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Speakerphone Conference

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 JANE DOE 43,

4 Plaintiff,

New York, N.Y.

5 v.

17 Civ. 0616 (JGK)

6 JEFFREY EPSTEIN, et al.,

7 Defendants.

8 -----x

9 November 7, 2018
4:00 p.m.

10 Before:

11 HON. SARAH NETBURN,

12 Magistrate Judge

13 APPEARANCES (via speakerphone)

14 BOIES, SCHILLER & FLEXNER LLP

15 Attorneys for Plaintiff

16 BY: SIGRID S. McCAWLEY

17 - and -

PAUL G. CASSELL

Attorney for Plaintiff

18 LINK & ROCKENBACH, P.C.

19 Attorneys for Defendants

Jeffrey Epstein, Sarah Kellen and

Lesley Groff

20 BY: SCOTT J. LINK

21 HADDON, MORGAN AND FOREMAN, P.C.

22 Attorneys for Defendant Ghislain Maxwell

Haddon, Morgan & Foreman, P.C.

23 BY: LAURA A. MENNINGER

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(In chambers; speakerphone call initiated)

THE COURT: Good afternoon. This is Judge Netburn. I have you here with my law clerk and with a court reporter.

What I'm going to ask is that each party state its appearance for the record, and then if I can request that whenever anybody speaks, that that person identify themselves again so that the court reporter can properly attribute your comments to the correct person. And then last housekeeping matter is that when I do these telephone conference, I do them as a courtesy to the parties. Obviously, you can't read body language over the phone, so please be considerate of one another and do your very best not to speak over somebody who is speaking.

So, who is here on behalf of the plaintiff?

MS. McCawley: Good afternoon, your Honor. This is Sigrid McCawley, from the law firm of Boies, Schiller & Flexner, and I represent the plaintiff Sarah Ransome, and I have on the line with me as well Paul Cassell, who is our co-counsel who also represents plaintiff, Ms. Ransome.

THE COURT: Thank you.

MR. CASSELL: Good afternoon, your Honor.

THE COURT: Good afternoon.

And on behalf of Mr. Epstein and others?

MR. LINK: Good afternoon, your Honor. This is Scott Link on behalf of defendants Epstein, Kellen and Groff, and we

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1 really appreciate your time this afternoon. Thank you.

2 MS. MENNINGER: Good afternoon, your Honor. Laura
3 Menninger on behalf of defendant Ghislain Maxwell.

4 THE COURT: Thank you.

5 All right. So I have a series of letters from the
6 parties regarding the dispute over the confidentiality order.
7 My understanding is that the parties agree in principle to a
8 confidentiality order but we have some disputes over its scope.

9 Having reviewed the two versions that were filed
10 yesterday, I believe the primary disputes are on paragraph 3,
11 where the definition of what is confidential is being
12 negotiated, and then with respect to paragraph 8, about who is
13 the qualified designating party. And then in the plaintiff's
14 proposal there is a paragraph 13, regarding what to do with
15 respect to electronic information that is sought by subpoena
16 from a nonparty.

17 Are those the three areas in dispute at this point?

18 MS. MENNINGER: Your Honor, this is Laura Menninger
19 for Ms. Maxwell.

20 There also is a dispute in paragraph 12 that relates
21 to the paragraph 13, that is whether electronic copies could
22 be -- after the conclusion of the case.

23 THE COURT: Sorry. You cut out for a minute. Whether
24 electronic copies?

25 MS. MENNINGER: Could be maintained after the

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1 conclusion of the case.

2 THE COURT: OK. I see what you are referring to.

3 All right. So let's begin with paragraph 3, which is
4 the definition of "confidential." And as I understand it,
5 defendant Maxwell seeks a definition that would encompass
6 information that is, quote, confidential, and implicates common
7 law and statutory privacy interests. Whereas the designation
8 from the plaintiff is, in my opinion, more broad, which just
9 requires a good faith basis to believe that the material is
10 entitled to confidential treatment.

11 So the plaintiff here seems to be advocating for a
12 more broad definition of confidentiality. I think the problem
13 with that is should there be a dispute that I need to resolve
14 as to whether something is appropriate or not, I think the way
15 it is written in paragraph 3 would require me to evaluate
16 whether or not the designating party had a good faith basis and
17 potentially even their own subjective view. And to the extent
18 there is an objective test that is implicit here, I'm not quite
19 sure what I would be weighing that against. So I'm not -- I'm
20 a little concerned that paragraph 3 is so broad.

21 That said, I think -- you know, I guess I'm curious to
22 hear what the nature of the conversations have been on this
23 particular topic to get a sense of where the real concerns lie.

24 MS. McCAWLEY: Your Honor, this is Sigrid McCawley for
25 the plaintiff. If I could just address that briefly?

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1 The one -- with respect to paragraph 3, the one thing
2 that is also different between the version that we proposed and
3 the version that Ms. Maxwell proposed which relates to
4 paragraph 3 is in the beginning, the opening paragraph of
5 Ms. Maxwell's protective order, you will see additional
6 language that is not in our protective order, and that is the
7 sentence that says, "Upon" -- at the very beginning of the
8 protective order, "Upon a showing of good cause in support of
9 the entry of a protective order to protect the discovery and
10 dissemination of confidential information or information which
11 will improperly annoy, embarrass, or oppress any party,
12 witness, or person providing discovery in this case, it is so
13 ordered." That language is not included in our introductory
14 paragraph.

15 We have in our proposal order, "Upon a showing of good
16 cause in support of the entry of a protective order to protect
17 the discovery and dissemination of confidential information in
18 this case, it is so ordered," because in our view that language
19 allows the defendants to mark in a broad manner information as
20 confidential that may not have -- they may not have a good
21 faith basis for asserting confidentiality.

22 THE COURT: Can we pull back the lens for a minute?

23 What are the types of documents that we are talking
24 about here that the parties have concern over?

25 MS. McCAWLEY: This is Sigrid McCawley again for the

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1 plaintiff.

2 Your Honor, we started this conversation by in this
3 case not proposing a protective order; it is the defendants who
4 wanted the protective order. We agreed to it in good faith in
5 order to try to move discovery along in this case.

6 My understanding is the types of -- you know, I see
7 this as a sexual trafficking case, and the types of information
8 that will be exchanged may have information of a sexual nature.
9 However, unlike prior cases that we have had that have dealt
10 with minors, the plaintiff in this case was not a minor at the
11 time she was trafficked. So we were -- we believe that we did
12 not need a protective order in this case as an initial matter.
13 The defendants would like a protective order in this matter.

14 THE COURT: So maybe, Ms. Menninger, you can tell me
15 what it is that you believe you are -- what is motivating you
16 here? What are you worried about producing that you want to
17 keep confidential?

18 MS. MENNINGER: Your Honor, I believe that the
19 majority of the concerns will be related to discussions during
20 depositions about sexual activities. Plaintiff has alleged not
21 only that my client ran a sex trafficking organization but she
22 claims also that she was directed by my client and the Epstein
23 defendants to have sex with third parties, including Alan
24 Dershowitz, for example. And so to the extent my client or
25 Mr. Dershowitz or anyone else is going to be asked about their

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1 private sexual activity, I believe that would implicate their
2 privacy rights for the reasons that Judge Sweet articulated in
3 the opinion that I had referenced in my moving letter. He
4 analyzed it largely on the basis of sexual activity -- or
5 sexual conduct being encompassed within a right of privacy -- a
6 broad right of privacy and that people who will be in pretrial
7 litigation have a right of some type around their private
8 affairs, to include sexual activity.

9 I will say that plaintiffs have requested things like
10 tax returns. They've requested credit card statements.
11 They've requested photographs. They requested all kinds of
12 materials relating to my client's personal life. The requests
13 range from the years 1997 through today.

14 So to sort of -- I think in my view there is a
15 mechanism within the protective order that should the other
16 parties disagree with the designation of confidentiality, to
17 raise that concern, and then if the parties still can't agree,
18 to bring it to the Court's attention. I think, in my view,
19 that's the more cost-effective and efficient way to go about
20 this rather than a third party who get involved or a witness
21 who is called to testify, having to raise it individually
22 themselves in a motion to quash or a motion for a protective
23 order.

24 I think it is not just documents that we're talking
25 about but based on my experience in the Giuffre v. Maxwell

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1 matter, it largely came up during the course of deposition
2 testimony. There were also medical records that were being
3 sought, psychiatric records being sought and I anticipate that
4 would occur in this case as well.

5 THE COURT: Make sure that everybody is speaking as
6 slowly and as clearly as possible so that the court reporter
7 can be sure to get everybody's statement.

8 I guess my concern here is -- I think that this goes
9 for both paragraphs, both paragraph 3's, that when the dispute
10 comes up, I need to have a standard against which I can measure
11 an application. And so, in my opinion, it is more effective if
12 we can have some more detail. And so if the parties are
13 prepared to agree to deem confidential, for instance, you know,
14 information that relates to, you know, sexual conduct or sexual
15 activity, you know, information that discloses personal
16 identifying information, which would cover tax returns,
17 information that discloses medical records, you know, and then,
18 if necessary, there can be some sort of a catchall, but at
19 least then I think that will save disputes in the first
20 instance, and if there are disputes, it will give me some sense
21 of what is intended here.

22 (Pause)

23 MS. McCAWLEY: Your Honor, this is Sigrid McCawley for
24 the plaintiff.

25 The concern I have with the broadbrush of sexual

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1 activity is that the case we brought is obviously for violation
2 under the Sexual Trafficking Act, so it would encompass
3 essentially everything that's going to transpire in the case.
4 And while that -- there may be a way to modify that, for
5 example, sexual activity as it relates to minors or something
6 in that regard if we are going to have a witness who was abused
7 by, or allegedly abused by the defendants when they were
8 underage, I will be willing to talk about something like that
9 would cover or protect from that issue. But to have a very
10 broad definition of any sexual activity would -- you know,
11 everything we would be filing would be almost entirely under
12 seal, in my view.

13 THE COURT: Well, you know, your point is well taken
14 that this is the topic of this case, and as a result, I think
15 very little would be authorized to be filed under seal should
16 it be relevant to an issue that the Court is going to decide.
17 And so my -- you know, right now we're really talking about
18 discovery and exchanging information, and I think it's
19 reasonable for nonparties especially, but even parties, to, you
20 know, to disclose information without a fear that it's going to
21 be passed along to the New York Times. And so, you know, it
22 may ultimately be covered by the press because it may
23 ultimately be tried, or there may be motion practice where all
24 of this is disclosed. But for the purposes of discovery, I'm
25 less sympathetic to the argument that this case is about sexual

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1 trafficking and therefore everything needs to be available to
2 the public.

3 Is there a way that you think you can narrow the issue
4 to accommodate your concerns?

5 MS. MENNINGER: Your Honor, this is Laura Menninger on
6 behalf of Ms. Maxwell.

7 I am happy to draft a list of potential topics that I
8 think are encompassed by the subject matter and circulate it.
9 I don't have -- I agree with all of the ones your Honor
10 suggested, and I would like to just take a look back at the
11 discovery requests thus far and see if there are any additional
12 discrete areas along with the language for a catchall that we
13 could use as our measuring stick going forward.

14 THE COURT: What is your response to Ms. McCawley's
15 general concern, and, therefore, what if we limited the sexual
16 nature documents to those that concern nonparties?

17 MS. MENNINGER: Your Honor, I can only speak from the
18 experience of the last case in which my client was asked by
19 these same counsel about her consensual sexual adult
20 relationships with others, including Mr. Epstein. So I don't
21 think addressing -- we are only talking about minors or
22 nonconsensual activities, those are the only things that are
23 likely to come up. If they are not planning to ask questions
24 about adult consensual relationships, then I probably would
25 have less of a concern. But we actually had a couple rounds of

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1 litigation before Judge Sweet in that case over whether my
2 client had to answer questions regarding her adult consensual
3 sexual activities, and ultimately, relying on the protective
4 order, he ordered her to answer those questions.

5 So I'm -- I don't think that the distinction about
6 whether it is a case involving alleged trafficking of minors or
7 adults changes what I anticipate may be asked. I could be
8 completely wrong and they don't plan to ask those same kind of
9 questions in this case.

10 THE COURT: OK. Why don't I ask you, Ms. Menninger,
11 to send a revised paragraph 3. I think the goal here is to be
12 as specific as possible. And, again, because of the nature of
13 this litigation, I think it's likely that much of the
14 information that you seek to hold confidential for purposes of
15 discovery would ultimately be disclosed certainly at a trial.
16 Obviously, this protective order makes clear of that.

17 MS. MENNINGER: Right.

18 THE COURT: But even in the context of any motion
19 practice, it may well be that the Court needs to rely on this
20 information in order to render a decision, which would then
21 make that confidential information a judicial document for
22 which the public has a presumptive right of access. OK.

23 MS. MENNINGER: All right. Yes, your Honor. I am
24 happy to do that.

25 This is Laura Menninger.

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1 THE COURT: OK. So let's see what that is. I don't
2 think that the proviso that the defendants have in their --

3 Sorry.

4 (Pause)

5 -- in the opening paragraph of the protective order
6 that talks about annoyance, embarrassment, or oppression, I
7 think that that should be removed, and so I would adopt the
8 plaintiff's version of the sort of preliminary whereas clause
9 for the protective order. But let's see if we can be more
10 specific in paragraph 3 as to what it is that we are seeking to
11 protect.

12 OK. Paragraph 8.

13 Paragraph 8, as I understand it, has to do with who
14 has the right to designate something as confidential. And in
15 my experience it has always been the producing party who has
16 the obligation and the right to do so, but maybe in this case
17 there are other concerns that I am not focusing on. Who wants
18 to address this in the first instance?

19 MS. McCAWLEY: Your Honor, this is Sigrid McCawley. I
20 am the one who proposed the language for paragraph 8.

21 The concern we had was from other actions --
22 Ms. Menninger has referenced the action before Judge Sweet,
23 where one party would designate wholesale a nonparty, for
24 example, all of their testimony confidential irrespective of
25 whether the nonparty believes that it should be held

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1 confidential. And so this paragraph, I adjusted it to
2 provide --

3 THE COURT: Sorry. Ms. McCawley, you've got to speak
4 half as fast.

5 MS. McCAWLEY: I'm so sorry.

6 THE COURT: We will never get a record here.

7 MS. McCAWLEY: I'm sorry.

8 So with this paragraph, I proposed to change the
9 language such that only the person that is actually producing
10 the confidential information, the one who owns that
11 confidential information, would be able to designate it as
12 confidential to protect from having a party wholesale
13 designate things as confidential that weren't that individual's
14 confidential information.

15 THE COURT: And your example is a nonparty gets
16 deposed and then the defendant says everything in that
17 nonparty's deposition should be confidential?

18 MS. McCAWLEY: Exactly.

19 THE COURT: Well, in part I would imagine that that
20 would be -- we would have some limitations based on the revised
21 paragraph 3 that will be more specific about what can and
22 cannot be designated as confidential. And so, you know, I
23 don't think testimony that, you know, one party believes is
24 intended to annoy or to harass is an appropriate designation.
25 But if that nonparty were speaking about something more narrow

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1 and more particularized, how would you feel about that
2 designation?

3 MS. McCAWLEY: Well, it can certainly be, for example,
4 if that individual provided testimony with respect to something
5 in this matter that they did not want to mark as confidential
6 or, for example, produce photographs of the defendants with
7 them that they did not want marked as confidential, under the
8 old version of this protective order, the defendants could come
9 in and mark it as confidential and the nonparty would have no
10 control over that situation.

11 So this is meant to -- in other words, the party who
12 is providing the information, whether it be by subpoena or
13 whether it be a party to this agreement, has the ability to
14 mark their information confidential if they want it to be
15 protected in that manner, but no other person can do that other
16 than the person who is producing the information.

17 THE COURT: OK. Ms. Menninger, that's certainly the
18 most traditional way to proceed. What's the reason for not
19 doing it that way?

20 (Pause)

21 MR. LINK: Your Honor, this Scott Link. Can I be
22 heard on this for just a minute?

23 THE COURT: Sure.

24 MS. MENNINGER: I'm having some trouble hearing
25 everyone.

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1 MR. LINK: OK. This is Scott Link, your Honor. May I
2 be heard on this --

3 THE COURT: Yes.

4 MR. LINK: -- topic for one moment?

5 THE COURT: Yes.

6 MR. LINK: So, first, I think it's unfair to expect a
7 third-party witness, some of whom are not represented by
8 lawyers, to have to make the decision about confidentiality.

9 Second, when a third-party witness comes in and gives
10 testimony that relates to potential, for example, sexual
11 activity with one of the defendants, then that defendant should
12 have the right to designate that information as confidential.
13 It's one thing to say that the defendant -- you know, that
14 whoever the third-party witness is doesn't have an interest in
15 maintain confidentiality, but that's really only half of the
16 equation, because the person that they're testifying about may
17 in fact want to keep that particular sexual relationship or
18 consensual relationship from being in The New York Times, like
19 you said.

20 So I think it just creates more of an issue for us if
21 we leave it to an unrepresented person to control whether the
22 confidentiality applies, particularly where you're going to
23 give us a definition now in paragraph 3 that should be more
24 limiting in what can be designated. And, frankly, if a party
25 goes too far in the designation, then we'll be back before you,

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1 and obviously you can do whatever you think is appropriate from
2 the attorney's fees and costs and enforce the protective order
3 that you've signed off on.

4 Thank you, your Honor.

5 THE COURT: Thank you.

6 MS. McCawley: Your Honor, this is Sigrid McCawley
7 again.

8 Just to address Mr. Link's comments in a reply from
9 the plaintiff, exactly what he is saying is what we're trying
10 to prevent, having to come back to you multiple times over
11 something like this. So the party who is, for example, a
12 nonparty witness who brings to a deposition photographs showing
13 that witness with the defendant, those are that nonparty's
14 photographs and they should be able to mark them as
15 confidential and (unintelligible). So choose or not mark them
16 as confidential, it is their material to designate. It
17 shouldn't be that a party to the litigation can then coax that
18 in confidentiality through this order. In other words, it
19 creates more layers of dispute relating to confidentiality than
20 is necessary.

21 THE COURT: I guess one question I have is, you know,
22 what confidence do you have that a lay witness who comes to
23 testify will have any understanding of the concept of
24 confidentiality and any rights that he or she might be able to
25 invoke to keep from the press his or her sexual activity? That

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1 is question number one.

2 And question number two is, you know, with respect to
3 the comment made by Mr. Link, which is that, you know, someone
4 else may be implicated in a way that they wish not to be
5 disclosed. You know, obviously, the nonparty is free to talk
6 about their own experiences in whatever way they wish outside
7 of the context of the litigation, but in the context of this
8 litigation, if they are called upon to disclose information
9 that might be I'll say confidential to a party, why shouldn't
10 that party be able to protect his or her interests?

11 MS. McCAWLEY: This is Sigrid McCawley again.

12 So to address the first point, in this litigation thus
13 far, we've only had obviously a few handful of depositions, and
14 all of the nonparty deponents are represented by counsel. So
15 this is not -- it is a hypothetical that we are posing, of
16 course, but it is not a circumstance that has arisen in this
17 case with respect to any nonparty witnesses.

18 On this second point of -- you made the point that
19 they are free to disclose. Obviously, a nonparty is in control
20 of their information if they want to disclose it, and that is
21 why courts typically have the standard that everything is open
22 and public. So we're going against that standard by folding in
23 a situation where a party could designate some other
24 individual's information as being confidential. So, it cuts
25 against what the standard is for federal court disclosures

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1 generally, and that individual has the right to disclose that
2 if they so choose.

3 THE COURT: OK. All right. I think I'm going to take
4 paragraph 8 under advisement and think a little bit, and I will
5 issue an order later on as to how to proceed on that topic.

6 Let's --

7 MS. MENNINGER: Your Honor, this is Laura Menninger
8 again. If I may just quickly, I want to correct one
9 misstatement.

10 There were a number of -- there are a number of
11 witnesses in this case who have been implicated by plaintiff
12 and do not have counsel. I think there are something like 80
13 witnesses who have been endorsed. And certainly if plaintiff
14 counsel believes that they -- each of those people have
15 counsel, they have not shared that information with us. So I
16 do actually believe this is quite a big concern that there will
17 be people involved in the pretrial discovery process who do not
18 have lawyers make the kind of assessment that paragraph 8
19 suggests they have a lawyer who would make it for them.

20 THE COURT: OK. OK. I appreciate that.

21 OK. Let's move to paragraph 12 and 13, which I think
22 are connected.

23 Paragraph 12, as I understand it, the issue in dispute
24 is with respect to the retention of electronic copies and a
25 representation that they would be not distributed at the

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1 conclusion of the litigation. And I take it that the
2 defendants' concern is that that paragraph and paragraph --
3 that provision in paragraph 12 implies that electronic
4 documents would be retained, and I presume that what you want
5 is full destruction of those documents.

6 You know, in this day and age --

7 MS. MENNINGER: Your Honor, Laura Menninger.

8 THE COURT: Yes.

9 MS. MENNINGER: That is correct. In the last case we
10 had that provision so that there would be destruction.
11 Obviously, if the case goes to trial, anything that is aired
12 publicly at the trial would not be destroyed. If there are
13 motions practice where documents are legal documents and relied
14 upon by the Court, they enjoy the protections of the matter.
15 But I do -- it is our request that there not be material held
16 indefinitely afterwards if they don't qualify under one of
17 those exceptions (unintelligible) because the pretrial
18 discovery process should not be used for ulterior purposes like
19 gathering material in subsequent media, you know,
20 participation, that shouldn't be the reason why these materials
21 are (unintelligible) for purposes of use at trial or as
22 judicial documents so that the matters can be resolved, as they
23 should be, through the court system.

24 MS. McCAWLEY: Your Honor, this is Sigrid McCawley for
25 the plaintiff.

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1 And I proposed the language in 12, but Ms. Menninger,
2 in response to that language, proposed paragraph 13. So that
3 was what we were negotiating. I want to make clear, 13 is not
4 my language. It was an accommodation with when I proposed 12.

5 And the reason why I proposed 12 is really more of a
6 technical reason. It is in my view -- and I have limited IT
7 experience, but in my view, the order that was -- is the prior
8 order that we had talked about makes it -- makes you attest to
9 the fact that you have destroyed all electronic information
10 that has been marked as confidential. And as you know, in this
11 electronic age, what happens is if you are filing, for example,
12 pleadings under seal, those documents get attached as filings.
13 Then they get moved by email to different individuals,
14 circulated in drafts. They get sent to experts. They get
15 moved electronically in a number of ways that in my view is
16 virtually impossible as an attorney to attest that you have
17 destroyed every single electronic -- you've extracted it from
18 other filings, other pdfs, and destroyed every single piece of
19 that confidential information, particularly when there are
20 large-scale confidentiality designations in a case where things
21 are -- the majority or the bulk of the information in the case
22 is designated confidential such that anytime discovery is used
23 in any manner, you would have to track down every single email
24 or electronic version of that document and make sure you have
25 destroyed it.

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1 So this is really from my perspective as a
2 practitioner, practically being able to say I have destroyed --
3 certifying I have destroyed everything I think is really an
4 impossibility in that regard. So that is why I proposed the
5 language, to attest that you've not destroyed it, you won't
6 destroy it, you will hold on to it, and not do so without a
7 court order, but I think it's virtually impossible to attest
8 that you have been able to destroy it all.

9 THE COURT: Well, I think that's a reasonable concern
10 given the technology. And I guess as to paragraph 13, my
11 reaction was -- and I think maybe this is what gave the
12 defendants some pause -- I mean, why can't paragraph 13 simply
13 say that absent a court order, you know, that the party is not
14 going to respond to a subpoena? You know, obviously notify the
15 designating party that a subpoena has been served, but the
16 protective order just prohibits you from responding. And you
17 can tell the party that subpoenas you, sorry, I'm bound by a
18 court order. You know, I can make an application to the Court
19 for permission to respond, but absent a court order, I can't
20 produce these documents. And in that way there will be no -- I
21 think that will be a good protection for the defendants against
22 some production of documents, whether electronic or otherwise,
23 that may be still accessible to the plaintiffs after the
24 litigation is over.

25 MS. McCAWLEY: Yes, your Honor. This is Sigrid

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1 McCawley again.

2 I'm sorry, Laura.

3 I'm comfortable with that modification or any
4 modification of paragraph 13 in that regard.

5 MS. MENNINGER: This is Laura Menninger on behalf of
6 Ms. Maxwell.

7 My only small concern to the paragraph 13 suggestion
8 is just to make sure we all are clear about what a court order
9 means, because in some contexts, in some cases, subpoenas are
10 viewed as court orders, and so I did not want a subpoena to be
11 construed as having the same force and effect as an actual, you
12 know, review and consideration by a judicial officer and then
13 giving rise to a court order. So with the caveat that a court
14 order really means that and it is not a subpoena, I don't have
15 a problem with that aspect of paragraph 13.

16 Getting back to the issues that Ms. McCawley raised
17 regarding, you know, the difficulty of complying with
18 destroying electronic copies, I think as long as there were a
19 certification that an attempt has been made to destroy
20 electronic copies, recognizing that perhaps not every single
21 one was caught, would then alleviate the defendants' concerns.
22 My concern, I think as the Court understands, is that
23 intentionally holding on to electronic copies and then
24 participating in trying to get a court order to release those
25 copies kind of undercuts the utility of the protective order in

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1 a way that makes -- would potentially make witnesses and
2 parties feel reluctant to provide information which they
3 thought was going to live on forever in a lawyer's file
4 regardless of whether it ultimately became public in a
5 courtroom. And so, you know, I think there could be language
6 maybe better crafted which said you make a good faith effort to
7 destroy the electronic copy, you know, that that would
8 alleviate the practicality concerns raised by Ms. McCawley but
9 also give some comfort to parties or third-party witnesses who
10 are understandably reluctant to have the limited categories of
11 documents exist forever and also ensure that the litigation
12 process is not being for ulterior purposes with regards to the
13 media.

14 THE COURT: Well, I am -- I think we're on our way to
15 finding a solution. Obviously, a good faith effort, the beauty
16 is in the eye of the beholder. And Ms. McCawley raises the,
17 you know, probable experience of lawyers during the course of
18 the litigation e-mailing documents back and forth. Look at
19 this. What do you think about this? Etc. Etc. And to comply
20 with any good-faith obligation would -- you know, the lawyers
21 need to then, you know, cull through their emails almost like
22 an e-discovery search to find out -- to find documents. That
23 seems a little bit much.

24 You know, maybe the -- you know, as long as they
25 represent that they've destroyed their --

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Speakerphone Conference

1 MR. LINK: This is Scott Link. Maybe it is my phone
2 that is cutting out, but I'm only hearing a few words here and
3 there for the last 20/30 seconds.

4 MS. MENNINGER: That is my problem, too. This is
5 Laura Menninger.

6 I apologize, your Honor.

7 THE COURT: Well, we can try another phone call or we
8 can have people come in.

9 (Pause)

10 MS. MCCAWLEY: Your Honor, this is Sigrid McCawley.

11 I'm hearing fine. I think it is when -- I think if it
12 is possible, you seem to get louder and a little quieter. I
13 don't know if it is possible to get closer to where the
14 microphone is at all so that Ms. Menninger and Mr. Link can
15 hear better.

16 THE COURT: I'm happy to try. I haven't moved and I'm
17 pretty close.

18 In any event, my concern is about what obligations
19 would be on counsel of all sides, all parties, to sort of go
20 through their email and other electronic file retention to
21 destroy documents. And it seems perfectly reasonable to
22 require a party to, for example, destroy an electronic file, so
23 maybe the file set, but it seems less reasonable to require
24 lawyers at the conclusion of this litigation to search through
25 the thousands of internal emails and identify and delete those

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Speakerphone Conference

1 emails that have a document attached to them. That seems
2 burdensome and unnecessary.

3 You know, in my experience, and I take it that you all
4 have had litigation experience between each other, but I find
5 that lawyers often overlitigate protective orders for fear of
6 nefarious conduct that very rarely comes to pass. And maybe
7 you all have experience to know that that conduct may arise,
8 but the parties are going to sign this protective order and
9 they're going to agree to be bound by it and to keep in
10 confidence the information that they receive, and they will be
11 held in contempt if they fail to comply. And, you know, I'm
12 not sure that any wordsmithing that we're going to do here with
13 respect to the destruction of electronic documents is going to
14 be that much more powerful than the fact that I will hold the
15 party in contempt if they violate any of the terms of this
16 protective order.

17 So I think, you know, requiring a party to destroy
18 their electronic file maybe is reasonable, but I don't think it
19 is reasonable to require them to comb through three years worth
20 of emails to see whether or not there are any attachments that
21 might be of confidential material, and that the party will
22 agree that they won't produce any documents in response to a
23 subpoena after -- you know, absent a court order from a
24 competent jurisdiction.

25 It seems to me that should be that should be --

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Speakerphone Conference

1 MS. MENNINGER: Your Honor, this is --

2 THE COURT: Go ahead.

3 MS. MENNINGER: Your Honor, this is Laura Menninger,
4 for Ms. Maxwell.

5 I appreciate your comments and I understand where they
6 are coming from. The other reason I had referenced Judge
7 Sweet's opinion in the Giuffre matter is that in that opinion
8 he talks about plaintiff's counsel supporting the protective
9 order throughout the litigation of that matter and then
10 afterwards, when the Miami Herald had an application to have
11 access to the confidential information, that they reversed
12 position and supported the Miami Herald's application so that
13 the Miami Herald, who I now have been observing by their
14 reporter as of yesterday, is writing a story about this --
15 about Ms. Giuffre's case and has introduced Ms. Giuffre. And
16 her counsel have supported their application to have access to
17 the confidential information after the conclusion of the case
18 and after the (unintelligible).

19 So Judge Sweet ruled that -- he declined the
20 invitation to do so in that opinion. I think that is -- while
21 I do think that in most cases parties are concerned about
22 things that never come to pass, in this particular case, I had
23 to -- we have reason to be concerned that even though the
24 protective order says what it says, should the case resolve
25 afterwards, there may be a changed position by plaintiff's

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1 counsel.

2 MS. McCAWLEY: Your Honor, this is Sigrid McCawley for
3 the plaintiff.

4 That isn't accurate and it needs to stand corrected.
5 If you look at the filings that we submitted, the Miami Herald
6 was trying to get access to information under the protective
7 order as well as other third parties. There are two appeals
8 pending. We did not file any of those appeals. They are by
9 other third parties who had access to the information. We said
10 that if they are going to be accessing information, it has to
11 be to all of the information, it cannot be to a selective
12 portion of the confidential information. And that was the
13 position that we took in that litigation. And Judge Sweet did
14 not make any comment that Laura had just stated that he did.
15 Those orders stand for themselves, as we read, by the Court.

16 THE COURT: OK. Well, again, I'm not quite sure we
17 can account for all of the potential scenarios that the parties
18 are contemplating or anticipating. I think we can revise
19 paragraphs 12 and 13 to require the destruction of electronic
20 files and that, you know, the commitment to keep in confidence
21 all materials held that are designated confidential and the
22 prohibition against disclosing any confidential materials
23 absent an order from a court signed by a judge.

24 I understand that there is a deposition happening
25 tomorrow and that there are documents that are to be turned

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1 over today. I'm going to consider paragraph 8. I may not get
2 you my thoughts before the day is over. The documents should
3 be produced immediately, and they should be kept in confidence,
4 and any protective order will apply to those documents. But
5 for time being they are to be kept in confidence, and the
6 deposition should be kept in confidence until the protective
7 order is entered.

8 Are there any --

9 MS. MENNINGER: Your Honor, this is Laura Menninger.

10 I produced the documents yesterday under the
11 confidentiality agreement. We'll keep it confidential as you
12 just suggested, and I appreciate the comments about the
13 deposition tomorrow.

14 THE COURT: OK. So I will turn to this last
15 outstanding issue in the next day or two and give you my
16 thoughts and then ask you to send me a revised protective order
17 sometime next week.

18 Anything further from either side?

19 MR. LINK: Your Honor, this is Scott Link. Nothing
20 for us, your Honor. Thank you.

21 MS. McCAWLEY: That is Sigrid McCawley.

22 Thank you, your Honor. We appreciate your time.

23 MS. MENNINGER: Thank you, your Honor. This is Laura
24 Menninger.

25 THE COURT: All right. Thank you.

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Speakerphone Conference

1 MR. CASSELL: Your Honor, this is Paul Cassell. Thank
2 you as well.

3 THE COURT: Thank you.

4 (Adjourned)