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

Plaintiff,

v.

GHISLAINE MAXWELL,

Defendant.

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New York, N.Y.

15 Civ. 7433(RWS)

June 23, 2016
12:19 p.m.

Before:

HON. ROBERT W. SWEET,

District Judge

APPEARANCES

BOIES, SCHILLER & FLEXNER LLP
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MEREDITH L. SCHULTZ

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LAW OFFICES OF GREGORY L. POE PLLC
Attorneys for Respondent Jeffrey Epstein
BY: GREGORY L. POE
RACHEL S. LI WAI SUEN

(Case called)

THE COURT: Extending discovery.

MS. McCAWLEY: Yes, your Honor. This is Sigrid McCawley on behalf of the plaintiff, and we had filed a motion for additional time to complete six depositions. Your Honor may recall that we received an order on Monday that allowed for alternative services to three of the witnesses that we were seeking to depose. Our discovery cutoff right now is set for June 30th, which is I believe next Friday, if I'm correct. So at present we have six witnesses that we still need to depose, the three that we had alternative service for, and then we have Mr. Ross GOw, who was the defendant's agent who issued the defamatory statement, Mr. Brunel --

THE COURT: How much time do you want?

MS. McCAWLEY: Sorry. We were requesting 30 days to complete those depositions to coordinate with their counsel and then coordinate with the defendant's counsel and get those set, and I believe we can do that without altering the Court's deadline for a trial, which is set presently for November -- I'm sorry, October 17th.

THE COURT: OK. What is wrong with that?

MR. PAGLIUCA: Your Honor, in theory, initially there is nothing wrong with that. It seems to me that we're not going to complete a variety of discovery issues by July 1. The problem, I think, your Honor, is the cascading effect of that

extension.

And if I could digress for a moment and just a moment? When we were here I think in March, the Court raised the issue of was this enough time for discovery at that time. I told the Court I didn't think so, and I didn't think that the trial date was reasonable as a result of what I perceived to be problems going forward with discovery. Counsel on the other side opposed my suggestion as to extension of time at that point and we proceeded. The Court agreed with the plaintiff and not with me.

The problem I see, your Honor, is that now we are scheduled to have expert disclosures due in July, dispositive motions in August, and a trial date in October. I don't believe that it is feasible, if we continue discovery out until the end of July, to have expert discovery done by the end of August. I don't believe it is going to be feasible to have dispositive motions completed in the time set by the Court, and all of that is going to push into whether or not we have an October 18th trial date.

I think the Court also needs to consider, your Honor, and of course is now familiar with the volume of paper that gets filed in this court on a regular basis at all hours of the day and night, and I anticipate that there are going to be significant evidentiary issues that the Court is going to need to rule on in advance of trial. The Court sees a harbinger of

those issues today, I think, as a result of these subpoenas. All of that tells me that the prudent course of action in my view is to sort of try to sit down and rework some of these discovery deadlines with an idea that we're going to actually have realistic dates.

THE COURT: OK. Good. I'll extend the deadline 30 days. I'll direct counsel to meet and confer and see if they can come up with a schedule that both sides will agree upon.

Second, the plaintiff wants to maintain certain confidentiality designations. What is the problem?

MS. McCAWLEY: Yes, your Honor.

So, with respect to our revised Rule 26 disclosures, we, in order to divulge all information relevant to the case, had a list of individuals on there who are allegedly victims of sexual abuse themselves as minors or witnessed things. So we designated under our protective order in this case that Rule 26 disclosure as confidential. It was challenged under the Protective Order. Once it is challenged, we have a ten-day window to file something with the Court. So we filed our motion for the protective order.

On Friday of this past week, on the 17th, they issued a new -- defendants issued a new Rule 26 disclosure with 42 new names on it, those of which were on our disclosures, without marking it as confidential. So I sent them an email just asking them to hold that as confidential until the Court has an

opportunity to rule on whether or not those names can remain confidential under the protective order. So that is the status as we are right now.

So we are awaiting a ruling. We believe those individuals should be protected under the Court's protective order and those names kept confidential during the course of this, and it is my understanding that defendants oppose that position.

THE COURT: What is the attack?

MR. PAGLIUCA: Well, your Honor, under the terms of the protective order, certain categories of information is likely confidential. People's names, in my view, are not confidential. I didn't choose to list these folks in what I understand is a Rule 26(a) disclosure, which is a good faith disclosure of people who may have information relevant to the claims or defenses in the case. That's their listing. All it is is the names of people.

I have absolutely no idea or ability to understand why someone's name could be considered to be confidential. It is their name. They use it every day. They walk around with it. They have a driver's license with it. I don't understand how names in a 26A(a) disclosure could be deemed confidential.

And what I view this as is just simply, you know, another step in the process here of preventing access and use of information.

THE COURT: Well, you've got the information.

MR. PAGLIUCA: I do have the information.

THE COURT: Yes.

MR. PAGLIUCA: Why is it confidential?

THE COURT: Why?

MS. McCAWLEY: May I address that, your Honor? Did you want me to address that?

THE COURT: Yes.

MS. McCAWLEY: Sorry. So with respect to the reason why individuals who may have been victims of sexual assault would be confidential, there is case law that we cite in our brief, Doby v. Evans, which deals with using, for example, pseudonyms of victims --

THE COURT: Let's just -- I think we can shorthand in the context of the patois of this case.

Victims. OK. You want to maintain the confidentiality of the identity of the victims. OK?

MS. McCAWLEY: Yes, your Honor.

THE COURT: Beyond that?

MS. McCAWLEY: Right. Beyond that we are fine.

THE COURT: OK. All right. That will be maintained.

MS. McCAWLEY: Thank you.

THE COURT: Apple and Microsoft. Let me ask the defense, seems to me the law bars the subpoenas.

MR. PAGLIUCA: I don't understand why, your Honor. I

think it's a legitimate Rule 45 subpoena. I don't understand why it would be barred under Rule 45. There is no objection by the providers of the information. They have indicated to us that if there is a release that's provided to them by the plaintiff, they will turn over the information. And I don't understand what the problem is. This is information indeed, your Honor, that the plaintiffs are required to produce to us under our discovery requests and have not, which resulted in these Rule 45 subpoenas. After the Rule 45 --

THE COURT: Well, as far as Apple, my understanding about Apple is that with respect to that, that material has been reviewed by counsel and everything has been turned over that's appropriate.

MS. SCHULTZ: That is correct, your Honor.

MR. PAGLIUCA: Well, if that's true, your Honor, then the issue is moot and I agree.

THE COURT: If what?

MR. PAGLIUCA: The issue is moot if that is true.

THE COURT: So Apple is out.

Now, the problem with Microsoft, I'm not quite clear.

MR. PAGLIUCA: The problem for me or the problem for them?

THE COURT: The problem for the plaintiffs.

MS. SCHULTZ: Thank you, your Honor. Meredith Schultz, from Boies, Schiller & Flexner, on behalf of Ms.

Giuffre. My client had two email accounts with Microsoft. They are personal emails accounts. We have not been able to access that.

THE COURT: Why not?

MS. SCHULTZ: Well, it appears for one -- there is one called live.com, and it appears for that, that that has been administratively deleted. I don't have personal knowledge of that, but when you put in the email address to try to recover it, I get a message saying we don't recognize this one, "this one" being the email address. That is Exhibit 1 to our brief on this matter.

We wrote a letter to opposing counsel citing some governing provisions of Microsoft's email policy that indicates that due to inactivity they delete accounts after a certain amount of time. It's my understanding that that has happened to that account but I can't say so for sure. So we are unable to access that whatsoever.

The second account is a hotmail.com account. We have also been unable to access that. It appears that it still exists, but despite multiple and diligent attempts to get into that account, we have been unable to. And I have been involved in those attempts myself personally. Accordingly, we have captured and produced every electronic document to which we have access.

And I'd like to speak a minute about the legality of

the Microsoft subpoena. Even under Rule 26, it is a hopelessly broad subpoena. It is abusive civil discovery and on the face of it appears to violate the Electronic Communications Privacy Act and the Stored Communications Act, federal laws. The email seeks -- excuse me. The subpoena seeks every email that has ever been sent to that account or sent from that account. That's every single personal email. This is without limitations, without exceptions, without a timeline. And pursuant to these subpoenas, these emails are to be turned over to defense counsel. So, plaintiff's counsel would not have an opportunity to review for attorney-client privilege email, review for relevance, and it wholly circumvents the protections of the discovery process, which is why courts who have looked at this issue have consistently rejected these broad subpoenas.

Defendants know that they are not entitled to every single personal email plaintiff has ever sent or ever received in the course of however many years these accounts were open. In fact, Judge Kozinski in the Ninth Circuit allowed a civil suit against those who propounded these improper subpoenas, and that was with regard to a professional email account, as opposed to personal email accounts, the issue in this case

THE COURT: Do we know what the date of this account is?

MS. SCHULTZ: It's an old account. I think, 2011 -- I know that it was -- at least one of them was active in 2011.

It's impossible for me to determine at this point when it was opened and when it was last used because we don't have access to them.

THE COURT: Yes. OK.

MR. PAGLIUCA: Your Honor, this is the problem and I'm going to be frank. This is a hide-the-ball problem. They tell us -- so let me backup.

We were originally told these are the only email accounts that the plaintiff had. When we deposed her, we found out about these accounts. We then get into an issue with counsel telling us, oh, we've done this due diligence search and we can't access any of this information, these accounts are closed. Well, then we look into it a little bit further and we find out, indeed, the accounts are not closed; indeed, they have been active, and there are indeed emails that are relevant to the issues in this case that were sent and received out of these accounts. That's a fact here.

Now, all they need to do, if they want to avoid electronic privacy issues, is comply with their discovery obligations, execute a release, and send it to Microsoft. Microsoft will then give them the information. That's what we have been told in response to this subpoena.

So to sit here and say, oh, it's overbroad and it's a problem and you can't do it, you know, you can't have it both ways. You either can't avoid discovery of something that you

are required to give up and then say, gee, we don't have access to it. That's the conundrum here, your Honor.

I'm sorry we are here at this point. I agree, if there is privileged information in there, maybe somebody should review it. But when you tell opposing counsel we don't have access to it and the account is closed and that's indeed not true, it seems to me that you have forfeited your ability to then stand up and say the subpoena is overbroad.

THE COURT: Forgive me, but what's the basis upon which you say it's not true?

MR. PAGLIUCA: The account is not closed?

THE COURT: Yes.

MR. PAGLIUCA: Because we have been told that by Microsoft when we issued them the subpoena.

MS. SCHULTZ: Can I address that really briefly?

My communications regarding these accounts are in letters that are attached to the briefs in this case. I never said that the Hotmail account was closed. I said that we are unable to access it.

With regard to the Live.com account, I said it appears to be closed because the website does not recognize the email address. I never told them that the accounts were closed.

I am more than happy to sign a release to Microsoft for any data that they might have to be delivered to plaintiff's counsel, at which point we will be more than happy

to run our search terms, review it, and produce anything that is relevant.

THE COURT: That is good.

MS. SCHULTZ: But the subpoenas are requesting that all of our data be turned over to defense counsel.

THE COURT: OK. Well, so what we'll do is at the moment -- yes, OK, we'll quash the subpoena on Microsoft, with the understanding that that's not on the merits and it can be renewed, if necessary. Also, on the understanding that the plaintiffs will do whatever is necessary to get access to these accounts, review them, and determine -- treat it as the Apple accounts have been treated.

OK. So that solves that problem.

Churcher's motion to quash.

MR. PAGLIUCA: Your Honor, before we move on, I have one point of clarification with regard to the earlier ruling about counsel conferring about scheduling going forward.

THE COURT: Yes.

MR. PAGLIUCA: I understand that to mean we should confer about all of the scheduling issues moving forward.

THE COURT: Which you think are relevant.

MR. PAGLIUCA: Including up to the trial date in this case?

THE COURT: Whatever you think -- if you have a position that you think is now established that we are not able

to try the case in October, that's fine.

MR. PAGLIUCA: OK. Thank you, your Honor.

THE COURT: Whatever.

MR. PAGLIUCA: I just want to make sure I am understanding the Court's order.

THE COURT: Yes, OK.

Churcher. Yes.

MR. FEDER: Eric Felder, from Davis Wright Tremaine, for the movant.

THE COURT: Sure. Of course.

MR. FEDER: Good afternoon. My name is Eric Feder from Davis Wright Tremaine, for the movant, Sharon Churcher.

My client, Sharon Churcher, is a journalist. She is currently employed by American Media, Inc., where she is a reporter for Radar Online and the National Inquirer. And prior to that she worked at the British newspaper, The Mail on Sunday. She's also worked as a freelance reporter. And she has been subpoenaed as a third party here to give testimony and to provide documents in this case. We move to quash the subpoena.

As Ms. Churcher states in her affidavit in support of the motion, her entire involvement with this case, with the plaintiff, with the defendant, all of the facts underlying the case was as a reporter seeking to report and publish news stories. All the documents and the information described in

the subpoena and the document requests, which are quite broad, by the way, and which we have to assume provide the contours of the information they are seeking in deposition, were created or obtained by Ms. Churcher in the course of her news-gathering activities, and much of the information sought was communicated in confidence, as well. So under the New York State Shield Law, which is the appropriate law and which defendants acknowledge is the appropriate law, not the slightly less protective Federal Reporters' privilege, the defendant has a heavy burden to meet to even obtain nonconfidential information, and confidential information is absolutely privileged.

We just received an opposition to our motion which was filed last night after close of business and we've been reviewing it, but much of the substance of it is redacted out pursuant, presumably, to the protective order. We had previously offered defense counsel to sign the acknowledgment of the protective order, which does provide for disclosure to witnesses and witnesses' counsel. They didn't take us up on it before. Obviously, the offer still stands.

But what we can say based on what we've seen is that the defendant claims that Ms. Churcher, who they fully acknowledge reported stories about this case -- not this litigation but the underlying case and who first met the plaintiff when she traveled to Australia to interview her in

2011, that she at some point along the way transformed from a reporter reporting news into a friend or a business adviser. It's not clear again because of the redactions when this transformation presumably took place. But the reality is that that is simply an incorrect characterization of the relationship.

Since 2011, and continuing up, frankly, through the present day, Ms. Churcher has continued to cover this story as a reporter, has published stories, including just I think two months ago, often using "Virginia" or her so-called agents as sources, of course most prominently in early 2015, which is what underlies this particular litigation.

By its terms, the Shield Law applies to any information obtained or communications made, quote, in the course of gathering or obtaining news for publication. Now, of course, a reporter's source relationship is complicated. Not every single interaction or every single communication is going to be an interview with questions and answers that then get published verbatim. So to the extent that there are particular emails where Sharon provided advice to Virginia, that doesn't transform the overall relationship from reporter and source to adviser and advisee or friend.

Reporters communicate with sources in a variety of ways. A police beat reporter may take a sergeant out for drinks and talk about life in general with no intention of

publishing details but with the intention of maintaining that close source relationship so that when the sergeant comes into possession of information, he's right there as the first recipient of that information.

As this Court stated in the Schoolcraft case, that the reporter's privilege seeks to prevent the unnecessary enmeshing of the press in litigation that arises from events they cover. And that's exactly what this is.

The Second Circuit interprets the qualified privilege very broadly to apply not only to individual bits of information gathered from sources but also to unpublished details of the news gathering process. That's from the Baker v. Goldman Sachs case, 669 F.3d 105, from 2012.

But either way, what they're seeking here, as described in their opposition, is quintessential news gathering Shield Law material. They list it at a couple of different points in their brief. They are asking for Sharon Churcher's interview notes, recordings, memos, and other documentation that are clearly, and concededly by the defendant, from the news gathering process.

In order to overcome this Shield Law for even the nonconfidential information, they have to make a clear and specific showing that the information is highly material and relevant, that it's critical or necessary to the maintenance of the claim or defense, and that it is not obtainable from any

alternate sources. So as an initial point, it is quite clear that they haven't exhausted all other sources up to and including the proceedings here today, where they are continuing to seek material from the plaintiff's email accounts, which your Honor just granted an order that would facilitate that, and also the pending motion to reopen plaintiff's deposition. So clearly they haven't exhausted plaintiff as a source.

They are also asking for Ms. Churcher's communications with the plaintiff's agents or attorneys or communications with law enforcement about the plaintiff, but we're not aware of any effort to obtain that information from those agents and attorneys or from law enforcement. Obviously, law enforcement may have their own objections to a subpoena. And while the defendants may not like what the FBI would say here, but there are certainly alternative sources that they are required under the Shield Law to turn to before seeking this from a reporter.

In addition, the information -- again, we haven't seen precisely what it is because it is blacked out of their opposition but to the extent we understand it -- does not meet the critical or necessary prong, which is, under the Second Circuit law and under New York law, quite high. As the Second Circuit articulated in Krase v. Graco, 79 F.3d 346, the information can be compelled, or disclosure can be compelled when the claim or defense, quote, virtually rises or falls with the admission or exclusion of the proffered evidence. And they

just -- they have not made that showing here.

They talk about the fact that they need this information because the credibility of the plaintiff is key, but the credibility of a plaintiff is key in many kinds of cases and certainly very often in libel case, where truth or falsity is sort of the ultimate issue being tried, and there is obviously not a wholesale exception for libel or any case where the plaintiff's credibility is central to the Shield Law.

They also focus heavily on the idea that the story changed over time from what was published in 2011 and what was published in 2015 and after and, in particular, the question of whether Virginia had sex with Prince Andrew or not. In 2011, the article stated that there was not evidence that that happened. In 2015, after court papers stated that it had happened, they then reported that it had. But I would submit that's less an issue of the story changing than what changed was what the newspapers were comfortable publishing.

There is actually a Vanity Fair article about this that was published later in 2011 that talks about how -- it talks about Prince Andrew -- that's what the article is about -- and it talks about the strictness of British libel laws that likely are what contributed to newspapers sort of hedging on that point.

This also is not a case where the journalist was an eyewitness to events in her capacity as a citizen. She wasn't

there when whatever happened with Ms. Maxwell and Ms. Giuffre took place, witnessing it as citizen Sharon Churcher. All of her knowledge about this comes from reporting as a reporter.

And, finally, because the documents all fall within the Shield Law, a reporter should not be burdened with going and sitting for a deposition where her counsel basically objects to every question as privileged under the Shield Law. And both the New York Court of Appeals and the Second Circuit have emphasized that. The New York Court of Appeals said, in Holmes v. Winter, which we cite in our brief, where the entire focus of a reporter's testimony would be on privileged topics, quote, No legitimate purpose would be served by requiring a witness to go through the formality of appearing to testify only to refuse to answer questions concerning the information sought.

And the Second Circuit, in Gonzalez, talked about the dangers that if parties to a lawsuit were free to subpoena the press at will, it would become standard operating procedure, and the resulting wholesale exposure of press files to litigants' scrutiny would burden the press with heavy costs of subpoena compliance and could otherwise impair its ability to perform its duties.

Finally, even setting aside the Shield Law, the scope of the subpoena is very broad and overly burdensome even just as a third party. These communications go back at least five

years, if not more. Ms. Churcher was employed at different newspapers and is a freelancer, so we are talking about multiple email accounts. So even just gathering this broad scope of communications which aren't limited by time or specific subject matter would be quite burdensome, but, again, because the Shield Law applies, a fortiori, as a journalist, she should not be put to that burden.

THE COURT: Thank you.

MR. PAGLIUCA: Your Honor, I start with -- I would like to read to the Court an example of Ms. Churcher's involvement in this case. I have this as an audio file and if I was allowed to bring my cell phone in, I would play it, but I wrote it down to read it to the Court.

MS. McCAWLEY: Excuse me, your Honor. I just want to make sure that we are not -- some documents have been labeled confidential, which is why there are redactions and I believe there are other individuals present in the courtroom --

THE COURT: Yes. Find out what it is.

MS. McCAWLEY: Thank you.

THE COURT: No. Confer with counsel.

MR. PAGLIUCA: This is not a document that has been produced by the plaintiffs, and it has never been labeled as confidential in connection with this case.

MS. McCAWLEY: Sorry. I was concerned about that.

MR. PAGLIUCA: So, this is a voice message that

Ms. Churcher left for Paul Cassell, who is a lawyer in this case who entered an appearance in this case, in February of 2015.

On February 5, 2015, your Honor, it starts out: Paul, it's Sharon. I wanted to discuss and with you on a deep background basis something that's in my file. I, as you know, feel almost like a friend of Virginia's. I think that the FBI affidavit was pretty close to perjury. Give me a call when you get a chance. On a deep background basis, if it's not going to be a conflict for you, it's something that I wanted to get your advice on. Take care. Bye-bye.

This voice message is troubling on a number of levels, your Honor, in connection with this case. First, it has never been provided to us, and there is a lawyer who has entered an appearance in this case. We have asked for this kind of discovery from the plaintiff and it has never been provided, and it's germane to the issues before the Court. But what it reveals is that this is not Ms. Churcher's first interaction with Mr. Cassell, lawyer for the plaintiff. They are on a first-name basis. She is feeling free to call him and leave messages for him.

And what she wants to discuss is apparently an affidavit prepared by the FBI that's been provided to Ms. Churcher by someone; I don't know whom, your Honor, but I'm going to presume it was provided to Ms. Churcher by the

plaintiff. That's troubling as well because we went through litigation in this case about our access to alleged public-interest privileged documents that were not turned over to us but were submitted in camera to the Court. But to the extent that that's part of those documents and Ms. Churcher has it, that's a problem for the discovery process in this case.

And it's a problem for Ms. Churcher, your Honor, because it's clear, as is attached to our papers, that Ms. Churcher's role in this entire ordeal was not simply a journalist. Ms. Churcher is a self-described friend. She is a self-described adviser. She's a self-described confidante. She is a self-described advocate. In many instances throughout this ordeal, Ms. Churcher was acting as a source of information to Mr. Edwards, who is another lawyer who has entered an appearance in this case, and to law enforcement.

The Shield Law only applies when journalists are asked to disclose information received in the course of gathering or obtaining news for publication. And Ms. Churcher's activities in connection with this case are far outside of those bounds. To be clear, we don't want that information from Ms. Churcher. So whatever information Ms. Churcher has that was indeed obtained in her job in the course of gathering or obtaining news for publication, we haven't subpoenaed that information.

But I suggest, your Honor, that the blanket notion that Ms. Churcher can't sit for a deposition in this case is

simply wrong, and these issues need to be resolved on a question-and-answer basis by Ms. Churcher, because her role in connection with this case far exceeded any role as a journalist.

Indeed, your Honor, Ms. Churcher is a fact witness in this case. The Shield Law relied on is only applicable when the journalist is asked to disclose information, again, received in the course of gathering or obtaining news for publication. And much of the information that we are asking -- if, indeed, it is not all -- from Ms. Churcher has nothing to do with information she gathered or collected in the course of gathering news for publication.

We have Ms. Churcher meeting with the plaintiff in early 2011 and then conducting a week-long series of interviews leading to the publications in March of 2011. We then go through another five years here where the story changes, and it is reasonable, I believe, to believe that the story is changing not because of the truth of the story but because of information that's being given to the plaintiff and she is then changing her story to make it more salacious and more sellable to various people through the world.

There is a series of exchanges between the plaintiff and Ms. Churcher that we have in email communications that have been provided to the Court that demonstrate this course of conduct over time. We also have a series of communications

between the plaintiff and law enforcement and the plaintiff's lawyers that are not news-gathering activities. These are wholly outside of the process of gathering news. And they are sharing information back and forth, and Ms. Churcher is providing information to Mr. Edwards, counsel in this case. Ms. Churcher is advising the plaintiff on how to deal with her own lawyer in connection with maximizing her return on publishing details that appear to be provided to the plaintiff by Ms. Churcher. All of this is outside the bounds of any Shield Law or any privilege.

I think the Court knows -- I'm sure the Court is exhausted with all of the pleadings that have been filed in this case related to discovery. I believe we have exhausted all avenues available to us to obtain this information. There is really no place else to go. And so there is -- I think it is not well founded, your Honor, that there is some notion that we have not done everything that we can to get this information from the plaintiff, Microsoft, other places before turning to a subpoena to Ms. Churcher.

Ms. Churcher is likely the only source of this highly relevant information, which is this 24-page fabricated diary and the testimony around that, communications with law enforcement and the FBI that have no legitimate investigative reporter purpose.

So, for those reasons, Judge, I believe the Court

should deny the motion to quash, we should be allowed to proceed forward with the deposition of Ms. Churcher. If there are particularized objections to the questions because counsel believe that those invade some privilege, they should be raised at that time, and we go forward on a question-by-question basis because most of this information will not be subject to any privilege.

Thank you.

MR. FEDER: May I be heard briefly?

THE COURT: Mm-hmm.

MR. FEDER: Thank you. Just very briefly.

First of all, the voicemail that my colleague read is totally consistent with news gathering. She mentions that it's on deep background, and in trying to cultivate the source she describes herself as almost a friend. Again, I don't think that type of less formal communication is indicative of a transformation from a journalist into something else.

But more problematically, we haven't heard that voicemail. We haven't seen any of the emails they are talking about because they are redacted; the exhibits containing them were filed under seal. So we don't know exactly which pieces of information they are trying to seek and which pieces of information they are claiming are not subject to the privilege.

I think we can all agree that Ms. Churcher is in fact a journalist, that she did in fact publish stories from

actually going back to 2007 that Virginia wasn't named, but from 2007 and certainly 2011 onward, publishing stories about these matters. So, clearly the Shield Law is floating around here at a minimum somewhere.

And they have to make a clear and specific showing for each piece of information that they claim either the Shield Law doesn't apply because she wasn't acting in her capacity as a journalist or that the Shield Law is overcome because it's critical or necessary and they've exhausted alternative sources. And the Shield Law itself provides that the Court shall order disclosure only of such portions of the news sought as to which the above-described showing has been made and shall support such order with clear and specific findings made after a hearing.

So we can't go forward and just deny the motion to quash entirely and just go to a deposition and start answering questions when the Shield Law at a minimum applies to, we would submit, all of it but at a minimum a substantial portion of the information. We need to see what they're specifically talking about here.

THE COURT: Thank you very much. I will reserve decision.

The motion to quash the Epstein --

MR. POE: May I approach the podium, your Honor?

THE COURT: Yes. Of course.

MR. POE: Good afternoon, your Honor. Gregory Poe on behalf of non-party Jeffrey Epstein. With me, your Honor, is my colleague Rachel Li Wai Suen.

THE COURT: Yes.

MR. POE: Yes, your Honor. Thank you.

We've attempted to be thorough in our briefing so I won't belabor the issues. I think the key issue is whether in fact an undue burden would exist if Mr. Epstein were subjected at this point to a deposition. The plaintiff concedes, as the law requires, that evidence must be relevant and admissible. And here the examples the plaintiff's counsel has offered with respect to a 2010 deposition in a different proceeding where Mr. Epstein apparently answered some questions doesn't add anything that the public record already doesn't reveal. So, in our view, that would not justify a deposition, which leaves really the Fifth Amendment implications that have been represented will be made, and that raises the LiButti issue.

And under LiButti, your Honor, really the permeating factor is control. And the typical case -- really, most of the cases, to the extent courts have addressed this issue, are employee invocations where the corporation for which the employee works is the party, and there the invocation can be imputed because it is controlled. There is no control here, and the factors that exist don't justify the deposition under the LiButti analysis. And I would point the Court, as I'm sure

the Court has reviewed, to docket 228 -- that's the defendant's pleading -- at pages 16 to 18, which lays out both in redacted form, which I have not reviewed, and unredacted form, various bases for why LiButti has not been met here by the plaintiff.

But the alternative argument the plaintiff makes, which is this is not ripe for decision, while we certainly concede that it would not be something that is the usual practice in a typical case, this is not a typical case, we would respectfully submit. And we would ask the Court consider as an alternative holding in abeyance any deposition of Mr. Epstein until the record that the plaintiff refers to has been developed. That would not result in prejudice to either party, and it would not subject Mr. Epstein to a burden of a deposition or the cost or inconvenience, which, of course, need to be considered with respect to a third party under Rule 45, when, in fact, if we are correct that no litigation purpose would be served, it would by definition, in our view, be an unnecessary cost and inconvenience and, therefore, an undue burden.

Finally, your Honor, if the Court -- and, ultimately, if Mr. Epstein is not granted relief with respect to this motion, we would ask in the alternative that the Court prohibit videography for the reasons that we have outlined in our briefs. The plaintiff's opposition states that Mr. Epstein is asking for preferential treatment. We make legal arguments,

your Honor. Whether the Court agrees or disagrees with our legal arguments, Mr. Epstein is not asking to be treated better or worse than anybody else under the law.

So with that, your Honor, we -- if the Court has any questions, I am prepared to answer them.

THE COURT: Thank you.

MR. POE: Thank you.

MS. McCAWLEY: Your Honor, may I be heard on the motion to quash, please?

So with respect to Mr. Epstein, obviously the Court has heard from us previously. He is at the center of this conspiracy, we allege, with Ms. Maxwell, the defendant. It would be highly prejudicial to the plaintiff here to not be able to take his deposition.

To accommodate his concerns, even though he was sighted just even days ago by his New York mansion, we have agreed to fly down to the U.S. Virgin Islands to handle that deposition.

With respect to his concerns over videography, he said he was concerned that that would be leaked to the media, we have a confidentiality order in place in this case and we will gladly mark that as confidential so that is not a concern.

It's very important that we are entitled to ask him those questions. I know his counsel has stated that he intends to take the Fifth. As the Court well knows, there are many

questions for which you have to have a basis to take the Fifth, so it can't be just a carte blanche taking of the Fifth. So there will be questions that he can answer during that deposition.

In addition, we're entitled to see his demeanor during that, to have the jury see his demeanor on video if this goes to trial. So it's critical that we are entitled to take that deposition of Mr. Epstein, who is the co-conspirator here.

With respect to the LiButti case, your Honor, that case addresses, as the Court may well know -- it is a Second Circuit case -- it addresses the standard by which a court can allow a nonparty's invocation of the Fifth Amendment to have an adverse inference against a party in a litigation. We contend that we meet all of the factors of LiButti, but at this point that would not be the time for the Court to make that decision. Obviously, the deposition needs to take place. We need to have a record of what he is taking the Fifth on, and then we can make those arguments presumably in a motion in limine for why we believe that that adverse inference should apply.

So, your Honor, I submit to you that this deposition is critical to us. We've done our part in trying to accommodate this witness, and we believe that the deposition should move forward and the motion to quash should be denied.

Thank you.

MR. PAGLIUCA: Your Honor, may I make some comments on

this motion as well?

THE COURT: Yes.

MR. PAGLIUCA: Thank you.

Your Honor, first, I think what I'd like to say to the Court is that, indeed, I wish Mr. Epstein's deposition could go forward. I have every reason to expect that should Mr. Epstein testify and testify truthfully, his testimony would be of enormous support and corroboration of Ms. Maxwell's version of events in this case.

It's important to note, your Honor, that Ms. Maxwell was not the subject of this investigation that led to Mr. Epstein's being charged and pleading guilty. We just finished the deposition of Detective Recarey, who was the lead deposition -- the lead detective in the case, and he agreed that throughout this investigation he never spoke to Ms. Maxwell. No one identified Ms. Maxwell as being involved in any of the alleged crimes. He did not seek any indictment or prosecution against Ms. Maxwell. And his only investigation relative to Ms. Maxwell was to simply look her up on the Internet.

There is no surveillance footage of Ms. Maxwell. She is not named in any of the affidavits that are filed with the court. So, in short, Ms. Maxwell was not implicated in any of the conduct that Mr. Epstein was alleged to have committed.

It's important background, your Honor, for the next

point here, because the plaintiff has not raised what I think is a very important issue here with regard to the Fifth Amendment, and that is does Mr. Epstein indeed have the ability to assert a Fifth Amendment privilege now in the context of this litigation. And there are a number of factors that are considered, the first being, and I think it is important to recognize, Mr. Epstein was granted immunity by the United States Attorney in the District of Florida for the conduct that I believe he is going to be questioned about. And I don't believe that it is appropriate for a witness to assert a Fifth Amendment privilege after they have been granted immunity by the prosecuting authority under 18 United States Code 6001. So, I don't think that there has been any exploration of whether Mr. Epstein can indeed invoke his Fifth Amendment privilege.

He also pled guilty to state charges which likely would act as a jeopardy bar and prohibit Mr. Epstein from asserting his Fifth Amendment privilege in the state system to the extent that the immunity from the federal government doesn't cover him, which I submit that it would.

There is also the statute of limitations, your Honor, which seems to me has long expired with regard to any of the allegations in this case.

Now, why do I raise that, Judge? They don't really want Mr. Epstein to testify. That's the point here. They want

to be able to have him assert his Fifth Amendment privilege so that they can then try to back-door this against Ms. Maxwell. And, in effect, they are creating their own little dichotomy here, which is he's taking the Fifth, we want him to take the Fifth, because then we get to just do a list of questions about everything that we want to have an adverse inference about as it relates to Ms. Maxwell, not as to Mr. Epstein. That is the problem, because they haven't done what they should do to get to that point in the first place. I think that is a real issue and a real problem for this motion before the Court now.

This is simply an attempt to manufacture -- and I use that word deliberately, your Honor -- manufacture self-serving evidence that they can then try to present to a jury through this derivative adverse inference.

Final comment: I have never had a court allow a witness to come into court and assert a Fifth Amendment privilege, whether that be in a criminal case or a civil case. I've never had a court allow a jury to be shown someone's deposition while they are asserting a Fifth Amendment privilege. I don't understand the point of that. And it seems to me there is no point in allowing a videotaped deposition of somebody who is going to sit there and say to every question "On the advice of my counsel, I assert my Fifth Amendment privilege." There is nothing to be served by the added expense of that process.

So, your Honor, this is Mr. Epstein's fight, it is not Ms. Maxwell's fight, but it becomes Ms. Maxwell's fight to the extent that we're trying to create evidence down the road that is used against Ms. Maxwell in this proceeding.

Thank you.

THE COURT: Thank you.

Yes. Anything further?

MR. POE: Nothing further, your Honor. Thank you.

MS. McCAWLEY: Your Honor, may I just briefly address -- defendant's counsel didn't file a brief on this so I just want to take a few moments to address the points he has just raised very briefly.

First, we would love to have Mr. Epstein give complete testimony in this case. I look forward to that. I hope that he will do that for us, and that is why we want to take his deposition. Ms. Maxwell had given an indication she was going to take the Fifth. When we deposed her, she didn't. So things may change. We need his deposition.

Second, with respect to the representations regarding the deposition of Detective Recarey which occurred earlier this week, Detective Recarey did say that he sought to interview Ms. Maxwell in the course of that and did acknowledge that Ms. Maxwell is in the police reports. I just want to make sure that that is corrected on the record.

Thank you, your Honor.

THE COURT: Thank you, all.

I will reserve decision.

MS. McCAWLEY: Thank you.

THE COURT: Thank you, all.

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