

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CA FLORIDA HOLDINGS, LLC,
Publisher of *THE PALM BEACH POST*,

CASE NO.: 50-2019-CA-014681-XXXX-MB

DIVISION: AG

Plaintiff,

v.

DAVE ARONBERG, as State Attorney of
Palm Beach County, Florida; SHARON R.
BOCK, as Clerk and Comptroller of Palm
Beach County, Florida,

Defendants.

**PLAINTIFF CA HOLDINGS, LLC'S RESPONSE TO DEFENDANT STATE ATTORNEY
DAVE ARONBERG'S REQUEST TO SCHEDULE HIS PREMATURE
FLA. STAT. SECTION 57.105 MOTION
AFTER HIS LATER FILED SUMMARY JUDGMENT MOTION**

Plaintiff, CA HOLDINGS, LLC ("*The Palm Beach Post*") for the reasons stated below requests that this Court schedule for hearing State Attorney Dave Aronberg's (the "State Attorney") Fla. Stat. section 57.105 motion before his motion for summary judgment:

I. INTRODUCTION

The State Attorney has admitted that his pending Fla. Stat. section 57.105 motion is "premature," and should not be set for a hearing. Rather than withdraw his sanctions motion without prejudice, the State Attorney seeks a Case Management Conference to have the court impose a hearing date upon *The Palm Beach Post* to hear his later filed summary judgment motion while his first filed sanction motion remains unscheduled and unheard. This Court should reject the State Attorney's misuse of section 57.105 by filing a premature motion and then letting it sit on the docket without setting it for hearing and refusing to do so. *The Palm Beach Post* requests a hearing be set on

the State Attorney's premature sanctions motion, and after it is disposed of, the parties can cooperate and schedule the State Attorney's summary judgment motion.

II. THE PURPOSE OF THE SUIT

1. The *Palm Beach Post* is the largest and most prominent newspaper in Palm Beach County, Florida. It has extensively reported upon the sordid abuse committed by the late Jeffrey Epstein and has justifiably questioned prior State Attorney Barry Krischer's decision to disregard evidence of Epstein's multiple sexual abuse of girls and to use a grand jury to indict Epstein for only one misdemeanor count of soliciting a prostitute.

2. The *Palm Beach Post* seeks, as is its First Amendment right, to gather information and inform the public about Barry Krischer's actions as State Attorney and why Epstein received lenient treatment.

3. The *Palm Beach Post* named the Clerk of the Court and the State Attorney in their official capacities. The Clerk is the custodian of the Epstein grand jury records and the State Attorney has authority over the grand jury and has the legal right to obtain the grand jury materials from the Clerk.

III. THE STATE ATTORNEY IMPROPERLY SEEKS SANCTIONS

4. Not merely interested in asserting grand jury secrecy in opposition to *The Palm Beach Post's* suit, the State Attorney wrongly seeks to punish it and its counsel by seeking Fla. Stat. section 57.105 sanctions.

5. The State Attorney's motion is flawed and should be denied. *The Palm Beach Post's* Memorandum of Law in Opposition to the State Attorney's motion is attached hereto as Ex. "A".

6. The State Attorney's sanctions motion is based upon a misinterpretation of the June 8, 2020 Order of Chief Judge Marx which held that *The Palm Beach Post* lacked standing to assert a

claim solely under Fla. Stat. section 905.27.

7. The June 8, 2020 Order does not address the interplay between the First Amendment and Fla. Stat. section 905.27, as Chief Judge Marx solely focused upon section 905.27. The constitutional issues remain unresolved.

8. After filing his 57.105 motion, the State Attorney moved for summary judgment on the remaining declaratory judgment count.

IV. THE STATE ATTORNEY HAS TIED HIMSELF IN HIS OWN PROCEDURAL KNOT

9. In his over-eagerness to sanction *The Palm Beach Post* and deter further inquiries into the Epstein scandal, the State Attorney filed his sanctions motion before filing his motion for summary judgment.

10. *The Palm Beach Post* repeatedly sought to schedule the sanction motion, but the State Attorney's counsel refuses to do so.

11. On September 18, 2020, the State Attorney's counsel responded that he would not cooperate in scheduling the sanctions motion until after this Court disposed of his later filed motion for summary judgment. See, Ex. "B" attached hereto for a copy of Douglas Wyler's September 18, 2020 email to *The Palm Beach Post's* counsel.

12. In trying to justify his refusal to schedule his own sanctions motion, the State Attorney's counsel admitted that his sanctions motion is "premature" and should not be scheduled for a hearing.

13. Despite this shocking admission, the State Attorney refuses to withdraw his sanctions motion. See, Ex. "C" attached hereto for the exchange of additional emails.

14. To extricate himself from his self-inflicted problem, the State Attorney seeks a judicial conference to schedule his summary judgment motion while letting his "premature" and defective

sanctions motion remain unscheduled.

15. This Court should refuse to solve the State Attorney's self-created dilemma. It should not schedule a hearing on his motion for summary judgment unless he withdraws his sanctions motion and if he does not do so, then a hearing should first be set for his sanctions motion.

16. The sanctions motion should be scheduled for the daily motion calendar as it is admittedly "premature" and improper.

17. *The Palm Beach Post* and its counsel should not have an improper sanctions motion hanging over their heads.

18. Premature motions should not be filed. This is so where, as here, the motion seeks sanctions against media parties and their counsel for their legitimate assertion of First Amendment rights.

WHEREFORE, *The Palm Beach Post* requests that the State Attorney's motion for summary judgment not be scheduled until the State Attorney either withdraws his premature sanctions motion or a hearing on his sanctions motion be scheduled before the hearing on his motion for summary judgment, and further requests that the Court grant such other relief as it deems just and proper.

Respectfully submitted,

GREENBERG TRAURIG, P.A.

*Attorneys for CA Florida Holdings, LLC, Publisher
of The Palm Beach Post*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2020, a true and correct copy of the foregoing has been filed with the Clerk of the Court using the State of Florida e-filing system, which will send a notice of electronic service for all parties of record herein

/s/ Stephen A. Mendelsohn

STEPHEN A. MENDELSON

ACTIVE 52726099v4

NOT A CERTIFIED COPY

EXHIBIT “A”

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

CA FLORIDA HOLDINGS, LLC,
Publisher of *THE PALM BEACH POST*,

CASE NO.: 50-2019-CA-014681-XXXX-MB

DIVISION: AG

Plaintiff,

v.

DAVE ARONBERG, as State Attorney of
Palm Beach County, Florida; SHARON R.
BOCK, as Clerk and Comptroller of Palm
Beach County, Florida,

Defendants.

**MEMORANDUM OF LAW OF PLAINTIFF CA HOLDINGS, LLC IN OPPOSITION
TO THE STATE ATTORNEY'S FLA. STAT. SECTION 57.105 MOTION**

Plaintiff, CA Florida Holdings, LLC, publisher of the largest and most prominent newspaper in Palm Beach County, Florida, *The Palm Beach Post*, submits this Memorandum of Law In Opposition to the State Attorney's Fla. Stat. § 57.105 Motion, and for the reasons set forth below, the State Attorney's Motion should be denied, with prejudice.

I. THE PURPOSE OF *THE PALM BEACH POST*'S SUIT

As extensively detailed in its Amended Complaint, the criminal prosecution of the late Jeffrey Epstein by former State Attorney Barry Krischer, Palm Beach Circuit Court Case No. 50-2008-CF-AXXXMB, raises serious and troubling questions as to whether it was properly conducted. The Amended Complaint provides numerous examples of the prior State Attorney's "highly unusual" – in the words of the former Town of Palm Beach Police Chief – treatment of the numerous complaints of sexual misconduct and assault made against Epstein, including but not limited to the former State Attorney's refusal to cooperate with the investigation of the Town of Palm Beach Police Department, his focus on only one underage sexual assault victim though there were other known victims, his use

of information provided by Epstein's defense team to undermine the State's witness and his approval of a plea agreement and sentence that enabled Epstein to spend his days on furlough where he likely committed additional sexual crimes. While much of the Epstein saga is a matter of public record, the public still does not know how former State Attorney Krischer used the grand jury process – and the secrecy that comes with it – to shield Epstein and his equally powerful and corrupt accomplices from the public and justify Epstein's lenient treatment. Access to the Epstein grand jury materials will reveal how the instrumentality of the grand jury was used in this case, which is unquestionably a matter of vital public concern.

II. THE STATE ATTORNEY'S 57.105 MOTION IMPROPERLY SEEKS TO DETER THE PALM BEACH POST FROM SERVING THE PUBLIC INTEREST

In moving pursuant to Fla. Stat. § 57.105 against *The Palm Beach Post* and its counsel, the current State Attorney improperly seeks to deter further media inquiry into the Epstein grand jury proceeding. Whether the current State Attorney is motivated by animus against *The Palm Beach Post* or is trying to protect grand jury secrecy is not important. What is important, and troubling, is that the State Attorney does not want to litigate the novel and important public issues on their merits, but instead is using the threat of sanctions to suppress *The Palm Beach Post's* investigative reporting.

The State Attorney has answered the Amended Complaint, and disclaimed possession of the Epstein grand jury materials, he has not moved for summary judgment on the remaining claim; Count I – Declaratory Judgment. Further, the State Attorney has now shown – and presumably cannot show – that he lacks the authority under Chapter 905, Fla. Stats., to request and obtain access to the Epstein grand jury materials from the Clerk of the Court (the "Clerk").

In response to *The Palm Beach Post*'s Request to Produce, the Clerk's office recently provided internal email communications, but none were relevant to the Request. According to its officials, the Clerk's office does not maintain logs or registers and that it is impossible to determine whether the State Attorney's office sought or obtained access to the Epstein grand jury materials during or after its Epstein prosecution. Given this uncertainty, *The Palm Beach Post* will serve discovery demands upon the State Attorney's office to determine whether it accessed or exercised control over the grand jury materials.

Also, the Clerk, who admittedly has both possession and control of the Epstein grand jury materials, has not followed the State Attorney's lead in seeking to sanction *The Palm Beach Post*: the Clerk has neither provided the 21-day safe harbor notice contained in Section 57.105 nor has she moved for sanctions. The Clerk's decision supports the inference that the State Attorney is using the threat of sanctions to avoid litigating the case on its merits.

III. THE STATE ATTORNEY MISREPRESENTS THE COURT'S JUNE 8, 2020 ORDER

In its bare-bones Section 57.105 motion, the State Attorney's main argument is that this Court's June 8, 2020 Order Granting Defendant's Motions to Dismiss Count II of Plaintiff's First Amended Complaint with Prejudice (the "Order") held that all *The Palm Beach Post*'s claims are without any merit. The Order does no such thing.

Though the parties' motion papers and the oral argument on June 2, 2020 covered a range of complex statutory issues, the Order addresses only one—whether Fla. Stat. § 905.27 creates a private right of action. This issue was not the principal focus of either the State Attorney's or the Clerk's motions to dismiss Count II. Instead, they primarily asserted that *The Palm Beach Post* lacked standing under section 905.27 to seek grand jury materials "in furtherance of justice." The State

Attorney and the Clerk argued that the statute prohibited the use of grand jury materials except for limited purposes in a civil or criminal proceeding in which the movant is a party. Because, according to the State Attorney and the Clerk, *The Palm Beach Post* did not intend to use the Epstein grand jury materials in a civil case in which it was a party, nor in a criminal case, the State Attorney and the Clerk asserted it lacked standing.

The Palm Beach Post, as set forth in its Opposition to Defendant Dave Aronberg, As State Attorney of Palm Beach County, Florida's Motion to Dismiss Count II of the First Amended Complaint ("Plaintiff's Opposition"), views § 905.27 as encompassing three possible scenarios—(1) use by a party in her civil case; (2) use by a party in her criminal proceeding; or (3) use by the media as a representative of the public "in furtherance of justice" as recognized by the First Amendment to the U.S. Constitution and the Florida Constitution.

This Court, in its Order, did not address these arguments, though it did acknowledge during oral argument that *The Palm Beach Post* had standing—page 8 of the transcript. Rather, the Order focused solely on whether § 905.27 creates an implied private right of action and held that it did not. *See* Order at 3. That ruling did not interpret – no less apply – the statute's "in furtherance of justice" exception to grand jury secrecy to the Epstein case. Given this Court's narrow ruling, the State Attorney wrongly claims that the Court determined that the "justice" provision of § 905.27 has been adjudicated against *The Palm Beach Post*, and that Count I is frivolous.

IV. THE ISSUES RAISED IN COUNT II ARE NOVEL AND COMPLEX

As set forth above, this Court limited its inquiry to "whether a cause of action under section 905.27 should be judicially implied. [citation omitted]." *See* Order at 3. In determining that the Florida legislature did not intend to create a statutory cause of action and remedy, this Court addressed a novel and complex issue. As such, section 57.105, on its face, is not implicated.

Section 57.105(1)(a)-(b) provides that a court shall award fees to the prevailing party if:

the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts.

Section 57.105(3)(a) further provides that monetary sanctions shall *not* be awarded

if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law *or the establishment of new law*, as it applied to the material facts, with a reasonable expectation of success. [Emphasis added.]

The Florida Supreme Court has held that attorneys' fees should not be awarded unless there is "a total or absolute lack of a justiciable issue, which is tantamount to a finding that the action is frivolous ... and so clearly devoid of merit both on the facts and law as to be completely untenable." *Muckenfuss v. Deltona Corp.*, 508 So. 2d 340, 341 (Fla. 1987) (quoting *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982)). Where an issue is novel and complex, sanctions under section 57.105(a) may not be imposed. *Grove Key Marina, LLC v. Casamayor*, 166 So. 3d 879 (Fla. 3d DCA 2015).

It cannot be contested that the Order rejecting a section 905.27 implied private right of action for the media is a case of first impression; indeed, neither this Court nor the State Attorney and the Clerk cite to any case that previously resolved this issue.

In contrast, *The Palm Beach Post* presented various reasoned arguments why section 905.27 creates a private right of action in favor of the media on both constitutional and statutory grounds. See Plaintiff's Opposition at 10-15. *The Palm Beach Post* first analyzed the Florida Statutes themselves and U.S. Supreme Court case law, both of which confirm that Florida's grand jury secrecy laws are not absolute. See Plaintiff's Opposition at 10-11; *Butterworth v. Smith*, 494 U.S. 624, 626 (1990) (section 905.27 unconstitutional to the extent it prohibits grand jury witnesses from disclosing

their own testimony).

Florida has also held that the media is entitled to know of grand jury reports that find public corruption, notwithstanding section 905.27 secrecy. *See Miami Herald Pub. Co. v. Marko*, 352 So. 2d 518 (Fla. 1977). In *Marko*, the Florida Supreme Court recognized that the media plays a vital role in informing the public of the misdeeds of public servants and statutory grand jury secrecy cannot outweigh the public's right to be informed through its constitutionally protected news reporting.

Here, *The Palm Beach Post* alleges overwhelming facts that raise serious questions as to why Epstein was prosecuted and sentenced in such a highly unusual and lenient manner. At the heart of this issue is the public's right to know, through the media, whether the attorneys then working the case at the State Attorney's Office fulfilled their public duties or acted either corruptly or recklessly by misusing the grand jury process.

In this regard, *The Palm Beach Post* analyzed section 905.27 and presented a well-reasoned argument supporting the existence of a private right of action, it properly focused on the interplay between section 905.27's allowance for disclosure "in furtherance of justice", on the one hand, with the public's right to know through the media under the First Amendment and the Florida Constitution.

This Court did not expressly address *The Palm Beach Post's* reliance on a combined constitutional and statutory basis for a section 905.27 private right of action. Instead, it focused exclusively upon section 905.27 and in holding that the "in furtherance of justice" exception is constrained by the statute's other secrecy provisions.

The State Attorney's section 57.105 motion also ignores the constitutional role of the media in informing the public. The fallacy of a purely statutory analysis, without consideration of *The Palm Beach Post's* constitutional rights and obligations in conjunction with section 905.27, is that justice can never be furthered, as the statute authorizes, unless the media is able to provide facts to the public

as to whether its officials may have violated their oaths.

The Palm Beach Post acted in good faith and presented reasoned bases to justify the interplay between the federal and state constitutions and section 905.27. It properly sought to enforce the rights of the media in the Epstein case through the application of complex constitutional and statutory arguments to create new law. Though the Court dismissed one of *The Palm Beach Post*'s two claims, such partial dismissal cannot support the State Attorney's section 57.105 motion.

V. THIS COURT'S LIMITED ORDER DISMISSING COUNT II DID NOT RESOLVE COUNT I

The State Attorney's threadbare section 57.105 motion assumes that this Court's Order extinguishes Count I – Declaratory Judgment, and renders Count I frivolous. The State Attorney is demonstrably wrong.

Count II alleges that *The Palm Beach Post* has constitutional and statutory standing for it to overcome grand jury secrecy provisions "in furtherance of justice." Count I, in contrast, does not allege a section 905.27 private right of action. Instead, Count I seeks a declaration that the U.S. Constitution's First Amendment and the Florida Constitution's analogous provisions, along with section 905.27, provide ample grounds for this Court to direct the release of the Epstein grand jury materials to *The Palm Beach Post*, or require the Court to conduct an *in camera* examination of the same, to balance the public's right to know through a free media with Florida's qualified statutory interest in grand jury secrecy.

These issues have yet to be addressed by a dispositive motion or by either Defendant. The State Attorney's motion to dismiss Count II focused exclusively on section 905.27 and did not acknowledge nor address any constitutional issues. The same is true of the Clerk's motion to dismiss. Concomitantly, as stated above, the Order was limited to the four corners of section 905.27, and expressly did not consider *The Palm Beach Post*'s constitutional arguments.

VI. THE STATE ATTORNEY IS A PROPER PARTY

The State Attorney also argues that it does not possess the Epstein grand jury materials, and based upon this unsworn claim, sanctions are also justified. Again, the State Attorney is incorrect, as there is no factual or legal basis to impose sanctions upon its unsupported allegation.

While the State Attorney alleges his office does not currently have physical possession of the Epstein grand jury materials, he has argued, relying on section 905.27, that the Clerk should not produce them. By taking a position against disclosure, the State Attorney has, in effect, asserted his right to the secrecy of the Epstein grand jury materials. Stated another way, the State Attorney claims the statutory right to *prevent* access to the Epstein grand jury materials; the inverse of such a claimed right is that he has the right to *provide* access to the same materials.

The State Attorney's position actually supports *The Palm Beach Post*. He was not named as solely a custodian of the grand jury records. Rather, he is a defendant in his official capacity as his office has "as its *primary* interest the protection of its grand jury system." [Italics in original.] *In re Grand Jury Proceedings*, 832 F. 2d 554, 559 (11th Cir. 1987). In that case, the federal government petitioned a Florida State Attorney to turn over state grand jury transcripts. In opposition, the Broward State Attorney argued against their release citing to section 905.27. Later, a federal grand jury served a subpoena upon the same State Attorney seeking grand jury transcripts. The State Attorney advised the federal court that he would produce the transcripts, thereby demonstrating that whether or not he has physical possession, he had legal authority to obtain and deliver them pursuant to the subpoena. For these same reasons, the State Attorney, in his official capacity, is a necessary party.

Also, assuming the State Attorney does not have physical possession, Florida law does not prohibit his office from requesting Epstein grand jury materials from the Clerk. Indeed, as the State Attorney is well aware, Chapter 905, Fla. Stats. does not bar any State Attorney from accessing grand jury materials, even after a defendant has been convicted and sentenced.

VII. THE STATE ATTORNEY'S MOTION IS ADMITTEDLY PREMATURE

The State Attorney also admits that his sanctions motion – which is based on the motion to dismiss proceedings and resulting Order – is “premature”. *See* Exh. “A” attached hereto for a copy of Douglas Wyler’s September 18, 2020 email. As set forth above, those proceedings and the Order were focused on *The Palm Beach Post*’s statutory claim, not the declaratory relief claim. The State Attorney acknowledges that his motion is not ripe because it first requires this Court’s resolution of his later-filed summary judgment motion. Unlike his motion to dismiss, his summary judgment motion addresses *The Palm Beach Post*’s remaining declaratory action claim for relief.

The State Attorney’s admission demonstrates that his motion is contrary to the express language of section 57.105. As stated above, section 57.105(1)(a)-(b) examines a claim or defense “when initially presented to the court”. Because the merits of the State Attorney’s sanctions motion admittedly depend upon this Court’s resolution of his yet-unscheduled summary judgment motion, the State Attorney’s sanctions motion is premature. *Reznek v. Chase Home Fin., LLC*, 152 So. 3d 793 (Fla. 3d DCA 2014). As a premature motion, it should be denied.

WHEREFORE, *The Palm Beach Post* respectfully requests that the State Attorney’s Fla. Stat. section 57.105 motion be denied, with prejudice, and that the Court grant such other relief it deems just and proper.

Respectfully submitted,

GREENBERG TRAUIG, P.A.

*Attorneys for CA Florida Holdings, LLC, Publisher
of The Palm Beach Post*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2020, a true and correct copy of the foregoing has been filed with the Clerk of the Court using the State of Florida e-filing system, which will send a notice of electronic service for all parties of record herein

/s/ Stephen A. Mendelsohn
STEPHEN A. MENDELSON

EXHIBIT “A”

From: Douglas Wyler
To: Mendelsohn, Stephen A. (Shld-FTL-LT)
Subject: Re: PALM BEACH POST (Epstein)
Date: Friday, September 18, 2020 1:11:43 PM

Mr. Mendelsohn:

Again, we will not withdraw the motion. Please let me know when you are available for the case management conference or I will unilaterally schedule the hearing.

Doug Wyler, Esq.
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From: <MendelsohnS@gtlaw.com>
Date: Friday, September 18, 2020 at 1:04 PM
To: "Douglas Wyler, Esq." <doug.wyler@comcast.net>
Cc: <BoyajianN@gtlaw.com>, <grygielm@gtlaw.com>
Subject: RE: PALM BEACH POST (Epstein)

Mr. Wyler, we appreciate your candor in admitting your 57.105 motion is premature.

You must withdraw it as the motion has no basis, which you acknowledge, because the court has yet to address the merits of the dispute.

Please do so without further delay.

Thank you.

From: Douglas Wyler <doug.wyler@comcast.net>

Sent: Friday, September 18, 2020 11:54 AM

To: Mendelsohn, Stephen A. (Shld-FTL-LT) <MendelsohnS@gtlaw.com>

Cc: Boyajian, Nina D. (Shld-LA-LT) <BoyajianN@gtlaw.com>; Grygiel, Michael J. (Shld-ALB-LT) <grygielm@gtlaw.com>

Subject: Re: PALM BEACH POST (Epstein)

EXTERNAL TO GT

Mr. Mendelsohn:

I spoke with my client we will not withdraw our motion for attorneys' fees. Again, we insist that the motion for summary judgment be heard first as it would be premature to have an attorney fee hearing when there is no prevailing party and no substantive hearings held since the motion for fees was filed. Being that we are unable to agree on the order of the motions to be heard, I am filing the attached motion to set case management conference. Please see the attached available hearing times for this motion and let me know what works best for you so we can resolve this matter.

Sincerely,

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From: <MendelsohnS@gtlaw.com>

Date: Wednesday, September 16, 2020 at 10:04 AM

To: "Douglas Wyler, Esq." <doug.wyler@comcast.net>

Cc: <BoyajianN@gtlaw.com>, <grygielm@gtlaw.com>

Subject: PALM BEACH POST (Epstein)

Mr. Wyler, please let us know if the State Attorney will withdraw its sanctions motion without prejudice.

Thank you.

If you are not an intended recipient of confidential and privileged information in this email, please delete it, notify us immediately at postmaster@gtlaw.com, and do not use or disseminate the information.

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<p style="text-align: center;">IN THE CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA CASE NO.: 50-2019-CA-014681 CIRCUIT CIVIL DIVISION: "AG" CA FLORIDA HOLDINGS LLC PUBLISHER OF THE PALM BEACH POST, Plaintiff/Petitioner -vs- DAVE ARONBERG, SHARON R. BOCK, Defendant/Respondents. _____ HEARING BEFORE THE HONORABLE KRISTA MARX (ZOOM CONFERENCE) Wednesday, June 3, 2020 10:08 a.m. - 10:28 a.m. REMOTE ZOOM CONFERENCE Port Saint Lucie, Florida Stenographically Reported By: SONJA M. REED Court Reporter</p>	<p style="text-align: right;">Page 1</p> <p>1 PROCEEDINGS 2 ***** 3 THE COURT: We are here today for a very 4 limited purpose. I'm sure the attorneys are aware of 5 that, but I just don't want there to be any 6 confusion. We are here on Defendant Dave Aronberg 7 and Defendant Sharon Bock for the Comptroller and the 8 State Attorney's motion to dismiss Count II. 9 You're all acutely aware as the lawyers that 10 this is a question of law. So we're not going to be 11 diving into facts and the Court will not be deciding 12 the merits of this motion this morning. We are 13 simply here for the sole purpose of that motion to 14 dismiss. So I just wanted to make sure that we all 15 stay on track and we're all on that same page. 16 So, Ms. Boyagian, I'll send it to you first, 17 Ma'am. I -- of course, we all know that the Law 101, 18 I must look at the four corners of the motion, which 19 alleges that the State Attorney, David Aronberg, and 20 the clerk and comptroller, Sharon Bock, actually have 21 custody and control of these grand jury proceeding. 22 Whether that is true or not is not for this 23 court to determine because I'm looking simply at the 24 four corners of the complaint. But, not for nothing, 25 I think we all know that they don't have control and</p>
<p>1 APPEARANCES: 2 3 On behalf of the Plaintiff/Petitioner: 4 GREENBERG TRAUERIG, P.A. 5 1840 Century Park East 6 Suite 1900 7 Los Angeles, California 90067 8 310.586.7700 9 boyajian@gtlaw.com 10 BY: NINA D. BOYAGIAN, ESQUIRE 11 12 On behalf of the Defendant/Respondent: 13 JACOB, SCHOLZ & WYLER, LLC 14 961687 Gateway Boulevard 15 Suite 2011 16 Fernandina Beach, Florida 32034 17 904.261.3693 18 doug.wyler@comcast.net 19 BY: DOUGLAS A. WYLER, ESQUIRE 20 21 On behalf of the Defendant/Respondent: 22 CLERK & COMPTROLLER, PALM BEACH COUNTY 23 P.O. Box 229 24 West Palm Beach, Florida 33401 25 561.355.2983 nfingerhut@mypalmbeachclerk.com BY: NICOLE R. FINGERHUT, ESQUIRE - - -</p>	<p style="text-align: right;">Page 2</p> <p>1 custody of the records. But I'm going to assume that 2 it's correct because that's what has been alleged. 3 So what I first want to hear from is the 4 attorney for Florida Holdings with regard to, 5 assuming arguendo, that Florida Statute 905.27 does 6 create a cause of action, what relief is it that 7 you're seeking from -- in Count II, specifically. 8 Not the dec action. We're not here on that today -- 9 what is it you hope to get, a judgment? 10 MS. BOYAGIAN: Thank you, your Honor. Good 11 morning, and thank you for the privilege of appearing 12 before this court. 13 The relief we are seeking is disclosure of the 14 grand jury records, pursuant to the Furtherance of 15 Justice Exception to 905.27. And under the First 16 Amendment. 17 The press, as your Honor is aware, has a right 18 of access under the First Amendment as a surrogate of 19 the public -- 20 THE COURT: Let me just stop you for a minute. 21 I'd like you to answer my specific question. 22 So I am not particularly convinced -- and I'd 23 like for you to address that. So we're not going to 24 dive into facts or the press's standing because 25 that's not something we're here to discuss today.</p> <p style="text-align: right;">Page 4</p>

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1 And I have read the voluminous paperwork --
2 I've received paperwork as -- and -- five-minute ago
3 from some of the other parties. But I deeply
4 appreciate the fact that you sent this to me so much
5 in advance and I have been able to spend some time
6 with, as I said, the voluminous paperwork that was
7 provided.
8 But as you know, Ma'am, we are here for such an
9 extremely limited issue today, and that their motion
10 to dismiss where they state "you're suing the wrong
11 people"; that the court has these records.
12 And so, more importantly, I want you to address
13 whether Section 905.27 gives you a private cause of
14 action against the state attorney and the clerk.
15 Again, I'm going to assume the facts are true
16 that are asserted in the motion. Whether they are or
17 not -- because I think we can all agree we're not for
18 sure if they ever -- that the state attorney doesn't
19 have these records. So what is it you're seeking in
20 Count II -- not the dec action. I know you want the
21 records. I've got that. But in Count II,
22 specifically, what do you -- what's the relief you're
23 seeking and, more importantly, how under this statute
24 do you get to assert a private action -- a private
25 cause of action against the state attorney and the

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1 clerk?
2 MS. BOYAGIAN: Your Honor, we are aware, of
3 course, that there is no expressed private right of
4 action, 905.27. But that does not end the inquiry.
5 As the Florida Supreme Court stated:
6 "Where a statute like 905.27
7 forbids an act which is to Plaintiff's
8 injury, the party injured should have
9 an action."
10 And that's the Smith Piezo case in the volume
11 of materials that we sent you.
12 There's no question here that the denial of the
13 FIRST AMENDMENT right to the press is an injury which
14 gives rise to a right of action.
15 Stated another way, looking at the analysis
16 that the Fischer Metcalf Court looked at, there are
17 three factors in determining whether there is a
18 private right of action where a statute does not
19 expressly provide for one.
20 One is whether the Plaintiff is part of the
21 class for which the statute is intended to protect;
22 second is a legislative history; and the third is the
23 underlying purposes of the statutory scheme.
24 The first factor I already addressed, that the
25 press is part of the class that the statute is

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1 intended to benefit, being the surrogate of the
2 public and exercising its first amendment right.
3 The second issue of legislative history and the
4 purpose -- statutory purpose are somewhat related.
5 We were unable to find much legislative history on
6 this issue of a private right of action under the
7 statute.
8 There is nothing that says we intend to create
9 a private action, but there's certainly nothing that
10 says we do not want to create a private right of
11 action.
12 What we do have is that in 1994, the same time
13 that 905.27 was reenacted, a statute that pertains to
14 the secrecy of State Grand Jury -- statewide grand
15 juries was also enacted. That provision, which is
16 905.395, has no exceptions for -- for revealing these
17 records. By contrast, the legislature intentionally
18 enacted 905.27 with the Furtherance of Justice
19 Exception.
20 If the public through the press can't bring a
21 private right of action to enforce that exception or
22 to seek relief under that exception, that
23 intentionally placed exception of furthering justice
24 is essentially rendered hollow --
25 (Speaking simultaneously.)

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1 THE COURT: Okay. Pause for a minute.
2 I don't think anybody is saying that there
3 isn't a cause of action or that the press doesn't
4 have standing. That's not what I'm asking you. I'm
5 asking you, how are the clerk and the state attorney
6 the proper defendants?
7 So, you know, nowhere have I said there isn't a
8 cause of action. Clearly there is. I'm puzzled by
9 the procedural posturing of this case naming the
10 state attorney.
11 And, you know, I'm further stymied by the fact
12 that you allege in your complaint that they have --
13 particularly David Aronberg the State Attorney --
14 that he has these records.
15 But I'm going to assume that's true. So I'm
16 not telling you, you don't have a cause of action.
17 I'm just saying, okay, let's run this all the way
18 out. Let's say you win and you get a judgment
19 against the State Attorney Dave Aronberg.
20 What's he supposed to do with it? He can't
21 release the grand jury testimony. He has no
22 authority whatsoever to do that.
23 MS. BOYAGIAN: Well, your Honor, as you stated,
24 this is a motion to dismiss stage, and we are
25 entitled to discovery on the issue of possession,

<p style="text-align: right;">Page 9</p> <p>1 custody, and control. My understanding is that the 2 state attorney has asserted that he does not have 3 possession. It's not my understanding that the clerk 4 has taken that position. So the clerk may indeed be 5 the -- someone who does have possession, custody, and 6 control. 7 In any event, we would submit that the state 8 attorney, even it does not have actual possession at 9 this time, it might be able to have the power to 10 control or direct the entity or persons who do have 11 control and possession to release those -- to effect 12 the judgment. 13 THE COURT: So let me ask you this: So the 14 clerk is the keeper of the record. But even if you 15 got a judgment against her -- let's say you asserted 16 this cause of action and let's say you win and you 17 get a judgment against the clerk. The clerk cannot 18 release grand jury testimony to you. Only the court 19 can. 20 So really -- all I'm saying to you is I do not 21 understand the way this case was filed or why these 22 are the defendants because it's impossible for them 23 to perform. 24 I mean, I'm going to assume, based on your 25 motion, again, that they do have the records. But we</p>	<p style="text-align: right;">Page 11</p> <p>1 give you what they don't have. 2 So -- I mean, it's as simply as this: Are 3 you -- you just want to engage in some discovery for 4 them to absolutely assert, particularly, the state 5 attorney, "I don't have these records"; look to the 6 rules that say the moment the grand jury's over, 7 they're sealed and they're turned over and they 8 cannot be released without court order? 9 So I'm not addressing the merits or whether you 10 have an exception or you're able to argue that 11 there's an exception in the furtherance of justice. 12 We're not getting there today. I'm simply saying why 13 should these two entities have to defend this lawsuit 14 when even down the road if they win they can't give 15 you what they don't have? 16 MS. BOYAGIAN: As your Honor stated, I'm not 17 sure that's the case with the clerk. That was not in 18 their -- that issue was not stated in their papers. 19 THE COURT: Let me ask you this, then: Do you 20 think, if you got a judgment and I or the court 21 doesn't make the determination that the grand jury 22 records should be released, that the clerk would be 23 able to perform? 24 Would they be able to say "here you go"? I 25 mean, could the clerk just make that unilateral</p>
<p style="text-align: right;">Page 10</p> <p>1 all know -- everyone in the room knows they do not -- 2 that only the court -- they're -- they're with a 3 court interpreting. And only the court can release 4 the records. 5 So if you get a judgment against either the 6 state attorney or the clerk, they cannot -- I mean, I 7 guess what you're saying to me is, well, we want to 8 do discovery and we want them to say unequivocally "I 9 have these records" or "I don't have them." 10 And -- I mean, the law is abundantly clear. 11 You cannot do it without a court determining whether, 12 in the furtherance of justice, the release is 13 appropriate. 14 MS. BOYAGIAN: And that is a determination 15 we're asking your Honor to make, and we're asking for 16 an order from your court. 17 THE COURT: When we get to the merits of the 18 case, sure it is. But, again, you're asking me to 19 make that determination and for me to make a 20 determination of whether the grand jury records 21 should be released. And the only thing we're here 22 today about is why should the clerk and the state 23 attorney have to defend a civil action when it's a 24 possibility of performance? They -- even if you were 25 to win and get a judgment against them, they cannot</p>	<p style="text-align: right;">Page 12</p> <p>1 decision "I'm going to release the records, sealed 2 confidential records"? 3 Does she have any authority to do that? 4 MS. BOYAGIAN: My understanding, your Honor, is 5 that 905.27 requires a court order before the records 6 are unsealed. 7 THE COURT: Exactly. Exactly. 8 All right. Let me hear from Mr. Aronberg's 9 attorney, Mr. Wylar. 10 MR. WYLER: Thank you, your Honor. May it 11 please the Court -- 12 THE COURT: Good morning, Sir. 13 MR. WYLER: Good morning. 14 Your Honor, I just wanted to let you know that 15 I spoke with counsel for the clerk, Ms. Fingerhut, a 16 couple of days before this hearing, and we decided 17 that I would just make the presentation for both of 18 of us, being that our arguments overlap except for 19 the fact of who this claim -- whether they have the 20 records or not, which, of course, we've said we don't 21 have custody of the records. 22 But, nonetheless, our arguments overlap. The 23 Plaintiff is attempting to assert a cause of action 24 under Section 905.27. That statute settled testimony 25 not to be disclosed exceptions. So it's just</p>

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1 explaining exceptions to the disclosure of the grand
2 jury testimony.
3 Our position is that it doesn't set forth a
4 cause of action and that it's impossible for us to
5 perform what they're asking.
6 I know you said you didn't really want to get
7 into the Furthering Justice Exception, but I know
8 that's what they're using as their basis to get to
9 these. But it's our position that the clear
10 unambiguous statutory language, it shows that this
11 disclosure only applies to a civil or criminal case,
12 and that within that civil or criminal --
13 (Speaking simultaneously.)
14 THE COURT: Again, sir -- I'm sorry. As I told
15 Plaintiff's counsel --
16 MR. WYLER: -- can only be used in the defense
17 for --
18 THE COURT: Okay. We're not there. We're not
19 discussing the merits of the case, and -- I'm not
20 ready to cross that bridge. I'm here for a very,
21 very limited hearing today.
22 So just as I stopped Plaintiff's counsel from
23 arguing the merits of the case and whether or not the
24 Furtherance of Justice Exception will apply in this
25 instance, we're not even there yet.

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1 I'm only here for the purpose of determining
2 whether or not the clerk and state attorney should be
3 dismissed. And I am bound by the four corners of the
4 document, which assert that you do have control and
5 custody over it.
6 So if you'll fashion your argument with regard
7 to that limited purpose, I would appreciate it.
8 MR. WYLER: No problem, your Honor. I
9 apologize.
10 Within the four corners of their complaint, our
11 position is that they failed to state a cause of
12 action under 905.27. It does not provide for -- it
13 doesn't list that there's no element that they have
14 adequately pled to assert a cause of action under
15 that. There's -- and the only thing they're asking
16 for is records that we don't have.
17 There's really not much more to it, your Honor.
18 And we would ask that you would grant our motion to
19 dismiss for failure to state a cause of action.
20 THE COURT: Okay. Ms. Fingerhut, are you still
21 on the phone?
22 MS. FINGERHUT: Yes, your Honor.
23 THE COURT: Is there anything you wish to add?
24 MS. FINGERHUT: We agree with the state
25

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1 attorney's position, and we also agree with what the
2 Court has said, that the plain language of the
3 statute, a cause of action doesn't exist. And we
4 really cannot -- we'll be defending something without
5 the four corners. We're simply involved in this
6 action because the clerk is the custodian of the
7 records.
8 THE COURT: Okay. Thank you, Ma'am.
9 Ms. Boyagian, back to you.
10 MS. BOYAGIAN: Your Honor, I'd like to note
11 that in the Butterworth case in which the Supreme
12 Court limited the application 905.27 by saying that a
13 witness can reveal her own testimony and prohibiting
14 that they violate the First Amendment --
15 THE COURT: Say that again, please.
16 MS. BOYAGIAN: In the Supreme Court case, the
17 Butterworth case, in which the Supreme Court ruled
18 that 905.27 can't restrict a Grand Jury witness from
19 revealing her own testimony, that would be a
20 violation of First Amendment, in that case, the state
21 attorney was, in fact, a party.
22 THE COURT: Well, I assume the state attorney
23 that was present -- I mean, I don't find that that's
24 close to what we're talking about here, and that's
25 whether or not -- I mean, as we know, this was in

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1 2006. Certainly Dave Aronberg wasn't even the state
2 attorney then. But this is about the release of
3 records.
4 I want to give you ample opportunity -- and
5 again, I sincerely appreciate that all of the case
6 law and the way that it was presented to the Court in
7 such a timely fashion. I really do. And I did spend
8 some time with it. But I want to give you whatever
9 opportunity you want to take to convince me that it
10 is in -- as to Count 2, again. Not the dec action --
11 whether these would be the appropriate defendants.
12 And, you know, really, I want you to boil it
13 down for me as to this -- let's take it all the way
14 down the road. You win. You get a judgment against
15 the clerk and the state attorney.
16 I know there's other reasons why you might have
17 filed it this way. But I'm just simply puzzled
18 because I do hear what the clerk and the state
19 attorney are saying, and that is, performance is
20 impossible. They don't have the records and
21 cannot -- absolutely. There's not even an inch of
22 wiggle room -- that they could release the records
23 even if you got a judgment. It is solely a
24 determination for the court.
25 I, frankly, think, you know, there's ways to

<p style="text-align: right;">Page 17</p> <p>1 get to your records. There's ways to get 2 confidential records. But it isn't by suing the 3 state attorney and the clerk. 4 So I just want to hear your last final argument 5 on how Count II, the appropriate defendants are the 6 clerk and the state attorney. Even assuming arguendo 7 they have the records -- we know they don't -- you 8 were to get a judgment against them, how would you 9 expect them to perform? 10 MS. BOYAGIAN: Two points, your Honor: One is 11 that, again, the clerk did not assert in her papers 12 that she does not have control. That is a position 13 that the State Attorney's Office has asserted. It is 14 our allegation, and as your Honor noted, allegations 15 must be accepted as true -- as true at this stage of 16 the proceedings. 17 Second, it is also our understanding that the 18 state attorney and the clerk intend to block access 19 to these records. So our allegation is that they do 20 have possession, custody, or control, which the clerk 21 has not denied; and second, that they are trying to 22 block access to the records -- 23 THE COURT: What do you mean? What do you 24 mean? They're not trying to block it. They're 25 saying that despite the fact -- let's just talk about</p>	<p style="text-align: right;">Page 19</p> <p>1 (Speaking simultaneously.) 2 THE COURT: Can you hear? Can the attorneys 3 hear? 4 MS. FINGERHUT: -- custodian the records and 5 that he cannot release the records without court -- 6 THE COURT: Exactly. 7 Okay. All right. Anything further, Mr. Wyler? 8 MR. WYLER: No, your Honor. I concur with the 9 attorneys for the clerk's office that it's impossible 10 for us to release these records. There's no intent 11 to hide them or block anything from the Plaintiff. 12 THE COURT: Okay. Anything further, 13 Ms. Fingerhut? 14 MS. FINGERHUT: No, your Honor. 15 THE COURT: And, Ms. Boyagian, anything 16 further, Ma'am? 17 MS. BOYAGIAN: Nothing further, your Honor. 18 THE COURT: Okay. I will get an order out 19 quickly. Thank you, folks so much. And I'll see you 20 on the next round. Thanks a lot. 21 MS. BOYAGIAN: Thank you, your Honor. 22 MR. WYLER: Thank you, your Honor. 23 (The proceedings concluded at 10:28 a.m.) 24 25</p>
<p style="text-align: right;">Page 18</p> <p>1 the clerk, because we all know the state attorney 2 doesn't have it. 3 So the clerk is the custodian of records. 4 That's her main job. There's no doubt about it. We 5 all know that. But we also know, unequivocally -- 6 unequivocally, only the court can make the 7 determination of whether the moving party has 8 satisfied that there is an exception that these 9 should be released. 10 So, again, I ask you -- she is, in fact, the 11 custodian of the records -- is it your opinion that 12 if you got a judgment saying clerk and comptroller 13 gets a judgment against them, that she can release 14 the records without the court -- without the court 15 weighing in, without the court making that 16 determination as required by law? 17 MS. BOYAGIAN: No, your Honor. We are asking 18 your Honor to order the clerk to do that under your 19 discretion. 20 THE COURT: All right. 21 Mr. -- Ms. Fingerhut, you wish to be heard on 22 that? 23 MS. FINGERHUT: Your Honor, our position is 24 that we're not trying to block access to the 25 records --</p>	<p style="text-align: right;">Page 20</p> <p>1 CERTIFICATE OF REPORTER 2 3 4 I, Sonja M. Reed, Court Reporter, certify that 5 I was authorized to and did stenographically report the 6 foregoing proceedings and that the transcript, pages 1 7 through 19, is a true and complete record of my 8 stenographic notes. 9 10 11 Dated this 3rd day of June, 2020. 12 13 14 15 16 17 18 Sonja M. Reed 19 Court Reporter 20 21 22 23 24 25</p>

EXHIBIT “B”

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From: Douglas Wyler
To: Mendelsohn, Stephen A. (Shld-FTL-LT)
Subject: Re: PALM BEACH POST (Epstein)
Date: Friday, September 18, 2020 1:11:43 PM

Mr. Mendelsohn:

Again, we will not withdraw the motion. Please let me know when you are available for the case management conference or I will unilaterally schedule the hearing.

Doug Wyler, Esq.
Jacobs, Scholz & Wyler, LLC
961687 Gateway Blvd., STE 201-I
Fernandina Beach, FL 32034
904-261-3693
904-261-7879 (fax)
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From: <MendelsohnS@gtlaw.com>
Date: Friday, September 18, 2020 at 1:04 PM
To: "Douglas Wyler, Esq." <doug.wyler@comcast.net>
Cc: <BoyajianN@gtlaw.com>, <grygielm@gtlaw.com>
Subject: RE: PALM BEACH POST (Epstein)

Mr. Wyler, we appreciate your candor in admitting your 57.105 motion is premature.

You must withdraw it as the motion has no basis, which you acknowledge, because the court has yet to address the merits of the dispute.

Please do so without further delay.

Thank you.

From: Douglas Wyler <doug.wyler@comcast.net>

EXHIBIT "B"

Sent: Friday, September 18, 2020 11:54 AM

To: Mendelsohn, Stephen A. (Shld-FTL-LT) <MendelsohnS@gtlaw.com>

Cc: Boyajian, Nina D. (Shld-LA-LT) <BoyajianN@gtlaw.com>; Grygiel, Michael J. (Shld-ALB-LT) <grygielm@gtlaw.com>

Subject: Re: PALM BEACH POST (Epstein)

EXTERNAL TO GT

Mr. Mendelsohn:

I spoke with my client we will not withdraw our motion for attorneys' fees. Again, we insist that the motion for summary judgment be heard first as it would be premature to have an attorney fee hearing when there is no prevailing party and no substantive hearings held since the motion for fees was filed. Being that we are unable to agree on the order of the motions to be heard, I am filing the attached motion to set case management conference. Please see the attached available hearing times for this motion and let me know what works best for you so we can resolve this matter.

Sincerely,

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From: <MendelsohnS@gtlaw.com>

Date: Wednesday, September 16, 2020 at 10:04 AM

To: "Douglas Wyler, Esq." <doug.wyler@comcast.net>

Cc: <BoyajianN@gtlaw.com>, <grygielm@gtlaw.com>

Subject: PALM BEACH POST (Epstein)

Mr. Wyler, please let us know if the State Attorney will withdraw its sanctions motion without prejudice.

Thank you.

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EXHIBIT “C”

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From: Mendelsohn, Stephen A. (Shld-FTL-LT)
To: Douglas Wyler
Cc: Boyajian, Nina D. (Shld-LA-LT); Grygiel, Michael J. (Shld-ALB-LT)
Subject: RE: PALM BEACH POST (Epstein)
Date: Friday, September 18, 2020 2:22:36 PM

I will let you know Monday.

From: Douglas Wyler <doug.wyler@comcast.net>
Sent: Friday, September 18, 2020 1:11 PM
To: Mendelsohn, Stephen A. (Shld-FTL-LT) <MendelsohnS@gtlaw.com>
Subject: Re: PALM BEACH POST (Epstein)

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Cc: Boyajian, Nina D. (Shld-LA-LT) <BoyajianN@gtlaw.com>; Grygiel, Michael J. (Shld-ALB-LT) <grygielm@gtlaw.com>
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