

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.
May 9, 2018
12:10 p.m.

10 Before:

11 HON. ROBERT W. SWEET,

12 District Judge

13 APPEARANCES

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1 THE COURT: I'll hear the movant in Giuffre.

2 MR. BOHRER: Your Honor, may I deal with one
3 preliminary thing first?

4 THE COURT: Sure.

5 MR. BOHRER: My assistant working with me,
6 Ms. Harrington -- she's done everything to get admitted. She
7 has an admission date in July, but she's not actually admitted
8 to the court.

9 Is it okay if she sits here with me?

10 THE COURT: Of course. Delighted to have you.

11 MR. BOHRER: Are you allowed to admit her?

12 THE COURT: Certainly I'll admit her pro hac vice.

13 MR. BOHRER: Thank you, your Honor.

14 Your Honor, my name is Sandy Bohrer with the law firm
15 of Holland & Knight. We represent the *Miami Herald*. We're
16 seeking to intervene. We're the third party that's sought to
17 intervene.

18 The *Miami Herald* does investigative reporting. My
19 reporter is an award-winning investigative reporter. We're
20 seeking access to the entire file. I realize that before us,
21 two people came in and sought access to different portions of
22 the file. But I think the circumstances have changed now and
23 the situation has changed now such that the Court should be in
24 a position where it should look favorably on our motion.

25 First, your Honor, one of the things that's changed is

1 there is no impending trial. If the Court recalls, in your
2 order --

3 THE COURT: I do recall.

4 MR. BOHRER: The case has been settled.

5 The second one is the Court was concerned about the
6 revelation of embarrassing information or, worse perhaps I
7 suppose, private information, about the plaintiff. But the
8 plaintiff now, with regard to my motion -- and obviously her
9 counsel can speak for herself -- has agreed to our motion if it
10 results in opening the whole file. So I think that the
11 underpinnings for the last order are not there anymore and we
12 have to find another way, if this motion to unseal is to be
13 denied.

14 My clients aren't here for prurient interest, and of
15 course we would agree to things like redacting names and
16 substituting initials and things like that. They don't
17 identify the names of victims of sexual assaults.

18 But the law is such that we have to decide what
19 standard applies. But in any event, a standard applies. In
20 the Court's original order, the confidentiality order, it gave
21 the parties a lot of latitude to determine something to be
22 confidential, and then it could be challenged later.

23 And then subsequently after, it looked to us from an
24 incomplete view of the record, 35 motions, the Court said that
25 basically the parties no longer have to send a letter to the

1 Court, and that left to the parties the discretion to
2 determine --

3 THE COURT: No. I don't think that's quite right. I
4 think the order said you could proceed by letter rather than my
5 motion. That's all.

6 MR. BOHRER: Yes.

7 THE COURT: But the same provisions applied. It was,
8 in effect, a you-had-to-be-there. The motions, to say the
9 least, were multitudinous.

10 MR. BOHRER: We got a taste of that, your Honor.
11 There are two ways of looking at judicial access in our federal
12 court system. One is the common law right of access to
13 documents, and the other is the First Amendment.

14 I'll go into it in a minute. Either way, there was to
15 be a showing by the party seeking to seal that a particular
16 test has been met with regard to the document at issue.

17 The courts have held pretty strictly, according to our
18 appellate courts, that it's a document-by-document basis. I
19 understand from what the Court just said that a
20 document-by-document basis is kind of a problem in this file,
21 but that is the law.

22 So if it is a judicial document, then the common law
23 right applies and we have a certain standard. If it's a
24 document recognized by the First Amendment as a judicial
25 document, then we have a different test. So, if it's not a

1 judicial document, for example, you still have to show a good
2 cause, "you" being the party seeking to seal, not the party in
3 my position.

4 And in the *Fournier* case which we cite in our
5 papers -- that case says you can't just simply do it. You're
6 going to have to show on a case-by-case, document-by-document
7 basis to the trial court that there is a basis for it. So
8 what's a judicial document, and everybody seems to have their
9 idea about what it is.

10 In *Lugosch*, if I'm pronouncing that correctly, the
11 Second Circuit says it's "a document relevant to performance of
12 judicial function and useful in judicial process." I want to
13 stress, your Honor, that I understand that documents can be
14 filed for purposes that lawyers shouldn't file them.

15 Someone could file a complaint making a bunch of
16 allegations just to get it in a newspaper and the allegations
17 aren't true and they take a dismissal after the newspaper
18 humiliates a defendant. But that's not where we are, and
19 that's not what we're looking for.

20 We're looking for papers, for example, relating to
21 summary judgment, after we've gotten past the what's
22 frivolous/what's meritless basis, what is an issue of fact for
23 trial or not. So relevant to performance judicial function and
24 useful in judicial process is a good standard, and it's a
25 Second Circuit standard.

1 The Second Circuit's decision in the *Under Seal*
2 case -- these are all cases cited in our papers -- says there
3 is a presumption of access to all filed documents, and I
4 understand that lawyers, although not necessarily in this case,
5 can file documents for inappropriate purposes, not to be
6 judicially resolved. But clearly dispositive motions have a
7 presumption of access and are judicial documents.

8 There's *Logosch* and a bunch of other cases we cited,
9 including the Second Circuit's decision *Joy*. The *Lytle* case we
10 cite makes it a point that there is no question that those are
11 judicial documents.

12 We've also asked for, because we don't know exactly
13 what else is in the record, for things like motions to compel
14 or motions for a protective order, the other side of that. Not
15 knowing what's in them, we can't be sure that there is not a
16 basis in a particular paper for sealing or redacting a portion
17 of that paper. We don't know because none of it is public.

18 But there are cases that cited -- *Alexander*
19 *Interactive* is one of them -- that say there is a presumption
20 of access to those papers too because there is a judicial
21 function associated with every one of those motions, every
22 single one of them.

23 Again, we assume -- and *Logosch* made a point of
24 this -- that lawyers, when they file papers, know that Rule 11
25 means you don't file papers that are irrelevant to the issue

1 before the court for some improper purpose.

2 So we're assuming everything in this file was filed --

3 THE COURT: My mentor in this business was J. Edward
4 Lumbard. When I was an assistant United States attorney,
5 Lumbard would have meetings of the office and try to educate us
6 on appropriate conduct and rules and whatever. One of J.
7 Edward's rules was never assume a God damn thing. I make that
8 comment because of your assumptions.

9 MR. BOHRER: Well, I'm trying to --

10 THE COURT: I understand your problem. Because of the
11 record here, clearly I do understand. But I couldn't resist.
12 I apologize.

13 MR. BOHRER: I accept, your Honor.

14 The only opposition at this point at this stage is by
15 Defendant Maxwell. Defendant Maxwell has a slim set of papers
16 in opposition, and they don't really dispute any of the basic
17 principles I've just gone over.

18 If you find that a document is a judicial record,
19 according to *Logosch*, you can only seal those records based on
20 findings made in the public record demonstrating that closure
21 is essential to preserve higher values and is narrowly tailored
22 to that interest. That comes from Supreme Court decisions.

23 So we're at a point where, had my client been looking
24 at this issue earlier, it would be easier to do. But the fact
25 is all of the records that were sealed in this file were sealed

1 without a determination by the Court that met the standard in
2 *Logosch* or met the standard I noted in *Fournier*, the good-cause
3 standard where the Court has to make a finding.

4 Ms. Maxwell's lawyers do point out that there are
5 documents in the file that won't qualify for access or won't
6 require redaction. For example, it could be an attorney-client
7 privilege document. It could be something that's embarrassing
8 that's irrelevant to the proceedings.

9 Again, I can't assume whether that's right or wrong,
10 but I noted that of the two examples she gave, one of them had
11 to do with plaintiff and plaintiff's passport information, and
12 plaintiff has agreed to open the whole file up.

13 Now, maybe they'll have some things they'll want to
14 redact -- we don't have a problem with those -- Social Security
15 numbers, that sort of thing. My client and my reporter write
16 about those things all the time. She writes about children.
17 She writes about public officials whose information needs to be
18 redacted for safety purposes.

19 But the bottom line, your Honor, is without
20 on-the-record findings meeting one test or the other, good
21 cause if it's not a judicial document or the higher standard if
22 it is, the record must be open. The and truth is that
23 Ms. Maxwell has not asserted that there is anything in the
24 record to support that.

25 The truth also is that something, for example, the

1 motion for summary judgment -- and I have read the redacted
2 order granting the motion for summary judgment -- without such
3 a showing all has to be opened up. The motions to compel would
4 have to be opened up. Yes, there might be redactions, and my
5 client is willing to cooperate in all regards to that. We do
6 this all the time. I do other public records and judicial
7 records access. But the bottom line is that this has to be
8 done, or the records have to be open entirely.

9 Now, there are a couple little points, whether our
10 motion is timely. The law is pretty clear that it was timely.
11 We cited a whole series of decisions. One of them is the
12 *Pineapple Antitrust* case. There is no deadline for filing a
13 motion such as my client's.

14 The second one is there is the argument that, well,
15 there may be some people who relied on the order, provided
16 information with a confidentiality notation of some kind, and
17 what about them.

18 I think there are a few things to say about that:
19 First, if the confidentiality order was not entered and the
20 confidentiality determination not made in accordance with the
21 law, the order is not valid. And it's unfortunate, but it
22 still gets opened up.

23 The second thing is -- and *Logosch* makes this point --
24 with even the confidentiality the Court entered, which seemed
25 to me, the initial one, the standard one that lawyers use all

over the United States, it provides for people coming back in and saying, I challenge it. I want to open it up. I want to unseal it.

So no one, as the Second Circuit said, should assume it's closed forever once it gets in a court record. We're not seeking things that were never filed. We're not seeking records that could have been filed but weren't filed. We're just seeking access to this court file.

My client is doing a report, which unfortunately is all too timely today, about a sexual predator and a sexual trafficking scheme, and this case relates very much to it.

We have a lot of information in Florida where Mr. Epstein committed his crimes, but when she learned about this case, we realized that there is more there.

Our purpose is not prurient. It is to inform the public. It is to prevent things like this from happening and to prevent such abuses. This is the purpose of the press in America.

We're the watchdogs. We make sure things don't slip by. We make sure things are done right. We make sure that people like Mr. Epstein and people associated with him, allegedly including Ms. Maxwell, are held up to public scrutiny such that other people won't do it in the future and the right gets done.

So, your Honor, we ask that the motion be granted;

1 that the file be unsealed. Thank you.

2 MS. McCAWLEY: Your Honor, may I be heard on behalf of
3 the plaintiff? Just briefly. Our position is very simple here
4 with respect to Virginia.

5 Our position is if one docket entry is opened, all
6 must be opened. There can be nothing in between because what
7 would happen is if, for example, as what was presented to the
8 Court previously, only a few documents were unsealed, only a
9 partial piece of testimony was unsealed, that would create an
10 incomplete record.

11 Virginia is prepared to stand up to her abusers, but
12 she can't do so with her hands tied behind her back. She has
13 to have the entire record available. It's either all or
14 nothing. Anything less than that would be inherently unfair to
15 her because obviously we have operated under the confines of
16 this protective order throughout the case. So while we do
17 oppose a selective disclosure, we don't contest, as long as
18 there is an entire disclosure.

19 What that means, your Honor, is with respect to all of
20 the record entries -- so, for example, the summary judgment,
21 while that had certain information that was presented to the
22 Court, it didn't have everything.

23 So after the summary judgment, your Honor will
24 remember there was other witness testimony that was presented
25 and put in the court record. There were designations for trial

1 that were put in the court record that tell the story of the
2 abuse.

3 So in order for her to be able to respond to public
4 attacks on her, she has to have the information available to
5 her. If it's sealed, she has to abide by that seal. So she
6 would be in a terrible position if she wasn't able to defend
7 and support her own position with the testimony of those others
8 who echoed her position.

9 So, your Honor, that's where we stand on this. We
10 firmly believe that in order for the complete story to be told
11 and to be public, if that's what's going to happen, it has to
12 be the entire record. Anything less than that would be
13 inherently unfair to the plaintiff. Thank you.

14 MR. PAGLIUCA: Good afternoon, your Honor.

15 THE COURT: Welcome back.

16 MR. PAGLIUCA: Thank you. It's good to see you again.

17 Your Honor, as unpleasant as this may be, I think it's
18 important to go back over the history of the protective order
19 in this case and some of the many squabbles and disputes -- and
20 I emphasize the word "many" -- that the parties had in
21 connection with the discovery in this case.

22 The Court may recall that about two years ago,
23 March 17, 2016, Ms. McCawley, Ms. Menninger, and I were in the
24 courtroom. At that point in time, Ms. McCawley was very
25 anxious to depose my client in a very short period of time.

1 The position of the parties then was we'll sit for a
2 deposition, but we need a protection order in place before we
3 do that, and it has to be agreed upon and ordered by the Court.

4 I mention this, your Honor, because throughout the
5 history of this case, the protection order has played a central
6 part and has been relied on by the parties, the Court, and the
7 witnesses and relied on in a way that I believe, frankly, that
8 Ms. McCawley's position is not well-founded here because indeed
9 there are many judicial admissions by the parties to this case
10 during the course of the case where they relied on and asked
11 the Court to endorse and protect the parties and the witnesses
12 under the protection order.

13 So the first example of this, your Honor, which I
14 think is important with regard to the reliance issue is that
15 March 17, 2016, hearing before your Honor.

16 Ms. McCawley was pressing hard for a deposition date,
17 and we hadn't gotten all of the documents, and we hadn't had a
18 protective order. And Ms. McCawley says -- and this is at page
19 9 of that transcript, your Honor, dated March 17, 2016 --
20 "Your Honor, if I can have the deposition of the defendant in
21 this case and move this case forward, I will agree to their
22 protective order. I just want that deposition."

23 And the Court says: "Yes."

24 Then Ms. McCawley says: "It is that important to me."

25 Then she says: "Your Honor, you can today enter the protective

1 order that they submit. I will disregard my objections if I
2 get the deposition."

3 The Court: "You will agree now to the protective
4 order?"

5 Ms. McCawley: "Yes. If it means I can get her
6 deposition, yes, I will do that."

7 The Court: "oh, okay. Good. Well, that's solved
8 then."

9 Well, that solved it for the course of this case,
10 your Honor, and it should solve it now.

11 The Court may then recall that we sat for that
12 deposition, and we disagreed about many of the questions that
13 were asked to our client because of her privacy concerns.

14 Ms. Maxwell has and had a constitutional right of
15 privacy and, on my advice, refused to answer a number of
16 questions related to what I will loosely characterize as her
17 "adult sexual conduct."

18 We were back in front of the Court on a plaintiff's
19 motion to compel answers to those questions where we asserted
20 Ms. Maxwell's privacy interest in not responding to those
21 questions.

22 We cited to the Court a number of cases, including *Doe*
23 *v. Bolton*, a U.S. Supreme Court case, which holds: "Personal
24 sexual conduct is a fundamental right protected by the right to
25 privacy."

1 In response to that, the plaintiffs said to the Court:
2 "well, your Honor, we have a protective order in place, and
3 that assures Ms. Maxwell's right to privacy in answering those
4 kinds of questions." And that was their response in docket
5 number 152 which was filed with the Court on May 11, 2016.

6 And the Court accepted that response and held, in
7 compelling Ms. Maxwell to answer those questions, her private
8 questions about her own life -- the Court ruled that: "The
9 privacy concerns are alleviated by the protection order in this
10 case drafted by the defendant."

11 So we lived with the protection order, and we answered
12 those questions. And that order was entered by the Court on
13 June 20, 2016.

14 I don't agree with the movant's counsel, and I don't
15 assume, your Honor, that the documents in this case were filed
16 for a good purpose. I complained early and often to this Court
17 about statements made by opposing counsel and documents filed
18 with the Court which I viewed to be not judicial documents, not
19 necessary for the determination of any issue in this case, but
20 simply filed in some effort to try to get the story that they
21 were promoting out to the Court.

22 There is virtually no document that was presented to
23 this Court that, in my view, throughout the majority of this
24 case, had a legitimate function other than to advance the
25 agenda of the plaintiff in this case.

I move on to the witnesses in this case who relied on this protection order, your Honor. There were 29 depositions taken in connection with this case. Many of these witnesses were represented by lawyers. Many of these witnesses did not want to be deposed, and the Court may recall that the Court had to issue a number of orders compelling the deposition testimony of many of the witnesses.

The Court's protection order was a significant factor in securing the testimony of these witnesses. Counsel for both parties would get contacted by either the deponent or the lawyer for the deponent. And they would raise concerns about what's going to happen to my testimony? Who is going to get access to it? You are asking me about many private issues.

And this would include alleged victims of Mr. Epstein who did not want to testify in deposition who were represented by lawyers. It would include other people who were accused by plaintiff's counsel as participants with Mr. Epstein.

I will give one example to the Court. I will refer to this witness only as Nadia. She was deposed, compelled to be deposed, after much litigation. She was represented by a lawyer here, Erica Dubno.

We start the record in that deposition with Ms. Dubno saying: "We believe this deposition is pursuant to a protective order. We want to ensure the confidentiality of everything that occurs during this deposition and that all

1 parties agree to a protective order for confidentiality of this
2 deposition." That's at page 6 of Nadia's transcript.

3 Mr. Edwards was in attendance at that deposition,
4 your Honor, and assured the witness and her lawyer: "This and
5 the other depositions that are designated as confidential are
6 being treated as confidential by the Court." That's what
7 Mr. Edwards, plaintiff's counsel, tells the witness and her
8 lawyer.

9 I indicated: "I have no objection to this deposition
10 being deemed confidential and subject to the protection order,"
11 And Mr. Edwards agree, "No objection." That occurred a number
12 of times during the course of this case.

13 So we have these third parties who, through no fault
14 of their own, are being questioned about extremely sensitive
15 personal matters and are doing so under compulsion and with the
16 understanding that they are protected by this Court's
17 protective order.

18 So the fact that the plaintiff is somewhat
19 flip-flopping here on this issue I think is really of no
20 consequence because it is the Court's order. It is not
21 Ms. McCawley's order. It's not my order. It's the Court's
22 order.

23 It was stipulated to by the plaintiff, and the
24 plaintiff relied on it. And in my view, these are judicial
25 admissions that can't be taken back at this point because they

1 were relied on to advance their position during the course of
2 the litigation, and you can't change that now because there is
3 some other agenda here.

4 The other thing that I think is interesting, if you
5 read carefully the plaintiff's papers, is they're not really
6 agreeing to really anything. What they're agreeing to is maybe
7 it's okay if the entire record gets unsealed, but, gee. There
8 are things in there that we think probably shouldn't be
9 unsealed anyway, and we're going to need to talk about that
10 down the road, which I think leads to then a discussion of kind
11 of what we're talking about in the universe of documents here
12 that the Court has to consider.

13 The Court is well aware that there are over 900
14 filings in this case, and I would group those into largely two
15 categories. The first would be discovery squabbles by the
16 parties, and then the second would be the flurry of pretrial
17 motions that the Court was deluged with shortly before trial a
18 year ago and then the summary judgment motion.

19 The Court did not rule on, I would say, the vast
20 majority of the pretrial motions that were pending when the
21 parties settled the case. I don't recall, frankly, how many of
22 those that there were, but I know that there were banker's
23 boxes of papers that the Court had that were under
24 consideration for those motions.

25 I break these categories out because indeed the

1 overwhelming record in this case is that these are not judicial
2 documents, and in fact, the Court didn't rule on a huge number
3 of the filings that were before the Court. So I don't see how
4 anyone could consider these to be judicial documents because I
5 don't believe that they were considered by the Court, given the
6 settlement of the parties. So that's the universe of what
7 we're talking about here.

8 The *Lugosch* case -- the subject matter of that is a
9 motion to intervene with regard to a summary judgment motion.
10 Here we have a different situation. The intervenor, late to
11 the party by three years at this point, asks to unseal 900
12 filings with this Court.

13 So I don't understand how you can sit on your hands
14 for three years and then come in and say, well, there's this
15 enormous public interest in this case which, by the way, the
16 *Miami Herald* has not published one article about this case,
17 your Honor. Not one. So there is no interest in this case.
18 They may be interested in Mr. Epstein, but I'm not here
19 representing Mr. Epstein.

20 We know -- and the Court knows this -- that just
21 because something gets filed, it's not a judicial document, and
22 it's not entitled to any sort of access presumptively.

23 So let's assume for a moment that there is something
24 that the Court considers a judicial document in this pile. We
25 first to have to look at has the movant established that this

1 is a judicial document.

2 I don't have the burden of establishing whether these
3 are judicial documents or not, and the Court is in a position
4 of determining whether these are judicial documents, not me and
5 not the movant.

6 Then we talk about the weight of presumption of
7 access. And, again, the vast majority of all of the papers
8 before the Court were not germane, in my view, to any of the
9 Court's determinations here. They were, in my view, simply
10 added for effect and had really no purpose in connection with
11 the pleadings.

12 The Court has to do a balancing test. This is a
13 nonexclusive list of factors, but two of the factors that are
14 discussed in *Lugosch* are the privacy interests of those
15 resisting discovery, judicial efficiency, and then there is a
16 discussion about reliance on the protection order. The Court
17 can use any of those factors to find that any of these
18 documents should not be disclosed or not accessible by the
19 public or the media.

20 Judicial economy was in fact advanced, your Honor, by
21 the way that these documents were handled and should be
22 handled. The Court addressed this issue in its opinion I think
23 issued on June 20 -- let me find the date. Sorry. November 2,
24 2016, your Honor.

25 I think sort of presaging some of these issues, I

1 quote the Court to the Court: "By the very nature of this
2 action, issues of credibility and reputation abound concerning
3 sensitive personal conduct."

4 The parties and the Court recognized early on the good
5 cause for the protective order which was entered "to protect
6 the discovery and dissemination of confidential information or
7 information which improperly annoy, embarrass, or oppress any
8 party, witness, or person providing discovery in this case."

9 The Court went on to say that there is no dispute that
10 the documents, at least with regard to this order, were
11 confidential and that they were, the Court found, properly
12 designated as such.

13 All of the documents that have been submitted in
14 connection with this case are highly sensitive confidential
15 documents that relate to very private matters of many
16 individuals.

17 Everyone associated with this case relied heavily on
18 this protection order throughout the conduct of this case, and
19 that includes the Court, the witnesses, and the parties.

20 I think that the Court has, at least twice now, found
21 that this protection order should remain in effect. And it
22 should continue the protection order because the privacy
23 interests and the reliance, certainly of Ms. Maxwell, on the
24 protection order outweigh any need or presumption of
25 disclosure.

1 Thank you, your Honor.

2 MR. WOLMAN: Your Honor, my name is Jay Wolman. I
3 represent Intervenor Michael Cernovich.

4 May I be heard for a minute?

5 THE COURT: Sure.

6 MR. WOLMAN: My brother at the bar mentioned the
7 changing positions of plaintiff in this matter, but let's first
8 focus on the changing position of the defendant.

9 We moved for unsealing the summary judgment motion,
10 all the attachments, all the opposition, the order that would
11 be forthcoming. At that time Ms. Maxwell did not oppose, but
12 now, only after settlement, only after a year, do we have her
13 finally coming in to say, well, now it should be remaining
14 sealed.

15 Similarly, as your Honor is probably aware, we have
16 appealed your Honor's order to the Second Circuit. Ms. Giuffre
17 has appeared to argue against it, but Ms. Maxwell hasn't.

18 So right now with Ms. Giuffre's position, if she's
19 saying you can release summary judgment materials but we want
20 other things released as well, then really there is no barrier
21 to the Second Circuit reversing your Honor's order at this
22 point and at least, at a minimum, releasing the summary
23 judgment materials because Ms. Maxwell certainly hasn't argued
24 that that should be prohibited. Only now has she changed her
25 position.

1 As to Ms. Giuffre, when we were here previously,
2 your Honor, the plaintiff was arguing that there were privacy
3 interests and reasons why it should not be released. She's not
4 arguing that anymore. All she's saying now is that there is
5 secondary gain. She wants a secondary use to be able to
6 release the rest. And certainly we don't object to releasing
7 the rest of the materials.

8 But at least as to the summary judgment materials,
9 there is no basis to keep X under seal because Y is also kept
10 under seal. That is not a rule. That's not a thing under the
11 law. There is not a single precedence cited for that
12 proposition because every document is considered in its
13 individuality.

14 I want to address one other point here that seems to
15 get conflated. It was conflated in the prior arguments. It's
16 conflated here. It was conflated, unfortunately, I believe in
17 your Honor's prior order.

18 There is the protective order issued under Rule 26(c)
19 that provided for confidentiality designations. We're not here
20 about that. We are here about the sealing order under
21 Rule 5.2, and that has its own separate standard for sealing,
22 documents that may or may not have been designated confidential
23 under a Rule 26(c) order, but findings as to 5.2 individually
24 need to be made, and they were not made here.

25 There may be grounds why something that's designated

1 confidential may need to be sealed under 5.2, but it's not
2 automatic. And in fact, your Honor started out by saying that
3 the parties still had to submit letters at one point.

4 Your Honor changed that requirement and allowed the
5 parties to just submit filings under seal. They had to publish
6 redacted versions, but they were able to submit unredacted
7 under seal with public redactions, which is why even last night
8 Professor Dershowitz's counsel was still filing something
9 automatically with redactions, because that order is still in
10 place.

11 So we need to bifurcate the issues of what is proper
12 to be sealed under 5.2, and certainly the summary judgment
13 materials should not have been sealed and should be unsealed
14 right now.

15 It is not too late for the news to be interested. It
16 was not late a year ago when we were interested, and certainly
17 we would have that access, should the Second Circuit grant it
18 to us anyhow.

19 So now under 5.2, we need to look at it. And even to
20 the summary judgment materials Ms. Maxwell argued in her papers
21 that there are some documents that may need certain redactions
22 or were irrelevant.

23 If they were irrelevant in her motion for summary
24 judgment, why was she attaching them to her summary judgment
25 motion. They certainly need to be relevant to the judicial

1 function of this Court.

2 The Court may consider *Alexander Interactive* for why
3 everything else are judicial documents and should be unsealed.
4 Thank you, your Honor.

5 MR. CELLI: Your Honor, may I be heard? I'm Andrew
6 Celli for Alan Dershowitz. Good afternoon.

7 Very briefly, your Honor, as your Honor is aware, Alan
8 Dershowitz is an intervenor in this case. We have been
9 litigating for nearly two years to unseal portions of this
10 record. And our appeal, along with Mr. Cernovich's appeal, is
11 pending in the Second Circuit as we speak.

12 We just want to say that we generally support the
13 application of the *Miami Herald*. We filed a letter along these
14 lines last night, and that letter directs the Court's attention
15 to document number 902 on the docket which was a letter that we
16 wrote to your Honor in June of 2017 more or less predicting
17 this exact turn of events and calling for -- this may be the
18 only time we agree with Ms. Giuffre's counsel on virtually
19 anything -- a fulsome release of information if there is going
20 to be any release at all.

21 So I just wanted to make that point orally. It's in
22 our letter, and we appreciate the Court's consideration.

23 THE COURT: I've read it.

24 MR. CELLI: Thank you, sir.

25 MR. BOHRER: Your Honor, might I be heard briefly in

1 reply?

2 THE COURT: Of course.

3 MR. BOHRER: Thank you.

4 Your Honor, I don't think I need to add anything to
5 what the plaintiff said.

6 Defendants' counsel -- they filed a response, but
7 nothing he said today was in the response. Basically he's
8 saying, take my word for it. Everything should stay sealed,
9 and that's exactly what the courts say you cannot do.

10 So he talks about reliance on the order and reliance
11 by witnesses. We don't have anything in the record to indicate
12 what witnesses relied on what, but I will say this:
13 Depositions are not judicial records. Filed depositions, if
14 filed for a proper purpose, are.

15 I don't know what was told to these witnesses or not
16 told to them. I do know that we can protect them by
17 eliminating their names and substituting some kind of
18 initialing system that doesn't identify them. This is just the
19 point. They need to come in and show you.

20 It struck me that when they talk about reliance on the
21 order, your order, it says: "This protective order may be
22 modified by the Court at any time for good cause."

23 So everyone looking at it knows just what the Court in
24 *Lugosch* was saying. You can't rely on a confidentiality order
25 to be forever. Once a document gets filed, it's at risk of

1 being disclosed, even if it was filed under seal and even if
2 the sealing was appropriate in the circumstances but later
3 becomes inappropriate.

4 So the *Lugosch* case again at 126 makes it quite clear
5 that you can't just rely on a confidentiality order which
6 actually isn't designed for this purpose.

7 The Court will recall your initial order said if you
8 want to seal something, confidential is one category. If you
9 want to seal something, as counsel just said, you have to file
10 a motion under seal. There is a local rule on sealing.

11 Counsel for Ms. Maxwell suggested that there are
12 documents that were filed that were relevant. I won't assume
13 what he said was correct because I can't assume one way or the
14 other, but basically he said over and over again, take my word
15 for it. Everything should stay sealed.

16 And I say over and over again that's not what the
17 Second Circuit and, indeed, the Supreme Court of the
18 United States will permit. It has to be done on a
19 document-by-document basis.

20 Whatever he said, there is a way to do that on the
21 record. Whatever he said should be sealed. There is a way to
22 handle that on the record. I'm not asking this Court to do
23 that, but in Florida where I practice more, most of the time,
24 judges routinely allow me to participate in in-camera
25 examinations -- videos, documents, hearings, testimony -- to

1 help the Court determine whether something should be kept out
2 of the public eye.

3 I do that with an agreement to never reveal to my
4 client anything that I saw, observed, heard, learned during
5 that process. The reason for that is it speeds it up. It
6 speeds it up because it helps keep the lawyers honest.

7 Counsel said there are 900 filings. Okay. We aren't
8 even able to see what a bunch of these documents are by name.
9 More importantly, Ms. Maxwell does not say anything about how
10 the law actually applies here.

11 And I want to just stress that on judicial documents,
12 recognizing that this case is settled and it's not pending for
13 a jury trial anymore. In *Lugosch* they talk about how access
14 should be generally speaking, always permitted when it's a
15 case-dispositive motion.

16 When I get to the conclusion -- I don't know how there
17 is any way to read *Lugosch* as anything but supporting our
18 position -- the court says, the Second Circuit, the
19 United States Court of Appeals says: "We hold that documents
20 submitted to a court in support of or in opposition to a motion
21 for a summary judgment are judicial documents to which a
22 presumption of immediate public access attaches under both the
23 common law and the First Amendment."

24 And they talk about the higher burden. If it's a
25 First Amendment covered document, it can only be overcome by a

specific on-the-record finding that higher values necessitate a narrowly tailored sealing. None of that was done here, and they're not urging it.

They're continuing to urge wholesale sealing. That's wrong. The Second Circuit actually said it could go back to the district court, and if these folks want to push the issue on what should be sealed and what shouldn't, they should do it.

But then the Second Circuit said: "We take this opportunity to emphasize that the district court must make its findings quickly."

And they go into, word after word and sentence after sentence, about how important it is that public access, if it's to be there, not be delayed any further. The decision in the case is inescapable. Their ruling, at least as it goes to anything that's case dispositive, is inescapable.

The authorities we cited for other acts of the judiciary, judicial acts that relate to documents, are unrebutted. Ms. Maxwell's lawyers, neither here today orally nor in their papers, said anything that we said about that is wrong. So where we are is very clear.

To determine whether docket entry 781 is a judicial record, I can't do that. I'm happy to participate in an in-camera process. I'm happy to participate if a magistrate judge or a special master is appointed in a way where I have to maintain the secrecy until the Court orders it.

1 But the fact is if 781 is a judicial document or not
2 has never been determined. Is 684. I don't know what's in
3 these documents. So, your Honor, we're left with what the
4 Second Circuit said we need to do.

5 We need to go, if Ms. Maxwell's lawyers really want to
6 do it, document-by-document. But first I think the Second
7 Circuit is quite clear. All of the papers relating to summary
8 judgment have to be opened. I don't think there is a way of
9 escaping that.

10 We are always open, on behalf of my client, in this
11 proceeding or others, to talking about what might be private
12 and needs to be protected or redacted. But Ms. Maxwell has
13 turned everything on its head. The rule is we have access
14 unless they can show it shouldn't be done, and they haven't
15 done it.

16 And talking about things that I have no knowledge
17 about and suggesting to the Court that you should make a
18 ruling, again, based on something where no showing is made, is
19 just wrong.

20 I should have the opportunity -- everyone in the
21 public should have the opportunity if they want to -- to come
22 in and say, no. No. We think that should be public.

23 And the burden is on the party, in this case,
24 Ms. Maxwell, to show you why it shouldn't be public, and they
25 haven't done that. And just saying it doesn't make it true.

1 We believe the motion should be granted and the file opened to
2 the public. Thank you.

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

5 (Adjourned)

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