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1 UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

2 -----x

3 BLAKE LIVELY,

4 Plaintiff,

5 v.

24 Civ. 10049 (LJL)

6 WAYFARER STUDIOS LLC, a
7 Delaware Limited Liability
8 Company, JUSTIN BALDONI, an
9 individual, JAMEY HEATH, an
10 individual, STEVE SAROWITZ, an
11 individual, IT ENDS WITH US
12 MOVIE LLC, a California
13 Limited Liability Company,
14 MELISSA NATHAN, an individual,
15 THE AGENCY GROUP PR LLC, a
16 Delaware Limited Liability
17 Company, JENNIFER ABEL, an
18 individual, JED WALLACE, an
19 individual, and STREET
20 RELATIONS INC., a California
21 Corporation,

22 Defendants.

23 -----x

24 New York, N.Y.
25 January 22, 2026
9:30 a.m.

26 Before:

27 HON. LEWIS J. LIMAN,

28 District Judge

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APPEARANCES

WILLKIE FARR & GALLAGHER LLP
Attorneys for Plaintiff Blake Lively

BY: MICHAEL GOTTLIEB
KRISTIN BENDER

-and-

MANATT PHELPS & PHILLIPS

BY: MATTHEW F. BRUNO
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BY: BRYAN J. FREEDMAN
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SHAPIRO ARATO BACH LLP

BY: JONATHAN BACH
ALEXANDRA SHAPIRO
ALICE BUTTRICK

-and-

MEISTER SEELIG & FEIN PLLC

BY: MITCHELL SHUSTER

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1 (Case called)

2 MR. GOTTLIEB: Good morning, your Honor. Mike
3 Gottlieb from Willkie Farr & Gallagher on behalf of the
4 plaintiff.

5 MR. BRUNO: Good morning, your Honor. Matthew Bruno
6 of Manatt Phelps & Phillips on behalf of plaintiff.

7 MS. HUDSON: Good morning, your Honor. Esra Hudson of
8 Manatt Phelps & Phillips on behalf of plaintiff.

9 MS. ROESER: Good morning. Stephanie Roeser, also
10 from Manatt Phelps & Phillips, on behalf plaintiff.

11 MS. BENDER: Good morning. Kristen Bender, Willkie
12 Farr & Gallagher on behalf of plaintiff.

13 MS. GOVERNSKI: Meryl Governski from Dunn Isaacson
14 Rhee on behalf of plaintiff.

15 THE COURT: And on the defense side.

16 MR. FREEDMAN: Yes. Bryan Freedman on behalf of the
17 Wayfarer parties.

18 MS. GAROFALO: Good morning, your Honor. Ellyn
19 Garofalo on behalf of Wayfarer parties.

20 MR. BACH: Good morning. Jonathan Bach on behalf of
21 the Wayfarer parties.

22 MS. BUTTRICK: Good morning. Alice Buttrick on behalf
23 of the Wayfarer parties.

24 MS. SHAPIRO: Good morning, your Honor. Alexandra
25 Shapiro on behalf of the Wayfarer parties.

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1 MR. SHUSTER: Good morning. Mitchell Shuster from
2 Meister Seelig & Fein of the Wayfarer parties.

3 THE COURT: Good morning, everybody. We're here today
4 for oral argument on three motions: The motion for summary
5 judgment, the motion for judgment on the pleadings, and the
6 motion for spoliation sanctions. I'll hear first from the
7 Wayfarer parties and then I'll hear from Lively, and then if
8 the Wayfarer parties want to be heard on rebuttal, I'll hear
9 from the Wayfarer parties.

10 I've indicated to the parties that they can each have
11 one hour for argument. It may, I realize, spill over more if
12 I've got questions, but we'll start with the Wayfarer parties,
13 unless counsel has anything else they want to raise.

14 MR. GOTTLIEB: Your Honor, we had just one question
15 for clarification, which is that the spoliation motion is of
16 course our motion. Your order indicated that the Wayfarer
17 parties would have time for rebuttal. We didn't know how the
18 Court wanted to sequence either the placement of the spoliation
19 motion or the time allocations, but we would request the
20 opportunity to have rebuttal time at least with respect to the
21 spoliation motion.

22 THE COURT: I'll grant that request. You can have
23 10 minutes for rebuttal time on the spoliation. You'll make
24 part of spoliation your argument in response to the summary
25 judgment and the motion for judgment on the pleadings.

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1 MR. GOTTLIEB: Thank you, your Honor.

2 THE COURT: Mr. Bach, I saw you standing up.

3 MR. BACH: Yes, Judge. I'm going to address some of
4 the summary judgment motions, Ms. Shapiro some others, and then
5 Ms. Garofalo will speak to the two other motions, and we plan,
6 if all goes well, to save 15 minutes for rebuttal.

7 THE COURT: We'll give you notice at 40 minutes. Why
8 don't you tell me, before you get started, what you're
9 covering, what Ms. Shapiro is covering, and what Ms. Garofalo
10 is covering.

11 MR. BACH: Sure. Speaking for me, I will be covering
12 sexual harassment, retaliation, and Ms. Lively's status as an
13 independent contractor.

14 MS. SHAPIRO: I'll be focusing on the defamation and
15 contract claims.

16 THE COURT: And then is there a third attorney who's
17 going to argue?

18 MR. BACH: Ms. Garofalo will address the two other
19 motions.

20 THE COURT: I gather, Mr. Bach, you want to go first?

21 MR. BACH: Yes, please.

22 THE COURT: You have within your ambit the questions
23 of extraterritoriality or is that Ms. Shapiro?

24 MR. BACH: No, those were raised primarily in the
25 motion for judgment on the pleading. So Ms. Garofalo will

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1 address those.

2 THE COURT: Okay.

3 MR. BACH: Judge, this is a case about making a movie,
4 a movie with highly charged romantic and sexual themes. In
5 that context, actors signed on knowing they would portray
6 characters in intimate, sensuous, and at times even abusive
7 situations. In that context, an intimacy coordinator was made
8 available, even before filming began, to talk to actors,
9 including Ms. Lively, about sensitive issues that might arise.
10 In that context, key source materials, including the book on
11 which the movie was based, called for hot and sexy scenes. And
12 in that context, Ms. Lively signed on knowing that she would be
13 directed by Mr. Baldoni, and would work with him side by side
14 to portray a steamy and turbulent romance at the heart of the
15 film. And now --

16 THE COURT: I mean, it's not necessarily a correct
17 proposition of law that no matter what conduct takes place, if
18 you're in a movie that has scenes of a sexual nature, you've
19 subjected yourself to all kinds of sexual harassment. So I
20 don't think you're suggesting such a broad proposition. Maybe
21 you'll focus on the evidence.

22 MR. BACH: I am not suggesting such a proposition. I
23 am suggesting, just as the California Supreme Court has said
24 loud and clear, that context matters in addressing these
25 issues, and that's in a case about the television show Friends.

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1 *Lyle v. Warner Bros.*, it's the most on point case in the
2 briefs. It involves adults in a writing room creating content
3 that involves sexual innuendo and adult themes. The California
4 Supreme Court looked at that situation and it said when
5 evaluating the standard of whether conduct is severe or
6 pervasive, you have to take into account the backdrop. The
7 facts there, Judge, the facts, there was a room of writers
8 where they were discussing oral sex, talking about which cast
9 members they'd like to have sex with, drawing graphic pictures
10 in coloring books, making disparaging comments about female
11 genitalia relating their own personal experiences. The court
12 said --

13 THE COURT: It was the writers' room and it was banter
14 that was connected to the creative process that took place in
15 that case.

16 MR. BACH: Correct. And because it necessarily took
17 place against the backdrop of sexual innuendo and adult themes
18 where the writers understood that was the work that was
19 assigned, that you have to take that as a starting point when
20 you begin to think about whether the conduct is severe and
21 pervasive. Obviously, in a typical office setting, if you were
22 to kiss someone aggressively or ask them to act out a sexual
23 role, that would be inappropriate, but Mr. Baldoni now stands
24 accused in the context of making an adult film with sexual
25 themes, he stands accused of commenting on actresses'

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1 wardrobes, of rewriting scenes to increase sexual tension --

2 THE COURT: Is it your view, just because it's a movie
3 that has scenes of a sexual nature in them, that he was
4 permitted whatever physical contact he wanted with Ms. Lively
5 when they were dancing, he could touch her wherever, do
6 whatever he wanted to her?

7 MR. BACH: Judge, I don't think that's what the facts
8 show.

9 THE COURT: Maybe you can actually help me sort of
10 tease out where the lines are.

11 MR. BACH: Well, here's the line, Judge, is that it's
12 not enough to show that sex or sexuality found its way into the
13 workplace. Their burden is to show that it not only entered
14 the workplace, but it was used to discriminate against women,
15 to pick one gender against another to make women feel alienated
16 in a severe and a pervasive way.

17 Here, there's no evidence that anyone was taking aim
18 at Blake Lively because she was a woman. If anything awkward
19 occurred, it occurred in the course of aiming to make a film
20 with a certain sexual aesthetic that Ms. Lively wrote about and
21 understood and signed on for.

22 That's the context in which the Court has to address
23 two questions. Number one, in that context, is this behavior
24 severe and pervasive? The second question is, is it directed
25 toward gender or is it part of the context of a professional

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1 work in which they're engaged? And that is all covered very
2 clearly, they are proceeding under California law that's all
3 covered by the Supreme Court of California --

4 THE COURT: They're also proceeding under federal law?

5 MR. BACH: Of course.

6 But they conspicuously ignore the leading California
7 case on this subject which sets this framework for analysis,
8 and I think we need to begin there.

9 Let's look at the evidence, as the Court has nudged me
10 to do. How do they attempt to meet these standards? Well,
11 first they load up their pleadings with a number of trivial and
12 petty grievances and offhand comment about circumcision, not
13 meant to discriminate against anyone as a woman, it was a topic
14 that Ms. Lively brought up. She hadn't even been hired yet.
15 They talk about fat shaming. She raised the issue of her
16 weight. She understood that she was signing on in documents.
17 We've submitted to the Court. Wayfarer exhibit 34, she
18 compares herself to an athlete that has to be in top form.
19 Mr. Baldoni reassures her she'll be great, her weight's not an
20 issue, they'll get there, and then when he raises this, it
21 becomes harassment. This was not intended to discriminate
22 against her as a woman. She was not even intended to hear his
23 remark. It was made to a third-party trainer.

24 What they have to show here, Judge, and the Court
25 should wonder why are we getting these kind of small potatoes

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1 throughout the pleadings rather than --

2 THE COURT: One reason may be because what the test
3 calls for is for me to look at the totality of the
4 circumstances and a whole bunch of little things can add up to
5 a big thing, right?

6 MR. BACH: They can, but what's not actionable are
7 trivial grievances or petty slights. Even if this were a New
8 York City human rights law case, and I know the Court has seen
9 plenty of those, even there where the standard is far more
10 relaxed than it is under Title VII or under FEHA. A petty
11 slight or a trivial grievance, that doesn't come close. The
12 Supreme Court has said that an offensive utterance, even an
13 offensive utterance, something that might be inappropriate or
14 offensive or might even annoy someone does not constitute a
15 severe or pervasive hostile environment. That's a heavy
16 standard, and we've cited cases, discussed them in our briefs,
17 they're not addressed, where far worse, far more egregious
18 context occurred in an ordinary office setting.

19 THE COURT: Let's assume, hypothetically, the facts
20 here establish that when a few of the women, and it's not just
21 Ms. Lively, but a couple of others walked onto the set, the men
22 on the set were constantly bantering, you look hot, you look
23 sexy, only directed to the women, but that was the banter every
24 day, commenting on their clothes and how they looked when they
25 were coming into work. Could that constitute a violation of

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1 FEHA or Title VII?

2 MR. BACH: Yes, but that would be an entirely
3 different case. There's no evidence here that anyone said
4 anything to Ms. Lively to get a rise out of her or to have men
5 chuckle in the back of the room. There's no evidence that
6 women come in and that it's done to alienate them in any kind
7 of severe and pervasive way. Ms. Lively was welcome as a full
8 fledged member of this cast.

9 And that's their burden, Judge. The question you've
10 asked is the burden that they have here and the burden they
11 cannot meet. They have to show that this was used in a
12 discriminatory way, to pit one gender against the other to
13 alienate women in a severe and pervasive way, and they don't
14 have that. What they have are some awkward situations that
15 arose in an environment in which people are going to be dealing
16 with sex and adult situations. It is very dangerous for a
17 court to start coming in and drawing lines. If this were an
18 office setting and men were pulling women aside and making
19 jokes in front of other men to make other men laugh, that's
20 sexual harassment. You don't have that in this case. I think
21 that's why they're bringing in the small potatoes. They're
22 trying to create the impression that that's what they have.

23 And here, Judge, a very important point, when these
24 issues were raised, apologies were extended within two days.
25 They were raised by Ms. Lively and Ms. Slate. Apologies were

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1 extended in two days and then the issue was resolved and it
2 didn't recur. They have to prove against that, that somehow
3 this culture represented sex severity and such pervasiveness --

4 THE COURT: What's the legal significance of the fact
5 that an apology was given and the conduct didn't recur?

6 MR. BACH: What it shows, Judge, is that the office
7 did not ignore any complaint, the office did not have a culture
8 of not taking this seriously. This workplace responded and it
9 responded effectively and it responded immediately and it
10 eliminated, it eliminated the issue entirely. The experience
11 of other women --

12 THE COURT: Maybe you want to -- I'm sensitive to your
13 time, even if you're not, because I am going to have questions
14 for your colleagues, so I do want to make sure you get on to
15 retaliation and the others.

16 MR. BACH: I want to make one point of the other
17 women. The experience of the other women is not cognizable in
18 terms of measuring the severity or pervasiveness of this
19 environment. The Second Circuit has spoken on that very
20 clearly in *Leibovitz v. New York City Transit Auth.* Ms. Lively
21 was not aware of any of the experiences of these other women,
22 except for Ms. Slate at the time. The Second Circuit has said
23 where it wasn't part of your experience, it doesn't affect the
24 terms and conditions of your employment and it can't be
25 considered in determining whether there was severity or

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1 pervasiveness. And I just want to make sure the Court is aware
2 of that Second Circuit opinion, *Leibovitz*.

3 Moving on to retaliation. Judge, they need to show an
4 adverse act. They don't have an adverse employment action.
5 The gravamen of their claim is a so-called smear campaign. But
6 what is the specific act within that campaign? When you look
7 at the details of it, much of it, when you look at their
8 interrogatories, their pleadings, much of it is Mr. Baldoni
9 simply spreading or boosting positive content about himself.
10 That's not against the law. It's him advocating for the cause
11 of victims of domestic violence. They say that makes her look
12 bad. That's not retaliation. That's a good chunk of what
13 they're saying this so-called campaign consisted of.

14 When you get to Ms. Lively, there's no evidence, none,
15 zero of the planting of any false story about her. And believe
16 me, they've scoured the internet. What they have is an expert
17 who talks at most not about the planting of any videos or false
18 stories, what he talks about is "thumbs up" in the comments
19 sections under the posts.

20 At worst, what you've got here, even construing all
21 inferences in their favor, is other people have introduced
22 content into the internet. There's preexisting content that's
23 simply being "thumbed up" or amplified, and Ms. Lively's own
24 press representative, Ms. Sloane, testified in this case that
25 that's standard operating procedure for PR firms, that once

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1 negative content is in the media, it's okay when you're talking
2 to a reporter or the press to say, by the way, there's a story
3 on such and such out there that you might want to consider when
4 you're aware of.

5 THE COURT: So let's assume it's standard conduct in
6 PR business to elevate negative content. How do you
7 distinguish that from actually generating the content in the
8 context of retaliation? I think you couldn't dispute that
9 spreading negative information about somebody that would have
10 the tendency to hurt their career could be retaliatory conduct,
11 at least under Title VII.

12 MR. BACH: Here, Judge, I think that the courts are
13 very clear that when a publicity campaign is launched by
14 plaintiff, that the other side doesn't have to sit silent.
15 You, yourself, have addressed this in the *McSweeny* opinion.
16 Reasonable defensive measures are okay and that's because
17 you're not punishing someone for having complained, what you're
18 doing is you're attempting to blunt publicity that might arise
19 in the future. The case law is clear that that's protected
20 activity.

21 Here, Ms. Lively took steps well before the defendants
22 retained a crisis PR firm. She had it so that Mr. Baldoni was
23 excluded from one of Ms. Hoover's book events. She told Sony
24 that she was not inclined to appear with him at the premiere.
25 Her husband told Justin's talent agency that he's a predatory

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1 fraudster.

2 When the plaintiff starts to undertake a publicity
3 effort or things that are designed to cast defendants in a
4 negative light in the press, the case law is very clear that
5 the other side can respond. That's not retaliation, that's not
6 punishment for past conduct, that's reasonable protective
7 measures.

8 Those protective measures, according to courts, the
9 two cases involving FOX News where people are leaking very
10 negative emails, and the courts have said – and these were even
11 on motions to dismiss – that's not retaliation once you get to
12 that point, once this is a publicity battle between PR firms.
13 That's not retaliation, that's PR practice. Those cases are
14 cited in our brief. It's the *Areu v. Fox News Network, LLC*,
15 and the *Hughes v. Twenty-First Century Fox, Inc.* case.

16 The Court doesn't even have to get to the retaliation
17 because, Ms. Lively, it's clear in any event that she's an
18 independent contractor, and independent contractors are not
19 entitled to protections of either Title VII or the California
20 whistleblower statute upon which she relies.

21 THE COURT: Do courts frequently say that that's a
22 question for the jury?

23 MR. BACH: Courts frequently say that. On the other
24 hand, many courts grant summary judgment in this context, and
25 especially where the facts are so clear. The critical issue,

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1 it's a multifactor test, courts look at the totality of the
2 circumstances. The key issue is the extent of control enjoyed
3 by the plaintiff. Here, here it's undisputed that Ms. Lively
4 went directly to Sony and talked to Sony about marketing the
5 film. Ms. Lively went directly to Colleen Hoover, the author
6 of the book. If an associate in my office went to the client
7 without permission or went and talked to a court without my
8 permission and I can't say you can't do that or I'm going to
9 fire you, that means I don't control them, and Ms. Lively was
10 acting on her own initiative in many ways.

11 But her own admissions, the PGA letter, the letter she
12 wrote to the Production Guild of America shows that she
13 controlled what happened in this production in an
14 extraordinarily substantial way. She said that she produced
15 every moment of this film, preproduction, through production,
16 into post. She says she led the location shift, she was
17 responsible for hiring and firing, she spent time at Sony on PR
18 and marketing. There's no question on that critical factor of
19 control. She exercises an extraordinary, extraordinary
20 directing of control in this situation.

21 If you're an employee, typically, social security,
22 income tax is withheld from your paycheck, you're given medical
23 insurance, other employment benefits - she's not treated in
24 that way. You can't have it both ways, Judge. You can't
25 be a non-employee for tax purposes and then an employee for

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1 Title VII.

2 One of the issues is whether the person had other
3 businesses that --

4 THE COURT: I think that's not strictly true. I think
5 there are circumstances in which, based on the totality of the
6 circumstances, you're not receiving a W2 and you still can be
7 an employee.

8 MR. BACH: The Court does look at the totality of the
9 circumstances. One of the circumstances here, and it's very
10 important, is whether she was engaged in other businesses.
11 Here, she claims millions of dollars of damages based on
12 independent businesses and independent brands, and then she
13 turns around and said no, no, no, I was just an employee, I was
14 just in this for my paycheck.

15 In the brief, they say, well, look at the contract,
16 look at the contract. The only operative contract was the
17 offer letter, and in the offer letter, she maintained
18 significant control. It's a short document, the Court will see
19 it, she maintained significant control. The only requirement
20 was that she show up for six weeks of photography, but she
21 makes more that she had coequal rights on every other point of
22 the film. And if she's not an independent contractor --

23 THE COURT: If I find that the ALA actually is a
24 binding contract, how does that affect your argument?

25 MR. BACH: It doesn't because Ms. Lively insisted on

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1 the terms of the ALA, she controlled the terms of the ALA. The
2 provisions of the ALA reflect her input, and Ms. Shapiro will
3 address the contract to the extent the Court has questions.
4 Even with regard to that document, she remained with extensive
5 control and never signed it because she continued to exercise
6 control all the way to the end.

7 Judge, I would love to continue to answer the Court's
8 questions all day. I'm going to refer.

9 THE COURT: I'll hear from Ms. Shapiro.

10 MS. SHAPIRO: Good morning, your Honor. I'm going to
11 briefly address the defamation and contract issues.

12 With respect to the defamation, which I'll turn to
13 first, it's clear there are no disputed material facts and the
14 issues are purely legal ones for the Court to resolve.

15 Ms. Lively's claims are based entirely on defense counsel's
16 denials of her allegations in the CRD complaint and in this
17 litigation. All the statements at issue were made after she
18 filed the administrative complaint and in the context of
19 discussing the litigation and responding to her meritless
20 allegations.

21 The statements were not false for the same reasons we
22 are entitled to summary judgment on the sexual harassment and
23 retaliation claims, but even if the Court were to find a
24 triable issue of fact on those claims, the defamation claims
25 would fail. Mr. Freedman's statements at issue were fully

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1 consistent with the defense in these proceedings, and they
2 obviously reflect his opinion that the allegations are
3 meritless and false.

4 THE COURT: So some of the statements include the
5 statement that the lawsuit was another desperate attempt by
6 Ms. Lively to fix her negative reputation, that she acted with
7 a "sole intent to ruin the lives of innocent individuals. She
8 used these allegations of bullying to try and leverage her
9 position so that she could be the *de facto* director in this
10 case."

11 I mean, at least with respect to the first two,
12 there's evidence in the record that your client understood that
13 Ms. Lively genuinely believed that she was a victim of sexual
14 harassment. Those kinds of statements go beyond simply denying
15 the allegations, they go beyond saying Ms. Lively is a liar,
16 they make comments about her reputation and about her
17 motivation. They're no different than *Carroll v. Trump*.

18 MS. SHAPIRO: Your Honor, I respectfully disagree for
19 a number of reasons. Number one, a lot of the words that your
20 Honor just read are just on their face exactly the types of
21 hyperbole and rhetoric that courts have routinely held reflect
22 a statement of opinion.

23 In addition, it's blackletter law that the key factor
24 in determining whether statements are statements of opinion is
25 the overall context in how a reasonable person would interpret

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1 the words. You're talking about a lawyer in essentially a
2 tabloid dispute that's being played out with competing press
3 narratives as well as litigation who's making these arguments.

4 In addition, I would point out that a lot of the
5 evidence that has emerged in discovery and much of which was
6 known to Mr. Freedman at the time is reflected in the Wayfarer
7 parties' complaints as well as many of the text messages and
8 other documents that he released to the press, even before the
9 lawsuit against Ms. Lively in this courthouse was filed, are
10 easily interpreted to draw exactly the kinds of inferences
11 Mr. Freedman was drawing about Ms. Lively's motivations. But
12 this is just classic --

13 THE COURT: That suggests to me an issue of fact, may
14 be an issue of fact with respect to maybe Mr. Freedman, but at
15 least with respect to the people on whose behalf he was acting.

16 MS. SHAPIRO: My point here is that it's not even
17 false. But the Court doesn't even have to get there because
18 these are obviously statements of opinion by a lawyer. The
19 sole intent point is obviously something Mr. Freedman could not
20 have known. It's clearly just his opinion.

21 The *Trump* case had totally different types of denials.
22 Number one, the statements were made by the individual who's
23 the percipient witness, the defendant, the President. He made
24 clearly factual statements. He said things like, I never met
25 that woman, I have no idea who she is. There were photographs

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1 showing that that was false. It wasn't the statement of an
2 advocate in the context of responding to a lawsuit in an
3 administrative complaint.

4 THE COURT: All right. I get your point. But these
5 were not statements made to the Court, these were statements
6 made to the press. I don't see why Mr. Freedman would be in a
7 different position than if the statements were made by a PR
8 agent on behalf of Wayfarer or some other person.

9 MS. SHAPIRO: A PR agent might be situated similarly
10 to Mr. Freedman. My point is that you're talking about the
11 defendant himself.

12 THE COURT: So the fact that he's a lawyer doesn't
13 really add very much to your argument.

14 MS. SHAPIRO: No, it does. My point is it's a person
15 who's an advocate for the defendant, it's a lawyer who's
16 talking about the litigation, the defense of the litigation.

17 And I would note that if these kind of statements
18 could be defamatory, then people accused of wrongdoing would be
19 deprived of their constitutional rights to publicly deny these
20 types of allegations.

21 What Ms. Lively is trying to do here, her position is
22 that she can leak an administrative complaint before it's filed
23 to the New York Times, create a media firestorm to destroy
24 Mr. Baldoni's reputation, and her lawyer is not allowed to
25 respond to this, except maybe 20 days later when he files his

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1 answer. That's essentially her position.

2 THE COURT: I don't think that actually is her
3 position. I think her position, as I understand it, is that he
4 had full license, any representative of Mr. Baldoni, full
5 license to say these allegations are wrong, I didn't do it, as
6 long as he's got a basis for saying that, but when he goes
7 beyond that to just attack the person's reputation, the motive
8 with which the action is being brought, knowing that that is
9 false, that there are limits.

10 MS. SHAPIRO: Your Honor, I'm going to put aside the
11 falsity, but I think it's clear the falsity hasn't been proven.
12 But what's most important is these are clearly statements of
13 opinion in context. The only factual statements in here are
14 statements where Mr. Freedman pointed to specific evidence.
15 That's the point. The point is, these are statements of
16 opinion and they can't point to a single controlling case, and
17 I submit the *Carroll v. Trump* is completely distinguishable
18 because you're talking about actual factual assertions. You're
19 not just talking about motives. And so the context is clear
20 and it's clearly part of a general denial. People understand
21 that lawyers are not objective spokespersons whose statements
22 are to be taken as if they're a scientist reporting the result
23 of some kind of scientific test, they were tantamount to
24 blanket denials.

25 Let me move on to the contract claims because I know I

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1 need to leave time for my colleague. I'll just be very brief.

2 I think the contract claims evince a similar issue.
3 What the undisputed facts show is Ms. Lively repeatedly refused
4 to sign the contract, even though It Ends with Us movie kept
5 asking her to sign. She wanted to keep her options open and
6 avoid being bound, apparently to use it as a point of leverage
7 against the company.

8 THE COURT: Will you help me with what the record
9 reflects with respect to the significance of the open items,
10 the issues with respect to stills, confidentiality and the
11 like. You may say to me, well, that's not dispositive, that's
12 not relevant, but I actually would like to know if you know
13 what the record reflects in terms of the significance of those
14 items.

15 MS. SHAPIRO: I don't think there's too much in the
16 record beyond the back and forth about those issues. I do
17 think it doesn't matter whether they're significant or not or
18 what the disputes that were going on were about. I think the
19 overall point is that It Ends with Us movie was insisting, as a
20 condition precedent for its obligations, that Ms. Lively sign
21 the contract and she refused. She repeatedly tried to avoid
22 signing and claimed this was waived and the company kept coming
23 back to her and saying, it's not waived, they crossed that out.
24 The chronology --

25 And indeed, the harassment provision itself was still

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1 being negotiated. So even if it mattered whether what was
2 being negotiated was significant, the issue of whether
3 Ms. Lively would have the right to terminate in the event of
4 sexual harassment is one of the items as to which the parties
5 were still negotiating.

6 I think it's important for the Court to have the
7 chronology clearly down because I think the whole point of
8 conditions precedent like this that require full execution is
9 to give people certainty in their contractual deal so they
10 don't have to fear being bound before the negotiations are
11 concluded, and her argument flies in the face of these
12 policies.

13 I think I need to cede my time, but I just want to
14 give your Honor some exhibit numbers to look at which will show
15 you the chronology bearing out that It Ends with Us movie was
16 continuing to assist on the condition precedent through the
17 end.

18 THE COURT: Are those the citations in your brief?

19 MS. SHAPIRO: Yes.

20 THE COURT: I have those. I've looked at them.

21 MS. SHAPIRO: Thank you, your Honor.

22 THE COURT: The one thing you haven't answered is the
23 significance of the fact that your client paid Ms. Lively at
24 the rate specified in the ALA rather than in the CRA. They
25 paid at the higher rate. The other side that reflects partial

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1 acceptance of the terms of the ALA.

2 MS. SHAPIRO: I think the point is the same, that that
3 may be the case, but that doesn't mean they waived the
4 condition precedent for all the reasons in the brief and that
5 the documents reflect. That's why --

6 THE COURT: I've got the argument.

7 MS. SHAPIRO: Thank you, your Honor.

8 THE COURT: Let me hear from Ms. Garofalo.

9 MS. GAROFALO: Good morning, your Honor.

10 THE COURT: Good morning. There are two things which
11 you might focus on. One is the language in the ALA, assuming
12 that the ALA is enforceable, that says that the choice of law
13 applies, that California law as applicable to contracts made
14 and performed entirely in California. You never addressed that
15 language in your briefs. The other is how to address the Ninth
16 Circuit's in extraterritoriality.

17 MS. GAROFALO: The *Gravquick* case, your Honor?

18 THE COURT: Yes.

19 MS. GAROFALO: Okay. I will address those two issues.
20 Let me start, and I'm going to try to be very brief given the
21 time constraints.

22 So, there are three cases that would guide the Court
23 through an analysis, and I will get to the Court's questions on
24 extraterritoriality. The first one is the *O'Connor* case, which
25 is cited in our brief and is the case raised in the opposition

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1 in the context of *Gravquick*, and I will get back to that case
2 in a moment and the issue relating to *Gravquick*.

3 There are two other very recent cases, 2025 cases, one
4 of which we have cited in our brief. It is a California case,
5 *Hill v. Workday*. It describes exactly what must be shown in
6 order to establish the site of the contract and the situs of
7 the wrongful conduct and how that plays into an
8 extraterritoriality analysis. The facts in that case, when
9 compared to the facts in our case, given the factors identified
10 by the Court, would establish that the presumption here
11 applies. I don't think there's any question that, on the face
12 of the complaint, the conduct complained of, primarily the
13 harassing conduct occurred in New York.

14 THE COURT: Actually, your briefs, you're very careful
15 to talk about the harassing conduct.

16 Just tell me, is there any dispute on your side that
17 there's enough evidence to go to the jury that the retaliatory
18 conduct emanated or at least part of it occurred in California?
19 I understand your colleague's argument that there's not enough
20 evidence of retaliation, period, but with respect to
21 extraterritoriality, do you dispute that?

22 MS. GAROFALO: Yes, your Honor, the *Hill v. Workday*
23 case addresses that issue. It was in the context of a 12(b)(6)
24 motion to dismiss. That case teaches us that in order to
25 allege before you get to proof, but to even allege in the

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1 complaint retaliation in the context of an extraterritoriality
2 analysis, you have to have specific facts, what decisions were
3 made and who made the decisions. This complaint lacks those
4 facts.

5 In the opposition, Ms. Lively argues that, well, some
6 of these people were based in California at certain times and
7 certain decisions may have been made. But in the complaint
8 itself, in the context of a 12(c) motion, those facts are not
9 alleged in the complaint. And again, your Honor, the *Hill v.*
10 *Workday* case goes into a fairly detailed analysis of that
11 issue.

12 There was another case that was decided by Judge
13 Furman on December 22nd, 2025 --

14 THE COURT: I'm aware of it. No need to spend your
15 time on it.

16 MS. GAROFALO: Okay. And so now let me get to the
17 *Gravquick* issue. *Gravquick* says, and *O'Connor* confirms, that
18 unless the California statute specifically says that there is
19 an extraterritorial breach outside the boundaries of
20 California, it doesn't exist, ME presumption applies, and the
21 presumption is not trumped by a choice of law clause. The
22 argument, as I understand it, being made by Ms. Lively --

23 THE COURT: Let's discuss the facts of *Gravquick*,
24 because the facts of *Gravquick* involved a California statute
25 that was not explicit with respect to its extraterritorial

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1 application. And the Ninth Circuit nonetheless said that by
2 operation of the choice of law provision, the statute would
3 apply to the relationship between the parties, but it involved
4 a statute that was not explicit. I know how *O'Connor*
5 distinguished it, but I'm not sure that *O'Connor* went to the
6 depth that the parties are asking me to do here in
7 distinguishing it. So help me for why that statute should be
8 treated any differently than this FEHA statute.

9 MS. GAROFALO: The FEHA statute, it is well
10 established, well established case law that the presumption
11 applies. In *Gravquick*, we're dealing with a statute where that
12 was not necessarily the case. FEHA has explicit language in
13 the advisory committee notes stating this is a statute intended
14 to protect California citizens for conduct occurring within an
15 employment in California.

16 THE COURT: So it sounds like now, basically, you're
17 saying the operative principle is whether the statute is
18 explicit, it's not whether there's a presumption. If there's a
19 presumption, if you look to the presumption, presumption should
20 operate with respect to the statute in *Gravquick* just as it
21 applies to FEHA.

22 MS. GAROFALO: Yes, your Honor. But, again, the
23 *Gravquick* case is something of an outlier because the more
24 recent rulings, recent decisions, and the weight of the more
25 recent decisions is that, at least with respect to FEHA, a

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1 choice of law provision, there's a presumption applied to the
2 choice of law provision that – and this goes to the Court's
3 next question – the choice of law provisions presumably
4 includes all of California law, including its
5 extraterritoriality.

6 THE COURT: If the Ninth Circuit had to follow
7 *O'Connor*, one would presume that the Ninth Circuit would have
8 come out differently, correct?

9 MS. GAROFALO: Yes, your Honor, *O'Connor* followed
10 *Gravquick*.

11 THE COURT: Right. But if it was the opposite way
12 around and *O'Connor* was a Ninth Circuit decision, one would
13 assume that *Gravquick* would have come out the other way.

14 MS. GAROFALO: Yes. But what *O'Connor* --

15 THE COURT: So shouldn't I follow the opinion of an
16 appellate court, three judges on an appellate court rather than
17 a district court opinion?

18 MS. GAROFALO: Language in *Gravquick*, what *O'Connor*
19 points out is that the language in *Gravquick* has been
20 fundamentally misunderstood and misapplied.

21 So *O'Connor* did not interpret *Gravquick* the way the
22 plaintiff is or the Court.

23 THE COURT: I mean, I'm just asking you if you've got
24 a better way of distinguishing *Gravquick* than the *O'Connor*
25 court did. It sounds like you don't.

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1 MS. GAROFALO: I don't, your Honor. But I think if
2 you read the *O'Connor* language and apply it to the statutes at
3 issue here, the presumption applies and the choice of law
4 provision is not --

5 THE COURT: Let me ask you a followup question, which
6 maybe you were getting to. Can't parties, by agreement, decide
7 that they're going to exclude the presumption? They're going
8 to apply only the substantive law without carrying with it the
9 presumption. That's the premise of *O'Connor*, is that the
10 choice of law provision carried with it the presumption,
11 presumably parties can decide not to carry the presumption.

12 MS. GAROFALO: I believe --

13 THE COURT: Can they, can they do so?

14 MS. GAROFALO: I believe they can, but they haven't
15 done it in this case. In this case, the choice of law
16 provision does not specifically explicitly exclude the
17 presumption against extraterritoriality.

18 THE COURT: So how do you give meaning to the clause
19 made and performed entirely in California? You ignore that in
20 the reply brief. What work does that language do in the choice
21 of law provision?

22 MS. GAROFALO: I don't think that language changes the
23 outcome.

24 THE COURT: Does it do any work in this contract?
25 What work does it do?

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1 MS. GAROFALO: I'm not sure, your Honor, what work it
2 does, and there's nothing in the record to support what work it
3 does. It may very well be language that was simply adopted
4 from another agreement. It does talk about performance in
5 California. However, there is broader language that's been
6 cited by plaintiff that seems to extend beyond the language the
7 Court's referring to, which seems to have some limitation to
8 the application of the choice of law clause to contracts
9 performed in California. Again, you can't have it both ways.
10 But assuming, and we have another issue here, as Ms. Shapiro
11 raised, whether this contract and all of its provisions,
12 including the choice of law provision, is enforceable at all
13 because it is an unexecuted contract.

14 THE COURT: I understand that point. I've got that
15 point.

16 MS. GAROFALO: So, should the Court agree with that
17 argument, then the choice of law provision becomes a nullity
18 and we just do a straight --

19 THE COURT: I get that. You don't need to spend time
20 on that.

21 MS. GAROFALO: I think I may have lost the track on
22 one of your questions. Do you have any further questions, your
23 Honor, on this issue?

24 THE COURT: No. I think you told me that you don't
25 know what work made and performed does.

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1 MS. GAROFALO: I don't. I know that plaintiff has
2 taken one position, it doesn't seem quite clear as to what that
3 position is, but if the clause doesn't apply, if the choice of
4 law provision is confined to the performance of a contract, if
5 you read it narrowly in that regard and there is no choice of
6 law provision, then we go back to a straight
7 extraterritoriality analysis without a governing choice of law
8 provision. Seems to me the outcome is the same.

9 THE COURT: I get that point.

10 MS. GAROFALO: I'd like to go on to the sanctions
11 motion. I'm going to be very brief and save some time for
12 rebuttal.

13 It is plaintiff's burden on a spoliation motion to
14 establish the facts and the elements, and we can go through
15 those very briefly, but I would like to save most of my
16 arguments for rebuttal. Here we have a motion that does not
17 even distinguish between sanctions under Section 37(e)(1) and
18 sanctions under 37(e)(2). Plaintiff has made no effort, either
19 in the moving papers or the reply papers, to explain to this
20 Court or to us which elements have been met as to which
21 subsection of 37(e). Subsection 1 is basically spoliation
22 sanctions on a showing of prejudice, and the only sanctions
23 available to the Court are the least intrusive sanctions aimed
24 at addressing curing the prejudice. The onerous sanctions
25 sought here go far beyond. Plaintiff is seeking an adverse

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1 inference and a preclusion order that would basically deprive
2 defendants of a defense. Eight defendants without distinction
3 as to who deleted what. Even any specifics, plaintiff argues
4 they can't know the content of what was deleted, but they can
5 know the subject matter. And more than just "may have, might
6 have, appears to have should have happened" is insufficient for
7 the onerous sanctions being sought against eight defendants
8 without distinction, including defendants where there is no
9 evidence that they communicated with Ms. Lively.

10 I'd like to save my argument on anticipation of
11 litigation for rebuttal.

12 And unless the Court has any questions?

13 THE COURT: I don't.

14 MS. GAROFALO: Thank you, your Honor.

15 THE COURT: The remaining time will be for rebuttal.

16 I'll hear from counsel for Lively. It's now 10:32,
17 we'll take a break at 11 o'clock, a 10-minute break at
18 11 o'clock.

19 Are the lawyers for Lively going to divide up their
20 argument?

21 MS. HUDSON: Yes, your Honor. I'm going to be
22 covering sexual harassment and retaliation as well as the
23 independent contractor issue.

24 THE COURT: And then what about your colleagues?

25 MR. GOTTLIEB: Your Honor, I'll be addressing the

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1 contract defamation and extraterritoriality issues.

2 MR. BRUNO: Your Honor, I'll be addressing spoliation.

3 THE COURT: We'll let you know with five minutes to
4 go.

5 MS. HUDSON: Thank you, your Honor.

6 Good morning. Beginning with the sexual harassment
7 claim, defendants' primary arguments are focused on two
8 elements of the hostile work environment sexual harassment
9 test. They assert that the conduct is not sufficiently severe
10 or pervasive, and that Ms. Lively was not targeted on the basis
11 of her gender. I would like to make four points on this issue.

12 THE COURT: Maybe you could help me with one thing.
13 To what extent do the FEHA claims matter? Don't your Title VII
14 claims cover all of the conduct that's also covered by FEHA?

15 MS. HUDSON: They matter because the damages are much
16 more substantial under the FEHA than Title VII.

17 THE COURT: Okay.

18 MS. HUDSON: The four points I'd like to make are:
19 One, that defendants admit the facts are disputed; two, they
20 misconstrue and misstate the standard at issue here; three, the
21 evidence obviously shows that the conduct is gender based; and
22 the nature of the workplace does not absolve defendants of
23 their conduct here.

24 THE COURT: What I want you to do is focus for me on
25 the harassment, the particular conduct that Ms. Lively

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1 experienced or was aware of at the time during the time period
2 she was an employee, in your view.

3 MS. HUDSON: Yes. Let me start with the four
4 incidents that were directed at Ms. Lively that are
5 independently actionable as severe because they involve either
6 physical touching or are humiliating. So these cannot be
7 squared with the notion that this workplace or any workplace
8 makes this behavior fair game.

9 So one, Ms. Lively was physically kissed, nuzzled, and
10 otherwise touched by Justin Baldoni without her consent. Two,
11 she was shown nudity by Mr. Heath without her consent, and
12 graphic nudity, a completely nude woman. She testified that
13 she saw her genitals. Three, she was stared at while she was
14 nude. This particular incident, there's a significant dispute
15 of facts here. And the way that Mr. Heath describes this
16 incident, he knocked on Ms. Lively's makeup trailer door and he
17 heard "come in." He entered. Ms. Lively asked him to turn
18 away, he turned away, they had a conversation. He quickly
19 glanced at her, and then she asked him to leave and he left.
20 This is his description of the events. And defendants, in
21 their description of this event, in their papers, consider this
22 a trivial minor issue. Contrast that to the way Ms. Lively and
23 veteran makeup and hair specialist Anne Carroll and Vivian
24 Baker describe this incident. They describe it as follows.
25 Mr. Heath knocked on the door. Instead of saying come in, they

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1 said whoa, whoa, whoa, whoa, whoa, no, no, no. And why did
2 they do that? Because Ms. Lively was nearly fully nude when
3 Mr. Heath knocked on the door. She was wearing a thong,
4 according to all three of them, and her breasts were exposed
5 from the waist up. So they said no, he came in nonetheless.
6 Ms. Lively said, let me talk to you later. She was desperate
7 to talk to him about the absolute chaos that was happening on
8 the set. And he insisted, if we don't talk now, this isn't
9 going to happen. So she said okay - she wanted to have this
10 conversation - you can come in, but you need to turn away and
11 look at the wall.

12 THE COURT: So I get that there are disputed issues.

13 MS. HUDSON: Yes. And this is for a jury to decide.
14 But this is a significant issue --

15 THE COURT: You said there are four things.

16 MS. HUDSON: Yes. And the fourth thing is that she
17 was violated in the filming of an intimate birth scene with no
18 protections. And all of these were without her consent.

19 THE COURT: One thing that I also wanted you to do is
20 make sure you address the distinction between Heath and
21 Baldoni, and also what is imputed to It Ends with Us movie,
22 whether anything is imputed to Wayfarer, because it's hard for
23 me to see, for example, why, in thinking about a case against
24 Baldoni, the Heath conduct in the trailer would be imputed to
25 him. Similar with respect to the physical contact of Baldoni

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1 with Lively, why that should be imputed to Heath.

2 MS. HUDSON: That's correct, your Honor. The conduct
3 and contact of Mr. Heath would not be attributed to Mr. Baldoni
4 and vice-versa. However, both of their conduct is attributable
5 to Wayfarer because Wayfarer is the employer. As the employer,
6 it is strictly liable under the Fair Employment and Housing Act
7 for the conduct of supervisors, both of whom Mr. Baldoni and
8 Mr. Heath were.

9 THE COURT: Now, with respect to the kissed and
10 nuzzled, your first point, that, I take it, took place during
11 the rehearsal for the acting out of the dance scene; is that
12 right?

13 MS. HUDSON: Correct.

14 THE COURT: And so tell me what your limiting
15 principle is. I mean, does a director have any ability in that
16 kind of a setting to improvise with respect to what the actors
17 are doing, to go off script a little bit, or does every going
18 off script, if it involves physical contact in this kind of
19 setting, give rise to a FEHA or Title VII claim?

20 MS. HUDSON: Your Honor, an actor can improvise with
21 consent, and that is the issue here. There was no discussion,
22 there was no planning, there was no agreement. There's a
23 reason --

24 THE COURT: I understand why consent might be relevant
25 to a contract issue. I'm not sure why it's relevant to a

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1 Title VII or FEHA where the question is, as I think Mr. Bach
2 correctly put it, is this directed at a person because of her
3 gender or is it because of the gender that she is playing, the
4 role that she's playing in the movie? Let's assume that
5 Mr. Baldoni was not both the director and the actor, but just
6 the director, could he direct the male lead and the female lead
7 without explicitly asking for their consent to touch each other
8 in a different way than what was reflected in the script?

9 MS. HUDSON: No, he cannot do that kind of direction
10 without their agreement. So there's no circumstance in which
11 an actor can be directed, told, or have their physical person
12 intruded upon without having some consent. And the way that it
13 works is there are intimacy coordinators who negotiate nudity
14 writers that describe in very specific detail what is
15 acceptable.

16 THE COURT: Sounds to me like your proposition of law
17 would make nudity writers and intimacy coordinators, in a way,
18 that you would regard as irrelevant because you would say all
19 of that is required by statute, it doesn't need to be
20 contracted.

21 MS. HUDSON: What's required by statute is not to
22 touch, kiss, nuzzle, or otherwise have physical contact with
23 people without their consent. That is what's required by
24 statute. There's no circumstance in which, even in an acting
25 scenario, people can be touched without their consent. Consent

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1 can be a spectrum of things. It doesn't have to be at every
2 single moment, but there has to be some general understanding,
3 this is the kind of thing we're going to do now and this is the
4 expectation.

5 THE COURT: That's actually very helpful when you say
6 it doesn't have to be every single moment.

7 What I'm struggling with is what principle of law you
8 can give me to say here's the limit and here's what goes beyond
9 the limit, because it strikes me that if there's a dance scene
10 and you're telling somebody to put their hands at a different
11 part of somebody's back, you may not need to actually ask for
12 consent in that particular circumstance. It also strikes me
13 that there probably are limits as to where Title VII gets
14 violated. But your proposition would seem to have every
15 director's decision decided by a jury, and that can't be right.

16 MS. HUDSON: Well, except that there is a --

17 THE COURT: What's the limiting principle? Where
18 would you draw the line?

19 MS. HUDSON: The limiting principle is there is a
20 subjective and an objective standard. So subjectively, in this
21 particular circumstance, Ms. Lively testified that she did not
22 consent, that she was uncomfortable, that she was surprised by
23 the amount of physical touching because there was no physical
24 touch of the kind that Mr. Baldoni was engaging in. And
25 remember, this is not just him putting his hand too low on her

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1 back. So, just like in all of sexual harassment law, there
2 isn't a specific line on this. There is a standard. So we
3 have evidence that the subjective standard is met because
4 Ms. Lively was uncomfortable. Then there's an objective
5 standard.

6 So the question is, what would a reasonable person in
7 her shoes feel like? That is for a jury to decide. And we
8 have that there is a consent, that there's physical touching,
9 and the statutes both make clear that physical touching,
10 without consent, is something that is a violation of the
11 provisions.

12 THE COURT: Remind me what the evidence is. It's the
13 biting of the lip and the caressing?

14 MS. HUDSON: That he leaned in, kissed her. This is a
15 dance sequence, and the only thing it says in the script is
16 they dance. He leans in, puts his face on her face, kisses
17 her, nuzzles up against her, strokes her, and touches her in a
18 variety of ways that she is not comfortable with. She leans
19 away, you can see the look on her face in the video, she is
20 clearly having her boundaries crossed at that moment and does
21 not want him to touch her in that way and tries to change the
22 subject, tries to deflect, tries to tell him let's talk, let's
23 do other things so this is not happening in this scene. It was
24 a surprise. No one discussed it with her, no one said before.
25 And the normal way you would do this is say, I think in this

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1 scene, these are the kinds of things we should do, okay, let's
2 do it. It doesn't have to be we'll necessarily do this kiss
3 now or we'll do that touch there.

4 THE COURT: I'm still having some trouble with where
5 consent fits into the analysis in a sexual harassment claim
6 because, if you took it in a very different workplace context,
7 there are all kinds of circumstances in which it's not okay for
8 the boss to ask for consent to conduct that would be
9 objectively considered to be sexually harassing, but you're
10 saying here it becomes the dispositive issue. Consent,
11 anything goes; no consent, nothing goes.

12 MS. HUDSON: Well, it is a dispositive issue precisely
13 because there is sexual content and there is physical contact
14 between the parties. It is exactly for that reason that there
15 has to be consent, otherwise you have the opposite problem.
16 There's nowhere to draw the line about what is allowed and
17 what's not allowed. And the only way to make sure that it is
18 acceptable is if there's consent. And when I say consent, I
19 mean some agreement that you can touch my person in this way,
20 not --

21 THE COURT: If you're right on the law, would there
22 ever be a need for the parties to have a nudity writer?

23 MS. HUDSON: The purpose of the nudity writer is so
24 they can discuss what is acceptable to them and get consent.
25 That's the whole point of it. It exists for that reason. And

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1 there's a need for it, because otherwise you have problems just
2 like we had here, which is a lack of clarity, somebody going
3 too far, crossing a boundary without that person's consent.
4 That is why it is done that way.

5 THE COURT: So that's that incident.

6 MS. HUDSON: Yes. I'd like to take just a minute to
7 talk about the *Lyle* case because Mr. Bach said it was the most
8 on point case, and it actually is not on point at all and we
9 did distinguish it in our papers. I think it kind of gets to
10 this issue here. The writers' room, the reason that was
11 important -- the thing that was most dispositive in that case
12 was the writers' room had both men and women, and none of the
13 conduct was directed at anybody. And this goes back to the
14 issue about consent and touching.

15 The Court said if the conduct had been directed at the
16 plaintiff, if the comments had been about her, it would be a
17 different story, and that's really the distinction and the
18 issue here. It's not the general atmosphere and whether
19 someone is engaging on a subject that is sexual, but whether
20 it's directed at them and whether they are giving permission
21 for that particular act.

22 THE COURT: I take it your view is that if Mr. Baldoni
23 said to Ms. Lively in the way she was acting a scene, you
24 looked sexy or I want you to look sexy or I want you to look
25 hot, all of that is fair game for the director?

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1 MS. HUDSON: If it's related to the character and the
2 acting, yes. If that were the issue, we wouldn't be here.

3 THE COURT: You also did make a point about him
4 writing into the script scenes of a sexual nature. That's hard
5 for me to see how that would constitute sexual harassment. The
6 two of them are working together on a script and he suggests
7 scenes that are more graphic than what she's suggesting.
8 That's all part of the creative process.

9 MS. HUDSON: I appreciate that perspective, your
10 Honor, but that really goes to the totality of the
11 circumstances test, looking at everything in context and the
12 workplace environment as a whole.

13 The problem with that particular example is that
14 Ms. Lively signed onto a script, and when that script was
15 signed onto, that is the expectation she had for what she would
16 be performing with respect to nudity, simulated nudity, and
17 interactions with Mr. Baldoni. She had an expectation.
18 Mr. Baldoni graphically changed the script to include things
19 that would require her as a person to crawl on all fours, to
20 have an oral sex scene with him that was not scripted. It
21 included climaxing together in the script. None of this was in
22 the original script. The author of the book said she did not
23 think this should be a hot and sexy movie at all. So it was
24 not something that was required.

25 In the full picture of Mr. Baldoni's behavior, which

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1 was consistently inappropriate and crossing boundaries, and
2 which many women in the workplace said --

3 THE COURT: I mean, if you've got particular incidents
4 of harassment of other women that you say your client was aware
5 of at the time, mention them to me, but if you've got just,
6 well, there are other women in ways that your client was not
7 aware of at the time who felt uncomfortable, that's not for
8 this forum.

9 MS. HUDSON: Actually, your Honor, #MeToo evidence,
10 even if the plaintiff is the not aware of it, is relevant to
11 determine whether gender is a factor in the behavior. That is
12 relevant. So it does have an impact --

13 THE COURT: It may be relevant. It doesn't contribute
14 to the severe and pervasive environment for your client. It
15 could be relevant in a trial, I get that.

16 MS. HUDSON: Well, it goes to whether the conduct is
17 based on gender.

18 THE COURT: Yes, I agree with that.

19 MS. HUDSON: But Ms. Lively has testified to a host of
20 conduct that she was subjected to and additional conduct that
21 Jenny Slate was subjected to, that she is aware that Isabela
22 Ferrer was subjected to and spoke to her about it. There is
23 substantial conduct significant enough to, at minimum, create a
24 jury issue about whether each of these individual incidents are
25 more consistent with what Ms. Lively and the various

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1 corroborating witnesses say about them or the defendants'
2 version.

3 And just to be clear, the *Leibovitz* case, which
4 defendants cite, is distinguishable here because in that case,
5 not only was the plaintiff not harassed herself, she only heard
6 about all of the other incidents. So there was no incident in
7 which she personally experienced harassment. That is not the
8 case that we have here.

9 Your Honor, in light of time, I'd like to move on
10 quickly to retaliation.

11 THE COURT: Please.

12 MS. HUDSON: With respect to the adverse employment
13 action, as the Court noted in its questions, the test is a
14 totality of the circumstances test here, as well. The
15 defendants take much too narrow a view of it. They also take
16 much too narrow a view of the evidence because the evidence has
17 to be looked at in light of the test, which is that it does not
18 have to be an ultimate employment action, it could be a series
19 of conduct.

20 When the defendants hired Ms. Lively, they believed
21 she had a sterling reputation, and her reputation is critical
22 to her career success because engaging in press and promotion
23 to sell a film is an essential part of her job, but when she
24 complained, everything changed, and it changed right away.
25 Mr. Baldoni became huffy, short, eye rolling, and attempted to

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1 justify his and Mr. Heath's behavior instead of taking it
2 seriously and taking action. As a result of that and as a
3 result of her unanswered complaints, she negotiated a
4 protection document in order to ensure that this behavior would
5 stop.

6 In that protection document, she negotiated a specific
7 term that dealt expressly with retaliation. So we don't have
8 to guess what an adverse employment action would be in this
9 case because the parties agreed --

10 THE COURT: We do need to because there's a question
11 with respect to whether that just gives rise to a contract
12 claim and whether that provision is enforceable as a contract
13 claim. There's maybe a separate standard with respect to
14 Title VII.

15 MS. HUDSON: Well, the types of behavior that are
16 included in that particular contract provision are consistent
17 with what the law finds can be an adverse employment action.
18 So these are changes in attitude, sarcasm, marginalization or
19 other negative behavior, either on set or otherwise, including
20 during publicity and promotional work. That is consistent with
21 the type of behaviors that can constitute an adverse employment
22 action under the totality of the circumstances, under both
23 *Yanowitz* and *Bailey and Burlington*. It can be a series of
24 subtle, yet damaging injuries. All of that is defined
25 consistently with this adverse employment action as it is in

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1 the agreement.

2 And the reputational harm is not so narrow as the
3 digital and media campaign as defendants suggest. There's a
4 variety of reputational harm, including badmouthing Ms. Lively
5 during postproduction, including to Colleen Hoover --

6 THE COURT: Maybe we can take those sort of one by
7 one. You do have the allegations about badmouthing and that
8 can, under some circumstances, constitute an adverse action,
9 but what is the evidence that the "badmouthing" is retaliation
10 for protected activity?

11 MS. HUDSON: Because the subject matter that was
12 discussed in the context of the badmouthing was specifically
13 Ms. Lively's sexual harassment complaints. Mr. Heath said that
14 he was worried that she was going to sue for sexual harassment
15 and that she was a narcissist and problematic. And Ms. Hoover
16 testified that, after hearing that, she was so disturbed about
17 the way that Mr. Heath and Mr. Baldoni spoke about Ms. Lively,
18 that she never talked to them again, and she felt that they
19 were trying to take down a woman and that they were trying to
20 get her on their side. So that is the evidence that is
21 retaliatory.

22 THE COURT: It sounds like that act of retaliation was
23 not very effective.

24 MS. HUDSON: That's why you have to look at the
25 totality of the circumstances. The fact is they began a

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1 campaign to take action to undermine her reputation. It began
2 immediately as soon as she complained, it continued throughout
3 postproduction up through the digital campaign, then we have
4 the digital and media campaign, and then finally their
5 dismissed litigation.

6 Setting aside --

7 THE COURT: So you had the disparagement, the refusal
8 to support the PGA application. You're still claiming that
9 that is an adverse act?

10 MS. HUDSON: Well, this is part of the overall
11 totality of the circumstances because you don't look at each
12 individual act and determine whether each one is an adverse
13 employment action. You have to look at the entire series of
14 events and determine if, as a whole, it is an adverse
15 employment action.

16 THE COURT: So you're not claiming that
17 independently --

18 MS. HUDSON: No.

19 THE COURT: -- on its own, that the refusal to support
20 the PGA application is an adverse act?

21 MS. HUDSON: No. We're claiming that there is an
22 overall reputational attack on Ms. Lively in a variety of ways,
23 and that is the adverse employment action, consistent with what
24 the Court noted during defendants' argument that reputational
25 attacks can be adverse employment actions. The defense of --

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1 THE COURT: So help me with respect to the social
2 media campaign. What is the protected conduct that you say
3 that that's retaliation for?

4 MS. HUDSON: Well, Ms. Lively engaged in a variety of
5 protected conduct that all arose out of her complaining about
6 being sexually harassed. The most recent protected conduct,
7 before the digital media campaign really took off, was her
8 expressing that she did not want to be pictured with
9 Mr. Baldoni in promotion and attend the premiere with him and
10 take pictures with him.

11 THE COURT: How is that protected conduct?

12 MS. HUDSON: Because the statutes provide that
13 protected conduct includes opposing conduct that's prohibited
14 by the acts, and that includes any kind of opposition. It
15 doesn't have to be filing a complaint, it doesn't have to be
16 complaining, it can be an informal protest. That is exactly
17 what she did here. She did not want to be pictured next to the
18 man who sexually harassed her. That is a protected act,
19 refusing to engage in some aspect of her work with someone who
20 has sexually harassed her.

21 THE COURT: What about accusing somebody in the press
22 of sexual harassment, is that a protected act?

23 MS. HUDSON: It is.

24 THE COURT: Does that mean that somebody is accused of
25 sexual harassment is completely defenseless to rebut that and

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1 to say, well, the person who accused me of that is a liar?

2 MS. HUDSON: There's obviously going to be a line
3 there, but there is a distinction between defending oneself and
4 besmirching an employee's performance or reputation in the
5 industry, or making threats or menacing language.

6 THE COURT: How is going to the press and saying
7 somebody's sexually harassed me -- I'll have to look at that.
8 What's your best case for that proposition? Then we'll take a
9 break.

10 MS. HUDSON: So I think *Dixon* is the best case for
11 this proposition, *Dixon v. International Broth. of Police*
12 *Officers*. In that case, the court says there's an important
13 difference between defending oneself on the one hand and
14 threatening, intimidating, or otherwise interfering --

15 THE COURT: My question, what's the best case for the
16 proposition that going to the press and accusing somebody of
17 being a sexual harasser is a protected act?

18 MS. HUDSON: Well, it is protected under the law
19 because --

20 THE COURT: I'm just asking for a case, if you've got
21 a case.

22 MS. HUDSON: Well, I would give you a statute.

23 THE COURT: Okay.

24 MS. HUDSON: That's civil subsection 47.1.

25 THE COURT: Okay. It's 11 o'clock, we'll reconvene at

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1 11:15. Thank you.

2 (Recess)

3 You may continue with your argument.

4 MS. HUDSON: Thank you, your Honor. I'm going to try
5 to wrap up in about two minutes here. I wanted to just revisit
6 the protected activity of not engaging in media with
7 Mr. Baldoni and the leaking to the press.

8 There is no evidence that Ms. Lively leaked to the
9 press, that is a disputed issue. To the extent that defendants
10 assert that they were just responding to leaks to the press
11 about sexual harassment, that is a disputed issue.

12 With respect to the protected activity, the evidence
13 shows that Ms. Lively made it clear on July 22nd, 2024 that she
14 was not going to appear in pictures with Mr. Baldoni at the
15 premiere for reasons directly related to the sexual harassment
16 that she experienced. And that is what triggered the hiring of
17 TAG, Melissa Nathan, and Jed Wallace, and kicked off the
18 digital and media campaign against Ms. Lively.

19 Three days later on July 25th, defendants contacted
20 TAG, and this is the day that Tara Hanks, Jamey Heath, Melissa
21 Nathan, and Katherine Case had a call to discuss why Wayfarer
22 needed crisis management. There are notes of that call, and
23 what they discuss was Ms. Lively's sexual harassment
24 complaints. That is the reason they kicked off the campaign,
25 to avoid it coming out in any way, not through leaks of the

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1 press, but in any way that Ms. Lively might disclose it,
2 including through a complaint or any other way. They wanted to
3 ensure that the reputational attacks that she was undermined,
4 that her character was undermined, that she would not be
5 believed before she had the opportunity to make things public.
6 And the way sexual complainants make things public is filing
7 complaints, which is exactly what she did here.

8 I want to just very quickly touch on independent
9 contractor and employee issues.

10 The Court noted that control is an issue of fact, and
11 we agree, control is an issue of fact.

12 THE COURT: But it's also an issue as to which, if
13 there's no evidence, a reasonable jury could find that your
14 client is an employee, I should grant summary judgment.

15 MS. HUDSON: But we submitted a lot of evidence that
16 is sufficient to show that she was not in control. The fact
17 that she had input, that she might have had influence is not
18 the same as control because --

19 THE COURT: Let me ask you, just looking at the offer
20 letter itself, if the offer letter is what controlled the
21 relationship between Ms. Lively or, put more specifically,
22 Blakely and It Ends with Us movie, doesn't that precisely
23 describe somebody who was an independent contractor? She had
24 veto rights on just about everything.

25 MS. HUDSON: Well, she was --

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1 THE COURT: Most employees don't.

2 MS. HUDSON: She didn't have veto rights as to
3 everything. She had to --

4 THE COURT: I'm just looking at the offer letter.

5 MS. HUDSON: Yes. Well, the offer letter is not the
6 totality of her employment relationship because she was
7 required to appear, she had to work the hours that were set for
8 her, she had to be available for hair and makeup at the hours
9 that were set to her, she was required to play the specific
10 part that she agreed to, and the ALA said that she has to
11 appear when reasonably required by the company in such a manner
12 as they may direct under instructions --

13 THE COURT: Meaning if I conclude that the ALA is not
14 a binding contract, that she was not bound to comply with it,
15 then what's left of your argument?

16 MS. HUDSON: Well, she nonetheless behaved in such a
17 way that was consistent with what the ALA requires because she
18 did have a schedule. As a matter of fact, some of the things
19 that became an issue were the defendants intruding on what was
20 called her turnaround time because she had a very strict period
21 of time where she had to be on set, and some of the lack of
22 controls with the way the protection was managed impacted her
23 ability to have her turnaround time consistent with what the
24 production required. She had to do that because it was her
25 job, because she was an employee, and she was told what to do.

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1 THE COURT: So tell me what you think the best
2 evidence that you've got is that establishes that she's an
3 employee. And give me, if you've got it, citations to the
4 portions of the record that I should look at.

5 MS. HUDSON: So the ALA states with respect to --

6 THE COURT: So I'll look at the ALA.

7 MS. HUDSON: Yes. There are a number of provisions in
8 the ALA, and I can cite them to you here. I believe they're
9 cited in our papers.

10 THE COURT: What, besides the ALA, should I look at?

11 MS. HUDSON: I think the most instructive is the case
12 of --

13 THE COURT: Talk about in terms of evidence creating a
14 general issue of fact that she's an employee. I have the ALA.

15 MS. HUDSON: I understand. And I'm just going to put
16 this in context of this case and compare the facts. So the
17 case is *Makarova v. United States*. This is a Second Circuit
18 case involving an actress who was also engaged through a
19 loan-out. The court determined that she was an employee under
20 a similar control test under New York law.

21 These are the factors that were looked at. One, that
22 she was required to play a specific part. So Ms. Lively was
23 required to play a specific part, she couldn't just choose
24 another role once she signed on for the role of Lily. She was
25 required to meet a contractually specified rehearsal and

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1 performance schedule. That was the same with Ms. Lively. She
2 was contractually obligated to have her hair styled in accord
3 with the time period of the show. Ms. Lively also had to meet
4 certain wardrobe and visual requirements. She was required to
5 wear shoes and makeup provided by the production. The
6 production is completely controlled by the studio, the same as
7 the actress in *Makarova*. She was also obligated to provide
8 exclusive services during the time. The court said even if the
9 actress was a star and had significant say over her own
10 performance and things related to her, she's still an employee
11 for the purposes of the production.

12 And this is also made clear by the fact that the
13 various things that Ms. Lively asked for, Mr. Baldoni said he
14 would "give her" 98 percent of what she wants. Well, the fact
15 that he had something to give her shows that she doesn't have
16 control. She asks, she maybe persuades, but she doesn't have
17 the ability to do it if they don't let her.

18 There are some additional factors, your Honor.
19 Multiple of the Reed factors show she was an employee, the
20 sources of instrumentalities and tools, the location of work.
21 And again, the fact that she would negotiate a different
22 location does not mean that she had control over that because
23 they could have said no. They would have just hired another
24 actress.

25 THE COURT: I take it, under your view of the law,

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1 there are no circumstances under which an actor is something
2 other than an employee?

3 MS. HUDSON: Very little. It's hard to imagine one.
4 If an actor is performing in a production and is under total
5 control of the production, which they are, being able to
6 negotiate or influence a production is one thing, but
7 Ms. Lively couldn't just go in and start doing things if
8 Wayfarer did not permit it.

9 THE COURT: All right. I've got it.

10 MS. HUDSON: Thank you, your Honor.

11 THE COURT: Remind me what you've got, please.

12 MR. GOTTLIEB: Yes, your Honor. I'm going to start
13 with the contract arguments, then I'll turn to
14 extraterritoriality and then to the defamation arguments.

15 On the contract arguments, I have three main points,
16 but before I get to them, I want to get to the Court's question
17 that you asked to my friend about what the record shows with
18 respect to the open items in the contract. We address those at
19 page 54 of our opposition to the motion for judgment on the
20 pleadings. Apart from the execution condition, which we
21 contend was waived, there were three other conditions that were
22 under discussion at the time. One was the detail of order --

23 THE COURT: I have that. Is there any evidence in the
24 record about the materiality of those issues?

25 MR. GOTTLIEB: Other than the performance of the

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1 parties with respect to the agreement, one of the conditions --
2 one of those factors of which was the payment that the Court
3 mentioned before, no, I'm not aware of any other evidence in
4 the record.

5 So the three main points with respect to the contract.
6 The first is that the execution condition, which is essentially
7 their only argument here, was waived in writing and through
8 performance.

9 Taking performance first. There is the performance
10 element that the Court mentioned before, which is an issue of
11 payment. And that is the issue that is most significant, given
12 the case law that we've cited, including the *Oakland Raiders*
13 authority as well as the *Wind Dancer Prod. Grp. v. Walt Disney*
14 *Pictures* case. The fact that Wayfarer decided to pay
15 Ms. Lively more rather than less money suggests that they
16 believed that the ALA was enforceable, otherwise they would
17 have acted in their own financial self-interest to pay less.

18 THE COURT: I understand why that would give Wayfarer
19 a right to assume that your client had accepted the terms of
20 the ALA. I mean, that's usually how partial performance works,
21 you accept the benefit of a contract and you're bound to the
22 terms of it. It's not usually the other way around where you
23 give somebody the benefit and then, because that person accepts
24 it, you're binding them to everything else.

25 MR. GOTTLIEB: The question, your Honor, is whether

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1 there's any indication that the execution condition was being
2 treated as something that was enforceable or whether the course
3 of performance that the parties exhibited suggested it's not --

4 THE COURT: So tell me at what point the ALA became
5 enforceable, because there are different versions of the ALA.
6 So what is the magic moment when it became enforceable?

7 MR. GOTTLIEB: I mean, we think it became enforceable
8 the moment the parties started performing the conditions under
9 it. The latest --

10 THE COURT: Does that mean the first draft was
11 circulated because she was acting?

12 MR. GOTTLIEB: When Ms. Lively began to follow the
13 conditions under the ALA, which would have been when filming
14 began, yes.

15 THE COURT: So under that view, the negotiations that
16 follow, they become negotiations about amendments, they don't
17 become -- the contract is binding, and that can't be right.

18 MR. GOTTLIEB: I think, your Honor, you can have
19 provisions of a contract that are subject to some dispute and
20 renegotiation. Whether or not that's right, your Honor, the
21 absolute latest that it would have been enforceable would have
22 been at the moment that Jamey Heath expressly waived the
23 condition that Ms. Lively signed the ALA in writing. We've
24 cited that at paragraph 452 of our 56.1 statement, it's exhibit
25 101. And Mr. Heath --

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1 THE COURT: And I think I've seen that. That's where
2 there's a comment bubble that says you've waived?

3 MR. GOTTLIEB: What it says, we have withdrawn our
4 request for your client to sign her agreement in order to
5 extend the time with the edit. The Wayfarer parties argue with
6 what the meaning of that is, and they try to cabin the meaning
7 of that to only a negotiation around the edit. That's an issue
8 for the jury to decide, whether that is fairly interpreted as a
9 statement with respect to the condition altogether or a
10 statement with respect to a negotiation over the edit.

11 THE COURT: Let me just take a look at the particular
12 exhibit, because it's important. Tell me, if you know, the
13 docket number.

14 MR. GOTTLIEB: This is exhibit 101. It's paragraph
15 452 of our 56.1 statement.

16 THE COURT: Okay I've got a copy of it.

17 MR. GOTTLIEB: Your Honor, this exhibit 101 is an
18 email exchange, and the date on that is May 3rd, 2024, when
19 Mr. Heath sends the note that we have withdrawn our request for
20 your client to sign her agreement in order to extend the time
21 with the edit. Again, the Wayfarer parties have an
22 interpretation of this as limited to a negotiation around the
23 edit. We think a jury, a reasonable jury can conclude that
24 this was the point in time at which they were withdrawing their
25 request for Ms. Lively to comply with the execution condition.

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1 There is other evidence that we have cited in our
2 papers on this point, as well, but the evidence, when it's
3 weighed against each other, including the correspondence
4 between the counsel, this email evidence is clearly an issue
5 for a jury to decide and make determinations about how they
6 interpret it. That's the first point.

7 The second point is that the defendants' prior attempt
8 to enforce the ALA, at minimum, demonstrates that they
9 understood it to be binding, notwithstanding that it was
10 unexecuted. We think that they ought to be estopped from
11 raising this argument. But the Court doesn't need to go that
12 far because their affirmative lawsuit, which was brought by all
13 the Wayfarer parties, including claims in it for the
14 enforceability of the ALA, this is their fourth cause of
15 action. This is docket No. 50, page 216, their fourth cause of
16 action for breach of the implied covenant of good faith and
17 fair dealing in which they allege, at paragraph 341, Lively and
18 the Wayfarer parties entered into a contract by which Lively
19 agreed to perform as an actor in the film It Ends with Us.
20 That is their allegation in their complaint under their fourth
21 cause of action.

22 THE COURT: Does that necessarily refer to the ALA?
23 There was an offer letter, and in fact there's correspondence
24 from your client saying we're going to perform under the offer
25 letter.

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1 MR. GOTTLIEB: To the extent there is any doubt on
2 this question, your Honor, it is answered at Dkt. No. 162,
3 which is the defendants' briefing on the motion to dismiss in
4 which they lean into the ALA heavily, citing multiple
5 provisions of the ALA that they alleged were enforceable and
6 breached by Ms. Lively. These are representations that they
7 made to the Court in advance of their claims, and we have cited
8 authority in our papers as to why they cannot now, having done
9 that, be heard to argue that the ALA is unenforceable.

10 THE COURT: You cite law with respect to estoppel.
11 Let's assume that I reject your argument with respect to
12 judicial estoppel, the Court didn't accept the proposition. So
13 what is the best authority for the proposition that this is
14 evidentiary with respect to a clear expression that the ALA is
15 binding?

16 MR. GOTTLIEB: This would clearly be admissible
17 evidence as an admission of a party under the Federal Rules of
18 Evidence, and the jury can consider it in reaching its
19 determination of what the Wayfarer parties' understanding was
20 with respect to the enforceability of the agreement. The fact
21 that they filed a lawsuit in federal court, and all of them,
22 not just Wayfarer or It Ends with Us, but Ms. Abel, Ms. Nathan,
23 Mr. Sorowitz all filed a lawsuit in federal court alleging this
24 claim against Ms. Lively, saying that she had breached the ALA
25 and it had harmed them under the fourth cause of action.

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1 The third point, your Honor, and I'm cognizant of my
2 time, the third point with respect to the contract that we
3 think is important is that the CRA, the contract writer is
4 independently enforceable, regardless of whether the ALA is a
5 binding agreement.

6 THE COURT: So can you please address the question of
7 consideration with respect to the CRA.

8 MR. GOTTLIEB: Yes. So to the extent that the CRA is
9 a modification of the agreement, the defendants concede that no
10 new consideration was required. So that's sort of point one.
11 If it's not a modification --

12 THE COURT: A modification of the offer letter,
13 because what other agreement is there? I assume that the ALA
14 is not enforceable. You're saying the CRA is independently
15 enforceable?

16 MR. GOTTLIEB: Yes, the CRA would be independently
17 enforceable regardless of whether the ALA is enforceable.

18 THE COURT: What are you saying, that it --

19 MR. GOTTLIEB: In that circumstance, your Honor, if
20 the assumption is that the ALA is unenforceable, the CRA is
21 independently enforceable because the consideration that it's
22 supported by is a forbearance, it's a forbearance to not move
23 forward with a claim, it's to not move forward with a formal HR
24 process, and there's authorities that we have cited --

25 THE COURT: Is there evidence that your client, as

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1 consideration for the CRA, agrees to forebear from asserting a
2 claim of sexual harassment?

3 MR. GOTTLIEB: Absolutely. It's undisputed, your
4 Honor. It's at page 55 of our opposition.

5 THE COURT: Aren't we here in fact because your client
6 is asserting claims of sexual harassment that predated the CRA?

7 MR. GOTTLIEB: It is undisputed, your Honor. I'm
8 sorry. I misunderstood your question. It is undisputed that
9 Ms. Lively, there is an exchange through counsel where
10 Ms. Lively proposed the CRA in forbearance of a, quote, more
11 formal HR process. We cite that evidence at page 55 of our
12 opposition to the motion for summary judgment. And this
13 agreement, CRA was an alternative to Ms. Lively engaging in a
14 more formal HR process at this time. The correspondence
15 clearly lays that out, we've laid it out in our papers. Given
16 that, your Honor, we believe the CRA is enforceable under the
17 governing law.

18 I'd like to go on, given my time, with
19 extraterritoriality arguments.

20 First with respect to *Gravquick* and the governing law,
21 we think the Court is clearly correct, that is relevant
22 decision, it's the appellate authority rather than this war
23 between the district court cases. The statutory limitation
24 under *Gravquick* has to be express, it can't be implied because
25 if it could be implied, then no choice of law provision could

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1 possibly overcome the implied presumption against
2 extraterritoriality and *Gravquick* makes absolutely no sense.

3 THE COURT: But I don't necessarily have to follow
4 *Gravquick*. Maybe I should because it's from an appellate
5 court, but it's not binding authority on me, correct?

6 MR. GOTTLIEB: That's right, your Honor.

7 THE COURT: My job is to try to figure out the best
8 interpretation of California law.

9 MR. GOTTLIEB: Yes.

10 THE COURT: So why don't you make the argument as to
11 why *Gravquick* is the best interpretation of California law.

12 MR. GOTTLIEB: It's the best interpretation of
13 California law because we have cited repeated authorities from
14 California courts of appeals that choice of law provisions are
15 enforceable. When you're following a choice of law provision
16 in a contract that is lawful so far as California law is
17 concerned, it doesn't present an issue of extraterritoriality
18 even when the conduct is extraterritorial.

19 THE COURT: Is there anything that the California
20 legislature could have done if it wanted to make sure that its
21 laws were not deployed for people for whom they did not pass
22 the law?

23 MR. GOTTLIEB: Absolutely. The California legislature
24 could have included provisions in FEHA or the labor code to say
25 private parties may not assert claims under this law under

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1 choice of law provisions.

2 THE COURT: So why is it then not sufficient,
3 legislatures legislate against a background of the law, they
4 legislate against presumptions. Couldn't the California
5 legislators have said this is exactly what we're doing by not
6 putting in something affirmative, that it's got
7 extraterritorial effect, what we are expressly deciding to do
8 is pass a law that has only domestic effect.

9 MR. GOTTLIEB: Theoretically, a legislature could have
10 had that thought process. I don't think any authorities from
11 the California appellate courts that we cited could be square
12 with that. The California legislature also has a policy
13 priority that's reflected in some of the authorities that we
14 cited to allow parties to -- particularly sophisticated parties
15 to make elections of law and to enforce those agreement absent
16 some overriding policy objective for doing so. There's just no
17 evidence at all that the California legislature had, either in
18 FEHA or the labor code, a concern about parties asserting a
19 FEHA or a labor code claim in an extraterritorial context,
20 particularly in a multistate event like this one is where you
21 have conduct across many states.

22 But I don't think that the Court necessarily needs to
23 even reach this decision as to whether *O'Connor* is right or
24 whether *Gravquick* is right because in *O'Connor*, the court was
25 considering a choice of law provision that looks nothing like

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1 the choice of law provision here. And so it's simply
2 distinguishable. The choice of law provision in *O'Connor* is a
3 choice of law provision that simply says that the agreement is
4 covered by California law. In this case, as the Court observed
5 earlier in the argument, you're dealing with a very broad and
6 very specific choice of law provision. And we cite it and
7 quote from it at page 8 of our opposition that says that the
8 ALA provides to the internal substantive laws of the State of
9 California applicable to contracts made and performed entirely
10 in California. That could mean nothing else other than opting
11 out of the presumption against extraterritoriality. It is
12 assuming that the law is applicable to the parties' dispute is
13 the law that applies if you don't have an extraterritorial
14 contract and you don't have extraterritorial situations. They
15 have no answer to this argument. In fact, Ms. Garofalo
16 conceded that the parties have the power to do this under
17 governing California law in her argument. So unless there's --

18 THE COURT: She did concede that, but I don't know
19 that I'm bound by that concession. I'm supposed to come up
20 with the right law. I could understand the notion that two
21 parties can decide to include a covenant in their contract that
22 replicates the law of any particular state, and it gives rise
23 to a contract claim. But you're arguing something quite
24 broader. You're arguing that it gives rise to a statutory
25 claim. And help me with why that is the case. That's not

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1 usually what a choice of law provision does.

2 MR. GOTTLIEB: Because, your Honor, we have cited, and
3 I don't think they have disputed, multiple cases that a choice
4 of law provision can apply to statutory claims. We cite at
5 this at pages 8 through 9 of our opposition to the motion for
6 judgment on the pleadings, there's the *Williams v. Deutsche*
7 *Bank* case from the Southern District, there is a *Yule* case,
8 there is the *Monroe Staffing Sfs.* case, also from the Southern
9 District, and others, as well, that we've cited, all that stand
10 for the proposition that you can cover a statutory claims
11 through these choice of law provisions. And why not? Why
12 wouldn't parties be able to, absent some indication from the
13 legislature say, we like this rule, there's a rule that was
14 passed by this legislature, we like it, we think it should
15 govern our conduct. There's nothing inherent about the
16 limitation of state sovereignty to say, no, you can't do that
17 unless you're completely within the confines of the state. The
18 only reason you'd make that latter determination is if there
19 was a policy reason, and there's no indication under FEHA or
20 labor code that there is such a provision here.

21 The last point that I'd make on extraterritoriality
22 is, again, we have this issue that the Wayfarer parties sued to
23 enforce the ALA, made that argument before with respect to
24 contract enforceability, but we think it's relevant in the
25 Court's determination here that they shouldn't be able to sue

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1 under the ALA provisions and then get out of it when they lose
2 their affirmative claims.

3 THE COURT: If I find that there's no new
4 consideration for the CRA and that the ALA is not in fact
5 binding, does the CRA have any legal effect whatsoever? Is it
6 really only something that would be enforceable through
7 promissory estoppel, but not as a contract claim?

8 MR. GOTTLIEB: We have argued that the CRA is
9 independently enforceable as a contract signed and executed
10 between the parties.

11 THE COURT: Because it's supported by consideration?

12 MR. GOTTLIEB: Because it's supported by
13 consideration.

14 THE COURT: If I conclude that it's not supported by
15 consideration, then we presume that you don't have a contract
16 claim under the CRA; is that right?

17 MR. GOTTLIEB: If you conclude it's not supported by a
18 consideration and that it's not a modification of the ALA, then
19 I don't think we have a freestanding contract claim.

20 At last, your Honor, if I could turn to the defamation
21 claims, because I'm very cognizant of my time. Only a couple
22 of points here.

23 The first is the actual statements that Ms. Lively has
24 sued for defamation over resemble nothing like the statements
25 being characterized by counsel. They contain verifiably false

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1 facts and factual representations not just about the motive for
2 fabricating claims of sexual harassment, but numerous factual
3 representations that we have alleged are false, including in
4 the December 21st statement, statements about how the Wayfarer
5 studio representatives did nothing correct and they retaliated
6 and only responded to incoming media inquiries to ensure
7 balance and factual reporting. We have alleged that was
8 knowingly false. There is the allegation that what is
9 pointedly missing from the cherrypicked correspondence is the
10 evidence that there were no corrective measures taken with
11 media or otherwise. That's also in the December 21st
12 statement.

13 We have alleged two things about that. One, it's
14 verifiably false based on the allegations in the case and the
15 summary judgment record; and two, the reference to the
16 evidence, what had is missing from the evidence is exactly the
17 type of the reference to undisclosed evidence that makes this
18 mixed opinion under the New York Court of Appeals decision in
19 *Gross*, and that recurs throughout the statements. There is
20 reference to evidence that is coming, text messages that are
21 not attached to the statements. That is definitively
22 blackletter law, a mixed opinion under *Gross* and actionable as
23 a matter of law.

24 I think that answers most of the arguments that
25 counsel made. So unless the Court has --

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1 THE COURT: I do have on the bit about not doing
2 anything proactive, just doing things that are responsive, it
3 may be false. Is it defamatory and is it of concern of your
4 client, is it defamatory?

5 MR. GOTTLIEB: It is defamatory because the
6 implication of it is that our client, again, it is the why for
7 fabrication. So in this instance, he's saying her claims are
8 fabricated and the reason that you know they're fabricated is
9 because there is evidence that she hasn't provided, but that we
10 have access to that shows that there were no proactive measures
11 taken. That, to the extent it's false --

12 THE COURT: I'm sorry. I was playing off of the first
13 alleged false statement, which says that they're just
14 responding to being responsive and not being proactive.

15 MR. GOTTLIEB: Yes, because that alleges by
16 implication that Ms. Lively fabricated her retaliation claims.
17 So we believe it is of and concerning Ms. Lively and
18 defamatory.

19 THE COURT: Thank you.

20 MR. BRUNO: Good morning, your Honor. I'm going to be
21 addressing the spoliation motion.

22 At the outset, your Honor, the majority of the facts
23 necessary for the Court to award spoliation sanctions under
24 37(e) (1) and (e) (2) are not in dispute. By November of 2023,
25 Wayfarer defendants received a protections document outlining

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1 Ms. Lively's grievances, including a retaliation provision. By
2 July of 2024, the Wayfarer defendants had retained Ms. Nathan
3 and the TAG defendants during which they devised a scenario
4 planning document that was to be untraceable and a digital plan
5 that would be implemented without any fingerprints. By August
6 of 2024, all of the defendants had begun discussing going to
7 war and fighting Ms. Lively. Days later, they begin turning to
8 Signal communications, Signal communications that included
9 setting up calls with Mr. Wallace and Mr. Freedman.

10 Now, your Honor has already ruled that it is
11 undisputed that the Wayfarer parties used Signal communications
12 to discuss topics relevant to this litigation. It is also
13 undisputed that no Signal communications were preserved prior
14 to December 20th, 2024, and that's because the defendants
15 figured Signal's auto deletion function. That was intentional.
16 When the law required the defendants to take preservation
17 efforts, they did the exact opposite.

18 Now, the facts establish all the predicate elements
19 for spoliation sanctions under 37(e)(1). There is a duty to
20 preserve by November of 2023 for the Wayfarer defendants and
21 August of '24 for all of the defendants. There was a failure
22 to preserve. That's conceded by the defendants on this point
23 at page 16 of their opposition. And the relevance of these
24 communications has already been observed and acknowledged by
25 this Court.

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1 Finally, the prejudice cannot be in question. The
2 lost Signal communications impact Ms. Lively's ability to
3 prosecute her claims and to test and rebut the defendants
4 defenses.

5 THE COURT: What evidence is there in the record that
6 the missing Signal messages would in fact support your client's
7 case?

8 MR. BRUNO: That's a great question. I think the best
9 evidence we have, your Honor, and I direct the Court to
10 exhibits 41 and 42 of our brief as well as exhibits 249 and 253
11 of our opposition to the motion for summary judgment, those are
12 Signal communications with all of the defendants with the
13 content creator Sage Steele. In those communications, they're
14 outlining, they're giving her a script, giving her detail about
15 how to make a carefully curated video, a TikTok that would be
16 criticizing and slamming Ms. Lively, all in the effort of it to
17 be presented as an organic video. That was another one, that's
18 something that we've heard from the beginning of this case,
19 that what transpired against Ms. Lively was organic and that
20 they're engaging in mere monitoring. And that's one of the
21 strongest pieces of evidence here, your Honor, as to the
22 relevance and the significance of these communications.

23 Now, putting aside the relevance, this goes to the
24 prejudice to Ms. Lively, which is an essential element for
25 sanctions under 37(e) (1).

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1 Now, in terms of prejudice, from the defensive
2 standpoint, it impacts our ability to address, to test one of
3 the defendants' primary defenses in the case, that they did
4 nothing wrong, that they were just merely monitoring social
5 media, and what happened was organic.

6 THE COURT: That in and of itself would not be enough
7 to support the type of inference that you're asking me to draw.
8 The fact that you can't test a proposition does not necessarily
9 give rise to an inference that the proposition is questionable.
10 There needs to be something to indicate that what's missing
11 would help you.

12 MR. BRUNO: Right. And, your Honor, that goes --

13 THE COURT: You agree with that?

14 MR. BRUNO: That goes to 37(e)(2) more than anything.
15 It goes to the intent to deprive that would warrant an adverse
16 inference that you're suggesting here.

17 In terms of preclusion sanctions, which is what your
18 Honor ordered in the *Barbara* case over the summer, that
19 component, which is one of the forms of relief we seek here, is
20 exactly what we would be requesting in addition to adverse
21 inference because the evidence that was lost, the evidence
22 that's been spoliated should warrant the preclusion of them
23 advancing similar claims that they didn't do anything wrong,
24 they weren't acting in a proactive manner in furtherance of the
25 scenario planning or the digital campaign.

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1 Now, in terms of 37(e)(2), which is where your Honor
2 was going, there are four factors that the courts consider.
3 This has first been articulated in *Moody* and more recent
4 recently in the *Oakley v. MSG* case where you basically have to
5 ask yourself three to four questions. Was there material
6 evidence that once existed; did the spoliating party make any
7 affirmative acts causing the evidence to be lost at a time when
8 they had a duty to preserve, and can the lost evidence be
9 credibly explained. In our papers and in this record, each of
10 these questions can be answered affirmatively.

11 Turning to the first question. Material evidence once
12 existed. The record is very clear on this point. Your Honor
13 already made that observation with respect to our omnibus
14 motion to compel earlier this summer, and the defendants
15 concede in their interrogatory responses that they did in fact
16 use Signal communications to discuss topics such as the digital
17 campaign, Ms. Lively, and the legal actions. I've already
18 addressed, your Honor, the fact that, in the Signal
19 communications that were preserved after December 20, we still
20 see active engagement with content creators for the purpose of
21 creating content to criticize and denounce Ms. Lively,
22 communications where all of the defendants are engaged in these
23 Signal communications. So that's the first factor.

24 Now, the second factor concerns affirmative acts and a
25 duty to preserve. Turning first to the affirmative act. At a

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1 time when the defendants admittedly anticipated litigation no
2 later than mid August 2024, they not only downloaded Signal,
3 but they activated Signal's auto deletion function. That alone
4 speaks to their intentionality.

5 I want to take a step back here to really explain how
6 the application works. When you download the app, the default
7 is not auto deletion. You need to download the app, go into
8 the settings, and set it for auto deletion. So that means in
9 this case -- and the defense will contest this. In fact, they
10 cite to authority that describes in exactly the same manner
11 that I am to your Honor. What this tells us, though, is that
12 the defendants downloaded Signal and took the affirmative steps
13 to enable the auto deletion function so that Signal
14 communications would not be preserved, which then goes to
15 timing.

16 At a time when they were preparing to go to war, to
17 fight Ms. Lively, and in their own interrogatories admit that
18 litigation was anticipated by that same point in time, they
19 made the conscious decision to start using auto deletion
20 communications through Signal.

21 I direct your Honor to the *FTC v. Nolan* case because
22 that had a very similar fact pattern where you had a defendant
23 who was anticipating litigation based on an FTC investigation.
24 Litigation had not been advanced yet and the defendant, at the
25 time that he learned of the investigation, decided to go to

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1 using Signal in lieu of ordinary communications to avoid
2 leaving a paper trail.

3 THE COURT: What is it that you say was the triggering
4 event for the anticipation of litigation?

5 MR. BRUNO: In this case, there's two different
6 triggering events. So the first is in November of '23, the
7 Wayfarer defendants, Heath, Baldoni, Sarowitz, Wayfarer, It
8 Ends with Us, he received the protections document. And that
9 is, as Mr. Baldoni has even described it, a legal letter. He
10 writes to his own friends and admitting and acknowledging that
11 constituted a legal letter.

12 THE COURT: Right. It would be fair to presume from
13 that and what follows with the CRA that the issues are then
14 resolved. Isn't that the natural inference?

15 MR. BRUNO: That's actually one of the points the
16 defense make in their opposition and, respectfully, we
17 disagree. The record doesn't support that kind of a defense or
18 that kind of an argument for a number of reasons, some of which
19 Ms. Hudson addressed earlier today. After the protections
20 document was served and after the January meeting and going
21 into the spring of '24, the behavior, the treatment with
22 Ms. Lively is different, there's increased tension between
23 Ms. Lively and the defendants. By May --

24 THE COURT: Are you saying that anytime that there's
25 tension or acts that, let's assume, constitute sexual

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1 harassment, that that moment, once you've done something wrong,
2 you should anticipate litigation?

3 MR. BRUNO: Well, I think you anticipate litigation
4 when you receive a letter from the complainant's counsel
5 telling them unequivocally that she reserves all rights to
6 pursue all claims if these issues are not addressed. It's a
7 little more nuanced here because of the fact that the
8 defendants were put on notice, there was a formal document in
9 place prepared by Ms. Lively's lawyers to put them on notice of
10 the fact that what had transpired on set was not acceptable,
11 and that if the issues do not get addressed and persist, there
12 will be legal action taken.

13 To go back to your Honor's question with respect to,
14 well, was everything resolved by that point. The answer to
15 that is no. And we know that because by June of '24, Wayfarer
16 defendants are seeking recommendations for great counsel, that
17 Steve Sarowitz would be covering. In July, they're speaking
18 with TAG defendants to roadmap their scenario planning and
19 digital campaign out of concern of being canceled and in
20 discussions relating to the protections document.

21 Now, these aren't the actions of an individual --

22 THE COURT: Well, what was the other triggering event?

23 MR. BRUNO: The other triggering event is in August of
24 '24. Now, this one is not disputed by defendants, but they
25 admit to this in their interrogatory responses. All of them

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1 acknowledge that litigation was anticipated by mid August '24.
2 That I don't think requires much more, unless your Honor has
3 any questions.

4 But turning back to the final element with respect to
5 intent to deprive under 37(e)(2). So the timing in this case,
6 again, no later than August of '24, be it on their own
7 admissions in their interrogatory responses.

8 And the final point that turns to, well, can the lost
9 communications be credibly explained. And we respectfully
10 submit they can't. The argument that they put forward is that,
11 well, we turned to Signal out of fear of hackers and aggressive
12 media players. But there's nothing in the record to support
13 that. They cite no evidence whatsoever for that point. In
14 fact, in the *FTC v. Nolan* case, a similar argument was made
15 there that was flatly rejected by the court where there's no
16 evidence to substantiate that concern or that justification.
17 And the reality is if the defendants were in a state crisis PR
18 or if they were concerned about maintaining the reputation of
19 their businesses and their reputation of Mr. Baldoni, there
20 would be nothing to hide, but the reality is what they did was
21 intentional and it was deliberate and it was consistent with
22 their plan to be untraceable and to leave no fingerprints, and
23 that's precisely the type of conduct that warrants the more
24 serious -- this more serious sanctions under 37(e)(2).

25 Unless your Honor has any other questions, I'd like to

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1 reserve my time for rebuttal.

2 THE COURT: I don't have any other questions. I think
3 I've heard everything from the Lively parties. Let me hear
4 rebuttal from the Wayfarer parties. You've got 18 minutes.

5 MR. BACH: Judge, we know, and I'm sure the Court is
6 aware, that the other side took some liberty, understandably,
7 with the time.

8 THE COURT: We'll see how it goes.

9 MR. BACH: Judge turning first to sexual harassment.
10 The Court posed the question what conduct was Ms. Lively
11 actually aware of at the time. The only conduct not concerning
12 herself that she was aware of at the time was a single comment
13 to Ms. Slate that her wardrobe was sexy. Ms. Hudson said
14 that's not why we're here, that she admitted that type of thing
15 doesn't rise to the level required here.

16 She also mentioned something about Ms. Ferrer, who
17 played young Lily in the movie. The record is clear that
18 Ms. Lively was not present when the comment concerning
19 Ms. Ferrer was made. She was not at the scene. The record is
20 also clear, this is paragraph 68 of the 56.1 statement, that
21 the comment that Mr. Baldoni was said to have made was directed
22 to both the male actor and the female actor in that scene, and
23 that's precisely how Ms. Hudson distinguished the Friends case
24 thing. That's not actionable when both genders aren't
25 involved.

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1 Now, turning to the specific conduct, the Court asked
2 what is the specific sexual harassing conduct concerning
3 Mr. Baldoni, and there was some discussion of him leaning,
4 nuzzling, kissing in what was an intimate dancing scene in the
5 movie, and Ms. Hudson stressed the issue of consent. The
6 primary issue there is gender. I don't know if the Court is
7 familiar, for instance, with a new show, Heated Rivalry.

8 THE COURT: I'm not.

9 MR. BACH: It's two male hockey players engaged in an
10 explicit -- it's an HBO show. It's an explicitly sexual show
11 where two male hockey players explore their relationship.
12 Let's say one of those men happened to kiss the other a little
13 bit aggressively during the scene. Is that because of the
14 gender? Is that discriminatory? That's the question here.
15 Ms. Hudson takes the position that that's per se sexual
16 harassment. It's not. The courts are clear that there has to
17 be a gender basis here, and I don't think she can meet that in
18 the context of a director in what is supposed to be two people
19 falling in love while they're dancing. Leaning forward? We go
20 to federal court when someone leans forward, when someone
21 nuzzles?

22 She says the experiences of other women come in on the
23 question of gender motive. Well, there's no other woman who
24 was touched or nuzzled or attempted kissing. I think this is
25 all fairly low level conduct, frankly, but there's no other

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1 woman who can come in and corroborate and say that that was a
2 pervasive experience by any means on this set.

3 Let's turn to Mr. Heath, because I think in the briefs
4 they retreat to Mr. Heath, implicitly acknowledging that they
5 don't have severity when it comes to Mr. Baldoni. There are
6 two instances involving Mr. Heath. The first is about a video.
7 Let's just be very clear about that video. That is not a
8 pornographic video. Sex is not depicted in the video. That's
9 not a video that is intended to arouse. There is a family
10 present in the film in that video. And there is no evidence,
11 again, this goes back to -- this has to be discrimination, it
12 can't just be annoying, it can't just be defensive, it has to
13 be discriminatory. There's no evidence that Mr. Heath showed
14 this to her because she was a woman or to single out her out in
15 that way. There's no evidence he showed this to her to get a
16 rise out of her or he did it while men were chuckling in the
17 back of the room, hey, guys, watch, I'm going to show her this,
18 let's see what she does. That's what the sexual harassment
19 cases we read about talk about. There's none of that here.
20 Instead, what do you have here? You have a film that's about a
21 birthing scene where everyone's talking about how do we get a
22 certain effect, a certain aesthetic in this birthing scene.
23 What do we want? What do we want to depict? That's the
24 context. In that context, Mr. Heath, who's a producer, and
25 he's shown this to men, he's shown this to men, that's

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1 undisputed, goes up and shows it to the female lead costar
2 co-collaborator and shows her a video very briefly. Are we
3 really in federal court to discern whether that meets the
4 Title VII standard in that context? It's not pornography, it's
5 not done because of her sex, it's done because she's a
6 co-female lead who's working towards the co-creative effort
7 here. And by the way, these are two very one off instances.
8 This does not show a pervasive pattern of the type necessary to
9 maintain a sexual harassment claim.

10 The other instance is this instance in the trailer,
11 which is a very unique, one-off situation, and I think it's
12 very important to understand a couple of things.

13 Number one, as Ms. Hudson correctly advised the Court,
14 there's a subjective standard and there's an objective standard
15 when it comes to harassment. Here, Ms. Lively has effectively
16 admitted that subjectively, at the time, she knew he was not
17 trying to cop a look. That's not disputed. That's in the 56.1
18 statement that she said to Mr. Heath after the fact, I know you
19 were not trying to cop a look. They don't dispute that. That
20 was her own subjective perception at the time that he wasn't
21 trying to glance at her because she was nude and a woman. This
22 was they were having a conversation because there were terms in
23 the contract about her not wanting to work overtime, so they're
24 doing this in the trailer, and she admits at the time that she
25 knew he didn't have that kind of intent. That's her subjective

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1 perception. That's her subjective perception.

2 And number two, if you look at Wayfarer exhibit 92, I
3 think it's very telling about her subjective perception. Those
4 are her call notes for a call with Andrea Giannetti of Sony
5 where she's going to raise those things that she thought might
6 have been improper or annoying at the time. Conspicuously
7 missing from that is any reference to what happened with
8 Mr. Heath in the trailer. It's a list of the points that she's
9 going to raise. This was a one-off passing incident. She
10 permitted him to come into the trailer and she was either
11 breastfeeding or breast pumping at the time, told him to sit a
12 certain way. And it was an awkward situation. Something
13 awkward happened. Again, do we come to court? Is this
14 pervasive, a pervasive culture of abuse? That's what they have
15 to show, a pervasive culture of abuse, severity. She even
16 admits it wasn't worth raising with Andrea Giannetti, she even
17 admits that at the time, she didn't see it as a man trying to
18 spy on a woman's body.

19 Let's go to retaliation. Ms. Hudson said that
20 Ms. Lively made clear that she didn't want to be seen at the
21 premiere with Mr. Baldoni. She also made clear that that's
22 what triggered -- those are Ms. Hudson's words -- the so-called
23 retaliation. It wasn't complaints about sexual harassment a
24 year before, it wasn't complaints that arose --

25 THE COURT: She said that was protected activity. So

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1 what's your response?

2 MR. BACH: Her words were that's what triggered it.
3 It's not protective activity. You have to distinguish between
4 the underlying protected conduct and then the effort to
5 publicize something. Those are two distinct aspects. One can
6 make a complaint that's protected, but then if you choose to go
7 public and make a film premiere, the forum, then you're
8 entering the public domain, that's a response to publicity,
9 it's not a response to protected activity.

10 And there's a second argument here that they don't
11 address, which is that -- the law is very clear on this --
12 retaliation only arises when the defendants knew that it was
13 protected activity. They have to know because -- and so here
14 they're saying, well, you can kind of creatively construe her
15 desire not be seen with Mr. Baldoni at the premiere as a form
16 of protest. Did the defendants know it to -- there's no
17 evidence the defendants understood it in those terms. They
18 thought this was just part of the emerging power struggle in
19 which she was trying to be seen as responsible for the film as
20 the person editing, as the person responsible for the final
21 cut, as the person who wants to be seen on the premiere. You
22 can't take something that's subtle and then say it forms a
23 predicate for retaliation. The law is clear, it's an element
24 of retaliation. The defendants had to know it was a form of
25 protected activity. They're not going to get facts here to

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1 help them with that. But it's not protected activity anyway
2 because this is a publicity stunt, it's not a complaint, it's a
3 publicity stunt.

4 THE COURT: They also mention the conversation with
5 Ms. Hoover.

6 MR. BACH: But Ms. Hoover, that had no harm, no
7 effect, nothing whatsoever. Ms. Hoover sided with Ms. Lively.
8 In California, the law is clear under the *Yanowitz* case that
9 trivial conduct like that, that doesn't rise to the level of
10 retaliation.

11 THE COURT: So it may not be something that gives rise
12 to a lot of damage, it may not have caused damage, but
13 Ms. Hoover was a best selling author. And if in fact the
14 evidence supports the notion that your client is badmouthing
15 Ms. Lively to Ms. Hoover in response to her complaints about
16 sexual harassment, it seems to me that that would give rise to
17 a retaliation claim. I'm not sure why it wouldn't.

18 MR. BACH: I'm not sure the facts really go that far.
19 That's a depiction of that conversation that I don't think is
20 supported by the record. They're certainly having dinner with
21 Ms. Hoover, they're saying that the dynamics were difficult on
22 the set, that these were some of the things that occurred, and
23 I think that that type of conversation, which people have all
24 the time in a professional life and professional settings,
25 falls under *Yanowitz*, which says something as trivial as that,

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1 as a dinner conversation in which someone is effectively
2 gossiping about someone else. And here, again, that gossip
3 must have been mild because it had no effect on Ms. Hoover,
4 none whatsoever. That's not enough for retaliation. I think
5 the law is clear on that in *Yanowitz*.

6 I want to turn to the independent contractor question.
7 We think the issue goes to the offer letter and not beyond, not
8 to the unexecuted unformed contracts. I think our position is
9 clear on that, so I don't need to belabor it. But I do want to
10 respond to one of the points that was made about the ALA, if
11 the Court ever feels inclined to get there, which we don't
12 think it should. They stress that the ALA provides for certain
13 hours, for certain turnaround time. Those terms were very
14 heavily negotiated and these were terms in which Ms. Lively
15 took control and set her limits and said these are the limits I
16 want, these are the protections I want. This wasn't like
17 conditions, standard conditions that Wayfarer has and imposed
18 on her. It's a reflection of what she negotiated.

19 THE COURT: Mr. Bach, help me think about the
20 following issue. I mean, surely there are circumstances in
21 which an employee can negotiate with the employer, the terms
22 and conditions under which the employee will work. And it may
23 be that the employee has a lot of leverage in those
24 negotiations, but the relationship that follows still would be
25 the relationship of employer to employee, even if at the

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1 contract formation stage it was not that. So how do I think
2 about that issue?

3 MR. BACH: I think you're right as an abstract
4 proposition. The whole range of possible situations, possible
5 scenarios in which these types of things can occur. But I
6 think here, first of all, under Title VII, contract terms are
7 not what courts look to. Courts look to the reality of the
8 situation. It's a multifactor test. You look at what's really
9 happening because a lot of times employers and employees have
10 contract terms for tax purposes, right, to try and help how
11 much they pay or don't pay the government. And so the court
12 has to say, look, I'm not just going to rely on your contract,
13 I'm going to do a multifactor test and look at the entire
14 situation.

15 The entire situation here cries out to the Court that
16 Ms. Lively had control. The PGA letter could not be a stronger
17 trumpet blast of how she controlled every single piece of this
18 film. And how many employees, regardless of the contracts they
19 negotiate, get to go speak directly to the book author and to
20 the Sony studio heads and have that kind of direct control and
21 power if they're just an employee.

22 The facts and circumstances here, I think you asked
23 the other side to give me some facts, what are your best facts
24 to show that she's an employee - they don't have those facts.
25 This is not your typical Hollywood contract, this is not the

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1 Makarova case in the Second Circuit that they referred to. In
2 the Makarova case, the prima ballerina, as prima ballerina, had
3 some control over her own dance part, her role, but she didn't
4 get to edit it, control the production of the ballet, its
5 publicity, its marketing, direct the other dancers and stars
6 and have that level of control. Also in that case, there was
7 no evidence that she was being taxed or compensated in a way
8 that was inconsistent with being an employee. Here, the
9 record's clear, and I know it's just one factor, it's not
10 dispositive.

11 THE COURT: Right. And it's somewhat intentioned with
12 your prior points.

13 MR. BACH: I understand that, Judge, but here, where
14 she has this strong independent businesses, strong independent
15 presence, is a strong independent force of her own here.

16 THE COURT: I have a question, and I'm going to ask
17 your adversary this question. Under the offer letter, there
18 are various veto rights that she has. I suspect I know the
19 answer that you're going to give me, but is there evidence in
20 the record that those veto rights were not in fact honored
21 during the course of the relationship?

22 MR. BACH: I think that the Wayfarer parties conceded
23 anytime she wanted something, they basically bent over and gave
24 it to her, Judge. They acquiesced to her every demand.

25 THE COURT: I do have that question for Lively's

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1 counsel, now that they're going to have to --

2 MR. BACH: And that's very telling about the reality
3 of the control in this case.

4 Unless the Court has any further questions, I defer to
5 my colleague.

6 THE COURT: I'll hear from your colleagues.

7 MR. BACH: Thank you.

8 THE COURT: Ms. Shapiro, you're doing defamation and
9 contract, correct?

10 MS. SHAPIRO: Yes, your Honor. Let me take the
11 contract first because there's been more focus on that one.

12 So, first of all, Mr. Gottlieb mentioned exhibit 101.
13 If you look at exhibit 101, it's clear on its face that it's
14 not a waiver of the condition precedent. And indeed, the last
15 sentence before have a good weekend, as for the future
16 resolution of the contract, we will stand by in hopes that we
17 come to a conclusion soon. Then, on July 2nd, which is the
18 last version of the contract that we have, there is an
19 attachment which, again, strikes Ms. Lively's counsel's
20 language saying that the condition precedent has been waived.
21 So that email clearly does not constitute a waiver.

22 With respect to the issue about our brief on the
23 motion to dismiss, keep in mind, the condition precedent, even
24 putting aside the issue of whether there's an enforceable
25 contract at all, what the condition precedent says is that a

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1 condition precedent to Ms. Lively enforcing the agreement is
2 that there's a fully executed agreement, and we dispute this.
3 but even if that could somehow be construed as some sort of a
4 concession that the ALA was a binding contract that we could
5 enforce, the condition precedent is explicit that her signature
6 and our signature was required to make it binding on us, which
7 is what we're talking about here.

8 With respect to the CRA, if you look at exhibit 103,
9 which is the cover letter to the CRA, Ms. Lively makes clear
10 that she is reserving all of her legal rights, hence the
11 lawsuit and everything that happened later. So the CRA is
12 simply not enforceable, there's no consideration --

13 THE COURT: They don't dispute the factual point that
14 you just mentioned. My question is, why doesn't the evidence
15 support that she decided to forego going through an HR process
16 at the moment constitute consideration that would support the
17 enforceability of the CRA? That's what they said. They said
18 she had the right to go through an HR process, she forewent
19 that, therefore there's consideration. She forewent that based
20 upon the promises in the CRA.

21 MS. SHAPIRO: She would have had those rights anyway.
22 I don't think that's sufficient consideration. And I took
23 their argument a little differently. I think that it was clear
24 from the cover email that they were reserving all rights to
25 invoke an HR process or a lawsuit in the future. The CRA --

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1 THE COURT: If they in fact had forewent, decided to
2 forego any HR process at the moment and say, listen, we're
3 going to go through with the movie, we're not going to disrupt
4 things with having an HR process right now, of course we're
5 going to reserve our rights, but if you agree to those
6 provisions, we're going to forego HR at the moment. Would that
7 be sufficient?

8 MS. SHAPIRO: No. I don't think it's sufficient, your
9 Honor.

10 THE COURT: Why not?

11 MS. SHAPIRO: That's just not sufficient
12 consideration. And I don't think there's any evidence in the
13 record that suggests that that is why they signed the CRA as
14 opposed to complete the movie because she was threatening to
15 not come back on the set, even though, under the offer letter,
16 she was obliged to do so.

17 The only other point I wanted to make on the contract
18 was your Honor had asked about the open items, and I just
19 wanted to direct your attention to exhibit 267 at Bates 38504,
20 which has a comment bubble discussing why It Ends with Us movie
21 can't agree to the termination provision that Ms. Lively was
22 suggesting with respect to the sexual harassment issue. In
23 addition, the confidentiality agreement, the issue was
24 important and that was something that Wayfarer continued to
25 object to, even as of the last draft of the contract.

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1 Sorry. One more thing. Just with respect to I think
2 both the Court and my adversary have used the phrase higher
3 rate. But actually, that's kind of a misnomer. It's not fully
4 accurate because what we're talking about in terms of
5 contingent compensation was just specific payment terms
6 relating to things like video revenues and so forth. So
7 there's no like higher rate that got paid.

8 Turning to the defamation, I just want to make a
9 couple of points there. My adversary claims that the
10 statements on December 21st are, he said they were verifiably
11 false facts, and he points to the statement, there was nothing
12 proactive nor retaliated.

13 First of all, that's not defamatory. But, in
14 addition, there's ample evidence in the record that, at various
15 times, both Mr. Heath and others specifically, when interacting
16 with the PR People, made clear that they didn't want to do
17 anything other than to defend Mr. Baldoni and that the scenario
18 planning document was specifically there as a scenario planning
19 depending on what would happen.

20 I neglected to mention this earlier, but we briefed
21 it. The plaintiff hasn't produced evidence to support the
22 actual malice element here, which they have to prove by clear
23 and convincing evidence.

24 In addition, the Court asked me earlier, well, what
25 difference does it make whether it's a lawyer or somebody else

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1 making this statement. My point then was if it's opinion, it
2 doesn't matter, but it matters for some of the other arguments,
3 both in terms of the privilege which applies. They really
4 can't contest that, certainly all of the statements, other than
5 the December 21st, and we dispute that, are clearly privileged.
6 They're referencing litigation that has already been filed and
7 I anticipated litigation, and all of the text messages and
8 evidence that Mr. Freedman talked about were disclosed. I
9 mean, if you look for instance at the Megyn Kelly, the article
10 accompanying the Megyn Kelly videos, all of that evidence was
11 disclosed, it was publicized.

12 The last point I wanted to make was that I think the
13 consequence of not treating these statements as opinions in the
14 heat of a very public tabloid litigation context is quite
15 severe, both in terms of the potential invasion of the
16 privilege needed to prove the actual malice when it's the
17 lawyer making this statement.

18 But also, I think the Court should take a look again
19 at some of the statements the other side has made. And I'm not
20 going to belabor this point, but if you look at docket 674,
21 pages 15 to 20, it catalogs many of the statements by the other
22 side, and they're similarly over the top, and some of which are
23 demonstrably false. And I'll just give two examples --

24 THE COURT: I'll look at them. You don't need to
25 spend your time on that.

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1 MS. SHAPIRO: Thank you.

2 THE COURT: Spoliation and the extraterritoriality
3 issues.

4 MS. GAROFALO: Your Honor, I will speak as fast as I
5 can. Just very quickly, 30 seconds going back to *Gravquick*,
6 the Court asked about the facts, and I'm sorry I did not
7 respond directly. In *Gravquick*, it was the California
8 Equipment Dealers Act. The issue there, the factual issue
9 there was the original draft of the act, the legislative
10 history had express geographical limitations in the bill
11 limiting it to residents of the State of California. When the
12 bill was enacted, that language was removed and the court found
13 that the removal of that language indicated you could infer
14 from that removal that the legislature intended the act to
15 apply outside of the California geographical limits.

16 Without belaboring the point, I just want to go back,
17 my adversary mentioned my concession about you can contract
18 around -- let me just clarify. There is, at least we have not
19 found a case, that says explicitly, that holds you can in
20 fact -- because it's not a subject matter jurisdiction, it's a
21 statutory issue, that you can in fact contract around
22 extraterritoriality where the statute has express geographical
23 limitations. There is some *dicta* in a couple of cases that
24 suggests that maybe that is the case, but there is no case on
25 point and Ms. Lively has not cited one.

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1 I do want to get to the spoliation issue. The problem
2 with plaintiff's spoliation argument I think was amply
3 demonstrated by my adversary's argument. It is not specific.
4 The facts are being blurred, the conduct of the parties is
5 being blurred, and the timeframes are being blurred.

6 The first issue under subsection 1 is prejudice. On
7 the first page of the brief, Ms. Lively admits that she has
8 substantial evidence that the digital campaign was in fact
9 implemented or launched. The relevance of the perhaps existing
10 and perhaps deleted materials as identified by plaintiff was
11 that it might, may have, or appears to may have shown that the
12 campaign was lost, they don't have it, they don't know what it
13 said, they cannot test it as the Court noted. Whether or not
14 you can test is not sufficient to establish prejudice under
15 subsection 1. Absent prejudice, there are no sanctions for
16 spoliation.

17 The act of spoliation for subsection 2, which is the
18 more onerous and draconian sanctions that are being sought by
19 plaintiff, requires a showing of an intent to deprive the
20 opposing party of evidence for use in this litigation. They
21 have not met that burden, they haven't shown it. It is not
22 equivalent to general intent, well, I hit auto delete,
23 therefore I must have intended to deprive the opposing party of
24 evidence. So I don't believe that they have met that element
25 for spoliation.

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1 THE COURT: So you've got hitting the auto delete in
2 anticipation of litigation with communications that relate to
3 the litigation. Isn't all of that sufficient?

4 MS. GAROFALO: It is not sufficient because the
5 problem here, in addition, is the anticipation of litigation.
6 There was an admission, as counsel pointed out, that the
7 parties at some point anticipated litigation over conduct or
8 what had happened, and this is a quote, on the set. That is
9 different from litigation over this allegedly retaliatory
10 digital or smear campaign or whatever term we use to describe
11 it.

12 The two individual defendants who, according to
13 plaintiff, were the primary users of Signal during this
14 pre-litigation period were Mr. Wallace and Ms. Nathan. Neither
15 Mr. Wallace or Ms. Nathan were involved with any of these
16 parties at the time that the alleged harassment took place, at
17 the time of the November 23rd lawyer letter. Plaintiff has not
18 shown that these parties or even the Wayfarer parties
19 anticipated litigation over what they consider to be a press
20 campaign.

21 Now, the Court, plaintiff may dispute how that
22 campaign should have been operated if it was at all, but the
23 fact is there is no showing that litigation over a digital
24 campaign, which is the only issue that these perhaps existing
25 Signal chats may have been relevant to, no evidence whatsoever

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1 that anybody could have foreseen litigation. And, in fact,
2 Mr. Gottlieb told us that the consideration for the November
3 23rd letter for the CRA was the promise to forebear from
4 litigation.

5 So even with respect to the sexual harassment
6 claims --

7 THE COURT: Bear from the HR process?

8 MS. GAROFALO: From the HR process. There was also
9 language in the letter, if you don't assign this, we will
10 pursue our legal remedies, but they did sign it. But again,
11 that goes to sexual harassment. Nobody is disputing that the
12 Wayfarer parties knew of the dispute over sexual harassment.
13 But that's not what these allegedly --

14 THE COURT: I think I've got the argument. Why don't
15 you bring it to a close.

16 MS. GAROFALO: I will, your Honor. Just one more
17 thing.

18 In Ms. Lively's own CRD complaint, she says that this
19 is a new form of litigation. She says that she is bringing her
20 CRD complaint to shine a light on this new form of retaliation.
21 Well, plaintiff does not explain how the defendants could have
22 foreseen that this new form of retaliation would in fact be
23 asserted in the complaint to come.

24 I just want to note the Sage Steele reference and note
25 for the Court that, firstly, those messages are in plaintiff's

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1 possession as are text messages and other communications
2 relating to the digital campaign. There is no evidence of what
3 the deleted messages may have contained. They may have
4 contained a statement saying, we're not going to do any of
5 this. We don't know. The *Barbara* case is distinguishable
6 because there the plaintiff who controlled the timing of
7 litigation communicated with a lawyer about when he learned of
8 the underlying infringement, the infringement that gave rise to
9 his claims. Those communications, although they didn't know
10 the precise content, they knew that information was included in
11 the deleted messages.

12 That information showed two things: One, the date of
13 discovery, which is relevant to a statute of limitations
14 defense; and two, that the plaintiff anticipated litigation
15 because he was communicating with his lawyer. These facts are
16 nowhere close.

17 With that, if the Court has any questions, I'm happy
18 to answer them.

19 THE COURT: Thank you.

20 I said I would give the plaintiffs 10 minutes to
21 respond with respect to spoliation. And I'm not sure, given
22 how long the response argument was from the defendants, that
23 you're going to need the whole 10 minutes.

24 MR. BRUNO: Thank you, your Honor. I'll try to be
25 brief and not retread the same points.

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1 At the outset, my friend Ms. Garofalo argued that
2 there was no prejudice, that the record doesn't support
3 prejudice. Now, when I was before you earlier, we discussed
4 briefly, but I do want to go back to it, the prejudice to
5 Ms. Lively based on the lost Signal communications.

6 The first was the fact that, from a defensive
7 standpoint, it impacts our ability to test and rebut the
8 defendants' defense in this case. Ms. Garofalo said that's not
9 a basis for finding prejudice. That's not correct and I point
10 your Honor to the *Charleston Capital* case, *Oakley v. MSG*, even
11 the *Pable v. Chicago Transit Auth.*, which is a case that they
12 cited in their opposition, all of which stand for the basic
13 proposition that when communications, whether they be ESI,
14 email, text message, when they're destroyed, it can be
15 prejudicial to pressure testing or challenging a theory or
16 argument being advanced by the adversary. So that in and of
17 itself supports prejudice to Ms. Lively.

18 Now, from an affirmative prejudice, and Ms. Garofalo
19 makes this point, as well, in response that, well, there is
20 evidence that we have identified showing the existence of a
21 digital campaign and a retaliatory campaign. There's no
22 argument here that there's a tremendous amount of evidence that
23 there was the existence of a retaliatory plan and the end
24 result.

25 What the lost Signal communications create is an

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1 evidentiary gap between the two, but we know that Signal was
2 used to implement this retaliatory plan by just simply looking
3 at examples like exhibits 41 and 42, as well as 249 and 253 to
4 the MSJ opposition. Just two weeks after the CRD complaint,
5 all of the defendants were collaborating with a content creator
6 and Sage Steele to create those carefully curated media clips,
7 which is something we've talked about time and again in our
8 complaint and throughout this case.

9 But the question remains, how many other Signal
10 communications are there like exhibits 41 and 42, and 249 and
11 253? And how many other Signal communications are there with
12 other content creators from August of '24 to December 20th of
13 2024? The fact that we don't have answers to those questions,
14 as Ms. Garofalo even presented, shows the prejudice to
15 Ms. Lively.

16 Now, turning back to intent to deprive, you asked
17 Ms. Garofalo, well, isn't the enablement of auto deletion at a
18 time when litigation was anticipated, isn't that sufficient.
19 The answer to that question is yes, your Honor. Again, I
20 direct your Honor to *FTC v. --*

21 THE COURT: Why don't you actually respond to the
22 argument, which is that the litigation that was anticipated was
23 the litigation over the conduct on the set and not the conduct
24 that postdates the editing of the film.

25 MR. BRUNO: Absolutely. I was actually going to go

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1 right there. There's a few points on this one. The first is
2 from a legal standpoint. The duty to preserve and the concept
3 of preserving relevant information is an extremely broad
4 concept. And I direct your Honor to the case of *Lokai Holdings*
5 *LLC v. Twin Tiger USA LLC* case for that proposition. And it's
6 an important one because you cannot take a narrower view of
7 your duty to preserve because it leads exactly to situations
8 like this where you take a narrow view and you end up
9 destroying or failing to preserve highly relevant, critical
10 communications or evidence as a result. And so the position as
11 a matter of law is inconsistent. We cite to a number of cases
12 in our reply that speak to that very issue. But just
13 factually, it's not correct.

14 The first point I'd make is that the protection
15 document expressly addressed retaliatory behavior, it's points
16 9 and 10 in the document. And what happens into August,
17 whether you want to accept their position that it was
18 anticipation as to the sexual harassment on set, they're
19 intertwined factually. The sexual harassment, the concept of
20 retaliation, they all fall in together.

21 THE COURT: There are all kinds of circumstances
22 where, after an event that could give rise to litigation,
23 people generate documents that relate to that event. I'm
24 thinking about in the corporate world where there could be an
25 event that happens with a mine or something like that and the

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1 corporation then generates drafts of the 10Q, 10K, talks to the
2 PR person, they have conversations with their earnings analyst
3 about the financial impact. Now, there may be separate reasons
4 to preserve those documents, but the documents would be
5 intertwined. Are you saying that, as long as there's an event
6 that gives rise to litigation, that you have to preserve
7 everything that is unrelated to the actual event itself, except
8 in terms of people talking about the consequences of it? That
9 seems like it's a very broad proposition.

10 MR. BRUNO: I think let's put a finer point then
11 because let's take it a step back. Any organization, whether
12 in the context of sexual harassment, employment issues, when
13 they receive a complaint, one of the most traditional
14 requirements of any business, any business that takes
15 themselves seriously, would be, at a minimum, you circulate a
16 litigation hold at that moment relating to the complainant
17 because you need to preserve that evidence, god forbid they
18 bring an actual lawsuit.

19 THE COURT: You've got folks who are communicating
20 amongst themselves who are not percipient witnesses to any of
21 the events. They're getting the stuff through hearsay.

22 MR. BRUNO: But I want to go back to one more point on
23 the preservation issue, though, because even accepting your
24 comment with respect to the type of claims that they could have
25 anticipated, whether it's everything under the sun or only as

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1 to specific issues, the thing they bring back to you is the
2 fact that, at a minimum, you would be expected to preserve
3 communications relating to the complainant. That's a basic
4 requirement. That's a basic expectation. They don't dispute
5 that they failed to do so.

6 Now, the final point I just would like to make is they
7 made a comment with respect to the CRD that this is a new form
8 of retaliation or a new theory that's being advanced by
9 Ms. Lively that further underscores that they couldn't have
10 anticipated litigation. And that's not correct. What the CRD
11 was presenting in those allegations was that this was a new
12 form of retaliation consistent with what we said all along.
13 This is a new form of media manipulation, social media
14 manipulation designed to harm and bury Ms. Lively. And that is
15 consistent with what we've said throughout this case. And it
16 doesn't excuse them from their failure to preserve evidence
17 relating to Ms. Lively as well as with respect to the Signal
18 communications.

19 THE COURT: I think I've got your argument.

20 MR. BRUNO: Unless your Honor has any other questions,
21 we rest on our papers.

22 THE COURT: I do have one question for each of the
23 parties. I asked the Lively parties to be prepared to answer
24 the question, whether there's any evidence that Wayfarer did
25 not honor the veto rights that were in the offer letter. Is

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1 there any evidence in the record with respect to that?

2 MS. HUDSON: Your Honor, with respect to veto rights,
3 are you referring to section 6(b) approvals?

4 THE COURT: There are a series of rights that
5 Ms. Lively has under the offer letter. I'm wondering whether
6 there's any evidence that the rights that she had under the
7 offer letter were not honored.

8 MS. HUDSON: I just want to make sure I understand
9 exactly what you're asking, your Honor, because there's a
10 section 6 in the offer letter that has various approval rights
11 to hair and makeup, material changes to the role in the
12 screenplay, director and colead for the picture.

13 THE COURT: Yes, all of those.

14 MS. HUDSON: So this provision is a mutual approval.

15 THE COURT: Yes, I understand that.

16 MS. HUDSON: And you're asking if they ever denied her
17 approval.

18 THE COURT: Correct. If they deprived her of any of
19 those approval rights. We know, I guess, that there was no
20 other director, Mr. Baldoni was preapproved, Mr. Baldoni was
21 preapproved to be the male lead, so I presume those were not
22 triggered. There was hair and makeup, there were a number of
23 other things in that clause. Were any of those dishonored?

24 MS. HUDSON: I don't believe there's evidence in the
25 record that, to the extent she made a request on any of these,

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1 they were dishonored. I will say though that some of these are
2 consistent with the *Makarova* case --

3 THE COURT: I get that point. I just want to
4 understand the record. You're not conceding anything with
5 respect to the law. I'm going to look through the record
6 myself, but it helps to get counsel telling me what they think
7 the record says.

8 MS. HUDSON: Yes. I don't think the record reflects
9 that there was a refusal to the extent she made a request, and
10 I believe the only requests she made were with respect to hair
11 and makeup and material changes over her role in the
12 screenplay.

13 THE COURT: Got it. My question then for the Wayfarer
14 parties I guess is to Ms. Garofalo. In the reply with respect
15 to the motion for judgment on the pleadings, you make the point
16 that I should not, in considering that, rely upon any evidence
17 that is not reflected or encompassed within the complaint.
18 Maybe you can be very specific as to what it is that you are
19 asserting I should not consider.

20 MS. GAROFALO: Rule 12(c) confines the Court's --

21 THE COURT: I understand. Tell me what pieces of
22 evidence.

23 MS. GAROFALO: I understand the opposition. They have
24 asked to incorporate all of the evidence in the summary
25 judgment motion and the summary judgment arguments.

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1 THE COURT: Some of that is encompassed within the
2 complaint. So what is it that you say is not encompassed
3 within the complaint?

4 MS. GAROFALO: Not encompassed within the complaint,
5 there are allegations primarily in the oppositions filed by
6 Ms. Lively relating to new conduct by Mr. Heath. For example,
7 there is an allegation that Mr. Heath, prior to Ms. Lively's
8 actual retention, made a decision relating to whether or not to
9 have a separate HR unit on the set on the east coast, and that
10 that in fact was an action taken in California. So there are a
11 number of factual allegations --

12 THE COURT: That's the reason I asked you to be
13 specific, because I can come through it, but you are counsel,
14 so you made this argument. Help me with what it is
15 specifically.

16 MS. GAROFALO: Specifically, we have the argument that
17 Mr. Heath engaged in some kind of conduct, decisions
18 Preproduction, I believe even before Ms. Lively was engaged,
19 relating to HR, which plaintiffs belatedly claim somehow opened
20 the door to sexual harassment. That's a discussion that wasn't
21 really relevant. There are references in some of the
22 opposition papers to conversations that may have been had
23 between the parties prior to the litigation that are not
24 mentioned in the complaint. And the complaint says what it
25 says. It says it in a lot of words. There are a lot of pages.

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1 But the extrinsic evidence, it's been raised, and I know the
2 Court's asking for specifics, but what they are asking to do --

3 THE COURT: If you want me to disregard something, you
4 have to tell me specifically what it was you want me to
5 disregard.

6 MS. GAROFALO: We want the Court to disregard those
7 allegations, the allegations relating to alleged retaliatory
8 conduct that took place allegedly in California, which isn't
9 defined in anything but general terms. We have the issue of
10 Mr. Heath from California telling Ms. Lively -- this is the call
11 that I was just referring to -- that it strains credibility to
12 argue that the term birthing -- strike that. He mentions to
13 Ms. Lively, they're looking forward to the birthing of a film,
14 and Ms. Lively now takes the position that the reference to
15 birthing somehow plays into her sexual harassment claims. This
16 is not in the complaint.

17 THE COURT: I've got it. I'm obviously not making a
18 decision as to whether I should consider that in connection
19 with the motion for the judgment on the pleadings or not. I'm
20 not making any decisions right now. But that information is
21 helpful for me as I review the motions. It's been very well
22 argued. I'm going to take it under advisement. Thank you,
23 all.

24 * * *

25