

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 VIRGINIA L. GIUFFRE,

4 Plaintiff,

5 v.

15 CV 7433 (RWS)

6 GHISLAINE MAXWELL, et al.,

7 Defendants.

8 -----x
9 New York, N.Y.
March 9, 2017
12:20 p.m.

10 Before:

11 HON. ROBERT W. SWEET,

12 District Judge

13 APPEARANCES

14 STANLEY POTTINGER PLLC
15 Attorneys for Plaintiff
16 BY: STANLEY POTTINGER

17 S.J. QUINNEY COLLEGE OF LAW AT THE UNIVERSITY OF UTAH
Attorneys for Plaintiff
18 BY: PAUL G. CASSELL

19 HADDON MORGAN AND FOREMAN, P.C.
Attorneys for Defendant Ghislaine Maxwell
20 BY: LAURA A. MENNINGER
JEFFREY S. PAGLIUCA

1 THE COURT: Giuffre. I was thinking the two
2 plaintiff's motions with respect to Epstein and Barden and then
3 the Ransome application and the Edwards application. That's
4 what I was thinking, but I'll be guided by you all.

5 How does that sound to you, all?

6 MR. CASSELL: That sounds good, your Honor, although
7 we had one small request on behalf of Mr. Pottinger here. He
8 is handling the one Ransome motion. If that could be handled
9 first, he could be returned to his office more rapidly.

10 THE COURT: Why should we be nice to him?

11 MR. POTTINGER: Other people have said that before,
12 your Honor. It is entirely, of course, up to the Court. We'll
13 accommodate you any way you want. Ms. Menninger has been kind
14 enough to say -- I think I will speak for her to say she's
15 indifferent to going first or second with this particular
16 Ransome motion. It's entirely up to you.

17 THE COURT: Sure.

18 MS. MENNINGER: Your Honor, I did have one small
19 concern about the Ransome motion that might foreshorten the
20 hearing on this topic. As Your Honor is aware, at the time
21 plaintiff filed a motion for a protective order about
22 Ms. Ransome's discovery, I had been in the process of trying to
23 confer with them about some discovery issues.

24 THE COURT: I think we can cut through that pretty
25 easy by simply saying that I believe that as for any of the

1 witnesses in this case, the protective order should apply.
2 Anybody that wants it should have it, and if they wish it and
3 invoke it, then I think it's up to whoever thinks that that's
4 inappropriate to challenge it.

5 So I take it she would want it, and as far as I'm
6 concerned, she's got it.

7 MS. MENNINGER: We have no problem with that,
8 your Honor. I just meant in terms of the order of business
9 today, I did file a combined motion to compel Ms. Ransome in
10 response to the motion for a protective order.

11 THE COURT: You want to deal with all of those?

12 MS. MENNINGER: We haven't finished briefing on that,
13 your Honor. You have set that motion for hearing on March 30.
14 So, instead of bifurcating a motion for a protective order
15 regarding this witness and then hearing later the motion to
16 compel regarding this witness, it would be my suggestion,
17 because we haven't actually finished briefing those issues --

18 THE COURT: What's your view about that? You've got
19 the protective order. So do you want to put the whole thing
20 over? The rest of it over, both sides of it?

21 MS. MENNINGER: There's no objection with the
22 protective order, your Honor. Of course it's all marked
23 confidential. The discovery has been marked confidential. The
24 deposition is marked confidential.

25 MR. POTTINGER: Thank you, your Honor. No,

1 your Honor. Frankly, we would prefer to go forward with a
2 limited argument about the extent to which the protective order
3 actually applies in this case to this particular witness, the
4 reason being that the defendant has asked for some very
5 specific things to happen, documents to be produced that should
6 not be produced by a nonparty witness, and we would just simply
7 like to present that to the Court today, if we may.

8 THE COURT: That's the compel motion.

9 MR. POTTINGER: Well, yes, it is.

10 THE COURT: Let me ask you this: It's their motion.

11 MR. POTTINGER: We're actually responding to their
12 motion.

13 THE COURT: Is there anything further that anybody
14 wants to submit with respect to the compel motion?

15 MS. MENNINGER: Yes, your Honor. Their response was
16 just emailed over Tuesday night. It was 25 pages, and I
17 haven't, frankly -- I traveled here yesterday, and we are
18 needing to reply to it, which would be next week.

19 MR. POTTINGER: By the same token, your Honor, what
20 we're trying to do is make sure that this particular witness
21 who lives abroad is not subject to the continuing sense of
22 burden and harassment --

23 THE COURT: I take it she has not been deposed.

24 MR. POTTINGER: She has been for ten hours,
25 your Honor.

1 THE COURT: Where is she now?

2 MR. POTTINGER: She's in Spain, and what we would like
3 to do is cut short the notion that she has to come back again.

4 THE COURT: We don't know about that yet. What
5 they're talking about are records. So we'll put that part of
6 it over. Is it next week?

7 MS. MENNINGER: It's set, your Honor, on March 30.
8 It's also set on the same day our motions in limine are going
9 to be heard. One of our motions in limine is to exclude her
10 testimony altogether, which would foreclose the need for any
11 additional discovery obviously.

12 THE COURT: Our trial date is?

13 MS. MENNINGER: May 15, your Honor.

14 THE COURT: Well, look. Let's do this: Let's
15 accelerate it. Your reply is due when?

16 MS. MENNINGER: I believe next Tuesday, your Honor.

17 THE COURT: Then let's hear this next week. Let's
18 hear the compel motion next week.

19 MS. MENNINGER: That's fine, your Honor.

20 THE COURT: I think maybe that takes care of this.

21 MR. POTTINGER: For the moment, perhaps --

22 THE COURT: For the moment.

23 MR. POTTINGER: Yes, your Honor. Two things, please,
24 very quickly. One is I believe we have a reporter for a
25 newspaper in the courtroom, and she has indicated obviously her

1 desire in a brief conversation to comply with whatever
2 protective orders and confidentiality orders apply in this
3 case.

4 If we could ask the names of any of the individuals
5 who have been spoken here not be reported in the press, we
6 would appreciate that. She can speak for herself, but I
7 believe she would agree to that.

8 THE COURT: I'm not sure. I don't think we need to do
9 anything because I haven't heard anything today that is --

10 MR. POTTINGER: Only the name of the witness. We did
11 speak the name of the witness here a few moments ago. If it's
12 agreeable, we would like that not reported. The witness for
13 whom we are seeking a protective order was spoken a moment ago.
14 I'm certainly not asking anyone to intrude on any newspaper's
15 First Amendment rights. We simply ask that that be treated
16 with respect.

17 THE COURT: What's the defense's view of that?

18 MS. MENNINGER: Your Honor, I don't care. I was
19 unaware that anyone had moved for confidentiality of the
20 identities. It's a witness they've designated for trial in
21 May, but I don't have a position really.

22 MR. POTTINGER: I've only noticed that her name, the
23 witness' name, has been redacted both in the defense papers and
24 in our papers.

25 THE COURT: Was it redacted in all the documents which

1 were submitted?

2 MR. POTTINGER: I'm not sure.

3 THE COURT: On the motions.

4 MR. POTTINGER: Honestly, I'm not sure. I'm not
5 positive of that.

6 THE COURT: Let me take a look.

7 MS. MENNINGER: Your Honor, the beginning of the reply
8 was not redacted, and her name is in the first line.

9 THE COURT: Neither is the motion.

10 MS. MENNINGER: I believe it's already a matter of
11 public record.

12 THE COURT: I guess that's right.

13 MR. POTTINGER: If that's the case then, I withdraw my
14 request. What I might do is make an oral motion at the moment
15 to redact her name, if that's possible. We simply are trying
16 to avoid --

17 THE COURT: I do think what's done is done.

18 MR. POTTINGER: It may or may not influence
19 your Honor's decision about this, but the reporter herself has
20 indicated her willingness not to use the name if requested, not
21 ordered, but requested.

22 THE COURT: Less is more. I'm for that. So let's do
23 it this way: I'll grant your application to redact the name
24 where it has appeared in the documents, and you'll have to
25 police that.

1 MR. POTTINGER: Yes.

2 THE COURT: That means I would ask the reporter not to
3 violate the confidentiality order as I've just amended it.

4 MR. POTTINGER: Yes. Thank you so much, your Honor.
5 We'll see you next week.

6 MS. MENNINGER: Your Honor, I apologize, but there is
7 one other issue that I think would affect our order of business
8 today, if you don't mind.

9 THE COURT: Yes.

10 MS. MENNINGER: Your Honor, with respect to
11 plaintiff's motion to compel work product from Mr. Barden, the
12 attorney Mr. Barden, as your Honor -- I'm not trying to get
13 into the substance of that argument, but a reply was submitted
14 again on Tuesday night in that case that was more than twice as
15 long as the original motion and contained entirely new
16 arguments, new documents, new everything that were not in the
17 original motion at all.

18 Again, I got it on Tuesday night at 7:30. I was
19 traveling yesterday, and I would ask that we -- I think there
20 is typically an order of operations that is supposed to occur.
21 Issues are supposed to be raised in the motion, there's a
22 response that addresses them, and then there's a reply. In
23 this case the reply was not a reply. It was really the motion
24 that was not filed originally.

25 Your Honor, I think basic fairness would dictate that

1 we have an opportunity either to argue today just the motion in
2 response or alternatively, your Honor, provide us an
3 opportunity to submit a surreply to the 17-page reply that was
4 just tendered on Tuesday night.

5 MR. CASSELL: Your Honor, I think there are three
6 subheadings in the reply brief. Each of those subheadings
7 links directly to an argument that was made in the response
8 brief. So our reply brief simply replied to each of the three
9 components that were in the response brief. So I'm not sure
10 that this is any different than usual. We filed it Tuesday
11 night in anticipation of flying -- I flew from Salt Lake City,
12 Utah.

13 THE COURT: Did we have any agreement on filing dates?

14 MR. CASSELL: Not that I'm aware of. We've been
15 filing replies -- I think both sides have -- on Tuesdays for
16 Thursday hearings on the understanding it would give the Court
17 Wednesday to review the matters.

18 THE COURT: I'll grant the defendant an opportunity to
19 file additional papers. We'll hear the argument today, and if
20 the plaintiff feels it's necessary to file a surreply after
21 that, they may do so, but all of that to be completed within
22 the week on dates that you all will agree upon.

23 Now what?

24 MR. CASSELL: Would you like to hear argument on the
25 Epstein case?

1 THE COURT: No, but I will.

2 MR. CASSELL: Thank you, your Honor. Paul Cassell
3 with the law offices out at the University of Utah College of
4 Law on behalf of Ms. Giuffre.

5 Your Honor has certainly had an opportunity to read
6 the brief. So I won't belabor what we argue there. This is a
7 case that obviously involves Giuffre v. Maxwell, but the third
8 party in interest is Mr. Epstein.

9 As you know, Ms. Giuffre has made allegations that she
10 was sexually trafficked by Epstein's conspiracy in which
11 Ms. Giuffre was the madam or key lieutenant. So he's the first
12 most important witness in the case after the two identified
13 parties.

14 There doesn't seem to be any debate that your Honor
15 will decide this issue based on federal law, and the Second
16 Circuit in the LiButti case has very clearly said that a party
17 can call a witness for the purpose of having them invoke the
18 Fifth Amendment and then having the jury potentially draw an
19 adverse inference in their discretion based on that invocation
20 of the Fifth Amendment right to remain silent.

21 The LiButti case lays out four different factors that
22 your Honor is supposed to look at in deciding whether that's
23 appropriate, and the first factor and the most important
24 factor, according to the Second Circuit, is the nature of the
25 relationships involved.

1 What we have here is the director of the conspiracy
2 and his key lieutenant, Maxwell, obviously in a very tight
3 relationship, and we made that argument in our initial brief.
4 In response, what we heard at page 2 of the response brief from
5 the defendants is that Maxwell and Epstein have -- and I'm
6 quoting here -- "have no relationship," which we find, frankly,
7 astonishing.

8 THE COURT: Let me ask you: There's been talk of a
9 joint defense agreement.

10 Does such an agreement exist?

11 MR. CASSELL: Well, your Honor knows that we have made
12 a request to have it produced, and your Honor directed the
13 defense to provide it to you in camera. So we're not familiar
14 with what's been provided to you in camera.

15 THE COURT: Has it been provided? Not as far as I
16 know.

17 MR. CASSELL: You directed them to do that in, I
18 believe, September for in-camera review because we requested it
19 as part of discovery. We wanted to see a copy. They objected,
20 and you said, well, I'll take a look at it in camera to see
21 whether it's relevant.

22 So the defense will have to speak to whether it's been
23 provided as directed. We have no control whether the defense
24 complies with the orders.

25 THE COURT: Excuse the interruption.

1 I don't think I've gotten it. Right?

2 MS. MENNINGER: Your Honor, I do not recall.

3 Perfectly honestly, I do not recall if it's been tendered to
4 the Court or not.

5 THE COURT: It obviously is relevant under what I just
6 heard. So what's reasonable? Within a week?

7 MS. MENNINGER: Yes, your Honor.

8 THE COURT: Okay.

9 Yes. Sorry.

10 MR. CASSELL: Certainly, your Honor. You can see
11 where we're sitting. During the deposition of Ms. Maxwell,
12 there were objections raised on grounds of the joint defense
13 agreement. When we tried to depose Epstein, the Epstein lawyer
14 said --

15 THE COURT: That's why I asked, because it's not clear
16 to me whether it's agreed that there is a joint agreement or
17 not. So that's why -- okay.

18 MR. CASSELL: We'd ask your Honor to look at that very
19 carefully because, remember. Just last week they filed a brief
20 in which they represented to your Honor, hey, Epstein shouldn't
21 be called here because we have -- again, I'm quoting. This is
22 a direct quote -- "have no relationship" with Epstein.

23 And yet I suspect in the next week you're going to get
24 a document showing they in fact have what kind of a
25 relationship? A common interest relationship, which of course

1 bears directly on the first LiButti factor, are the witness and
2 the party -- are they in a close relationship.

3 They're in a working relationship, a legal working
4 relationship. They're not in some remote event, in this very
5 lawsuit. But that's not all we have, your Honor. Remember.
6 They said they have again "no relationship."

7 Well, we provided to you in our reply brief emails,
8 and what do the emails show? We have a reporter here. So I
9 won't go into all the details, but your Honor has had a chance
10 to look into them, but you can see the defendant, Ms. Maxwell,
11 and Mr. Epstein talking about fabricating evidence by producing
12 a non-existent witness who will cover up for Ms. Maxwell.

13 MR. PAGLIUCA: Your Honor, I object to this.

14 THE COURT: Don't now. He's entitled to argue.

15 MR. CASSELL: Again, I'm not revealing the specifics
16 of the material that are under seal, but that's the nature of
17 the material that is under seal, and you can certainly see
18 them.

19 Again, for them to represent to this Court that there
20 is no relationship and then ask you to prevent what I think is,
21 frankly, the most pivotal and nonparty witness being presented
22 to the jury is highly unfair to Ms. Giuffre.

23 Now, also one of the things the Second Circuit asks
24 you to take a look at in the LiButti factors is whether the
25 witness in question is -- I think the phrase they use -- a

1 non-captioned party in interest.

2 Well, clearly Epstein is a non-captioned party in
3 interest here. This case revolves around whether there was a
4 sex-trafficking organization with Epstein as its head and
5 Maxwell as his madam or key lieutenant.

6 Clearly, if Ms. Maxwell wins the case, that's good for
7 Epstein. Clearly he is very interested in the case which is
8 presumably why he was exchanging emails with Ms. Maxwell about
9 whether they could have witnesses come forward or things like
10 that.

11 Now, the other point to remember that I think the
12 defense has not responded to at all is we're going to have
13 jurors sitting here. They're going to here Ms. Giuffre say she
14 was sexually trafficked. They're going to hear Ms. Maxwell
15 say, I can't remember whether I was on the airplane with you or
16 not.

17 They're going to wonder, well, what does Epstein say
18 about all of this. The only way to answer the jury's natural
19 question is going to be, let's bring Epstein in and put him
20 onto the stand so the jury can hear what's going on.

21 Maxwell says, well, look. We want to ask him some
22 questions as well. We're, frankly, skeptical of that.
23 Remember the steps that Ms. Giuffre had to take to get him
24 deposed.

25 We made 16 separate attempts with a professional

1 process server constantly being evaded, and finally we had to
2 come to the Court to seek your assistance with alternative
3 service of process, and then once we did that, then at that
4 point, one of the attorneys for Epstein came forward and said,
5 all right. I'll accept service. That was the only way we
6 could get him deposed.

7 Remember, the defense is, to our understanding, in a
8 joint defense agreement with Epstein. They can get him to
9 produce whatever information they want, and yet we've been the
10 ones who have been forced to do this, precisely because we know
11 that what Epstein says will be so corroborative of
12 Ms. Giuffre's testimony.

13 If he told the truth, he would have to explain what
14 was going on on those 23 flights where he, Ms. Giuffre, and the
15 defendant were flying into places such as London.

16 Now, the last thing your Honor has to look at in this
17 adverse inference issue is: All right. Of these questions
18 that are being asked, is there independent evidence that makes
19 those questions fair questions to propound to Mr. Epstein.

20 One of those questions is based, of course, on
21 Ms. Giuffre's testimony. So we do have independent evidence in
22 that sense. Even setting that aside, let's look at some of the
23 questions that we want to ask, and I don't believe the
24 questions themselves would be under seal. So I'll put those
25 into open court.

1 One of the questions we want to ask is: Did you meet
2 Prince Andrew, the Duke of York, in March 2001 in London?
3 That's the question we want to ask him.

4 And you notice what the defense responds to that is.
5 They say that's irrelevant. How can that possibly be
6 irrelevant when that's one of the central issues in the case?

7 By the way, is there independent evidence
8 corroborating that? Remember. We have a photograph showing
9 Prince Andrew, Ms. Giuffre, and Ms. Maxwell all together in
10 what appears to be London.

11 Again, Ms. Giuffre has testified about the
12 significance of that photograph. What do we hear from the
13 defendant? She can't remember where that photograph was taken.
14 So then we're forced to try to get another witness, Mr. Epstein
15 being of course the logical candidate to tell us exactly what
16 was going on there.

17 Another question we want to ask is: "On or about
18 March 9, 2001, you, the defendant in this case, Emmy Taylor,
19 and Virginia, flew on your private jet from Tangier to Luton
20 International Airport in London England's metropolitan area."

21 Is there corroborating evidence for that independent
22 evidence? Flight logs show that flight happening with exactly
23 those people there. Once again, Ms. Giuffre has testified that
24 the flight occurred. The defendant was deposed about that, and
25 once again, her memory failed her. She has no memory

1 whatsoever of this flight.

2 So then we called the pilot, and the defense says,
3 well, your records are inaccurate. Who is GM? Maybe that's
4 somebody else, Greg somebody or whatever. So they're
5 challenging all that.

6 So what do we do? We go to the next person listed on
7 the flight logs, which is Mr. Epstein, and we want to ask him
8 what is going on, and we want to present all of that
9 information to the jury.

10 So we think we easily satisfy the four LiButti
11 factors. We think we've provided independent evidence. We'd
12 be happy to provide more briefing on each and every question if
13 your Honor thinks that would be useful.

14 We believe it is highly appropriate to call
15 Mr. Epstein to this case and let the jury hear what he has to
16 say.

17 MR. PAGLIUCA: Thank you, your Honor.

18 I'd like to go through each of these factors, and I
19 think it's instructive to talk a little bit about the LiButti
20 case and how those factors do not apply in this case.

21 First, when we talk about the nature of the relevant
22 relationship, the LiButti court said that this relationship
23 should be examined from the perspective of a nonparty witness'
24 loyalty, and in this case, to the defendant. So that's the
25 first issue.

1 There is an interesting comparison, I think,
2 your Honor, to the facts of LiButti and this particular case.
3 In the LiButti case, we're talking about Edith LiButti, who is
4 a child, and her father, Robert LiButti. Robert LiButti is
5 someone who was convicted of tax evasion and was using his
6 daughter, Edith LiButti, to hide money from the United States
7 government.

8 That was a significant fact for the LiButti court, the
9 nature of that relationship, father and daughter. The court
10 described Edith LiButti as a nominee as part of the
11 relationship between this father and daughter. Edith was a
12 nominee because she had a company that was created by her
13 father, Lion Crest, in which the assets that her father owned
14 were placed. So the daughter is then holding assets for her
15 father as a nominee in this Lion Crest company, and the asset
16 happened to be a horse in that particular case.

17 There were significant financial ties between Edith,
18 the daughter, and her father. Mr. LiButti was using the bank
19 account of Lion Crest to pay his bills. Mr. LiButti was using
20 the bank account of Lion Crest to pay his mortgage.
21 Mr. LiButti lived at the house that was owned by his daughter.
22 That's the type of significant relationship that the LiButti
23 court felt was appropriate to look at.

24 We compared that to the relationship here, which is
25 non-existent. Any relationship between Ms. Maxwell and

Mr. Epstein ended over a decade ago. There's no dispute about that.

Mr. Epstein and Ms. Maxwell have never been married. They have no financial relationship. They have no financial ties. So the disparity between the LiButti relationship and the relationship of Ms. Maxwell is significant.

The common interest agreement which the plaintiff makes so much about, your Honor, I submit to you is really not a relationship that is significant in the sense of what the LiButti court was talking about.

As you know, your Honor, it is not uncommon for lawyers to enter into these agreements, and essentially it allows for a voluntary sharing of information. That's it. There is no way that anyone under a common interest agreement can make somebody give them a document. You're not entitled to information from the other lawyer or the other party.

In my mind, these are two one-way streets that never really converge. If somebody gives you something under a common interest agreement, that's fine, but you're not entitled to anything. So there is no legal relationship of the sort that would qualify under the LiButti factors to allow for any adverse inference here.

They talk about these emails. Your Honor, I objected, and I'm sorry. There is so much noise and vitreal in the arguments and the papers that it distracts from the issues.

1 When I read these papers now, I'm accused of criminal activity,
2 something that's never happened to me in my entire life.

3 When I read these papers, my client is accused of all
4 sorts of things. A good example, on page 3 of the reply brief,
5 there's a quote in the first full paragraph under the nature of
6 the relevant relationship, and the words "madam," which have
7 been repeated here today, are quoted with a citation, id,
8 there. That id purports to go to Ms. McCawley's declaration at
9 lines 17 through 19.

10 When you look there, there is no support for that
11 proposition. It is a misrepresentation in the pleadings, just
12 like, your Honor, when we get to this email issue that they are
13 so proud of here.

14 First I note that the emails -- they want to say that
15 Mr. Epstein is lying and Mr. Epstein is falsely inducing a
16 witness to come forward by the email that's in the middle of
17 page 4.

18 There's nothing false about that. There's no
19 misrepresentation there. That is simply again, in my view, a
20 misrepresentation by the plaintiff about the evidentiary
21 significance of this.

22 Note the date on these emails, your Honor, that begin
23 at page 4 and go through page 5 and compare the date of these
24 emails with the actual date of the purported defamatory
25 statement that was written by Mr. Barden and issued by Mr. Gow.

1 These emails all are weeks after that statement is
2 issued. Why does that become important, your Honor? Because
3 not only does it not support the plaintiff's claim about the
4 relationship and the control here, it supports Ms. Maxwell's
5 position because this is a series of emails that is exchanged
6 or written by Mr. Epstein after the alleged defamatory remark
7 in this case. And Mr. Epstein is urging Ms. Maxwell to come
8 out with another statement, to make another statement denying
9 the allegations.

10 Well, guess what happens, your Honor. Precisely
11 demonstrating the lack of any control by Mr. Epstein and the
12 lack of any relationship between Mr. Epstein and my client,
13 what happens is my client declines to make any further
14 statement in this regard.

15 So not only does this not support any theory of any
16 relationship, it directly supports the fact that Ms. Maxwell is
17 not doing Mr. Epstein's bidding and really could care less
18 about what Mr. Epstein says she should or should not do.

19 What is buried in these papers, your Honor, and is
20 very disingenuous to the Court is the notion that this somehow
21 predated, predated, the January 4, 2015, statement that's at
22 issue in this case. These are all post hoc and, in fact, do
23 not support the motion that there's any collaboration that's
24 occurring before the defamatory statement is issued.

25 I want to turn next to -- well, your Honor, so we're

1 clear, there is no economic relationship. That's established
2 in the testimony of Ms. Maxwell. They have not come forward
3 with any economic relationship.

4 There's no social relationship. That's established
5 and is uncontroverted in this case. There's no employment
6 relationship, and there's no family relationship. So, in
7 short, these folks were involved more than a decade ago and
8 have nothing to do with each other, other than the plaintiff
9 wants to harm my client.

10 The next factor, your Honor, the degree of control of
11 the party over the nonparty. I think it's significant to refer
12 to the LiButti case itself when we're talking about this
13 because what the LiButti court said -- and I quote. This is
14 from page 123 -- "The degree of control which the party has
15 vested" -- and I highlight the word "vested" your Honor -- "in
16 the nonparty witness.

17 So what we're talking about here in the second factor
18 is the party giving over control to the nonparty in some
19 fashion. In the LiButti case, Edith, the daughter, acceded
20 control over all of the assets to her father who was writing
21 his checks and paying for his lavish lifestyle.

22 The LiButti court characterized that conduct quite
23 disparagingly, frankly. We're talking about Mr. LiButti,
24 Robert's, "indiscriminate manipulations of monies and business
25 affairs."

1 So we don't have that here, your Honor. Ms. Maxwell
2 has not vested any control over any issue to Mr. Epstein in
3 relationship to this litigation or her affairs. Here, in fact,
4 the record evidence is that the exact opposite is true.
5 Ms. Maxwell issued a statement and got sued for making that
6 statement. Mr. Epstein is not a party to this litigation and
7 has no control over this litigation.

8 Ms. Maxwell moved to compel Mr. Epstein's testimony.
9 I would challenge the plaintiff to find one case or one
10 circumstance where the person against whom an adverse inference
11 is being offered actually moved to compel the testimony.

12 THE COURT: We keep talking about the adverse
13 interest, but that's really not the issue, is it? Isn't the
14 issue whether or not he gets called?

15 If he's called, if he were to invoke his privilege, as
16 he has in the past, there presumably would be some kind of an
17 instruction which would be given to the jury as to what they do
18 about that, but that's not being decided now.

19 MR. PAGLIUCA: Well, I'm not sure. They're asking you
20 to decide that now, your Honor. They are asking you to decide
21 two things --

22 THE COURT: I don't think so. I may be wrong, but I
23 don't think so.

24 Let me ask you this: If I bought your argument, if I
25 adopt your position, what are we going to do about a missing

1 witness charge?

2 MR. PAGLIUCA: Well, we address that, your Honor. I
3 think there are a number of ways to deal with it through
4 instructions. First of all, my position is that Mr. Epstein's
5 absence hurts Ms. Maxwell in terms of any speculation that the
6 jury might enter into.

7 THE COURT: Well, he's going to call him.

8 MR. PAGLIUCA: Well, he's going to take the Fifth.

9 THE COURT: Maybe he will, and maybe he won't. He has
10 in the past, but we don't know. I presume he would, yes.

11 MR. PAGLIUCA: His lawyers have said --

12 THE COURT: By the way, he's not here.

13 MR. PAGLIUCA: Who is not here? His lawyer is here,
14 your Honor.

15 THE COURT: I haven't heard from him.

16 MR. PAGLIUCA: I don't think he is on the docket
17 today. They have filed a separate motion, your Honor, to quash
18 Mr. Epstein's subpoena which is not being heard today.

19 So that is an issue that has not been briefed but is
20 before the Court at this point because Mr. Epstein has moved to
21 quash the subpoena that his lawyers accepted service of
22 essentially saying that he shouldn't have to appear to invoke
23 the Fifth Amendment.

24 So I may be a little bit ahead of the Court, given the
25 pleadings that have been filed but not fully briefed before

1 your Honor.

2 THE COURT: Well, logically speaking, doesn't that
3 issue take precedence over this?

4 MR. PAGLIUCA: What I would suggest to you,
5 your Honor, is if the Court were to decide that there is no
6 adverse inference against Ms. Maxwell based on Mr. Epstein's
7 invocation of the Fifth Amendment privilege, all of this
8 becomes moot because there would be no reason for Mr. Epstein
9 to testify, because the only reason for Mr. Epstein to testify
10 would be so the plaintiffs could then say, see. He took the
11 Fifth. You should hold that against Maxwell. That's what
12 they're asking you to do, your Honor.

13 If he simply comes in and says, I take the Fifth,
14 frankly, that's not what's being asked of your Honor, but I
15 suppose you could issue an instruction that says, you can't
16 hold that against either party. You can hold it against
17 Epstein, but you can't --

18 THE COURT: You can draw whatever conclusion you want.

19 MR. PAGLIUCA: Then we would have to have additional
20 discussion about this because then it becomes what can people
21 argue about that in closing and what it means, etc.

22 However, what I am talking about is what they are
23 asking for, your Honor, which they are asking for you, first of
24 all, to say that they can play Epstein's deposition testimony
25 first.

1 Second, that you will then look at a jury and say to a
2 jury, because Epstein took the Fifth, you can take an adverse
3 inference against Maxwell in this case. That's what they're
4 asking in their papers. When I'm going through the LiButti
5 factors, I don't see how this adds up here.

6 Continuing on, your Honor, in terms of the control
7 issue, had we had control over Epstein, we would want him to
8 testify. You know that we moved to compel his testimony, and
9 you, your Honor, denied that motion to compel and found that
10 Mr. Epstein had a Fifth Amendment privilege.

11 The control issue I think is also significant here,
12 your Honor, because not only does Ms. Maxwell not have control
13 over this topic, the plaintiff does. That is a central tenant
14 to this that, again, is unlike any other case that I have read.

15 The plaintiff here, her lawyers and the plaintiff,
16 have sought to revoke Mr. Epstein's nonprosecution agreement,
17 which is the primary basis for his invocation of the Fifth
18 Amendment privilege. They can withdraw that, and that then, in
19 my view, allows Epstein to testify or at least takes away the
20 primary basis for his non testimony.

21 THE COURT: I'm sure Epstein wouldn't agree with you.

22 MR. PAGLIUCA: It's a different day. However, in my
23 view, they have created this situation. Here is why,
24 your Honor. This is the control issue. They all know, because
25 of history of litigation, years of litigation against Epstein,

1 a decade of litigation against Epstein -- what he does is he
2 takes the Fifth. They know that they get an adverse inference.
3 He has to settle the lawsuit against him.

4 So he's become a serial target for Mr. Edwards, who
5 has been involved in this since 2006, and that's what happens.
6 Serially Epstein is the defendant, he takes the Fifth, he
7 settles the lawsuit, and we move on.

8 That's part of their control of this issue. In my
9 view, they have manufactured him asserting a Fifth Amendment
10 privilege in this case so that they can then try to bootstrap
11 that against my client, and they're the ones that have the
12 control here.

13 The next factor, your Honor, compatibility of the
14 interests of the party and the nonparty. Again, compare this
15 to LiButti. In LiButti, the interests are perfectly aligned.
16 Mr. LiButti, Robert, the father, was taking his assets and
17 giving them to his daughter to hide them from the government.

18 Mr. LiButti had to assert the Fifth because they were
19 his assets. Their interests are aligned because if he says,
20 yes, they're my assets, guess what. The government takes the
21 race horse that was worth \$400,000 and won a \$77,000 prize that
22 was being held by the government at the time.

23 So they get together, and collude, and they said,
24 fine. These are your assets. If I'm asked, I'll take the
25 Fifth. They can't use that against you. You get to keep it, I

1 get to write the checks, and we all live happily ever after.
2 The court found that their interests were completely
3 compatible, and that is the third factor.

4 The fourth factor, your Honor, the nonparty, the key
5 figure in the litigation and playing a controlling role in the
6 litigation. Again, that's not happening here.

7 I understand their argument, but you have to take a
8 step back and say, wait a minute. This is a defamation action
9 that is as a result of Mr. Barden's writing of a statement that
10 gets issued by Mr. Gow, Mr. Barden, a lawyer, not Mr. Epstein.
11 Mr. Epstein didn't write the statement that is being at issue
12 here. Mr. Barden did, and you have his declaration.

13 So Mr. Epstein isn't controlling that statement, isn't
14 controlling the litigation around that statement. I think
15 that's important because, unlike LiButti, Mr. LiButti was
16 controlling his daughter and controlling the actions that were
17 occurring during the litigation.

18 This case is entirely different. Ms. Maxwell, her
19 lawyer, and her press agent issued the statement, not
20 Mr. Epstein. It might be a little different if Mr. Epstein
21 actually had something to do with, here. This is the statement
22 that we want you to send out there on behalf of Epstein, if
23 some interest of Epstein was being protected, but there's not.
24 There's no nexus between those two things.

25 So, your Honor, it would be patently unfair in this

1 case to allow a jury to see -- well, let me touch on one other
2 thing, your Honor. This is what happens when lawyers know that
3 somebody is going to invoke the Fifth Amendment privilege.

4 It is like chumming waters, and the sharks come out,
5 and they just go to town, and everybody asks the most
6 ridiculous question they can think of, and that's what happened
7 during Epstein's deposition.

8 There were some 500 highly flammatory or inflammatory,
9 as the case may be, questions that were asked by Mr. Cassell
10 during the course of the deposition, far ranging, having little
11 or nothing to do with this litigation. That then turns the
12 question into the answer and the evidence that the plaintiff
13 wants the jury to hear. That's just not fair.

14 They want to say to you, well, Ms. Maxwell can't
15 remember. Therefore, we get to ask these questions. Those two
16 things have nothing to do with each other. We're talking about
17 events that happened 15-plus years ago, and it is not unusual
18 or uncommon for people to not remember details of events 15
19 years ago. So that's a non sequitur.

20 Whether or not she remembers has nothing to do with
21 whether Epstein should be a witness or not. She can be
22 cross-examined on her memory. A jury can decide, we think
23 that's credible or not credible, based on the testimony from
24 the witness stand. Epstein brings nothing to that equation by
25 asserting his Fifth Amendment privilege.

1 The other thing that they say in her papers is she
2 said go ask Epstein. Again, that's disingenuous because the
3 questions that were being asked to her during her deposition
4 called for speculation by Epstein.

5 So if I asked you, your Honor, what does Jeff like to
6 eat for breakfast, you're going to say, well, go ask him. I
7 don't know. I don't sit there and eat breakfast with him.
8 They are the kinds of questions that they are now relying on to
9 say, well, she invited Epstein to this party. Well, she
10 didn't.

11 To sum up here, your Honor, the whole point of this
12 exercise that was first articulated by the LiButti court was
13 where it fits, where it is appropriate, where the person
14 invoking the Fifth Amendment privilege somehow controls the
15 party, benefits from the invocation through the party. We're
16 not going to let people manipulate the system around the
17 truth-seeking process to have that happen. So those are the
18 four factors.

19 That has absolutely nothing to do with this case.
20 In fact, this is exactly the opposite. The questions by the
21 lawyers -- they want them to become the truth, not the answers
22 from the witness stand.

23 I believe, your Honor, that the appropriate thing to
24 do is to deny this motion. There is no good ground to say that
25 Epstein's invocation of the fifth is somehow imputed to

1 Ms. Maxwell. If you do that, this issue is moot, I don't
2 believe Mr. Epstein needs to testify, and we move on with the
3 actual evidence in the case. Thank you.

4 MR. CASSELL: Your Honor, may I have a moment to
5 confer with counsel?

6 THE COURT: Sure.

7 (Pause)

8 MR. CASSELL: Your Honor, I apologize for interrupting
9 a moment ago. I think your Honor may have come up with a
10 solution for cutting through some of the morass here.

11 We could just call Epstein to the stand. We'll ask
12 our questions. I was trying to make the point we would have no
13 objection to Ms. Maxwell calling him to the stand and asking
14 whatever questions they want as well.

15 Your Honor has already ruled that with respect to at
16 least one area of inquiry, the nude photographs that Epstein
17 has in his possession. He doesn't have a Fifth Amendment
18 interest in preventing disclosure of that. So that's one of
19 the things we would have him produce at trial.

20 So we could see which questions he invokes on, which
21 ones he's unable to invoke on, and then sort all of the issues
22 out at trial. We thought it would be useful for the Court if
23 we aired this issue ahead of time rather than having it come up
24 in the middle of trial.

25 We think that certainly at a minimum, Ms. Giuffre

1 would be entitled to some instruction to the jury that, look.
2 Ms. Giuffre has been trying to put Mr. Epstein on the stand.
3 This isn't a situation where she's afraid of his testimony.
4 She sent out process servers 16 different times to try to get
5 him to appear. So we think the jury is entitled to have that
6 information when they decide the case.

7 Mr. Pagliuca goes through the various four factors
8 that the LiButti test requires. The first one of course is
9 whether there is a relationship here. I'm not sure if I got a
10 direct concession from Mr. Pagliuca today that there is in fact
11 a joint defense agreement. It seemed to me he was suggesting
12 that there was.

13 A prerequisite for a joint defense agreement is that
14 the interest of the parties to that agreement are aligned. So
15 obviously, that bears quite directly on the most important
16 LiButti factor.

17 You can't have a joint defense agreement if the
18 interests of the two folks in the agreement are at odds with
19 each other. Mr. Pagliuca cites the LiButti case and says that
20 case involved a father and his daughter, and this case doesn't
21 involve a father and daughter. That's true.

22 There were other cases -- and we cited them in our
23 brief -- such as FDIC v. Fidelity Deposit Company, the Fifth
24 Circuit case. That involved coconspirators, and the Fifth
25 Circuit said, if you got one conspirator, he's taking the

1 Fifth, that can be used against the other conspirators, which
2 is exactly our situation here.

3 Once again, we hear -- again, I think this is a direct
4 quote. "Any relationship ended over a decade ago" is the
5 argument that's being made today. Your Honor, we just do not
6 understand how that argument can be made, given that we
7 included in our reply brief emails between Epstein and Maxwell
8 dated January 13, 2015; January 21, 2015; January 27, 2015.

9 What are they talking about? They're talking about
10 this case. They're talking about fabricating evidence.
11 They're talking about witnesses coming forward to say, oh,
12 Maxwell wasn't the girlfriend. We'll have somebody else be the
13 girlfriend. That's the nature of those communications.

14 How can the argument be that there was no
15 relationship? I guess the technical argument is aha.
16 January 15 is 12 days after the statement. It's 12 days after
17 the statement. It's obviously connected in time and in subject
18 matter with the events in this case.

19 Your Honor is familiar, having already directed that
20 the jury could draw an adverse inference in this case, from the
21 defendant's failure to produce all of the email accounts that
22 she was supposed to produce, that if we've got emails on the
23 15th, the 21st, and the 27th, there very well may be other
24 emails that she has failed to produce.

25 We hear about the economic relationship being

1 nonexistent. We would certainly like to see all the financial
2 records. Your Honor has ordered those records be produced but
3 has directed that that won't happen until shortly before trial.

4 THE COURT: Tell me where did these emails come from?

5 MR. CASSELL: Eventually, we got them from production
6 from the defense.

7 THE COURT: I see.

8 MS. MENNINGER: Your Honor, they were produced at the
9 outset of our production, the one he's referring to.

10 MR. CASSELL: So they're within 12 days -- January 15
11 is within 11 days of the --

12 THE COURT: In other words, there's no reason I would
13 have known about these of course. There's no impropriety in
14 the production of these emails.

15 MR. CASSELL: These emails, of course, have been
16 properly produced. Our argument has been that we have not
17 gotten -- as you know from the earlier briefing, that there has
18 been withholding of other information by the defendant.
19 Your Honor has already said the jury could draw an adverse
20 inference.

21 THE COURT: I'm sorry to go over plowed ground, but
22 these were not produced after that weekend of review?

23 MR. CASSELL: No, not these particular emails.

24 THE COURT: They were subsequently produced.

25 MR. CASSELL: No. I believe they were produced, as

1 Ms. Menninger indicates, in the initial production.

2 MR. PAGLIUCA: These were all produced at the same
3 time, your Honor. There's no subsequent production of these
4 emails. We produced them as part of the emails that we had.
5 That's it. There is no surprise here.

6 THE COURT: Am I wrong then that there were no -- I
7 was under the impression that there were no emails produced
8 after the initial search.

9 MR. CASSELL: So we have discovered -- for example,
10 Ms. Schultz, one of my colleagues from Florida, traveled to
11 London, deposed Mr. Gow, that kind of stuff.

12 THE COURT: I know about the Gow email. That one I
13 know.

14 MR. CASSELL: Right.

15 THE COURT: That's the only instance? After that
16 initial weekend review, there was production?

17 MR. CASSELL: Maybe you would --

18 MR. PAGLIUCA: I'm unclear on what the weekend is that
19 we're talking about here, your Honor. We produced whatever we
20 had is all I can tell you, and we reviewed all the emails.
21 Whatever was responsive got produced.

22 THE COURT: In other words, your view is everything
23 was produced except the Gow email, and I understand there's an
24 argument about that, an explanation for that.

25 MR. PAGLIUCA: Gow had it, and we didn't.

1 THE COURT: I understand.

2 MS. MENNINGER: Your Honor, I actually believe that
3 these emails were some that your Honor had reviewed because we
4 had asserted a joint defense agreement privilege, and your
5 Honor reviewed these emails, and they were produced last April,
6 the ones that Mr. Cassell is talking about right now.

7 THE COURT: I see. Okay.

8 MR. CASSELL: Of course it's our position that there
9 are email accounts and things like that, as you know from our
10 other papers, where we think -- so the fact that we have emails
11 on January 15, 21, and 27 and they're discussing this very
12 issue, we think a reasonable inference could be drawn by the
13 jury, and we'll be arguing at trial that there may well be
14 other smoking-gun emails that haven't been produced by the
15 defendant in this case. I'm not attacking the lawyers here.
16 I'm saying we believe there's been inadequate production, as
17 you know from our other papers.

18 In addition, with regard to the financial information,
19 your Honor has directed the defense to produce all of the
20 financial information but just shortly before trial. So we
21 haven't had an opportunity to look at, for example, the
22 \$17,000,000 townhouse to see if there is any financial
23 connection between Maxwell and Epstein. She's a coconspirator.
24 We're told that the plaintiffs are somehow responsible for
25 Epstein taking the Fifth.

1 THE COURT: You just said something that I had not
2 heard before, that you have reason to believe Epstein was
3 involved in the townhouse?

4 MR. CASSELL: We believe that was a gift from Epstein
5 to Ms. Maxwell. It may be a payment to keep her silent. That
6 could be one of the arguments that would be advanced. We
7 haven't had a chance to look at the financial information.
8 Once we do, we'll work with it from there.

9 I think the speculation is that that was a gift from
10 Epstein to his loyal lieutenant in exchange --

11 THE COURT: I hear you say that, but I haven't seen
12 anything to support it.

13 MR. CASSELL: We haven't been given access to the
14 financial records. Your Honor has said that that will be
15 produced shortly before trial. That's why we're pursuing that
16 line of inquiry. I don't believe I'm the only one who is
17 speculating --

18 THE COURT: By the way, that was not stated with
19 respect to the financial information dispute. Let's call it
20 that. This is the first time I hear this.

21 MR. CASSELL: I can't recall whether we included that
22 in our papers, that particular issue or not. We won the
23 argument to get our -- our argument all along has been that
24 financial information is appropriate to show an inner
25 relationship.

1 THE COURT: Like a number of other things in this
2 case, it's back before me. Thanks very much.

3 MR. CASSELL: It's back before you because, I believe,
4 once you ruled in our favor, they filed a motion to reconsider.

5 THE COURT: Be it right, wrong, or rain, it is back
6 before me. In that briefing -- correct me if I'm wrong -- I
7 don't think I saw any reference that Epstein was involved in
8 any way with the house.

9 MR. CASSELL: It's been a while since I've looked at
10 the briefing. What I recall is we have a separate heading
11 where we say the reason we want the financial records is to
12 show a close financial relationship between Epstein and
13 Maxwell.

14 I know we made that argument generally. I can't
15 recall, sitting here, whether we said and an illustration of
16 that general point would be the townhouse. I think we provided
17 some illustrations. I can't recall immediately whether that
18 was one of the illustrations. We think their financial
19 affairs --

20 THE COURT: It's not an issue.

21 MR. CASSELL: We think their financial affairs are
22 interwoven, and of course, we will know that for sure once we
23 get the financial production before trial.

24 THE COURT: It depends on what you get.

25 MR. CASSELL: There may be. We're, frankly,

1 fearful -- as you know, we have alleged in our papers that this
2 money is being moved offshore so that it will not be reachable
3 in the event that Ms. Giuffre --

4 THE COURT: This I understand. That point you made.

5 MR. CASSELL: Whether Epstein is involved in that,
6 obviously, we'll have to see what the evidence shows. We heard
7 that somehow Mr. Epstein is taking the Fifth because we have
8 this pro bono Crime Victims' Rights Act lawsuit going on down
9 in Florida.

10 Mr. Epstein has criminal problems, frankly, all over
11 the country, in the Southern District of New York, for example.
12 So let's assume that we withdraw that lawsuit tomorrow, which
13 we won't, he would still have criminal exposure --

14 THE COURT: Hold the phone just a second. You just
15 said Epstein has criminal issues --

16 MR. CASSELL: Exposure.

17 THE COURT: -- in the Southern District of New York.

18 MR. CASSELL: Right.

19 THE COURT: That's the first time I hear this.

20 MR. CASSELL: Our papers have said he's running a
21 sex-trafficking organization that included not only Florida --

22 THE COURT: Criminal. That means U.S. Attorney.

23 MR. CASSELL: I can't make any representations for
24 what law enforcement in the Southern District of New York is
25 doing.

1 THE COURT: You just said.

2 MR. CASSELL: Maybe I misspoke. I said, in our view,
3 in our opinion, Epstein has committed federal sex-trafficking
4 offenses.

5 THE COURT: Look. I don't doubt for a moment that you
6 believe that or Ms. Giuffre believes that he has liability.
7 God only knows where.

8 MR. CASSELL: Right.

9 THE COURT: That's not what you said.

10 MR. CASSELL: I apologize then, and I retract what I
11 said. When I said he has criminal exposure, what I should have
12 said, I guess to be more precise, is that in the opinion of
13 Ms. Giuffre and her attorneys, Jeffrey Epstein has committed
14 federal sex-trafficking crimes in the Southern District of New
15 York.

16 Therefore, in our opinion, his lawyers will direct him
17 to invoke the Fifth Amendment for any and all questions that
18 are asked, regardless of whether or not the Florida
19 proceeding --

20 THE COURT: Perhaps I misunderstood you.

21 MR. CASSELL: I apologize. I think that was my error,
22 and I apologize.

23 The point is he's going to take the Fifth, I would
24 suspect, regardless of what's happening in Florida. That's the
25 overarching point here.

1 The last thing that was said was somehow we have
2 manufactured Epstein and tried to inject him into this case.
3 Ms. Giuffre was trafficked by Epstein and Maxwell. It was
4 their choice to operate this conspiracy together, not hers.
5 They have completely compatible interests here.

6 Remember the one thing -- I was waiting to hear what
7 Mr. Pagliuca was going to say about this. You're supposed to
8 figure out, look. Is this witness a key figure in the case?

9 I can't imagine a case that has a key figure, if
10 that's the right way of putting it, a more important figure,
11 than Epstein in this case. He's the one who's running the
12 sex-trafficking organization. This won't be just a missing
13 witness. This will be a missing main event if he's not allowed
14 to testify.

15 So the last point I'll make is we were told that I
16 asked a series of ridiculous, far-fetched questions. Remember.
17 I read two of the questions that we wanted to ask in front of
18 the jury.

19 Is this a ridiculous question? "On or about March 9,
20 2001, you, Mr. Epstein; the defendant, Ms. Maxwell; Emmy
21 Taylor; and Virginia, flew on your private jet from Tangier to
22 Luton in the London area?"

23 That's not a ridiculous and far-fetched question.
24 That's a question that goes to the heart of this case about
25 whether sex-trafficking was taking place in London.

1 So we would ask your Honor to rule now that we could
2 get an adverse inference. We would have no objection to
3 your Honor deferring ruling on this. We'll call him at trial,
4 they can call him at trial, hear what his answers are, and we
5 can sort out the issues then. Either approach is acceptable to
6 us.

7 THE COURT: Thank you. We have one more to go.

8 MR. CASSELL: I believe I'm the moving party on this
9 as well. Is this Barden now?

10 MS. MENNINGER: I think we also have an Edwards
11 subpoena issue, your Honor.

12 THE COURT: Pardon me?

13 MS. MENNINGER: There is also a motion regarding their
14 motion to quash our subpoena on Mr. Edwards that was
15 transferred from Florida.

16 THE COURT: True.

17 MR. CASSELL: Attorney Barden, your Honor will
18 remember, I think it was two weeks ago we were here on the
19 summary judgment issue, and Mr. Barden's name came up a lot. I
20 won't rehash the issues on the summary judgment motion, and I
21 won't rehash what we've presented in our briefs.

22 I did just want to answer one question your Honor
23 might be wondering, why is it that suddenly we are now hearing
24 this issue about Mr. Barden. The reason I think is
25 straightforward.

1 Earlier in the case, we requested on behalf of
2 Ms. Giuffre all the documents connected with the defamatory
3 statements at issue here, and we got sporadic production, as
4 your Honor is aware. Some of the production we got was a
5 privilege log that said, Barden communications, Bates numbers
6 and so forth, attorney-client privilege. So our opportunity to
7 go after Barden was cut off. Your Honor sustained the
8 attorney-client privilege invocations, and we respected that
9 ruling of course.

10 Then we show up here two weeks ago for the summary
11 judgment motion and papers being filed just shortly before
12 that. Suddenly the attorney-client privilege has been asserted
13 over the witness, a blanket thrown over him so we can't
14 approach him. Now he's suddenly the central figure in the
15 summary judgment motion.

16 What do we discover? Lo and behold this statement
17 that we had thought had been crafted by Ms. Maxwell and
18 released by her, the lawyer is -- I think the phrase that's
19 commonly used is falling on his sword. He's the one that has
20 done essentially everything. At least that's the impression
21 he's trying to create.

22 So now that puts us in a position where we want to
23 know what did Barden say to the defendant. What did the
24 defendant say so Barden. He's now become a central figure in
25 this case.

1 In fact, his declaration which he wrote out and then
2 was included as an exhibit in support of the summary judgment
3 motion explicitly and implicitly reveals all kinds of
4 attorney-client communications. In our reply brief we list a
5 whole series of those and which statements are made.

6 In addition to that, Mr. Barden says in his affidavit,
7 "The content of the statement was entirely based on information
8 I acquired in connection with my role as counsel for
9 Ms. Maxwell."

10 Again, you're being asked to throw out Ms. Giuffre's
11 claims based on this affidavit, I guess. So that's why the
12 issue is just being presented to you now. I think it's fair to
13 see we've had a sea change in the landscape.

14 Ordinarily, if you got a lawyer in the case, fine.
15 Let's not talk to him. Let's not get evidence from him. But
16 when suddenly he shows up at the summary judgment for the first
17 time, we're entitled to say, why were you asserting
18 attorney-client privilege over these communications during the
19 discovery phase of the case?

20 One of the things that was interesting, when you look
21 at that reply brief that they filed, the defense filed, they
22 concede that work product protection has been waived now. They
23 say, okay. The attorney can waive work product, and we're
24 waiving it. If there is any work product protection over his
25 communication or other evidence, that's gone.

1 What about the attorney-client issue? Well, the
2 declaration that was provided to you two weeks ago clearly
3 waives communications. Here is one example. This is from
4 Mr. Barden. "I did not ask Ms. Maxwell to respond point by
5 point to Ms. Giuffre's factual allegations in the CVRA joinder
6 motion. What we needed to do was issue an immediate denial,
7 and that necessarily had to be short and to the point."

8 That's a discussion between the lawyer and the
9 defendant in this case about how they're going to craft the
10 statement, whether it's going to be broad or narrow, point by
11 point, or something else, which is of course the central issue
12 in this case.

13 So he has revealed communications. Even if you say
14 that technically doesn't reveal a communication, he's certainly
15 placed the communications at issue, and I say Barden has done
16 that.

17 Maybe I should speak a little more precisely. Once
18 Barden wrote that declaration out, I'm assuming at the request
19 of the defense attorneys, the defense attorneys put it in
20 evidence here. We raised an objection saying you're waiving
21 attorney-client privilege.

22 I suppose at that point they could have said,
23 Ms. Maxwell doesn't want to waive her privilege. They could
24 pull back, but what they've done is doubled down. They've now
25 said, nope. We're going forward with that. We want your Honor

1 to throw out the case based on what Barden is saying.

2 So clearly we now have issues involving what
3 Mr. Barden said to Ms. Giuffre. Those should be resolved
4 before you rule on the summary judgment motion, although we
5 think you can deny the summary judgment motion without ever
6 looking at this.

7 We want all the communication that's were logged as
8 attorney-client protection. We also want an opportunity to
9 depose Mr. Barden about what those communications mean,
10 something that we clearly would have done if the
11 attorney-client privilege had not been invoked during the
12 discovery phase of this case. So we could ask for the
13 communications from Barden, and we would ask for an opportunity
14 to depose him.

15 MS. MENNINGER: Your Honor, last February, over a year
16 ago, Ms. Maxwell provided her initial disclosures under Rule 26
17 which requires her to disclose anybody upon whom she intends to
18 rely to assert a defense.

19 The number three witness disclosed in her Rule 26
20 disclosures was Mr. Barden. In particular, "He has knowledge
21 concerning press statements by plaintiff and defendant in 2011
22 to 2015 at issue in this matter."

23 In March of 2016, over a year ago, plaintiff had
24 submitted discovery requests to Ms. Maxwell. None of those
25 discovery requests asked for Mr. Barden's work product, asked

1 for communications with Mr. Barden, asked for anything having
2 to do with Mr. Barden.

3 Other requests were made, your Honor. For example, as
4 you know, because you reviewed them all, requests for all of
5 Ms. Maxwell's communications with Mr. Gow. Incidental to
6 producing her communications with Mr. Gow, some of those
7 emails, as you may recall, included Mr. Barden because
8 Mr. Barden was her lawyer. Mr. Gow was working with Mr. Barden
9 on issuing this statement, and Ms. Maxwell asserted a privilege
10 over those communications.

11 We submitted a privilege log. We gave it to the
12 Court. We gave the communications to the Court. Your Honor
13 overruled that assertion of privilege. Your Honor found that
14 Mr. Gow was not necessary for purposes of provision of legal
15 advice and, therefore, any communications with Mr. Gow had to
16 be produced, whether or not the attorney was also on there.

17 If I may, your Honor, approach, because the plaintiffs
18 attached as Exhibit 1 to their motion, this privilege log.
19 Your Honor, as you will see when I hand you this document, if I
20 may approach.

21 The vast majority of those documents in Plaintiff's
22 Exhibit 1 were produced to plaintiff. All of the documents
23 that are grayed out were in fact produced. Included among the
24 documents that were produced were ones that said things --
25 for example, Ms. Maxwell said to Mr. Gow, copying Mr. Barden,

1 "Just sent you a letter of re-engagement plus a letter that
2 Philip is slightly reworking," "Philip" being Mr. Barden.
3 Another document that was produced pursuant to the Court's
4 order from Mr. Gow to Ms. Maxwell, "Will do. Awaiting
5 revamped note from Devonshire," "Devonshire" being Mr. Barden's
6 law firm.

7 So since April of last year, plaintiff not only had
8 Mr. Barden disclosed as a witness, they also had the emails
9 showing that Mr. Barden was the one who was drafting the
10 statement at issue.

11 In April Ms. Maxwell was deposed. At that time she
12 said her attorney, Mr. Barden, was the one who had directed
13 Mr. Gow to release the statement. In may and June, as
14 your Honor knows from the extensive litigation, both sides took
15 ten depositions. Ms. Giuffre asked for permission to take more
16 depositions. She took more depositions.

17 The depositions continued into November when Mr. Gow
18 was deposed overseas, and he also explained that Mr. Barden was
19 involved in drafting and disclosing the statement at issue.

20 So Mr. Cassell's representation to the Court that
21 Mr. Barden has just somehow magically appeared at the 11th hour
22 is not supported by the record evidence in this case. There
23 are a number of different problems with the motion to compel.
24 First of all, a motion to compel is supposed to include the
25 discovery request to which any such work product would be

1 responsive.

2 Your Honor, you can search in vain in their motion to
3 compel. There's not a single discovery request that they
4 identify as calling for any of the records they now seek.

5 The cases cited in our response at page 7 require that
6 a motion to compel be dismissed in circumstances where the
7 moving party doesn't actually have a discovery request pending.

8 Secondly, your Honor, this motion is addressed to the
9 wrong person, Ms. Maxwell. Ms. Maxwell is not the one who
10 holds the work product protection. Her attorney, Mr. Barden,
11 holds the work product protection.

12 There has been no attempt by plaintiff to seek
13 discovery from Mr. Barden, despite all of the evidence that
14 they have had for over a year now that Mr. Barden was the one
15 who drafted the statement at issue.

16 Fourth, your Honor, they've noted that there have been
17 suggestions that Mr. Barden placed the work product materials
18 at issue and then, therefore, goes on to demand that
19 Ms. Maxwell be the one to produce all of the work product, not
20 work product related to a topic, not work product related to a
21 certain time period, that she should then get all of her work
22 product from Mr. Barden somehow overseas and produce it in this
23 case.

24 Your Honor, they make another extraordinary request of
25 this Court, and that is that Mr. Barden be compelled to come

1 sit in the U.S. for a deposition based on this declaration when
2 they have taken no steps to take his deposition in the UK.
3 For example, when we were there altogether taking Mr. Gow's
4 deposition, Mr. Barden was actually in the room. No request to
5 take his deposition there in his presence.

6 Finally, your Honor -- and I think perhaps the most
7 problematic -- they've quoted to you what they claim is the
8 basis for the placing of an attorney-client communication at
9 issue thereby waiving the entire attorney-client privilege.

10 As your Honor is well aware, there are two completely
11 different protections we're talking about here, the work
12 product protection that belongs to an attorney that an attorney
13 can waive under certain circumstances and an attorney-client
14 communication privilege which the client holds and the client
15 can waive.

16 Their assertion for the waiver of this entire
17 attorney-client communication is Mr. Barden's statement that he
18 "did not ask Ms. Maxwell to respond point by point to
19 Ms. Giuffre's factual allegations in the CVRA joinder motion."

20 So an attorney saying he did not have a communication
21 with his client they would submit to your Honor completely
22 waives the attorney-client privilege as between Ms. Maxwell and
23 her attorney, Mr. Barden. There is not a single case that a
24 statement by the attorney that he did not have a communication
25 with his client waives that privilege.

1 Finally, your Honor, the cases regarding waiver that
2 plaintiff has cited come in the nature of an advice of counsel
3 defense. There has been no assertion of an advice of counsel
4 defense in this case.

5 Ms. Maxwell is not disclaiming that her attorney and
6 her agent with whom she was working issued a statement. She's
7 not saying she only did it on the advice of counsel and,
8 therefore, she should be excused from having done so.

9 Mr. Barden was proffered as a witness for a separate
10 privilege, the litigation privilege, your Honor. And that
11 litigation privilege, as we discussed during the summary
12 judgment proceedings a couple of weeks ago, requires that there
13 be a showing that there was a good-faith anticipated litigation
14 for which the statement was issued in connection.

15 In this case, Mr. Barden is, for example, a fact
16 witness because he is the one who told your Honor during his
17 declaration that there was good-faith anticipated litigation.

18 THE COURT: But isn't there also another issue
19 involving Barden? That is, that it was a question of the
20 intent for the issuance of the release?

21 MS. MENNINGER: Yes, your Honor, that is true. It is
22 not, however, an advice of counsel defense.

23 THE COURT: No.

24 MS. MENNINGER: The advice of counsel cases that are
25 cited by plaintiff for the proposition are in opposite for that

1 reason.

2 Your Honor, in the absence of an actual discovery
3 request for which these documents would be responsive, there is
4 no basis for a motion to compel. Plaintiff chose not to seek
5 Mr. Barden's deposition. Nor did they choose to serve a
6 subpoena upon him as they did, for example, for Mr. Gow, who
7 also lives in the United Kingdom.

8 There is nothing about the reliance on Mr. Barden's
9 declaration that opens up the attorney-client communications.
10 Simply saying I did not have a particular conversation with my
11 client certainly does not qualify, and plaintiff has offered no
12 proof or legal support that it does.

13 Frankly, your Honor, I believe this is an attempt by
14 plaintiff to ask this Court to produce discovery, demand
15 international travel of a UK citizen to come to the U.S. to sit
16 for a deposition without a single citation to any legal
17 authority for the ability to do that.

18 I would ask your Honor to deny the motion. And,
19 furthermore, as I mentioned earlier, your Honor, because I
20 received a reply that raised five new legal issues, I'd like
21 the opportunity to brief those issues.

22 THE COURT: You have that. Do I not have a joint
23 pretrial order in this case?

24 MS. MENNINGER: We do, your Honor, yes.

25 THE COURT: Is Barden listed as a witness?

1 MS. MENNINGER: I don't recall, your Honor. I
2 apologize. I don't have a computer to look it up.

3 THE COURT: If Barden appears as a witness, it would
4 seem to me certainly fair to have a deposition at that point.
5 However, I'll take a look and see. Okay. Thanks.

6 MS. MENNINGER: Thank you.

7 THE COURT: Yes.

8 MR. CASSELL: Following up on your Honor's suggestion,
9 we're happy to work on logistics, if it would make sense, when
10 he's traveling over to do the deposition, shortly before he
11 testifies, if it would be more convenient to do a video
12 deposition. We're not trying to create an unnecessary expense.

13 THE COURT: But the point is taken -- you heard it --
14 there is no proceeding.

15 MR. CASSELL: I guess they could tell us whether
16 they're planning to call him as a witness at trial.

17 THE COURT: They could tell you, but then they might
18 change their mind. I don't know. The defense is there is --
19 well, you heard it. What do you say?

20 MR. CASSELL: And the answer I think is clear-cut. I
21 think roughly a year ago we had rulings from your Honor that
22 his communications are attorney-client protected. They've just
23 handed up to you a chart. If you look at item 16 there, it's
24 marked --

25 THE COURT: Are you saying that the only thing you're

1 asking at this point is a determination as to whether there was
2 a waiver?

3 MR. CASSELL: We're asking for a determination as to
4 whether there was a waiver of the attorney-client privilege --

5 THE COURT: And of course, if there was a waiver, then
6 you would say you would like to have the documents.

7 MR. CASSELL: That's right.

8 THE COURT: But that's it.

9 MR. CASSELL: That's right.

10 THE COURT: No deposition. There's nothing else
11 pending. So what you're really doing is moving to reconsider
12 the determination based on his later thing.

13 MR. CASSELL: Based on intervening circumstances.

14 THE COURT: Based on this affidavit. That's all there
15 is.

16 MR. CASSELL: That's right. Now the centrality of
17 that affidavit -- I should be clear. It's not just the
18 affidavit. It was the arguments that you heard two weeks ago.

19 THE COURT: Argument shmargument. There's always an
20 argument, particularly in this case. This case is not unique.
21 The argument I don't care. Factually, the only basis for your
22 motion to alter the decision on the attorney-client is his
23 affidavit.

24 MR. CASSELL: When you boil it down, I think that's
25 right. What we don't want to have happen is the jury sitting

1 there, and they're going to say, hey, this is all Mr. Barden's
2 idea. Ms. Maxwell had nothing --

3 THE COURT: How that comes up is a whole different
4 thing. That's a question is he going to testify, etc., etc. I
5 inquired on that. Nobody seems to know.

6 MR. CASSELL: Right.

7 THE COURT: I think we do know.

8 MR. CASSELL: I think he's going to show up and fall
9 on his sword, and we want to have an opportunity, and I think
10 your Honor was suggesting it would be fair for us to at least
11 get a chance to depose him. Remember. We were limited to ten.
12 We had to fight to get a couple more. We had to make some
13 choices. In the face of --

14 THE COURT: It's perfectly obvious. I say "perfectly
15 obvious." It's maybe not that clear. If you were to seek his
16 deposition tomorrow, it would be a tough job to get it
17 accomplished by the trial date.

18 MR. CASSELL: Our team could do it.

19 THE COURT: I presume you do not want to delay the
20 trial date.

21 MR. CASSELL: Right.

22 THE COURT: So that's really what we're talking about.

23 MR. CASSELL: Our team could take the deposition on a
24 moment's notice, on one week's notice I would represent. We
25 could do it by video. We live in a world where --

1 THE COURT: I can't compel him. Who am I? I'm just a
2 little, old district court judge in New York. I can't compel
3 Mr. Barden to come here.

4 MR. CASSELL: He's Maxwell's lawyer.

5 THE COURT: You say he's their agent.

6 MR. CASSELL: That's right. He's their lawyer.

7 THE COURT: So I could compel them to direct him to
8 come.

9 MR. CASSELL: Right.

10 THE COURT: Suppose he says, sorry, Judge. I don't
11 want to do it.

12 MR. CASSELL: Then we would just ask you to exclude
13 any reference to Mr. Barden's communications at trial.

14 THE COURT: I see. Unbelievable.

15 MR. CASSELL: This case has every evidentiary -- a law
16 professor's dream, I guess you could say, all the twists and
17 turns.

18 THE COURT: This case certainly has got it all. Your
19 quite right about that.

20 Is there anything else you want to tell me?

21 MR. CASSELL: That would be the main point. Their
22 suggestion we haven't identified the documents, they're right
23 there on their own exhibit, the documents we want.

24 We're happy, again, to work on logistics, or if they
25 would just represent, we're not calling him and not going to

1 make an issue of him at trial, then this issue goes away, but I
2 think we all know they're planning on calling him.

3 THE COURT: Okay. Mr. Edwards.

4 MR. CASSELL: Your Honor has already ruled on a
5 parallel subpoena.

6 THE COURT: Now, let me ask you this: If I were to
7 simply say, this motion is granted in part and denied in part
8 and controlled by the decision on your --

9 MR. CASSELL: Right. I believe the defense can
10 correct me if I'm wrong. Those were overlapping subpoenas in
11 all respects except for three.

12 THE COURT: Can we dispose of it that way?

13 MR. CASSELL: It resolves all the issues except for
14 one issue, which is requests 3, 4, and 5, in my view. But I
15 should let the defense speak to that.

16 MR. PAGLIUCA: I agree the majority of this has been
17 disposed of by your opinion, your Honor. I can walk through
18 all of these and tell you which ones I believe have been
19 resolved and which ones haven't been resolved, if you would
20 like me to do that.

21 THE COURT: If you all agree with that, then that's
22 fine. So what's left?

23 MR. PAGLIUCA: What is left is 3, 4, and 5. Those
24 deal with the Epstein v. Edwards litigations. 12 is still at
25 issue. That deals with disclosures made to the plaintiff by

1 Mr. Edwards.

2 14, 16, 17, and 18 are different from what was in
3 Mr. Cassell's subpoena. Those items were not contested in
4 response to the pleadings in Florida. So I assume that they're
5 not at issue before the Court because they were never
6 contested.

7 19 and 20 are specific to Mr. Edwards, and those deal
8 with communications, letters or communications, from
9 Mr. Edwards to prospective witnesses in this matter and
10 responses thereto. So that's what at issue and not resolved by
11 your order.

12 THE COURT: Let's do it again. 3, 4, and 5 were
13 documents related to Epstein against Edwards.

14 MR. PAGLIUCA: Correct.

15 THE COURT: Epstein against Edwards I never heard of
16 before. What's that?

17 MR. PAGLIUCA: Mr. Epstein sued Mr. Edwards in the
18 Southern District of Florida. This is part of the submission
19 is the complaint in these litigations. Mr. Epstein accused
20 Mr. Edwards and his former partner, Rothstein, of RICO
21 violations, fraud, and other things. Mr. Epstein claimed that
22 Mr. Edwards and Mr. Rothstein manufactured --

23 THE COURT: I thought that lawsuit went away.

24 MR. PAGLIUCA: It is still pending in some fashion,
25 your Honor. It is on appeal, as I understand it, and has not

1 yet been resolved.

2 THE COURT: What happened below? What's being
3 appealed?

4 MR. CASSELL: I don't mean to interrupt, but I can
5 give you a more complete accounting.

6 MR. PAGLIUCA: I'm trying to remember, your Honor. It
7 was set for trial at some point, and there are claims that have
8 not been resolved that are on appeal. That's what I recall of
9 this.

10 THE COURT: What is it you want?

11 MR. PAGLIUCA: I'm informed that the case is in the
12 Supreme Court of Florida now by Mr. Epstein's lawyer.

13 What I want, your Honor, are the documents that were
14 produced in those litigations.

15 THE COURT: Why?

16 MR. PAGLIUCA: Well, because Mr. Edwards is a central
17 figure in this case. He is listed as a witness.

18 THE COURT: I know what he's done in this case, but
19 what's that case got to do with this case?

20 MR. PAGLIUCA: There is a theme that runs through
21 these cases, your Honor. The complaint that's attached as part
22 of the submission, the Epstein v. Edwards complaint, details a
23 scheme in Florida that was started by Mr. Rothstein, who was
24 Mr. Edwards' partner.

25 Mr. Rothstein is in prison I think for 15 years as a

1 result of this scheme, having been convicted in the Southern
2 District of Florida. The scheme was that Mr. Rothstein would
3 manufacture claims against Mr. Epstein. So Rothstein was
4 manufacturing claims against Epstein claiming that Rothstein
5 represented victims of sex abuse by Epstein.

6 Rothstein was then selling participation interests in
7 these lawsuits and was going around southern Florida telling
8 people, if you invest X amount of dollars in this particular
9 lawsuit against Epstein, I'm going to give you a return of X on
10 your money.

11 It's unbelievable, but those are the allegations, and
12 that's what Mr. Rothstein was convicted of. So there are a
13 number of fake plaintiffs that were created by Mr. Rothstein
14 and in the complaint alleging that Mr. Edwards participated in
15 this conduct, and then that is why Mr. Rothstein ended up in
16 prison.

17 The relevance to this, your Honor, here -- again, I go
18 back to Mr. Edwards is sort of a central hub, in my view.

19 THE COURT: Just for the sake of argument, let's
20 assume that Edwards was in the middle of that scheme.

21 So what in my case?

22 MR. PAGLIUCA: Well, Edwards is listed as a witness in
23 your case, your Honor.

24 THE COURT: I beg your pardon?

25 MR. PAGLIUCA: He is listed as a witness.

1 THE COURT: He's not going to testify. I can't
2 imagine that he's going to testify. I was unaware of that. We
3 all know about lawyers testifying. So I would think it highly
4 unlikely that he would testify.

5 MR. PAGLIUCA: You may recall some year ago, your
6 Honor, when Mr. Edwards and Mr. Cassell moved to enter this
7 case and enter their appearance. I put in the pleading I
8 anticipated they were going to be witnesses, and you said,
9 rightly at the time, we'll take that up when we get there
10 because you can't disqualify them now on a future anticipated
11 witness.

12 THE COURT: You're saying if he testifies, you think
13 this might be -- okay. I can see that certainly would bear on
14 his credibility, etc., etc., if he testifies.

15 MR. PAGLIUCA: Mr. Edwards represents a number of
16 witnesses in this case.

17 THE COURT: Whatever he is as a lawyer, that's one
18 thing.

19 MR. PAGLIUCA: What I'm getting at, your Honor, is
20 that there is a central hub here, in my view. That hub ends up
21 likely, the argument is, disseminating information to others
22 like the plaintiff in this case.

23 One of the main issues in this case is -- and you've
24 seen it attached to all the pleadings. There are the Palm
25 Beach police reports that relate to a 2005-2007 time frame

1 which antedates, is well after, the allegations in this case.

2 And you've seen this in the police reports and in the
3 pleadings. You don't see my client's name in those police
4 reports as being involved as a target of that investigation.

5 The question then becomes the plaintiff in this case
6 who leaves the country well before any of this surfaces. So
7 what's the source of the information that she is then
8 disseminating to the media and to the CVRA litigation which
9 results in the denial which then results in this lawsuit.

10 There is certainly a reasonable inference that the
11 conduit of the information is the lawyer that's at the center
12 of all of this. That is fair game and fair cross-examination,
13 not only of Mr. Edwards, should he testify, but also of the
14 plaintiff. Where did you get this from? Why are you saying
15 this? Isn't it true that your lawyer who has represented you
16 since 2011 has had access to all of this information?

17 THE COURT: Do you intend to call him?

18 MR. PAGLIUCA: We very well may, your Honor. We very
19 well may. That's why we put him as a witness on our pretrial
20 order. I'm not trying to be coy about this because I try to
21 think through these things.

22 One of the problems you have as a defendant in a case
23 is I'm not exactly sure what I'm going to need to do until I
24 get there. So I try to anticipate the problems or what I need
25 to be able to do that so somebody doesn't say, gee, you didn't

1 list him. So, therefore, you can't call him.

2 When you look at all the tentacles that go out from
3 Mr. Edwards' participation in these various litigations, that's
4 the source of the information, and I need to be able to look at
5 it.

6 Now, your Honor made a ruling that I would suggest to
7 your Honor is very similar. Both Mr. Cassell and Mr. Edwards
8 in categories 1 and 2 were required to produce the documents in
9 the Edwards and Cassell v. Dershowitz litigations. It's sort
10 of the same notion here, that these folks are all involved in
11 all of the underbelly of all of this.

12 THE COURT: This issue certainly did not come up in
13 the Dershowitz.

14 MR. PAGLIUCA: It did not. This is a separate issue.
15 Correct. That's why Mr. Cassell was not subpoenaed for that
16 information, because he was not the defendant in that
17 litigation, which was Mr. Edwards was the defendant, Epstein
18 against Edwards.

19 So that's the reason why at least I believe that's
20 discoverable, your Honor. They say that it's burdensome. It's
21 really not burdensome. Mr. Edwards was separately represented.
22 He was represented by a competent lawyer. They will have
23 electronic files of these things that can be produced.

24 THE COURT: Parenthetically, he's not here.

25 MR. PAGLIUCA: He's not here today. Correct.

1 MR. CASSELL: I'm sorry to interrupt, but I'm here
2 representing Mr. Edwards today.

3 MR. POTTINGER: Mr. Scarola is not here, which is a
4 very good point, your Honor. I didn't even dawn on that.
5 Mr. Scarola entered his appearance in Florida on behalf of
6 Mr. Edwards.

7 I don't think he's entered his appearance here. I'm
8 happy to have Mr. Cassell represent Mr. Edwards' interests to
9 move this along, but it is a good point that the lawyer that
10 was on the paper in Florida is not here today.

11 THE COURT: If he's represented -- and I'm told he
12 is --

13 MR. PAGLIUCA: Your Honor, I can move along here.

14 THE COURT: So that's 3, 4, and 5.

15 What was the next?

16 MR. PAGLIUCA: You have resolved 6, 7, 8, 9, 10, and
17 11. That's either by it's already been produced or you denied
18 the production. So that's no longer in issue. 6 through 11
19 are no longer at issue.

20 The next item that's at issue is 12. I think this is
21 a fairly discreet item, your Honor, and I suspect that the
22 answer is there are no documents responsive. I haven't heard
23 that yet, but 12 relates to disclosures from Mr. Edwards to the
24 plaintiff in this case under the Florida Rules of Professional
25 Conduct.

1 The objection to this is attorney-client privilege.
2 I'm not asking for anything that's privileged. I'm asking for
3 disclosure documents of the type that would be associated with
4 a fee agreement, for example. If they don't have any, they
5 don't have any, and I'm happy to accept that representation,
6 whether they do or they don't, as concluding that.

7 If they have something that they think is privileged,
8 I'm simply going to suggest that they put it on a log, and the
9 Court can make that determination. That's a very discreet
10 item, number 12.

11 THE COURT: Okay.

12 MR. PAGLIUCA: Number 13 has been resolved. You
13 denied this request as part of the Cassell subpoena. 14 has
14 never been contested. So I assume someone will respond, and
15 maybe we don't have any of these documents or not, but it's not
16 contested.

17 15 has been resolved by your Honor in the Cassell
18 order. 16, 17, and 18 have not been contested. So I'm
19 assuming they will either be produced or they don't have any of
20 these documents.

21 19 and 20 have been contested. 19 and 20 are
22 requests. 19 is any letter or communication from you to any
23 witness or prospective witness in this case, Giuffre v.
24 Maxwell. And 20 is any letter or communication to you from any
25 witness or prospective witness in Giuffre v. Maxwell. I don't

1 understand the objection to this, quite frankly. What I'm
2 asking for are written communications from Mr. Edwards to
3 prospective witnesses in this matter.

4 I know that Mr. Edwards has written to witnesses
5 soliciting their participation in this case, and I know that
6 witnesses have responded. I have not been produced any of that
7 information, and we've subpoenaed it. Frankly, I think it
8 should have been produced as part of the underlying request for
9 production of documents in this case. When it wasn't, we
10 subpoenaed it from Mr. Edwards.

11 It's not privileged because it's a communication to a
12 third party. It's not work product because it's a
13 communication to a third party. To the extent that Mr. Edwards
14 conveys facts or makes representations or promises in these
15 communications, they are discoverable substantively and
16 potentially usable, either as impeachment or for additional
17 discovery, should those witnesses testify.

18 I can't understand how this would be burdensome on
19 anyone. If you write someone a letter, you keep it in a file,
20 electronically no doubt, and you say, here are the letters that
21 I've written, and here are the communications I've gotten back.
22 That's it, your Honor. Thank you.

23 MR. CASSELL: Thank you, your Honor. Let me describe
24 a little bit about this Florida lawsuit since I think this is
25 the first time it's shown up on your docket here, and that's, I

1 think, an indication of how removed it is from this particular
2 case.

3 What happened was Mr. Epstein, unhappy with the fact
4 that Brad Edwards and I guess me as well had been representing
5 a number of victims of his sexual assault organization, filed a
6 frivolous lawsuit against Brad Edwards saying he was making up
7 claims.

8 Edwards responded with a counterclaim saying, these
9 are not frivolous claims, and indeed this is a malicious
10 prosecution designed to burden me from my representation of
11 victims of your sex-trafficking organization.

12 Mr. Edwards then moved for summary judgment on the
13 claim against him, and the day before the summary judgment
14 motion was to be argued, Epstein dropped his claim.

15 All that remains now is the Edwards against Epstein
16 malicious prosecution claim, that you filed a bogus lawsuit
17 against me to try to keep me from representing these young
18 women who have been the victims of your sex abuse.

19 And the trial court judge allowed that case to move
20 forward and allowed there to be a punitive damages claim which
21 requires a specialized finding in Florida law that the claims
22 have in fact so much merit that punitive damages might be
23 appropriate.

24 However, under a Florida Court of Appeals decision
25 that came out while the litigation was going on, which appeared

1 to abolish the tort of malicious prosecution in Florida,
2 Edwards' case was thrown out based on this Florida Court of
3 Appeals decision.

4 It went up to the Florida Court of Appeals, which
5 reaffirmed its earlier decision, and then it went to the
6 Florida Supreme Court which, not surprisingly, unanimously held
7 about three weeks ago that yes, the tort of malicious
8 prosecution, including punitive damages, still exists in
9 Florida.

10 THE COURT: I'm sorry. Say it again.

11 MR. CASSELL: The Florida Supreme Court ruled
12 unanimously that a malicious prosecution tort still exists in
13 Florida, and implicitly that means that Edwards' malicious
14 prosecution claim against Epstein can move forward.

15 The only thing that's going on is Edwards' lawsuit
16 against Epstein saying, you were trying to shut me down as a
17 lawyer representing these women because you knew these were
18 legitimate claims, and this was a malicious prosecution.

19 The Florida Supreme Court ruling, by the way, was not
20 in the Edwards v. Epstein case. It was in a parallel case, but
21 the issues were overlapping and I think essentially
22 consolidated or held together because they're the same issues.

23 So now, under the trial court's order that's in place
24 in the Edwards counterclaim against Epstein, as soon as the
25 Florida Supreme Court disposes of the pending motion to

1 reconsider, which Epstein has filed to kind of slow things
2 down, in our opinion, once that happens, there will be a trial
3 within 60 days on the punitive damages and other claims against
4 Epstein. So that's that lawsuit.

5 Let's understand a couple things about that lawsuit.
6 Epstein filed that lawsuit against Edwards in 2009. I think
7 it's undisputed the first time Mr. Edwards had any contact with
8 Ms. Giuffre was 2011.

9 So the lawsuit is two years prior, was filed two years
10 prior to anything having to do with contact between Edwards and
11 Ms. Giuffre. Of course, the events that are central to this
12 case occurred in late December/early January 2014/2015, which
13 was, if I'm doing my math correctly, about six years after the
14 lawsuit was filed.

15 So now the issue is, okay. What's going on here. In
16 our view -- I'll be very candid here. We believe that this is
17 an effort to distract Mr. Edwards from preparing for trial.

18 Our trial team that has been assembled for this very
19 complicated case will be headed by David Boies of the Boies,
20 Schiller law firm, his partner Sigrid Mc Cawley in Florida, and
21 Brad Edwards.

22 Those are going to be the three central figures on our
23 trial team, and Mr. Edwards has critical pieces of the case.
24 My understanding is, for example, he'll be handling the
25 examination of Ms. Maxwell.

1 THE COURT: That simply means that he cannot testify.

2 MR. CASSELL: That's our position. We believe the
3 only reason this litigation is going on is to try to knock out
4 the key person who knows the most about this case.

5 Your Honor has seen this before. The reported
6 decisions are filled with, you know, lawyers moving to call a
7 lawyer as a witness and what have you. The reason that they're
8 doing that is to try to disrupt the preparations of the
9 opposing side in the case. For example, they could call me as
10 a witness, but they don't want to call me.

11 THE COURT: So your representation is that he is going
12 to be an active participation in the trial.

13 MR. CASSELL: There are lawyers. He's going to be
14 handling, for example, my understanding is the direct and
15 cross-examination of Maxwell.

16 THE COURT: That's the representation.

17 MR. CASSELL: Yes. That's the representation.
18 Mr. Boies has gotten involved in the case in the last year or
19 two. Mr. Edwards has the institutional knowledge. Think about
20 it. If you're on the defense team, who do you want to knock
21 out of the lawyers here. You don't want to knock out some law
22 professor from Utah. You want to knock out someone who is
23 intimately familiar with the witnesses.

24 THE COURT: Is there anything else you want to tell
25 me?

1 MR. CASSELL: Yes. So, with regard to 3, 4, and 5,
2 the issue is should he be required to produce these documents
3 in this lawsuit that was filed in 2009. You have in front of
4 you an uncontested declaration from Mr. Edwards which
5 indicates --

6 THE COURT: How about 19 and 20?

7 MR. CASSELL: Let's turn to 19 and 20. In the letter
8 to any perspective witness -- lawyers contact witnesses in
9 cases, and you generally don't get discovery about we haven't
10 subpoenaed them to say any time you've called up a witness, let
11 us know and give us all your communications with them. That
12 would have a chilling effect on lawyers doing their job with
13 respect to contacting witnesses.

14 You'll notice too the way this is phrased. It says
15 any letter or any communication. Mr. Edwards would have to go
16 through all of his emails, all of his phone logs, and you'll
17 notice the indication is "any prospective witness."

18 there have been, I suppose, I think several hundred
19 prospective witnesses that have been identified, and I think
20 that the idea here is to burden Mr. Edwards with trying to
21 figure out who are prospective witnesses, has he had any
22 contact with them, is there some email in either his current
23 law firm or his old law firm that indicated some --

24 THE COURT: So you're not telling me that there is
25 anything improper except the statement that you just made,

1 well, it would have a chilling effect.

2 Has anybody said that besides you?

3 MR. CASSELL: That's what we've argued in our papers
4 on this, as I recall. Let's see. At page 19 of our moving
5 motion to quash, we have said that, "Most important, like the
6 other requests the subpoena makes, this request appears to be
7 exclusively designed to burden Mr. Edwards. Defendant Maxwell
8 is certainly free to depose any witness --"

9 THE COURT: I take a look at your reply, and I don't
10 see anything about 20 in the reply.

11 MR. CASSELL: Let me see how the course of the
12 briefing went on this. There is a three-sentence response from
13 a defendant at page 16 of their response. I'm now looking. I
14 think maybe we just thought the issues were sufficiently well
15 briefed that we wouldn't provide an additional argumentation
16 above and beyond.

17 THE COURT: Do you want to add anything now?

18 MR. CASSELL: Yes, I do, your Honor.

19 THE COURT: Okay. Let's do this --

20 MR. CASSELL: I'll file something by Monday on this.

21 THE COURT: It's your motion. So I think, if you want
22 to file something in addition with respect to 20 --

23 MR. CASSELL: And 19 I think, 19 and 20.

24 THE COURT: What's the difference between 19 and 20?

25 MR. CASSELL: I'm not certain.

1 MR. PAGLIUCA: 19 is outgoing letters; 20 is incoming
2 letters, your Honor. So it's whatever goes out and whatever
3 comes back.

4 THE COURT: So they're the same.

5 You want to file something. When?

6 MR. CASSELL: We'll file it on Monday, if that's all
7 right.

8 THE COURT: So the defendant is going to get
9 additional time. Monday to when from the defense?

10 MR. PAGLIUCA: A week from Monday would be fine. I'm
11 going to be back here on Thursday.

12 THE COURT: Thursday?

13 MR. PAGLIUCA: Thursday is fine, your Honor.

14 MR. CASSELL: Is that for the argument?

15 THE COURT: Is there anything else you all want to
16 add?

17 MR. CASSELL: Is that being set for argument next
18 Thursday then?

19 THE COURT: No, not as far as I'm concerned.

20 MR. CASSELL: Just the briefing. All right.

21 THE COURT: If you want to give me some authorities
22 and something, that might help. What I'm hearing from the
23 defendant is that aside from this business of burdening
24 Edwards, which that I don't pay much attention to -- lawyers
25 burden lawyers, and that's life. So that doesn't cut any ice

1 with me, frankly. I'm being told that there is no basis for
2 objecting, and you say, there is, but I don't see any authority
3 for it.

4 MR. CASSELL: All right. If we could provide a brief.
5 If I could just say one thing about lawyers burdening lawyers.
6 Typically what you're saying is lawyers are saying they're
7 really busy. These are subpoenas asking for Mr. Edwards --

8 THE COURT: I understand what they are. I understand
9 what they are, but you're not saying that it's irrelevant.

10 MR. CASSELL: We are saying it's irrelevant.

11 THE COURT: You didn't say it was irrelevant. The
12 first word "irrelevant" came out of my mouth, not yours.

13 MR. CASSELL: What we've set out in our brief --

14 THE COURT: It seems to me that as to work product, I
15 don't know. I can imagine that there may very well be a work
16 product privilege.

17 MR. CASSELL: The reason we didn't put that --

18 THE COURT: But that hasn't been briefed either.

19 MR. CASSELL: What we put in our initial paper was we
20 thought that this was going to be resolved on burdensome
21 grounds, burdensomeness grounds, and that we reserved the right
22 then to do the additional, if your Honor --

23 THE COURT: Fine. So we've got these additional
24 grounds that you want to advance.

25 We've still got 3, 4, and 5 that I have to resolve.

1 MR. PAGLIUCA: Correct.

2 THE COURT: As far as 19 and 20 are concerned, we'll
3 split that off, and you can argue that next week.

4 MR. CASSELL: All right.

5 MR. PAGLIUCA: That's fine, your Honor.

6 MR. CASSELL: I think we were going to also see about
7 possibly moving next week?

8 MR. PAGLIUCA: No.

9 THE COURT: Is there anything else?

10 MR. CASSELL: Not for today, your Honor. Thank you.

11 MR. PAGLIUCA: No. Thank you.

12 THE COURT: Thanks. I almost forgot. When are we
13 going to get together to determine how we're going to try this
14 thing with respect to the protective order?

15 MR. PAGLIUCA: I believe you entered an order,
16 your Honor, saying we're going to talk about that next Thursday
17 is my recollection. So I will be prepared to do that next
18 Thursday. I'm hoping to talk to plaintiff's counsel before
19 then.

20 THE COURT: Work it out if you can. Okay. Good.
21 Thanks.

22 (Adjourned)

23

24

25