearing, or lawful deposition, whether given during the current proceeding or a different one; and
21 (B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--
22 an opportunity and similar motive to develop it by direct, cross-, or redirect examination.” F. R. E.
23 804(b).

24 The Ninth Circuit has not decided the meaning of “predecessor in interest” for purposes of
25 this rule. However, district courts within the Ninth Circuit have found that “[u]nder the modern
26 view of the former testimony exception . . . parties who are found to have an ‘opportunity and
27 similar motive’ like that of the current party are deemed to be predecessors in interest.” *Lisker v.*
28 *City of Los Angeles*, No. CV09-09374 AHM AJWX, 2012 WL 3610134, at *1 (C.D. Cal. Aug. 20,
2012) (citing *Hynix Semiconductor Inc. v. Rambus Inc.*, 250 F.R.D. 452, 458 (N.D.Cal.2008)

1 (“The modern test does not require privity between the current party and the party who
2 participated in the prior proceeding.”). Similarity of motive does not require that the motives be
3 identical between the proceedings. See *United States v. Salerno*, 505 U.S. 317, 326 (1992)
4 (Blackmun, J., in concurrence). Thus, in *Lisker*, the court found that a criminal prosecutor in a
5 murder trial had a similar opportunity and motive in developing the testimony of two witnesses
6 found unavailable in a later section 1983 civil case against the investigating officers. *Lisker*, 2012
7 WL 3610134, at *1; *Carpenter v. Dizio*, 506 F. Supp. 1117, 1124 (E.D. Pa.), *aff’d sub nom.*
8 *Appeal of Allmond*, 673 F.2d 1298 (3d Cir. 1981), and *aff’d*, 673 F.2d 1298 (3d Cir. 1981)
9 (eyewitness account of the confrontation between section 1983 plaintiff and officers accused of
10 excessive force was essential to both criminal trial and civil suit, giving prosecutor and attorneys
11 for officers same motive to cross-examine eyewitness for purposes of Rule 804 predecessor in
12 interest determination). Here, the prosecutors in the underlying criminal proceedings had the
13 opportunity to examine Lualemaga, and had a similar motive as the defendants here in examining
14 her: to establish the credibility of her identification of Trulove and the integrity of their
15 investigation. The testimony from the second trial offered by plaintiff for its truth--concerning
16 how well Lualemaga could have viewed the scene and how well she reviewed the photos on the
17 wall in the police station--therefore is admissible under Rule 804(b)(1).

18 The Court finds defendants’ suggestion that the portions of the trial testimony should only
19 be presented if the entire transcript of the prior trials is read into evidence to be without merit. The
20 issues before the jury in this civil case are limited, and the jury does not need to rehear the prior
21 two criminal trials in their totality in order to decide them. See *Jimenez v. City of Chicago*, 732
22 F.3d 710, 719 (7th Cir. 2013) (plaintiff whose wrongful murder conviction was vacated was not
23 required to present entire criminal trial transcript in order to support his due process Brady claim
24 against former police detective).

25 Thus, defendants’ motion to exclude portions of the testimony from the criminal trials and
26 preliminary hearing is **DENIED**. However, defendants may designate additional testimony from
27 the prior trials or preliminary hearing to be read into the record here, subject to existing time
28 limitations. Accordingly, the portions of the prior criminal trial testimony at pages 666-68 maybe

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be read into evidence by plaintiff on Monday, March 12, 2018.

Attached hereto as Appendix A are the Court's rulings on the parties' objections to their respective designations of Lualemaga's deposition testimony.

This terminates Docket No. 171.

IT IS SO ORDERED.

Dated: March 11, 2018


YVONNE GONZALEZ ROGERS
UNITED STATES DISTRICT COURT JUDGE

APPENDIX A

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10 Attorneys for Defendants
 MAUREEN D'AMICO, JOHN EVANS,
 11 MICHAEL JOHNSON, ROBERT MCMILLAN
 12

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA

15 JAMAL RASHID TRULOVE,

16 Plaintiff,

17 vs.

18 MAUREEN D'AMICO, ET AL.,

19 Defendants.

Case No. 16-cv-00050-YGR

~~PROPOSED~~ ORDER ON JOINT PRISCILLA
 LUALEMAGA TESTIMONY DESIGNATIONS
 AND OBJECTIONS

Trial Date: March 12, 2018

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 21 Objections to designations are overruled ("O/R") in part and sustained in part as follows:

22 **TESTIMONY DESIGNATIONS FOR PRISCILLA LUALEMAGA BY TOPIC**

23 **Deposition Volume 1**

Party	Designation	Objections	Counter Designation	Ruling
Plaintiff	7:23-8:4		4:3-4 (Oath)	
Plaintiff	129:19-20; 129:22-25; 130:3-6; 130:9	Vague	129:15-18	O/R

1	Plaintiff	181:19-21; 181:25-82:2; 182:5-13; 182:16-25	181:19-82:5 Hearsay, argumentative, overbroad, vague	181:19-25 - Sustained otherwise O/R
2	Plaintiff	181:19-21; 181:25-82:2; 182:5-13; 182:16-25	182:11-16 Hearsay, argumentative, overbroad, vague	O/R
3	Plaintiff	184:10-12; 184:14-24	Hearsay, overbroad, vague, argumentative	O/R
4	Plaintiff	222:17-20; 222:23-23:2	Mischaracterizes her testimony	Sustained. see p. 5
5	Plaintiff	250:5-8; 250:11-15	Hearsay, asked and answered, vague	O/R
6	Plaintiff	251:2-11; 251:14-52:6	251:24-252:6 Hearsay, asked and answered, argumentative	252:7-10 O/R
7	Plaintiff	255:21-24; 256:3-6	Hearsay, argumentative, asked and answered	O/R
8	Plaintiff	267:19; 267:22-68:12; 268:15	268:10-15 Argumentative, mischaracterizes testimony	sustained
9	Plaintiff	269:24-70:12	Overly broad, vague, argumentative, asked and answered	269:24-70:12 O/R 270:5-12 Sustained
10	Plaintiff	283:7-13; 283:16-18	Calls for a legal conclusion	O/R
11	Plaintiff	285:19-23		285:24-286:2
12	Plaintiff	286:5-7; 286:10	Hearsay, vague	Sustained
13	Plaintiff	306:13-15; 19-23	306:13-19 Hearsay, mischaracterizes testimony, assumes facts not in evidence, compound.	O/R

1	Plaintiff	308:6-9	307:21-308:9 Withdrawn. Mischaracterizes testimony, calls for speculation		see p. 6
2	Plaintiff	315:4-9; 12- 15; 17-20; 24	315:4-17 Vague		OR
3	Plaintiff	315:4-9; 12- 15; 17-20; 24	315:18-24 Vague, calls for speculation		O/R
4	Plaintiff	317:6-7; 11- 21	317:6-11 Vague, argumentative		OR
5	Plaintiff	321:15-18; 321:24	Argumentative, calls for speculation, incomplete hypothetical		Sustained
6	Plaintiff	326:11-17; 21-22	Argumentative, assumes facts not in evidence, may misstate testimony		Sustained
7	Defendants	9:23-10:15	10:11-15	174:8-25	
8	Defendants	22:7-10		22:1-6	
9	Defendants	22:19- 23:21	23:5-9 Speculation, FRE 401, 403		Sustained
10	Defendants	30:8- 31:5		30:7	
11	Defendants	31:11-15		31:8-9 31:16-18	
12	Defendants	33:19- 34:4		34:5-7	
13	Defendants	46:1-11		45:17-25	
14	Defendants	46:24- 47:11		47:20-24	
15	Defendants	56:16- 57:7		56:14-15 57:14-21	
16	Defendants	59:24- 60:1		60:2-3	
17	Defendants	61:14- 62:4	61:24-62:4 Hearsay, FRE 404, 403		O/R
18	Defendants	63:18- 64:17		64:18-19	
19	Defendants	78:25- 82:19	Leading		O/R
20	Defendants	94:21- 95:3	94:21-25 Question isn't answered and counsel's		O/R

		statement isn't testimony		
1	Defendants	100:4-12	Hearsay, FRE 401, 403	O/R
2	Defendants	100:17-20	Hearsay, FRE 401, 403	O/R
3	Defendants	101:5-9	Relevance, FRE 401, 403	Sustained
4	Defendants	102:15-103:8	FRE 401, 403	O/R
5	Defendants	108:18-109:2		109:3-5
6	Defendants	113:12-17		113:18-19
7	Defendants	114:23-25	Bolstering, FRE 401, 403	Sustained
8	Defendants	116:4- 117:1	Testimony from counsel, leading	O/R as to all except preface at 116:5-10 which is sustained
9	Defendants	117:4-18	117:13 Commentary from counsel	Sustained
10	Defendants	117:22-118:9	117:22-18:2 FRE 401, 403	O/R
11	Defendants	118:10-119:2	118:8-9 FRE 401, 403 119:1-2 Hearsay	O/R 118:8-9 Sustained 119:1-2
12	Defendants	120:2-14		120:15-18
13	Defendants	129:3-14		129:19-25 130:3-7, 130:9 — O/R
14	Defendants	137:15-138:9	Relevance, FRE 403	O/R
15	Defendants	154:22-155:1		154:21
16	Defendants	185:20-22		185:11-19
17	Defendants	185:25		186:10-13
18	Defendants	199:3-11	Hearsay, FRE 401, 403, lack of personal knowledge	Sustained Except O/R as to: 198:19-22; 199:16-200:2; 200:15-17, 20.
19	Defendants	199:15-200:9	Hearsay, FRE 401, 403, lack of personal knowledge	
20	Defendants	201:11-19	201:11-13 Hearsay, FRE 401, 403, lack of	Sustained
21				
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		personal knowledge		
1	Defendants	203:14-21	Hearsay, FRE 401, 403, lack of personal knowledge	O/R
2	Defendants	204:15-19	Hearsay	sustained
3	Defendants	207: 15 2-5	Hearsay, FRE 401, 403, lack of personal knowledge	sustained
4	Defendants	207:11-17	Hearsay, FRE 401, 403, lack of personal knowledge	sustained
5	Defendants	209:18-20		210:10-13, 210:18-19, 210:23-24, 211:1-4, 211:13-20
6	Defendants	209:23		210:10-13, 210:18-19, 210:23-24, 211:1-4, 211:13-20
7	Defendants	214:21-215:15	Hearsay, FRE 401, 403, Lack of personal knowledge	sustained
8	Defendants	218:10-220:1	Hearsay, FRE 401, 403	O/R
9	Defendants	222:23-223:5	Hearsay, FRE 401, 403	sustained
10	Defendants	224:6		224:7-9, 224:12
11	Defendants	231:23-25		231:14-17, 231:22
12	Defendants	232:1-24		
13	Defendants	233:2-14		
14	Defendants	233:17-235:13		235:16
15	Defendants	239:13-240:15	FRE 401/402/403	O/R
16	Defendants	242:10-244:5		244:8
17	Defendants	244:9-245:10	Assumption about where D'Amico went	245:11-12, 245:15-21 O/R except sustained as to 244:4-8
18	Defendants	246:3-11		251:2, 251:10-11, 251:14
19	Defendants	254:1-9		253:25
20	Defendants	254:24-255:5		255:6-7, 255:11, 255:17-23

Defendants	256:7-8		256:4-5	
Defendants	256:22-23		256:24-25, 257:3-7	
Defendants	260:4-6		259:18-21, 259:24, 260:3	
Defendants	260:13-16		260:10-11	
Defendants	263:3		263:4-7, 263:14-17, 263:21	
Defendants	265:19- 266:2	Hearsay, FRE 401, 403		<i>O/R</i>
Defendants	267:1-18	Hearsay, FRE 401, 403		<i>Sustained</i>
Defendants	269:18- 270:1		268:10-12, 268:15- 18, 268:22-69:5, 269:8-11	
Defendants	270:4		270:5-6, 270:12	
Defendants	283:16-22		283:23, 283:25-84:4, 284:15-17	
Defendants	287:18-21			
Defendants	287:24		288:1-7, 288:10	
Defendants	304:6		304:12-23, 305:9-12	
Defendants	305:13-22		305:23-6:2, 306:13- 15, 306:19	
Defendants	306:20- 307:5		307:6-8, 307:10-13, 307:16-23, 308:6-9	<i>307:21- 308:9 sustained</i>
Defendants	319:21- 320:4		320:5-8, 320:11-21, 321:3-10, 321:12	
Defendants	322:18		322:19-23, 322:25	
Defendants	325:16-20		325:21, 325:25	
Defendants	328:13-17		328:18-19, 328:23- 29:1, 329:5	
Defendants	333:4		333:5-7, 333:11	

Deposition Volume 2

Party	Designation	Defendants' Objections	Defendants' Counter Designation	Ruling
Plaintiff	347:20-22; 348:1-2	Vague, asked and answered		<i>O/R</i>
Plaintiff	348:13-16; 348:19	Vague, asked and answered		<i>O/R</i>
Plaintiff	355:5-14; 355:17-22; 356:3	355:13-14 Not answered. Vague.		<i>Sustained.</i>
Plaintiff	355:5-14; 355:17-22; 356:3	355:20-356:3 Vague		<i>Sustained</i>

1	Plaintiff	359:23-61:17	360:6-11 Vague		O/R
2	Plaintiff	359:23-60:8; 360:11-17; 360:19-22; 360:25- 61:11; 361:15-17	360:17-19 Not answered/withdra wn. Vague		Sustained
3					
4					
5	Plaintiff	359:23-60:8; 360:11-17; 360:19-22; 360:25- 61:11; 361:15-17	360:20-25 Vague		O/R
6					
7					
8					
9	Plaintiff	359:23-60:8; 360:11-17; 360:19-22; 360:25- 61:11; 361:15-17	361:10-15 Asked and answered, argumentative		O/R
10					
11					
12	Plaintiff	361:21-62:7; 362:9-12; 362:15-19; 362:23	362:10-23 Vague, argumentative		O/R
13					
14	Plaintiff	390:15-91:8; 391:12-18	391:13-18 Argumentative		O/R
15					
16	Plaintiff	408:1-2; 9- 21; 408:25- 9:7; 409:9	408:17-409:3 Mischaracterizes testimony, vague		O/R
17					
18	Plaintiff	408:1-2; 9- 21; 408:25- 9:7; 409:9	409:4-9 Vague		O/R
19					
20	Defendants	349:9		349:21-24	
21	Defendants	360:3-5		360:6-8, 360:11	
22	Defendants	360:12-16		360:20-22, 360:25	
23	Defendants	361:1-9		361:10-11, 361:15, 361:17	
24	Defendants	368:13 - 17		368:18-20	
25	Defendants	370:13-14		370:3-5	
26	Defendants	376:2-11		376:16-19, 376:22, 376:24-77:1	
27	Defendants	379:17- 380:6		380:10-17, 380:25- 81:3, 381:6	
28	Defendants	382:22- 383:6		383:7, 383:11	
	Defendants	383:12-14		383:15-16, 383:24- 84:1	

1	Defendants	391:25-392:1		391:7-8, 391:12-14, 391:18-20, 391:24	
2	Defendants	392:5		392:6-8, 392:11-12, 392:17-19, 392:23	
3	Defendants	394:13-15		394:6-7, 394:12	
4	Defendants	399:20-25		400:1, 400:3-5, 400:11	
5	Defendants	400:19		400:20-24, 401:3	
6	Defendants	414:5-415:22		415:1-10	
7	Defendants	416:7-11		415:23-16:2, 416:5-6	
8	Defendants	417:14-22	Speculation, lack of personal knowledge, FRE 401, 403		417:14-18 O/R 417:19-22 Sustained
9	Defendants	419:4	Hearsay, FRE 401, 403		O/R
10	Defendants	419:12-16	Hearsay, FRE 401, 403		O/R
11	Defendants	420:20-24		420:19	
12	Defendants	421:20	Argumentative		Sustained
13	Defendants	427:5-15		426:19-25, 427:3	
14	Defendants	427:23-428:1		428:2-6	
15	Defendants	429:3		429:4-9	
16	Defendants	433:22-434:3		434:4, 434:8	
17	Defendants	435:21-436:8	436:5-8 Hearsay, FRE 401, 403	435:5-9, 435:13-16, 435:20	Sustained

2010 Trial Testimony

Party	Designation	Objections	Counter Designation	Ruling
Plaintiff	639 :20-28	Hearsay. Not impeachment.	Complete testimony. Exhibit 1444	SEE ORDER
Plaintiff	642:5-9	Hearsay. Not impeachment.	Complete testimony. Exhibit 1444	
Plaintiff	657:26-58:7	Hearsay. Not impeachment	Complete testimony. Exhibit 1444	
Plaintiff	663:27-64:17	Hearsay. Not impeachment	Complete testimony. Exhibit 1444	
Plaintiff	666 :1-68 :28	Hearsay	Complete testimony. Exhibit 1444	
Defendant	684:9-13			
Defendant	688:7-689:14			