UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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VIRGINIA L. GIUFFRE,

Plaintiff,

v. 15 Cv. 7433 (RWS)

GHISLAINE MAXWELL,

Defendant.

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February 16, 2017
12:45 p.m.

Before:

HON. ROBERT W. SWEET

District Judge

APPEARANCES

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BY: JAY M. WOLMAN

(Case called)

THE COURT: I think we have got to try to bring a little order out of this chaos. Chaos being, by my approximation, five feet of paper, maybe I am wrong, it might be four, but it's between four and five, and myriad motions and so on.

There are some preliminaries I would like to ask you about.

How do you all feel about our trial setting of March 13. Is that real?

MS. McCAWLEY: We are set for March 13 right now, and we actually had on the agenda, Jeff and I spoke about wanting to talk to you about this today. We had originally anticipated a two-week trial. We have set aside our experts, other individuals that need to be here for that time period, so we are planning to go to trial during that time period if it works with the Court's schedule.

There is a concern that we may run long. So one thought we had, I had, was whether or not it would be amenable to the Court to possibly pick our jury on the Friday before, which would be the 10th, so that by the time Monday rolls around we can start the actual trial. Mr. Pagliura has a family wedding the third weekend, so if we roll into that third week that may become problematic for him. So we want to try to find a way to keep the trial date and get through it, and

hopefully we can work with the Court on that.

I will let them speak on that as well, but that's our position, is we would like to go forward on the 13th and proceed forward.

MR. PAGLIUCA: We actually conferred with Mr. Edwards about this last week, and I advised Mr. Edwards that we were going to be filing a motion to continue the trial that's presently scheduled.

The Court can see from the pretrial order that we filed, there is some roughly, by my count, 80 witnesses that have been identified as trial witnesses. When you actually try to tally up the recorded testimony that's been designated, I don't think you could play that testimony within a two-week time frame. So, in my view, this case as currently postured would roughly take about a month to try as currently postured. When we originally scheduled the case, we all agreed it would be a two-week time frame. My daughter's wedding is not the issue in this case. So I don't want that to be an issue.

THE COURT: When is it?

MR. PAGLIUCA: It is before the trial, shortly before the trial, your Honor. So it is not the third week. There was some discussion about opening up the trial, moving it earlier, which is why I said I really need to be at my daughter's wedding, which is March 4, but that's not the issue. The issue is the two weeks that have been set aside are not sufficient to

try this case, number one.

There is another real problem and a prejudicial problem to the defense, should it go as the plaintiffs have currently postured it, which is we have witnesses in England, South Africa, Colorado, and these people all have to come here on a date certain. And the pretrial order, the plaintiff's statement suggests that they may need 10 to 15 trial days, but I can't schedule international witnesses and Colorado witnesses and expert witnesses on a rolling basis because they have to get here and be available to testify.

So there are a plethora of problems with this case proceeding on March 13. And that's sort of the tip of the iceberg, your Honor, because then there are all these other discovery and evidentiary issues that, frankly, I don't believe will be resolved in sufficient time to have an orderly trial here. If we go through all of the deposition designations and then end up with designations, I don't see how anyone can cut together that much designation testimony in a short time before trial in the case. So I predict, if we were to go to trial, we would end up with massive delays, massive juror problems, and delay of time and waste of court resources.

So I think for all of those reasons, your Honor, I am anticipating filing a motion to continue, but that's as I see the lay of the land here. If we had planned for this to be a month long case, I think we would have approached this

differently, but we didn't.

THE COURT: What do you think is a reasonable trial date under your view of the matter?

MR. PAGLIUCA: I would say sometime this summer would be fine, your Honor. June would be fine. We are talking about 90 days from the original trial date. Believe me, we all want to resolve this case, and my client wants to resolve this case. I am not looking for any tactical delay here. I am just looking for a reasonable solution to what I see as a global problem.

THE COURT: OK. Let me ask you this. Would anybody have any problem if we were to start this on April 10?

MS. McCAWLEY: Your Honor, I don't believe at this very moment that that would be a problem. My only issue is I cleared all of my experts. They had to set aside their schedule to be here for that date. So I would hate to commit to something and have one of my critical experts say they have already scheduled something in that time period. The earlier the better for us. We want to get this case tried, but I would have to double-check before I committed our group to that because I just don't know at this point.

THE COURT: I think based on the joint pretrial order, and the outstanding problems that we have, which we will get to, I think we are probably talking about a four-week trial.

How about the defense, April 10.

MS. MENNINGER: Your Honor, I have a trial scheduled in federal court in Colorado beginning on April 24.

THE COURT: When?

MS. MENNINGER: April 24, your Honor. And I have another state court trial scheduled on May 8. So I would ask to set it past those two dates.

THE COURT: That sounds like May 15.

MS. MENNINGER: That's fine, your Honor. We haven't checked with our experts either.

THE COURT: I understand the problem of witness availability and so on, I have got that, but that's something we can work out, hopefully. How about May 15 then?

MS. McCAWLEY: Yes, your Honor. Again, we have two of the partners trying the case with us as well.

THE COURT: Let's do this then. Let's plan on May 15, and I would direct counsel not to take any other commitments, trial counsel, so that we can go forward with that.

So that's first order of business.

MS. McCAWLEY: Your Honor, could I ask one question, just so I am clear when we are scheduling witnesses. Do you typically run your trials five days through or take off Thursdays? In other words, do we get five full days straight or do you usually have a break where we won't be on trial on Thursday, for example?

THE COURT: I don't understand the question.

MS. McCAWLEY: If we start trial on a Monday, do you typically run the full week or do you take a break on Thursdays for these hearings?

THE COURT: No. We would probably run a full week. Friday has sort of a sacrosanct atmosphere, but that's not written down anywhere. It will depend. See how we go and whatever.

MS. McCAWLEY: Thank you, your Honor.

MR. PAGLIUCA: Your Honor, might I ask one other question on the scheduling matter?

THE COURT: Yes.

MR. PAGLIUCA: One of the things that would be very helpful in scheduling would be if we had a system where the plaintiff had a start date and an end date so that I could then contact witnesses and say, here's your day.

THE COURT: There's a lot of things that have to be ironed out. Let's start with a couple.

The Flores motion, I think we should probably have a hearing on the admissibility of the challenged document -- I am calling it that -- because if the document doesn't get in, there is no sense worrying about Flores. So that's one thing.

Secondly, we have got to figure out how you all want to handle the confidential material, any materials that have been designated as confidential, when we get to the trial. And we have got to have some kind of a protocol as to how that's

going to be done.

So I would say counsel should get together and decide when you want to have a hearing on the admissibility issue, the Rodriguez materials, and then, also, how you would propose that we handle the question of confidentiality. Because I hope we are not going to be opening and closing the courtroom. It should be open all the time, as far as I am concerned.

Let me put it this way. I would certainly urge that we remove the confidential designation for any material that's going to be submitted to the jury.

MR. PAGLIUCA: Your Honor, I think that's what our protective order contemplates.

THE COURT: Well, work out how we are going to deal with it. The mechanics are not easy.

Having said all of that, I think what I should do right now, I think we might hear briefly on the motion to intervene and then hear the motion for summary judgment. My sense of that at the moment is that some of the issues that are involved in that motion for summary judgment have to be decided before you really come to grips with the seven experts that have been de-expertized, if that's a word.

So that's the way I would suggest we proceed. So you meet and confer and decide when you want to have a hearing on the Rodriguez documents, and if you can agree on how we are going to handle the confidential materials, bring it back to me

if you can't agree. And at the moment, I will hear the motion to intervene.

Anybody for it?

MR. WOLMAN: Good afternoon, your Honor. Jay Wolman, Randazza Legal Group, on behalf of putative intervenor Michael Cernovich, d/b/a Cernovich Media.

Consistent with how your Honor is approaching trial, saying that it should be open all the time, summary judgment is a proceeding --

THE COURT: I didn't make a decision on that. I said that would be my preference. We have a confidentiality agreement and that's controlling.

MR. WOLMAN: I understand, your Honor.

The orders already here did not require the Court to analyze any material submitted to be sealed. The parties were given the opportunity to freely submit in support of judicial documents. There is no question summary judgment papers are judicial documents. They can determine the outcome of the case. The Second Circuit is quite clear on this. It's settled.

So then the only question becomes whether or not the plaintiffs, or whomever would want the materials sealed, because the motion for summary judgment itself was filed by the defendants who didn't say why it should be sealed.

THE COURT: Let's talk about the motion to intervene.

MR. WOLMAN: Yes, your Honor. It's to intervene for the purposes of unsealing. My client is a member of the media. The Fourth Estate has a First Amendment right to review judicial documents, a common law right of access to the court proceedings as to what is going on, because the Court may find for the defendants. The court may say, no, it has to go to trial. But that is an adjudication and the standard for sealing any of these documents has not been met because nobody has asked the Court for a finding on any of the materials.

THE COURT: Thank you.

MS. SCHULTZ: This is Meredith Schultz for the plaintiff.

This Court has already ruled that the protective order should not be disturbed by a proposed intervenor seeking to unseal and publish self-selected, piecemeal portions of the record. The latest attempt at intervention by a party line defendant failed on the applicable law, as it is little more than an attempt to taint the jury pool and malign the plaintiff in the eyes of the public immediately prior to trial.

This Court's analysis can begin and end with the Second Circuit's presumption against modifying protective orders on which the parties have reasonably relied. The Second Circuit test on this is clear. It's articulated in *In re Teligent*, 640 F.3d 53, and *In re Sep. 11 Litig.*, 262 F.R.D. 274. Courts can only set aside protective orders if they are

improvidently granted or if there is some extraordinary circumstance or compelling need. The proposed intervenors fail to make any showing whatsoever for either prong of this test.

The Second Circuit has been hesitant to permit --

THE COURT: Forgive me, but we are talking about the motion to intervene. You're talking about the substance of unsealing. But do they get in to make that motion?

MS. SCHULTZ: No, your Honor, and this is why.

The First Amendment does not give the proposed intervenor standing to intervene in this case. Nonparties cannot claim a First Amendment infringement on their freedom of speech. The right to speak in public does not carry with it an unrestrained right to gather information. Moreover, the proposed intervenor's brief is completely silent on how the public access to pretrial proceedings would play a significant positive role in the functioning of the judicial process. And under the test set forth by the Second Circuit in *Newsday LLC*, 730 F.Supp.2d, at page 417, he makes no showing of that whatsoever. So already there is no standing to intervene based on the Second Circuit test.

Finally, this Court has already ruled that it's appropriate for these materials to be sealed, and nothing in either the purported intervenor or Professor Dershowitz's joining of that brief put forth any evidence that the law should be disturbed.

THE COURT: Anything further?

MS. SCHULTZ: Before you are going to reach the merits going to the sealing order, the protective order, there is no standing to intervene in this case.

THE COURT: Thank you. Anything else?

MS. SCHULTZ: Yes, if you don't mind, your Honor.

It fails for other reasons under the law. In the entire motion and reply brief, it is wholly bereft of case law in which a motion to intervene and publish confidential information has been granted in a case with circumstances like this at all.

Here, there are clear and compelling reasons for the sealed documents to remain sealed. They involve the sexual abuse and sexual trafficking of minors. Both parties in this case and the Court in its March 17, 2016 hearing articulated clear and compelling reasons why these records should be sealed.

Contrary to the *Bernstein* case cited by the purported intervenor, where records were unsealed after settlement, not weeks prior to trial, these documents were not sealed because of some pedestrian reason like an alleged kickback scheme. There can hardly be a more compelling reason to seal documents than those that depict the sexual abuse and sexual trafficking of plaintiff, other minors and other young women.

Here, there is no showing why some unspecified

interest in revealing documents concerning sexual assault should disturb the protective order. Moreover, there is prima facie evidence here that there is an illegitimate purpose.

There are two purported intervenors -- one intervenor and one purported intervenor moving the Court to unseal these documents right now. Under *Nixon v. Warner,* Supreme Court case, 435 U.S. 598, and *Amodeo*, 71 F.3d at 1044, the purported intervenor's history of being, as New York Magazine termed, a rape apologist and attacking victims of sexual abuse point to a highly illegitimate purpose to get these unsealed documents that relate to sexual assault. Also, Dershowitz's now official joining of this motion shows that both directly and by proxy are acting to ratify Dershowitz's private spite.

Courts in this district and others routinely seal summary judgment materials, such as in *Louis Vuitton v. My Other Bag*, wherein the court held that privacy interests of business figures were sufficient to keep summary judgment documents sealed. Here, the privacy interests are those of underage victims of sexual assault. If this Court can extend protection to summary judgment materials related to business figures, it can certainly protect documents surrounding sexual assault of minors.

Again, I don't think the Court needs to reach the merits because I don't think there is standing to intervene.

Thank you, your Honor.

THE COURT: Anything further?

MR. WOLMAN: I am surprised by the question of standing. Nothing in any of the opposition suggests that my client is not a member of the Fourth Estate. Nothing in the opposition suggests that this is not a newsworthy case. There have been plenty of articles about Mr. Epstein, about this entire proceeding. This has been in the media. So my client is just another journalist looking to find out here what's going on.

Honestly, I am litigating a little bit with one arm tied behind my back because I am being told that the summary judgment motions and papers have information about all these other minors. I wouldn't know that, your Honor. The motion for summary judgment is redacted, pages 1 to 68. Every single exhibit, the opposition, the reply, this is all redacted. This is not part of the public record. The public cannot examine it.

Regardless of my client's relationship with Professor Dershowitz does not negate his standing as a member of the media looking to report on a newsworthy case. If there are particular materials in the summary judgment motion or opposition that are proper to be sealed, we recognize that, but we don't know what they are in order to make that analysis. They are putting the cart before the horse saying it should be sealed or remain sealed when they haven't made a showing of

what it is that should be sealed. So we can't address that issue.

With respect to the Second Circuit precedent, this is not about tainting the jury pool or self-selecting. This isn't even about discovery materials. Mr. Dershowitz's motion was about discovery materials. This isn't. This is about a judicial document, the motion for summary judgment.

Now, the case they relied upon, the documents weren't at issue until after settlement. Well, this is actually more important because this is about what the Court will or will not decide on the ultimate outcome potentially of this case, because defendants could walk out of here winning summary judgment based upon these very papers that the public has no idea what is in them. That distinguishes *Martindale*. It fits as seen in *Agent Orange*. Just because, unfortunately, it does involve allegedly the sexual assault of minors, that does not in and of itself mean there should be a blanket sealing order in all cases.

In fact, *Globe Newspaper* was the Supreme Court case that specifically held that a Massachusetts statute that automatically sealed material relating to sexual assault of minors does not pass muster. We have to look at an individualized, particularized basis as to why these particular materials should be sealed. Maybe they should be, some of them. We are not looking to embarrass or expose the plaintiff.

We are looking to publicize about a defendant who is now sued in multiple cases relating to a pedophilia ring. This is the news. This is what the public is interested in. This is about there is justice in the courts and there is justice in the court of public opinion.

THE COURT: Thank you all. I will reserve decision.

Now I would like to hear on the motion for summary judgment.

MR. PAGLIUCA: Your Honor, this Mr. Gee who will be arguing this motion. I think it might be prudent at this point, given that I think we are likely going to be talking about information that is subject to the protective order --

THE COURT: I think you won't.

MR. PAGLIUCA: OK.

MR. GEE: Good afternoon, your Honor. My name is Ty Gee. The Court granted my PHV motion last week.

We have 80-some-odd witnesses and the Court has talked about four to five feet of material. I think the summary judgment motion, your Honor, might cut to the chase, and the Court has suggested that perhaps it could, at least with regard to the pending 702 motions.

I am here to suggest to the Court that the disposition of this motion for summary judgment, at least with regard to issue number one, certainly can narrow the issues considerably. There would not necessarily need to be 80 witnesses. And with

regard to the other three issues raised on the motion for summary judgment, they would resolve the case entirely.

I would like to talk in order of the issues that I think require the least amount of facts in order for the defendant to prevail on summary judgment. The first had to do with republication.

Your Honor, this Court decided the *Davis* case in 1984, which, frankly, has been consistent with all of the republication law in the state of New York. It requires that for there to be liability for republication, it must be based on real authority to influence the final product. So that's what we, the defense, have been focusing on with regard to this issue. Was there real authority to influence the final product? Authority has a specific meaning. In *Davis*, the Court said that authority means the authority to decide upon or implement the republication. And the Court further said that acquiescence or peripheral involvement in any republication is legally insufficient.

Of course, I have read the response and the plaintiff chafes at this idea that an original publisher should not be liable for republication. Your Honor, I guess I have a couple of responses to that. One is that this disagreement with that rule is directed to the wrong forum. The New York Court of Appeals and the New York law, of course, is what applies here. The New York Court of Appeals already has spoken on this topic.

And in *Geraci*, the court said that *Davis* is right, that you need control and authority over the republication in order for a defendant to incur liability.

I would also say, Judge, that the plaintiff's disagreement with this rule fails to acknowledge the unique history and the robust protection of free speech that the New York Constitution has afforded speakers in the state of New York. This is discussed in the *Immuno AG* case cited in our papers. At the end of the day, Judge, the plaintiff chose to sue in New York, chose to have New York State law apply. The plaintiff doesn't have to like it. They just have to live with it. And the law is very clear as stated in *Davis*.

Now, with regard to the undisputed facts on this question, Judge, there is no question that Mr. Barton, Ms. Maxwell's lawyer, as her agent, caused the January 2015 statement to issue. The e-mail that accompanies that January 2015 statement says, in effect, here is a quotable statement.

Here is what it does not say, Judge. It does not say, you are hereby commanded to reprint and republish what we say here. It doesn't say, if you do not print this quotable statement, we will sue you. It does not say that if you republish the joinder motion allegations, you must also republish the statement. Ultimately, what the e-mail does is that it leaves totally in the discretion of the media whether to publish this quotable statement or not to publish the

quotable statement.

There was some discussion in the papers about whether this was a, quote unquote, press release. The plaintiff wants to call it a press release. That's not what the statement calls itself. As we point out in our papers, it would be quite an unusual press release to make these arguments about how the plaintiff has told falsehoods and then threatened to sue the very people to whom this quotable statement is submitted.

The dispositive fact for *Davis* purposes and for *Geraci* purposes, Judge, is that we have uncontested testimony from the defendant, Ms. Maxwell, from Mr. Barton and Mr. Gow that they did not control the republication of this quotable statement, and they had no decision-making authority over any of the media. You did not see a contest on that question.

In *Davis*, this Court held that if there is no evidence that the defendant controlled republication or made the decision to republish, the trial court has "no option" but to dismiss the case. And here, your Honor, to grant summary judgment.

There was some confusion, I believe, in the plaintiff's papers with regard to the question of republication and the separate question of republication of excerpts from the quotable statement. These are two different points, your Honor, and we submit that the plaintiff loses on both of these issues.

It loses on the first issue because it has not produced any admissible evidence that Ms. Maxwell or her agent had any control or authority over the media or making a decision about the republication of the quotable statement.

On the second issue, with regard to excerpts, we pointed out that, as bad as it is to hold a defendant liable for the republication of a statement, it must ever so be wrong to make that defendant liable for someone else's decision to republish portions of a statement she has issued.

Now, the New York state law on this is set out in the *Rand v. New York Times* case. The undisputed facts with regard to this second point with regard to republication, Judge, is that Mr. Barton drafted the bulk of this statement. If you look at the Barton declaration, paragraphs 13 to 20, this makes it absolutely clear. I understand from the plaintiff that there is some dispute about whether Mr. Barton drafted the bulk of the statement. That's not true at all. If the Court looks at the papers cited by the response, there is no contradiction of Mr. Barton's testimony. Mr. Barton said that, I drafted the vast majority of it. He said that it's possible that someone else may have contributed, but, ultimately, I'm the one who drafted it, and I adopted all of these statements in the January 2015 statement.

It is undisputed, Judge, that Mr. Barton's purposes in drafting the statement on behalf of Ms. Maxwell was two-fold:

To mitigate the damage caused by the plaintiff's salacious statements to the media, in the form of that joinder motion in the CVRA case, and the second purpose was to prevent further damage to Ms. Maxwell by issuing this quotable statement.

Now, the quotable statement is unique, as I pointed out earlier, because it threatens to sue the very people to whom it is sent. And Mr. Barton says that that was intentional. This quotable statement was intended to be a cease and desist. If you republish this plaintiff's allegations in that CVRA joinder motion, you do so at your own legal peril. That was the message that Mr. Barton was delivering in that January 2015 statement.

Mr. Barton also testifies -- and this is actually shown in the statement itself, January 2015 statement -- that he was building, in effect, a syllogism. The syllogism went something like this, Judge:

Premise number one is that this woman has made false statements in the past, referring to the original allegations from as far back as 2011 and the Sharon Churcher articles.

Premise number two was she is doing it again. These allegations, these new allegations in the CVRA joinder motion are different from, and more salacious than, and contradictory of the March 2011 statements that were made to the press, for example, the two Churcher articles attached as Exhibit A and B to our motion.

The conclusion from these two premises, Judge, is found in the third paragraph of the January 2015 statement, that this plaintiff is uttering, quote, obvious lies, the claims are obvious lies.

THE COURT: Meaning all that you have referred to?

MR. GEE: I'm sorry?

THE COURT: Meaning all that you have referred to, the 2011 and the intervenor's claims?

MR. GEE: That's a very good question.

THE COURT: Yes, it is.

MR. GEE: The recipients of this quotable statement, of course, are the 6 to 30 journalists to whom Mr. Gow sent e-mails to. There is no indication whatsoever in the January 2015 statement about which allegations are being referred to and the allegation -- there's two references to allegations in the first paragraph of the January 2015 statement.

THE COURT: Original.

MR. GEE: Right. If we go back to the original allegations --

THE COURT: Those are 2011.

MR. GEE: That's right, Judge.

So let's go back to the original allegations. I'm not sure exactly what are the original allegations. I have no doubt that the recipients of this January 2015 statement had no idea what qualifies as, quote, the original allegations.

THE COURT: I don't care about that. What I am trying to figure out is what claims are we talking about.

MR. GEE: Your Honor, I think that is the problem with the plaintiff's case. Is that we have no idea what we are talking about. Because if we listen to what Mr. Barton is intending, he is not trying to focus --

THE COURT: His intent, it seems to me -- I don't mean to be rude, but I don't know that his intent matters. There is no question but that Ms. Maxwell authorized the issuance of the statement. So it seems to me it's her statement.

MR. GEE: Your Honor, in fact, why don't we just set aside Mr. Barton's declaration for purposes of discussion of this second point about republication.

The *Rand* point is that you cannot take a statement, an excerpt from a statement; you, the republisher, cannot choose which part of a statement to extract from and then republish it and then have the plaintiff choose to sue the person whose statement was extracted. That's the *Rand v. New York Times* point, Judge. And we don't need Mr. Barton's support there because it is uncontested that what happened in this case is that every single one of the republications were excerpts from that quotable statement.

The only point I was trying to make, and I don't need Mr. Barton to make this for me, is that that quotable statement sets up a legal argument that says, she lied here, she lied

here, these are obvious lies.

Now, the *Rand* point is this. You can't take one of the premises, or, for example, a conclusion, and then republish that and then make Ms. Maxwell liable for that republication. She didn't choose to say only premise one. She didn't choose just to say premise two. She chose to say all of it. She is building a point. She is making a point to the media that you, media, need to be responsible, you need to be questioning, and you need to make comparisons between her earlier statements and her new statements, and you figure it out, because if you figure it out wrong, you could be on the wrong end of a lawsuit filed by my client.

What the media did in this case, and, frankly, what the plaintiffs did in their own complaint, paragraph 30, your Honor, was to take portions, in fact, it was words in the complaint, the complaint that your Honor ruled on in that 12(b)(6) motion. They didn't even take the sentences; they literally extracted phrases and stuck it into paragraph 30 of their complaint. But the problem here is, if you do anything like what the plaintiffs did, or what the media did in this case, you can't hold Ms. Maxwell liable for that republication. You change the meaning. How do you change the meaning? You changed the meaning because you excluded premise one or premise two or the conclusion or the entire argument that Mr. Barton was trying to make on behalf of Ms. Maxwell.

So that's the second republication point, your Honor.

Let me move quickly to the pre-litigation privilege. This was argument three in our summary judgment papers, Judge.

We know under New York law that if you're in litigation, a lawyer makes a statement that's absolutely privileged. The question in the *Front v. Khalil* case is what happens if a lawyer makes a statement before litigation has begun? And in that case, litigation did not begin until six months after the allegedly defamatory statements by the lawyer.

So what the New York Court of Appeals says in 2015 is that, because of the possibility of abuse by lawyers -- I can't imagine that -- what we are going to do instead is we are not going to give you an absolute privilege, we will give you a qualified privilege. But it defines a qualified privilege rather carefully, Judge. It says that the qualified privilege that you have is that any statement that a lawyer makes in good faith anticipated litigation, that's pertinent to good faith anticipated litigation, is privileged.

Now, you can look at this as being absolutely privileged or qualifiedly privileged. It's absolutely privileged, in my view, so long as the lawyer can establish that there was a good faith anticipated litigation. Once you have established that point, then it is an absolute privilege. Or you can talk about it in a qualified sense, which is that the lawyer has a privilege to make defamatory statements, but

the privilege is qualified by whether or not the statement is pertinent to good faith anticipated litigation.

Regardless of which way we want to look at this privilege, as articulated in the *Khalil* case, Judge, it applies here. The elements that *Khalil* says we must establish in order to prevail on summary judgment on this privilege, Judge, is it has to be a statement by an attorney or an agent under his direction. We have undisputed testimony, paragraphs 7 to 20 of Mr. Barton's declaration, saying that: I'm the one who engaged Mr. Gow. I am the one who directed Mr. Gow. I am the one who drafted the vast majority of the statement. As to the possibility that other parts were drafted by someone else, I adopted them as my own before I directed Mr. Gow to send out the statement. We have satisfied that.

The second element is that it had to be pertinent to good faith anticipated litigation. Well, the test on pertinence, I don't believe that the plaintiff is contesting this but I will just mention it quickly, which is that in the *Flomenhaft* case, the appellate court said that the test on pertinence is "extremely liberal." And for a statement to be actionable it must be "outrageously out of context."

Well, there is good reason why the plaintiff would not dispute this, Judge. The January 2015 statement was certainly not outrageously out of context. It was fully within context. Be careful if you choose to republish the plaintiff's salacious

allegations because we may end up suing you for defamation. As a matter of fact, in the last paragraph of the January 2015 statement, the word defamatory is used twice, Judge.

The last element is, was there anticipated good faith litigation? Well, that's not a difficult hurdle for us, Judge. Mr. Barton says in his declaration that, as a matter of fact, he did anticipate litigation. He did not have in his eye a particular reporter or medium to bring a lawsuit against. In fact, that was the whole point of the January 2015 statement, was to dissuade the media from republishing plaintiff's false statements. And that's why he made the argument that he did: Do not trust this person, this person tells falsehoods. He could easily see, and he did see, that if the media chose to republish the plaintiff's false allegations, it would be "defamatory," as he says in the fourth paragraph of the January 2015 statement, and he would be entitled to sue. So that certainly is good faith anticipated litigation.

Judge, once we have satisfied those elements, this privilege kicks in and that statement, the January 2015 statement, all of it, becomes non-actionable under the New York Constitution.

It seems to me that the main point of the plaintiff's in opposition to the pre-litigation privilege is this idea that malice applies. Well, Judge, that was addressed in the Khalil case. There is no malice question in the application of the

pre-litigation privilege. It specifically talks about how malice does not apply. In other words, the privilege removing malice that applies to, let us call it, a qualified privilege, a general qualified privilege in the State of New York, does not apply to the pre-litigation privilege. It says so in *Khalil*. And all that we must show to prevail on summary judgment is good faith anticipated litigation that is related to the statement made by an attorney. It could not be a simpler rule. And, Judge, we have satisfied all the standards. We don't even need to rely on Mr. Barton frankly. We have to rely on Mr. Barton to the extent that he is the lawyer who prepared the statement, but that's not a contested fact, your Honor.

I see the plaintiff, as they sometimes want to do, is simply making an argument that, no, he did not prepare the statement, but they have no opposition to Mr. Barton's declaration. They say that Mr. Gow prepared the statement, or Ms. Maxwell prepared the statement. Where is the evidence for that, Judge? There is absolutely no evidence. Mr. Barton's declaration is undisputed on the question of who prepared the statement, who engaged Mr. Gow, who directed Mr. Gow to cause this statement to issue to the media.

Let me move on to the issue of opinion, Judge. This is argument two in our motion for summary judgment.

The New York Constitution, under *Immuno AG* and the

Steinhilber case, requires the application of those four so-called *Omen* factors. I call them the *Steinhilber* factors because *Steinhilber* adopted the four factors in the D.C. Circuit *Omen* case. And these factors, your Honor, all come our way. The plaintiff loses on the question of opinion as well.

On the question of indefiniteness and the ambiguity, the Court brought out the point earlier about, well, what is meant by the word allegations used twice in the first paragraph. First, allegations without an adjective, and then the second time, original allegations. What is meant by that?

Well, here is the indefiniteness and the ambiguity, Judge, that comes right into play. The plaintiff is facing an insurmountable problem, both at trial against the 80 witnesses and in the summary judgment motion, because they are trying to establish that every allegation ever made by the plaintiff is true, and provably true. So here they are chasing windmills trying to prove that every allegation the plaintiff has ever made is true. It can't be done, and I am going to talk a little bit more about that in a moment as far as why it cannot be done. For now I just wanted to talk about the indefiniteness and the ambiguity.

The third statement in the January 2015 statement, the third sentence that is the subject of the complaint, paragraph 30, is Mr. Barton's statement in paragraph 3 that plaintiff's claims are "obvious lies." Well, we don't know what, quote

unquote, claims Mr. Barton is referring to. He just says claims. That is another area of indefiniteness and ambiguity, Judge. The Court doesn't know, the plaintiff doesn't know, and none of the reporters would know what is meant by the words allegations, original allegations, and claims.

As Mr. Barton tells it, he is not trying to go blow by blow to try to rebut plaintiff's allegations. He is going after something bigger. He is going after the plaintiff's credibility. And that comes out in the January 2015 statement itself. It talks in generalities about how her claims have proven to be untrue. Well, how are they proven to be untrue? Well, you don't need Mr. Barton for this. Take a look at the March 2011 statement issued by Ms. Maxwell, and that also was drafted by Mr. Barton, but it doesn't really matter. The point is that in the March 2011 statement, and this answers your question with regard to that statement, Judge, the March 2011 statement, in the very first paragraph of the March 2011 statement, Ms. Maxwell says that the allegations by the plaintiff are "all entirely false." That is to be distinguished from the January 2015 statement when she does not say "all entirely false." She says simply that the allegations are false.

Now, the distinction between the March 2011 statement and the January 2015 statement bear on this question of indefiniteness and ambiguity. It's certainly not indefinite

and it's certainly not ambiguous when Ms. Maxwell says in March of 2011 that these allegations are "all entirely false." It is ambiguous and it is indefinite when she fails to say "all entirely false."

The second issue is whether these three sentences identified in paragraph 30 of the complaint are capable of being characterized as true or false.

Now, this is a kind of binary question that the *Steinhilber* factor two has us look at. But recognizing at the same time that there are some statements that appear factual, but are not when looked at in context -- and now we are jumping to factor number three in *Steinhilber*, the contextual issue.

On the question of whether it could be proved true or false, well, the plaintiff has taken to chasing this windmill of trying to prove whether the allegations are true or false. What I suggest to the Court is that you can't prove whether the, quote unquote, allegations are true or false because they are not identified. You can't prove whether the, quote, claims are obvious lies because they are not identified. If you broke down every single allegation made by the plaintiff into constituent sentences, discrete constituent sentences, you might have over a thousand statements. These plaintiffs have chosen to go on this adventure of trying to prove each one of these allegations is true, and, conversely, that there was no good faith basis for Ms. Maxwell to say that any of them were

not true, to say that any of them were false.

Judge, I don't know that this is an adventure that is going to get us very far. The Court is setting a one-month trial for us to figure out whether these hundreds of allegations made by the plaintiff are true or false, but what I was trying to do, Judge, was cut to the chase. Are there at least two allegations, plural? Because the Second Circuit in the *Law Firm of Foster Case* says that substantial accuracy is the standard here for defendants, not literal accuracy. But what I am trying to focus on is that, if that's the standard, Judge, and we show you literal accuracy, then surely we win on the *Law Firm of Foster Case*.

Judge, may I approach the Court? I have a hand-out I would like to share with the Court.

So that I don't need to discuss this on the record, Judge, I ask two things. Number one, that the Court let me know when it has finished reading this, and, number two, I would like for this document to be included in today's record.

THE COURT: Yes.

MR. GEE: Thank you, Judge.

What I have done here is to do a very simple comparison between the March 2011 allegations, i.e., the original allegations by the plaintiff, and her new, her CVRA joinder motion allegations. The first allegations were given to Sharon Churcher, reporter, for $160,000, where Ms. Churcher

says in the article that she interviewed the plaintiff "at length." In the article it says -- I think it was on page 3 of the article; Exhibit A to our motion for summary judgment -- for a week or better she interviewed the plaintiff.

This was plaintiff's coming-out story, first time that she had publicly disclosed who she was and what has happened to her, supposedly, to Ms. Churcher. Ms. Churcher then writes a very lengthy article, Exhibit A to our memorandum, and the second column, Judge, discusses the plaintiff's allegations on the very same subjects. The first encounter with Mr. Epstein and then the second encounter with Prince Andrew.

As the Court can see from this very simple comparison, anyone with half a brain in January of 2015 could take a look at column 1 and look at column 2 and decide that the original allegations are either true or they are false; the new allegations are either true or false.

Now, here is a situation where we are not talking about opinion; we are talking about remembered fact or, alternatively, manufactured fact. Now, either the plaintiff had these encounters as she described in 2011, or she had the encounters as described in her CVRA joinder motion in December 2014.

As the Court says in its 12(b)(6) order, one of these must be true. This is a binary question, Judge. You can't have both of these being true.

Now, when we are talking about that second *Steinhilber* element, whether something can be characterized as true or false, of course, we are applying the second factor to the January 2015 statement and, specifically, to those three sentences: The allegations are false, the original allegations were shown to be untrue, and the third sentence is, the claims are obvious lies.

Now, when the Court issued its 12(b)(6) order, it did not have the benefit, of course, of Exhibits A and B, the Sharon Churcher articles to our memorandum of law; it did not even have the benefit of the full January 2015 statement; it didn't have the benefit of the original allegations proven to be a true statement from March of 2011, because all that it had before it was what the plaintiff chose to select, excerpt, and put into paragraph 30 of the complaint.

In that context, it was fairly easy for the Court to say, well, accepting these allegations as true, and drawing all inferences in favor of the plaintiff, I, the Court, can see how this idea of an opinion defense doesn't fly, because it says here that the allegations are false. I could see how the Court would say, well, either the allegations are true or they are false. When we place into context the statement, however, we now see all kinds of problems with the plaintiff's case.

The one problem this Court already identified was this question of, What does it mean allegations, plural? What does

it mean original allegations, plural? And what does it mean claims, plural? We don't know, Judge, what that means. And I will predict that if you have Mr. Barton, Mr. Gow, and Ms. Maxwell testify in this case, they will say, we don't know what it means. They will say, we don't know what it means because it is totally vague. That's not the point they are trying to make. They are not trying to make the point in 2015 that everything this plaintiff has ever said is a falsehood. They are making the point that, media, use your head, figure out which of these allegations are true and false before you go around republishing her allegations. That's the point.

When we get to the third factor, the third *Steinhilber* factor, we know that the New York Constitution requires that we consider the full context. And in the *Boeheim* case, the court said that the full context factor is often the key consideration. I think it is here too, Judge. It makes sense, this factor. It is a First Amendment sin to take things out of context and then sue people for it. Everything must be read in context. If you take something out of context, as the plaintiffs do in paragraph 30, you have no idea the environment in which those excerpted statements are being used. But we know now, Judge. We know now because of the Rule 56 record.

We know that in context that January 2015 statement in its entirety actually makes a lot of sense. It actually is something that you can see a lawyer drafting, on one hand, to

try to fend off the allegations he believes are false on behalf of his client, and on the other hand, to tell the media, you republish her false allegations at your peril. That is the context of that statement. As I say, Judge, you don't need Mr. Barton to take a look at the statement and see what he was building there. He is building a syllogism. He is trying to persuade the media don't republish the plaintiff's statements.

As a side note, Judge, on the question of republication, you will note that Mr. Barton gets it right. Mr. Barton doesn't say, if you republish plaintiff's allegations, we are going to sue the plaintiff. He doesn't say that. He says, in the fourth paragraph of the January 2015 statement, if you republish the plaintiff's false allegations, we are going to sue you, the plaintiff. The January 2015 statement is not issued to the plaintiff, although she would certainly be a critical witness if Mr. Barton were to sue the media.

Let's get to the last factor, Judge. The last factor is a broader setting, and the broader setting as applicable to our motion for summary judgment has to do with the question of to whom this January 2015 statement was issued. It was issued to 6 to 30 media. It doesn't really matter what the number is. It could be one, it could be eight, it could be 100 newspaper reporters. The point is that it was issued to this audience, and the audience of reporters, not to the general public. It

didn't make any sense to issue to the general public because he is talking about threatening to sue the media.

So he sends it to the reporters, the reporters who had contacted Mr. Gow and asked for a response from Ms. Maxwell. You want a response? I will give you a response. Here is the response. The response is this woman is telling falsehoods. Her original allegation had proven to be false. She is doing it again. This time they are more salacious, yes. The claims are obvious lies. If you're not careful about republishing, we will sue you. That's the message.

So, Judge, the New York Constitution would require that the jury be instructed, if it gets that far, that this has to be looked at, not as a member of the general public, the January 2015 statement must be viewed from the viewpoint of these journalists who are the recipients, the exclusive recipients of the 2015 statement.

The last argument that we made I can be fairly short with, Judge. This is the argument that discusses the plaintiff's heavy burden. Plaintiff has to prove two things by clear and convincing evidence. One is it has to prove falsity of the three sentences that are the subject of this lawsuit: The allegations are false, the original allegations have proven to be false, and the claims are obvious lies.

By the way, on the "obvious lies" question, Judge, just to step back for a second, on the question of opinion, I

don't see how anyone could look at that sentence, "these are obvious lies," and not see an opinion here. Because what is an obvious lie? That is purely subject to opinion. It certainly can't be proven true or false what is obvious. I would suggest to the Court that the hand-out that I gave titled "Two examples of Plaintiff Giuffre's original and new allegations" is an example of where there are obvious lies.

Now, moving back to this question of what the plaintiff's heavy burden is, they have to prove by clear and convincing evidence -- and we set out what the standard is in the Southern District of New York in our papers what clear and convincing is -- they have to prove falsity and they have to prove actual malice, actual malice being that Ms. Maxwell, when that January 2015 statement was issued, knew that those three sentences were false or had been published anyway through Mr. Gow with reckless disregard to whether they were false or not.

For the Court's benefit, what we tried to do to make this point more salient is, rather than have the Court wade through the hundreds of pages of materials the plaintiff submitted, we look at it from the converse angle, and that is, are there at least two allegations? I use two because I am trying to follow the *Foster* case, and I am trying to show literal truth or literal falsity, and allegations plural means two or more. So if I can find two occasions when this plaintiff has told falsehoods, or has said something that would

lead Ms. Maxwell or Mr. Barton on her behalf to believe in good faith that she has told a falsehood, this case ends, Judge, the plaintiff loses.

In our papers, we actually identified for the Court some of those facts. I won't go into them now because we are on the record and the court hasn't been sealed, but I submit to the Court, Judge, that there is no dispute that at least two, and we know of many more of course, but at least two of plaintiff's original allegations are false. We know that at least two of her new allegations are false. And any way you cut it, this plaintiff has lied, and she has lied in statements to the public. The only way that Ms. Maxwell would know about the statements are the ones that she made to the public. In her own deposition, she has admitted that parts of the Sharon Churcher article, Exhibit A to our memorandum, at least 11 statements that she made are not true.

That's it. The case is over, Judge. We have shown more than one allegation made by this plaintiff is false. Or we don't even have to prove that it's false. We can simply show that we had a good faith basis for believing that it was false, and under *New York Times v. Sullivan*, that's good enough. The case is over, Judge.

I anticipate that what is going to happen as soon as I leave this podium, Judge, is that the plaintiff is going to trot out about a hundred pages of facts and spend most of the

time talking about facts. That's simply an homage to the idea that if the law is opposed to you, go with the facts. I suggest that the Court do what I am going to be doing, which is I am going to be trying to figure out, every time they mention a fact, whether it is something that is of consequence to our motion for summary judgment. I have laid out what the law is. I don't expect them to be talking much about the law. It will be about the facts and about how there must be conflicts. But there is no disputing Mr. Barton's declaration to the extent that it is required for a motion for summary judgment.

So, your Honor, we would ask that the Court enter a motion for summary judgment and we can have our May free.

MS. McCAWLEY: May I be heard, your Honor?

THE COURT: Sure.

MS. McCAWLEY: I would like to start by handing your Honor some materials, if I could approach the bench.

THE COURT: Sure.

MS. McCAWLEY: I did three this time. I remembered.

I want to be very clear to start. We are going to focus on the law, but as you know, at the summary judgment stage, if there are factually disputed issues, it would be improper to be granting summary judgment. So let's talk about both.

To start, there is a plethora of evidence that shows that the defendant sexually abused and sexually trafficked my

client when she was a minor. A plethora. We don't have to prove hundreds of allegations. All we have to prove is that my client was abused and trafficked by Maxwell. The statement comes out two days after the CVRA filing where my client says she was abused and trafficked by Maxwell, and that statement is released and calls her allegations, plural, untrue, obvious lies, etc.

So let's just look at what we have. I am not going to repeat it because it's in your binder, but in there you will see -- and, also, because it's confidential right now -- you will see a number of witnesses who corroborate the story that they were similarly abused by both Maxwell and Epstein. You will see eyewitnesses at the time back in 2000 who defendant asked to assist in this process with. You will see the flight log showing over 23 flights when my client was a minor flying with Maxwell and Epstein. You are going to see a number of witnesses taking the Fifth when asked about Maxwell. You're going to see the house staff talking about how these things occurred, that there was evidence of sexual trafficking and abuse.

More importantly, your Honor, you're going to see the hard copy documents. As my partner, David Boies, often says, the documents don't lie, and in this case they prove the case. It needs to go to the jury. You will see that there are pictures from early 2000. Nothing produced by Maxwell, mind

you; she has produced nothing. From the early 2000s, the first documents we get, after pulling tooth and nail, is 2011. So there is nothing from her for the early years 2000.

But we have pictures, hard copy pictures. We have hospital records from when my client was a minor here in New York with them. We have time and travel records saying call Maxwell. We have message pads. We have the FBI 302, which was taken in 2011, mentions Prince Andrew in it, in the unredacted part, so you can see it there. The victim notification letter, the black book, which we have talked about, and you said with respect to Alfredo Rodriguez, which has a Florida massage section that has a 14-year-old girl's name in it.

So this information is all relevant to the factual issue of whether defendant's defamatory statement that my client lied about sexual abuse that's at issue here.

Your Honor, they have been careful about trying to carve around your February 27th order, and I am mindful of the fact that that was an order that was issued at the motion to dismiss stage, but to be clear, that order has well-reasoned language because it talks about sexual abuse being a clear-cut issue. You either were abused or you were not. You said either Maxwell is telling the truth and she was involved or the plaintiff is telling the truth. It's a factual issue that can be determined by the finder of fact, as you said.

So, your Honor, let's look at this republication issue

because I think that is an issue that they focused on tremendously, and I want to be very clear on that.

First of all, Maxwell issued this press release, not her lawyer Barton. They can file as many self-serving declarations as they want, but the documents don't lie. If you look in your binder, your Honor, you will see the smoking gun e-mail. And I will tell you, we didn't get that e-mail from Maxwell. You will remember that we had to fight tooth and nail to get the deposition of Ross Gow, her press agent. We spent close to $100,000 getting all the way over to London, fighting in those courts, to get the deposition of her agent. They wouldn't produce him. And now they are submitting this affidavit on behalf of Barton.

Your Honor, that document is critical, because what it shows very clearly is it was Maxwell who sent the press release to her press agent, Ross Gow, for publication. That press release goes out from Ross Gow, not from a lawyer. His Web site says he is a reputation manager. He is a press agent who issued a press release. This is not a cease and desist letter. This was a press release. In fact, a press release that said, "Please find the attached quotable statement by Ms. Maxwell." It's a press release telling the press, please quote these defamatory statements.

They have admitted at least 30 different international press folks to defame my client in the international press.

And now they want to say, Oh, no, no, hands off, we are not liable for any of that; we are not liable for our statement being disseminated in the international press; there is republication case law and we didn't control or authorize that. There is no better evidence, your Honor, of control and authorization than sending a press release to the international press saying, please publish this, please publish these defamatory statements so that the international public thinks that this little girl is a liar. So that is what is happening here.

So when we look at the republication law, you will see very clearly, there are cases that we can follow -- and it is New York case law; we have cited nothing but New York case law -- that says it's different when you issue a press release. Look at *Levy v. Smith*, and that's in your binder, your Honor. That case says, yes, there is republication case law that says you have to control or authorize. But issuing a press release so that it goes out to the media, is that control or authorization? It's saying, here is a statement, I want to publish this and disseminate it internationally.

We also have the *National Puerto Rican Day* case, which is the same thing. It was an opinion piece that was paid for and disseminated to the press. And there the court held, yes, there is control and authorization over that dissemination.

Here, your Honor, we have the same thing. We have

Maxwell hiring a paid press agent to issue a statement to the international press with defamatory statements in it, your Honor.

They focus on the *Geraci* case. And that is case law in New York. We looked at that case. We take no issue with that case. That case is vastly different than the situation here. In that case, the republication happened three years later. The initial publication was a statement to a fire commissioner, it was a letter, but then three years later a newspaper published.

This here is vastly different. We have a press release that's given directly to the international media for publication saying, Please, here, attached find a quotable statement for your distribution, your Honor. This is the perfect situation. If the law were otherwise, it would turn defamation on its head. It would mean that you could issue a press release to the international press and then sit back and say, I am not liable because those other publications put the quotes in, I didn't. That's not the law, your Honor. She controlled and authorized this entire process.

So, your Honor, we believe that the cases that they focus on there are distinguishable because they are situations where -- for all of their cases -- where the publication was in a different type of publication, happened years after the fact. Those are the types of republication issues where the court

says, well, that person is not really liable. Three years later a different movie came out with a statement that the original publisher had no involvement with. That's where the republication law lands. But if you look at *Levy* and if you look at the *National Puerto Rican Day* cases, you will see that the courts do hold you liable when you issue a press release, which is what happened here.

So I submit to you that on republication and the publication issue, she is certainly liable for publication of the initial statement to the 30 international press, and then thereafter she is liable for those being quoted.

Now, she says, well, there is another issue, because if it's excerpted or quoted or edited in any way, under *New York v. Rand*, I am not liable. *New York v. Rand* is a case that involves an interview of a singer, and it's a long interview that takes place, and then the publication that comes out takes statements from that interview and changes the words. So it uses different words than what happened during the interview.

That's not our situation here, your Honor. The defamation that we have gone after, that you see from our expert, Jim Jansen, has gone after, are the quoted statements. That's what we are looking at. The press release has those statements; those being quoted by the international media that she sent it to, she is liable for that. It's not a *Rand* situation. This is exact quotes from her statement that she

said, Please find a quotable statement. She didn't say, you have to quote the whole thing. She said, Please find a quotable statement. And what are they going to quote? The defamatory pieces, the obvious lies, the things that make my client look like a liar when she is not.

So that issue, in my view, is something that is clear that there was publication, and that if anything is deemed republication, it was clearly authorized by the defendant.

So let's look at the second issue that they raise, and that is they raise the issue of the pre-litigation privilege.

Now, your Honor well knows, I know you're familiar with the pre-litigation privilege because you have had cases that have talked about it. But with respect to the pre-litigation privilege, that was crafted to handle situations like when, for example, a lawyer sends a cease and desist letter in advance of litigation. If you look at the *Khalil* case, which they talk about, that case was a situation where an employee had stolen intellectual property and the lawyer sent a letter saying, this person has stolen this intellectual property, we want them to cease and desist and give our property back. Then that person sued for defamation.

We are in a remarkably different situation here. We are not in a pre-litigation context here, no matter how many times they want to say it. No matter how much they want Barton to throw himself on the sword and say, oh, this is all about

litigation, it's not, your Honor, because the documents don't lie. So if you look at the documents, you will see it's not about pre-litigation.

The *Block v. First Blood* case, which is your case, your Honor, in that case you denied summary judgment saying, to prevail on a qualified privilege defense, the defendant must show that his claim of privilege does not raise a triable issue of fact that would defeat it. Here, we clearly have triable issues of fact. We believe that there is no pre-litigation privilege that's applicable, but at a minimum, we have triable issues of fact.

So with respect to pre-litigation, let's look at what the facts are. The facts are that this statement, which they say we haven't contested or disputed, that's not correct. We submitted the statements themselves, those e-mails that show that Maxwell is sending the statement; not her lawyer, Maxwell. The documents don't lie. So Maxwell sends a statement to her press agent, which gets issued to the international press. They say, no, the purpose was -- let's rephrase that, the purpose was that we really were thinking about suing the international press. Maxwell in her deposition said she never sued the international press. So this never occurred. There was no lawsuit that came out of this.

If you look at what the statements are, if you accepted that, you would be able to say, someone can defame

someone freely, a nonparty, included in a statement, issue it to the international press and then stand back and say, oh, well, my lawyer really intended to sue those other entities, those publications, so therefore I get protected by the pre-litigation privilege. That's not the law, your Honor. It doesn't apply here. This was Maxwell issuing a statement for her own benefit, to try to clear up her reputation, because she had been implicated in a very serious sexual trafficking and sexual abuse situation. That is what that statement was about. It was not about litigation. It was about taking down my client and her reputation and trying to build back defendant's reputation.

And while we are on that, your Honor, they admitted that by submitting Barton's declaration, they waived the work product privilege. We contend that they also waived an attorney-client privilege. They have submitted a privilege log to you that you have reviewed that had documents on it, communications between the two of them. We should be able to see all of that. Certainly, if they waived the work product privilege, where are the drafts of this document, where are the e-mails back and forth on how this was created? That's all factual issues. We are entitled to see that.

So, your Honor, I submit to you that there is no pre-litigation privilege here. This was not done for the purposes of litigation, regardless of what they are doing as a

post hoc self-serving declaration, and that they don't meet the case law for that either. If anything, there is clearly a questionable issue of fact as to that.

So, your Honor, I would like to turn now to the issue of whether or not -- they have now argued again, as they did at the motion to dismiss stage, that these statements are not fact, they are opinion.

So, your Honor, if you look at that, that argument turns logic on its head. Mr. Gee said today, these folks would have to prove a hundred allegations are all true in order to win this case. That's not the case, your Honor. We only have to prove, because her statement says the allegations that my client has made are false, we only have to prove that my client was sexually abused and trafficked, which we can do. We prove that, we win this defamation case. She defamed my client by calling her a liar about sexual abuse and trafficking claims.

Your Honor, when we look at whether that's fact or opinion, you were very clear in your motion to dismiss order, talking about the nature of calling someone a liar, and that being able to be proven true or false when it relates to sexual abuse. You said either Maxwell was involved or she was not. This issue is not a matter of opinion, and there cannot be a differing understanding of the same fact that justify diametrically opposed opinions as to whether defendant was involved in the plaintiff's abuse as plaintiff has claimed.

Either plaintiff is telling the truth about her story and defendant's involvement or defendant is telling the truth and she was not involved in the trafficking and ultimate abuse of the plaintiff. The answer depends on facts.

Your Honor, that is the case. So let's look at this four-factor test that they talk about, because that four-factor test, which you did analyze in your motion to dismiss papers as well, but that four-factor test bodes clearly in favor of finding that this is fact and not opinion.

If you look at the first factor, the statement has to be definite and unambiguous, clearly, the statement is definite here. She is calling my client a liar. She is saying her claims of sexual abuse and trafficking are obvious lies. So in that context, there is definiteness, it is not ambiguous. She is either telling the truth or she is not. That's it.

With respect to the second factor, it says the statement must be verifiable and be capable of being proven true or false. That's clearly the issue here. It is capable of being proven true or false as to whether or not my client was sexually abused and trafficked by Ms. Maxwell. Again, you have a plethora of facts in the binder that show, we believe, that that is the case. But, nevertheless, it's not an opinion. It is a factual issue as to whether that occurred.

The third is looking at the entire context of the statement and to compel a finding of whether it's a statement

of fact or opinion. Again, the context of this statement -- and that bleeds into the fourth factor -- is a press release. This was a press release by Maxwell. It wasn't an opinion piece. It wasn't a letter to the editor. It was a press release, your Honor, where Maxwell's goal was to put false facts into the public to try to repair her reputation.

So, your Honor, we contend that under that four-factor test, it is absolutely clear that this would be fact and not opinion.

The last issue that they raise -- they skipped a few things, but the last issue that they did raise was the issue of malice, and they say that we would be unable to prove in this case malice.

First, they haven't met their burden for showing that we have to prove malice. But if we do have to prove malice, we absolutely can, because what this statement is about is sexual abuse, and the person who made the statement is Maxwell. So if Maxwell abused my client, and then knowingly made a statement that my client was lying about that abuse, that those claims were obvious lies, that establishes malice. It's knowledge on the part of the person making the statement. She made it intentionally to try to deflect from her own self, and she would be responsible for that action, and we would have established malice.

So with respect to that issue, we absolutely can

establish malice without question. The only question is whether we have to establish that.

Now, I just want to touch one more moment on this idea they have just raised in the summary judgment papers that they only have to show that two issues are false, and if they show that, they win. That's not the case, your Honor. The statement is about any of the allegations. So she is saying my client's allegations are untrue. So if we prove that those allegations of sexual abuse and trafficking are true, that my client was sexually abused and trafficked, we win. That's defamatory. So they have just flipped logic on its head with respect to this, oh, we can prove two things and then we win. That's not the case here.

But regardless, bottom line, your Honor, this is a case that must go to the jury. There are clearly questions of disputed fact. They don't qualify for the issue of republication. They don't qualify for the pre-litigation privilege. Malice is a factual issue that goes to the jury, your Honor. So summary judgment should be denied, and we are entitled to take this case to a jury.

Thank you, your Honor.

MR. GEE: Thank you, your Honor.

Well, I didn't give the plaintiff enough credit. I thought they were going to try to prove this case, but instead, they are going to try to prove a different case.

I didn't think that it was possible to prove, for example, all of the allegations the plaintiff made to Ms. Churcher in Exhibit A and B were all true. I didn't think that they were going to be able to prove that all of the allegations made by the plaintiff in the CVRA joinder motion are true. And put a different way, I didn't think that they were going to be able to prove by clear and convincing evidence that Ms. Maxwell, through Mr. Barton, could not have in good faith believed that at least two of these allegations, the original and the new, were false. I didn't think they could do that.

I think what Ms. McCawley has just done is implicitly confirm that they can't do that, that's why they are not going to do it. Instead, they have changed the case, Judge. And I want to spend a little bit of time on this because I think it's really important for the parties and for the Court, and ultimately, if this case makes it that far, to the jury.

I heard Ms. McCawley say multiple times that what this case is about is sexual abuse. My client was sexually abused and trafficked, that's what we have to prove. That's coming right out of Ms. McCawley's mouth.

Judge, they brought a defamation case; they didn't bring a sexual abuse case. The question is not whether Ms. Maxwell sexually abused anyone. The question is whether Ms. Maxwell defamed someone, specifically, the plaintiff. And,

judge, they don't cite any case law for this idea that if you're alleged to have defamed someone about the underlying transaction, that we get to prove whether the underlying transaction is true, and if it is true, then we win. That's not the case they brought.

The allegation in the complaint, the requirement of defamation law in the State of New York is that, if you, the plaintiff, allege that you have been defamed, your obligation, or burden as the defamation plaintiff, is to prove that the allegations made against you are false.

Furthermore, if you, the plaintiff, are a public figure, as the plaintiff in this case must certainly be -- a person who writes books, a person who gives out interviews is a public figure. A person who establishes a nonprofit organization for this very purpose of making public this idea of assisting victims of sexual abuse, I can't imagine a more limited public figure set of facts. But setting that aside, the defamation law in New York says, if you bring a defamation claim, you have to prove the defamation. And if you're a public figure, as the plaintiff is, then you would also have to prove actual malice. You have to prove falsity by clear and convincing evidence, falsity of the allegedly defamatory statement, and you have to prove actual malice.

Now, I don't know what case Ms. McCawley is trying. She is the one who brought this lawsuit. She has to prove

defamation. If she proves that the plaintiff was sexually abused, in fact, if I were to concede right now that the plaintiff had been sexually abused, does that mean that she wins the defamation case, Judge? I think not. She has said that three sentences in the January 2015 statement are false, are defamatory. One is, the allegations are false. Sentence number two is, the original allegations have been proven to be untrue. And the third sentence is, the claims are obvious lies.

Well, one thing that I took away from Ms. McCawley's conversation with the Court is that she didn't answer your question, Judge. The question was, What does it mean when the January 2015 statement says allegations twice in the first paragraph? What does it mean in the third paragraph when Ms. Maxwell, through Mr. Barton, says the claims, plural, are obvious lies? Ms. McCawley doesn't answer the question because, as I predicted the first time I was up here, there is no answer to that question. She doesn't want to answer the question because she can't answer the question. The Court can't answer the question, and I guarantee you I cannot answer the question. No one knows what that means. As I said before, there is no witness who will testify in this courtroom about what that means, what specific statement is being referenced. It doesn't exist.

So what does the plaintiff do? What the plaintiff

does is, since we can't figure out what it means, what we will try to do is just prove that she was sexually abused. In the words of Ms. McCawley, I am going to prove that my client was sexually abused and trafficked. Well, that doesn't satisfy your burden of proving defamation. The fact that the plaintiff was sexually abused and trafficked? No.

To use Ms. McCawley's words, there is a plethora of allegations. Take a look at Exhibits A and B. Take a look at the CVRA joinder motion. Talk about plethora. Judge, this plaintiff has said at least 100 different things in all these news articles, the original allegations, and then another couple of dozen in the CVRA joinder motion. Well, which of these allegations is the plaintiff going to prove, if true, in order to show that my client's statement from January 2015 is false?

I think what we hear from Ms. McCawley is we are not going to do that. Well, Judge, if we are not going to do that, can we please have summary judgment because they can't prove their case. You can't prove your case by showing that Ms. Giuffre was sexually abused and trafficked.

On the republication issue, Judge, Ms. McCawley says there is no better evidence about the authorization and control of republication other than the words in Mr. Gow's e-mail, "please find this quotable statement," on behalf of Ms. Maxwell.

Well, that's not true, Judge. That sentence from Mr. Gow tells us two things. One is that this is a statement written on behalf of Ms. Maxwell. This is not Ms. Maxwell's statement per se. It is written on behalf, by her agent.

Now, the reporters may very well have thought that Mr. Gow prepared the statement, but it doesn't really matter because we have Mr. Barton's declaration saying that, I prepared the statement.

But with regard to the issue of republication, Judge, it says, here is a quotable statement. It doesn't say, as Ms. McCawley recharacterizes it, please publish the statement. Actually, you won't see those words in that January 2015 statement. It doesn't say, please publish this statement. It says, here is a statement.

And Ms. McCawley wants to put all of her eggs into the question whether this is a press release or whether it's not a press release. Judge, that seems like an irrelevant road to go down to try to characterize something as a press release or as not a press release.

How about we look at it this way? It is a statement that was issued to 6 to 30 media. We should look at it that way because that's what the undisputed facts are. It wasn't issued to anyone else.

What is also true is that the press were free to do with that statement as they wished because we, Ms. Maxwell and

her agent, did not control what the media did with that.

I hear Ms. McCawley try to characterize the authorization and control law relevant to republication. I guess I could ask the Court to disregard what Ms. McCawley and I say altogether because we have laid out the law. If the Court looks at, for example, footnote 3 on page 3 of our reply brief, we cited to five, six cases from the federal district courts in New York.

In *Egiazaryan*, the 2012 case, it says the original publisher is not liable for republication where he had nothing to do with the decision to republish and he had no control over it. Well, those are facts, Judge.

In *Egiazaryan* II, same holding. That's a 2011 opinion.

In *Davis v. Costa-Gavras*, which is this Court's 1984 decision, what does the court say? Under New York law, liability for a subsequent republication must be based on real authority to influence the final product, not upon evidence of acquiescence or peripheral involvement in the republication process.

Judge, we are within *Davis*. We didn't have any influence over the final product. At best, we had acquiescence or peripheral involvement, but *Davis* says that's not enough.

In the earlier *Davis* case, from 580 F.Supp., at 1094, it says the original publisher is not liable for injuries

caused by the republication "absent a showing that they approved or participated in some other manner in the activities of the third-party republisher." Well, we win on that case, Judge. We certainly didn't participate or approve of any republication or any third-party republisher's decision to republish.

Then we have the *Croy* case from 1999, "The original author of a document may not be held personally liable for injuries arising from its subsequent republication absent a showing that the original author approved or participated in some other manner in the activities of the third-party republisher."

Then, finally, we have the *Cerasani* case, also from this court, 1998, "A liable plaintiff must allege that the party had authority or control over or somehow ratified or approved the republication."

Well, we win on that case, Judge.

So I appreciate Ms. McCawley's attempt to recharacterize and redefine what authority and control are, but it's totally unnecessary because the federal courts and the state courts have made it clear what kind of control or authority is required.

With regard to the pre-litigation privilege, Judge -- I'm sorry. Let me step back on the republication issue. There was a mention of the *Levy* case and the *National*

Puerto Rican case, two New York intermediate appellate court decisions. Once again, the plaintiff fails to acknowledge that those, like this Court's opinion back in October, are 12(b)(6) cases. They are not summary judgment cases, not relevant to this proceeding, Judge. Those are cases where, actually, the courts made inferences of control and authority based on the pleaded facts. Of course, the Court isn't able to do that in a Rule 56 proceeding.

On the pre-litigation privilege, Judge, the statement made by Ms. McCawley is that Ms. Maxwell sends the statement. She is the one who drafts the statement. She is the one who prepares the statement. She points to a, quote unquote, smoking gun. What is the smoking gun Ms. McCawley is referring to? This e-mail that they spent upwards of $100,000 to get.

Well, Judge, the smoking gun turns out to be nothing but a peashooter. This smoking gun is an e-mail from Ms. Maxwell to Mr. Gow saying this is the statement. That's it. It is the actual transmission. It was the actual approval by Ms. Maxwell of the statement that Mr. Gow ultimately sends to these 6 to 30 newspaper reporters.

Well, since Ms. McCawley wants to call this a conflict of facts and wants a jury, then it's her burden to show that there is a conflict between the smoking gun and Mr. Barton's declaration. Well, where is the conflict, Judge?

Ms. Maxwell, in sending out that smoking gun, didn't

say, Mr. Gow, I just drafted this statement without the help of any lawyers, would you please issue the statement? That's not what Ms. Maxwell said. She said, this is the statement, this is the agreed statement. That's perfectly in consonance with Mr. Barton's declaration. What does Mr. Barton say? Mr. Barton says, I drafted the vast majority of the statement, and to the extent that anyone else contributed to drafting the statement, I adopted it and I approved it as my own, and I am the one who directed Mr. Gow to issue the statement. Those are not inconsistent. That's not a basis for a jury trial, Judge.

Finally, we get to this issue of the plaintiff having to prove falsity by clear and convincing evidence, actual malice by clear and convincing evidence. There was very little discussion of this by Ms. McCawley, but she points out that we are not going to try to prove actual malice as to any discrete set of statements made by our client. We are not going to try to prove the truth of her allegations that makes Ms. Maxwell's January 2015 statement false. We are not going to do that. What we are going to do instead, Judge, according to Ms. McCawley, is we are going to prove that our client was sexually abused and trafficked.

This returns us to the beginning, Judge. It is crucially important to the parties that they know what they are litigating, and I see two ships passing in the night on the central question in this case. On the one hand, the plaintiff

says we are proving a sexual abuse case; we are going to prove that our client was sexually abused and trafficked. We on the defense are trying to prove -- well, we have no obligation to prove anything, but here is what we are defending against. We are defending against a defamation claim. The defamation claim, as alleged in the complaint, paragraph 30, says there are three sentences in your January 2015 statement that are false. So, naturally, we have focused on those three sentences in the 2015 statement to see whether they are true or false.

If we, Judge, the parties, the lawyers cannot agree on that central question, it may not take four weeks to try this case, it might take eight weeks to try this case. They are proving something that we have no obligation to defend against. We are defending a defamation claim because that's the claim that they brought.

So, Judge, we think it's just imperative that the Court step in on this central question of what is at issue in this lawsuit, this defamation lawsuit.

THE COURT: Thank you all. I will reserve decision.

I think we will leave the other motions for consideration after I resolve the summary judgment.

MS. McCAWLEY: Thank you, your Honor.

(Adjourned)