

**United States District Court  
Southern District of New York**

Virginia L. Giuffre,

Plaintiff,

Case No.: 15-cv-07433-RWS

v.

Ghislaine Maxwell,

Defendant.

\_\_\_\_\_ /

**PLAINTIFF'S MOTION IN LIMINE AND INCORPORATED  
MEMORANDUM OF LAW**

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Pursuant to FRE 401, 403, and 702, as well as Fed. R. Civ. P. 37(c)(1) and other related rules, Plaintiff, Ms. Giuffre respectfully, submits this motion in limine and incorporated memorandum of law to bar certain opinions offered by Defendant's [REDACTED] expert Phillip W. Esplin. In particular, Esplin should be precluded from testifying about subjects related to [REDACTED]

### PRELIMINARY STATEMENT

Defendant Maxwell has offered [REDACTED] Phillip W. Esplin as an expert on [REDACTED]  
[REDACTED]  
[REDACTED]. While Esplin may be an expert on certain [REDACTED]  
[REDACTED] the Court should preclude his testimony. This Court's "gatekeeping" function requires it to carefully scrutinize proposed expert testimony for relevancy, reliability, and helpfulness to the jury. *See* Fed. R. Evid. 702; *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 589. "[W]hen an expert opinion is based on data, a methodology, or studies that are simply inadequate to support the conclusions reached, *Daubert* and Rule 702 mandate the exclusion of that unreliable opinion testimony." *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 266 (2d Cir. 2002). In addition, the ordinary rules of evidence remain in play with expert witnesses. "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 . . . exercises more control over experts than over lay witnesses." *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 566 (S.D.N.Y. 2007).

It is also important to note that "[o]ne of the fundamental requirements of Rule 702 is that

the proposed [expert] testimony ‘assist the trier of fact to understand the evidence or to determine a fact in issue.’” *In re Rezulin Products Liab. Litig.*, 309 F.Supp.2d 531, 540 (S.D.N.Y.2004) (quoting Fed.R.Evid. 702); accord *Lippe v. Bairnco Corp.*, 288 B.R. 678, 685 (S.D.N.Y.2003), *aff’d*, 99 Fed.Appx. 274, 275, 2004 WL 1109846, at \*1 (2d Cir. May 17, 2004); see also *In re Initial Pub. Offering Sec. Litig.*, 174 F.Supp.2d 61, 68 (S.D.N.Y.2001) (“As Rule 702’s plain language shows, the opinion of an expert witness is *only* admissible if it (1) assists the trier of fact in (2) understanding the evidence or determining a disputed fact.”) (emphasis in original). In deciding whether expert testimony will be helpful to the fact-finder, the Court must determine whether the testimony “usurp[s] either the role of the trial judge in instructing the jury as to the applicable law or the role of the jury in applying that law to the facts before it.” *United States v. Lumpkin*, 192 F.3d 280, 289 (2d Cir.1999) (quoting *United States v. Duncan*, 42 F.3d 97, 101 (2d Cir.1994)) (internal quotation marks omitted); accord *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir.), *cert. denied*, 502 U.S. 813 (1991); see also *Highland Capital Mgmt., L.P. v. Schneider*, 379 F. Supp. 2d 461, 468 (S.D.N.Y. 2005).

## ARGUMENT

### **I. Esplin Should Not Be Allowed to Offer any Opinions Regarding Subjects Touching on**

Esplin and a colleague, Professor David C. Raskin, d

See David C. Raskin & Phillip W. Esplin, *Assessment of Children’s Statements of Sexual Abuse*, in THE SUGGESTIBILITY OF CHILDREN’S RECOLLECTIONS 153 (1991).

[REDACTED] *Id.* at 155. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at 163.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *See id.* at

156-57 (entered as Exhibit 15 during Esplin's deposition), attached as McCawley Decl. at Exhibit 1, [REDACTED]

In his expert report, [REDACTED] *See* McCawley Decl. at Exhibit 2, Esplin Expert Report at 9. And in his deposition, [REDACTED] *See* McCawley Decl. at Exhibit 3, Esplin Depo. Tr. at 57, 232-33. And, more broadly, in his report Esplin [REDACTED]

[REDACTED]

[REDACTED]

During Esplin's deposition, [REDACTED]

[REDACTED]

[REDACTED] In particular, Ms. Giuffre [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]



[REDACTED]



[REDACTED]

*See* McCawley Decl. at Exhibit 3, Esplin Depo. Tr. at 295-300 (emphases added).

[REDACTED]

[REDACTED]

See McCawley Decl. at Exhibit 3, Esplin Depo. Tr. at 300.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] “not a valid basis for refusing to answer a question during a deposition.” *Balk v. N.Y. Inst. of Tech.*, No. CV 11-509 JFB AKT, 2012 WL 5866233, at \*2 (E.D.N.Y. Nov. 19, 2012) (citing *Kelly v. AI Technology*, No. 09-CV-962, 2010 WL 1541585, at \*20 (S.D.N.Y. April 12, 2010). Indeed, [REDACTED]

[REDACTED] “If there is an objection to a question, the court reporter must note the objection ‘but the examination still proceeds [and] the testimony is taken subject to any objection.’” *Balk*, 2012 WL 1541585 at \*2 (citing Fed.R.Civ.P. 30(c)(2)).

The question then arises of what remedy is available for [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**II. Esplin Should Not Be Allowed to Testify Regarding or Offer any** [REDACTED]

[REDACTED]

[REDACTED]

[illegible]

*See* McCawley Decl. at Exhibit 3, Esplin Depo. Tr. at 52-53.

[REDACTED]

[REDACTED]

[REDACTED] Nor does he have any expertise (above and beyond that of ordinary jurors)

\_\_\_\_\_

in assessing whether, [REDACTED]  
[REDACTED]. Those kinds of determinations belong to the jury and Esplin should be precluded from offering opinions on such subjects. *See Nimely v. City of New York*, 414 F.3d 381, 398 (C.A.2 (N.Y.),2005) (reversing failure to exclude expert testimony on an individual’s propensity for truthfulness because such testimony represented an “attempt[] to substitute the expert’s judgement for the jury’s.”) (internal citations omitted).

**III. Esplin Should Not Be Permitted to** [REDACTED]

At several points in his report, [REDACTED]  
[REDACTED]  
[REDACTED]

*See* McCawley Decl. at Exhibit 2, Esplin Expert Report at 2 (emphasis added).

[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED] *See* McCawley Decl. at Exhibit 3, Esplin Depo. Tr. at 281 (internal quotation added). Accordingly, [REDACTED]  
[REDACTED]

## CONCLUSION

For all of the foregoing reasons, Ms. Giuffre respectfully requests that the Court preclude Court preclude defendant's proposed expert, Phillip W. Esplin, from presenting expert testimony on subjects related to [REDACTED]

Dated: January 6, 2017.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that on the 6<sup>th</sup> of January, 2017, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on the individuals identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

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<sup>2</sup> This daytime business address is provided for identification and correspondence purposes only and is not intended to imply institutional endorsement by the University of Utah for this private representation.