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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

ANTHONY NUNES, JR.,)
ANTHONY NUNES III,)
AND NUSTAR FARMS, LLC,)
Plaintiffs,)

VS.) 20-CV-4003

RYAN LIZZA AND HEARST MAGAZINE)
MEDIA, INC.,)
Defendants.)

* * * * *

TELEPHONIC MOTION HEARING,

HELD BEFORE THE HON. MARK A. ROBERTS,

on the 11th day of June, 2021, at 111 Seventh Avenue
S.E., Cedar Rapids, Iowa, commencing at 1:59 p.m., and
transcribed from an audio recording by Patrice A. Murray,
Certified Shorthand Reporter.

Transcript Ordered: 6/11/21
Transcript Completed: 6/14/21

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APPEARANCES:

ATTORNEY STEVEN SCOTT BISS, Law Office of Steven S. Biss, 300 West Main Street, Suite 102, Charlottesville, Virginia 22903, appeared on behalf of the Plaintiffs.

ATTORNEYS NATHANIEL S. BOYER, JONATHAN R. DONNELLAN, NINA N. SHAH, AND RAVI V. SITWALA, The Hearst Corporation, 300 West 57th Street, 40th Floor, New York, New York 10019, appeared on behalf of the Defendants.

ATTORNEYS MICHAEL A. GIUDICESSI AND NICHOLAS A. KLINEFELDT, Faegre Drinker Biddle & Reath, 801 Grand Avenue, 33rd Floor, Des Moines, Iowa 50309, appeared on behalf of the Defendants.

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1 (The following transcript was prepared from an audio
2 recording.)

3 * * * * *

4 (The following proceedings were held in the chambers
5 of the Hon. Mark A. Roberts.)

6 THE COURT: Good afternoon. The matter before
7 the Court is Nunes, et al., versus Lizza, et al., Number
8 20-CV-4003.

9 I understand, Mr. Biss, you are here for the
10 plaintiffs?

11 MR. BISS: Yes, sir.

12 THE COURT: And for the defendants, I
13 understand we have Mr. Donnellan, Mr. Giudicessi,
14 Mr. Boyer, Mr. Klinefeldt, and Ms. Shah. Did I miss
15 anybody?

16 MR. SITWALA: Yes, Your Honor. This is Ravi
17 Sitwala, also for defendants.

18 THE COURT: Welcome, Mr. Sitwala.
19 Anybody else?

20 MR. SITWALA: Thank you.

21 THE COURT: Okay. So I know we have a lot on
22 our agenda, and I'm actually needing to leave. There's
23 going to be an initial appearance for a gentleman who was
24 involved in activities in Washington, D.C., on
25 January 6th that I need to go meet with at 3:00 for the

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1 first time, so I need to leave before that.

2 What I have in front of me is the prayer from
3 document 103, plaintiffs' pleading that has their prayer,
4 that has various items they're seeking in relief, and
5 that's what I am intending to sort of use as my -- my
6 checklist just so I make sure I don't miss any of the
7 things that we need to visit about this afternoon. So
8 I'm going to let the parties know, I have read
9 everything, I've been through it all, and, in fact, I've
10 been thinking about the dilemmas this case presents quite
11 regularly and persistently, since we seem to meet fairly
12 regularly.

13 The first item in the prayer from the plaintiffs is
14 compelling the NuStar employee deponents to comply with
15 the subpoenas duces tecum and produce the requested
16 identification documents at their depositions. And from
17 the defendants' reply, I get the sense that the
18 defendants are in agreement that they should and are
19 willing and will provide anything that they do have,
20 although Mr. Biss represents that he's not sure how much
21 they may have; because some of them have been here for a
22 number of years, they might have -- not have original
23 documents. So I guess it's more of my concern that,
24 given the state of counsel for these people and the
25 language barriers, et cetera, that it be conveyed to

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1 these people in advance of their depositions what is
2 really being required of them, that they are to bring all
3 of these requested identification documents to their
4 deposition if they have them, that they are to make a
5 thorough inspection of every place they think they might
6 be before they get to the deposition. And then when they
7 get there, that they can expect to be asked, "Did you
8 look for them, and is this all you found?"

9 And I don't know who's going to convey that to them.
10 Mr. Biss, I assume that might be part of one of your
11 duties, but it might also be part of counsel for these
12 people that we'll discuss here in a minute. Is there
13 anything we -- else we need to talk about, about the
14 responses to the subpoenas duces tecum in terms of
15 production of documents?

16 MR. BOYER: Your Honor, this is Mr. Boyer for
17 defendants. I just -- a point of clarification, and I'm
18 almost positive these are the exact words the Court had
19 in mind. I think you might have mixed up the parties in
20 which you were saying we're here on. This is the
21 defendants' motion. We were the ones who had filed the
22 prayer, but I think that's exactly what you meant, but I
23 just wanted to make sure we were all on the same page
24 here.

25 THE COURT: Yeah, I do apologize. I get enough

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1 plaintiffs and defendants through here, that it's
2 surprising I don't make that mistake more often. But,
3 yes, I do mean the prayer by Mr. Lizza and Hearst, is
4 what I'm going through here. And I assume it's
5 Mr. Biss's side or perhaps their attorney who will be
6 conveying to these employees the need to bring these
7 items.

8 So let's talk about the next one, directing
9 plaintiffs' counsel, including Mr. Biss and Mr. Feller,
10 to comply with the Federal Rules of Civil Procedure and
11 Iowa Rules of Professional Conduct with respect to the
12 depositions in this case. I'm just going to cut to the
13 chase on this. It's not the worst conduct I've seen in a
14 deposition, Mr. Biss, but it's -- it's not helpful to me,
15 to the court reporter, or to making a good record, to do
16 things other than assert the basis of your objection.
17 You know, just asserting form of the question -- that's
18 another issue, but it doesn't always help. I'm going to
19 ask you to endeavor in the future to avoid speaking
20 depositions [sic]. Like I tried to put before everybody,
21 what I thought was somewhat humorously, before was
22 pretend it's a courtroom, you know. Kind of assume that
23 I'm there in the courtroom when you are making a long
24 speaking objection, and know that I'm going to tell you
25 to stop it if I hear it. So I get that there are reasons

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1 that people feel heated or animated, but let's try to do
2 everything we can to be as professional and just get to
3 the nub of this.

4 I guess, another layer of this is, this is a
5 difficult -- this is a difficult position for those
6 employees to be in. Whether they've committed a crime or
7 done something illegal with respect to their immigration
8 status, these aren't sophisticated people who understand
9 the American legal system. They don't want to be in
10 front of judges, juries, lawyers, and court reporters,
11 and interpreters, and it -- it doesn't -- it's not
12 conducive -- and we'll talk more about that later
13 perhaps, but it's not really conducive to getting these
14 depositions completed to have the attorney, particularly
15 for their employer, reacting negatively to -- you know,
16 you're kind of cluing them in to what you want them to
17 do, and there's enough pressure in this circumstance that
18 we don't really need that. And I think that's all I'm
19 going to say about the deposition conduct. I think
20 everybody gets the point. And everybody should follow
21 the Federal Rules of Civil Procedure. Okay.

22 So the -- here's the \$64,000 question, if anybody
23 remembers old game shows, appointing independent counsel
24 to represent the employee deponents at their depositions,
25 I've made inquiry of our clerk's office here, and we do

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1 have a CJA panel that when someone is facing potential
2 criminal liability, that is a possibility for me to do.
3 However, I understand that in this circumstance, that
4 Mr. Biss, or perhaps it's the Nuneses, have arranged to
5 have another lawyer or lawyers appear on behalf of these
6 witnesses. Is that the case, Mr. Biss?

7 MR. BISS: Yes, sir, it is.

8 THE COURT: All right. Who is it that you've
9 arranged to have appear?

10 MR. BISS: I know her name is Jennifer. I
11 don't know her full name, but I was involved in engaging
12 her; but NuStar engaged her, so she -- and she is
13 available.

14 THE COURT: What do you mean that she is
15 available? For us to talk to now or just available for
16 any of these depositions?

17 MR. BISS: She's available for the depositions,
18 whenever they are scheduled.

19 THE COURT: Okay. I'd like you to figure out
20 who that person is and notify the Court and notify
21 opposing counsel of that today. I know you expressed
22 some concern that whoever would be designated to
23 represent these defendants would be -- I don't know if
24 you used the word "harassed," but I don't -- encouraged
25 to assert their Fifth Amendment rights, and I don't think

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1 there's -- I'm not worried about Iowa lawyers who are
2 admitted to the bar being able to vigorously assert their
3 clients' rights. I think if I were in Jennifer's
4 position and someone who knew a lot more about the
5 underlying case -- whether it was you, Mr. Biss, or
6 someone from the defendants who knew more about the
7 underlying documents and the potential jeopardy my
8 clients might face -- was calling me to talk to me about
9 that, I'm not sure I would consider that harassment. It
10 might be somewhat welcome so that I can accurately -- I
11 mean, effectively defend my clients in their depositions.
12 So that's not a worry that I have.

13 I guess another worry that someone might have and
14 I -- I obviously don't know who Jennifer is, but if she's
15 admitted to practice in Iowa courts and in federal court,
16 she certainly understands that she's governed by the Iowa
17 Rules of Professional Conduct, including Rule 32:1.8(f),
18 which provides that a lawyer shall not accept
19 compensation for representing a client from one other
20 than the client unless, (1), the client gives informed
21 consent; (2), there is no interference with the lawyer's
22 independence of professional judgment or with the
23 client-lawyer relationship; and, (3), information
24 relating to the representation of a client is protected
25 as required by 32:1.6. I assume the lawyers on this call

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1 know about this, as will Jennifer, and she will be able
2 to do her job to assert the Fifth Amendment as she sees
3 fit on behalf of her clients. If it seems like that's
4 not the case or she feels like she is being threatened or
5 pressured by either party to do something, I'm sure
6 she'll make that known after she's met with her -- met
7 with her clients. So at this point, I'm not appointing
8 independent counsel to represent the employee deponents.
9 That is a possibility, if this doesn't straighten up,
10 this deposition situation.

11 Part 4 of this says, given the extraordinary
12 circumstances and threat of a violation of the witnesses'
13 Fifth Amendment rights or the possibility of false
14 testimony being provided, providing court supervision of
15 the employee depositions as follows: Location and time,
16 to be held at a location identified. I assume these are
17 still going to be held at that law office in Sibley, as
18 they were originally planned.

19 Is that right, Mr. Boyer?

20 MR. BOYER: That is correct. We will make
21 arrangements for them to take place at the location
22 there.

23 I apologize, I tried to stay on point. On point 3,
24 we are -- I must note, defendants' concern -- I
25 appreciate, of course, Your Honor's point that you expect

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1 Iowa lawyers to conduct themselves in accordance with the
2 applicable rules. I am concerned that we're going to see
3 this play -- play out again. I mean, we -- there was --
4 there was a competent counsel once. That counsel, very
5 tellingly, over plaintiffs' claim that that person was
6 fired -- that counsel was fired by the first witness, was
7 then never offered for any other witness, so I am -- I am
8 concerned, significantly so, that a -- an independent
9 counsel, somebody who is retained, is going to be getting
10 a message from plaintiffs to be -- that's to the extent
11 of, you know, the advice that needs to be given and, you
12 know, what ultimately needs to be put on the record here,
13 and if it doesn't come out the way (indiscernible audio),
14 then that lawyer's ultimately not going to be sticking
15 around very much longer either.

16 THE COURT: Okay. And I appreciate your
17 concern, Mr. Boyer. I can see it possibly playing out
18 this way. I did -- and I expressed this before when I
19 heard about former counsel from BrownWinick, who left
20 after the two-hour hiatus during those depositions, after
21 there had been an attempt to assert the Fifth Amendment
22 privilege, that he's out of this, that -- that is
23 troubling, and it would be even more troubling if this
24 new lawyer is similarly cowed or fired. I think if
25 that's the case and we can't rely on counsel that's

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1 independent in this manner, then I can find counsel that
2 I'm confident are independent, because we have counsel on
3 our CJA -- Criminal Justice Act -- panel in the Northern
4 District of Iowa, that if someone's in criminal jeopardy,
5 I can appoint them to people who request it. I think
6 there's going to be practically some challenges for me,
7 but I'm willing to do it. If I have to go out to a
8 courtroom -- well, I'm sorry, a conference room in Sibley
9 and meet with each of these individual deponents, because
10 I think dragging them to a courthouse would be
11 counterproductive for a lot of reasons -- but meet with
12 them and an interpreter ex parte and explain to them, you
13 know, what they're in and why I'm willing to appoint them
14 a lawyer if they want one and what that's going to mean,
15 I can do that and I will do it. But I'm hoping that, you
16 know, what happened at the last depositions doesn't
17 happen, and this lawyer understands -- and I'm willing to
18 convey it to her ex parte if need be -- that, you know,
19 it's her job to represent people who are potentially --
20 and I'm not saying they are, Mr. Biss, because I know
21 you've represented to me these people want to testify and
22 they're not worried about it -- but that's what this
23 process gets, is some confidence that those people when
24 they do testify, you know, if they testify and they say
25 things, that you and I and everybody can sleep at night

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1 that they did that with good counsel that's independent,
2 that they weren't placing themselves in legal jeopardy.
3 I think that's hopefully something we're all trying to
4 accomplish here. And that's why I'm doing it this way.
5 But I can -- there are other gears that I can put in
6 motion if need be, and I'm willing to do it, but let's
7 try to do it this way.

8 MR. KLINEFELDT: Your Honor, this is Nick
9 Klinefeldt. If I may add a point to that.

10 THE COURT: Please do.

11 MR. KLINEFELDT: I wanted to put out another
12 idea as well in terms of kind of a middle ground here,
13 and that would be as follows. We fully understand and
14 expect that this new -- Jennifer will abide by the Iowa
15 ethical rules and do her very best job to be independent,
16 but I think there's another concern here, and that is
17 having counsel that is experienced and knowledgeable in
18 this area. As the Court's already indicated, that
19 typically when this kind of thing would occur, in a
20 trial, for example, the Court wouldn't -- the Court
21 wouldn't just appoint anybody. They would appoint
22 somebody from the Criminal Justice Act. And I know how
23 important that is, because I'm a member of the Southern
24 District of Iowa Criminal Justice Act panel. You have to
25 be vetted by the Court, you have to fill out

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1 applications, and the Court has to be comfortable that
2 you have the requisite federal criminal experience to
3 adequately advise your client. And here, when it comes
4 to Fifth Amendment issues, this is something that I've
5 built part of a 20-year career on. It can be a very
6 complex situation, to not only understand the criminal
7 statute, to understand your client's potential exposure,
8 but also the process for asserting the Fifth Amendment,
9 which was not followed here, as well as the scope of the
10 protection afforded by the Fifth Amendment, which is
11 often disputed. And it's not just as simple as one or
12 two questions. It can be much, much broader in terms of
13 what protections somebody is afforded under their Fifth
14 Amendment rights. And we would request in that regard
15 that if -- if Jennifer is allowed to be counsel for
16 employees, that the Court, you know, have a conference or
17 a hearing to kind of, you know, vet and make sure that
18 she's going to be equipped, not just based on her
19 experience to represent these individuals, but also in
20 terms of, as the Court indicated, you know, she has the
21 requisite discovery and everything else to be able to
22 adequately do her job. Because if that doesn't happen,
23 we are back in front of Your Honor, then we would have
24 already had made, for lack of a better term, a mess on
25 the record that may be difficult to correct.

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1 THE COURT: Okay.

2 MR. KLINEFELDT: And so that would be the only
3 additional request we would make, Your Honor.

4 THE COURT: Well, I think it's more complicated
5 than that, Mr. Klinefeldt, for a couple reasons. One
6 being, in addition to my confidence in Iowa lawyers,
7 knowing their ethical responsibilities with respect to
8 conflicts of interest, I think they also have -- they
9 know their ethical responsibilities with respect to
10 competence. And if they're not competent in a certain
11 area, they have to associate with someone who is. And
12 I'm hopeful that Jennifer "unknown name" is a person who
13 realizes her ethical responsibilities in both of those
14 venues.

15 Also, people in criminal matters, they have a right
16 to pick their own attorneys, right? And I don't know
17 that these people don't want Jennifer to represent them.
18 I see people every day who make bad decisions about --
19 well, not every day because we have lots of really good
20 lawyers in the criminal bar here, but occasionally I see
21 people who pick a worse attorney than one who would be
22 appointed for them perhaps, but that's their right too.
23 And, you know, one of the reasons that I would perhaps
24 need to make inquiry of these deponents on my own is, you
25 know, I don't know that they -- that they want attorneys

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1 appointed for them. So I guess I'm not -- I appreciate
2 your concern, but I'm not willing -- ready at this point
3 to make that step. And whoever is working -- talks to
4 Jennifer -- and I assume you all will. Once Mr. Biss has
5 identified her, I'm sure Mr. Biss will visit with her and
6 let her know that he's not intending to pressure her one
7 way or the other, and that the plaintiffs don't want to
8 pressure her one way or the other, to do what she thinks
9 is right for her clients, and explain probably from their
10 perspective what the documents show or don't and what
11 might be the pitfalls, and she'll probably take that as
12 useful information; and similarly, a friendly call from
13 you, Mr. Klinefeldt, perhaps in the very tone you shared
14 today, about the potential pitfalls of representing
15 people in this area and your views on, you know, what the
16 jeopardy out there is for these various witnesses, may be
17 welcome for her as she, you know, both prepares to attend
18 those depositions and assesses potential conflicts and
19 whether there's a Fifth Amendment right. And her
20 knowing, as I'm making clear today, that if she feels
21 that there is pressure one way or the other or some other
22 concern that she would like to bring to my attention
23 ex parte, I am inviting her to make that ex parte
24 communication. I'll certainly keep a sealed record of
25 it.

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1 MR. KLINEFELDT: Okay, thank you, Your Honor.

2 THE COURT: Okay. So I guess that gets us to
3 paragraph C. Materials provided to new counsel: That
4 discovery regarding the NuStar employees be provided to
5 their new counsel and that this motion and any responses,
6 hearings, or orders regarding this motion be shared with
7 counsel for the NuStar employees. And, reviewing your
8 response, Mr. Biss, perhaps I missed it, but is there an
9 objection to that?

10 MR. BISS: Well, Judge, my response is, I don't
11 know what they're talking about. We have produced 5,000
12 pages of documents in discovery. And one of the things
13 that -- and, Judge, I -- I disagree with Mr. Boyer and
14 Mr. Klinefeldt. One of the things that they're going to
15 try to do is put pressure on this lawyer. They're going
16 to bombard her with a ton of questions and they're going
17 to, you know, again, intimidate her into -- into either
18 making a decision not to do this, in which case then
19 they're going to come back to court and ask you to
20 appoint independent counsel, that -- that -- I'm afraid
21 that's what's going to happen. So materials -- what
22 materials does she -- does she need? I mean, I think
23 that's up to her. I -- you know, at this point in time,
24 she hasn't even met with -- with any of the employees, so
25 if she needs some materials, you know, again, I'm not

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1 sure what she would need. I don't know how to really
2 respond to it, but I certainly don't feel like it would
3 be appropriate to dump 6,000 pages of documents on her at
4 all. I think that's -- that's -- again, that's
5 calculated to further defendants' desire to get her to
6 withdraw. It's hard enough finding somebody to -- to get
7 involved in a case like this. It's hard enough. I think
8 that's what this is designed to do, is to put pressure on
9 her to get her to disengage.

10 THE COURT: And I hope that's not the case.
11 I'm hoping that the point of this is to get someone who
12 is competent and informed so that they can make a --
13 their own assessment of the legal jeopardy of their
14 clients. I'm not sure, I guess, now that Mr. Biss has
15 said that, what materials that plaintiff -- I'm sorry,
16 defendants are thinking they want to provide to the new
17 attorney. I'm guessing it's shy of the 6,000 pages of
18 documents, perhaps documents that are related to the
19 individual defendants' potential jeopardy, whatever I9
20 forms relate to those. It might be the concern here that
21 are -- are they going to be running afoul of a protective
22 order if they show this lawyer that.

23 What's the concern here, Mr. Boyer?

24 MR. BOYER: Sure. I think it would just be
25 something similar to the documents which would be shown

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1 in the deposition in any event, (indiscernible audio)
2 maybe some beyond that. The point is just, as I
3 understand, you know, from my own experience, and
4 certainly (indiscernible audio) to Mr. Klinefeldt, it's
5 very common in these situations when somebody has their
6 own individual counsel, once they've signed
7 (indiscernible audio) protective orders, to provide that
8 information to them, such that (indiscernible audio).

9 THE COURT: I'm not -- you're --

10 MR. BISS: I can't hear Mr. Boyer. I'm sorry,
11 Your Honor.

12 THE COURT: I'm having the same problem.

13 MR. BOYER: Yes, let me -- hold on one second.
14 I will see if I can turn up my Bluetooth. Is that
15 better, Your Honor?

16 THE COURT: Yes, it is.

17 MR. BOYER: Is it better? I'm sorry.

18 THE COURT: Yes, it's better.

19 MR. BOYER: Okay, great. I apologize. Yes.
20 It would be something similar, Your Honor, to the packet
21 of materials that would constitute the exhibits at the
22 deposition, maybe some more beyond that, with the point
23 being to get the person up to speed as to (indiscernible
24 audio). And I understand this general practice of doing
25 so is common, when individuals have counsel that they've

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1 retained for themselves and they're being examined by
2 lawyers; and, of course, if that person signs a
3 protective order, there would be no reason for them not
4 to have it. I would also note that this transcript of
5 the hearing that we've had here today would certainly be
6 of value to the new counsel, for them to consider the
7 issues that brought -- brought us to this moment and to
8 make sure that counsel acts (indiscernible audio). And
9 the last thing I would note is (indiscernible audio)
10 scratch my head and not understand Mr. Biss's concern
11 that I'm going to be lecturing or intimidating anybody to
12 do anything in particular. We want everybody -- we want
13 the person to know the issues that their clients will be
14 facing, but ultimately, they have presumably the
15 fortitude and the judgment to make decisions that they
16 need to make and to advise their clients accordingly.

17 MR. BISS: This is Steve Biss. There's no need
18 for defendants' counsel to be in contact with an adverse
19 party or the adverse party's lawyer. If they want to
20 provide deposition exhibits ahead of time, which is
21 rarely done, if they want to do that, they can do that,
22 but they don't have to be in e-mail contact with her;
23 they don't have to be in telephone contact with her; they
24 don't have to be asking her questions about her
25 representation, whether her clients understand what's

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1 going on. I mean, some of the things that I've been
2 bombarded with in discovery, they don't need to do that.
3 There's no need. The goal is to harass her and get her
4 to disengage. There should be no -- it -- there should
5 be no need for them to have any contact with her
6 whatsoever before the depositions. It's her job.

7 THE COURT: Well, I -- I disa --

8 MR. BISS: And I'm not going to have any
9 contact with her either.

10 THE COURT: Okay, well, I disa -- you know, I
11 thought I expressed myself fairly plainly when I said I
12 disagreed with that. When I said that, you know, if I
13 was in Jennifer's shoes, I'd -- and someone knew more
14 about the underlying case and the potential legal
15 jeopardy of my client, I'm not such a retiring or shy
16 violet that I couldn't take a call from an attorney who's
17 familiar with the case who has thoughts on it. I
18 anticipate that the tone of the conversations, whether
19 it's Mr. Biss calling Jennifer or it's Mr. Boyer calling
20 Jennifer, it will be the same tone of discussion that
21 we've had here today, or Mr. Klinefeldt expressed, and
22 that -- you know, this isn't about browbeating. And
23 that's why Jennifer can call me if she feels she's being
24 browbeaten or being subject to some improper influence.
25 But, you know, these are -- we're all grown-up attorneys,

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1 and there's no reason we can't answer our phone and talk
2 to people who know about our cases.

3 So with respect to the materials that are to be
4 provided to this new counsel, you know, you have
5 exchanged 6,000 documents. I don't know as though you
6 have to copy Mr. Biss on anything you want to send her
7 but at least alert him to what it is. It may be just as
8 easy to, you know, make another copy of whatever letter
9 you're -- or e-mail you're sending to her so that he's
10 aware of what that communication is. So anything that is
11 shared does need to be pursuant to the confidentiality
12 order. If there's some reason that you can't share
13 something with her because of that, we need to discuss
14 that. We can -- we can do that, or she can sign-off to
15 be subject to it if -- if need be, but I don't think
16 there's any reason that this new attorney can't be
17 provided information that will help her in discharging
18 her duties for her -- for her new clients.

19 Okay. There's another thing perhaps on my agenda,
20 but is there anything else with respect to the current
21 motion to compel that anybody wants to bring --

22 MR. BOYER: Your Honor, this is Mr. -- this is
23 Nathaniel Boyer, defendants. Just a matter of potential
24 housekeeping, and this is probably just consisting of the
25 discussion we've had all along, but before Your Honor

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1 were the declarations that were submitted in support of a
2 motion, Boyer declaration, Exhibits A through L, and then
3 reply Boyer declaration. I just want to make sure that
4 the -- I'm correct in understanding that those documents
5 are part of the evidentiary record that's been considered
6 on this motion and, to the extent necessary, I would just
7 offer them into evidence at this moment in time.

8 THE COURT: I have considered those exhibits,
9 and they are part of the court's -- court's record at
10 this point. I don't know as we need to formally admit
11 them otherwise. And I -- I hesitate to ask Mr. Biss, but
12 since we've offered exhibits, are there any objections?

13 MR. BISS: Well, Judge, I'll be succinct. I
14 object on grounds of relevance, I object on grounds of
15 inadmissible opinion, hearsay, I want to preserve all
16 objections under the Federal Rules of Evidence, lack of
17 foundation. And in particular, I do want to preserve the
18 argument that I had raised in the areas that this -- this
19 motion on a grand scale is an effort to -- is an effort
20 to distract from what this case is really about, and that
21 is whether or not the statements in this article are
22 truthful. So I -- I want to be succinct and I intend --
23 I heard Your Honor's admonishment; I intend to be
24 succinct. Those are my objections to all of
25 his declarations and their parts.

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1 (Telephone rings.)

2 THE COURT: Okay.

3 UNIDENTIFIED SPEAKER: That's not me, Your
4 Honor. That's not my phone.

5 THE COURT: It wasn't mine either, but we don't
6 have to sort it out.

7 Since this isn't, you know, the trial in this
8 matter -- I understand you're potentially preserving your
9 objections, to make those at trial -- I'm going to
10 overrule them for the purposes of our hearing today to
11 the extent that the evidentiary rules apply in this
12 hearing, and I am going to consider those.

13 So is there anything else with respect to the motion
14 that you wanted to say, Mr. Boyer?

15 MR. BOYER: No, Your Honor. Thank you.

16 THE COURT: Okay. I guess I -- here in the
17 Northern District of Iowa, unlike some other places you
18 might practice, we're not big on twisting people's arms
19 to settle their cases, and I have never done that, and
20 none of the judges over here suggested that I should do
21 that for any of their cases; and Judge Williams certainly
22 hasn't reached out to me and asked me to do anything like
23 that. So the -- the next observation I'm going to make
24 is merely that; it's just an observation. And I'm not
25 volunteering to be involved in any sort of settlement

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1 discussion, and I'm not even going to ask you to even
2 reply about what you think of my idea or my observation
3 here, because your clients aren't even here to consider
4 it. But, like I said, I have been giving this case a lot
5 of thought. And I -- I can see how each side with
6 competent -- very competent lawyers can spin a version of
7 their of story that, perhaps for Mr. Lizza and Hearst,
8 that they're the ones who are out fighting the interests
9 of the First Amendment and doing investigative journalism
10 and presenting the truth and preserving the reporter's
11 privilege, and, you know, they're -- they're doing the
12 right thing. And I can also hear Mr. Biss saying, well,
13 what about the poor Iowa farmers that are just trying to
14 make a living, they're just trying to, you know, make
15 milk for America's youth, things like that, you know, and
16 here they are being picked on by the big media
17 conglomerate. I can see you doing that. But the party
18 who we can all agree deserves some sympathy in this
19 matter are these deponents. Now, you can both point your
20 fingers at the other about why now they might be subject
21 to these depositions, whether it was the article or the
22 lawsuit. I don't care to resolve that at this point,
23 but, you know, I guess my observation is that this claim,
24 this lawsuit, is now kind of falling on the backs of
25 some -- some people who I think, in ordinary human

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1 circumstances, we'd all have a great deal of sympathy for
2 them. I see people in my courtroom all the time that
3 their only crime is an immigration violation perhaps;
4 they've been found illegally reentering two or three
5 times because they're trying to feed their family. And I
6 think everybody in the courtroom, from the prosecutors,
7 to the defense attorneys, to everybody else, you know,
8 it's -- they're -- they're sympathetic people. But the
9 weird way that this lawsuit has shaken out is that the
10 incentives are really -- are really troubling, that
11 Mr. Biss's clients are at the position that they're not
12 just doing what every other business in America does, and
13 that's, you know, presenting it -- or preserving the I9
14 forms and filling them out the best they can and saving
15 them. They're not promising to the world that none of
16 these people have immigration problems, but because of
17 the way this lawsuit is shaking out, you know, they're --
18 they're sort of making a promise somewhat similar to
19 that, that, you know, there's nothing in here that could
20 make these people have any sort of immigration problems.
21 And on the other side of the coin we've got Mr. Boyer and
22 Mr. Klinefeldt, and neither of them probably particularly
23 wanted to be a federal prosecutor, who are now showing up
24 in Iowa conference rooms asking people questions that
25 could potentially put them in legal jeopardy of having

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1 committed an immigration violation. So it's -- it's just
2 a weird circumstance for us to have gotten to where your
3 clients end up fighting about people you probably both,
4 on a human level, certainly, as their employers, you care
5 about. You don't want to -- you know, and, Mr. Biss, I
6 say that believing that perhaps -- that, you know, there
7 is no reason for them to have any worry of legal
8 jeopardy, but they're still being forced to go in front
9 of, you know, a court reporter, potentially a judge,
10 potentially a jury, when they're not familiar with the
11 system, so it's frightening regardless of what legal
12 jeopardy they actually face. So it's far above my pay
13 grade to speculate on what a claim like this is worth
14 monetarily. It's farther above my pay grade to suggest
15 what it might be worth politically or financially or
16 reputationally or anything else. But if I'm the only one
17 in a position who can suggest it to both the parties, I'm
18 willing to do that; and that is, I'm just wondering if
19 there is a way that the parties could find a way to walk
20 away from a claim that's kind of visiting this sort of
21 mess on people who don't deserve it and don't welcome it
22 and just want to work, and then, you know, go to the
23 Eighth Circuit and fight about the rest of the case that
24 Judge Williams dismissed.

25 Now, Mr. Biss, that may be completely harebrain from

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1 your perspective, and completely harebrain from the
2 perspective of Hearst and Mr. Lizza, for all I know. And
3 again, I don't expect either of you to make any response
4 because you don't have your clients here to talk about
5 it, but I just thought I would throw that out as
6 something that maybe if a third-party threw it at both
7 sides in the room together, from my perspective, it might
8 be something that you could consider separately with your
9 clients, and perhaps from that ripen into something
10 that's useful for resolving this case in a way. And
11 that -- that's my big thought for today.

12 As I said, I will make myself available to Jennifer.
13 You don't have to schedule your depositions around me,
14 but if you do want to alert me to when the depositions
15 are occurring, I'll do what I can to make myself
16 available if the need arises for questions or concerns
17 that arise in the course of those depositions.

18 Is there anything further this afternoon, Mr. Biss?

19 MR. BISS: Judge, just one thing. I'm going to
20 do my best to contact my client to get the name and
21 e-mail that name to opposing counsel, and I'll copy
22 Ms. Steele on that e-mail. But if I can't reach my
23 clients today, because it's Friday -- if I can't reach
24 them for whatever reason, then -- I think Your Honor
25 knows, these people work 24 hours a day. They're

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1 (indiscernible audio) dairy virtually their whole lives.
2 If I can't reach them, I will reach them at the very
3 earliest part of this weekend, one day this weekend, and
4 get it done. I just want to alert you to that, and
5 I don't -- because you indicated I should do it today.
6 If I can't do it today, I'm going to do it just as soon
7 as I possibly can do it.

8 THE COURT: Okay, I appreciate that.

9 Ironically, Ms. Steele held up a sticky note that
10 said "sticky note," because she wanted to remind me to
11 talk to you all about the sticky notes. So I've looked
12 through them. I guess my general impression of them is
13 that they're fairly innocuous. They might have comments
14 that relate to attorney-client privilege communication,
15 but even those strike me as fairly innocuous. What we do
16 with -- with that, I'm not sure.

17 Mr. Biss, I think, as I -- looking back, when we
18 first started talking about the sticky notes, I
19 understand your general response to it was, you know,
20 they don't amount to anything, it's not worth the time,
21 or, you know, they don't mean anything. Whatever it was,
22 it was -- it was not like you were super worried about
23 them. So -- and I -- I think I can provide, with what I
24 said, to Mr. Boyer that, you know, they're probably not
25 something that's very helpful to the defendants, but if

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1 we can't reach an agreement to -- one way or the other
2 to, you know, just turn them over or just forget about
3 them, then it's going to be a lot of work for everybody.

4 I've talked to Amy about the possibility of scanning
5 them in in color and then identifying each of the
6 post-its on them, then separately scanning in the
7 post-its, so that could be like after we've applied a
8 Bates stamp to them, because they're not Bates stamped.
9 We'd have to put a number on them, and then 1A for the
10 first post-it, and then 1B for the next post-it, and then
11 the next document with the post-it -- you know, it's
12 going to result in all of that for what seems is
13 something that doesn't help or hurt either side. But
14 that's kind of where my in camera review left me.

15 MR. BISS: Judge, this is Steve Biss. I agree
16 with you, that the sticky notes are innocuous.
17 Obviously, they are communications at some level of
18 generality between the attorney and the client, and my
19 main concern is that there -- they are -- the lawyers for
20 the defendants argue that I've waived the attorney-client
21 privilege somehow by turning these documents over, and I
22 don't -- I don't even want to take a step down that path.
23 I don't want to get into any arguments about waiver.
24 Quite frankly, the sticky notes and the documents they're
25 attached to aren't going to change the needle I don't

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1 even think by a fraction. So that's my main concern.
2 And if that -- and if that informs some resolution of
3 this -- because I agree with you, making copies of these,
4 scanning them in, is just a colossal waste of time, in my
5 view, so . . .

6 THE COURT: Mr. Biss, are you telling me that
7 every one of those post-it notes is a communication
8 either to or from the Nuneses' attorney?

9 MR. BISS: That's my -- that's my
10 understanding, Judge. And I've talked to both sides --
11 both the attorney, Ms. Bahena, and the client -- and
12 that's my understanding, is these -- these were sticky
13 notes that were instructions given, and the sticky note
14 was just like Ms. Steele did. The sticky note was
15 prepared and shown to the client and put on a particular
16 document for a particular reason.

17 THE COURT: Okay. Well, I mean, if that's the
18 case, then I think that answers my question, that
19 regardless of how innocuous they are, if they are --
20 you're representing to me that they are how the Nuneses
21 and their attorneys communicated about these documents,
22 that -- then they wouldn't be subject to production.

23 Mr. Boyer?

24 MR. BOYER: Yeah, Your Honor. I mean, the only
25 thing I would point out is that if the issue was merely

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1 that plaintiffs' counsel is not concerned about these
2 documents but then just doesn't want it to constitute an
3 issue of a broader waiver, while we would, of course,
4 reserve our rights to make arguments about waiver even as
5 discovery develops (indiscernible audio) whatever we may
6 learn at the depositions of the plaintiffs (indiscernible
7 audio), I mean, we can represent that the mere production
8 of these sticky notes, he's been clear that he still
9 asserts privilege over other things, and the
10 assertions -- and the production of these sticky notes
11 would not constitute a waiver beyond the sticky notes
12 obviously themselves, so I -- I would think that
13 (indiscernible audio) just about a broader waiver, then
14 maybe we can work past that and come to that arrangement.

15 THE COURT: Well, I'll leave that as a
16 possibility, if the two of you want to visit about it and
17 come to an agreement, but ultimately, you know, it's --
18 if it's true and I'm accepting the representation that
19 that's how they communicated with -- with one another,
20 then, if it's communication between a lawyer and a party,
21 then it's privileged and they don't have to produce them.
22 That's -- and I looked at the post-its, and that's --
23 that's conceivably true. So I'll -- that's all I'll do
24 with those sticky notes at this point.

25 I guess the only other issue then is, do we need to

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1 do something with these to preserve our record on them,
2 because right now I've got three manila folders with I
3 think the original documents, with the original post-its
4 on them, so you won't have a good record of what did I --
5 of what it is that I received and reviewed before I sent
6 it back. And, you know, maybe just to preserve the
7 record you're going to want to -- us to make some sort of
8 copies of these. I'd rather avoid it by you accepting my
9 representation that this seems to be a dead-end, but why
10 don't you visit about this outside of my presence and see
11 and let me know the next time we get together or by
12 e-mail what you want us to do. Otherwise, we'll just
13 hang onto them for now.

14 And I do need to leave you for today, so everybody
15 have a good weekend.

16 MR. BISS: Thank you, Your Honor.

17 MR. BOYER: Thank you, Your Honor.

18 THE COURT: You're welcome.

19 (Proceedings concluded at 2:45 p.m.)

20 * * * * *

21 (This concludes the transcription of the audio
22 recording.)

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C E R T I F I C A T E

I, Patrice A. Murray, a Certified Shorthand Reporter of the State of Iowa, do hereby certify that at the time and place heretofore indicated, a hearing was held before the Honorable Mark A. Roberts; that I transcribed from an audio recording to the best of my ability the proceedings of said hearing; and that the foregoing transcript is a true record of all proceedings had on the taking of said hearing at the above time and place.

I further certify that I am not related to or employed by any of the parties to this action, and further, that I am not a relative or employee of any attorney or counsel employed by the parties hereto or financially interested in the action.

IN WITNESS WHEREOF, I have set my hand this 14th day of June, 2021.

/s/ Patrice A. Murray
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