

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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| In Re: Bair Hugger Forced Air | ) | File No. 15-MD-2666    |
| Warming Devices Products      | ) | (JNE/FLN)              |
| Liability Litigation          | ) |                        |
|                               | ) | September 21, 2017     |
|                               | ) | Minneapolis, Minnesota |
|                               | ) | Courtroom 12W          |
|                               | ) | 9:09 a.m.              |
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BEFORE THE HONORABLE JOAN N. ERICKSEN  
UNITED STATES DISTRICT COURT JUDGE

THE HONORABLE WILLIAM H. LEARY, III  
RAMSEY COUNTY DISTRICT COURT JUDGE

**(STATUS CONFERENCE)**

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28 transcript produced by computer.

## P R O C E E D I N G S

(9:09 a.m.)

1  
2  
3 THE COURT: Good morning, everybody. Nice to see  
4 you all. Please be seated. I gave some thought a couple  
5 days ago to make taking the day off and having Judge Noel  
6 handle this on his own and then he beat me to it. So you're  
7 stuck with me today.

8 Would you mind noting your appearances for the  
9 record? It helps at least the people on the phone and then  
10 I see one person I don't know, so I'm just going to have  
11 everybody note their appearances, and that way it will be  
12 more subtle, but I don't recognize Ms. Lewis.

13 MS. ZIMMERMAN: Good morning, Your Honor.  
14 Genevieve Zimmerman for the plaintiffs.

15 THE COURT: Good morning.

16 MS. CONLIN: Jan Conlin. Good morning, Your  
17 Honor.

18 THE COURT: Good morning.

19 MR. ASSAAD: Gabriel Assaad. Good morning.

20 MR. SZERLAG: David Szerlag.

21 MR. BLACKWELL: Good morning, Your Honor. Jerry  
22 Blackwell for 3M.

23 MS. LEWIS: Good morning, Your Honor. Deborah  
24 Lewis.

25 THE COURT: And you're for 3M? And where do you

1 office?

2 MS. LEWIS: I'm with Blackwell Burke.

3 THE COURT: Right here?

4 MS. LEWIS: Yes.

5 THE COURT: I apologize for not -- whatever I  
6 apologize for, I apologize.

7 MR. GORDON: Good morning, Your Honor. Corey  
8 Gordon for 3M.

9 MS. AHMANN: Bridget Ahmann for 3M.

10 MS. YOUNG: Mary Young also for 3M.

11 MR. HULSE: And Ben Hulse for 3M. Good morning.

12 THE COURT: Good morning. And Judge Leary is  
13 here. Judge Noel is not. And, Judge Leary, you're welcome  
14 to come on up here and sit if you want or, you know,  
15 obviously, participate fully.

16 I have the agenda, and my proposal would be that  
17 we just March through it and then at the end discuss any  
18 matters that we haven't been able to get to, unless somebody  
19 has something that they urgently want to talk about.

20 MS. VERA: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MS. MARINO: This is Vera Gretchyn Marino. I  
23 represent Leonard Smalls. Your docket number on that case  
24 is 00897.

25 THE COURT: Hold on, hold on, whoa, whoa, just a

1 second. You've caught me a little bit by surprise, so just  
2 slow down. Once again, would you state your name once more,  
3 please? I didn't catch it.

4 MS. MARINO: Yes, it's Vera, V-E-R-A, Gretchyn,  
5 G-R-E-T-C-H-Y-N, Marino, M-A-R-I-N-O. I'm the attorney  
6 representing Leonard Smalls, whose case was incorporated  
7 into the MDL case. His docket number is also different.  
8 It's 00897, but it's the year 17:000897, and it was  
9 incorporated into the Bair Hugger case on May 31, by  
10 decision after issues with the judicial panel. And David  
11 Szerlag is aware of my appearance here, and I think that he  
12 is going to request some clarification on the application of  
13 the order to this case.

14 THE COURT: Okay. And is it Raino?

15 MS. MARINO: Marino, M-A-R-I-N-O, like Dan Marino,  
16 the football player.

17 THE COURT: That, you know, if we knew each other  
18 better, you would know that doesn't really help me.  
19 Ms. Marino, where are you talking to us from? Where are you  
20 right now? What state?

21 MS. MARINO: Right now, I'm in Los Angeles. I'm  
22 on another case, a pro hac vice case, but my office is in  
23 New York, in Great Neck, New York, 175 East Shore Road, and  
24 I've been cc'd in the e-mails that have been coming from the  
25 Bair Hugger case by the Court. And my only issue is is that

1 I have filed the plaintiff's fact sheet, and filed it ECF  
2 filing under the 00897 filing. And the Clerk of the Court,  
3 one of the Clerks of the Court, Chad Pennington, called me  
4 the next day and told me the record was sealed because there  
5 were medical records that haven't been redacted, and I  
6 understand that, but to tell me that the Court requested a  
7 hard copy of that very voluminous document.

8 And when I spoke to Mr. Szerlag, he put me in  
9 touch with the portal; unfortunately, the computer service,  
10 we had a little earthquake here, it failed, and it won't be  
11 restored until the 25th, Monday, so I can't file it under  
12 the portal, even though I signed in for it and paid for it.  
13 So my question is does Your Honor still request a hard copy  
14 to be sent to her chambers?

15 THE COURT: All right. I think if you don't mind,  
16 I'm going to hear from Mr. Szerlag.

17 MR. SZERLAG: Good morning, Your Honor.

18 THE COURT: Good morning.

19 MR. SZERLAG: This is over, I think, just some  
20 miscommunication over PTO-14. Ms. Marino apparently filed  
21 the PFS through ECF filing along with some confidential  
22 documents. My understanding is that it went to the clerk's  
23 office. The clerk's office immediately sealed those  
24 documents. There was some conversation between Judge Noel's  
25 chambers and the clerk's office and Ms. Marino, but my

1 understanding is right now it's all straightened out. Once  
2 Ms. Marino gets credentials for the portal, she'll upload  
3 the PFS. I'll make sure that my assistant helps her with  
4 that, and I think that we should be all squared away.

5 THE COURT: Okay, because the PFSs haven't been  
6 being filed on ECF.

7 MR. SZERLAG: Correct. It was just a  
8 miscommunication.

9 THE COURT: All right. And so, Ms. Marino, first  
10 of all, are you able to hear what's going on in court okay?

11 MS. MARINO: Yes, with some difficulty, yes.  
12 Thank you, Your Honor.

13 THE COURT: It sounds like your issue is going to  
14 be worked out and there's nothing that we need to decide  
15 right now, but maintain your contact with Mr. Szerlag, and  
16 he'll lead you to enlightenment.

17 MS. MARINO: All right. It's just that I have a  
18 conflict with the instructions and wonder if Your Honor  
19 requests a hard copy to be mailed anyway.

20 THE COURT: The short answer to that is no.

21 MS. MARINO: Thank you. Thank you.

22 THE COURT: Okay. I have a list of counsel who  
23 are on the phone, and so could I just hear from let's say  
24 one person, somebody who is on the phone say something so I  
25 know you can hear us.

1 MR. NIGH: This is David Nigh from Levin  
2 Papantonio.

3 THE COURT: Okay, good enough. Thank you very  
4 much.

5 MR. NIGH: Thank you.

6 THE COURT: Now, let's turn our attention to the  
7 joint agenda.

8 MR. BLACKWELL: Your Honor, if I may, Jerry  
9 Blackwell. Just in terms of setting the table, a lot has  
10 happened since we were here last.

11 THE COURT: Do you want to come up to the podium?

12 MR. BLACKWELL: Oh, sure, it's just kind of a  
13 brief comment, but a lot has happened since we were here  
14 last. We've had two unprecedented in the history of the  
15 world hurricanes, which they both managed to impact  
16 plaintiffs' counsel involved in this case, whether it in  
17 Houston was Kennedy Hodges who flooded out, and then with  
18 Hurricane Irma affected Mr. -

19 MS. CONLIN: Mr. Nugier.

20 MR. BLACKWELL: -- yes, and it impacted our  
21 discovery plans and so on. We were able to work through it.  
22 And as Your Honor has seen in looking at our agenda, there's  
23 also been a tornado on the bellwethers that we'll be talking  
24 about that today, so I just want to make sure Your Honor was  
25 aware there's lots been going on and that's impacted our

1 ability to undertake some of the discovery and that  
2 translates into some of our discussion on Kamke and Nugier  
3 for this morning.

4 THE COURT: A hurricane you say?

5 MR. BLACKWELL: A couple of them.

6 THE COURT: Yeah, I've got a place in Florida.  
7 Well, it's not going to affect Kamke, is it?

8 MR. BLACKWELL: No, Your Honor. It affects  
9 Nugier, and to the extent any of the lawyers were involved,  
10 it, obviously, impacted what resources the parties would  
11 have had at a given time to do various things but primarily  
12 Nugier.

13 THE COURT: My guess, when I got your  
14 communication, I don't know what time it came in yesterday,  
15 but the update on your motions to dismiss, when I saw the  
16 cases that you were not currently moving on any more, that  
17 looked hurricane related to me.

18 MR. BLACKWELL: And Mr. Hulse can --

19 MR. HULSE: That wasn't actually, at least not to  
20 my knowledge, hurricane related. That's the PFS-related  
21 motion, and there were some of those that were just  
22 dismissed by stip., and some that we were able to work out  
23 through subsequent submission.

24 THE COURT: Okay.

25 MR. HULSE: And we've got seven left or eight left

1 to talk about today.

2 THE COURT: Right. All right. So Kamke, I don't  
3 believe I have anything in front of me on Kamke right now,  
4 is that correct, Ms. Zimmerman?

5 MS. ZIMMERMAN: Yes, Your Honor, that is correct.

6 THE COURT: But it doesn't look like Kamke is  
7 going to be going.

8 MS. ZIMMERMAN: I believe that that's correct,  
9 Your Honor, and I think that the parties have outlined the  
10 position or the new information with respect to Ms. Kamke's  
11 case in the joint status report and also in the letters to  
12 the Court yesterday. I did bring with a copy of the medical  
13 record in question if the Court would like to look at it.

14 THE COURT: Nope, I don't need to look at it. I  
15 do hear the phone. Is it possible those of you who are  
16 participating on the phone, could you mute your microphone  
17 so that the paper rustling doesn't -- okay, one more time,  
18 mute that microphone. Ms. Zimmerman?

19 All right. So whoever is on the phone, you really  
20 need to mute your microphone. This is like having a bench  
21 meeting where we have senior judges on the phone, and they  
22 don't know how to mute their microphone. And we say, "mute  
23 your microphone, mute your microphone," and they go,  
24 "(coughing)." I hope I didn't rat anybody out.

25 (Laughter.)

1           Mr. Blackwell or Ms. Zimmerman, do you want to  
2 talk about Kamke right now? Or do you want to continue to  
3 discuss it amongst yourselves. I can do it now or later,  
4 never, whatever you want.

5           MR. BLACKWELL: Your Honor, I think it's ripe to  
6 discuss now.

7           THE COURT: Okay.

8           MS. ZIMMERMAN: Well, we're happy to do that,  
9 Your Honor. Ms. Kamke is a case that was jointly nominated  
10 by both plaintiffs and defendants. And as Your Honor is  
11 aware, there's multiple scheduling orders that prohibited  
12 case specific discovery to start prior to June second. In  
13 connection with preparation for the depositions of various  
14 treating physicians, in August we learned that a small  
15 handwritten notation on the anesthesia record indicates that  
16 shortly after the surgery started, and this is about a three  
17 hour surgery, the Bair Hugger machine was turned off.

18           This was new information to plaintiffs. When we  
19 learned about it, we identified that issue. I called  
20 Mr. Blackwell myself. We put that in a letter, and we  
21 traded correspondence back and forth. Suffice it to say  
22 that because of this new information, we think that  
23 Ms. Kamke's case is no longer representative because of the  
24 limited exposure to the machine.

25           As such, we indicated, ultimately, Ms. Kamke's

1 decision that she would have her case dismissed with  
2 prejudice. We communicated this to Mr. Blackwell. He  
3 indicated that defendants would not stipulate to the  
4 dismissal, that rather they would require a motion to be  
5 brought before this Court, that while the plaintiffs could  
6 bring this motion, it would go unopposed should the  
7 plaintiffs agree to pay defendant's costs.

8 Last Friday, we learned that the costs were  
9 somewhere around \$16,000. I have an accounting of the bills  
10 as well. It seems to plaintiffs that the vast majority of  
11 the costs there are likely summaries of the medical records  
12 themselves, which we think are not appropriate for costs.  
13 And because there was no bad faith involved in this, we  
14 think that it would be unnecessarily punitive to assign  
15 costs to plaintiffs in this respect. We're certainly happy  
16 to prepare and submit a formal motion, and we have one  
17 prepared and we can do that --

18 THE COURT: That's not necessary. It seems like a  
19 waste of your time. Mr. Blackwell?

20 MR. BLACKWELL: Yes, Your Honor.

21 THE COURT: You've got a couple of issues on this.  
22 One is, and what strikes me is the more fertile area for  
23 discussion is what this does to the bellwether lineup and  
24 then, of course, you have the attorney fee issue, which I  
25 would encourage you not to spend too much on.

1 MR. BLACKWELL: Your Honor, not attorney's fees --

2 THE COURT: Or the fees.

3 MR. BLACKWELL: The issue of just costs incurred.

4 And let me start with the latter first and explain to Your  
5 Honor why we are focused on this. And while counsel  
6 represented they just discovered this notation in the  
7 medical records, the fact is I have here a copy of the  
8 submission of the records from Aspirus that was sent to the  
9 plaintiffs containing the record at issue from August 21, of  
10 2013. It was sent to them on March 23 of 2016, so they had  
11 this for over a year, and so this notation was in their  
12 possession for over a year. It wasn't just discovered.  
13 Always there, always in their possession, so that's one  
14 fact.

15 There's a second fact that is of concern to us  
16 that isn't mentioned, and we think in the interest of  
17 transparency it ought to be said. This happens to be in our  
18 view that what was really discovered, there were multiple  
19 surgeries that this particular plaintiff had, Mr. Kamke,  
20 involving the Bair Hugger. So in the second surgery, it's  
21 turned off for half an hour. They claim that all of them,  
22 all of the exposures contributed in some way to cause the  
23 surgical site infection the Bair Hugger was used.

24 What we knew about this case is that just before  
25 the controversial surgery in issue that led to the SSI,

1 there was an angle swab taken of plaintiff that was positive  
2 for staph. The results came back after the surgery, and the  
3 surgical site infection developed that was positive for  
4 staph.

5 Now, this would be a fact that would cause one to  
6 question whether the plaintiffs would want to pursue this.  
7 We didn't know why they wanted it as a bellwether. We  
8 certainly knew why we did, but alternative causation is an  
9 issue in every single case we've got.

10 So the fact that they pull out this record that  
11 they've had for over a year and pull out this fact they  
12 claim was just discovered when it was easily discovered or  
13 should have been discovered back in March of 2016 at the  
14 earliest does call into question all of the costs that we've  
15 spent up to that time when this could easily have been  
16 discovered and should have been.

17 So those are the critical facts in the Kamke case.  
18 And so the costs we seek are simply those that related to  
19 the discovery we had to undertake specifically for the  
20 bellwether. And we understand that litigation is expensive.  
21 Everybody is going to spend, and it costs, but the right  
22 anybody has to simply waste the other side's money is at  
23 issue in the case. And I suppose had we done it, it would  
24 have been an issue too had the defendants done this.

25 So given that this relates to discovery, we at

1 least want an opportunity to be kind of heard on it. The  
2 reason that we had asked the plaintiffs to file a formal  
3 motion was simply because this is a bellwether, and we  
4 wanted it to be properly presented to the Court, so it isn't  
5 something that we're standing on that, obviously, we're not  
6 given that Your Honor said don't stand on it.

7 THE COURT: Well, even though there hasn't been a  
8 formal motion filed, I have a hard time imagining that  
9 there's a lot more information that would come my way if a  
10 formal motion was filed.

11 So I mean if the provision of Rule -- if Court  
12 permission is required, and maybe there's a question about  
13 whether it is because the answer, the short answer was never  
14 actually filed in the individual Kamke. I looked on the  
15 docket, and it's not there. So, you know, I guess there's  
16 an argument to be made whether 41A, the permissive dismissal  
17 might apply, but nobody is talking about that, so I probably  
18 should have kept my mouth shut on it.

19 But I feel like I've got the information, and  
20 what's the point of making them file a motion, and you  
21 having to file a motion back and everything. So --

22 MR. BLACKWELL: And, Your Honor --

23 THE COURT: Let me just tell you how I have come  
24 to view the Kamke situation and what ought to be done about  
25 it.

1           The purpose of bellwethers is to give the parties  
2           an idea of what the strengths of their cases are, right? So  
3           it's not as if there's some -- there's no magic in having  
4           the plaintiffs lose on Kamke this way versus some other way.  
5           Like Kamke, they say it's not representative. I don't know,  
6           maybe it is representative, who knows? But it's a  
7           bellwether, and, but what's the difference between they find  
8           it out now versus you go to trial and they lose, the jury is  
9           out for five minutes. You know, you don't get costs for  
10          that. It's just that it's a bellwether that tells you  
11          something and, you know, you won that one.

12                 So you win Kamke. It's just you don't have to go  
13          to trial on it, but it's still it's some information. And  
14          from the plaintiff's point of view, I would think that this  
15          would cause them to go through and look and see whether  
16          similar facts might come up in some of the other cases. But  
17          it's instructive, so that's why I don't see having to add  
18          another bellwether -- I mean, I guess if we keep losing  
19          bellwether plaintiffs, we'll have to do something.

20                 But I like your Order, so your Proposed Order  
21          getting rid of Kamke as a bellwether would be Nugier, Skaar,  
22          Walker -- what's the other --

23                 MR. BLACKWELL: Gareis.

24                 THE COURT: So if I had to say right now what I  
25          would do, I would say that Kamke will be dismissed with

1 prejudice because it's a failure on the merits. No  
2 substitute bellwether comes in. We adopt the new bellwether  
3 order that you propose, which is to say, again, Nugier,  
4 Skaar, Walker, Gareis.

5 On the costs, I guess the short answer is no, I'm  
6 not going to give them to you. If you want more  
7 explanation, I can --

8 MR. BLACKWELL: Your Honor, I don't think we need  
9 a longer answer. Simply our perspective was we've gone  
10 through a fairly protracted process to choose our  
11 representative cases, and we spent a lot of time on cases  
12 that would be meaningful to all of the parties. And Kamke  
13 was one that both parties had agreed to, and we spent money  
14 and time on it.

15 THE COURT: Yeah, I don't doubt that. But I think  
16 just imagine that you went to trial, and the jury was out  
17 for five minutes and you won, kind of think of it that way,  
18 if that makes you feel any better.

19 MR. BLACKWELL: I understand, Your Honor. And so  
20 does that bring us to Nugier?

21 THE COURT: Yes, that brings us to Nugier. Now,  
22 what's the -- I understand that who from the U. S.  
23 Attorney's Office?

24 Oh, please, please, please, whoever is on the  
25 phone, would you mute your microphone?

1           Was it Mr. Fuller from the U.S. Attorney's Office  
2           who was there? How is that going? Are you getting?

3           MR. BLACKWELL: Your Honor, I think --

4           THE COURT: Would you hold on a second? I can't  
5           take this microphone issue. We'll mute on our end then.

6           So the question is how are we coming on getting  
7           those records from the VA?

8           MR. BLACKWELL: Your Honor, we've kind of reached  
9           the impasse, I think, with the VA discovery. There was an  
10          e-mail exchange as early as this morning at 8:00 between the  
11          AUSA and the parties. And what the VA office can ultimately  
12          agree to is that we'd be allowed to take one or two  
13          depositions depending on of up to -- we could talk to up to  
14          four VA personnel for one to two hours, depending on whether  
15          they do questions by deposition, by written questions as  
16          opposed to in person. If they're in person, they said up to  
17          four persons for two hours each.

18          And if we depose them by written questions, then  
19          they will allow followups of four persons for only one hour.  
20          And the problem is we don't know a lot about this Nugier  
21          case right now, and we learned something that was new even  
22          to us as of a week or so ago. It may have been known to the  
23          plaintiffs because they probably could have talked to their  
24          client and found out that this surgery took place in a  
25          mobile surgery unit, a trailer. And so we just learned

1 this. They have these -- I've got pictures of them so.

2 THE COURT: Why?

3 MR. BLACKWELL: Well, sometimes, there are five of  
4 these apparently at this particular hospital in Miami, and  
5 at times when there's construction going on or I suppose  
6 everything is filled up, some people go out to the trailer.

7 THE COURT: A trailer?

8 MR. BLACKWELL: It is. And, Your Honor, if I  
9 could show you --

10 THE COURT: It can't be what I'm picturing.

11 MR. BLACKWELL: No, no, I don't think there is --

12 THE COURT: I'm picturing Alan Alda from the MASH  
13 unit.

14 (Laughter.)

15 MR. BLACKWELL: I don't think there are any  
16 chickens in it, but it was probably next to a food truck.  
17 And so if I may just show Your Honor what these might look  
18 like. So one of them is actually one of the trucks from the  
19 VA, and the other is one at Stonybrook where you can see  
20 like one of those fancy RVs that kind of juts out on the  
21 side, and you kind of push the button and --

22 THE COURT: Here's the part I like. I like just  
23 the scraggly electrical, the extension cord. The red  
24 extension cord that just goes, I hope nobody trips on that.

25 MR. BLACKWELL: Right, right. The good news is

1 they could probably drive it up here, Your Honor, and we can  
2 look at it.

3 THE COURT: Yeah, you call that good news.

4 MR. BLACKWELL: But I think that the ultimate kind  
5 of punch line on this, and we've got a schedule right now  
6 that in about two weeks we've got a deadline for initial  
7 expert reports in the case, and we are sort of creeping  
8 along incrementally with respect to the VA.

9 Now we have this added fact that this involves a  
10 mobile surgery unit, which is, frankly, a vista of discovery  
11 onto itself that will need to be explored in terms of what  
12 the implications are there. And I'm fairly certain, not  
13 speaking for the plaintiffs, but I'm certain that none of  
14 the science they intend to rely upon involve studies that  
15 were done in the mobile surgery unit and nor was there CFD.

16 THE COURT: Could I just stop you for a second?  
17 Is there a motion -- is the Magistrate Judge taking a look  
18 at this now?

19 MR. BLACKWELL: He did. There was a hearing on  
20 this roughly three days ago.

21 THE COURT: I know you were down there on Monday.  
22 And do you have an Order yet from the Magistrate Judge? So  
23 I should probably just leave it alone, but I appreciate the  
24 --

25 MR. BLACKWELL: We were instructed to try to work

1 it out informally with the VA and then report back before  
2 9:00 this morning as to what the status was.

3 THE COURT: Okay.

4 MR. BLACKWELL: So, the mobile surgery unit really  
5 wasn't a part of that discussion because that's a different  
6 issue with respect to discovery that we've just learned  
7 about. And if we're looking at a current schedule, the VA  
8 says they might not even be able to find documents that  
9 relate to this mobile surgery unit, but we certainly would  
10 have to have fulsome exploration about the implications of  
11 using that for an orthopedic surgery or any kind of surgery.

12 THE COURT: Do you know how many other plaintiffs  
13 had their surgery done in a mobile unit?

14 MR. BLACKWELL: I would ask the plaintiffs. I  
15 would hazard to say I don't know of any but I'll look back  
16 to them.

17 THE COURT: They probably don't know at this  
18 point.

19 Ms. Zimmerman, if you want to come up and,  
20 Mr. Blackwell, you don't mind sharing the podium with  
21 Ms. Zimmerman, do you?

22 MR. BLACKWELL: Not at all, Your Honor. I'll just  
23 turn my microphone way over here.

24 MS. ZIMMERMAN: Thank you, Your Honor. And much  
25 like what was the situation with Kamke when we talked to the

1       anesthesiologist for the first time, and they explained this  
2       handwritten note, we learned for the first time in Judge  
3       Noel's chamber, courtroom on Monday that this mobile surgery  
4       unit was used. We don't think, ultimately, that it should  
5       impact the representativeness of Mr. Nugier, and we are  
6       absolutely prepared to go forward with the case. Perhaps  
7       Mr. Blackwell will like to try a case against somebody who  
8       has got a mobile surgery unit and should be -- I don't see  
9       any way --

10               THE COURT: Okay, well, what about this discovery  
11       matter? I guess we'll just have to wait and see what Judge  
12       Noel issues.

13               MS. ZIMMERMAN: Yes, I think that's right.

14               THE COURT: Can I ask you another question before  
15       I forget? Skaar, Walker and Gareis, are they VA? Are we  
16       going to run into this with other bellwether? Are they --

17               MS. ZIMMERMAN: That's a great question. I know  
18       that Mr. Walker is a patient at Regions in St. Paul.

19               MR. BLACKWELL: No, they're not VA, Your Honor.

20               MS. ZIMMERMAN: Right. So Judge Noel instructed  
21       the parties to try to work this out. The VA made a  
22       counter-offer with two different options for us with respect  
23       to getting access to some additional information for  
24       Mr. Nugier. We think that either of the counter-proposals  
25       would be acceptable.

1           It's my understanding the defendants have  
2 declined, and plaintiffs' concern is that this is also a  
3 bellwether that we're prepared to go forward with, and this  
4 may well hijack this particular case from the bellwether  
5 order as well now, so. And pending before Judge Noel, at  
6 this point, is a motion by the VA to quash the subpoena from  
7 defendants, and the motion to compel.

8           MR. BLACKWELL: And just to be clear in terms  
9 of --

10          THE COURT: Hold on one second. We can anticipate  
11 an order from Judge Noel very soon.

12          MR. BLACKWELL: So there's probably nothing else  
13 further pending on it, but just to be clear on that, the  
14 posture of the VA issues and the disputes before Judge Noel,  
15 the plaintiffs formally took no position to then join the  
16 motion, so it's been a little bit cumbersome kind of  
17 navigating around them given that they don't have a dog in  
18 the fight.

19          But we'll await Judge Noel's Order, and to the  
20 extent there will be additional discovery needed on this  
21 mobile surgery unit, and there most certainly will be to  
22 figure out what flies in the door when you open it, and how  
23 patients get there and so on. We, Your Honor, can also take  
24 that up with Judge Noel because I'm really not seeing how  
25 given that we don't have any discovery yet, and we just

1 learned about the mobile surgery unit, we'd be able to have  
2 all of this discovery completed in time to disclose experts  
3 in two weeks in the Nugier case, which, according to our  
4 schedule, I think those reports are going to be due  
5 October 9th, deadline for initial expert reports.

6 MS. ZIMMERMAN: In that regard, I think the  
7 plaintiffs join defendants in expressing concern about the  
8 ability to meet the current deadlines given this new  
9 information that defendants obtained on Friday. But I do  
10 think that we could certainly work together, meet and  
11 confer, and see how we might expedite process and get  
12 whatever information we might need to get Nugier fully  
13 worked up and perhaps advise back to the Court what we think  
14 is possible with respect to the deadlines.

15 THE COURT: I'm just looking at the scheduling  
16 order. I will be available if you need any fast action, but  
17 I won't be available starting next Wednesday, and then I'll  
18 be gone Wednesday, Thursday -- so sort of available on  
19 Wednesday, but then Thursday, Friday, and the following week  
20 I'm not. There won't be anything I can do for you.

21 MR. BLACKWELL: All right, Your Honor, that's very  
22 good to know, and we may need to take up the  
23 representativeness of the Nugier case. I didn't really hear  
24 an answer from the plaintiff as to whether any other  
25 surgeries involved a trailer surgery.

1 THE COURT: They don't know, and probably if  
2 they're not, yeah, it sounds like if the other -- if Skaar,  
3 Walker and Gareis aren't VA, they probably weren't done in a  
4 trailer.

5 MR. BLACKWELL: That's correct, Your Honor.

6 THE COURT: But I guess we don't know, and they  
7 don't know. They only found this out as part of the  
8 bellwether specific discovery.

9 MR. BLACKWELL: Or so they said. Although, I  
10 suspect every plaintiff knows if the surgery took place in a  
11 trailer. It doesn't happen often in your life.

12 THE COURT: I don't know. You know, who knows  
13 what a big deal it is to have a trailer? It sounds bad, but  
14 maybe it's nothing. We don't know.

15 MR. BLACKWELL: Somebody has to roll you down the  
16 street.

17 MS. ZIMMERMAN: Well, and we're certainly happy to  
18 try to do some sort of census to report back about that, but  
19 as I stand here right now, we don't know how many.

20 THE COURT: Makes sense. I would say that's all  
21 we can do on that right now.

22 MR. BLACKWELL: All right. Thank you, Your Honor.

23 THE COURT: And, Ms. Zimmerman, the order, the  
24 Nugier, Skaar, Walker, Gareis, that's okay with you?

25 MS. ZIMMERMAN: Nugier, Skaar, Walker, Gareis is

1 acceptable to plaintiffs. I think our concern is if  
2 something should happen to Nugier, but I think the Court is  
3 aware of that.

4 THE COURT: Right. Let's move to the PFS  
5 dismissal motions. Mr. Hulse?

6 MR. HULSE: Your Honor, I have a cheat sheet  
7 prepared like last time.

8 THE COURT: Could you just give me a moment, so  
9 that I'm prepared for your cheat sheet? Is this something  
10 different from what was submitted yesterday afternoon, a new  
11 list?

12 MR. HULSE: It captures essentially the same  
13 information.

14 THE COURT: Okay, because I made my own notes, and  
15 I put a post-it on it saying, "my notes." Okay, so I now  
16 have what I think I need. Could you just hold on to your  
17 cheat sheet, and then if there's something on it that's  
18 going to be helpful. I've got three places to look as it  
19 is, so.

20 MR. HULSE: Understood.

21 THE COURT: So it's not your fault that that's how  
22 I've made these notes. Now, there is a category of  
23 plaintiffs with respect to whom you are withdrawing your  
24 motion.

25 MR. HULSE: Correct.

1 THE COURT: And so I'm crossing off Chavers,  
2 Chenowith, Anita Johnson, the Dr. King, Walter King? That's  
3 a 90-day extension.

4 MR. HULSE: That's correct. We don't object to  
5 the relief they sought there.

6 THE COURT: And so what you're expecting to within  
7 90 days is a statement from the plaintiff himself.

8 MR. HULSE: What we're expecting to get is a cured  
9 PFS from either the plaintiff or somebody with a power of  
10 attorney to answer on behalf of the plaintiff.

11 THE COURT: Right. And the son died not that long  
12 ago.

13 MR. HULSE: Who had the power of attorney, that's  
14 right.

15 THE COURT: But I, for some reason, was under the  
16 impression that the plaintiff was participating at least to  
17 some extent on his own. But anyway that's --

18 MR. HULSE: And we didn't really get into the  
19 nuances. It seemed that based on the representation that  
20 the son had died and that somebody needed a power of  
21 attorney, that this was a reasonable request.

22 THE COURT: Anita Moses, Jasmine Stewart, is that  
23 an extension or are you withdrawing that, because she's a  
24 person who said she didn't -- her PFS said, I don't know,  
25 discovery is ongoing with respect to my date of birth or

1 something.

2 MR. HULSE: Right, we got some additional  
3 information since their response that we're satisfied with  
4 and are withdrawing.

5 THE COURT: Okay, and that would be similar to  
6 Zivanovich. Those were almost identical. In fact, PFS  
7 said, "her," so it really looked like it was copied from --

8 MR. HULSE: Sometimes there are a lot of PFSs to  
9 deal with.

10 THE COURT: There are a lot. Michael Warren not  
11 Debbie Warren.

12 MR. HULSE: Correct.

13 THE COURT: And then Zivanovich. All right, then  
14 we have a category of plaintiffs who have agreed to  
15 stipulate to dismissal with prejudice, and there are three  
16 in that group. And that is John and Alice Garger, Ron and  
17 Myra white, and Allan Zenner.

18 MR. HULSE: That's correct.

19 THE COURT: And those cases are dismissed.

20 MR. HULSE: Yes, Your Honor.

21 THE COURT: I'm saying they're dismissed just in  
22 case you need me to say that.

23 MR. HULSE: They have already been dismissed by  
24 stipulation.

25 THE COURT: Once again, a powerless order. And

1 then there are some non-responses, and that's Emery,  
2 Kauanui, Guadalupe Lee, Melissa Redford, Norma Saldana,  
3 Lewis and Marjorie Van Wart, and Jane West.

4 Would it make sense for me to hear from the  
5 plaintiffs about whether they're continuing to resist your  
6 motion with respect to those? Well, first of all, is that  
7 correct, is it those six people?

8 MR. HULSE: I just wanted to make sure that we got  
9 Debbie Warren. That's 17-435.

10 THE COURT: I have her on one.

11 MR. HULSE: Right.

12 THE COURT: Yes, Debbie Warren.

13 MR. HULSE: She did oppose, file an opposition, or  
14 her counsel did. Whereas, I believe the others didn't file  
15 an opposition.

16 THE COURT: Okay, let's take Debbie Warren's case  
17 separately because there was a response there.

18 What about the other six, the ones with respect to  
19 whom there's been no response? Ms. Zimmerman, did you want  
20 to be the spokesperson on that?

21 MS. ZIMMERMAN: I think we're going to have  
22 Mr. Szerlag handle that, Your Honor.

23 THE COURT: I'm unmuting the phone in case  
24 anybody... Okay, so now you people on the phone I have  
25 unmuted you, in case we're talking about one of your cases,

1 and you want to be heard.

2 MR. SZERLAG: Good morning, Your Honor. You know,  
3 we've been working, plaintiffs have been working pretty  
4 diligently to go through the cases that Mr. Hulse has  
5 provided with us, whether there have been either  
6 deficiencies or, you know, lack of communication with some  
7 of the firms. This time around, I think there were 40, you  
8 know, 47 cases, and we've cured 30 of those. Four of them  
9 were on the list in error.

10 As far as the cases where there were no response,  
11 and I think, Mr. Hulse: Lee, Sanders and West, those three  
12 of the cases?

13 THE COURT: Not Sanders, Jane West and --

14 MR. SZERLAG: I'm sorry, Saldana, I apologize.

15 THE COURT: Yes, Norma Saldana, 17-CV-977.

16 MR. SZERLAG: I know that we have reached out, we  
17 have reached out to this firm. My assistant Wendy has done  
18 a yeoman's job. I want to give her a little pat on the back  
19 because she's been pretty persistent and "tenacious," I  
20 think is probably the better word to use in trying to get  
21 this cleared up, and we have not heard back from them, so I  
22 really can't say any more than that.

23 THE COURT: All right. Is there anybody on the  
24 phone who wants to be heard with respect to Lee, Saldana or  
25 West?

1 MR. JENSON: Yes, Your Honor. This is Justin  
2 Jenson, Bailey Peavy Bailey Cowan Heckaman. All three of  
3 those clients we've lost contact with. We've tried on at  
4 least ten occasions for each client to get in touch with  
5 them with the fact sheets, and we've got no response.

6 THE COURT: Okay. So but you've done everything  
7 in your power to try to shake a response out of them, and it  
8 just doesn't seem forthcoming, is that right?

9 MR. JENSON: Yes, Your Honor.

10 THE COURT: Okay. Those cases are dismissed on  
11 the defendant's motions. That is 17CV971, Guadalupe Lee.  
12 17CV977 Norma Saldana, and 17CV984, Jane West.

13 Leaving then, Mr. Szerlag, you don't have anything  
14 else on the remaining three: Kauanui, Redford and Van Wart,  
15 right?

16 MR. SZERLAG: If you just bear with me one second.

17 THE COURT: While you're doing that, let me ask if  
18 there's anyone on the phone who wants to be heard. I don't  
19 know if I'm pronouncing Kauanui right. It's Kauanui,  
20 K-A-U-A-N-U-I, 16CV4290. Okay, I hear nothing on the phone.

21 MR. SZERLAG: On that case, yes, Your Honor, I --

22 THE COURT: Which one?

23 MR. SZERLAG: On the Kauanui.

24 THE COURT: The Hawaii sounding name?

25 MR. SZERLAG: Yes. From what I understand on that

1 case, a PFS was filed. There were sections, the entire --  
2 this is what I understand -- the entire PFS was completed.  
3 Some of the answers that were given in the PFS indicated  
4 that the information was not available and that they would  
5 and that the firm or the plaintiff would supplement that  
6 when the information became available. Apparently, that  
7 type of response was not liked by the defendants, and the  
8 deficiency notices were sent. Apparently, there has some --  
9 I'm not privy to the discussions between plaintiff's counsel  
10 and the defense, perhaps Mr. Hulse can enlighten us a little  
11 bit on that, but my understanding is they did file a PFS and  
12 to their defense it was complete, except there was some  
13 information that was not currently available to them or  
14 available to them at the time that the PFS was completed,  
15 and they said they would supplement it.

16 THE COURT: Mr. Hulse, you might possibly --

17 MR. HULSE: Yes, I'll be brief. Our notice was  
18 sent out in April of 2017. The firm here is Kirtland &  
19 Packard, which is a firm whose lawyers have appeared  
20 frequently here in person and are heavily involved in the  
21 case. The things that the plaintiff didn't have information  
22 about include employers for the last 10 years, educational  
23 background, driver's license number, primary care  
24 physicians, pharmacies used. I don't see how that could be  
25 information that was not in the possession of the plaintiff

1 at the time the PFS was due.

2 We sent the deficiency, and there's never been a  
3 response of any kind. It's been listed once, twice, I think  
4 three times, and I think in fairness to the process, the  
5 time has expired. And no opposition was filed, I would add,  
6 too, which was required by PTO-14.

7 THE COURT: And your first deficiency notice  
8 looking at this chart was sent in April, April 18th.

9 MR. HULSE: Correct, and we never got any kind of  
10 response to it.

11 THE COURT: And it was listed June -- on the dates  
12 of June 8th of 2017, July 14th of 2017, and August 10th of  
13 2017?

14 MR. HULSE: That's correct.

15 THE COURT: Okay. Once again, anybody on the  
16 phone want to say anything about 16CV4290?

17 All right. Defendant's motion is granted and that  
18 case is dismissed.

19 Melissa Redford, 16CV2055. Anybody on the phone?

20 MR. NIGH: Your Honor, this is David Nigh on  
21 behalf of Levin Papantonio. I represent Ms. Redford. We're  
22 not resisting this motion. This plaintiff has gone MIA  
23 despite our best attempts to get her to answer this  
24 information.

25 THE COURT: Okay, thanks. Much appreciated.

1 Defendant's motion will be granted on that one.

2 What about Lewis and Marjorie Van Wart? That's  
3 16CV625. Anybody on the phone? Nope.

4 Mr. Szerlag, we're down to you then.

5 MR. SZERLAG: From my notes, Your Honor, we have  
6 not had any contact with this particular firm. My  
7 understanding is that an updated -- it appears at least from  
8 my notes here that an updated PFS was filed but a  
9 verification was not, and there was some dates that were  
10 missing on the PFS. That's what I have in my notes, but we  
11 have not had any particular contact with this firm.

12 THE COURT: Mr. Hulse?

13 MR. HULSE: The information that remains missing  
14 include information about the surgery including hospital  
15 name, surgery date, location, physician, type of surgery,  
16 reason for surgery, height and weight at time of surgery,  
17 medical condition at time of surgery, infections prior to  
18 surgery, persons with whom the plaintiff discussed the risks  
19 of surgery, and the cause of infection. That remains  
20 missing, deficient after several notices, both to the  
21 plaintiff and then listings with the Court, and no  
22 response --

23 THE COURT: And it's not verified either.

24 MR. HULSE: -- correct.

25 THE COURT: Okay, that motion is granted. 16CV625

1 is dismissed.

2 Debbie Warren, anybody on the phone about Debbie  
3 Warren? That is 17CV435.

4 MR. ASSAAD: Not on the phone, Your Honor, but in  
5 person.

6 THE COURT: Mr. Assaad.

7 MR. ASSAAD: Good morning, Your Honor. Gabriel  
8 Assaad on behalf of Debbie Warren. We kind of stand on the  
9 papers. We tried to reach this client numerous times. We  
10 were unable to receive a response. I have no authority to  
11 agree to a stipulation of dismissal, so to protect my  
12 client's interest, we filed a response in this case. We  
13 would request a 90 day extension.

14 THE COURT: Okay. I looked at the actual -- many,  
15 many phone calls from the Kennedy Hodges staff.

16 MR. ASSAAD: That is correct, and also four  
17 letters.

18 THE COURT: And she, obviously, knew about her  
19 obligations because in July or June she said she would send  
20 --

21 MR. ASSAAD: Yes, Your Honor, then she told us  
22 that she became ill in July, and since July, August, and  
23 September, we were unable to contact her.

24 THE COURT: All right. Mr. Hulse, your motion  
25 will be granted on that, and that is dismissed. That is

1 17CV435. Are we missing anybody there, Mr. Szerlag?

2 MR. HULSE: I think we've covered them all, Your  
3 Honor. All that were before you today.

4 MR. SZERLAG: I believe so, yes.

5 THE COURT: All right. I'm going to go ahead and  
6 re-mute the phone.

7 The number and status of cases, anything to add to  
8 what appears in the joint agenda at number 3?

9 MR. SZERLAG: Yes, Your Honor. I decided not to  
10 sit and come back up if you don't mind, with your  
11 permission. From what I understand --

12 THE COURT: It's good. This is more talking than  
13 you normally get to do.

14 MR. SZERLAG: Of course. From what I understand,  
15 as of yesterday, the close of business yesterday, there are  
16 3,922 cases that are currently filed in the MDL. I don't  
17 believe all of them have been served.

18 In respect to the state cases, my understanding is  
19 that the number has not changed since the filing of the  
20 joint agenda and report. And I don't have any further  
21 update on the Canadian or the other state actions that are  
22 currently pending.

23 THE COURT: And we still have 57 in Ramsey County?

24 MR. SZERLAG: That's what I understand, yes, Your  
25 Honor.

1 THE COURT: Are there any problems with the Walker  
2 case? Or are you not --

3 MR. SZERLAG: I'm not familiar with that.

4 MS. ZIMMERMAN: I'm counsel for Mr. Walker. He's  
5 an excellent plaintiff, and he's prepared to try his case.

6 THE COURT: All right. Now, this sealing  
7 business, let me just start by saying I very much appreciate  
8 the efforts that everyone has made, not just efforts but  
9 your good compliance with our new sealing rule. You get  
10 worthless gold stars.

11 But you do seem to have identified a little bit of  
12 an ambiguity in the rule. And let me just ask if there's  
13 any current issue about sealing, and then maybe we can talk  
14 about that? The concern I have about the rule, and what I  
15 am in my mind redrafting, drafting a little bit of an  
16 amendment to our rule has to do with objections to either  
17 reports and recommendations or orders. Ms. Zimmerman, do  
18 you have any issues?

19 MS. ZIMMERMAN: I think from the plaintiffs'  
20 perspective, Your Honor, we always, from the Court's  
21 perspective is, generally, that we favor having these  
22 documents being publicly available. And certainly, for no  
23 other reason, it would streamline filings moving forward  
24 because many of the same documents end up being exhibits to  
25 subsequent motions. And I think that the new procedure is

1 actually quite a bit easier than the last, but it is a  
2 complicated procedure if something is under seal.

3 So to the extent that documents we've either  
4 agreed upon should no longer be confidential or sealed, I  
5 think that we've actually publicly filed some of those with  
6 the consent of defendants. But to the extent that there are  
7 some documents that we would suggest should be unsealed and  
8 the defendants have disagreed, we would like to have a  
9 ruling on that such that we can use those documents moving  
10 forward, so.

11 THE COURT: Okay. And so these are documents  
12 where the joint motion was filed pursuant to our Rule 5,  
13 whatever it is, but the new civil sealing rule.

14 MS. ZIMMERMAN: Correct.

15 THE COURT: And you do or do not have the  
16 Magistrate Judge's Order on the joint sealing at that point?

17 MS. ZIMMERMAN: We do not, at least with respect,  
18 and correct me if I'm wrong, but I do not believe that we  
19 have an Order yet or maybe it just came in the last day.

20 MR. HULSE: We do have Orders from Judge Noel on  
21 all of the pending joint motions to maintain under seal.

22 THE COURT: Okay. But you did not have them at  
23 the time the objections were filed?

24 MS. ZIMMERMAN: Or at the time the status report  
25 went in on Friday.

1           MR. HULSE: Right, exactly. So what we're saying  
2 is we're kind of wondering whether there were going to be  
3 rulings, if there was something more we needed to do, and we  
4 now have those rulings, and so, and also, of course, that  
5 provides some guidance the way Judge Noel went on some of  
6 the disputed issues.

7           So one thing that we've done is, you know, for  
8 example, on the motion for leave to amend to allege punitive  
9 damages, there were a number of exhibits that had been filed  
10 under seal by plaintiffs where we agreed they could be  
11 unsealed, but there hadn't been a ruling from the Magistrate  
12 yet formally unsealing them, so what I told Ms. Zimmerman is  
13 we've already agreed those can be unsealed for future  
14 motions, you can go ahead and file them. So that's how  
15 we've worked through the lapse of time while we're waiting  
16 for the joint motion to be ruled on.

17           THE COURT: But that does the raise the issue of  
18 whether counsel can agree to unseal something that is  
19 currently the subject of a Court Order putting it under  
20 temporary seal. So here's the procedure that I'm kind of  
21 thinking about, and I would appreciate your input on whether  
22 this would be a helpful modification to the rule.

23           If at the time a party has to file an objection to  
24 a Magistrate Judge Order or R and R, the sealing order has  
25 not been issued. The Magistrate Judge should stop

1 considering that sealing, the temporary seal will remain  
2 until the last document authorized by 72.2 is filed, at  
3 which point the sealing motion can then be considered  
4 revived before the Magistrate Judge.

5 MR. HULSE: I understand the issue what you're  
6 talking about. I, just speaking personally here, I think  
7 that's a great idea. That you consider the last brief filed  
8 not to be the one on the original motion before the  
9 Magistrate, but the one on the objection to the District  
10 Court.

11 THE COURT: So, of course, you can't just wait for  
12 that. You have to, because most of these issues are not --  
13 this is an unusual one. And so what we don't want to do is  
14 clog up the vast majority of cases because of the exception.  
15 So I would imagine that we'd still have the 21, the 21 days  
16 after the last filing in front of -- in connection with the  
17 7.2 motion. And then the Magistrate Judge either has or has  
18 not ruled at the time, because on that 21 days, you don't  
19 know who is -- you know, maybe nobody is going to appeal.  
20 You don't know who is going to appeal. And we don't want  
21 these things to just get fall through the cracks. And once  
22 again, the clerk's office has all of these sealed documents.  
23 So still leave that, and then if the Magistrate Judge has  
24 ruled, then the rule has a procedure for appeals on any  
25 disagreement on that. I don't think we need to revisit

1 that.

2 But if a party is in the position of having to  
3 file an objection and there are documents in there that are  
4 either ordered unsealed that you don't think should be, you  
5 know, if there's some disagreement about it, there should be  
6 a procedure for -- well, it's simple. They just stay sealed  
7 during that.

8 And so that's how I -- I mean I don't know if, we  
9 have a federal practice meeting on October 11th, I think,  
10 and it's my intention to bring this up to the committee at  
11 that time. But for our purposes in this case, that's how I  
12 see the process going. And if you have any questions, I  
13 know that rule, that that subdivision E says, "contact the  
14 Court," and let's call that Judge Noel in our case.

15 MR. HULSE: But we can proceed in this case with  
16 the gloss or the instruction you've just given, Your Honor.

17 THE COURT: Okay. Yes, I hope that's helpful.

18 MS. ZIMMERMAN: I think that's helpful.

19 THE COURT: It's really I guess funny because I  
20 worked so hard on that rule. You think you covered  
21 everything. And when we sent the ship out to sea, we knew  
22 that there would be something. And I know we talked about  
23 objections, but I think you've managed to identify something  
24 that might be able to be improved, so it was only starting  
25 yesterday that I started to think about this and do some

1 preliminary redrafting, but that's --

2 MS. ZIMMERMAN: Well, the procedure is easier, at  
3 least from my perspective, than the old in the envelopes and  
4 all that, so.

5 THE COURT: Oh, good, good. You know there was so  
6 much resistance to it.

7 MS. ZIMMERMAN: Well, it's a little complicated  
8 and nerve wracking for the staff and even the lawyers to do  
9 it the first few times, but.

10 MR. HULSE: Your Honor remembers the Carlson IBM  
11 case, we fought endlessly over these issues and tried to  
12 get, tried to work out agreements between the parties. We  
13 did for a while that we would let each other know in advance  
14 of a filing what we intended to file under seal and ask for  
15 an objection, and it just wasn't sustainable because, of  
16 course, really filing of the exhibits often come together  
17 pretty close to when they're actually filed.

18 THE COURT: Well, and that was always my part of  
19 what took so long to get the rule in place is we kept  
20 encountering, if I remember correctly, this would mostly be  
21 from judges, well, why can't they just let the other side  
22 know in advance? You don't know in advance. If you've ever  
23 been in private practice, you know you could be putting  
24 these things together at the last minute. And then if you  
25 have a rule that says you have to let the other side know in

1 advance what you're going to put in your summary judgment  
2 motion, you're basically messing with the notice  
3 requirements that are in the federal rule. We can't have  
4 local rules that contravene the federal rules. So we went  
5 around and around on that.

6 And then we had to overcome the sense that, well,  
7 whoever files under seal, whoever does the filing has to  
8 make a motion, but it's not necessarily the filing party who  
9 has the privacy interest in it. So what do you do except to  
10 have a temporary seal and then give people the opportunity  
11 to go back and forth on this.

12 So I know that if you just look at the rule  
13 without reading it slowly and going step-by-step, it looks  
14 very cumbersome and overwhelming. And if you have any ideas  
15 of how to improve it, you know, it's people from all over  
16 the country are looking at it because it's a problematic  
17 thing, and I'm interested in making it as good as we can, so  
18 any thoughts that you have about it in addition to the one  
19 we just talked about I'd be happy to hear. But I just  
20 couldn't think of any other way.

21 And then you have non-parties whose rights have to  
22 be considered also, because sometimes you get the records  
23 under the promise of confidentiality to them, and then you  
24 turn them over, and the last thing you want is for the other  
25 side, well, anyway.

1 MR. HULSE: It's right, absolutely right, Your  
2 Honor raised the nonparties. We've had this issue come up  
3 here where, you know, we've tried to apprise nonparties that  
4 there's a different standard for marking something  
5 confidential under a protective order then actually having  
6 it maintained under seal, but I don't know that that's fully  
7 sunk in across the bar yet.

8 THE COURT: Well, not even all the lawyers  
9 understand it.

10 MR. HULSE: Yes, exactly, exactly.

11 THE COURT: Forget judges.

12 MR. HULSE: Fine. And so I think we feel sort of  
13 on onus as the litigants here to let them know that that's  
14 not, just because something is marked confidential in a  
15 protective order doesn't mean it doesn't come out on the  
16 public docket, but it's not sinking in everywhere.

17 THE COURT: No, but you want to give them as much  
18 opportunity as possible to be heard but not slow down the  
19 process unnecessarily.

20 MR. HULSE: Right.

21 THE COURT: We had talked at one point about  
22 cancelling the October 19th status conference because it's  
23 so close to when the dispositive motion hearing will be.  
24 Does that still make sense?

25 MS. ZIMMERMAN: I thinks so from the plaintiffs'

1 perspective. I don't know why we would need another hearing  
2 in October.

3 MR. BLACKWELL: Your Honor, that makes sense to  
4 the defendants.

5 THE COURT: Okay.

6 MS. ZIMMERMAN: And we can talk about this  
7 afterwards, too, but if Your Honor has any specific guidance  
8 or thoughts on what you'd like to see from a housekeeping  
9 perspective for those three days, I suspect we are all ears.

10 MR. BLACKWELL: And, Your Honor, I thought what we  
11 might do is to confer. And I can confer with Ms. Zimmerman  
12 and Ms. Conlin to give Your Honors some idea of what we  
13 propose to do for the days set aside for the other Daubert  
14 hearings, whether there will be live testimony, how much  
15 time, who. And if Your Honors have any idea as to when you  
16 might want to get that back from the parties so you have  
17 enough time to consider it, we could abide by that also.

18 But, otherwise, my thought was that by the end of  
19 next week would be sufficient for us to be able to have met  
20 and conferred. At this point, I think we all have some idea  
21 what we want to do with respect to Daubert.

22 MS. ZIMMERMAN: Perhaps by Wednesday given the  
23 Judge's communicated schedule.

24 THE COURT: Give me a second on that. I might  
25 want to talk to you in chambers. I want to be able to

1 consult with Judge Leary too. So can we just set that aside  
2 for one moment, and I had one other matter that I want to  
3 bring up before I forget.

4 Skaar, the plaintiff has submitted a *Lexecon*  
5 waiver, but it would be helpful to have that filed.

6 MS. ZIMMERMAN: All right.

7 THE COURT: I gather that there was an e-mail back  
8 in February.

9 MS. ZIMMERMAN: That's correct, Your Honor.

10 THE COURT: So if you could just get that filed.

11 MS. ZIMMERMAN: We'll work with them.

12 THE COURT: And it should be filed in the  
13 individual case, which is 16CV2969.

14 MS. ZIMMERMAN: We will work with his attorney to  
15 make sure that happens.

16 THE COURT: Okay. Judge Leary, is there anything  
17 right now? What I propose, unless you have something, well,  
18 whatever you have right now. And then my thought is that we  
19 could consult and speak informally with the lawyers to see  
20 if there's some guidance we can give on the three days  
21 hearing and when we're going to want material. But other  
22 than that, is there anything that you want to bring up?

23 JUDGE LEARY: Nothing else to add, thank you,  
24 Judge.

25 THE COURT: Let me just ask Judge Noel's law

1 clerk.

2 (Off the record discussion between the Court and  
3 law clerk.)

4 (In open court.)

5 THE COURT: Yes, there is, thank you. So back on  
6 sealing, there were some -- I've got three docket entries  
7 that were made before the rule. And would you -- I'll tell  
8 you what those are:

9 Would you clean those up? File a motion, let's  
10 get them either sealed or unsealed. And the docket entries  
11 that you want to look at are: 266, 268, and 285.

12 MS. ZIMMERMAN: Certainly, Your Honor.

13 THE COURT: Okay. Thank you. Anyone on the phone  
14 have any issues that you want to bring up?

15 All right. Mr. Blackwell, it looks like you have  
16 something that you want to bring up now?

17 MR. BLACKWELL: Yes, Your Honor, just one  
18 additional housekeeping scheduling issue with the Kamke case  
19 out, and we're working two bellwethers. We've got Nugier,  
20 and now we've got Skaar.

21 THE COURT: Right.

22 MR. BLACKWELL: And if Your Honor wants to put  
23 into place a schedule for Skaar, so we know what we're  
24 doing, at least know to get going on the Skaar case.

25 THE COURT: Yes, and I knew that that was

1 something that we were going to have to do, so let's talk  
2 about that also when we convene. Can we convene in chambers  
3 in, you know, whatever, 10 or 15 minutes or something? Or  
4 5, 10, 15. I'll be back there.

5 MR. BLACKWELL: All right, thank you, Your Honor.

6 THE COURT: Thanks very much. We are in recess.

7 (Court adjourned at 10:22 a.m.)

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11  
12 I, Maria V. Weinbeck, certify that the foregoing is  
13 a correct transcript from the record of proceedings in the  
14 above-entitled matter.

15  
16 Certified by: s/ Maria V. Weinbeck

17 Maria V. Weinbeck, RMR-FCRR  
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