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STANDING ORDER FOR CIVIL CASES BEFORE MAGISTRATE JUDGE FUENTES

Civil matters come before U.S. Magistrate Judge Fuentes in one of two ways. First, the parties may consent to have Judge Fuentes, as the assigned magistrate judge, preside over all aspects of the case. Second, in matters not before Judge Fuentes on consent, the assigned U.S. district judge may refer a matter to Judge Fuentes, also as the assigned magistrate judge, for a specific purpose. Usually, the scope of these referrals is for supervision of discovery and/or for settlement including conducting a settlement conference. This standing order is meant to give the parties guidance in civil matters before Judge Fuentes. It sets forth the practices the Court expects itself and the parties will follow in these cases, but the practices may vary to suit the peculiarities of any given case. Judge Fuentes is open to a continuing discussion in any case about the best, most efficient way to proceed. In the absence of such a discussion, this standing order should be treated as a set of default rules. This order applies to all matters pending before Judge Fuentes on consent or referral. Litigants should review the procedures of their assigned district judge(s), and in the case of any conflict, the practice of the assigned district judge governs.

NOTE CONCERNING COVID-19 PUBLIC HEALTH EMERGENCY: This Standing Order was recently revised to account for the Court's recent measures in response to the public health emergency as of the late winter and spring of 2020, and revised further as of the date of this order. Revisions related to the COVID-19 crisis are reflected below in boldface. The non-bold portions of the order represent procedures in effect before the

emergency. Although they have not been deleted and are technically still in effect, the boldface, revised portions of this Order govern in the event of conflict, until further notice.

Goals

The Court's goal for each case is to promote the just, speedy and inexpensive determination of the matter. Fed. R. Civ. P. 1. In pursuit of that goal, the Court will exercise the broad discretion afforded it under the applicable rules and the common law.

On discovery, the Court believes cases should move expeditiously, but the Court is sensitive to the many demands on an attorney's time. The Court also is sensitive to the needs of *pro se* and prisoner litigants. The Court also cares a great deal about controlling litigation costs by carefully applying Rule 26(b)(1) as amended in 2015. Parties contesting a particular discovery issue should be prepared for the Court to pay close attention to whether the requested discovery is within the scope of the rule as amended, including whether the discovery is proportional to the needs of the case.

On settlement, the Court relishes its role as a facilitator and mediator. The Court may communicate with counsel for both sides before or after settlement conferences, in attempt to bridge differences and find pathways toward success. Parties should review Judge Denlow's Top Ten Ways to Defeat Settlement, available on the Court's website with the permission of the Hon. Morton Denlow (Ret.). Several of Judge Denlow's maxims apply at the start of the case and call for careful management of costs, long before a settlement conference is scheduled. In addition, in some cases, parties have facilitated settlement by exchanging key information first, then considering whether to begin settlement discussions before incurring greater costs. Settlement may be appropriate before expert discovery – and its costs. Settlement may be appropriate before the litigation of summary judgment motions – and its costs and attendant risks. It may be appropriate after denial of summary judgment but before a looming trial. The Court's settlement practices are set forth in the Court's Standing Order for Settlement Conferences, also available on the Court's website. **The Standing Order for Settlement Conferences was revised on May 18, 2020 to include procedures during the COVID-19 public health emergency and was revised most recently on September 1, 2020.**

Initial Status Reports and Hearings

During the COVID-19 public health emergency, the Court has ceased its regular practice of holding in-person initial status hearings and has directed the parties to file written status reports in lieu of personal appearances.

When a matter arrives before the Court on referral or consent, and the parties have not yet filed a recent joint status report, the Court commonly will order that the parties file a joint initial status report within a week before the first status hearing. If a recent status report is on file, the Court will not require an additional report and will rely on the previously filed report.

The joint status report shall contain the following information:

- 1. Description of Claims and Relief Sought.**

- a. Describe the claims and defenses raised by the pleadings, including the basis for federal jurisdiction. Include enough detail to color in the nature of the key factual allegation(s) and dispute(s). In other words, a bare statement to the effect of “this is a Title VII employment discrimination lawsuit in which the plaintiff alleges a hostile work environment and a retaliatory discharge” is not very helpful to the Court.
- b. State the relief sought, including an itemization of damages.

2. Referral Cases.

Describe the matter(s) referred to the magistrate judge.

3. Discovery Schedule.

Identify any existing discovery cut-off dates. If no discovery schedule has yet been set, and the case has been referred for discovery supervision, the parties should confer and submit the following information:

- a. Initial Disclosures
 - i. The due date for Fed. R. Civ. P. 26(a)(1) disclosures.
 - ii. A date to issue written discovery requests.
 - iii. (The Court’s Mandatory Initial Discovery Pilot Program expired on June 1, 2020. The program is no longer in effect as to cases filed after June 1, 2020. As to cases filed before June 1, 2020, if an order has been entered requiring MIDP disclosures, parties should abide by that order or seek relief as appropriate by motion.)
- c. A fact discovery completion date. For claims involving medical conditions, fact discovery ordinarily includes treating physician depositions. **See the Court’s reference below to its protocol in *Lipsey v. Walmart*, No. 19 C 7681, 2020 WL 1322850 (N.D. Ill. Mar. 20, 2020.)**
- d. If there will be expert discovery, an expert discovery completion date, including dates for the delivery of expert reports and rebuttal reports, if any (or summaries for non-retained expert testimony).

4. Consideration of Issues Concerning ESI.

State whether the parties anticipate or are engaged in discovery of ESI in this case, and, if so, what agreements have been reached regarding ESI and whether there are any areas of disagreements.

Please note the Court has adopted the Principles of the Seventh Circuit Electronic Discovery Pilot Program and the parties should be familiar with them. In a patent case, the Court will apply the Local Patent Rules for Electronically Stored Information.

5. Settlement.

- a. Describe the status of settlement discussions.
- b. State whether all parties wish to participate in a settlement conference or believe such a conference would be productive.

6. Magistrate Judge Consent.

State whether all parties will consent to have Judge Fuentes conduct all further proceedings in this case, including trial and entry of final judgment, in accordance with 28 U.S.C. § 636(c) and Federal Rule of Civil Procedure 73.

7. Pending Motions.

Indicate the status of any pending motions.

8. Trial.

In consent cases, state whether a jury trial is requested, the date when the parties expect to be ready for trial, and the probable length of trial.

9. Other Matters.

State any other matters that should be brought to the Court's attention for scheduling purposes.

10. Standards for Professional Conduct.

The Court calls all counsel's attention to the Seventh Circuit's "Standards for Professional Conduct," available on the Seventh Circuit's website at <http://www.ca7.uscourts.gov/rules-procedures/rules/rules.htm#standards>. At the outset of each case assigned to Judge Fuentes, counsel for each of the parties should review the standards and make a good-faith effort to abide by them during the litigation of the case and during any settlement discussions. Counsel should pay particular attention to the statement in the preamble of the Standards, stating that "[a] lawyer's conduct should be characterized at all times by personal

courtesy and professional integrity in the fullest sense of those terms," and to the first of the listed "Lawyers' Duties to Other Counsel," stating that although the lawyers' role is to advance the legitimate interests of their clients, "[i]n our dealings with others we will not reflect the ill feelings of our clients. We will treat all other counsel, parties, and witnesses in a civil and courteous manner, not only in court, but also in all other written and oral communications." Lawyers practicing in Illinois are reminded that their conduct is subject to the Illinois Rules of Professional Conduct, including but not limited to Rules 3.1, 3.2, 3.3, 3.4, 3.5, and 8.4. In particular, Rule 3.5(d) broadly prohibits conduct that is "intended to disrupt a tribunal." As the commentary to Rule 3.5 states, "[a]n advocate can present the cause, protect the record for subsequent review and preserve professional integrity by patient firmness no less effectively than by belligerence or theatrics," and "[t]he duty to refrain from disruptive conduct applies to any proceeding of a tribunal, including a deposition."

Whether or not an initial status report is ordered, the Court commonly will schedule an initial status hearing to discuss a plan for managing the case. Lead counsel is requested to attend these initial status hearings. **This procedure has been suspended during the public health emergency. In the event a "live" status hearing becomes necessary, the Court will conduct it by telephone. In-person hearings may be held only in extraordinary circumstances.**

Depositions

Resolving disputes

The Court expects that during the public health emergency, parties will do all they can to conduct oral depositions remotely by videoconference. Also, during the public health emergency, in matters in which depositions of treating physicians or other medical personnel are sought, parties are directed to consider the concerns expressed by the Court in *Lipsev v. Walmart*, No. 19 C 7681, 2020 WL 1322850 (N.D. Ill. Mar. 20, 2020). The Court may impose the protocol set forth in *Lipsev* in various matters as appropriate.

The Court generally prefers that disputes during depositions be resolved by the parties consistent with Local Rule 37.2 and then presented to the Court by motion if the dispute cannot be resolved. On the other hand, the Court recognizes that in some circumstances, a same-day resolution to a dispute during a deposition can save the litigants time and fees, in that a deposition might be completed on that day instead of being reconvened after a judicial ruling. The costs of reconvening the deposition can be substantial, particularly where the witness or the attorneys must travel. If, in the judgment of at least one of the parties at the deposition, the Court's same-day intervention would further the just, speedy and inexpensive determination of the matter, and if the dispute reasonably can be presented briefly and orally, such party is welcome to telephone chambers to request a same-day hearing. Again, the Court expects that this will be the exception and not the rule, but the Court will make every attempt to make itself available on that same day. The Court cannot promise that it will be available. In the event that a hearing is not conducted at the time of the call or later in the day, the parties should continue the deposition and reserve the disputed issue for determination. *See* Fed. R. Civ. P. 30(c)(2). All

same-day hearings shall be conducted on the record as transcribed by the retained private court reporter.

Technology and cost management

The Court encourages the innovative use of technology, including remote video, to reduce the costs of depositions. **During the pandemic, the Court directs the parties to Judge Gilbert's well-reasoned approach to video depositions as set forth in *In re Broiler Chicken Antitrust Litig.*, No. 16 C 8637, 2020 WL 3469166, at *4-5, 11-12 (N.D. Ill. June 25, 2020), and to Judge Gilbert's protocol for such depositions at Docket Entry 3729 of that matter. The Court has adopted that protocol in certain cases, and parties are free to propose variances from it as they believe necessary to tailor the protocol to their individual matters.**

Rule 30(b)(6) Depositions

Rule 30(b)(6) deposition notices generate much motion practice that arises from some fundamental misunderstandings of the rule. Rule 30(b)(6) permits a party to bind another party, through the testimony of one or more representative deponents, to testimony given on the topics contained in the notice of deposition. *See* Fed. R. Civ. P. 30(b)(6). The rule is intended to streamline the discovery process and to do away with the practice of “bandying,” in which business entities would present individual witnesses who would disclaim knowledge of particular issues and put the other party to a costly and burdensome task of determining which individual witnesses might be competent to testify to a variety of relevant issues. *Fed. Deposit Ins. Corp. v. Giancola*, 13 C 3230, 2015 WL 5559804, at *2 (N.D. Ill. Sept. 18, 2015), citing *SmithKline Beecham Corp. v. Apotex Corp.*, No 98 C 3952, 2000 WL 116082, at *8 (N.D. Ill. Jan. 24, 2000).

Here are some pointers on the rule:

- The rule does not require the noticed party to produce a witness “most knowledgeable” about the topics. The rule provides that the noticed party must designate representative deponents who “must testify about information known or reasonably available to the organization.” Fed. R. Civ. P. 30(b)(6).
- By its terms, the rule recognizes that the task of educating and presenting a representative deponent to testify on the topics in the notice can be burdensome, and thus the rule requires the “matters for examination” to be “describe[d] with reasonable particularity.” *Id.* Courts have limited or narrowed Rule 30(b)(6) topics that were found not to describe the matters for examination with reasonable particularity. *See Ball Corp. v. Air Tech of Mich., Inc.*, 329 F.R.D. 599, 604-05 (N.D. Ind. 2019). This Court also frowns upon 30(b)(6) notices that describe the topics with the vague term “including but not limited to.” *See Winfield v. City of New York*, No. 15-cv-05236 (LTS)(KHP), 2018 WL 840085, at *5 (S.D.N.Y. Feb. 12, 2018) (“The Court must evaluate ‘reasonable particularity’ [of Rule 30(b)(6) topics] based on the nature of the topics listed in the deposition. ‘Reasonable particularity’ requires the topics listed to be specific as to subject area and to have discernible boundaries This means that the topics should not be listed as ‘including but not limited to;’ rather, they must be explicitly stated.”).

- The 2015 amendments to Rule 26(b)(1) provide that the scope of permissible discovery is not only relevance to claims or defenses in the action but also proportionality to the needs of the case. Fed. R. Civ. P. 26(b)(1). This Court generally agrees with courts that, after the 2015 amendments, have applied the proportionality limitation on discovery under Rule 26(b)(1) to overbroad Rule 30(b)(6) notices. *See Schyvincht v. Menard, Inc.*, 18 C 50286, 2019 WL 3002961, at *2 (N.D. Ill. July 10, 2019); *Ball*, 329 F.R.D. at 602. But proportionality must be considered on an individualized basis with attention to the needs of the particular case. The amended rule dictates that judicial consideration of the needs of a particular case includes consideration of “the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.” Fed. R. Civ. P. 26(b)(1). As Magistrate Judge Schenkier of this district has stated, “the factual nuances of each case are what guide the courts.” *Giancola*, 2015 WL 5559804, at *3, citing cases.
- Rule 30(b)(6) topics calling for representative deponents to address legal contentions or conclusions are disfavored. *See Schyvincht*, 2019 WL 3002961, at *3 (holding that legal conclusions, legal opinions, and legal positions in the case are outside the scope of permissible Rule 30(b)(6) discovery). Some courts have exercised their discretion to determine that written interrogatories (directed at a party’s contentions or bases for those contentions) are a more efficient means of obtaining discovery than a 30(b)(6) deposition, while others have viewed the circumstances as making the 30(b)(6) deposition the better vehicle. *Compare Clauss Constr. v. UChicago Argonne LLC*, 13 C 5479, 2015 WL 191138, at *5 (N.D. Ill. Jan. 1, 2015) (allowing 30(b)(6) testimony where court determined that written interrogatories would not be efficient) *with Schyvincht*, 2019 WL 3002961, at *3 (concluding that inquiry into the legal bases for certain contentions is better suited to contention interrogatories than to Rule 30(b)(6) testimony). The outcome of such an analysis inevitably will depend on the factual nuances of each case.

Counsel’s conduct during depositions

The below admonitions have become all the more important during the public health emergency.

“Litigation is not a contest to see how much trouble you can cause your opponents. Those who treat it as such do so at their peril.” *Hal Commodity Cycles Mgmt. Co. v. Kirsh*, 825 F.2d 1136, 1139 (7th Cir. 1987). Depositions must be conducted in a manner that avoids wasting time and protects witnesses from harassment and undue embarrassment. Fed. R. Evid. 611(a); Fed. R. Civ. P. 30(d)(3). Borrowing heavily from U.S. District Judge Steven C. Seeger’s standing order on depositions (available on the Court’s website at <https://www.ilnd.uscourts.gov/judge-info.aspx?q7AroZFqQJxIXbDV5X8oQ==>), which is applicable to all matters in which Judge Seeger is the assigned district judge, the Court reminds the parties of the following rules or standards of conduct by which all counsel are ordered to abide:

- Counsel must behave professionally at all times during depositions. Depositions must be civil, and attorneys must be respectful to witnesses, to the court reporter, and to other attorneys. Counsel must conduct themselves as if the Court were present, and as if the jury were watching. *See* Fed. R. Civ. P. 30(c)(1).
- Objections are to be stated concisely and in a nonargumentative and nonsuggestive manner. Fed. R. Civ. P. 30(c)(2); *LM Ins. Corp. v. ACEO, Inc.*, 275 F.R.D. 490, 491 (N.D. Ill. 2011). Interruptions, by counsel defending a deposition, with words such as “if you know,” or “if you remember,” are improper attempts to coach witnesses or influence their testimony, and they are not permitted. Nor are “speaking objections” that go beyond a short and nonsuggestive statement of the basis for the objection. Objections to relevance during a deposition are not necessary because they generally are not waived if not made at the deposition. Fed. R. Civ. P. 32(d)(3)(A).
- There has been some confusion around when counsel might permissibly confer with the deponent during the course of questioning. In some jurisdictions, a “break” or a conference is permitted so long as it occurs when no question is pending. But in federal deposition practice, courts have construed Rule 30 to bar interruptions that reasonably may be read as an attempt to influence the witness’s testimony as to a particular topic or line of questions. *ACEO*, 275 F.R.D. at 491-92. Instead of interrupting the deposition, counsel may make an appropriate, nonspeaking objection and should consider how the testimony might be supplemented during counsel’s further examination later during the deposition. Counsel may also seek a protective order under appropriate circumstances as discussed below.
- Such interruptions are sometimes occasioned by examining counsel’s unfair treatment of the witness. For example, the examiner may use a set of documents to induce a careless witness to acknowledge or admit facts that are stated in documents but are outside the witness’s personal knowledge. Or, the examiner may attempt to mislead the witness with false information. The proper objections here include lack of foundation, assumption of facts not in evidence, misstatement of facts, or even harassment of the witness. But nothing further need be said or done by defending counsel by way of interruption. Defending counsel may also maintain a standing objection to this manner of examination and may call it to the Court’s attention at an appropriate time, or through a Rule 30(d)(3) motion.
- Counsel need not, and should not, state *every* ground for objection by articulating a string of grounds that turns the objection into an improper speaking objection. In those instances, pick a ground, or state that the objection is to “form,” and the Court will not deem subparts of that objection to be waived.
- “Asked and answered” is not an appropriate objection during depositions, absent truly abusive conduct in extraordinary cases. It coaches the witness to say nothing more than “I incorporate what I said earlier,” or “I already answered.” All too often, when an attorney makes an “asked and answered” objection during a deposition, the witness has not actually answered the question, and the witness shuts down instead of answering the

question or appropriate follow-up questions. The remedy when examining counsel crosses the line from appropriate follow-up questions into harassment and undue annoyance of the witness is to seek a protective order. *See* Fed. R. Civ. P. 26(c); Fed. R. Evid. 611.

- An objection that “the document speaks for itself” also is disfavored. The Court has yet to hear a document actually speak.
- Do not instruct a witness not to answer a question except to preserve a privilege, to enforce a limitation necessary to preserve a privilege, or to present a motion under Rule 30(d)(3). Fed. R. Civ. P. 30(c)(2). In the third of those circumstances, the Court of Appeals has held that even when counsel concludes that his or her witness has been asked the most outrageous of deposition questions, counsel may not simply instruct the witness not to answer without bringing a motion for protective order under Rule 26(c). *Redwood v. Dobson*, 476 F.3d 462, 468 (7th Cir. 2007). The disputed matter may be reserved for the end of the deposition so that the deposition may otherwise continue, and counsel then may resort to the Court for intervention, but an instruction not to answer does not comply with the third circumstance stated in Rule 30(c)(2) if it not coupled with a motion for a protective order. Our Court of Appeals has spoken harshly of counsel who have not abided by this rule. *See id.* at 468-69.
- Witnesses who turn their testimony into a narrative filibuster, and counsel who encourage or permit this conduct by the witness, do so at the peril of being deemed to have obstructed the deposition, and in that event, the Court may, in its discretion, allow additional deposition time. *See Flores v. Bd. of Trs. of Cmty. Coll. Dist. No. 508*, No. 14 C 7905, 2015 WL 7293510, at *2 (N.D. Ill. Nov. 19, 2015).
- On occasion, counsel in a deposition may resort to conduct that is downright insulting, or that conveys some form of insult, including the making of faces, the rolling of the eyes, laughter, editorial comments, or other conduct that is not only unbecoming, but is flat-out improper. *See Redwood*, 476 F.3d at 491 (citing “the insult-riddled performance . . . that incensed the Supreme Court of Delaware” in *Paramount Communications Inc. v. QVC Network Inc.*, 736 A.2d 34, 52-57 (De. 1994)). Counsel must not engage in the sort of conduct exhibited in the Addendum to the *Paramount Communications* opinion.

Discovery Motions

During the public health emergency, the Court has modified its motion procedures. The Court will review motions as they are filed, and the Court commonly will order a prompt written response, with no reply contemplated unless ordered. At this time, motions need not and should not be noticed for presentation or argument at an in-person hearing. For now, the Court is no longer holding such hearings for the purposes of hearing argument on motions. Instead, the Court will consider the arguments made in the respective submissions and will rule promptly. Parties should not unilaterally file responses to discovery motions, as the Court will be able to resolve some of them without further

briefing or by telephonic status hearing. The Court may also direct the non-movant to address, in a response, one or more specific issues.

The parties are directed to the federal rules and the local rules with respect to the filing of discovery motions. The parties should be aware of the Court's practice as to the hearing of discovery motions. In general, the Court will hear discovery motions on the date of presentation, based on the papers filed by the movant and the oral argument presented at hearing by the non-movant. Parties should expect that no responsive brief is necessary unless the Court requests it, and non-movants should be prepared to argue their position at the presentation date and motion hearing. The Court may enter an order upon receiving a discovery motion, and such orders may address whether additional briefing is requested or permitted. The Court may determine at oral argument that a brief or response, or some other material, should be filed promptly by the non-movant.

Magistrate Judge Fuentes has expressed that he believes relevance under Rule 26(b)(1) is broad. *See Coleman v. State of Illinois*, No. 19 C 3789, 2020 WL 5752149 (N.D. Ill. Sept. 25, 2020). He also has expressed that Rule 26(b)(1)'s proportionality concept may also be broad, in appropriate circumstances. *See Johnson v. Soo Line R.R. Co.*, No. 17 C 7828, 2019 WL 4037963 (N.D. Ill. Aug. 27, 2019) (applying proportionality concept to assess burdens that compelled production of federal income tax returns in civil discovery could place on system of voluntary tax compliance); *Washtenaw County Employees' Retirement Sys. v. Walgreen Co., et al.*, No. 15 C 3187, 2019 WL 6108220 (N.D. Ill. Nov. 15, 2019) (applying proportionality concept to assess burden that compelled production of settlement-related materials could place on the social policies underlying Federal Rule of Evidence 408).

Local Rule 37.2 Compliance

Counsel are directed to review and abide by Local Rule 37.2 during the public health emergency. The rule requires face-to-face or telephonic communications. It requires a certification setting forth specifically how the rule's requirements were met, and if efforts to meet it were not successful, what specific efforts were undertaken. In the time of the pandemic, parties should seek to confer by telephone and to discuss their differences during the telephone conference(s), rather than argue to each other in emails.

Local Rule 37.2 provides that the Court shall not hear a discovery dispute unless the movant certifies that it has complied with the rule. The plain language of Local Rule 37.2 requires more than an exchange of emails. *See BankDirect Capital Fin., LLC v. Capital Premium Fin., Inc.*, 343 F. Supp. 3d 742, 743-44 (N.D. Ill. 2018) (collecting cases). The Court does not consider an unanswered email, where no face-to-face or telephonic conference was requested, to be in compliance with the local rule. Nonetheless, in some cases, the Court may exercise its discretion in favor of deciding a discovery dispute where requiring Local Rule 37.2 compliance may be futile, or where doing so may be inefficient. *See In re Fluidmaster, Inc., Water Connector Components Prod. Liab. Litig.*, No. 14 C 5696, 2018 WL 505089, at *3 (N.D. Ill. Jan. 22, 2018) (internal citations and quotations omitted); *Munive v. Town of Cicero*, No. 12 C 5481, 2016 WL 8673072, at *1 (N.D. Ill. Oct. 14, 2016), report and recommendation adopted *sub nom. Colon v. Town of Cicero*, No. 12 C 5481, 2017 WL 164377 (N.D. Ill. Jan. 17, 2017). Parties should be

aware that the Court generally will adhere to the local rule's strict requirement concerning a face-to-face or telephonic conference before filing of a motion to compel.

Motion Practice Generally

The procedures below are modified significantly by the Court's revised practice of deciding motions "on the papers," without motion hearings set at the Court's discretion. Until further order or further revised practice of the Court, the magistrate judge is not holding motion calls. The magistrate judge also is not holding status calls and is ordering and reviewing written status reports in lieu of status hearings.

The Court hears motions on Tuesday, Wednesday and Thursday at 10:30 a.m. The Court will normally set status calls on Tuesday, Wednesday and Thursday at 9:30 a.m. All motions must be filed no later than three business days before the day the motion is to be heard (e.g., for a motion to be heard on Thursday, it must be filed no later than Monday of that week). The Court will dispense with its three-day notice requirement only in connection with emergency motions. To qualify as an "emergency," a motion must arise from an unforeseen circumstance that arises suddenly and unexpectedly, and that requires immediate action in order to avoid serious or irreparable harm to one or more of the parties. Motions for extension of time for filing, or for continuances of deadlines or other dates previously set by the Court, are highly unlikely to qualify as "emergencies." In the event a party seeks to present an emergency motion, that party must inform the courtroom deputy by email at jenny_jauregui@ilnd.uscourts.gov prior to filing the motion of the general nature of the motion and the reason that it requires emergency treatment, so that it can be determined if emergency treatment is appropriate. A party seeking to present an emergency motion must make all reasonable efforts to provide the opposing party with actual notice of the motion.

The body of any motion must state if the motion is joint, or if the other parties have authorized the movant to state that the parties either agree to the motion or have no objection to it. Absent leave of Court, all memoranda of law must comply with the 15-page limitation set forth in Local Rule 7.1.

In those instances where a motion exceeds 20 pages, the Court requires compliance with Local Rule 5.2(d), which requires that "[a] judge's paper copy shall be bound on the left side and shall include protruding tabs for exhibits. A list of exhibits must be provided for each document that contains more than one exhibit." Moving counsel should send an email, with a copy to opposing counsel, to the courtroom deputy at jenny_jauregui@ilnd.uscourts.gov on the day immediately before the motion is scheduled to be heard to find out if an appearance will be required. Email communication with the courtroom deputy is preferred. Unless the Court has told a party to not appear, counsel for all parties are expected to be present irrespective of whether the motion is agreed. Parties shall jointly contact the courtroom deputy by email in order to reschedule any hearing date.

Summary Judgment Motions

Parties should be mindful of the legal standards under which federal summary judgment motions are decided per Rule 56. No party should undertake the expense and effort involved in filing a summary judgment, and in complying with the procedural requirements of these motions,

without considering carefully whether discovery in the case supports a colorable argument that there is no genuine issue of material fact. For example, in any case turning on the resolution of factual disputes over the statements or conduct of the parties or others, courts will have difficulty granting summary judgment, and a Rule 56 motion may not be a productive use of the Court's time or the parties' resources. Moreover, some attorneys believe that even a losing summary judgment motion may be productive if it "educates the judge" for purposes of a later trial. The Court does not need to review meritless summary judgment motions to become "educated" about a case.

In the event a litigant decides that a summary judgment motion is appropriate, the Court requires strict compliance with Local Rules 56.1(a) and 56.1(b) in the briefing of all summary judgment motions. In addition, to assist the Court in reviewing the factual record submitted in connection with summary judgment motions, the Court requires the following:

- A courtesy copy of the memorandum of law, depositions and other materials relied upon in support of the motion (as required by Local Rule 56.1(a)(1)-(3) or in opposition to the motion (as required by Local Rule 56.1(b)(1)-(3)) must be delivered to chambers within 24 hours of when it is filed on the CM/ECF system. The courtesy copy of the compendium must be securely bound, must separately tab each document, and must contain an index identifying what document is contained under each tab. It must also have the CM/ECF header.
- All statements of undisputed material facts offered by the moving party under Local Rule 56.1(a)(3) or statements of additional facts offered by the opposing party under Local Rule 56.1(b)(3)(C), must list the facts in short, numbered paragraphs that refrain from argument. Argument must be reserved for the moving party's memorandum of law. Each numbered fact statement must contain a specific citation to affidavits, depositions or other materials that support the fact statement, as well as to the tab(s) in the compendium where those materials may be found. Failure to provide support for a statement of fact may result in that alleged "fact" being disregarded. *Friend v. Valley View Cmty. Unit Sch. Dist.* 365U, 789 F.3d 707, 710-11 (7th Cir. 2015).
- All responses to statements of undisputed material facts offered by the opposing party under Local Rule 56.1(b)(3)(B), or responses to statements of additional facts offered by the moving party under Local Rule 56.1(a), shall be in a format similar to that used in answering a complaint: that is, the response must repeat each numbered paragraph of the fact statement, and then immediately following each numbered statement must state whether the alleged fact is "undisputed" or "disputed." As with the fact statements submitted under Local Rules 56.1(a)(3) and 56.1(b)(3)(C), the responses to those fact statements must refrain from argument. The significance or lack of significance of a disputed or undisputed fact may be argued in the respondent's legal memorandum. If a particular fact is "undisputed," nothing more should be said in the response. If a particular fact assertion is "disputed" in whole or in part, the response must state what part of the assertion is disputed and must contain a specific citation to the supporting affidavits, depositions or other materials as well as to the tab(s) in the compendium where those materials may be found. Failure to provide support for an alleged fact dispute may result

in that fact being deemed admitted. *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 218-19 (7th Cir. 2015).

- In accord with Local Rule 56.1, absent prior leave of Court, a movant shall not file more than 80 separately numbered statements of undisputed material fact, and a party opposing a summary judgment motion shall not file more than 40 separately numbered statements of additional facts under Local Rule 56.1(b)(3)(C). The Court reminds parties that the fact statements under Local Rule 56.1(a)(3) and Local Rule 56.1(b)(3)(C) “shall consist of short numbered paragraphs.”
- Motions to strike or to have Local Rule 56.1 statement of facts deemed admitted will not be accepted by the Court. These concerns should be raised in the parties’ briefs.

Motions To Seal and for Confidentiality Orders

If the parties require a confidentiality order entered by the Court, they are directed to use the model confidentiality order approved by the full Court and set forth in the Local Rules: Form 26.2 Model Confidentiality Order, with the following two additions to make clear that with respect to filed discovery materials, (1) sealing must be justified under the law of this Circuit, and (2) rather than file a motion to seal whenever a party files discovery documents designated “confidential” under the protective order, the parties are to confer in advance about the filing of any such documents so that a motion is filed only as to documents as to which a good-faith argument for sealing may be made under the applicable law:

First Addition:

[inserted after the model order’s reference to Local Rule 26.2] and the common law of this Circuit. *See Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) (noting that public “has a presumptive right to access discovery materials that are filed with the court”); *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545-46 (7th Cir. 2002) (stating that filed discovery documents “that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality . . . In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of sexual assault) are entitled to be kept secret”); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 567-68 (7th Cir. 2000) (“Many a litigant would prefer that the subject matter of a case . . . be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing.”); *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (warning courts not to allow parties “to seal whatever they want” and urging them to apply “a neutral balancing of the relevant interests” in connection with any good-cause determination presented by a motion to seal).

Second Addition:

[inserted immediately after the First Addition] If a party wishes to file in the public record a document that another producer has designated as Confidential or Highly Confidential, the party must advise the producer of the document no later than five business days before the document is due to be filed, so that the producer may move the Court to require the document to be filed under seal. The party must review the foregoing case law, and any motion to seal will be taken by the Court as a certification that the movant has read the foregoing case law and has ensured that it is making a good-faith argument that the document in question qualifies for sealing under the Seventh Circuit's stringent standards.

The Court will also consider motions to seal settlement-related information that the parties agreed to keep confidential during a settlement conference. Accordingly, the confidentiality order or the confidentiality designation under that order is *not* a basis for a motion to seal the document. The parties should consider carefully what they choose to submit to the Court in support of any request for judicial relief in a matter. On occasion, when parties filed materials under seal under an unwarranted expectation that they would remain under seal, the Court has allowed such parties, at their request, to withdraw materials that they no longer wish the Court to consider or do not wish to see unsealed.

While the parties may deviate from the model order as modified, any additions and deletions are to be redlined. A request for entry of an agreed confidentiality order should be submitted after a corresponding motion has been filed unless the Court has given prior leave to submit an agreed confidentiality order without a motion. An agreed confidentiality order should be sent to the Court's Proposed Order Box at Proposed_Order_Fuentes@lnd.uscourts.gov.

Under Local Rule 26.2(b), no document may be filed under seal without an order of the Court specifying the particular document or portion of a document that may be filed under seal except that a document may provisionally be filed under seal. With respect to documents filed electronically, Local Rule 26.2(c) states that a party must (1) provisionally file the document electronically under seal; (2) file electronically at the same time a public-record version of the document with only the sealed material excluded; and (3) file a motion to seal before or simultaneously with the provisional filing and notice it for presentment promptly thereafter.

Use of Medical Records in Litigation: The Court reminds counsel that the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and its regulations create a procedure for obtaining authority to use medical records in litigation, including requesting a qualified protective order. 45 C.F.R. § 164.512(e). A "qualified protective order" means an order that: (1) prohibits the parties from using or disclosing the protected health information for any purpose other than the litigation for which such information was requested and (2) requires the return to the covered entity or destruction of the protected health information (including all copies made) at the end of the litigation. 45 C.F.R. § 164.512(e)(1)(v).

Privilege Logs

In the event that a party withholds otherwise discoverable information on the ground of privilege, the withholding party generally must provide a log of the documents withheld. *See* Fed. R. Civ. P. 26(b)(5)(A) and Advisory Committee Comments to 1993

Amendments. Any privilege log must be detailed enough to enable other parties to assess the applicability of the privilege asserted, and should include: (1) the name and capacity of each individual from whom or to whom a document and any attachments were sent (including which persons are lawyers); (2) the date of the document and any attachments; (3) the type of document; (4) the Bates numbers of the documents, (5) the nature of the privilege asserted; and (6) a description of the subject matter in sufficient detail to determine if legal advice was sought or revealed, or if the document constitutes work product. *See RBS Citizens, N.A. v. Husain*, 291 F.R.D. 209, 218 (N.D. Ill. 2013).

The Court reminds the parties that the meet and confer requirements of Local Rule 37.2 apply to privilege disputes, just as they do to other discovery disputes. In addition, the Court wishes the parties to be aware that it understands the burdens and high costs associated with preparing detailed privilege logs in very complex cases in which discovery, and privileged materials, may be voluminous. The Court is open to a discussion with the parties about developing creative ways to reduce this burden or to streamline the preparation process. Parties should feel free to address these issues themselves in complex cases, or, if no resolution can be reached, to bring their proposals to the Court.

Finally, the Court also is aware that attorneys may have different approaches to preparing privilege logs. They may tend to claim privilege whenever a document is to or from an attorney, but without sufficient attention to whether the communication related to the rendering of legal advice or services. They may have varying conceptions of the degree of detail needed in the log's description of the document over which they are asserting a privilege claim. Parties should be mindful that “[t]oo many lawyers think that they can paint claims of privilege with a broad brush and sweat the details later. But some courts have been troubled with that approach, and counsel may face arguments that genuine privileges have been waived by asserting dubious ones. *See* Jerold S. Solovy and Robert Byman, “It’s As Easy As Falling Off a Privilege Log,” *The National Law Journal* (July 24, 2000). Since the article by Solovy and Byman, the Seventh Circuit has made clear that “blanket” waiver of privileges based on the technical inadequacy of a privilege log is generally disfavored, absent bad faith. *See Am. Nat’l Bank & Trust Co. v. Equitable Life Assurance Soc’y of U.S.*, 406 F.3d 867, 879 (7th Cir. 2005). Nonetheless, counsel are advised to make their privilege log entries specific enough to allow the Court to determine whether the document contains a privileged communication and whether the confidentiality of that communication has been maintained. *See* Solovy & Byman (“To meet your burden you have to provide a description which, when read, establishes privileged content: ‘Letter seeking advice of counsel with respect to contract negotiation strategy’”). For further guidance on the views of Judge Fuentes on privilege log content, see *Washtenaw County Employees’ Retirement Sys. v. Walgreen Co., et al.*, No. 15 C 3187, 2020 WL 3977944 (N.D. Ill. July 14, 2020).

Matters Before the Magistrate Judge on Consent

Judge Fuentes encourages parties to consent to his jurisdiction so that he may preside over the entirety of the case, including ruling on dispositive motions and presiding over any trial and the entry of a final, appealable judgment. Because Judge Fuentes does not handle felony criminal cases, he generally is able to accommodate the requests of counsel for particular (and firm) trial

dates. Parties are encouraged to read 28 U.S.C. § 636 and Fed. R. Civ. P. 73 regarding trial by consent and discuss this option with their clients and opposing counsel.

Civility

Civility is important to the Court. The Seventh Circuit’s Standards for Professional Conduct are a starting point. All counsel are referred to those standards and are expected to comply with them. Counsel should take care to treat all persons with courtesy and respect. The Court will do so as well. Further, out-of-town counsel are advised that they will be treated no differently than Illinois- or Chicago-based counsel. Counsel will not be “hometowned.”

Efficiency

Again, the Court is searching for ways to reduce the parties’ costs. **During the pandemic, the Court is reducing unnecessary status hearings through the use of written status reports.**

Diversity

Diversity is important to the Court. In “A Word About Inclusion of Diverse and Junior Attorneys,” on the Court’s website, the Court makes several suggestions for the inclusion and development of diverse attorneys. The Court has experienced, in private practice and on the bench, hearings in complex, multi-party cases in which the courtroom is filled with lawyers and yet no diverse lawyer (including at least women and attorneys of color) is present at the podium or even in the courtroom. Commonly, this is a result of staffing decisions by clients and law firms. Parties are directed to review the above-referenced suggestions by the Court and to consider how parties and law firms might improve the diversity of their staffing and contribute to the professional development of diverse lawyers.

SO ORDERED.

ENTER:



GABRIEL A. FUENTES
United States Magistrate Judge

Dated: October 14, 2020