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STANDING ORDER FOR CIVIL CASES BEFORE MAGISTRATE JUDGE FUENTES

Please review this order in its entirety at the outset of a district court referral of your case to U.S. Magistrate Judge Fuentes for discovery supervision or for other civil litigation case management, or at the outset of your consent to proceed before the magistrate judge. A separate standing order is on the Court's website for settlement conference referrals. This Standing Order was recently revised, so please review it carefully. The highlights of the order's more recent revisions are as follows:

- As a matter of policy, Magistrate Judge Fuentes strongly encourages the participation of junior and diverse attorneys (as defined in this order) in all court proceedings, with appropriate supervision. The Court has included, in this order, additional information about the Court's practices in this regard, amid the need to promote attorney professional development through practical experience and the opportunity to "stand up" and speak for a client in court. More on the involvement of junior and diverse attorneys is set forth below under "A Word About Involving Junior and Diverse Attorneys."

- Counsel, on behalf of themselves and/or their clients, are invited to communicate to the courtroom deputy the pronouns and honorifics they or their clients use, if they wish. The Court may also discern gender from usages in the parties' public filings. Where the Court is unaware of a person's pronouns, the Court may use they/their/theirs to avoid inadvertent misgendering. *See* American Bar Assn. ("ABA") Resolution No. 604 (Aug. 8, 2023) ("encourag[ing] respectful use of language (including pronouns, honorifics, salutations, and titles) consistent with a person's gender identity within law schools, the bar admissions process, the legal profession, and the justice system generally" (https://www.americanbar.org/content/dam/aba/directories/policy/annual-2023/604-

annual-2023.pdf); ABA Resolution 401 (Feb. 5, 2023) (supporting judicial implementation of N.Y. State Unified Court System's "bench card" outlining inclusive language practices "to foster an environment free of bias, prejudice, and harassment") (https://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/2023-midyear-supplemental-materials/401-midyear-2023.pdf); N.Y. Advisory Comm. on Judicial Ethics Op. 21-09 (2021) ("That is, 'they' has been recognized as a grammatically correct use for an individual."), citing Merriam-Webster, *2019 Word of the Year: They* (https://www.merriam-webster.com/words-at-play/word-of-the-year-2019-they/they); Rules of the Chief Administrative Judge, New York State Unified Court System, 22 NYCRR 100.3(B)(4) ("A judge …. shall not, by words or conduct, manifest bias or prejudice, including but not limited to bias or prejudice based upon age, race, creed, color, sex, sexual orientation, gender identity, gender expression, religion, national origin, disability, marital status or socio-economic status ….") (June 25, 2018). The judge's pronouns are "he/him/his." In addition, the Court will make efforts to avoid using certain terms that may have taken on a loaded or offensive meaning to some in the community, no matter their historical use, meaning or accuracy. For example, the Court uses terms such as "person without status," "person unlawfully in the country," or "unauthorized immigrant" to describe a human being whose presence in the United States is subject to civil enforcement of the Immigration and Nationality Act. Except in quoted material, the Court ordinarily uses such language in lieu of terms such as "illegal" or "alien," which the Court views as imprecise, insufficiently descriptive and potentially dehumanizing. *See generally United States v. Valdez-Hurtado*, 638 F. Supp. 3d 879 (N.D. Ill. 2022) (referring to "immigrants without status"). The Court also encourages all litigants and counsel to choose inclusive language. For more on the choice of inclusive language generally in the legal profession, see Jennifer Salstrom & Joseph Mead, "Developing Inclusive Language Competency in Clinical Teaching," 29 Clinical L. Rev. 349 (Spring 2023).

> Words have power, including the power to persuade or offend. They influence how we think about the world and ourselves, how we communicate, and how we effect change. Choosing appropriate language communicates respect. It can also amplify understanding; as we take the time to learn why people prefer some labels to others, we gain a window into how they view themselves, as well as their concerns, motivations, and histories.

Id. at 350.

- In May 2023, the Court adopted a new requirement in the fast-growing and fast-changing area of generative artificial intelligence ("AI") and its use in the practice of law. The requirement is as follows: "Any party using any generative AI tool in the preparation or drafting of documents for filing with the Court must disclose in the filing that generative AI was used to conduct legal research and/or to draft the document. Further, Rule 11 of the Federal Rules of Civil Procedure continues to apply, and the Court will continue to construe all filings as a certification, by the person signing the filed document and after reasonable inquiry, of the matters set forth in the rule, including but not limited to those

in Rule 11(b)(2). Parties should not assume that mere reliance on an AI tool will be presumed to constitute reasonable inquiry. Just as the Court did before the advent of AI as a tool for legal research and drafting, the Court will continue to presume that the pre-existing Rule 11 certification is a representation by filers, as living, breathing, thinking human beings, that they themselves have read and analyzed all cited authorities to ensure that such authorities actually exist and that the filings comply with Rule 11(b)(2)." The Court for now is continuing to maintain this disclosure requirement, which includes no separate certification beyond the pre-existing certification imposed by Rule 11. In addition, the requirement is mere disclosure, to aid the Court in its duty in confirming the accuracy of the parties' legal research. It is not intended to discourage use of generative AI. It is not intended to trigger greater judicial scrutiny of any brief containing such a disclosure. It is intended only as a guardrail. The Court does not attempt here to define "generative AI" as applied to legal research and drafting, but nor is such a definition necessary. No party has yet considered itself compelled to disclose use of ubiquitous internet search engines, spelling or grammar check, or computer-assisted legal research tools such as Westlaw or LEXIS, and rightly so, as the Court is confident that parties and attorneys know exactly what the Court intends here. If they do not, today's revised Standing Order, dated January 9, 2024, should clarify that issue for those commentators whose concerns about the order's lack of defining language concerning generative AI have proved to be overblown. Finally, the Court modified the disclosure requirement to reduce the required disclosure to the sole fact that generative AI was used in legal research of drafting. Parties need not disclose the specific AI tool used or the manner in which it was used. The Court's limited effort to learn when generative AI has been used in legal research or drafting of court documents is not and never was intended to compel disclosure of protected attorney work product. The Court views the integration of generative AI tools into the modern practice of law as an organic issue, and the disclosure requirement in this order remains subject to change.

Introduction

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.

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. *See Jones v. City of Elkhart, Ind.*, 737 F.3d 1107, 1115 (7th Cir. 2013).

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 retired 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 more fully in the Court's Standing Order for Settlement Conferences, also available on the Court's website.

Initial Status Reports and Hearings

If a recent status report is on file, the Court will not require an additional report and will rely on the previously filed report. Where the Court orders an initial joint status report upon referral, the report should contain the below information. Where the Court orders a joint status report to address identified issues during the Court's ongoing management of a case, the parties may limit their report to those identified issues.

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.)

b. A fact discovery completion date. For claims involving medical conditions, fact discovery ordinarily includes treating physician depositions.

c. If there will be expert discovery, proposed dates for Rule 26(a)(2) expert disclosure reports and depositions, with an expert discovery completion date.

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. In addition, all counsel should have a thorough

understanding of their ESI discovery obligations under Federal Rule of Civil Procedure 26 and their related ethical obligations including but not limited to the requirements of Rules of Professional Conduct 1.1, 3.3, 3.4, and 8.4. *See generally DR Distributors, LLC v. 21 Century Smoking, Inc.*, 513 F. Supp. 3d 839, 923-49 (N.D. Ill. 2021) (containing detailed outline of the obligations of parties and counsel with respect to ESI discovery).

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."

Depositions

Resolving disputes

The Court generally prefers that parties resolve their deposition disputes consistent with Local Rule 37.2 and then present the dispute 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. If 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, with the hearing transcript prepared and filed on an expedited basis to ensure public access. In rare cases, the Court may supervise a deposition remotely.

Technology and cost management

Even before the COVID-19 public health emergency, many litigants were gravitating toward video depositions in the interest of efficiency and cost savings. They are encouraged to continue doing so. 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 views the *Broiler Chicken* protocol as the starting point for a discussion of an applicable protocol, subject to proposed, tailored revisions in individual cases.

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

"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 of the sort exhibited in the Addendum to the *Paramount Communications* opinion.

Discovery Motions

The parties are directed to the federal rules and the local rules with respect to the filing of discovery motions. The magistrate judge commonly evaluates motions as they are filed, before determining whether the motion may be set promptly for oral argument during an in-person motion call, whether further briefing should be ordered, or whether the motion may be ruled upon immediately for failure to state a basis for judicial relief or for failure to comply with Local Rule 37.2. The magistrate judge's motion call is a floating, in-person call, in that it is not on a set day of the week and is scheduled according to the exigencies of the moment. If any counsel reasonably requests in advance to appear by telephone, the Court will consider such a request. The practice of noticing motions for presentation already was somewhat unique to this judicial district. But after dispensing with that practice during pandemic conditions, the magistrate judge found the practice inefficient and needlessly costly to parties. Accordingly, parties should continue to file motions without noticing them for presentation, and the Court determine whether, if a hearing is set, it will be conducted in person or remotely. The Court's current preference is for in-person hearings, which offer more opportunities for the Court and counsel to pick up on non-verbal cues and to know when a party or counsel wants to be heard further or wants an attorney-client communication out of earshot of the Court.

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, at *3-4 (N.D. Ill. Sept. 25, 2020). He also has expressed that Rule 26(b)(1)'s proportionality concept may also be broad, so that courts should consider the "burden" associated with a particular discovery issue in contexts

beyond the mere cost in effort and expense. *See Johnson v. Soo Line R.R. Co.,* No. 17 C 7828, 2019 WL 4037963 at *2-3 (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, at *5-6 (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

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. Nor does a motion comply with the rule if it does not identify the time, manner and persons who participated in the Local Rule 37.2 conference. 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). But filing a motion not in compliance with Local Rule 37.2 risks having the motion denied without prejudice.

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)) may be requested by court staff. If so, 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@ilnd.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).

<u>Privilege Logs</u>

If 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. 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, parties 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* David M. Greenwald, Michele L. Slachetka, & Caroline L. Meneau, 1 Testimonial Privileges § 1.69 (Thomson Reuters 2023 ed.) ("A party asserting privilege may not meet its burden through conclusory statements that the materials in question are privileged, but instead must supply sufficient information upon which to make a determination as to each assertion of privilege."). 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) and *Williams v. City of Chicago*, No. 22 C 1084, 2023 WL 3387915, at *6 & n.7 (N.D. Ill. May 11, 2023). Finally, the Court wishes to be sensitive to the costs involved in preparing detailed privilege logs in modern discovery, and it is open to the parties' suggestions about ways to reduce or minimize those costs.

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."

A Word About Inclusion of Junior and Diverse Attorneys

Judge Fuentes encourages counsel and the parties to staff their matters with junior and diverse attorneys, consistent with applicable law including *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. 181, 143 S. Ct. 2141 (2023). The Court sees such attorneys' meaningful participation in important aspects of the litigation and settlement of cases, including status hearings, depositions, and settlement conferences, preferably under the active supervision of lead counsel, as beneficial to the professional development of lawyers generally. Counsel and client will often find that their meaningful inclusion of junior and diverse attorneys into their cases adds value. These attorneys often bring a fresh perspective to the case. Lawyers, parties and the courts benefit from the professional development of experienced and effective counsel from a variety of backgrounds. Parties in particular benefit from having a broader base of skilled counsel available to handle their most important matters, in an era in which litigants are demanding greater leveraging of their invoices and greater inclusion of diverse attorneys.

"Participation" means a significant speaking role – not just carrying the briefcase. "Junior attorney" means associates, not partners, or other attorneys with less than five years of experience after law school. A "diverse" attorney, for the purposes of this order, is one who also has five years or less of experience and who may have unique experiences, character traits or qualities such as an ability to overcome adversity, including how race may have affected the person's life, "be it through discrimination, inspiration, or otherwise," *Students for Fair Admission,* 143 S. Ct. at 2176. Lawyers and law firms are encouraged to obtain any necessary legal advice and/or to give due consideration to *Students for Fair Admission* and any other applicable law in following this Standing Order.

Junior and diverse attorneys should already be integral members of the party's legal team at the time of the proceeding, and their appearance must be on file by that time. Parties who are initially unwilling to allow counsel to add a junior or diverse lawyer to a file, out of concerns about costs, are asked to consider those costs an investment in their future relationship with junior counsel. Law firms are asked to consider exercising their judgment about "writing off," in whole or in part if necessary, the cost of including a junior or diverse lawyer as an investment in training and a cost of doing business. Counsel and clients will not likely regret making this sort of investment. Passing on knowledge and skill to younger or less-experienced lawyers is one of the most important additions senior lawyers can make to the development of our profession. Parties and clients also may wish to consider the optics, for example, of showing up at a complex hearing or mediation with a large team of lawyers who all or virtually all are senior and non-diverse. Moreover, even in the most complex of disputes, parties may already have availed themselves of the skills and lower billing rates of junior attorneys to perform the research and draft the briefs. Lawyers who have done so are often more than prepared to argue a motion effectively and have earned that opportunity.

A few additional points: In encouraging parties to allow junior or diverse attorneys to appear in court and argue, the Court will not insist upon the "one-lawyer-per-side" practice, followed by many courts, on motions or other matters in which junior or diverse attorneys are arguing or examining. Parties including a junior or diverse attorney may "split" the issues in any way such parties prefer. Senior, supervising attorneys also will be permitted to add to the record or conduct additional witness examination as reasonably necessary, once junior or diverse counsel has argued or examined. The Court also will allow senior attorneys to confer as reasonably necessary, during the hearing, with the arguing attorney to make suggestions. The Court may allocate additional hearing time, if practicable, for hearings in which junior or diverse attorneys are arguing. Settlement conferences often allow multiple opportunities for a junior or diverse attorney to speak on behalf of a client or to lead negotiations, under the supervision of a senior attorney. No inference will be drawn as to the relative importance of any motion or proceeding based on who argues it or whether it is argued orally.

This order should not be misunderstood as an attempt by the Court to dictate whom parties may select to argue their matters in court. The ultimate decision as to who speaks on behalf of a party remains with that party and its counsel, not the Court. Further, the Court will expect that all attorneys appearing in any proceeding will meet the highest professional standards, will be prepared to address any matter that may arise, and will have a degree of authority commensurate with the proceeding, i.e., to bind the party they represent (for example, by agreeing to a briefing or discovery schedule). Overall, the Court has received positive feedback from counsel in matters in which an effort was made to allow junior or diverse attorneys a meaningful role in a proceeding.

The attorney performances under the foregoing practices of the Court have been, in a word, splendid. Concerns that the Court's practices in this area might impede the Court in getting to the correct result so far have proved unfounded.

SO ORDERED.

ENTER:

GABRIEL A. FUENTES
United States Magistrate Judge

Dated: January 9, 2024