ZEIGER, TIGGES & LITTLE LLP

TELEPHONE: (614) 365-9900
FACSIMILE: (614) 365-7900

ATTORNEYS AT LAW
3500 HUNTINGTON CENTER
41 SOUTH HIGH STREET
COLUMBUS, OHIO 43215

WRITER'S DIRECT NUMBER:
(614) 365-4113

July 28, 2020

**VIA ECF**

Hon. Loretta A. Preska
United States District Judge
United States District Court for the
Southern District of New York
500 Pearl Street, Room 2220
New York, NY 10007-1312

Re: *Giuffre v. Dershowitz*, Case No. 19-cv-3377 (LAP)

Dear Judge Preska:

We are writing in response to Defendant Dershowitz's correspondence of July 23, 2020. The discovery disputes generally fall into two categories. The first is the manner by which confidential documents and testimony should be produced. We submit discovery should be conducted subject to a protective order. The second relates to the scope of discovery, and specifically whether Defendant, adopting the maxim "falsus in uno, falsus in omnibus," should be permitted to impose an unnecessary burden upon Mr. Wexner and many others for purposes of staging a collateral attack on the credibility of Ms. Giuffre with extrinsic evidence. We submit there is no basis for compelling Mr. Wexner's deposition.

**A. Defendant's Refusal To Accept Confidential Information Subject To A Protective Order.**

The subpoenas seek both records and testimony that are confidential under Ohio law, pursuant to a claim of confidentiality by attorney David Boies, and given the private nature of the proposed inquiries. John Zeiger, who is a member of the Ohio Bar and represents Mr. Wexner, is subject to Professional Conduct Rule 1.6(a): "A lawyer *shall not* reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law…." (Emphasis added.) "Confidential information" under this Rule "is *broader* than simply that information covered by the attorney-client privilege and covers *all 'information* relating to the representation.'" Lamson & Sessions Co. v. Mundinger, No. 4:08-CV-1226, 2009 WL 118217, at *5 (N.D. Ohio May 1, 2009) (emphasis added). See Hustler Cincinnati, Inc. v. Cambria, No. 1:11-CV-718 2014 WL 347021 11760, at *9 (S.D. Ohio Jan. 30, 2014) (same). The "presumptive prohibition on the disclosure of confidential information" pertains to all information concerning the representation, "*whatever its source*." Ohio Prof. Cond. Rule 1.6, cmt. 3 (emphasis added); Restatement (Third) of the Law Governing Lawyers, § 59 cmt. b (duty of confidentiality "covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege").

To be clear, we have never asserted that this Rule or any other considerations serve as a basis for refusing to produce non-privileged documents. However, where "the disclosure will be made in connection with a judicial proceeding, *[the law dictates] the disclosure should be made in a manner that limits access to the information* to the tribunal or other persons having a need to know it and *appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable*." Ohio Prof. Cond. Rule 1.6, cmt. 16 (emphasis added). Defendant scoffs but his view does not trump the law, the privacy rights of non-parties, or the confidentiality agreement asserted by Mr. Boies. [R-128, at 2]

We have attempted to reasonably resolve these (and other discovery) issues to no avail. While Defendant's positions have vacillated, ranging from insisting on no protective order to offering a perfunctory one of no applicability, Defendant has consistently stated his desire to publicly publish his discovery results for his press battle. We submit Defendant's position imposes an unreasonable burden on non-parties, as measured by any standard. This Court has expressed concerns as well. [R-144] As a result, we tendered a protective order that is unremarkable. It allows a non-party to designate materials as confidential; the Court serves as the final arbiter if a dispute exists; and leave must be sought to file any materials under seal, which is required by Rule 2(H)(2) of your Honor's Rules of Individual Practice. [Exh. A] Thus, if the discovery information is truly relevant to Dershowitz's position, he will have the information available. A protective order only renders discovery "useless," as Defendant asserts, for his media campaign. While much more could be said in support given the particulars of this case, especially given the admissions made by Defendant in his July 27 correspondence to this Court (which we will address in our July 31 correspondence), we submit our approach is both fair and, unfortunately, necessary.[1]

**B. Defendant Impermissibly Seeks To Depose Mr. Wexner.**

Subject to a protective order and COVID-19 considerations, *we are producing all documents* responsive to the subpoenas and *making Mr. Zeiger available for deposition*.

[1] Defendant's letters offers several unfortunate misstatements as to the timing and actual service of the subpoenas to create a misleading narrative. Page limitations permit only brief comment. Defendant represents he originally issued the subpoenas on April 28, 2020. But he omits that he did not serve such subpoenas on that date. Rather, based upon representations Defendant made as to the timing of any deposition, Mr. Little accepted service on June 8, 2020, subject to reservation of all objections, which he timely made on June 19. [Exh. B; see also Exh. C] However, after securing this courtesy, Defendant reneged on his representations, thereby voiding the terms of acceptance. Contrary to Defendant's statement to the Court, this had nothing to do with the issue of a protective order, particularly as the parties already had reached an impasse on the issue of the protective order and we advised we intended to seek relief from this Court. Defendant knows service is lacking, and thus proceeded to serve Mr. Zeiger on July 22, 2020, but has not successfully served Mr. Wexner. Thus, there are preliminary issues such as service and venue, which are hereby reserved.

Defendant's Counterclaim includes the contention that Ms. Giuffre defamed him as part of a scheme orchestrated by Mr. Boies to extort monies from wealthy men. While many of these are discovery subjects that should be, in the first instance, explored with Ms. Giuffre and Mr. Boies, Mr. Zeiger did have communications with Mr. Boies and can readily confirm that: no extortion demand was ever made, no settlement was entered into, and not a penny (or other consideration) was ever paid. Just the opposite is true for Mr. Wexner, however. He had no involvement, and thus lacks any personal knowledge relating to, Defendant's so-called "Extortion Claim." Mr. Boies, who is in the midst of litigation with Defendant, can readily confirm Mr. Wexner's lack of involvement without burdening a non-party.

Indeed, Defendant has candidly conceded the sole purpose for Mr. Wexner's deposition is to collaterally attack, with extrinsic evidence, Ms. Giuffre's credibility. Defendant contends that Wexner and other's denials of an inappropriate relationship show Ms. Giuffre's propensity to lie or misremember, and thus she must have lied or misremembered in accusing him of sexual misconduct. On several occasions, this Court has already expressed concerns with Defendant's stated strategy and proposed far-ranging discovery from non-parties. [R-96; R-152] It has for good reason. Evidence Rule 608(b) prohibits the offering of extrinsic evidence to attack a witness' credibility. Such propensity testimony is also inadmissible under Rule 404(a)(1): "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait." If such evidence were permitted here, the resolution of the parties' claims would involve a series of mini-trials where the jury, in order to resolve the disputes Defendant seeks to interject, would be forced to render de facto verdicts as to non-parties not before the Court and who are not presenting their case.

Yet, in an effort to limit our unnecessary involvement in Defendant's litigation (including motion practice before this Court), we offered to have Mr. Wexner answer a written deposition question, as permitted under Civil Rule 31, confirming his lack of any relationship whatsoever with Ms. Giuffre. Defendant steadfastly refused this offer and demands a mini-trial. He seeks to videotape the deposition of Mr. Wexner, take advantage of his credibility, interrogate him as to Ms. Giuffre, and then use that video testimony to challenge the video testimony of Ms. Giuffre with a side-by-side comparison (although Ms. Giuffre has already stated Defendant mischaracterized her statements). [R-141] It makes good theater, but is not relevant here. As the Court recently observed, the "central factual issue is the case is quite simple: did the parties have intimate contact or not." [R-152] The discovery sought from Mr. Wexner is "fairly far afield from the main issue in this litigation." [Id.] It imposes an unreasonable burden on a non-party in violation of Rule 45, particularly where Defendant unnecessarily subjects others to discovery in multiple forums without having, first, accomplished such basic tasks as consolidating discovery and securing a protective order to facilitate non-party discovery. Allowing him to pursue motion practice compounds the resulting burden occasioned by his failure to proceed appropriately under Rule 45 and without regard to the proportionality requirement of Rules 26 and 403.

Respectfully submitted,

*/s/ Guy Petrillo*

Guy Petrillo
PETRILLO KLEIN & BOXER LLP

*/s/ Marion H. Little, Jr.*

Marion H. Little, Jr. (Ohio Bar # 0042679)

cc: All counsel of record, via email

# EXHIBIT A

ZEIGER, TIGGES & LITTLE LLP

ATTORNEYS AT LAW

3500 HUNTINGTON CENTER

41 SOUTH HIGH STREET

COLUMBUS, OHIO 43215

TELEPHONE: (614) 365-9900
FACSIMILE: (614) 365-7900

WRITER'S DIRECT NUMBER:
(614) 365-4113

May 29, 2020

**Via Email**

Howard M. Cooper, Esq.
Todd & Weld LLP
One Federal Street
Boston, MA 02110
hcooper@toddweld.com

Re: David Boies v. Alan Dershowitz
Supreme Court of New York, County of New York
Case No. 160874/2019 (the "State Action");

Virginia L. Giuffre v. Alan Dershowitz
U.S. District Court, Southern District of New York
Case No. 19-cv-3377 (Preska, J.) (the "Federal Action") (collectively, the Federal Action and the State Action are referred to as the "Lawsuits")

Dear Howard:

We are enclosing a proposed form of protective order for your review.

If such a protective order is in place, it will allow us to produce the documents responsive to your proposed subpoena and make Attorney John Zeiger available to testify at a mutually agreeable date.

As you may know, under Rule 1.6(a) of the Ohio Rules of Professional Conduct, lawyers are not permitted to reveal information relating to the representation of a client. This prohibition is broader than simply information protected by the attorney-client privilege--it covers all confidential and non-public information relating to the representation. Where information relating to a representation is to be disclosed as part of a judicial proceeding, the disclosure needs to be made in a manner that limits public access to the information. This is one of the reasons necessitating the protective order.

We would appreciate your review and comments.

Very truly yours,

Marion H. Little, Jr.

Enclosure
MHL:tlt:1053-001:859002

**EXHIBIT A**

**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---|---|---|
| **VIRGINIA L. GIUFFRE,** | : | |
| | : | **Case No. 1:19-cv-03377** |
| **Plaintiff,** | : | |
| | : | **Judge Preska** |
| **v.** | : | |
| | : | |
| **ALAN DERSHOWITZ,** | : | |
| | : | |
| **Defendant.** | : | |

**PROTECTIVE ORDER**

Upon a showing of good cause in support of the entry of a protective order to protect the discovery and dissemination of confidential information or information which may improperly annoy, embarrass, or oppress any party, witness, or person providing discovery in this case, **IT IS ORDERED:**

1. This Protective Order shall govern the production, disclosure, dissemination, exchange and use of all documents, information, or other things, responses to interrogatories, responses to requests for admission, responses to subpoenas, deposition testimony and exhibits, and all copies, extracts, summaries, compilations, designations, and portions thereof produced, given, or exchanged by and among all parties and non-parties in the course of the above-captioned proceeding (the "Proceeding") ("Discovery Materials").

2. A party, person, or entity receiving Discovery Materials from another party, person, or entity shall use such Discovery Materials solely for purposes of preparing for and conducting litigation of the Proceeding. Discovery Materials designated as Confidential shall not be disclosed by a non-designating party except as expressly permitted by the terms of the Protective Order.

3. Any party to this litigation and any third party shall have the right to designate as "Confidential" and subject to the Protective Order any information, document, or thing, or portion of any document or thing that contains: (a) information that relates to efforts to comply with statutory or judicial regulations (regardless of whether such information is protected by the attorney-client privilege); (b) information concerning private facts or information which, if publicly disclosed, would serve to embarrass a party or third party; (c) disclosure of information prohibited by non-disclosure agreement(s) with third parties that is not (i) generally available to the public or in the public domain or (ii) independently known to the receiving party; or (d) information a party otherwise believes in good faith to be entitled to protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure. Any party to this litigation or any third party covered by this Protective Order, who produces or discloses any Confidential material,

including without limitation any information, document, thing, interrogatory answer, admission, pleading, or testimony, shall mark the same with the foregoing or similar legend: "CONFIDENTIAL" or "CONFIDENTIAL – SUBJECT TO PROTECTIVE ORDER" (hereinafter "Confidential") at the time of its production.

4. This Order does not authorize filing protected materials under seal. No Discovery Material designated as Confidential may be filed with the Court under seal without prior permission as to each such filing, upon motion and for good cause shown, including the necessity and legal basis for filing under seal.

5. Confidential material and the contents of Confidential material may be disclosed only to the following individuals under the following conditions:

a. The parties;

b. The parties' legal counsel (partners, employees, legal assistants, paralegals, secretarial and clerical employees);

c. Any deponent or witness may be shown or examined on any information, document or thing designated Confidential if it appears that the witness authored or received a copy of it, was involved in or may have relevant knowledge with respect to the subject matter described therein or is employed by the party who produced the information, document or thing, or if the producing party consents to such disclosure;

d. Vendors retained by or for the parties to assist in preparing for pretrial discovery, trial and/or hearings including, but not limited to, court reporters, litigation support personnel, jury consultants, individuals to prepare demonstrative and audiovisual aids for use in the courtroom or in depositions or mock jury sessions, as well as their staff, stenographic, and clerical employees whose duties and responsibilities require access to such materials; and

e. Such other persons as may be designated by order of the Court.

6. Confidential material shall be used only by individuals permitted access to it under Paragraph 5. Confidential material, copies thereof, and the information contained therein, shall not be disclosed in any manner to any other individual, until and unless (a) counsel for the party asserting confidentiality waives the claim of confidentiality, or (b) the Court orders such disclosure.

7. With respect to any depositions that involve a disclosure of Confidential material of a party or third party to this action, such party or third party shall have until thirty (30) days after receipt of the deposition transcript within which to inform all other parties that portions of the transcript are to be designated Confidential, which period may be extended by agreement of the parties. No such deposition transcript shall be disclosed to any individual other than the individuals described in Paragraph 5 (a), (b), (c), (d), and (e) above and the deponent during

these thirty (30) days, and no individual attending such a deposition shall disclose the contents of the deposition to any individual other than those described in Paragraph 6 (a), (b), (c), (d), and (e)) above during said thirty (30) days. Upon being informed that certain portions of a deposition are to be designated as Confidential, all parties shall immediately cause each copy of the transcript in its custody or control to be appropriately marked and limit disclosure of that transcript in accordance with this Order. The portions of a transcript designated as Confidential shall not be filed under seal absent the further order of this Court.

8. If counsel for a party receiving documents or information designated as Confidential hereunder objects to such designation of any or all of such items, the following procedure shall apply:

a. Counsel for the objecting party shall serve on the designating party or third party a written objection to such designation, which shall describe with particularity the documents or information in question and shall state the grounds for objection. Counsel for the designating party or third party shall respond in writing to such objection within 14 days, and shall state with particularity the grounds for asserting that the document or information is Confidential. If no timely written response is made to the objection, the challenged designation will be deemed to be void. If the designating party or third party makes a timely response to such objection asserting the propriety of the designation, counsel shall then confer in good faith in an effort to resolve the dispute.

b. If a dispute as to a Confidential designation of a document or item of information cannot be resolved by agreement, the proponent of the designation being challenged shall present the dispute to the Court initially by telephone or letter, in accordance with the Court's published Individual Procedures, before filing a formal motion for an order regarding the challenged designation. The document or information that is the subject of the filing shall be treated as originally designated pending resolution of the dispute. The provisions of this paragraph are not intended to shift the burden of establishing confidentiality, which shall at all times remain the burden of the designating party.

9. If the need arises during trial or at any hearing before the Court for any party to disclose Confidential or information, it may do so only after giving notice to the producing party and as directed by the Court.

10. To the extent consistent with applicable law, the inadvertent or unintentional disclosure of Confidential material that should have been designated as such, regardless of whether the information, document or thing was so designated at the time of disclosure, shall not be deemed a waiver in whole or in part of a party's claim of confidentiality, either as to the specific information, document or thing disclosed or as to any other material or information concerning the same or related subject matter. Such inadvertent or unintentional disclosure may be rectified by notifying in writing counsel for all parties to whom the material was disclosed that the material should have been designated Confidential within a reasonable time after

disclosure. Such notice shall constitute a designation of the information, document or thing as Confidential under this Protective Order.

11. When the inadvertent or mistaken disclosure of any information, document or thing protected by privilege or work-product immunity is discovered by the producing party and brought to the attention of the receiving party, the receiving party's treatment of such material shall be in accordance with Federal Rule of Civil Procedure 26(b)(5)(B). Such inadvertent or mistaken disclosure of such information, document or thing shall not by itself constitute a waiver by the producing party of any claims of privilege or work-product immunity. However, nothing herein restricts the right of the receiving party to challenge the producing party's claim of privilege if appropriate within a reasonable time after receiving notice of the inadvertent or mistaken disclosure. If a party decides to add a designation to any document previously produced without designation, or to withdraw the designation on any document previously produced, the designating party shall produce to each receiving party substitute copies of such documents bearing the appropriate designation, if any. Each receiving party shall use reasonable efforts to substitute the later produced documents for the previously produced documents, and destroy or return to the designating party the previously produced documents and all copies thereof.

12. This Protective Order shall not deprive any party of its right to object to discovery by any other party or on any otherwise permitted ground. This Protective Order is being entered without prejudice to the right of any party to move the Court for modification or for relief from any of its terms.

13. This Protective Order shall survive the termination of this action and shall remain in full force and effect unless modified by an Order of this Court or by the written stipulation of the parties filed with the Court.

14. No receiving party shall produce Confidential material to third parties unless a request is made in accordance with applicable discovery rules and/or pursuant to a subpoena, court order, or other compulsory process, or any request for production is received from any governmental agency or other self-regulatory organization, purporting to have authority to require the production thereof. In the event that a receiving party receives such a request, subpoena, order or other compulsory process commanding the production of Confidential material, the receiving party shall, to the extent permissible by law and the rules, requirements or requests of any relevant governmental or self-regulatory organization, promptly (a) make a timely objection to the production of the Confidential material on the grounds that production is precluded by this Protective Order; (b) notify the designating party of the existence and general substance of each such request, subpoena, order, or other compulsory process, including the dates set for the production, no later than three (3) business days after the receipt of such request, subpoena, order or other compulsory process; (c) furnish the designating party with a copy of the document(s) that the receiving party received that memorialized the request, subpoena, order, or other compulsory process, no later than three (3) business days after the receipt of such request, subpoena, order or other compulsory process; and (d) not interfere with the designating party's response or objection to any such request, subpoena, order, or other compulsory process. The receiving party shall be entitled to comply with the request, subpoena, order or other compulsory

process except to the extent that (i) the designating party is successful in timely obtaining an order modifying or quashing the request, subpoena, order, or other compulsory process, or (ii) the receiving party is on notice that an application for such relief is pending; provided that the receiving party shall in all events be entitled to comply with the request, subpoena, order or other compulsory process to the extent required by law and the rules, requirements or requests of any relevant governmental or self-regulatory organization.

15. Upon final conclusion of this litigation, each party or other individual subject to the terms hereof shall be under an obligation to assemble and to return to the originating source all originals and unmarked copies of documents and things containing Confidential material and to destroy, should such source so request, all copies of Confidential material as well as excerpts, summaries and digests revealing Confidential material that do not constitute attorney work product. Counsel may retain complete copies of all work product, transcripts, and pleadings including any exhibits attached thereto for archival purposes, subject to the provisions of this Protective Order. To the extent a party requests the return of Confidential material from the Court after the final conclusion of the litigation, including the exhaustion of all appeals therefrom and all related proceedings, the party shall file a motion seeking such relief.

16. The Court retains jurisdiction even after final disposition of this proceeding to enforce this Protective Order and to make such amendments, modifications, deletions and additions to this Protective Order as the Court may from time to time deem appropriate.

IT IS SO ORDERED.

Dated: _____

_____
United States District Judge

# EXHIBIT B

ZEIGER, TIGGES & LITTLE LLP

ATTORNEYS AT LAW

3500 HUNTINGTON CENTER

41 SOUTH HIGH STREET

COLUMBUS, OHIO 43215

TELEPHONE: (614) 365-9900

FACSIMILE: (614) 365-7900

WRITER'S DIRECT NUMBER:

(614) 365-4113

June 19, 2020

**Via Email**

Howard M. Cooper, Esq.
Todd & Weld LLP
One Federal Street
Boston, MA 02110
hcooper@toddweld.com

Re: David Boies v. Alan Dershowitz
Supreme Court of New York, County of New York
Case No. 160874/2019 (the "State Action");

Virginia L. Giuffre v. Alan Dershowitz
U.S. District Court, Southern District of New York
Case No. 19-cv-3377 (Preska, J.) (the "Federal Action") (collectively, the Federal Action and the State Action are referred to as the "Lawsuits")

Objections to Record Subpoenas Propounded upon Attorney John W. Zeiger and Leslie H. Wexner

Dear Howard:

Pursuant to Rule 45 of the Federal Rules of Civil Procedure, we object to the subpoenas issued on June 8, 2020, to Attorney John W. Zeiger and Leslie H. Wexner (the "Subpoenas") seeking records on the following grounds:

1. The Subpoenas seek confidential records and information relating to Attorney Zeiger's representation of Mr. Wexner.[1] Under Rule 1.6(a) of the Ohio Rules of Professional Conduct "[a] lawyer *shall not* reveal information relating to the representation of a client, including information protected by the attorney-client privilege under applicable law…." (Emphasis added.) "Confidential information" under this Rule "is *broader* than simply that information covered by the attorney-client privilege and covers *all 'information* relating to the representation.'" Lamson & Sessions Co. v. Mundinger, 2009 U.S. Dist. LEXIS 37197, at *13 (N.D. Ohio May 1, 2009) (emphasis added). The "presumptive prohibition on the

[1] The Subpoenas do not appear to request the production of any privileged materials. However, all rights and objections are reserved as to all privileged materials.

EXHIBIT B

disclosure of confidential information" under Rule 1.6(a) extends to information the attorney receives from sources outside of the attorney-client relationship such as communications with opposing counsel. See City of Pittsburgh v. Silver, 50 A.3d 296, 301 (Pa. Commw. 2012) (settlement negotiations are protected by Rule 1.6). It includes "all information relating to the representation, *whatever its source*." Ohio Prof. Cond. Rule 1.6, cmt. 3 (emphasis added).

2. The Subpoenas seek records and information exchanged with the expectation and/or an express or implied agreement of confidentiality. We have reviewed some of the correspondence publicly filed and submitted to District Judge Preska in the Federal Action. Attorney Boies asserts his communications with Attorney Zeiger were confidential. [Federal Action, Doc. 128, pg. 2.]

3. Under those limited circumstances where deviation from the "presumptive prohibition" precluding disclosure is permitted under Professional Conduct Rule 1.6, the attorney and the court are duty-bound to protect confidential information from entering the public domain: "If the disclosure will be made in connection with a judicial proceeding, *the disclosure should be made in a manner that limits access to the information* to the tribunal or other persons having a need to know it and *appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable*." Ohio Prof. Cond. Rule 1.6, cmt. 16 (emphasis added). Accord: Spratley v. State Farm Mut. Auto. Ins. Co., 78 P.3d 603, ¶ 22 (Utah 2003) (discussing Utah's version of Rule 1.6 and noting: "[t]he trial court has numerous tools it *must* employ to prevent unwarranted disclosure of the confidential information, including the use of sealing and protective orders, limited admissibility of evidence, orders restricting the use of testimony in successive proceedings, and, where appropriate, in camera proceedings.") (quotation omitted).

   We have previously provided a proposed Protective Order that would allow non-parties responding to discovery to invoke its protection for offered testimony and documents produced. Mr. Dershowitz has rejected this proposed Protective Order, and we understand that he otherwise intends to oppose any confidential treatment of the documents produced in response to the subpoena duces tecum or any testimony solicited in oral depositions except to the extent such information relates to health or financial information. As such, separate and apart from the instant objections, we intend to move the court for the entry of a standard and customary protective order consistent with those routinely entered in cases pending in the Southern District of New York in comparable type proceedings.

4. The Subpoenas unnecessarily and unreasonably expose the deponents to duplicative discovery. As referenced above, Mr. Dershowitz is a party in two

related cases: the State and Federal Actions. We have preliminarily reviewed the Lawsuits and note they overlap in substantial respects, thus exposing non-parties to duplicative discovery in multi-forums. A review of the respective dockets in the Lawsuits reveals no order or stipulation consolidating discovery. We understand that the subpoenas, from the perspective of Mr. Dershowitz, are intended to be for both Lawsuits. However, absent a stipulation from the litigants in the Lawsuits that the requested discovery will, in fact, be consolidated at least as to the deponents, we object that this discovery unreasonably imposes a burden on non-parties.

We further note that, provided that our confidentiality concerns are appropriately addressed either voluntarily by the parties to the Lawsuits or otherwise resolved by the Court, we will make Attorney Zeiger available for oral testimony. Having reviewed the respective pleadings from the Lawsuits, it appears that Attorney Zeiger may possibly have discoverable information that is relevant to either a claim or defense in the Lawsuits and such deposition is proportional to the needs of the Lawsuits.

In contrast, we believe Mr. Wexner has no non-privileged information relevant to a claim or defense on Mr. Dershowitz's allegations of an extortion scheme. As for the remaining allegations in the Lawsuit, we believe Mr. Wexner's deposition would impose an unreasonable burden on him as his testimony would not be relevant and/or proportional to the needs of the Lawsuits and, in fact, is at best merely inadmissible extrinsic, collateral evidence. Having reviewed the transcript of the Rule 26 conference before District Judge Preska, it appears Her Honor shares our view. We thus intend to seek an order precluding his testimony. We previously offered as a compromise to have Mr. Wexner answer written deposition questions, as permitted under Civil Rule 31, but understand this proposal is unacceptable to Mr. Dershowitz, and he will oppose our motion to preclude Mr. Wexner's deposition.

As a final note, Mr. Wexner will be 83 years old and Attorney Zeiger will be 73 years old at the rescheduled deposition dates, they are thus in a heightened-risk category, and their continued health remains paramount. Each of the deponents has followed quarantine practices for the last several months given the current pandemic. Attorney Zeiger and Mr. Wexner, if ordered by the Court, will only be made available for deposition consistent with the then-federal, state, and local health restrictions and best heath practices.

We believe we have conferred in good faith with your offices in an effort to resolve these disputes without court action, and thus intend to certify for purposes of Rule 26 and any applicable local rule that all extrajudicial efforts to resolve these issues have been exhausted. If you disagree and believe additional discussions would be beneficial, please advise and we will schedule a call.

Thank you for your attention to this matter.

Very truly yours,

Marion H. Little, Jr.

MHL:tlt:1053-001:860834

# EXHIBIT C

ZEIGER, TIGGES & LITTLE LLP

ATTORNEYS AT LAW

3500 HUNTINGTON CENTER

41 SOUTH HIGH STREET

COLUMBUS, OHIO 43215

TELEPHONE: (614) 365-9900

FACSIMILE: (614) 365-7900

WRITER'S DIRECT NUMBER:
(614) 365-4113

July 10, 2020

**Via Email**

Howard M. Cooper, Esq.
Todd & Weld LLP
One Federal Street
Boston, MA 02110
hcooper@toddweld.com

Re: David Boies v. Alan Dershowitz
Supreme Court of New York, County of New York
Case No. 160874/2019 (the "State Action");

Virginia L. Giuffre v. Alan Dershowitz
U.S. District Court, Southern District of New York
Case No. 19-cv-3377 (Preska, J.) (the "Federal Action") (collectively, the Federal Action and the State Action are referred to as the "Lawsuits")

Dear Howard:

We are writing in response to your email of June 29, 2020. The delay in our response was caused by the two in-court preliminary injunction hearings the undersigned has tried within the last seven days, with a third scheduled this upcoming Monday.

At the outset, we note that your email appears to be an effort to rewrite both the context and content of our discussions. We assume that your client is driving this new position, but we are obviously obligated to respond directly through you.

To be clear, our position on this matter has been consistent throughout. Although you incorrectly state the amount of documents, we have previously confirmed for you that in response to a subpoena we would have certain non-privileged, but otherwise confidential, information responsive to your client's subpoena. We have never suggested or indicated that such records would be released without the benefit of a protective order. To the contrary, the Ohio Code of Professional Responsibility, as outlined in our prior correspondence, requires that we affirmatively seek to secure a protective order before the production of such information. We have cited for you this mandatory rule. We have cited for you the case law. In response to both, you have offered nothing.

**EXHIBIT C**

In our initial discussion, you represented that the parties to the case were developing a proposed protective order, which a review of the docket reveals never occurred. Later, you communicated your client's position that a protective order would only be acceptable to him in the most limited of circumstances, namely the protection of tax information and health information. We disagreed and tendered a protective order for your review and consideration. There is nothing extraordinary about the protective order. It is, quite frankly, fairly customary and standard for this type of litigation and this form has been filed in countless federal proceedings.

We believe District Judge Preska will agree. Having reviewed the July 1, 2020 Order issued in the Federal Action, it appears that the Court does not share your client's view as to the scope or import of protective orders. For example, the Court commented: "The Maxwell Protective Order . . . is unremarkable in form and function," and then discussed its basic elements. The protective order we tendered for your review contains these same elements and serves the same basic purpose.

Your email suggests that your client is changing his position and is more flexible than previously represented as to the scope of the protective order. If this is true (as it should be), we invite you to return a redline copy of the protective order we tendered to you. We are not, however, prepared to speculate and guess as to your client's position on any given day.

We have been equally clear as to the scope of permissible discovery. We have agreed to make Attorney Zeiger available for deposition given that he arguably has discoverable information. While we believe the information is unfavorable to your client's claims, we are prepared to make Attorney Zeiger available for your examination so that you can confirm this as well. In contrast, we have repeatedly advised that Mr. Wexner does not have any non-privileged personal information relevant to the purported conspiracy theory narrative outlined in your client's amended counterclaim in the Federal Action. And what other information he may possess, is simply collateral, extrinsic evidence of no admissibility or, quite frankly, import to the claims of these cases. On this point as well, District Judge Preska's July 1 Order further supports our view that the discovery sought by your client is impermissibly broad, as the Court offered several comments questioning the scope of the discovery pursued by your client.

We have consistently communicated the foregoing positions so that we could identify and narrow those issues that District Judge Preska would be required to consider and resolve. This is, of course, an obligation that all counsel share as part of any extrajudicial dialogue addressing discovery disputes. We had also shared with you our intention to move the Court for a protective order on whatever issues remain unresolved.

Now as for the event presumably prompting your client's most recent position, you inquired whether we would make the requested documents available to both you and your client

before the Court's resolution of our motion for a protective order—even though your client had not agreed to a protective order. We responded that we would consider your proposal but we were concerned given the lack of an enforcement mechanism for ensuring compliance with a confidentiality commitment. You responded by noting that you would not share the information with your opponents unless they agreed to maintain the confidentiality of the information, but did not address the lack of an enforcement mechanism. The latter is particularly important as we already have advised you of your client's breach of his confidentiality agreement with Attorney Zeiger—an agreement (and breach) that we have not waived.

We then advised, on June 23, that we would not release the information without the benefit of an enforcement mechanism for seeking a contempt of court citation. The necessity for such protection was made clear by press reports detailing the content of sealed materials purportedly made available to you.

> NEW: Alan Dershowitz's attorney confirms that his client has access to Virginia Giuffre's sealed depositions. Those depositions reveal that she was directed by Jeffrey Epstein to have sex with former Israeli PM Ehud Barak & Victoria's Secret's Les Wexner.
>
> [Julie K. Brown June 23, 2020 Twitter Post.]

District Judge Preska's July 1 Order, at footnote 6, further highlights the necessity for an enforcement mechanism given the public and toxic-fashion in which your client has sought to litigate his disputes with Ms. Giuffre. Those comments need not be repeated here.

Equally troubling is that we have re-reviewed you client's pleading in the Federal Action in light of the foregoing. Paragraph 23 of the Amended Complaint specifically discloses the contents of a "sealed deposition." Is this the same deposition that District Judge Preska ordered released to you with the stipulation that the contents remain sealed? If it is the same deposition, there is compelling reason for the Court to issue a protective order and take such other action as she deems appropriate.

Turning to your threats to proceed with the filing of a Motion to Compel, we do not believe your client has a basis for seeking any relief. However, we assume (and insist) any such motion will be filed consistent with the local rules and in a manner that is consistent with all pending orders and directions by the District Court.

As for your statement that you are no longer willing to wait until the fall for depositions, we offer two points. First, the timing of the depositions is not a choice for you to make. We have already advised that there will be no deposition of Mr. Wexner until the District Judge has

resolved the disputes and, in any event, no depositions will occur unless they are done in a manner that does not unnecessarily create health risks given the ages of the deponents. We cite for your benefit the national headlines reporting on the surge of COVID-19 cases and State's re-closings. In our county, for example, Ohio's Governor is issuing an order obligating the wearing of facial coverings. Second, Mr. Zeiger and Mr. Wexner will not compromise their rights in response to your client's threat to make things inconvenient for them.

Moreover, we had accepted service of the subpoenas based upon your representations as to the dates and times of the depositions—your transmittal correspondence confirms the same. Given your client's breach of this agreement, the deponents are relieved from the subpoenas. Your client can re-serve the subpoenas at his pleasure and then we will respond appropriately. Given that your client's entrenched position seems to be diametrically inconsistent with the District Judge's view on this matter, we will be pleased to present these issues to the Court for full consideration and all available relief.

There is another point your client should appreciate. Rule 45 expressly provides for a non-party's recovery of its attorneys' fees where undue burden or expense has been imposed. The following conduct certainly supports recovery of fees: Mr. Dershowitz's game playing of (a) seeking the discovery of confidential information but not agreeing to a protective order; (b) making representations with respect to the service of a subpoena and then reneging on the agreement; and (c) interposing baseless threats in an effort to force a capitulation from a non-party. Each supports an award of all fees and costs.

Very truly yours,

Marion M. Little, Jr.

MHL:tlt:1053-001:864313