United States District Court
Southern District of New York

[redacted],

Plaintiff, Case No.: 15-cv-07433-RWS

v.

Ghislaine Maxwell,

Defendant.
_____/

PLAINTIFF [redacted] REPLY IN SUPPORT OF MOTION TO PRESENT TESTIMONY FROM JEFFREY EPSTEIN FOR PURPOSES OF OBTAINING AN ADVERSE INFERENCE INSTRUCTION

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Plaintiff [redacted] respectfully submits her reply in support of her Motion to Present Testimony from Jeffrey Epstein for Purposes of Obtaining an Adverse Inference.

INTRODUCTION

As the Court is aware, this case involves allegations by [redacted] that she was sexually trafficked by Jeffrey Epstein and his girlfriend, Defendant Maxwell. When deposed, Defendant professed to be unable to recall critical events – such as flying more than twenty times with then-[redacted] on Epstein's private plane. Because Defendant's remarkably poor memory has permitted her to avoid being forced to admit critical events in this case, [redacted] has been forced to track down witnesses and evidence from other sources to confirm the truth of her claims of sexual abuse by Defendant and her convicted pedophile boyfriend, Epstein. Of course, one person would know the most about the truth of those allegations is Jeffrey Epstein. Epstein, however, took the Fifth at his deposition in this case.

[redacted] has moved to present a selected number of Epstein's invocations to the jury, and Defendant argues that doing so would be an "end run around the truth." Defendant's Response in Opposition to Plaintiff [redacted] Motion to Present Testimony from Jeffrey Epstein for Purposes of Obtaining an Adverse Inference at 1 (hereinafter "Response"). Indeed, warming to the task, Defendant says that, for [redacted], the effort is designed to let the "truth be damned." *Id.* at 10. But while blustering about how such an inference would not be "trustworthy," Defendant fails to present any evidence that *any* of the inferences [redacted] is attempting to obtain would be inaccurate. For example, Defendant offers no evidence at all that she wasn't on any of the flights that are central to the case. And, in sharp contrast, as the Court is aware from reading [redacted] lengthy response to the pending summary judgment motions, [redacted] has provided ample facts make clear that Epstein took the Fifth to avoid

admitting his and Defendant's role in sexually abusing [redacted].

Apart from the two parties to this case, Epstein is the single most important witness. The jury should be permitted to hear what he has to say about what he and Defendant did to [redacted] when she was under-age.

DISCUSSION

I. THE FACTORS IDENTIFIED IN THE SECOND CIRCUIT'S DECISION IN *LIBUTTI V. UNITED STATES* POINT IN FAVOR OF ALLOWING [redacted] TO CALL JEFFREY EPSTEIN FOR PURPOSES OF OBTAINING AN ADVERSE INFERENCE.

A. Federal Law Controls This Procedural Issue.

In her motion seeking to call Epstein for adverse inference purposes, [redacted] cited the Second Circuit's decision in *LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997), and explained why federal law controls this procedural issue. *See* Plaintiff [redacted] Motion to Present Testimony from Jeffrey Epstein for Purposes of Obtaining an Adverse Inference at 5-9 (hereinafter "Mot."). [redacted] noted that Defendant Maxwell had filed an earlier brief, in which Defendant claimed that New York state law would provide the rule of decision on this issue," which Defendant described as involving an issue "of attorney-client privilege." *Id.* at 8 (*citing* DE 135 at 6-7). In her response to the current motion, Defendant does not say a word about the applicable law. Apparently, she now has switched positions and agrees with [redacted] position that federal law is controlling, because Defendant cites exclusively federal law in her response. Accordingly, the Court should decide this issue with reference to federal law.

B. The *LiButti* Factors Point in Favor of Allowing [redacted] to Call Epstein.

LiButti listed four non-exclusive factors court should consider when determining whether to allow a witness to be called for purposes of obtaining an adverse inference. Each of those four factors points in favor of allowing [redacted] call Epstein, as do other relevant considerations.

1. The Nature of the Relevant Relationships.

The first *LiButti* factor is "the non-party witness' loyalty to the plaintiff or defendant, as the case may be" and how likely it is for the non-party witness "to render testimony in order to damage the relationship." *LiButti*, 107 F.3d at 123. As [redacted] explained in her opening brief, Mot. at 10, defendant and non-party witness Epstein have had – and continue to have – a close relationship. Indeed, they were sexually intimate for a number of years. *Id.*[1] They also shared a home. And, of particular relevance to this case, ample evidence demonstrates that they were joined together as co-conspirators in a criminal sex trafficking enterprise with Epstein at its head and Defendant as his trusted lieutenant or "Madame." *Id.*

In her response, Defendant does not specifically contest these points. For example, she does not even take the minimal step of providing an affidavit under oath stating she never flew on twenty flights with [redacted] for sex trafficking purposes – presumably aware that doing so would be perjury. Instead, she tries to deflect attention from the fundamental underlying facts of the sex trafficking by arguing that the only issue is Defendant's "current relationship" with Epstein. Response at 2. She then asserts that she has "no relationship" with Epstein. Resp. at 2. But the support for the position turns out to be nothing other than Defendant's self-serving statements at her deposition, where on this subject (as with many others) she has convenient memory lapses. For example, during her deposition she could not recall what she talked to Jeffrey Epstein about when [redacted] allegations against Maxwell were first filed:

> Q. When you spoke with Jeffrey in January of 2015, what did he say to you?
> A. I really couldn't remember exactly what he said to me.
> Q. Did you talk about [redacted]?
> A. I'm sure we did but I couldn't recall the exact conversation.

[1] For a direct acknowledgment of this fact, *See* McCawley Dec. at Exhibit 1, Maxwell Depo. Tr. at 295:17-19.

See McCawley Dec. at Exhibit 1, Maxwell Depo. Tr. at 297:12-298:2.

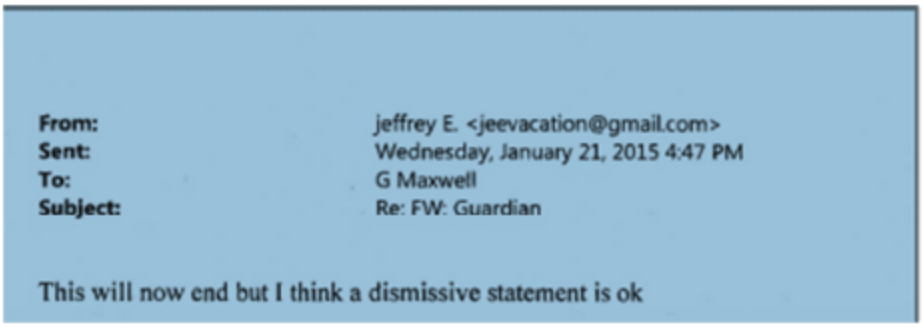
Since Defendant was deposed, [redacted] has been able to review emails that shed more light on exactly what Epstein and Defendant were talking about. It is clear that they were talking about a plan to cover up Defendant's close relationship with Epstein, by fabricating evidence. For the Court's reference, we attach all the emails that Defendant has produced which show her communications with Epstein shortly after [redacted] allegations were filed.[2] Of particular interest is this email, in which Epstein and Defendant discuss having a witness falsely come forward to say that she was Epstein's girlfriend at the relevant time:

From: jeffrey E. <jeevacation@gmail.com>
Sent: Thursday, January 15, 2015 5:27 PM
To: Gmax

do you want shwlly to come out and say she was the girlfriend , during the time . be

GM_01081. Or this email, in which Epstein urges Defendant to send a dismissive press statement:

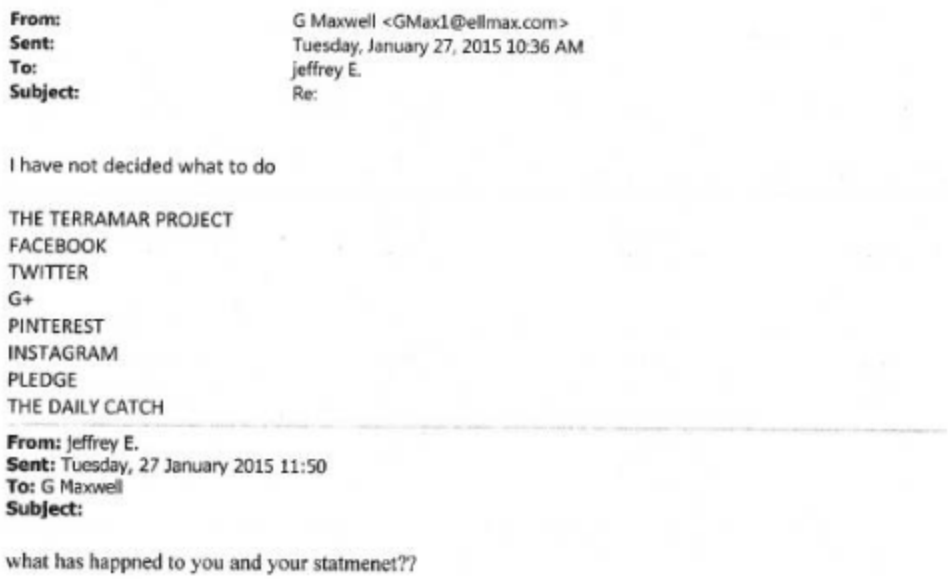
[2] As the Court will recall from earlier proceedings in this case, Defendant has not undertaken good [redacted] efforts to produce all relevant emails in this case, wholly failing to produce any emails from prior to 2009, and failing to disclose even what email account she has. Indeed, for good cause shown, the Court has allowed the jury to draw an adverse inference that further emails were hidden. In the months since the Court ordered an instruction on an adverse inference, [redacted] has obtained at least one important email that Defendant had apparently hidden, as explained at greater length in [redacted] response to the pending motion for reconsideration of the adverse inference issue. Accordingly, it is likely that Defendant has either destroyed or willfully withheld many other emails, both with Jeffrey Epstein and other key witnesses. The fact that some of Defendant's relevant emails have trickled into this litigation through the production of third parties is highly probative of the fact that the few documents Defendant did produce are merely the tip of the iceberg.



From: jeffrey E. <jeevacation@gmail.com>
Sent: Wednesday, January 21, 2015 4:47 PM
To: G Maxwell
Subject: Re: FW: Guardian

This will now end but I think a dismissive statement is ok

GM_01088. Or this email chain, in which Epstein and Maxwell discuss what next steps to take.



From: G Maxwell <GMax1@ellmax.com>
Sent: Tuesday, January 27, 2015 10:36 AM
To: jeffrey E.
Subject: Re:

I have not decided what to do

THE TERRAMAR PROJECT
FACEBOOK
TWITTER
G+
PINTEREST
INSTAGRAM
PLEDGE
THE DAILY CATCH

From: Jeffrey E.
Sent: Tuesday, 27 January 2015 11:50
To: G Maxwell
Subject:

what has happned to you and your statmenet??

GM_01099.

Further, in saying that she has no "relationship" with Epstein, Defendant seems to conveniently forget that the she does in fact have a relationship – indeed, a relationship linked to this very case! Defendant and Epstein are operating together under a Joint Defense Agreement in this case. *See* McCawley Dec. at Exhibit 1, Maxwell Depo. Tr. at 299:7-9; *see also id.* at 199:21-200:7 (Defendant's counsel instructing Defendant not to answer a question about Epstein based on "communications subject to a joint defense agreement or common

interest agreement"); *see also* McCawley Dec. Exhibit 2, Epstein Depo. Tr. at 20:16-21:8 (Epstein takes the Fifth when asked about a joint defense agreement with Maxwell); *id.* at 23:3-8 (attorney for Epstein invokes common interest agreement as a basis for Epstein not answering questions about communications with Maxwell).[3] Of course, the basis for a joint defense agreement is that it rests on "a cooperative and common enterprise towards an identical legal strategy." *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 415 (S.D.N.Y. 2004).

Defendant also argues that Epstein is the only one facing criminal prosecution in various jurisdictions. That is simply untrue. For example, the non-prosecution agreement in the Southern District of Florida covers not only Epstein but also any "potential co-conspirator." The language is certainly broad enough to cover Defendant, and Defendant has never disavowed the protections of the provision.

Defendant also mischaracterizes the case law when she argues that "this is not the case, as it was in *LiButti*, of a father protecting his daughter; it is not the case of a servant protecting their master. These are the *only* types of cases in which the relationship has been held significantly close to tip the scales in favor of permitting the inference." Resp. at 3 (emphasis added). Defendant conveniently overlooks, for example, cases in which co-conspirators' invocations have been used against other members of the conspiracy. An illustration is *F.D.I.C. v. Fidelity & Deposit Co. of Maryland*, 45 F.3d 969 (5th Cir. 1995), in which a bank's loan officer was accused of dishonest and fraudulent acts in colluding to extend loans to persons to whom he may have owed favors. The Fifth Circuit allowed invocations by the loan recipients to be used against the loan officer, explaining: "Certainly, evidence of this nature is

[3] Defendant also asserted this relationship with Epstein on the first privilege log she produced as part of a baseless and failed attempt to hide the emails cited above.

generally relevant. In this case, a jury could determine that a witness who colluded with [the loan officer] took the Fifth Amendment to avoid disclosing that collusion." 45 F.3d at 977. The Court should note that *LiButti* cited this case favorably as one of the decisions underlying its holding allowing the drawing of an adverse inference. 107 F.3d at 121 (noting that it found "conceptual support" for its holding in the Fifth Circuit's ruling).

The bottom line is that: (1) Defendant and Epstein were first intimate sexual partners; (2) then co-conspirators in criminal sex trafficking enterprise; (3) then coordinated by email (and presumably in other ways) in 2015 to manufacture the best response to [redacted] allegations; and (4) are currently in joint defense agreement to permit them to coordinate legal strategies relating to this case (and, when convenient to them, to avoid answers questions during depositions). Clearly there is a strong relationship between the two that supports allowing [redacted] to present Epstein's testimony to the jury.

2. The Degree of Control of the Party Over the Non-Party Witness.

The next factor identified by *LiButti* is the "degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation." *LiButti*, 107 F.3d at 123. In response, Defendant argues that Epstein was the boss and she was only his lieutenant, and therefore this factor does not apply. But [redacted] has certainly presented powerful evidence that Defendant and Epstein were co-conspirators together in a joint criminal enterprise. Rather than take this point head on, Defendant argues that [redacted] "fails to cite a single case in which this factor has been used to find reliability or trustworthiness of an inference where the invoking non-party was the principal, not the agent." Resp. at 4. But [redacted] did discuss a comparable case – a case cited and discussed at length in *LiButti*: *Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987). As *LiButti* approvingly explained, in sustaining the trial court's ruling

allowing an adverse interference to be drawn against a charity which was a party to the litigation, the Eighth Circuit:

> did not base its decision on [the witness'] status. Rather, it focused on three factors that permitted the drawing of an adverse inference under the circumstances of that case: (1) it was unlikely that the non-party witness would invoke the privilege solely for the purpose of harming the charity since he was a controlling member of the charity at the time the suits were brought; (2) the invocation of the privilege was not the exclusive factor for the jury to consider in determining whether a fraud had been committed since there was other evidence presented at trial implicating the non-party witness in defrauding the insurance companies; and (3) the non-party witness . . . was "a key figure" since his actions formed the very basis for the affirmative defense of fraud.

819 F.2d at 122–23. Each of these factors readily applies here: (1) it is unlikely that Epstein will invoke the privilege solely for the purpose of harming Defendant, since he and Defendant have been coordinating together (via email and through a Joint Defense Agreement) to craft the best mutual response; (2) the invocation will not be the exclusive factor for the jury here, because there is independent evidence supporting each of the questions asked of Epstein; and (3) obviously Epstein is a "key figure" – arguably even *the* key figure – in the sex trafficking allegations at the center of this case.

Defendant also recounts some evidence which, she argues, shows that she was not a co-conspirator in the sex trafficking ring. Resp. at 4. But this evidence does not prove her lack of involvement in the conspiracy, but merely her success in being able to hide it from some persons who did not observe her activities. She wholly fails to address evidence from those who were aware of what she was doing. To review such evidence, the Court need only refer to [redacted] recently-filed response to the pending summary judgment motion, which canvases some of the evidence at length. For example, [redacted] explains how [redacted] testified under oath during his deposition that, when he was living with [redacted], Defendant called him to ask if he had found other girls to bring to Jeffrey. As he explained:

"Pretty much every time there was a conversation with any of them, it was either asking [redacted] where she was at or asking her to get girls, or asking me to get girls." *See* Plaintiffs' Response to Defendant's Motion for Summary Judgment at 7. [redacted] explained that when Defendant called, she would just say: "Hi. This is Ghislaine. Jeffrey was wondering if you had anybody that could come over." *Id.* And there is significant related evidence collected in the summary judgment motion pointing to the same conclusion. *See generally id.* at 4-27.

3. The Compatibility of the Interests of the Party and the Non-party Witness in the Outcome of the litigation.

The third *LiButti* factor asks about the compatibility of interest between the party and the non-party witness, and directs that the "trial court should evaluate whether the non-party witness is pragmatically a non-captioned party in interest in whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation." *LiButti*, 107 F.3d at 123-24. Remarkably, Defendant claims that "Epstein has absolutely no dog in this fight." Resp. at 6. And yet, as discussed above, immediately after [redacted] allegations became public, Defendant and Epstein exchanged many emails (and presumably other communications that Defendant has not produced) about how to best coordinate a response to the allegations. For example, Epstein had enough of a dog in this fight to offer to have "Shelley" come forward to lie and pretend to have been his girlfriend during the time he and Defendant were trafficking [redacted]. And even today, Defendant Epstein continues to be in a joint defense arrangement (commonly referred to a "common interest" agreement) with Defendant, presumably because of Epstein's and Defendant's common interests.

This case involves [redacted] allegations that she was sexually trafficked by *both* Epstein and Defendant – in a sex trafficking conspiracy that had Epstein at the top and Defendant has his trusted lieutenant. Clearly a victory for the Defendant in this case is a victory for Epstein.

Pragmatically, Epstein is a "non-captioned party in interest" and his assertions of the Fifth Amendment serve to advance Defendant's interest in this case by avoiding testimony on how the conspiracy operated.

4. The Role of the Non-Party Witness in the Litigation.

The final *LiButti* factor is whether "the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects." 107 F.3d at 123-24. In this case, it is hard to imagine a nonparty witness who could have been more centrally involved. In an effort to avoid the elephant in the room, Defendant remarkably claims "[t]here is not a single piece of evidence suggesting that Mr. Epstein had any role in creating or publishing the content of the alleged defamatory January 2015 statement . . . ." Resp. at 8. Defendant has apparently forgotten about the emails quoted above, which show both defendant and Epstein working closely together on crafting a public statement. Moreover, the core feature of Defendant's defamatory statements was to attack [redacted] allegations that she was the victim of sex trafficking by Defendant *and* Epstein. Clearly Epstein's central role in this litigation warrants allowing the jury to hear him invoke the Fifth Amendment rather than answer questions about how he worked closely together with Defendant to sexually traffic [redacted].

5. Other Factors Apart from the Non-Exclusive List.

LiButti made clear that this four-factor list was a "non-exclusive" list. 107 F.3d at 123. Defendant agrees that the Court should look to other factors. Resp. at 9. But she argues that the search for truth would somehow not be served by allowing [redacted] present to the jury testimony from Defendant's co-conspirator in the sex trafficking (not to mention someone she *lived with* for the duration of the time upon which [redacted] claims are centered, namely 2000-2002). In a convoluted argument that is impossible to follow, Defendant contends that

[redacted] somehow "purposefully manufactured" Epstein's decision to take the Fifth Amendment "instead of trying this case on the facts." Resp. at 9. The Defendant fails to acknowledge that [redacted] had to make sixteen attempts to serve Epstein before he could be forced to sit at his deposition. And it was only after [redacted] filed a motion with this Court for alternative forms of service that Epstein's lawyers agreed to accept service. If Defendant thought that the search for truth would have been aided by having Epstein testify, why wasn't she sending out process servers and filing similar motions?

At his deposition, Epstein refused to answer questions which would have shed light on the scope of his criminal enterprise. If Epstein had testified truthfully and completely, he would have converted this case from a dispute between [redacted] and Defendant into one in which it would have been obvious what Defendant's role was in the conspiracy – i.e., he would have served as a "tiebreaker" between any conflicting testimony offered by [redacted] and Defendant. Defendant offers no real reason to reach any other conclusion.

Defendant does proudly proclaim that she "did not invoke the Fifth." *Id.* at 9. Of course, what Defendant does not acknowledge is that the only way she could avoid invoking the Fifth was by feigning convenient memory lapses whenever difficult questions were posed to her during the deposition. Consider, for example, Defendant's evasions when asked about flight logs showing her repeatedly flying interstate and internationally on Epstein's private jet with then-[redacted]:

> Q. So this flight is from . . . it says 2000 at the top and this would be the 11th and then the 14th are the two I'm going to direct your attention to. On that first one on the 11th you will see the column reading PBI in the ["]from["] column to TEB in the ["]to["] column and you will see some initials, you will see JE for Jeffrey Epstein, GM for Ghislaine Maxwell, [redacted] for [redacted] [redacted] and then [redacted]?
> A. I have to object. . . .
> Q. Let me ask the question and if you have an issue -- so with respect to this flight, do you recall being on a flight in the -- November 2000 going from Palm

Beach to Teterboro?
A. No, I don't recall any specific flight.
Q. Do you recall flying with [redacted] on a flight with [redacted] and Jeffrey Epstein at any time?
A. I don't.
Q. How often did you fly on a plane with a 17 year old? . . .
A. I have no idea what you are talking about, other than friends of mine that had kids.
Q. Did you regularly fly on Jeffrey's plane with individuals who were under the age
of 18? . . .
A. Can you repeat the question?
Q. Did you regularly fly on Jeffrey Epstein's planes with individuals who were under the age of 18?
A. I regularly flew on Jeffrey Epstein's airplane but I cannot testify as to flying with people under the age. I don't believe that I did.
Q. Why wouldn't you remember flying with a 17 year old? . . .
A. How would I know, one, that she is 17, how would you know that, how do you know I'm on the plane.
Q. Are you saying you are not on this flight, so this is a Palm Beach to Teterboro. This says the JE, GM [redacted] and [redacted]. The GM you are saying is not you? . . .
A. How do you know the GM is me?
Q. Is it your testimony that on the flight logs when it represents GM that it is not you flying on the plane? . . .
A. GM can stand for any level, it could be Georgina, George.
Q. Are there any people that flew with Jeffrey Epstein that had the initials GM?
A. I don't know.

See McCawley Dec. at Exhibit 1, Maxwell Depo. Tr. at 120:7-123:8 (objections omitted).

As questioning continued, Defendant took the even more extreme position that, despite flight logs for more than twenty flights on Epstein's private jet indicating that she and [redacted] flew together, she could not remember even a single one:

Q. Do you recall flying from, if you see the dates, the 5th, 6th, 8th, 9th and 11th. Do you recall a trip that went from the United States to Canada and to the places I just mentioned where [redacted] was on the plane with you? . . .
A. I already testified that I don't recall [redacted] on any of these flights.

See McCawley Dec. at Exhibit 1, Maxwell Depo. Tr. at 132:18-133:3 (objection omitted).

The extensive and international traveling she did with [redacted] while she was underage (corroborated by flight log's and the pilot's own testimony) is not the only subject on

which Defendant had extraordinary memory lapses. For example, during her deposition, Defendant was asked whether she recalled a hand-held puppet being used when Prince Andrew was present to fondle female breasts. She could not recall any of the details … or so she claimed:

> Q. When we were talking earlier about Prince Andrew, I asked you whether you had ever given him a gift of a puppet. Did you ever, not as a gift, did you ever see in the presence of Prince Andrew a puppet? . . .
> A. Can you be more direct, please?
> Q. Sure. Were you ever in a room with Prince Andrew where there was a puppet? . . .
> A. Can you be more specific please and can you bound it by time and be more specific, whatever you are actually asking me?
> Q. Were you ever in a room with Prince Andrew in New York in Jeffrey Epstein's home where there was a puppet? . . .
> A. What sort of puppet are you asking me?
> Q. Any kind of puppet?
> A. You need to be more descriptive. I don't know what you mean by puppet, there is hand puppets, all sorts of puppets.
> Q. Is there any puppet you've ever seen in Jeffrey Epstein's home in the presence of Prince Andrew?
> A. Again, puppet, you know, there is lots of types of puppets.
> Q. Any type of puppet.
> A. If you want to give me a description of the puppet, I would be perhaps be able to say.
> Q. Any type of puppet?
> A. Can you be more detailed?
> Q. Have you ever seen a puppet in Jeffrey Epstein's home in the presence of Prince Andrew?
> A. My understanding of a puppet is a small handheld item you have in a circus. I have never seen that.
> Q. Have you ever seen a puppet which is defined as a movable model of a person or animal that is used in entertainment and typically moved either by strings or controlled from above or by a hand inside it? . . .
> A. I have not seen a puppet that fits exactly that description.
> Q. Have you seen any puppet that fits any description? . . .
> A. Can you re-ask the question, please?
> Q. Yes. Have you seen any puppet that fits any description in the presence of Prince Andrew in Jeffrey Epstein's home? . . .
> A. I am not aware of any small handheld puppet that was there. There was a puppet -- not a puppet -- there was a – I don't know how would you describe it really, I don't know how would you describe it. Not a puppet, I don't know how you would describe it. A caricature of Prince Andrew that was in Jeffrey's home.

> Q. Did you use that caricature to put the hand of the caricature on [redacted] breast? . . .
> A. I don't recollect. I recollect the puppet but I don't recollect anything around the puppet. You characterized puppet, I characterize it as, I don't know, as a characterization of Andrew.
> Q. Do you recollect asking [redacted] to sit on Prince Andrew's lap with the caricature of Prince Andrew?
> A. I do not recollect that.
> Q. What do you remember about the caricature of the Prince Andrew caricature when you were in the presence of Prince Andrew, [redacted] and [redacted]? . . .
> A. I don't recollect the story as told by [redacted] or [redacted]. I don't even know who -- I remember the caricature of Prince Andrew and I remember Prince Andrew but I don't recall anything else around the caricature.

See McCawley Dec. at Exhibit 1, Maxwell Depo. Tr. at 286:23-290:25 (objections omitted).

Given such a phenomenal lack of memory – not to mention its convenient on-again, off-again quality – it is hardly surprising that Defendant did not invoke her Fifth Amendment rights. Her feigned memory lapses served to be every bit as effective a cloak against admitting incriminating information as any invocation of the Fifth Amendment would have been.

Defendant also remarkably argues that [redacted] and her lawyers "don't want the truth. They want a prejudicial and improper inference to 'break the tie' in [redacted] favor, truth be damned." Resp. at 10. The Defendant doth protest too much – as her claims lack any substance. For example, Defendant's voluminous pleadings – both with regard to this motion and elsewhere – fail to explain whether she was on more than twenty flights with [redacted], as shown by the flight logs, and if so, what she was doing with this seventeen-year-old girl in the company of Epstein in his private jet flying to various locations around the United States and the world. Nowhere in this litigation does Defendant provide any type of explanation as to why she, herself, spent so much time with a child not related to her, traveling overseas with her, and living with her at Defendant and Epstein's various residences. [redacted] had said that she was being sexually trafficked by Epstein and Defendant. Defendant

conveniently can't remember even a single flight. Against that backdrop, it is entirely appropriate for the jury what Epstein says when asked that same question.

C. [redacted] Should Be Allowed to Call Epstein to Prevent the Jury from the Erroneous Conclusion that She Fears His Testimony.

[redacted] also argued at length in her motion why admitting Epstein's imprecations to the jury is necessary to prevent the jury from erroneously concluding that [redacted] is not calling Epstein as a witness. Mot. at 13. [redacted] explained that Epstein was a crucial witness in the case, and the jury should not be left to infer that [redacted] was concerned his testimony would be harmful to her. *Id.* at 14. Defendant does not provide any substantive answer to these points, which is another clear reason for allowing [redacted] to call Epstein at trial.

In addition to failing to address these points, Defendant does not acknowledge that several of the excerpts that [redacted] has designated for use at the trial pertain to the Defendant refusing to answer questions during her deposition, directing [redacted] to go ask the question of Epstein. *See* Mot. at 19-20 (citing McCawley Dec. at Exhibit 1, Epstein Depo. Tr. at 55:18-56:18 (in answer to question about massages, Defendant states: "I think you should ask that question of Jeffrey.")). It is highly relevant for the jury to hear that Defendant declined to answer the question about Epstein's massage practices, referring [redacted] to Epstein, who thereafter took the Fifth rather than provide any answer to the question that Defendant, his joint-defense partner, was avoiding. Given that she was on the one who said Epstein held the answer, it can hardly be unfair prejudice to the Defendant to have Epstein's answer admitted.

II. ADMITTING EPSTEIN'S TESTIMONY IS NOT PREJUDICIAL OR CONFUSING TO THE JURY.

Defendant also argues that Epstein's testimony to the jury would somehow be prejudicial or confusing. Resp. at 12-11. Defendant remarkably starts off her argument by raising the

question of whether Epstein's testimony would be relevant to this defamation action. But, of course, this defamation action revolves around whether Epstein and Defendant were involved in a conspiracy to sexually traffic [redacted]. Obviously, Epstein's testimony about whether he and Defendant were involved in sex trafficking of [redacted] is highly relevant.

Defendant then suggested the form of the question involved somehow makes Epstein's testimony prejudicial. Epstein was asked question in a variety of ways precisely to avoid some claim that the form was somehow improper. Consider, for example, these questions asked of Epstein:

- Was it your preference to start a massage with sex?
- Why did you bring [redacted] on your trips with you?
- Did you meet Prince Andrew, the Duke of York, in about March of 2001 in London?

See McCawley Dec. at Exhibit 2, Epstein Depo. Tr. at 56:11-13; 59:18-19; 101:5-6. These examples (and there are many others, as the Court can quickly confirm by looking at the questions that [redacted] has designated to be presented to the jury) show questions that are not leading or any conceivably way objectionable. Defendant's purpose in raising this technical "form" objection is to simply throw a roadblock in the search for truth. Defendant realizes that it will be practically impossible to secure Epstein's live appearance at trial where questions could be asked in a different format.

Even with regard to leading questions, Epstein is clearly an adverse witness for which leading questions are entirely appropriate. *See* Fed. R. Evid. 611(c). And this is not a case of a lawyer testifying to facts that lack any support. To the contrary, as explained below, each and every one of the questions asked of Epstein is supported by substantial evidence, making the inferences to be drawn from his invocation highly reliable.

The one case that Defendant cites for her form objection – *In re WorldCom, Inc. Securities Litigation*, 2005 WL 375315 (S.D.N.Y. Feb. 17, 2005) – is an unreported decision that never actually reached a conclusion about the form of questions that could be asked. Instead, the case simply said that the matter would be taken under advisement. *See id.* at *5.

Finally, it is important to understand that [redacted] is not seeking to present to the jury the answers to every single question she asked Epstein during his deposition. Instead, she has whittled down the questions to a select few – narrow questions for which there is strong supporting evidence about the inference that the jury is being asked to draw. This is not situation where an attorney dreamed up an outlandish set for facts to present to recalcitrant witness. To the contrary, this is a situation where, after [redacted] made her (well-supported) allegations against Epstein and Defendant, an attorney simply went to Epstein to ask whether these allegations are true. The jury should be permitted to hear what Epstein said.

III. EPSTEIN'S ABSENCE FROM TRIAL WILL BE HIGHLY PREJUDICIAL TO [redacted].

Defendant next argues that somehow Epstein's absence from trial will be more prejudicial to her then to [redacted]. Resp. at 14-15. This is a factor that has been discussed in both cases and law review articles, as [redacted] discussed in her opening motion. Mot. at 14-15. Defendant does not respond to any of these arguments, and clearly it will be highly prejudicial if the jury is left to speculate as to why [redacted] – the plaintiff who must shoulder the burden of proof – did not call this pivotal witness.

IV. [redacted] CAN PROVIDE INDEPENDENT EVIDENCE SUPPORTING EACH QUESTION SHE SEEKS TO PROPOUND.

In her opening motion, [redacted] provided, for illustrative purposes, 23 specific questions that she wanted to present to the jury. Mot. at 16-18. For each of the 23 questions, [redacted] listed significant supporting independent evidence. For example, one of the specific

questions was: "On or about March 9th, 2001, you, the Defendant in this case, Ms. Maxwell, Emmie [redacted], and [redacted]] flew on your private jet from Tangier to Luton International Airport in the London, England metropolitan area?" Mot. at 18. As support for this question, [redacted] cited the flight logs maintained by the pilot of Epstein's private jet. *Id.* As another example, [redacted] offered the question: "Did you meet Prince Andrew, the Duke of York, in about March of 2001 in London?" *Id.* For support for this question, [redacted] cited the flight log showing Epstein's arrival in London – along with Defendant and [redacted] – as well as a photograph taken showing Prince Andrew, [redacted], and Defendant all standing close together in what appears to be Defendant's London apartment.

Startlingly for a litigant claiming to be concerned about "the truth," Defendant does not challenge the inference that [redacted] seeks to have drawn from the 23 questions. For example, she does not challenge the fact that she flew into London with Epstein. Nor does she challenge the photograph's depiction of her standing next to [redacted] and Prince Andrew. Indeed, Defendant has chosen not to challenge even a single one of the 23 questions on the merits.

The blindly obvious fact is that Defendant can offer no explanation for how it was that she was in the close company of Epstein and young [redacted] during extended periods of time, such as multiple flights on Epstein's private jet. Presumably that is why she has had some convenient memory lapses when asked about these events. But, in any event, because Defendant has not substantively contested even a single one of the examples provided by [redacted], the Court can draw the obvious conclusion that there is substantial evidence supporting, not only the specifically-listed questions that [redacted] asked during the deposition, but in fact all similar questions. And, as [redacted] indicated in her opening motion, she is fully prepared to provide

such evidence on a question-by question basis if the Court would find it useful. *See* Mot. at 16. Indeed, the Court already has before it information that amply supports all of the questions that [redacted] plans to ask. The Court can simply peruse [redacted] statement of facts in response to the summary judgment motion. *See* [redacted] Response to Defendant's Motion for Summary Judgment at 4-27 (collecting ample testimony, documents, and other evidence demonstrating that Defendant was involved in the sex trafficking scheme).

Instead of contesting what is the on-the-ground truth in this case, Defendant raises a series of technical form objections to the questions asked of Epstein. But these form objections strain credulity. For example, with regard to the question of whether Epstein met Prince Andrew in March 2001 in London – the very time when [redacted] alleges Epstein and Defendant sexually trafficked her to Prince Andrew – Defendant can only argue that the issue is "irrelevant." Resp. at 18. Or with regard to the question about whether Epstein flew to London on March 9, 2001, with Defendant and [redacted], Defendant can only lamely respond: "If true, evidence should be available to establish this point to the extent it is relevant." Resp. at 18.

In one breathtaking audacious response, Defendant clearly demonstrates why this motion should be granted. Yes – evidence should, indeed, be available to establish Defendant's presence on this flight into London. But when asked about it, Defendant has conveniently forgotten about it. And her lawyers are aggressively challenging the admissibility of the flight logs pertaining to it. This forces [redacted] to go to the other person who would have the clearest memory about these events: Jeffrey Epstein. The jury should be allowed to hear what he said when asked.

CONCLUSION

For all of the foregoing reasons, [redacted] respectfully requests that the Court allow her to call Epstein as a trial witness for purposes of having him invoke his Fifth Amendment rights and then to have the jury, in its discretion, draw such adverse inferences as it deems

appropriate. [redacted] also requests that appropriate cautionary instructions be provided to the jury. If the Court believes that it requires a question-by-question listing of the evidentiary support for the questions that she plans to ask, then [redacted] requests leave to provide such a listing.

Dated: March 2, 2017

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd of March, 2017, I electronically filed the foregoing document with the Clerk of Court by using the CM/ECF system. I also certify that the foregoing document is being served this day on the individuals identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

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/s/ Sigrid S. McCawley
Sigrid S. McCawley

United States District Court
Southern District of New York

[redacted],
Plaintiff,

Case No.: 15-cv-07433-RWS

v.

Ghislaine Maxwell,

Defendant.
_____/

DECLARATION OF SIGRID MCCAWLEY IN SUPPORT OF PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO PRESENT TESTIMONY FROM JEFFREY EPSTEIN FOR PURPOSE OF OBTAINING AN ADVERSE INFERNCE INSTRUCTION

I, Sigrid McCawley, declare that the below is true and correct to the best of my knowledge as follows:

1. I am a Partner with the law firm of Boies, Schiller & Flexner LLP and duly licensed to practice in Florida and before this Court pursuant to this Court's Order granting my Application to Appear Pro Hac Vice.

2. I respectfully submit this Declaration in Support of Plaintiff's Reply to Motion to Present Testimony from Jeffrey Epstein for Purpose of Obtaining an Adverse Inference Instruction.

3. Attached hereto as Sealed Exhibit 1 is a true and correct copy of Excerpts April 22, 2016, Deposition of Ghislaine Maxwell.

4. Attached hereto as Sealed Exhibit 2 is a true and correct copy of Excerpts from September 9, 2016, Deposition of Jeffrey Epstein.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Sigrid McCawley
Sigrid McCawley, Esq.

Dated: March 2, 2017.

Respectfully Submitted,
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EXHIBIT 1

(File Under Seal)

EXHIBIT 2

(File Under Seal)