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REPORTER'S RECORD
VOLUME 1 OF 1 VOLUME
TRIAL COURT CAUSE NO. D-1-GN-18-001835
COURT OF APPEALS NO. 03-18-00650-FILED IN
3rd COURT OF APPEALS
AUSTIN, TEXAS

NEIL HESLIN,) IN THE DISTRICT COURT
Plaintiff) JEFFREY D. KYLE
Clerk
VS.)
TRAVIS COUNTY, TEXAS
ALEX E. JONES, INFOWARS,)
LLC, FREE SPEECH SYSTEMS,)
LLC, and OWEN SHROYER,)
Defendants) 216ST JUDICIAL DISTRICT

10/15/2018 10:55:38 PM
JEFFREY D. KYLE
Clerk

HEARING ON MOTION TO DISMISS,
MOTION FOR EXPEDITED DISCOVERY,
AND MOTION FOR SANCTIONS

On the 30th day of August, 2018, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable Scott H.
Jenkins, Judge presiding, held in Austin, Travis County,
Texas;

Proceedings reported by machine shorthand.

A P P E A R A N C E S

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I N D E X

VOLUME 1

HEARING ON MOTION TO DISMISS,
MOTION FOR EXPEDITED DISCOVERY,
AND MOTION FOR SANCTIONS

AUGUST 30, 2018

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1 case. And you're set today on four motions. And I'll
2 need you to confirm that when I recite the motions.
3 First of all, the live pleadings in the case are
4 plaintiff's original petition filed on the 16th of April
5 and a new answer from defendant filed yesterday. It's
6 defendants' second amended answer filed yesterday.

7 The motions set before me today are
8 defendants' motion to dismiss filed on July 13th;
9 plaintiff's motion for expedited discovery in aid of
10 plaintiff's response to defendants' motion to dismiss,
11 which plaintiff filed on August 17th; plaintiff's motion
12 for sanctions for intentional destruction of evidence,
13 also filed on August 17th; and defendants' motion for
14 sanctions, which is a part of defendants' first amended
15 response to plaintiff's motion for sanctions, which
16 defendant filed on August 27th.

17 You set this matter some time ago for a
18 two-hour hearing. One or both of you announced last
19 week. Under our local rules you're required to do that.
20 And the announcement you made with the court
21 administrator is two hours. And so you will have
22 exactly two hours and no more than two hours.

23 And the way I'm dividing the time is this:
24 And we just discussed that, so I know you're not
25 surprised by what I'm saying now on the record.

1 Defendant gets to go first because on the central motion
2 that I'm about to consider, plaintiff has the burden of
3 persuasion -- I'm sorry -- defendant has the burden of
4 persuasion. I had that backwards. And so defendant
5 gets to go first and last. Defendant can save up to ten
6 minutes of your hour to make rebuttal arguments to
7 whatever you hear from the plaintiff.

8 There is a blizzard of filings in this
9 case. There should be no secret to either one of you
10 about the positions taken by either one of you. I don't
11 think I'm going to be surprised because I've looked at
12 it as fast as I could given the time I have with the
13 other cases I have to work on. And so that's what we're
14 doing.

15 Again, the defendant will go first. I'll
16 let you know when you're nearing your 50 minutes so that
17 you don't erode your ten-minute rebuttal time if you
18 don't wish to. But if you want to go beyond your 50
19 minutes, you certainly may. You can use your whole hour
20 if you want. But if you do that you'll have no rebuttal
21 time. The plaintiff will have a total of one hour all
22 at one time to respond or to argue in favor of your
23 motions. And that's the way we're going to conduct the
24 hearing.

25 Does everyone understand and agree that

1 will be the rule for this hearing?

2 MR. ENOCH: We do.

3 MR. BANKSTON: Yes, Your Honor.

4 THE COURT: Great. With that, you get to
5 go first. Go ahead.

6 MR. ENOCH: May it please the Court. Mark
7 Enoch here for the defendants on the defendants' motion
8 to dismiss under the TCPA.

9 Judge, what we're here to talk about
10 technically today is obviously a lawsuit for defamation
11 by a party against another party and in the ordinary
12 course of things will not garner the press attention
13 that these cases have garnered. But because of the way
14 public perceives my clients and public perceives
15 Mr. Bankston's client, I believe -- and I don't think
16 I'm overstating it -- that this Court and its decisions
17 is at the epicenter of the debate in our country over
18 free speech and where free speech meets, quote, "fake
19 news."

20 And since the hearing that we had a month
21 ago, my client has been banned from about 70 percent of
22 the world's platforms for dissemination of information.
23 Millions of people listened to my client's message. He
24 operated within the confines of Supreme Court rulings
25 within the standards. He was publicly accountable,

1 terribly so, facing terrible criticisms, as is
2 everybody's right to do if they disagree, and yet his
3 voice now has been snuffed as we predicted.

4 At the beginning of this case in our
5 motion in this case and in our motion in the Pozner case
6 we told you that we believe these cases were part of the
7 front launched by these plaintiffs and others, including
8 plaintiff's law firm, to silence my clients.

9 Now, what has happened, Judge, is those
10 platforms have not taken down just content, offensive
11 content. They have banned his speech as a prior
12 restraint. He is unable now to do anything on those
13 platforms. Therefore, the millions of people who are
14 not all crazies, as are alleged to be, have been denied
15 that ability to listen to his political speech.

16 And say whatever you want to about
17 Mr. Jones. It is political speech. Political speech is
18 often assertive, offensive, hurtful, cutting,
19 outrageous. But political speech is at the core of the
20 First Amendment. And when political speech is at
21 question, it is this Court's duty to protect First
22 Amendment rights, because when the -- I can think of no
23 better example in this country right now where the
24 majority of Americans -- there was a poll out that
25 *The Hill* announced three days ago. The majority of

1 Americans want him banned.

2 We don't take polls over free speech in
3 this country. That's why we have the First Amendment.
4 If we had polls, we would never have change. The
5 Constitution would be nothing if every day we could
6 change depending on the whims of the country.

7 Now, this has been brewing for a long
8 time. One of the things that I want to remind the Court
9 is we are at the epicenter now, waves crashing over in a
10 sea of discontent in this country, politically based,
11 primarily since the election of Donald Trump. We had
12 fake news arguments before. But Mr. Jones, I think
13 a lot of people thought he was in the corner, nobody was
14 listening to him, until Donald Trump was elected to the
15 White House. And that's what Megyn Kelly said in that
16 June 18th interview. Twenty-two times she mentioned in
17 that interview the reason I'm talking to Alex Jones is
18 because he has the ear of the president. That was not
19 acceptable.

20 And Mr. Heslin and the Pozners -- and I
21 might do the same thing. Judge, I can't imagine the
22 horror and daily horror to go through thinking of lost
23 children and the way they got lost. They are -- it's
24 not their doing that we're here. They're just part of
25 the larger debate right now, whether it's school

1 shootings or whether it's something the president tweets
2 or his opponents tweet. It is a mass of discontent in
3 this country. But it's not just now. When Mr. Heslin
4 voluntarily appeared on the Megyn Kelly show, we were
5 already there as established in the papers. Ms. Kelly
6 was vilified when she announced she was going to do
7 this. She was excoriated by folks. You can't give him
8 a forum; this man is a serpent; we can't have him; he's
9 a cancer. I think that's Mr. Bankston's words; he's a
10 cancer to America. You can't bring him on TV. And she
11 did anyway.

12 And into that firestorm of controversy
13 Mr. Heslin voluntarily stepped. And that controversy
14 very clearly was: Is Alex Jones a truth teller? A
15 crazy man? A conspiracy theorist? We want to make sure
16 we shame him and discredit him so the president
17 disassociates so he has not the political influence that
18 others perceived he had.

19 If they could shame Mr. Jones -- surely he
20 said some outrageous things. There's no question about
21 that. But if he could be shamed to the point where the
22 president would disassociate, if they thought he had
23 persuasion, and if they could put enough shame to -- as
24 Ms. Binkowski, their expert, has been trying to do for
25 the last few years, put shame on platforms like YouTube

1 and Google, they could silence him.

2 And what we're doing here, Judge, in this
3 courtroom is Mr. Bankston -- one month ago he stood in
4 this courtroom and I said very similar things. I said,
5 Judge, this is not about a defamation case. This is
6 about First Amendment. This is about an overall program
7 of silencing my client.

8 That day he told *Reuters* "After the
9 hearing I see these cases building a wave that could
10 topple Jones." That was reported by *Reuters* on
11 August 2nd. That's what the plaintiffs think this case
12 is about. I showed you and I filed videos of Mr. Heslin
13 and Mr. Bankston with Megyn Kelly on April 19th --

14 THE COURT: You do have to stay at counsel
15 table.

16 MR. ENOCH: Thank you.

17 THE COURT: Remember that. It's in the
18 local rules.

19 MR. ENOCH: I apologize.

20 THE COURT: Judge Hart used to tell me
21 that too many years ago. Go ahead.

22 MR. ENOCH: On April 19th he and
23 Mr. Bankston appeared on Ms. Kelly's "Today" program.
24 And this video that is claimed to be so offensive as to
25 be a *per se* injurious video to his psyche, his

1 reputation, they voluntarily played to millions of
2 people at 9:00 a.m. in the morning on NBC.

3 Now, that doesn't sound like that video
4 was so shameful, so horrible that the Court should
5 presume general damages as a result of it. As a result
6 of his willingness to do so, another video -- he's on
7 CNN. We know you want us to publicize it; how can we
8 help you?

9 The point has not been to avoid this
10 shameful video. The point has been to castigate and
11 retaliate and get back at Mr. Jones for all the years
12 of, what he claims and I'm sure is, torment. But that's
13 not what defamation law is about. Defamation law in
14 Texas is: What have I said in the last year that meets
15 the test of defamation?

16 And these are the issues for today against
17 that backdrop. You might recall in the Pozner hearing,
18 Judge, I showed you a chart like this. These are
19 Mr. Heslin's legal actions. And actually, there are
20 more because he has *per quod* and *per se* by gist and
21 particular, so there are many more than that.

22 But the red is what I believe there is
23 absolutely no attempt by them to meet. The black are
24 the ones only that I believe they've attempted. Those
25 are the ones in play I believe today, though I think we

1 still win on those.

2 The reason that June 26 is in yellow,
3 Judge, is because they sued Owen Shroyer for making a
4 statement on June 26 that he didn't make. He made it on
5 June 25. The problem with that is June 26 was a
6 republication. And as you know, there's a single
7 publication rule. And it doesn't matter how you find
8 out about it, when you find out about it. June 25 was
9 the date, and it's in Mr. Shroyer's affidavit. That's
10 when he said what he said. And in that context, it was
11 a two-hour show. You have his affidavit saying that as
12 well.

13 Therefore, in order to look at the
14 June 26th video that they've given you that's four and a
15 half minutes long to determine if it's defamatory in the
16 context of the entirety, you can't do it. The reason
17 you can't do it is because that wasn't published. The
18 only part that was republished was his four-and-a-half-
19 minute video. And Mr. Shroyer has said he didn't know
20 it was going to be republished -- or published on
21 InfoWars, he didn't authorize anybody to do it, all the
22 tests you have for republication liability. So they
23 don't have any evidence at all that Mr. Shroyer did
24 anything on June 26, conspiratorially or otherwise.

25 THE COURT: InfoWars did, but not him.

1 MR. ENOCH: Judge, and I would argue
2 InfoWars didn't either, and I'll tell you why.

3 THE COURT: I thought you just said
4 InfoWars republished it.

5 MR. ENOCH: Your Honor, the issue is a
6 corporation, as you know, can only work through its
7 agents. A corporation can be liable on agency and
8 *respondeat superior*. Agency is never presumed. That's
9 the *Moore* case, never presumed. And there is no
10 evidence that InfoWars or Free Speech or particularly
11 that he authorized them to post it or that anybody at
12 InfoWars under *respondeat superior* authorized it.

13 Now, obviously, if you find liability on
14 the part of Mr. Jones -- I don't think you should -- you
15 would have potential there because you have an agent
16 there. I don't think you've got evidence it was in his
17 course and scope of duties for InfoWars because we don't
18 have evidence of that. But they're simply saying since
19 it's on the InfoWars website, InfoWars is liable.

20 That's not the way corporate law works.
21 Corporations work through people. If I'm going to get a
22 corporation liable for something, I have to show -- and
23 the case they cite, which is the -- I can't remember,
24 the Elizabeth McKernan, who is the -- I think it's the
25 article that they draft, and they sue her and find she

1 about who Shroyer does work for?

2 MR. ENOCH: He works for FSS, which is the
3 Free Speech Systems.

4 THE COURT: Okay. So that's undisputed.

5 MR. ENOCH: That is not disputed, except
6 for the fact that nobody has asked -- nobody's provided
7 any evidence that what he did -- that FSS did anything,
8 FSS posted anything, or that he on behalf of FSS was in
9 the course and scope of anything. But the primary thing
10 is on June 26 he didn't do anything. His testimony is I
11 didn't post it; I don't know who did; I didn't authorize
12 it.

13 So there's nobody that they can point to
14 for evidence that shows any clear and specific evidence
15 of who republished this. And Judge, there's logic to
16 that. If all we had to do was just republish and
17 republish and create new statute of limitations, it goes
18 away. You can't be liable for republication if you
19 don't do that.

20 THE COURT: Do we know that it had to be
21 one of the entities controlled by defendant or one of
22 the defendants who republished it? Do we know based
23 upon how it was republished that --

24 MR. ENOCH: Oh, I --

25 THE COURT: Tell me what we do know.

1 MR. ENOCH: Well, what we know is,
2 according to the papers, Free Speech Systems owns --
3 operates some businesses and employs people like Owen
4 Shroyer. InfoWars, we -- our position is it doesn't own
5 anything and it doesn't control anything. Mr. Bankston
6 is going to tell you about some terms of service that he
7 found that says InfoWars controls the website, but the
8 fact of the matter is -- and you have this in evidence
9 conclusively -- InfoWars owns nothing.

10 THE COURT: Now, is that one of the
11 reasons -- and there's a sworn affirmative defense that
12 we've been sued in the wrong capacity.

13 MR. ENOCH: Yes.

14 THE COURT: Is that what's behind that?

15 MR. ENOCH: That is.

16 THE COURT: I understand.

17 MR. ENOCH: That is. So in this -- as we
18 go down here to *per se* of the argument, Judge, besides
19 the fact that -- there's an interesting case, *Hancock*
20 *vs. Variyam*. And I'm not sure it says what I think it
21 says. I'll be honest with the Court. It's a puzzlement
22 to me. We have a statute that says 73.001, libel
23 *per se*. One of the things is if you impugn someone's
24 honesty or integrity. We also have common law that says
25 if you impugn someone's ability to run their business in

1 the trade or profession.

2 This doctor sued another doctor who had
3 accused him of lying, saying you deal in half truths,
4 you don't know the difference between the truth. And
5 the Court of Appeals found that he had shown his burden
6 under the TCPA. And the Court of Appeals opinion in the
7 footnote specifically mentions 73.0 -- I'm sorry. They
8 found he did not meet his burden. And the footnote
9 specifically mentions the statute, which says if you --
10 it's *per se* if someone impugns your honesty or
11 integrity. The Supreme Court ignores that and says no,
12 no, no, what we have here is we have an action for
13 defamation, and you have to show that the defamation
14 related to your trade or profession, crossed right over
15 that. And my thinking is that the reason is is because
16 not every lie is actionable, only those lies -- only
17 those imputations of reputation that are so egregious
18 that you should presume general damages.

19 I would suggest to you in this case that's
20 not what we have here. You should not presume general
21 damages when a man has lost his son terribly amongst a
22 city tragedy that still lasts today I'm sure in the
23 hearts and minds of everybody around there, including
24 the country. This video is not the cause, as we've
25 argued, of his anguish that he testified to in his

1 affidavit. This is not the epicenter of his problem.
2 He had that before.

3 And as a matter of fact, Mr. Zipp, their
4 expert who we've objected to -- by the way, we think
5 those experts you should not listen to because they are
6 interested parties. Ms. Binkowski is not disinterested.
7 She's been after Mr. Jones, as the evidence in the case
8 shows, for a long time.

9 But primarily nobody is an objectively
10 reasonable person from whom they have affidavits in this
11 case. They are longtime friends or longtime enemies of
12 Mr. Jones. So they're not disinterested. Mr. Zipp goes
13 back five years and studies videos to give his opinions.
14 That's not the objectively reasonable listener and
15 viewer of this video because the objectively reasonable
16 person would not have ever done that.

17 So let's get back to the issue of --

18 THE COURT: Is your argument that he did
19 it before he was ever even contacted about this case
20 because he has an agenda about it? Or are you saying
21 it's just kind of excessive work by an expert to have
22 done that?

23 MR. ENOCH: I'm not saying that he had --
24 I don't know what his opinions were ahead of time,
25 unlike Ms. Binkowski. But what I'm saying is the

1 objective reasonable person is a -- normal reasonable
2 persons make mistakes every once in a while. The
3 objectively reasonable person doesn't under defamation
4 law. And the objectively reasonable person does not --
5 he's not the sleuth. He doesn't know all about
6 everything associated with the subject of the broadcast.

7 Mr. Zipp, by making himself an expert, has
8 taken him right outside of the shoes of being an
9 objectively reasonable person. Ms. Binkowski, the same
10 way. She has a long history of investigation. She has
11 a long history of opinions about it. She knows more
12 than the objectively reasonable person, and she's not
13 objective. So that's the reason, besides the other
14 evidentiary objections which we filed, Judge.

15 THE COURT: But don't journalists have to
16 make that assessment all the time; how would an
17 objectively reasonable person perceive what I am
18 communicating? Even though they have a wealth of
19 knowledge about what they're communicating and a whole
20 history about it, they still have to on a daily basis
21 think about how the objectively reasonable reader or
22 listener would perceive it, correct?

23 MR. ENOCH: I disagree.

24 THE COURT: Tell me why.

25 MR. ENOCH: Because she's not. Because

1 she --

2 THE COURT: No. I'm saying on Mr. Zipp,
3 for example.

4 MR. ENOCH: Oh, because he's not.

5 THE COURT: Okay.

6 MR. ENOCH: Because the law says he's not.

7 And the reason the law says he's not is he might be a
8 very reasonable person, but he's not the objectively
9 reasonable, because the objectively reasonable will
10 never make a mistake and will never assume something
11 that's not right.

12 THE COURT: So we need the other
13 affidavits from -- I think the medical examiner is one.
14 There's another woman who gave an affidavit about how
15 she perceived it --

16 MR. ENOCH: Right.

17 THE COURT: -- about the plaintiffs,
18 correct?

19 MR. ENOCH: Yes. Yes.

20 THE COURT: All right.

21 MR. ENOCH: And again, if all we had to do
22 to defeat a TCPA claim is get a bunch of affidavits from
23 experts who say yeah, yeah, yeah, that's what it was,
24 the TCPA would never be sustained in the state of Texas.
25 That's not the test. As you know, it's an objective

1 test for this Court to determine those very issues. And
2 expert testimony is not relevant and probative on those
3 issues.

4 But beyond that, we have proximate
5 causation. The law in Texas, the *Bos vs. Smith* case
6 that we cited in our -- I think it's Page 49. It's a
7 case where there's a child custody --

8 THE COURT: I was going to check to see if
9 you were right about 49.

10 MR. ENOCH: Well, I hope I am. I hope I
11 am. It's *B-o-s vs. Smith*. It's a 2017 Supreme Court
12 case. There's a child custody issue going on. And
13 grandfather defames new father/husband with the children
14 talking about a lot of things. The jury gives father a
15 bunch of money. The Court of Appeals affirms. The
16 Supreme Court comes back and says no, no, wait a second,
17 there's lots of stuff out there about grandfather --
18 about father -- or about grandfather, excuse me, and he
19 has not shown in the record how his damages arose from
20 what the plaintiff in this case -- the defendant in this
21 case did.

22 In this case Mr. Heslin has said -- and
23 Mr. Zipp has done this -- after this video, I started
24 suffering X, Y, and Z. As a matter of fact, I think the
25 exact words were before this he had never named me

1 before. Well, of course, if that's the case, Mr. Heslin
2 stepped again one time into whatever cross hairs in the
3 public view were there surrounding Alex Jones when he
4 voluntarily went on the Megyn Kelly interview. There
5 were people who lambasted him for that way before we
6 did, if we did. Whatever our video was, it happened
7 before that. Mr. Zipp shows some meanings and some
8 screen shots from the Internet. I went to those same
9 ones that he did, and they occurred before the video.

10 So Mr. Heslin was confused with some 9/11
11 actor, a fireman, long before this video. He was
12 accused of being a liar, holding guns and saying --
13 there's a video that I sent in not to disparage him but
14 just to point out that Mr. Zipp's affidavit is
15 incorrect. Mr. Heslin did not suffer those things after
16 this. Mr. Zipp says, you know, once you have that
17 reputation, it's hard to get rid of it. And I certainly
18 agree with that. But he had -- whatever he had among
19 those people on the Internet who like to do this stuff,
20 he had it well before this video.

21 And then, of course -- so he has not
22 separated. He's told you, gosh, I feel fearful, I can't
23 sleep, all the things that you've read in his
24 declaration. But he's not said I didn't feel that way
25 before. He didn't say that was separate from this video

1 that I saw from Mr. Jones.

2 And more importantly, Judge, our video
3 goes out -- or Megyn Kelly's does and then ours
4 immediately thereafter in June and July of 2017. In
5 April he sues. April, he shows the world the same
6 video, exactly the -- at least portions of the same
7 video. Millions of people saw it then. He's under a
8 duty under that *Bos* case to say, You know what? There's
9 all this stuff out there. We're not liable for NBC's
10 reproduction of that publication. That's someone
11 else's. And he authorized it, so that's
12 self-publication. He has the burden to say, You know
13 what? I had these thoughts, I bought this stuff, I
14 spent this money before I showed it to people out there.
15 He didn't do that.

16 So on proximate causation and damages
17 *per quod*, as well as the general damages under *per se*,
18 we think this information is -- this evidence is
19 inefficient -- excuse me -- inadequate, not clear and
20 specific, because he doesn't tie the damages to the
21 actions of the defendants.

22 Now let's talk about July 20th for
23 Mr. Jones. Mr. Jones, if he did anything wrong, he
24 republished this video. He republished this video. And
25 he had some comments about the video. These were his

1 comments: "I could never find out. The stuff I found
2 was they never let them see their bodies. That's kind
3 of what's weird about this. But maybe they did. So I'm
4 sure it's all real."

5 But for some reason they don't want you to
6 see the video. The circumstances for this June 26, as
7 we outline in our papers, Judge, Mr. Jones is at the
8 center of this debate in the country over free speech,
9 fake news, friend of the president, too much -- we don't
10 want to give him notoriety, et cetera. And so he now is
11 on Megyn Kelly. And right after Megyn Kelly, Shroyer
12 does this ten days later or something like that. And
13 then it's censored. It's taken off the Google and
14 YouTube. They remove it under one of their policies. I
15 don't know which it is.

16 So on June 26 when this video -- and I
17 don't know if you've watched it yet. But when you watch
18 it, you will see that it's a reaction to Mr. Jones on
19 June 20th -- July 20th saying, wait a second, they
20 censored. Shroyer's video has been taken down. His
21 outrage was at being censored for Mr. Shroyer's video.
22 He wasn't angry at Mr. Heslin. In fact, he said, "I'm
23 sure it's all real. Can I prove that New Haven didn't
24 happen? No. So I've said for years, and we've had
25 debates about it, I don't know. NBC needs to clarify

1 because the coroner said none of the parents were
2 allowed to touch the kids or see the kids and maybe
3 meaning in the school. I'm sure later maybe the parents
4 saw their children."

5 Now, if you're an objectively reasonable
6 person who reads that or hears that said, you cannot
7 believe that Mr. Jones is sponsoring a claim of a lie.
8 As a matter of fact, very specifically in the video --
9 this is cited in our pages. "I'm not ready to say kids
10 didn't die and point my finger at parents and say they
11 are liars." Now, the only way they can morph that into
12 I am saying they didn't die and I point my finger at
13 them as liars is by ignoring English.

14 Now, let's get to the *per se* in malice.
15 As Your Honor very well knows, in order to find any
16 *per se* on the part of Mr. Shroyer, you have to show
17 state of mind. Zero evidence in the record. They
18 didn't even address it. What Zipp and Binkowski and
19 everybody does, Jones for these years has done X, Y, and
20 Z. Oh, he's a bad person. Look at everything Jones
21 does. Look at everything InfoWars does.

22 I don't think that's admissible or
23 evidence of Jones' mental state, any -- this is
24 conclusive what he says on the video of his mental
25 state. And they have no evidence to point to Shroyer's

1 previous statements about hoaxes, people not actors,
2 crisis actors, they're liars, nothing, no criminal,
3 nothing, zero. They have four and a half minutes of him
4 talking and that's all they have.

5 There is no evidence as far as an
6 objective reasonable of the state of mind at the time of
7 his publication, which is the test. And all their
8 experts can say, gosh, he shoulda, woulda, dunna. No,
9 it doesn't work. They have to show what his objective
10 state of mind was at the time he did that.

11 So when Mr. Jones replayed the video and
12 said I'm sure it's all real, I don't know if it
13 happened, maybe they -- meaning at the school, I'm sure
14 later maybe the parents saw their children, and I'm not
15 willing to call parents liars, how on earth does that
16 come to the point where I intend this defaming -- this
17 content, what I'm saying, I intended to call someone a
18 liar?

19 Now let's talk about their --
20 extrapolation is the only way I can say it, Judge.
21 Their hope is -- if anybody but Alex Jones would have
22 said what they said, we wouldn't be here today. If
23 another of the websites out there, the thousands of
24 websites who think that things are strange about Sandy
25 Hook -- there are lots of them out there. If any other

1 person had done it, we wouldn't be here today. We're
2 here because it's Alex Jones.

3 And Alex Jones went on camera -- you heard
4 it, by the way; I showed it at the last hearing; it's
5 also filed with this one -- saying, Hey, I hurt for you;
6 I know you lost your children; I'm sorry. And he did
7 that before this lawsuit was filed. It wasn't to cover
8 the lawsuit. He can't get it out. When he's talking to
9 major media, they won't report that. They keep
10 reporting the other things. That's what he's told you,
11 and that's what we've shown in the papers.

12 I want now to go to the issue of the --
13 okay. So no evidence of the state of mind. And the
14 best state of mind to show of Mr. Jones is Mr. Jones'
15 statements during the broadcast.

16 Now, I'd like to move to the sanctions
17 motion if I can, Judge. I'm sure you have read the
18 papers. You're very diligent about that. But I want to
19 go step by step because I think it's important. Given
20 my belief, defendants' belief, that what we have here is
21 a point on the spear, these cases being a point on the
22 spear, let's make sure we end Jones' voice in America, a
23 major theme has been to create publicity, negative
24 publicity about Mr. Jones.

25 I was on vacation in Alaska, Denali. It's

1 a beautiful place, Judge. If you've never been there,
2 it's just --

3 THE COURT: I hiked it last year. Yeah.

4 MR. ENOCH: I thought I'd never see a
5 place that's prettier than Estes Park, Colorado, but
6 there is. Anyway, not a lot of cell service, not a lot
7 of Internet service. It just doesn't happen. Well, I
8 filed a vacation letter. And I'd like to -- at the end
9 I'll ask about judicial notice. June 29, 2018, I wrote
10 to the clerk saying I would be on vacation August 12th
11 to August 26th of this year. It shows it being copied
12 and it was in fact copied to Mr. Bankston.

13 THE COURT: I noticed that. And then I
14 noticed you tried to respond, that you weren't able to
15 respond, and you asked the Court not to take up a motion
16 for sanctions while you were gone.

17 MR. ENOCH: Yes, sir.

18 THE COURT: Am I right?

19 MR. ENOCH: Yes, sir.

20 THE COURT: Yes, I saw that.

21 MR. ENOCH: On July -- as part of his
22 motion for sanctions -- I've got to refer to that -- he
23 claims that somehow we did something wrong and I didn't
24 respond properly on these July 20 and June 26 videos.
25 He had them. And he had them -- and I will represent to

1 the Court my assistant Melanie Illig on July 13, 2018 at
2 6:15 p.m. sent him links for all of the videos. So the
3 same day we filed our TCPA, he had all the videos,
4 including the two that he claims now in his motion that
5 we destroyed. Ms. Illig gives him her signature block,
6 her email address and both her fax number and her direct
7 line number.

8 On July 16th, just belt and suspenders,
9 Ms. Illig sends him a letter hand-delivering -- excuse
10 me -- by Fed Ex all of -- the thumb drive with the
11 videos on it. And again, she has her direct dial
12 number, and she has her name and telephone number and
13 email address.

14 On August 6 through 8 -- these are
15 attached to the papers -- we were discussing whether or
16 not we could move this date to a date more convenient to
17 Mr. Bankston. And in that discussion, on August 6th I
18 said, "Please let's get on this because I will be out of
19 the office and largely unavailable starting this next
20 Sunday for two weeks and my assistant is out tomorrow
21 until next Monday."

22 Some more discussions. Mr. Ogden then
23 gets involved in the communications. My last
24 communication on August 8th at 10:47 is "I am leaving
25 town this afternoon and won't be back in the office

1 until Friday. That will be my last day in the office
2 until I return on August 28th. My assistant is also out
3 and will not be back until the middle of next week."

4 August 8th I'm going to be out, largely
5 unavailable. My assistant's out until the middle of
6 next week. A reasonable person would assume you're not
7 going to get a lot of action when you call or they send
8 an email to that address.

9 Mr. Bankston sends his email on
10 August 12th, Sunday afternoon, the day he knows I'm
11 leaving, at 4:42 p.m. on a Sunday afternoon. And this
12 is the interesting thing. He does not CC my assistant,
13 does not leave me a voicemail, never calls my office.
14 And he says, On August 9th, report from CNN indicates
15 that deleted materials include social media messages and
16 current video content related to the Sandy Hook and
17 Parkland school shootings."

18 Parkland school shootings? Hmmm. I don't
19 represent -- Parkland has nothing to do with this case.

20 "My clients in the Fontaine, Pozner, and
21 Heslin matters would like you to confirm whether these
22 reports are accurate."

23 Why on earth is he addressing me about
24 someone I -- I don't represent the clients. I've never
25 heard of Mark Fontaine other than the news. So I

1 called -- and you have this affidavit. I called
2 Mr. Taube.

3 THE COURT: I'm a little surprised by
4 that. You know Mr. Taube, don't you?

5 MR. ENOCH: I do.

6 THE COURT: Okay. And you know he's
7 defending --

8 MR. ENOCH: Oh, yeah, I know.

9 THE COURT: -- the same defendants in the
10 Fontaine case.

11 MR. ENOCH: I have no personal knowledge.
12 I am aware of the lawsuit, of course, and Mr. Taube is a
13 friend. And yes, of course I know that.

14 THE COURT: Okay.

15 MR. ENOCH: But I've never been to a
16 hearing. I'm not on the pleadings. For Mr. Bankston to
17 send me a notice on Fontaine --

18 THE COURT: I understand. You're not
19 responsible for Fontaine.

20 MR. ENOCH: Yes, sir.

21 THE COURT: Inappropriate communication,
22 wrong lawyer.

23 MR. ENOCH: Yes.

24 THE COURT: I get it.

25 MR. ENOCH: Not a wrong lawyer.

1 THE COURT: I mean --

2 MR. ENOCH: No. What I'm saying is I
3 think it was intentional. I'm making that allegation,
4 Judge.

5 THE COURT: I see.

6 MR. ENOCH: And the reason I'm doing it is
7 because he did not send this email to Mr. Taube. He did
8 not contact Kevin Turner -- Kevin Brown. They were here
9 on August 2nd when you had the hearing on Fontaine. Why
10 would he send me a demand for information on Fontaine
11 unless he didn't want an answer, unless he thought if he
12 sent it to Mr. Taube's office, he might actually get a
13 response? I suggest to you, Judge, that a reasonable
14 lawyer --

15 THE COURT: And how do we know he didn't
16 also send it to Mr. Taube?

17 MR. ENOCH: I've asked Mr. Taube. And
18 Mr. Turner's here. He'll testify to that. And his
19 affidavit is on file.

20 THE COURT: Okay.

21 MR. ENOCH: No telephone calls, no emails.
22 This was a setup, because what Mr. Bankston wanted to do
23 was make sure that he filed a very pernicious -- a very
24 ugly pleading saying that Mr. Jones in the face of
25 rising public indignation and these pending lawsuits

1 intentionally chose to destroy evidence, and counsel's
2 silence -- he said he contacted me twice and I was
3 silent, I didn't respond -- was somehow evidence of that
4 wrongful destruction of this information.

5 As a lawyer, Judge, if I want to get an
6 answer, I not only send an email; I call; I leave a
7 message. Oh, gosh, he's out of town. I'll call the
8 main number. Is anybody there working with Mr. Enoch on
9 this case? Every lawyer in that office and the
10 switchboard has my cell phone number. Someone could
11 have called me. I don't know if I would have gotten it
12 as quickly as anything else in Denali, but it's a
13 possibility.

14 THE COURT: By the way, you mentioned this
15 earlier. I'm sure your colleague has let you know. You
16 crossed the halfway point a couple minutes ago, but I'm
17 sure you're aware of that. Go ahead.

18 MR. ENOCH: I am, Judge. But I'm also
19 aware of the fact that I'm going to be called at
20 50 minutes. I'm good.

21 THE COURT: Just wanted to make sure you
22 knew.

23 MR. ENOCH: Thank you very much.

24 Judge, he implied -- I think implied in
25 the pleading he filed that I was part and parcel of it,

1 that I was part of the destruction. He did so by
2 mentioning two cases in a bar proceeding where it was
3 appropriate for a lawyer to be sanctioned \$542,000 along
4 with his client for intentional destruction of social
5 media material and where a lawyer was suspended from the
6 practice of law and another was brought up for
7 disbarment. That's in the pleading of sanctions on this
8 when he knows I'm out of town. I've told him I'm out of
9 town. He makes no effort other than sending the one
10 email. And he doesn't contact the lawyer for Fontaine
11 that he knows is in the office.

12 Mr. Bankston sent a letter to Mr. Taube as
13 registered agent for my client Free Speech Systems on
14 May 25th, 2018. Judge, I will show you this one. This
15 is our Exhibit B-89. And I need to bring it a little
16 closer. May I approach, Judge, just to get --

17 THE COURT: I think I've seen this. It's
18 in -- yeah. It's --

19 MR. ENOCH: Yes, sir.

20 THE COURT: Yeah, I have.

21 MR. ENOCH: I want you to see the last
22 line. Mr. Bankston --

23 THE COURT: You can just read it for the
24 record if you want.

25 MR. ENOCH: Thank you. "Finally, I would

1 like to note that for the record that our law firm is
2 committed to transparency through the pendency of these
3 lawsuits. For that reason, we plan to make available to
4 the general public and media copies of all
5 correspondence and pleadings which arise in this
6 lawsuit, including this letter."

7 I understand the media has a right. These
8 are public documents. I have never ever been in a case
9 where I send my correspondence and opposing counsel's
10 correspondence to the media unless I'm running a
11 publication -- a publicity campaign.

12 So as our papers show, he files the
13 motion, and immediately *The Hill* picks it up, *New York*
14 *Times* picks it up. Yeah, even sanctions against the
15 lawyer are possible. Hundreds of thousands of dollars
16 for this intentional destruction of evidence.

17 Now, if Google's board and YouTube's board
18 are on the cusp, "Golly, have we gone too far? Do we
19 want to let him back in? Are we working through our
20 policies here?" what do you think scares them off the
21 most? *The New York Times*, *The Hill*, CNN, bash Jones.
22 He's intentionally destroying things. He wants to
23 publish the addresses of these poor folks. Get it out
24 there so that Jones can't respond except on his little
25 channel that's been silenced now. That's what's been

1 going on.

2 It was reported, Judge, his -- the report
3 on his filing, 47 minutes. After the filing of that
4 motion for sanctions, 47 minutes later it was posted
5 online by *The Hill* I think. Now, how did -- were they
6 down at the courthouse or were they sent something as an
7 announcement?

8 Interestingly, even though Mr. Taube
9 didn't get notice. And I didn't get notice of this
10 because I was out of town, on August 16th -- and this is
11 Exhibit 1 to the supplemental affidavit in support of
12 this filed yesterday by Mr. David Jones. This is a
13 letter -- on August 9th we got a letter from Google
14 saying they were taking us down. On August 16th we have
15 a lawyer that sends a letter to Google and among other
16 things says -- this is August 16th. The day before he
17 files this motion for sanctions claiming that we're
18 intentionally destroying, without talking to Mr. Taube,
19 without calling me, "Further, in light of its
20 preservation obligations, Free Speech asks that Google
21 refrain from deleting, destroying, dissolving or
22 otherwise rendering inoperable any videos or other
23 documents posted by Free Speech or Alex Jones or others
24 at their direction until Free Speech has retrieved all
25 the materials."

1 Without any notice at all, he leaves the
2 impression out in the world that Alex Jones is running
3 from this, that he's culpable, he's a bad person, it's
4 consistent with their story, while at the same time
5 quietly they're making sure that they preserve the stuff
6 that they need for these lawsuits and other things.
7 That's the juxtaposition of the parties.

8 Then on August 22 -- excuse me. On the
9 17th, in a communication with Tiffaney Gould with your
10 court, did not copy me, Mr. Bankston sends an email.
11 This is August 17th at 3:34 p.m. "Attached for the
12 Court's convenience are courtesy copies of the motion
13 for sanctions." At the end of the second paragraph, "I
14 have repeatedly contacted defendants' counsel for the
15 past week about the issues in the motion but have
16 received no response." Repeatedly. It doesn't say,
17 hey, by the way, he's out of town. It doesn't say I've
18 tried to call anybody else. It's just a part -- and
19 again, correspondence is going to the media.

20 The motion. Judge, do you have the motion
21 in front of you?

22 THE COURT: I've got them all, yeah. I've
23 got things highlighted. I've got everything.

24 MR. ENOCH: His motion --

25 THE COURT: So I don't need extra motions

1 because that will just confuse me.

2 MR. ENOCH: I want to point something out
3 is all, Judge.

4 THE COURT: I've got it. Tell me what it
5 is -- stay at counsel table and tell me what it is in
6 the motion you want me to make sure I know.

7 MR. ENOCH: It's a footnote, Judge, is
8 what I'm pointing at.

9 THE COURT: It's in his motion for
10 sanctions.

11 MR. ENOCH: It is, yes.

12 THE COURT: I've already got my own
13 highlighted here. What page do you want me to look at?

14 MR. ENOCH: I just want you to note the
15 money.CNN.com article.

16 THE COURT: What footnote do you want me
17 to note?

18 MR. ENOCH: The very first one on the
19 first page, sir.

20 THE COURT: Got it.

21 MR. ENOCH: Okay. That's just the --
22 that's the location of the article. Now, the essence of
23 this motion is, with Ms. Binkowski's support and
24 declaration, CNN came out with this story about how
25 Twitter still had some posts, and what Jones did is he

1 went and removed those posts before I could get them for
2 this discovery, he destroyed them, and I can't get them
3 now. The gravamen of everything, Ms. Binkowski said I
4 went to this site, I went to this site, they're not
5 there, I can't find them. You'll see in the motion
6 papers we filed, the same day she filed that declaration
7 she told the press that she got every one of them and
8 preserved every one of them. So something's going on
9 outside the courtroom.

10 But I decided once I got back in town from
11 Alaska, how hard would it be to find those tweets? So
12 this is what I did. I made a video of it, Judge,
13 because I wasn't sure if the Internet would work here
14 today. I sat down -- the first thing I did when I got
15 back in the office, I sat down at my computer --

16 MR. BANKSTON: Judge --

17 THE COURT: Excuse me. He's arguing.
18 It's not your turn.

19 MR. BANKSTON: I'm just going to object to
20 the evidence. I've never seen this evidence.

21 THE COURT: I don't think it's being
22 offered.

23 MR. BANKSTON: Oh, okay.

24 THE COURT: If he shows things that are
25 outside the record, they're outside the record.

1 MR. BANKSTON: Okay.

2 MR. ENOCH: Well, Judge, my testimony -- I
3 mean, my -- I thought we were doing representations.

4 THE COURT: You are doing representations.

5 MR. ENOCH: Okay.

6 THE COURT: And you can call him as a
7 witness if you wish. But we're not going to add new
8 exhibits that have not already been disclosed. You're
9 not planning on doing that, are you?

10 MR. ENOCH: Well, Judge --

11 THE COURT: You're giving me a history,
12 the chronology --

13 MR. ENOCH: I am.

14 THE COURT: -- of what you did as counsel
15 in the case.

16 MR. ENOCH: Yes, sir.

17 THE COURT: But you're not offering an
18 exhibit, are you?

19 MR. ENOCH: This exhibit is filed. It was
20 filed today. So I think it's -- I can't remember the
21 exhibit number. I'm not sure about that, Judge. I
22 don't want to misrepresent the file, whatever it is.

23 THE COURT: That's all right. You believe
24 it's in the clerk's file. So if he wants to go back and
25 look at it --

1 MR. ENOCH: Yes.

2 THE COURT: -- it's transparently there.

3 MR. ENOCH: Yes, sir. And I'm not sure,
4 so I could be -- I don't -- I don't want to misrepresent
5 something. But this is -- and I will describe it also.

6 I sat down at my computer screen. I put
7 two Google screens up. And I decided I want to find out
8 how you find deleted tweets, and this is how I did it.
9 In one Google search page I put the CNN article in it,
10 just Oliver Darcy, CNN, Alex Jones, Twitter, as you see
11 on that screen. Hit search. I found the CNN article
12 during that search. And I'm going to put that -- click
13 that August 9 article. Click it.

14 Now, the left Google page has got that
15 article. I have to get rid of some security alerts.
16 And I go down to the tweets that are under the Sandy
17 Hook portion of his argument. You'll see they're in
18 blue. I show where the first two tweets are. I click
19 on one of the tweets. So I do exactly in the motion
20 what Mr. Bankston did. I got this blue page saying
21 sorry, that page does not exist.

22 So I went to Google and typed in "How do I
23 find deleted tweets?" And in .44 seconds I got
24 32 million results. So I followed the instructions I
25 got on Google. You copy the URL at the original deleted

1 tweet site, which I'm doing now, and then you go to
2 Google and you paste that full URL and search, which I'm
3 doing now on the left-hand side of the video. And you
4 paste it, and then you search.

5 And then Google says if the tweet URL is
6 shown as having results, look for an arrow to the right
7 of it. And sure enough, there's an arrow to the right
8 that's Twitter. Select cache. I select cache. There
9 is the tweet.

10 Judge, that process was repeated by me --
11 I'm looking at the time now. That's how difficult and
12 time consuming it is to find these, quote, deleted
13 tweets, because they're not deleted. They're not
14 destroyed. It's just like an email. If you sent an
15 email out there in the universe, you can take it off --
16 you can pull it down. You can pull down your post.
17 Everybody out there has it. And that's the way you find
18 it. And his expert, Ms. Binkowski, who is a
19 self-professed online researcher couldn't figure that
20 out. Nobody prompted me. I didn't call an IT person.
21 I just asked Google.

22 I will wrap up the sanctions, Judge, and
23 then I'll wrap up. It's so early in the case. I've
24 never sought sanctions like this before, but I've never
25 been in a TCPA case where someone sought spoliation.

1 Under the TCPA, unless you ask for permission, you don't
2 get discovery anyway. You have to come ask for it. And
3 it's a burden to get it. I don't care what happens;
4 you've got to get leave from the Court. You don't send
5 a letter wanting information and then when you don't get
6 it from someone you know who's not around and can't
7 answer whose assistant isn't around and can't answer
8 you, and you don't call the firm to ask anybody else to
9 find it, and don't send context to the people who
10 actually represent Jones in the Fontaine matter, you're
11 not really looking for the answer; you're just looking
12 for a setup.

13 And then he files a motion for sanctions
14 calling my clients, among other things, evil,
15 intentionally destroyer of evidence, trying to hide from
16 the truth. Mr. Jones is a lot of things. He's not a
17 coward. He's not trying to run from anything.

18 I sent whatever my affidavit is. And my
19 affidavit was filed as Exhibit D in one of our filings,
20 Judge. And I testified that I have spent \$28,162 in
21 fees responding to this crazy motion for sanctions,
22 another \$75 in long distance communications, ship to
23 shore, when I was coming home and I had to get the
24 response filed. You were gracious enough to say -- you
25 might recall I said I'd try to get it on -- the cell

1 phone, it cuts out and is terribly inefficient.

2 And then I estimated that through today
3 would be \$3,275, for a total of \$28,162, plus 75, plus
4 3275. I think those are reasonable and necessary fees
5 for me having to respond to a motion that was a
6 publicity stunt, a motion that got what he wanted, that
7 got the *New York Times*, *The Hill*, *The Guardian*, to put
8 nationally my client is a bad guy, because that's his
9 desire to have Google and Ted Cruz -- he sent a letter
10 to the editor Cruz -- to Senator Cruz, please stop
11 defending this vial man.

12 It is an all-out campaign to silence my
13 client, and that is inappropriate under the TCPA. And
14 if you looked at the discovery he wants, Judge, he wants
15 tax returns. I didn't see anything related to these
16 supposed tweets or the comments to the tweets. The *KTRK*
17 case that we've already cited in our papers say, Judge,
18 comments -- you can't get spoliation for destroying
19 comments because that's not relevant to either malice or
20 to the defamatory statement. The idea that we should be
21 sanctioned because other people's comments, they took
22 them down, that's silly.

23 So to wrap up on the TCPA, we have a
24 situation where we had told you from the beginning that
25 it was all about making sure that Mr. Jones be shut

1 down. I just showed you this video. That's the
2 simplicity with which I found most of the tweets, I
3 think three of them where he complains about we had to
4 find a different one -- another way. And I followed
5 Ms. Binkowski's tweets. Same thing works. You can find
6 those.

7 They didn't look. If I could do that in a
8 half a second -- they spent hours on this motion.
9 Ms. Binkowski spent presumably some time on her
10 declaration. And they didn't even ask Google how to
11 find them. And they didn't even -- he didn't even
12 contact Mr. Taube about Mr. Taube's clients in the
13 Fontaine matter. It's because he didn't want the
14 response. He wanted to say I tried, like he told
15 Tiffaney, repeatedly contacted him this week. Not true.
16 Not true. Because he wants the press to believe and
17 report that my client is running from justice and afraid
18 of this lawsuit when my client is anything but that.

19 My client believes very strongly that free
20 speech in America is under attack. And he uses some
21 words, Judge, that I would never use, nor would you or
22 anybody in this courtroom. I get that. It's
23 uncomfortable. It's hurtful. It is absolutely
24 offensive to most people. But it wasn't defamatory in
25 this case.

1 What Mr. Shroyer did and what Mr. Jones
2 did when he played it later saying I'm not saying
3 they're liars, they were commenting on the Zero Hedge
4 report. And in the Zero Hedge report, Ms. Binkowski
5 gives an opinion about how Zero Hedge is a dubious this
6 and that. I gave you cites in my papers, *Time Magazine*,
7 *New York Times*, et cetera, that have said, yeah, the
8 reporting's good; as a matter of fact, it affects the
9 markets. It's a great financial blog. My clients gave
10 direct testimony; I believe them credible.

11 Ms. Binkowski says that Mr. Shroyer edited
12 the tapes that were played. That's pure speculation on
13 her part. An affidavit Mr. Shroyer just filed said you
14 can't go to the Zero Hedge report now and find those
15 videos because they've been removed.

16 The only person who knows what happens
17 with those videos when they're played is Mr. Shroyer,
18 and he's testified I just clicked on the embedded links
19 and played the videos that were there. There was no
20 editing by anybody at InfoWars. And he shows the Zero
21 Hedge report for the first part of the presentation.
22 Ms. Binkowski says, oh, that's terrible because he only
23 mentions it one time.

24 They cite a case, Judge, where there are
25 three editorials over a two-week period, a proposition

1 that if you don't mention it each time, you're
2 commenting on it yourself and you're no longer relying
3 on the report. This is one four-and-a-half-minute
4 report. They mention it at the beginning. They show
5 the report. He flips through the report, rolls through
6 the report, showing the language that he's quoting when
7 he's doing it. He was obviously relying on it.

8 And if he endorsed it, Judge -- this is an
9 argument they're going to make; he endorsed the lie;
10 they called my statements about substantial truth vial,
11 just like Mr. Jones. Our statement is not that it was
12 true that he didn't hold his son. I would never say
13 that. I know better than that. The news reports --
14 you know better than that. The point is when
15 Mr. Shroyer commented on that, all he said the
16 conclusion was -- the conclusion was, well, there's
17 going to be a lot of conspiracy theorists who question
18 this now and that's just a fact. It's got to be cleared
19 up. It wasn't this guy's a liar.

20 You remember the context in which it was
21 shown, Megyn Kelly had done a hit piece, in their view
22 and others' view, to show that Mr. Jones spurs
23 conspiracy theories by spewing inconsistent facts or
24 false facts. Megyn Kelly had just misplayed, a lot of
25 people thought, and misquoted and edited out some things

1 from Mr. Jones.

2 Zero Hedge responded to that: Megyn
3 Kelly's hit piece has shown an anomaly. And so the
4 point of the piece when you watch it will be it's not
5 that Mr. Heslin is a liar. It is look at NBC and Kelly
6 calling us conspiracy theorists, fueling conspiracy
7 theorists, and yet they're doing it themselves because
8 they're not explaining the apparent inconsistency
9 between the testimony of the coroner, the parents, and
10 Mr. Heslin; NBC and Megyn need to respond. That's what
11 it was.

12 At this time, Judge, I'll yield the rest
13 of my time. We believe -- not yield. Excuse me. I'll
14 take --

15 THE COURT: Well, you have more time to
16 use without --

17 MR. ENOCH: Am I limited to ten minutes on
18 rebuttal?

19 THE COURT: Yes, you are.

20 MR. ENOCH: Then I'll --

21 THE COURT: And so you've got another --

22 MR. ENOCH: I'll do one more thing,
23 Your Honor.

24 THE COURT: -- another eight minutes if
25 you want to use them.

1 MR. ENOCH: Oh, I thought he said three.

2 THE COURT: I may be miscalculating. I
3 thought you started at -- I'm sorry. You are so right.
4 You are so right. You're down below your three minutes.
5 I didn't -- I didn't give you the warning that I -- I
6 mismarked it.

7 MR. ENOCH: That's all right.

8 THE COURT: So you've actually gone past
9 into your ten minutes, but I didn't warn you, so I'm not
10 going to count that against you. You went a couple
11 minutes over, but you'll have ten minutes to rebut.

12 MR. ENOCH: Thank you, Judge.

13 THE COURT: All right. Why don't we break
14 now.

15 MR. BANKSTON: That sounds good.

16 THE COURT: And then we'll let you use
17 your hour, and we'll let him use ten minutes. I guess
18 if you want an hour and two minutes, you can have them,
19 since I'm giving him two extra minutes, but I'm hoping
20 you can do it in an hour. And I'll see you back in
21 about ten minutes.

22 MR. BANKSTON: Okay, Judge.

23 *(Recess taken)*

24 THE COURT: You may proceed.

25 MR. BANKSTON: All right, Your Honor. May

1 it please the Court. Mark Bankston for the plaintiffs.

2 I want to talk to you first about
3 discovery. You can grant discovery in this context on a
4 showing of good cause. When good cause is undefined in
5 a statute, that means something akin to a legitimate
6 reason as opposed to mere arbitrariness. And here
7 there's going to be several non-arbitrary reasons to
8 grant discovery.

9 First of all, I don't get to roll the dice
10 on your public figure ruling, so there's the possibility
11 I'm going to have to prove malice in this case. I
12 believe we have that evidence, but obviously you just
13 heard a bunch of argument about subjective state of
14 mind. And most of these things are things I wouldn't be
15 able to get without discovery.

16 Also, you've also heard while we've
17 established to you who the various people are and where
18 the things were published and the businesses involved,
19 there's some dispute about who at Free Speech Systems
20 caused it to be on the website, the responsibilities of
21 various parties. We've pled everything that we can and
22 given you every information in the public domain, but
23 clearly there's information in the private domain that
24 could assist us in proving those if we need to
25 supplement and make our record better on that.

1 It's interesting because these issues came
2 up in the last hearing as well, the last two hearings we
3 had. And during those hearings it was the said, well,
4 he should have asked for discovery; and knowing
5 Your Honor, you very well would have granted it. And
6 now I'm hearing the exact opposite argument; don't grant
7 the discovery.

8 Here you could also have whether
9 defendants' affirmative defenses have been asserted in
10 good faith. There's a bunch of affirmative defenses
11 asserted. Some of that is also -- some insider
12 corporate information is going to help make that more
13 illuminated. I think it's already clear, but that will
14 resolve all of defendants' objections equitably.

15 The internal documents they have prior to
16 defamation can help establish the context of the video
17 that meet both parts of our burden. As I said, these
18 issues have come up in the other hearing. And while
19 it's not the general rule in every TCPA case, pretty
20 much every major opinion we bandy about here with each
21 other, the *Warner Brothers* case, *KTRK*, *Bentley*, all
22 these cases ordered discovery, because in a case that
23 has complicated facts, that has a complicated legal
24 backdrop, that has multiple affirmative defenses, and
25 particularly corporate defendants, discovery is going to

1 be appropriate there if the plaintiff wants it.

2 You can also consider whether the suit
3 appears facially substantive or facially frivolous. A
4 facially frivolous suit is probably not one where you're
5 going to want to order discovery because the entire
6 purpose of the TCPA is to take care of that. But where
7 you see things before you that are substantive, that
8 have substantive merit to them, discovery is an
9 appropriate option in that case.

10 I believe the Court's going to be well
11 within its discretion here to order discovery just on
12 those bases, but there is another basis, and that's this
13 deletion issue. So in talking about plaintiff's motion
14 for sanctions, I want to walk you through that. And as
15 a preliminary matter, as your court brought up -- as the
16 Court brought up, if we're talking about instructing the
17 jury, we're talking about something way down the line;
18 we're not talking today. But if we are talking about
19 relief that could potentially influence our burdens with
20 the TCPA motion, that may be ripe for today. I'm not
21 today going to ask you to rule on that motion, to give a
22 remedy in the TCPA motion today or within the next
23 couple weeks or whenever it is.

24 THE COURT: On the sanctions?

25 MR. BANKSTON: On the sanctions. What I

1 would rather --

2 THE COURT: Well, let's hold off on that
3 before you move past what you just said. I asked, as I
4 do in virtually every case I hear where I know it's
5 coming in, give me your proposed orders a couple days
6 ahead of time, and you did. You gave me --

7 MR. BANKSTON: Now --

8 THE COURT: Excuse me.

9 MR. BANKSTON: Oh, sure. Yes.

10 THE COURT: You gave me a proposed order
11 in which -- I know this came from you because there's
12 your sig right on it. In light of the intentional
13 destruction of evidence, the Court finds that plaintiff
14 has been hindered in full access to evidence.
15 Accordingly, for the purposes of defendants' TCPA
16 motion, the Court will presume that the destroyed
17 evidence was unfavorable to defendant. That's your
18 order --

19 MR. BANKSTON: Correct.

20 THE COURT: -- you wanted me to sign.

21 MR. BANKSTON: I want -- I probably want
22 to have you sign that in the future. But because of the
23 affidavits that have been filed in the last 24 to 48
24 hours, I would rather for right now -- will the Court
25 allow me to argue that spoliation motion in support of

1 further discovery with our discovery motion?

2 THE COURT: Well, let's nail that down
3 then.

4 MR. BANKSTON: Okay.

5 THE COURT: So what I hear you saying is
6 if I don't grant further discovery, and they are
7 resisting further discovery, and I just go ahead and
8 rule, and I have to rule in the next 30 days under the
9 law on the motion to dismiss, you are not asking me to
10 make any presumptions because, in light of the record so
11 far, you're not sure you're able -- and I would respect
12 it if you say that in light of what I heard on the other
13 side -- you're not sure you're able to yet make the case
14 that in fact intentional spoliation has occurred.

15 MR. BANKSTON: Correction on --

16 THE COURT: Is that a fair enough
17 statement?

18 MR. BANKSTON: I do believe we have the
19 information that intentional spoliation has occurred.
20 What --

21 THE COURT: Because their argument is --
22 excuse me. Their argument is you don't; and in fact,
23 it's so spurious that you should be sanctioned for
24 making it.

25 MR. BANKSTON: Absolutely.

1 THE COURT: You're saying, well, I might
2 agree that we -- in light of the recent affidavits,
3 maybe we fired off without enough complete information
4 and now we want some more information about that topic,
5 but I concede I can't yet, yet, make the argument for
6 that.

7 MR. BANKSTON: That's -- perhaps it'll
8 become more clear when I go through the argument,
9 because I am not in any way saying that we cannot prove
10 intentional spoliation.

11 THE COURT: At this moment.

12 MR. BANKSTON: At this moment.

13 THE COURT: Okay. Well, I welcome hearing
14 that because they're saying it's so spurious you should
15 be sanctioned for it.

16 MR. BANKSTON: Absolutely. And let's get
17 into the heart of that.

18 So let's first talk about the origin of
19 how it happened, which is that all of a sudden we saw a
20 CNN article in which a journalist named Oliver Darcy had
21 discovered tweets that nobody else had known about.
22 This has always been a needle in a haystack kind of
23 process. Jones himself has had like 100,000 tweets.
24 He's on air four hours a day. So they found these. And
25 then immediately afterwards, Jones got on his broadcast

1 show or his Internet show and said that I -- you know,
2 once that article was published, I instructed my staff
3 to go delete it.

4 Obviously this caused a lot of panic on
5 our side. We sent an urgent request on Sunday after
6 seeing the article. We sent a follow-up request. So we
7 communicated with counsel twice. On top of that, we
8 consulted with our expert. And what she said is that in
9 this hasty situation, regardless of even if they did
10 take steps to preserve information and try to save
11 original copies, doubtless information was going to be
12 lost in that process because they didn't have time to do
13 it properly. And it turns out that that's exactly true.
14 That is exactly what happened and is admitted in their
15 affidavits. And we'll get to that.

16 Basically I needed to file ASAP to stop
17 further irreparable harm. If I've got Alex Jones on TV
18 saying I'm ordering my staff to delete stuff, I'm very
19 concerned. I needed to file advance of the hearing in
20 order to be considered. And I wanted to file it 72
21 hours after having no response. But because of the
22 situation which I knew, which was that Mr. Enoch was on
23 vacation, I gave him the entire week to get back to me.

24 I can tell you, Your Honor, that if my
25 client was on TV saying I'm destroying evidence, I've

1 ordered my staff to delete things that are relevant to
2 this lawsuit and I had two urgent communications from
3 opposing counsel asking what the situation was, that --
4 those emails are not going unanswered for a week no
5 matter where I am on the planet. And I can understand
6 if maybe there were communication issues for some reason
7 for the entire week, he wasn't able to get Wi-Fi or
8 update emails. I'm not asking for anything based on
9 that. I'm just saying I had a reasonable inquiry of
10 asking counsel and asking my expert, and my expert told
11 me I had good faith to move forward.

12 So what we did is we filed the motion
13 telling Your Honor that even if materials were saved
14 from social media, even if individual tweets were saved,
15 that we were still at risk of serious irreparable harm,
16 and that is exactly what happened.

17 They contend that we allege that four
18 tweets and two YouTube videos were deleted. We didn't
19 allege any such thing. We said there's a CNN article
20 saying there's a bunch of stuff deleted, and our expert
21 went and pulled it up and confirmed that they were
22 actually deleted.

23 Let me tell you -- well, actually, let's
24 move on to what was actually deleted. Defendant said
25 that they copied the four tweets before deleting. They

1 don't say exactly how they did that. And they don't
2 produce them, so we don't exactly know, but they say
3 they've copied them. But what they -- the problem is
4 that social media is not just a chat room or a bulletin
5 board. Okay. So when you take a single message out,
6 not only are you pulling it out from the web of context,
7 not only can it become inscrutable in that --

8 THE COURT: Slow -- you're really red
9 lining now --

10 MR. BANKSTON: Okay.

11 THE COURT: -- because you're --

12 MR. BANKSTON: Yeah, I'm trying to make my
13 time. You're right, Your Honor.

14 THE COURT: And the time is the time you
15 announced for.

16 MR. BANKSTON: Exactly.

17 THE COURT: But you still have to do it in
18 a measured enough way that the --

19 MR. BANKSTON: You're -- yes, you're
20 absolutely right, Your Honor.

21 THE COURT: -- that the court reporter can
22 get you a record.

23 MR. BANKSTON: And our expert talks about
24 how when you take a piece of content out that happens.
25 But most importantly, when you do that, you can also

1 lose concrete data.

2 And in this case, what they admit is that
3 17 messages, which are third-party messages, are now
4 lost because what they say is 17 messages were
5 inadvertently lost on defendant's cache, although the
6 vast majority were able to be maintained. And what this
7 means is they relied on their local cache, which is
8 temporary computer memory, instead of actively archiving
9 the entire thread by permanent means. They didn't do
10 that. Mr. Dew in his affidavit admits that.

11 And if you knew you were going to have to
12 delete stuff and you weren't in a hurry, you could
13 archive the entire thread. It gets a little technical,
14 but basically you need to tweet every comment in what's
15 called a quote tweet of the original tweet, which holds
16 itself out and creates a new thread. Social media is
17 weird like this. It's not -- it doesn't function
18 exactly like a chat board would function. And the point
19 is you can do it and it was not done. And there's no
20 dispute that information was lost.

21 They're trying to tell us that the
22 information --

23 THE COURT: And the information that was
24 lost we know is what? Not what it specifically said,
25 but from whom was this communication made to whom?

1 MR. BANKSTON: We only know two of them.

2 THE COURT: Okay. We know it wasn't from
3 the defendants, correct?

4 MR. BANKSTON: Only to the extent that
5 they've represented that, and I don't know if that's in
6 an affidavit.

7 THE COURT: Well, do you have anything in
8 the record, since it's your burden to show they
9 spoliated something that would be their communication or
10 their representation or their documents, their
11 evidence --

12 MR. BANKSTON: There's no dispute that the
13 messages were in their possession, were in their Twitter
14 thread.

15 THE COURT: Here's my question. When I
16 read the affidavits, am I going to see that these -- we
17 know there were certain communications made by them that
18 they destroyed?

19 MR. BANKSTON: No. Let me make that very
20 clear.

21 THE COURT: That's what I thought the
22 answer was.

23 MR. BANKSTON: No.

24 THE COURT: I just wanted to nail it down
25 on the record. Thank you.

1 MR. BANKSTON: Yes, absolutely. These are
2 absolutely -- well, again, it's hard for me to know.
3 But from what every evidence would suggest, these are
4 third-party communications.

5 THE COURT: That's what I understood you
6 to be saying.

7 MR. BANKSTON: Right.

8 THE COURT: And so there's nothing in the
9 record before me to indicate that they have destroyed
10 any communications they made?

11 MR. BANKSTON: I agree with that.

12 THE COURT: Okay.

13 MR. BANKSTON: I agree with that,
14 although, I mean, obviously I would say that a party's
15 duty to preserve evidence goes beyond their own
16 communications and goes to all relevant documents in
17 their possession or control. Right? So in this case
18 those comments very well can be relevant. They cited
19 you --

20 THE COURT: Comments from third-parties --

21 MR. BANKSTON: Yes.

22 THE COURT: -- could be relevant --

23 MR. BANKSTON: Yes.

24 THE COURT: -- even if they're just out in
25 the sphere of people who comment?

1 MR. BANKSTON: Who communicated with
2 InfoWars, correct, Your Honor.

3 THE COURT: Okay.

4 MR. BANKSTON: For instance, in the
5 Fontaine case we included such evidence that gave
6 awareness of InfoWars' actual notice that Mr. Fontaine
7 was being harassed and subject to -- you know, from
8 actions from their followers, right?

9 There's other things you could have as
10 well. If those third-party user comments provided
11 information to InfoWars about the bona fide events of
12 Sandy Hook or other things relevant to the comment
13 InfoWars is making --

14 THE COURT: It can go to malice,
15 et cetera.

16 MR. BANKSTON: Exactly. So these comments
17 all can be relevant. And in fact, when *Brookeshire*
18 *Brothers* says that the Court can make the assumption
19 that if stuff is lost through an intentional act like a
20 deletion, that you can assume that they are all
21 relevant. They cite --

22 THE COURT: Wasn't that the object that
23 fell off the shelf onto somebody?

24 MR. BANKSTON: Yes, it sure was.

25 THE COURT: Yes, I remember.

1 MR. BANKSTON: And *KTRK* is the case they
2 cited you about third-party comments. And that does
3 make a point about third-party comments, is there's one
4 thing you can't do. You can't use them to prove
5 defamation *per se*. And the reason you can't do that is
6 because defamation *per se* can only be proved from the
7 actual text of the defamation. You can't take users and
8 show how they reacted to it to show that it defamed him
9 *per se*. But that's not to say that all third-party
10 communications with InfoWars and directed to them to
11 provide them notice isn't relevant.

12 So in other words, we know it's not
13 evidence created by InfoWars --

14 THE COURT: So you may be able so far to
15 show that there might be some evidence, which if you can
16 show they intentionally deleted these third-party
17 communications to them, you could make -- I guess I'm
18 going to use your words in your order. For the purposes
19 of this motion to dismiss, you could conclude that I
20 could presume that those tweets, those incoming tweets,
21 would be unfavorable to defendants by showing what?
22 Very different than *Brookshire* where the very object
23 that caused the harm to the injured person was gone.

24 MR. BANKSTON: Exactly.

25 THE COURT: This is much -- this is

1 several degrees away from that in terms of being a
2 tangent.

3 MR. BANKSTON: I agree with that.

4 THE COURT: And so does the law of
5 spoliation allow me to go that far on presumptions or is
6 it just, wow, that doesn't look good and you ought to
7 think about that when you think about this motion to
8 dismiss?

9 MR. BANKSTON: I can answer that in two
10 ways, Your Honor, which is, one, I think you would be on
11 a close call. I really do.

12 THE COURT: On the presumption.

13 MR. BANKSTON: On the presumption. I
14 think you might go -- off this evidence that we have in
15 front of us right now, I think if you entered a
16 presumption today, it's arguable you might go too far.

17 THE COURT: Well, that's why I'm picking
18 on you, because I don't think we have the record to do
19 it, don't you?

20 MR. BANKSTON: Correct.

21 THE COURT: All right.

22 MR. BANKSTON: And so at the point at
23 which I filed the motion, which I had no response from
24 them, and now obviously the motion did get their
25 attention, the record's been developed a little bit.

1 But I still have a ton of questions. There are some
2 things about this that don't quite line up.

3 THE COURT: You want to do some more
4 discovery on spoliation.

5 MR. BANKSTON: Correct.

6 THE COURT: Yes, I understand.

7 MR. BANKSTON: That would be a nice thing
8 to do. And part of it, Your Honor, is because InfoWars
9 argues that all of this should be excused because it
10 attempted to maintain as much of the information as
11 possible. And what that says to me is we intentionally
12 modified evidence, but we tried to save most of it. And
13 if that's their attitude, and if that's how this
14 litigation is going to go, I'm very concerned. And
15 that -- even with whatever we have in the record right
16 now, I'm very concerned about that fact alone. Their
17 justification was --

18 THE COURT: About what fact alone?

19 MR. BANKSTON: The fact that they -- their
20 attitude of we should be excused because we
21 intentionally modified evidence, but we tried to save
22 most of it. If that's going to be their approach to
23 evidence going down the road in this case, then I'm very
24 concerned, and I'm very glad this came up now early.
25 Because the problem is with this, Your Honor, is they

1 said that if they didn't -- the reason they said they
2 had to do this is they said, quote, if defendants did
3 not remove such complained-about posts, they would have
4 likely been found to have violated Twitter policies, and
5 the entire account would have been shut down resulting
6 in serious injury to defendants. And they have to know
7 that's not an excuse. They would have to know that.

8 In fact, all of their social media
9 troubles recently would mean that they should be
10 preserving every social media account down to
11 everything, down to the kitchen sink, and I do not
12 understand why that hasn't occurred already. And these
13 series of events have seriously alarmed me about that.
14 And it relates to the videos. So, for instance, in the
15 CNN article there's talks about Periscope videos
16 being --

17 THE COURT: But you don't have any duty to
18 not spoliage something unless you know or can reasonably
19 anticipate it would be an item of evidence -- potential
20 evidence in a lawsuit.

21 MR. BANKSTON: Correct. And we did serve
22 a spoliation letter which identified any communication
23 in their possession relating to Sandy Hook, my clients,
24 or the fundamental claims of the demand letter. So they
25 were on notice to preserve all documents relating to

1 Sandy Hook, period. So they've been put on notice for
2 that.

3 THE COURT: Well, you were talking earlier
4 about they know they've got problems with Twitter, et
5 cetera; they should be saving everything. I didn't
6 follow that.

7 MR. BANKSTON: Oh, what I mean by that is
8 that if they know that there is a third-party out there
9 who may in some way take some action that's going to
10 cause a bunch of deletion of their materials, they
11 should probably have to bear in mind to preserve those
12 because they know they're under a duty to preserve them.

13 THE COURT: Well, that's actually what
14 their lawyer sent to Google, as I recall --

15 MR. BANKSTON: Correct.

16 THE COURT: -- within a short period of
17 time --

18 MR. BANKSTON: Correct.

19 THE COURT: -- saying we don't understand
20 your email, but here's something you can't do; don't
21 destroy anything.

22 MR. BANKSTON: Absolutely. And I have no
23 problem with that letter whatsoever. What my point is,
24 is that after that letter was sent and after all this
25 was going on with Google and then also Facebook, if I'm

1 a reasonable person in defendants' position and I know I
2 have preservation obligations, I'm preserving my Twitter
3 account because I know that might be next. And it's
4 sort of a situation of -- say I own a construction site
5 or something that's relevant to a lawsuit, but I know a
6 third-party is about to go in there and destroy it for
7 some reason.

8 THE COURT: Well, that's his point on his
9 motion for sanctions, which got my attention more than
10 sanctions motions usually do, to be honest. I don't see
11 them very often, and no judge likes to see them.

12 They're suggesting you can read everything
13 we did, especially as counsel, and you should infer good
14 faith from that and that -- I can tell he's taking a
15 great deal of umbrage and feels maligned by the
16 aspersions -- what he considers to be aspersions about
17 his work as an officer of the court in terms of making
18 sure that no evidence is destroyed. And, you know,
19 we're all lawyers. We all take a lot of pride in that,
20 because that's at the end of our career what matters to
21 us most, that we acted with integrity.

22 MR. BANKSTON: When he's talking about an
23 aspersion against him, I'm assuming he's talking about
24 simply the citation of cases about what courts have done
25 in terms of spoliation before.

1 THE COURT: Well --

2 MR. BANKSTON: The only things our motion
3 has ever said is that we repeatedly contacted him over a
4 week and never got a response.

5 THE COURT: Okay. So you're not
6 suggesting in any way that counsel is complicit with
7 anything being done by the defendants to fail to
8 preserve evidence?

9 MR. BANKSTON: Absolutely not.

10 THE COURT: Okay.

11 MR. BANKSTON: At least not on the record
12 I have. And I don't think there's anything in front of
13 you that would suggest that to you. Again, I do make a
14 comment that I wish I had gotten a faster response, but
15 I don't think there's anything untoward about that or
16 anything.

17 I mean, I'm 100 percent -- I understand
18 Mr. Enoch was on vacation that apparently produced
19 unusual amounts of connectivity problems. That's fine.
20 I mean, I absolutely am not making any aspersions on
21 that at all.

22 From where we stood when this motion was
23 filed to the information we have today is obviously two
24 different places. That being said, our initial concern
25 that we filed with this motion is that information would

1 be lost, and we described to you exactly how it would be
2 lost, and that's exactly what happened.

3 THE COURT: In his argument for sanctions,
4 though, he talks about the communications you made
5 erroneously to his office about the Fontaine case, which
6 I ruled on yesterday, along with the Pozner case, as
7 you know. And so I was mystified by that too.

8 MR. BANKSTON: The inclusion of
9 Mr. Fontaine was simply because there was a Parkland
10 tweet in there.

11 THE COURT: And I'm understanding that
12 they have affidavit record in this record that Mr. Taube
13 and his law firm and his colleagues were never notified
14 of any Fontaine issues and that -- they're suggesting
15 that this is more a -- that you're waging several
16 fronts, just one of which is the lawsuit -- and,
17 you know, it's not the first time I've seen lawyers do
18 that; it's not unheard of -- but that that's -- that
19 there's some setup going on and that that's an improper
20 use of the Court.

21 MR. BANKSTON: Let me answer both parts of
22 that, first with Fontaine. I didn't have a -- I was not
23 on the eve of a dispositive hearing in Fontaine.
24 That's -- I'm not doing -- nothing's happening in
25 Fontaine for a while. I mean, you're going to rule.

1 wasn't chief on my mind at the moment, but it would --
2 certainly I would have liked to get an answer about the
3 Parkland tweet, and I thought I could get it from one
4 source. I thought whatever was going to be the answer
5 on the Sandy Hook tweet was going to be the same answer
6 on the Parkland tweets and because I wasn't planning on
7 taking any action in Fontaine; also, just to make it
8 clear why the Parkland tweet was even relevant to the
9 conversation. I just wanted to deal with it one time.

10 And if I'm going to talk about that
11 with -- for the specifics of the Fontaine case and seek
12 any sort of motions or remedies, all that's going to
13 Mr. Taube. But I'm not going to file anything in the
14 Fontaine case right now. So that's a little bit why
15 that was the way it was.

16 Another issue that comes up with that too
17 is the videos. So there's this -- if you'll notice in
18 our motion, our concern about the videos is not so much
19 the videos themselves, which, of course, we have clips
20 of and we have transcripts of, but the social media
21 pages they're hosted on. And now it does appear from
22 the letter that we have that at least with the Google
23 videos there's been a request for Google to maintain
24 that information. And it appears from Mr. Dew's
25 affidavit, although it's not totally sure -- it appears

1 that they're saying they didn't delete the videos and
2 that YouTube did. But I'm not sure if they're saying
3 that neither they or YouTube deleted the videos. It's
4 hard to tell. But suffice it to say it looks like
5 they've attempted to maintain the information InfoWars
6 created to accompany the videos online. That's what it
7 looks like.

8 THE COURT: Well, as far as you know now,
9 videos have not been destroyed, correct?

10 MR. BANKSTON: Correct. Correct. And
11 what I'm concerned about is not the videos, but the
12 pages they're hosted on. Right? Because those pages
13 contain textual information created by InfoWars and
14 commentary to accompany the video. And that's true
15 whether it's on YouTube or Periscope.

16 THE COURT: That it's published.

17 MR. BANKSTON: That it's published. Now,
18 the letter sent from the law firm in another case to
19 Google that they produced does a really good job of
20 saying we want you to produce -- like don't destroy not
21 just the video but the textual information on the page.
22 That letter is actually a really good job. I have no
23 beef with that letter whatsoever.

24 What I don't understand still at this
25 point is the timing on all that because the timing

1 doesn't make quite sense. These pages were down
2 August 2nd, August 3rd, right after this hearing.
3 Google didn't take action until August 6 publicly.
4 Maybe they did privately.

5 Anyway, my real concern is about what we
6 know has been lost right now. And for that we know that
7 stuff has been lost.

8 THE COURT: 30 tweets so far, right?

9 MR. BANKSTON: I think it's 17 messages.

10 THE COURT: 17.

11 MR. BANKSTON: And then we don't know of
12 anything that quote tweeted those, which it's going to
13 be --

14 THE COURT: I'm sorry. We don't know of
15 any --

16 MR. BANKSTON: Know of anything that --
17 what's called "quote tweeting" those individual tweets.
18 So that would be -- that chain is also broken whenever
19 those tweets disappear, so we're not entirely sure.

20 In terms of -- let me just address the
21 sanctions, the request, which is -- which has been based
22 on Rule 10 and Rule 13 on reasonable inquiry. And I
23 believe under the facts that my main reasonable inquiry
24 here was to go to my expert and say what has happened
25 here, what are the consequences. And in doing so, I got

1 an affidavit from her. And in doing so, that supported
2 our motion. And in doing that, the affidavit is
3 100 percent accurate because that is exactly what
4 happened.

5 In terms of communications of counsel, I
6 feel like contacting counsel twice over a week and
7 waiting a week for a response is a reasonable thing to
8 do on the eve of a dispositive hearing. I certainly
9 don't think in essence that I would have ever had to ask
10 him for any of that in truth, because once I knew what
11 was going on from my expert, I feel like I had good
12 cause to file the motion.

13 And I think it's a bit -- it would be
14 backwards to say I should be sanctioned for bringing a
15 motion for describing something to you that we were
16 worried would happen that then indeed did happen.

17 And so in this case I really feel that
18 this motion had -- there's a very strong chance in my
19 mind that this motion stopped further irreparable harm.
20 And I am absolutely confident that I would have filed
21 the exact same way every time, because when you have
22 Alex Jones on TV saying he's deleting materials, you
23 have to do something. You have to take some action.

24 Should I be sanctioned because I didn't
25 reach out and call his legal secretary? I think that's

1 a strange standard. I think I had plenty to go on to
2 file that motion and do so in good faith.

3 Is it part of a publicity campaign?
4 You'll not see my name in any of these articles. You
5 hear about this *Hill* -- you know, this *Hill* article that
6 showed up 45 minutes or something after the hearing --
7 or after the motion was filed. My name is not quoted.
8 I don't have any quotes in that article. I didn't
9 provide *The Hill* with a copy of that pleading.

10 There are people watching these pleadings.
11 There are people already right now posting about your
12 orders online. I know *Reuters* has got people at a
13 public terminal here every day. These suits are being
14 watched very closely. And I think, Your Honor, I'm very
15 familiar with what my obligations are under pretrial
16 publicity disciplinary rules. And yes, if reporters
17 want copies of pleadings, I'm more than happy to give
18 them to them. They are public documents.

19 Ultimately, Your Honor, I find this
20 worrisome. I still do have a lot of questions. It's an
21 unusual situation on a short time frame, and my client's
22 entire cause of action is at stake.

23 Given the other legitimate purposes that
24 discovery could serve and non-arbitrary reasons in
25 fairly resolving this matter, plus looking into what

1 actually happened here with the sanctions, because we
2 just don't have enough information at all yet, and all
3 we do know is stuff was lost, I'd ask you to reset the
4 hearing until November 9, allow me to serve the limited
5 written discovery that I've submitted, and allow me to
6 take the deposition of the parties. I don't need any
7 employees or any other people like that. I just want
8 the parties themselves.

9 THE COURT: Well, let's go through that
10 since you're back to your discovery motion. I looked at
11 your Exhibit H, which is the proposed written discovery.
12 In addition, you want to take four depositions.

13 MR. BANKSTON: Correct.

14 THE COURT: There's not a lot of law on
15 this. I think Justice Lang in the Dallas Court of
16 Appeals wrote an opinion recently. And I tried to glean
17 as much as I can from the few cases that are out there.
18 But it's clear that you don't have just unlimited
19 depositions and unlimited written discovery. In fact,
20 you used the words yourself. It's limited discovery.
21 And those words come right out of the CPRC.

22 So depositions. I'm looking at your
23 proposed order, what it is you want. And I see your
24 topics. I even numbered them. It's not just
25 spoliation. It's -- that's Item 2. It's also

1 responsibility of the various named parties. That was
2 an important issue in Fontaine, as you know, part of why
3 I ruled the way I did yesterday. And then 4, whether
4 affirmative defenses have been asserted in good faith.
5 5, whether it's an opinion or assertion of fact. And
6 full copies of the challenged statements, although it
7 sounds like other than these missing items you just
8 identified, there's not much more to be gleaned about
9 that. Correct?

10 MR. BANKSTON: Correct.

11 THE COURT: Okay. So let's go through
12 your proposed order, and then let's look at Exhibit H to
13 see what exactly you're limiting on your discovery.

14 MR. BANKSTON: Okay.

15 THE COURT: First of all, what would be
16 the hour length for -- remind me in the rules. It used
17 to be unlimited, but they finally put some constraints
18 on long-winded lawyers in depositions. How many hours
19 would you have for each one of these four depositions?
20 Two corporate reps. Maybe one of them would be Alex
21 Jones, maybe not, or maybe you'd have two different
22 corporate reps for the two different corporations. So
23 you'd have a total maybe of four witnesses.

24 MR. BANKSTON: Correct.

25 THE COURT: How much for each one?

1 MR. BANKSTON: I would assume a normal
2 deposition for them. I would ask for six hours.

3 THE COURT: Ah, that's pretty lengthy, but
4 I see you want six hours for each of four depositions.
5 Do you have a backup position on that?

6 MR. BANKSTON: My backup position is
7 whatever Your Honor thinks is appropriate, and I'm happy
8 to work with that.

9 THE COURT: Well, actually, some of the
10 case law suggests that you shouldn't have unlimited time
11 on depositions. That may be Justice Lang's opinion. I
12 can't remember. But I know that courts are supposed to
13 take a hard look at that so it doesn't become just full
14 bore discovery. In fact, there's a case -- there's
15 another case where they say that's what they were trying
16 to do, getting to the injunctive relief. Maybe it was
17 that case.

18 Defendant shall respond to written
19 discovery as revised. Well, first of all, let's start
20 with -- begin with the end in mind. The next hearing,
21 if I do this, what you're asking me to do, will not be
22 November 9th? Why? That's Thursday of a jury week.
23 I'm on the jury docket that week. There is no
24 three-hour hearing on that day. That's actually Friday.
25 I take it back. The 15-minute docket.

1 Now if you wanted to set it and have seven
2 minutes a side, I would let you, but I think you'll
3 regret that. So the next time you will have a
4 three-hour hearing in the 120 days -- because I made
5 this calculation when I read your motion -- is I believe
6 November 10th, which means you have to have this hearing
7 under the CPRC prior to November 10th, which means the
8 last day you can have a hearing that is at least three
9 hours long is Thursday, November 1st. Is that what you
10 want?

11 MR. BANKSTON: I'll take that.

12 THE COURT: Okay. Well, you don't have a
13 choice. You can make it earlier.

14 MR. BANKSTON: Right. Exactly. I think
15 if we took --

16 THE COURT: You can't make it later.

17 MR. BANKSTON: Sure.

18 THE COURT: And so you want written
19 discovery eight days. You did want it eight days before
20 your November 9th hearing, which you cannot have.

21 MR. BANKSTON: Yeah.

22 THE COURT: You can have a November 1st
23 hearing if I grant this motion. And depositions would
24 be completed no later than -- you had October 30th.
25 Eight days prior to the hearing you could have, if I

1 grant the motion, is October 22nd. Is that what you're
2 asking for?

3 MR. BANKSTON: That would be -- yes, that
4 would be our request, Your Honor.

5 THE COURT: Now let's look at the written
6 discovery that you say they should respond to. I didn't
7 get a lot of argument about this. I read his responsive
8 motion. It was mainly about spoliation, that your
9 justification for discovery is spoliation. It's not.
10 There's more than that, including the responsibility of
11 each and every one of the parties, which, as we all
12 know, became important in the orders I signed yesterday.
13 The responsibility of each and every party was not shown
14 in one of the cases, and so I granted a motion to
15 dismiss one of the parties.

16 But you're asking for it, and that makes
17 sense to me, particularly where you've got a verified
18 denial contesting that this entity's even been sued in
19 the correct capacity. So it makes sense to me to have
20 some limited discovery.

21 MR. BANKSTON: Okay.

22 THE COURT: But how limited?

23 MR. BANKSTON: Right.

24 THE COURT: And the one argument counsel
25 did make -- and I had already highlighted that written

1 I think you're going to have to cut it down into more
2 surgical requests. I'm not bothered by Neil Heslin or
3 his son. There's what this case is about.

4 MR. BANKSTON: Okay.

5 THE COURT: Does that make sense?

6 MR. BANKSTON: Yes, absolutely.

7 THE COURT: So B through E I'm not -- or
8 even Jim Fetzer. That's a very unusual twist in this
9 case, who Mr. Fetzer is and what exactly he's saying and
10 who is ever relying upon that.

11 MR. BANKSTON: Right.

12 THE COURT: Your argument is the
13 defendants are and they're doing it recklessly to the
14 extent they ever do. But B through C I'm -- B through E
15 I'm not worried about. But A, are you okay with just
16 letting that go --

17 MR. BANKSTON: Yes, Your Honor.

18 THE COURT: -- and taking the deposition?
19 Okay. That's good.

20 MR. BANKSTON: I could maybe try to come
21 up with something more focused, but --

22 THE COURT: Maybe, but you've got to be
23 careful because I'm going to sign --

24 MR. BANKSTON: If I'm doing a
25 deposition --

1 MR. BANKSTON: Okay.

2 THE COURT: Again, same thing under your
3 request for production. Everything that you ever have
4 having anything whatsoever to do with Sandy Hook, pretty
5 broad when this is supposed to be limited discovery just
6 so you can survive a motion to dismiss by showing a
7 *prima facie* case. So it's not full bore discovery of
8 everything that you might get if you survive the motion
9 to dismiss. So you'll be back on that. But at this
10 stage I'm supposed to limit the discovery to only that
11 which you should be allowed to get in order to respond
12 to this motion. So do you agree with me Sandy Hook's a
13 little too broad?

14 MR. BANKSTON: The one thing I am
15 concerned about or maybe -- I mean, actually I think
16 this could be taken care of in deposition, is I am
17 concerned --

18 THE COURT: There you go. So that
19 answers --

20 MR. BANKSTON: Yes, absolutely.

21 THE COURT: That answers my question. I
22 don't need that RFP that broad.

23 MR. BANKSTON: I think you're right,
24 Your Honor.

25 THE COURT: I appreciate you saying that.

1 Now I'm on to Free Speech Systems.

2 MR. BANKSTON: All right.

3 THE COURT: Once again, RFP -- see in
4 RFP 2 you didn't include Sandy Hook. But then on RFP 3,
5 transcripts of all InfoWars video in which Sandy Hook is
6 discussed.

7 MR. BANKSTON: Okay.

8 THE COURT: Again --

9 MR. BANKSTON: Too broad.

10 THE COURT: -- that's the case. That's if
11 you want to get into going beyond what he did with
12 Mr. Heslin, particularly about his son and holding his
13 son, that's what you have -- you have to survive the
14 motion to dismiss on that, not on everything having
15 whats- -- you know, anything whatsoever to do with Sandy
16 Hook. Same with RFP 5.

17 MR. BANKSTON: Okay.

18 THE COURT: A little broad. Make sense to
19 you?

20 MR. BANKSTON: It does.

21 THE COURT: Okay. And again, here we are,
22 RFP 11. You're going -- clearly getting discovery that
23 might have been pertinent in the Pozner matter and maybe
24 eventually will be in this case too.

25 MR. BANKSTON: Yes.

1 THE COURT: But this is Sandy Hook
2 Vampires Exposed. Don't know why you'd get that to
3 survive a motion to dismiss in this case. Does that
4 make sense to you so far?

5 MR. BANKSTON: I could see how it could be
6 evidence of malice, but since it's not primarily, I
7 would think that limiting discovery is just what you
8 would do.

9 THE COURT: Good. I appreciate that
10 you --

11 MR. BANKSTON: I just didn't want to
12 represent that that may never be relevant. I agree with
13 you; it may be in the future.

14 THE COURT: But you can't argue today why
15 you must have it to survive a motion to dismiss?

16 MR. BANKSTON: Exactly, as a necessity.
17 You're right, Your Honor.

18 THE COURT: Right. And that's what I'm
19 supposed to do, limit the discovery.

20 RFP 49, Owen's Shroyer's entire personnel
21 file. Well, that includes his financial records, his
22 medical information, just all kinds of stuff that --
23 you know, when I used to defend cases and prosecute
24 cases, you just didn't always get -- you might have to
25 review it in camera to see what on earth in the

1 personnel file do we really need in this case.

2 MR. BANKSTON: Yeah, I agree.

3 THE COURT: So you agree you don't need
4 the personnel file to survive a motion to dismiss?

5 MR. BANKSTON: I think if we could change
6 that to his employment agreement, that might help.

7 THE COURT: Well, that's actually the
8 next --

9 MR. BANKSTON: You're right, Your Honor.
10 It sure is.

11 THE COURT: That's exactly the next RFP.
12 That's No. 20.

13 MR. BANKSTON: Then yes, I'm fine with you
14 limiting that, Your Honor.

15 THE COURT: So in other words, you would
16 eliminate 19. You'd just like to keep 20 because that
17 could show who he works for.

18 MR. BANKSTON: Correct.

19 THE COURT: And it might show the scope of
20 his employment and the scope of his latitude as an
21 employee?

22 MR. BANKSTON: Yes.

23 THE COURT: Okay.

24 MR. BANKSTON: I'm thinking there are
25 other things in the personnel file that might match

1 that, but I'm willing to limit it for the moment.

2 THE COURT: I appreciate it. So 19 is
3 gone, but you'd like to keep 20.

4 MR. BANKSTON: Yes, Your Honor.

5 THE COURT: Got it. And I'm making a list
6 so that opposing counsel can -- he's making a list as we
7 speak to see if he's going to push back on any of this.

8 Now we're up to a long list of things that
9 I don't understand at all why you would get to respond
10 to the motion to dismiss, exactly counsel's point when
11 he was making his argument RFPs 27 through 33.

12 MR. BANKSTON: Sure.

13 THE COURT: Loans made --

14 MR. BANKSTON: Yes.

15 THE COURT: -- to Free Speech?

16 MR. BANKSTON: Absolutely, Your Honor.

17 THE COURT: Do you have any argument why
18 you need any of the RFPs 27 through 33 to respond to
19 this motion to dismiss?

20 MR. BANKSTON: Those are my form RFPs for
21 alter ego and piercing the corporate veil. I want to
22 prove that these entities commingle funds. I want to
23 prove that all of the things talked here about -- how
24 these are elements of proof to proving up alter ego or
25 piercing the corporate veil.

1 THE COURT: But you don't need that to
2 respond to the motion to dismiss?

3 MR. BANKSTON: I think I might. I think
4 if I need to --

5 THE COURT: Have you pled -- I didn't see
6 in your pleadings in your original position -- you have
7 not pled alter ego, have you?

8 MR. BANKSTON: I have pled conspiracy.
9 And so I think these would relate to the same evidence.
10 If they are conspiring in any of these ways as a joint
11 operation, commingling funds, acting as essentially one
12 operation --

13 THE COURT: Loans made? I don't think so.

14 MR. BANKSTON: Okay.

15 THE COURT: I don't think so.

16 MR. BANKSTON: Okay.

17 THE COURT: 27 through 33, I don't think
18 so. But I understand your argument.

19 MR. BANKSTON: That's 27 through 33,
20 Your Honor?

21 THE COURT: 27 through 33.

22 MR. BANKSTON: No problem. Okay.

23 THE COURT: Now I'm up to InfoWars.

24 MR. BANKSTON: All right.

25 THE COURT: Here we go. It's similar ones

1 to what we just went through with, I guess, Free Speech.
2 It starts with RFP No. 6.

3 MR. BANKSTON: Sure.

4 THE COURT: Goes through 7.

5 MR. BANKSTON: Okay.

6 THE COURT: All the way down through 12,
7 which happens to be copies of federal tax returns.

8 MR. BANKSTON: 6 through 12.

9 THE COURT: 6 through 12. Any argument
10 that I shouldn't do that to you?

11 MR. BANKSTON: No. It's the same argument
12 I had before.

13 THE COURT: Okay. That it goes to your
14 conspiracy?

15 MR. BANKSTON: Sure.

16 THE COURT: And you even need federal tax
17 returns to explore your conspiracy theory?

18 MR. BANKSTON: I'd sure like them, but if
19 you don't, you know --

20 THE COURT: Well, I'm just not
21 understanding how that's going to help you pursue your
22 conspiracy theory.

23 MR. BANKSTON: I want to prove where all
24 the revenue is coming from and where it's going.

25 THE COURT: Okay. Well, so far no.

1 MR. BANKSTON: Okay.

2 THE COURT: You're going to have to
3 survive the MTD without that.

4 MR. BANKSTON: Okay.

5 THE COURT: RFP 15. All documents in the
6 possession of InfoWars relating to the Alex Jones Show
7 at any time?

8 MR. BANKSTON: Well, they should --

9 THE COURT: You need that to survive the
10 MTD? And that's way, way broad. Even on the merits of
11 the case, that's a way broad RFP.

12 MR. BANKSTON: Well, you'll notice I
13 didn't serve that on Free Speech. The reason here it's
14 not broad or burdensome is because there should be zero.
15 There should not be an answer to this RFP. InfoWars,
16 LLC, according to an affidavit of representation, has
17 absolutely nothing to do with the Alex Jones Show.

18 THE COURT: Well, then why don't you --

19 MR. BANKSTON: If there are documents --

20 THE COURT: Then why don't you send an
21 i-roq, what kind of documents do you maintain about any
22 communications between -- you know, at InfoWars relating
23 to the Alex Jones Show? Just describe generally,
24 you know, the kind of documents you have.

25 A general interrogatory like that to kind

1 of feel that out, maybe. I don't know. But this
2 seems -- it just jumped out at me as being --

3 MR. BANKSTON: Okay.

4 THE COURT: -- excessively broad. You're
5 right. If there's none, then it's not just broad; it's
6 like -- it's non-existent.

7 MR. BANKSTON: Exactly.

8 THE COURT: Great. Well, send an i-roq to
9 confirm your thoughts about that. But if you're wrong,
10 then it's too --

11 MR. BANKSTON: Well, I'd --

12 THE COURT: -- then it's too broad.

13 MR. BANKSTON: I'd be willing to just ask
14 a deposition question --

15 THE COURT: That covers it.

16 MR. BANKSTON: -- and not have to add it.

17 THE COURT: And if you limit the time in
18 your depos, you may get them.

19 MR. BANKSTON: All right.

20 THE COURT: Okay. RFPs 17 through the
21 end, 33, can you tell me anything in there that we
22 haven't already discussed?

23 MR. BANKSTON: No, Your Honor. Same
24 argument.

25 THE COURT: Okay. Well, then it makes

1 sense to me to redact all of that and trim back on this
2 written discovery and get some basic stuff about the
3 basic elements you need to show to make a prima facie
4 case and survive the motion to dismiss. Does that make
5 sense to you?

6 MR. BANKSTON: It does. It does,
7 Your Honor.

8 THE COURT: Okay. Now, depos. Six hours,
9 no. Don't know. If you're focused on just this conduct
10 with these plaintiffs in order to simply survive the
11 motion to dismiss, I don't know why you'd need more than
12 an hour or two hours at most.

13 MR. BANKSTON: Well, part of it is because
14 after the past four months, I've grown pretty familiar
15 with the personalities involved, and I'm not expecting
16 them to go easy. I'm not expecting to get easy answers.

17 THE COURT: Well, and at some point -- and
18 this can be something -- I actually thought about that.
19 If you've got evasive witnesses -- and we've all as
20 lawyers faced that where they just won't answer the
21 question; and Judge, you can read an hour of transcript
22 here and you can tell this witness will not answer
23 questions. Well, you know, at some point you can begin
24 to infer something from that too, can't you --

25 MR. BANKSTON: Yeah.

1 THE COURT: -- about whether they're being
2 obstreperous and being evasive, and that can inure to
3 your benefit. But, you know, years ago our depositions
4 were never more than three hours, and so six has become
5 sort of this monstrous time.

6 MR. BANKSTON: I would propose three for
7 the following reasons, that I think -- I think I would
8 need to with most of the witnesses -- all four of the
9 witnesses to spend about -- coming close to an hour
10 discussing with them business structure, employment,
11 their duties, all of the things dealing with that sort
12 of thing. And I --

13 THE COURT: And then the facts of this
14 case.

15 MR. BANKSTON: And the facts of the case
16 ultimately. But then I'm also going to want to explore
17 malice, and that may be a little more intensive personal
18 questioning that I think is going to take longer.

19 THE COURT: Okay. So you want --

20 MR. BANKSTON: So all total, I think I
21 could half it and do it in three hours.

22 THE COURT: That's your backup position; I
23 want three hours.

24 MR. BANKSTON: Correct, Your Honor.

25 THE COURT: Okay. You've answered all my

1 questions about discovery. You're free to use the rest
2 of your time until I interrupt you again.

3 MR. BANKSTON: I have lost track of my
4 time. Can you tell me about how much time I have left?

5 THE COURT: I'll tally it up for you.
6 You've got, I don't know, another 15, 17, 18 minutes,
7 something like that.

8 MR. BANKSTON: Okay. Let me try to go
9 through the issues that I think are important.

10 THE COURT: Not that you need to use it
11 all of it.

12 MR. BANKSTON: Sure. Okay. Your Honor,
13 can I ask you, first of all, have you been able to view
14 the video, because it wasn't shown to you during this
15 hearing?

16 THE COURT: I have not viewed this video
17 at this time.

18 MR. BANKSTON: Let's go ahead and do that.
19 And I know Your Honor is familiar with the background of
20 how this all came to be of Ms. Kelly producing a piece
21 on Mr. Jones. This video you're about to watch is what
22 was broadcast about two weeks or so afterwards, I
23 believe.

24 I do want to address really quick this
25 argument about the June 25th, June 26th thing. There's

1 a June 25th video that's like two, four hours long.
2 It's something. It's the whole episode of the Alex
3 Jones Show. It has different titles, Russians
4 something. It's a different thing.

5 On June 26 posted to InfoWars.com and to
6 YouTube was a four-and-a-half-minute video that's
7 completely separate entitled "Contradiction in Alex
8 Jones Hit Piece." If InfoWars had published the entire
9 four-hour video again, that's a single publication.
10 That's one thing that they published. This is a totally
11 different -- a totally separate piece of video content
12 promoted and published as a separate piece of video
13 content. And that was published in two places on
14 July 26 as its own thing. And you're going to see that
15 that has been edited into its own publication, and
16 that's what we're about to watch right now.

17 *(The video was played as follows:)*

18 "So, folks, now here's another story.
19 You know, I don't even know if Alex knows about this, to
20 be honest with you. Alex, if you're listening and you
21 want to -- or if you just want to know what's going on,
22 Zero Hedge has just published a story, 'Megyn Kelly
23 Fails to Fact-Check Sandy Hook's -- Sandy Hook Father's
24 Contradictory Claim in Alex Jones Hit Piece.'

25 "Now, again, this broke -- I think it

1 broke today. I don't know what time. But featured in
2 Megyn Kelly's expose, Neil Heslin, a father of one of
3 the victims, during the interview described what
4 happened the day of the shooting, and basically what he
5 said -- the statement he made, fact checkers on this
6 have said cannot be accurate. He's claiming that he
7 held his son and saw the bullet hole in his head. That
8 is his claim.

9 "Now, according to a timeline of events
10 and a coroner's testimony, that is not possible. And so
11 one must look at Megyn Kelly and say, Megyn, I think
12 it's time for you to explain this contradiction in the
13 narrative because this is only going to fuel the
14 conspiracy theory that you're trying to put out, in
15 fact.

16 "So -- and here's the thing too, you would
17 remember -- let me see how long these clips are. You
18 would remember if you held your dead kid in your hands
19 with a bullet hole. That's not something that you would
20 just misspeak on.

21 "So let's roll the clip first, Neil Heslin
22 telling Megyn Kelly about his experience with his kid.

23 "... that Sandy Hook Elementary School,
24 one of the darkest chapters in American history, was a
25 hoax."

1 "I lost my son. I buried my son. I held
2 my son with a bullet hole through his head."

3 "Neil Heslin's son Jesse, just six years
4 old, was murdered along with 19 of his classmates and
5 six adults on December 14th, 2012 in Newtown,
6 Connecticut."

7 "I dropped him off at 9:04. I dropped him
8 off at school with his book bag. Hours later I was
9 picking him up in a body bag."

10 "Okay. So making a pretty extreme claim
11 that would be a very thing -- vivid in your memory,
12 holding his dead child.

13 "Now, here is an account from the coroner
14 that does not corroborate with that narrative."

15 "(Inaudible)"

16 "We did not bring the bodies and families
17 into contact. We took pictures of them, of their facial
18 features. We have -- it's easier on the families when
19 you do that. There is a time and a place for up close
20 and personal in the grieving process, but to accomplish
21 this, we felt it would be best to do it this way. And
22 you can sort of -- you can control the situation
23 depending on (inaudible)."

24 "It's got to be hard not to have been able
25 to actually see her."

1 "Well, at first I thought that and I had
2 questioned maybe wanting to see her."

3 "Okay. So just another question that
4 people are now going to be asking about Sandy Hook, the
5 conspiracy theorists on the Internet out there that have
6 a lot of questions that are yet to get answered. I
7 mean, you can say whatever you want about the event.
8 That's just a fact. So there's another one. Will there
9 be a clarification from Heslin or Megyn Kelly? I
10 wouldn't hold your breath. So now they're fueling the
11 conspiracy theory claims. Unbelievable. We'll be right
12 back with more."

13 (Video stopped)

14 MR. BANKSTON: All right, Your Honor.
15 This case is about a persistent lie in InfoWars'
16 mythology about Sandy Hook. And this lie, as you'll see
17 this repeated in Defendants' Exhibit B-35, is that the
18 parents were never allowed to see their children. And
19 Mr. Jones has said that the coroner said none of the
20 parents were allowed to touch the kids, and the stuff I
21 found was they never let them see the bodies, and you've
22 got different groups of parents and the coroner saying
23 we weren't allowed to see our kids ever.

24 This has been a part of InfoWars for a
25 while. And so when Mr. Heslin made his comments, this

1 was an easy attack that they made on him. And they did
2 it when you see Mr. Shroyer saying the statements he
3 made fact-checkers on this have said cannot be accurate.
4 And then he says according to a timeline of events and a
5 coroner's testimony, that's not possible.

6 They use two edited videos to pull off
7 this sleight of hand. And the first one was from
8 Dr. Carver.

9 And if you'll queue that up, we're going
10 to need to play that.

11 You'll see that Dr. Carver was answering a
12 question. It wasn't very clear what he was being asked.
13 The audio wasn't really well there. But if you turn it
14 up, you can hear it.

15 *(Video began playing)*

16 If you can stop that for just a second.

17 He was asked about the initial photo
18 identifications. We know this video is edited because
19 here's the rest of the video that's been available since
20 the day it happened. And I want to play two other
21 answers Dr. Carver gave.

22 *(Video played as follows:)*

23 "(Inaudible)."

24 "Our goal -- our goal was to get the kids
25 out and available to the funeral directors first just

1 for -- well, you know, obvious reasons.

2 "And have all the children's bodies been
3 returned to the parents and the mortuaries or --"

4 "I don't know. The mortuaries have all
5 been called and --"

6 "But they're ready to be released, these
7 bodies?"

8 "The paperwork has been done. As of 1:30
9 the paperwork is done. And if the -- the usual drill is
10 the funeral homes call us, and as soon as the
11 paperwork's done, we call them back. That process was
12 completed for the children at 1:30 today."

13 *(Video stopped)*

14 MR. BANKSTON: All right. So Dr. Carver
15 clearly indicates multiple times in this interview that
16 the children were released to private custody to the
17 parents. The reporter directly asked him if they were
18 released to the parents. The paperwork's been done at
19 1:30.

20 They use that video to say the exact
21 opposite. They also used -- you saw Ms. McDonnel's
22 interview. And there's a transcript of that interview
23 that's been there since the day it happened as well.
24 And I won't belabor that too much. You'll see in the
25 pleadings that huge parts of that were cut out.

1 THE COURT: And the video you just played,
2 all of it, are various exhibits attached to your
3 response to the motion to dismiss?

4 MR. BANKSTON: Correct. Yes, that was
5 Ms. Binkowski's B-2. And in Ms. McDonnel's interview
6 she makes it abundantly clear that her child was
7 released to her. She was in the room with her. She had
8 every opportunity to do so.

9 As the Court might know, many of the
10 children who were murdered were done so in a
11 four-by-four-foot closet, which 80 rounds of AR-15 was
12 put into that closet. Not every parent was lucky enough
13 to be able to have the experience of looking at their
14 child in that way. And she said it would be best if we
15 just remembered her how she was. And, you know, all the
16 parents had to make that choice.

17 As Mr. Zipp said in his affidavit, this
18 was a calculated and unconscionably cruel hit job. It
19 was intended to smear and injure a parent who had the
20 courage to speak up after all these lies. And I
21 understand that that would happen in an InfoWars
22 broadcast. But what has really disturbed me in this
23 case and is really disturbing my client is the
24 statements that were made in pleadings, is the statement
25 that plaintiffs cannot avoid the fact that there is in

1 fact a contradiction when the medical examiner said the
2 bodies weren't released to the parents.

3 THE COURT: I'm sorry. You're saying this
4 is in the second amended answer?

5 MR. BANKSTON: No. This is in InfoWars'
6 motion to dismiss, Page 78.

7 THE COURT: Yeah, okay.

8 MR. BANKSTON: And that comment is also
9 repeated. It's repeatedly said that no, this broadcast
10 was substantially true because Mr. Shroyer was justified
11 because the medical examiner said the bodies weren't
12 released to the parents.

13 THE COURT: I'm sorry. Give me the page
14 in the motion to dismiss you wanted me to follow.

15 MR. BANKSTON: Page 78.

16 THE COURT: 78.

17 MR. BANKSTON: And you will see a quote on
18 that page saying that the plaintiffs cannot avoid the
19 fact that there is in fact a contradiction when the
20 medical examiner said the bodies weren't released to the
21 parents. That is an outrageous falsehood.

22 THE COURT: I'm on Page 78. Is it near
23 the top or the bottom? I'm looking for it.

24 MR. BANKSTON: I'm not actually looking at
25 it myself, Your Honor. Let me see if I can find it for

1 you. I hope I have the page number right for you there.

2 THE COURT: Ah, here it is, in the middle
3 of the middle paragraph.

4 MR. BANKSTON: Yes, Your Honor.

5 THE COURT: Plaintiff cannot avoid the
6 clear fact that there was in fact a contradiction
7 arising from the medical examiner's statements when he
8 claimed the bodies were not released to the parents.

9 MR. BANKSTON: Correct.

10 THE COURT: Your point is all he's saying
11 is they aren't immediately released. Until he does the
12 autopsy, they can't release them. And there is no place
13 for the parents to come down to the medical examiner's
14 office and look at the bodies there. And so he finishes
15 his work, does the paperwork, and releases the bodies as
16 quickly as he can.

17 MR. BANKSTON: Yes.

18 THE COURT: That's your point.

19 MR. BANKSTON: I'm saying more than that.
20 I'm saying that nowhere did he ever say the bodies were
21 not released to the parents. All he said is at the
22 initial identification process, we showed them
23 photographs; we didn't bring them into contact for that
24 process. He at no point ever said they weren't released
25 and in fact as we've shown twice has indicated they were

1 released.

2 So to see it distorted in InfoWars'
3 pleading is one thing, but counsel should know better
4 than this. And honestly, Your Honor, this feeds the
5 fanaticism of Jones' followers. They read these things.
6 And that basically is an affirmation of, look, there's a
7 contradiction between what Mr. Heslin said and what
8 the -- that is just not true. And it's causing more
9 harm to Mr. Heslin.

10 There are some issues, Your Honor, that I
11 think are so frivolous we don't need to discuss.
12 Whether it has a defamatory meaning, I mean, yes, he's
13 saying he's lying. And he even goes as far as to say
14 this is not something you would just misspeak on. He's
15 explicitly telling his audience this is not a mistake,
16 he's lying. We have affidavits from witnesses who have
17 the same meaning.

18 The same deal with it being of or
19 concerning. You just saw the video. It was all about
20 Mr. Heslin. It quoted him. It showed him. It
21 criticized him. Of course it was of or concerning him.
22 And of course, we also have affidavits from people who
23 satisfy those same burdens that you saw in Pozner.

24 They talk about -- another one of my
25 burdens is whether this was an assertion of fact. And

1 again, this is frivolous because you can't have an
2 argument that goes to your viewers that this has been
3 checked out by fact checkers and then say yes, this
4 wasn't an assertion of fact.

5 Even if you want to say that this was
6 Mr. Shroyer's opinion based on a collection of facts,
7 the case law that we cited you in *Campbell* says that if
8 your facts are wrong and you reach this opinion, that's
9 an actionable opinion. That's actually an assertion of
10 fact. That's not what *Tatum* meant by an opinion.

11 The biggest defense that they advance is
12 this third-party defense. And we dealt with that a
13 little bit in *Fontaine*. It has the same meaning here.
14 Here they're not a broadcaster, newspaper, or
15 periodical. So they don't get that defense. So what
16 they have is the *Neely* situation. And in fact, you saw
17 it in the briefing in *Fontaine* --

18 THE COURT: I'm sorry. So what they have
19 is the what?

20 MR. BANKSTON: The *Neely* situation. So
21 what you saw in *Fontaine*'s briefing is they told you
22 that that statute was a legislative fix or correction to
23 *Neely* that would apply that to certain media defendants,
24 and those being newspapers, broadcasters, periodicals.

25 Before that in the common law states, a

1 defendant cannot escape liability by claiming that it
2 accurately reported a third-party's allegations. And
3 that what I'm telling you right there, that was briefed
4 to you from InfoWars. InfoWars put that in front of you
5 in front of Fontaine saying the situation has changed;
6 now we are under this new statute. They're not under
7 the new statute.

8 So the *Neely* still applies to them. And
9 they cannot get off just by saying we just reported a
10 third-party's allegation. Even if --

11 THE COURT: Now, give me -- before you
12 finish your time -- and you're down to under five
13 minutes.

14 MR. BANKSTON: Okay.

15 THE COURT: Give me the chronology in
16 response to Mr. Enoch's argument that that was the
17 25th -- was what you just played the 25th, June 25th?

18 MR. BANKSTON: 26th.

19 THE COURT: 26th.

20 -- what you have in the response to the
21 motion to dismiss if I don't grant discovery that allows
22 you to survive as to each one of the four defendants.

23 MR. BANKSTON: Okay.

24 THE COURT: That was his front argument to
25 begin with.

1 MR. BANKSTON: Sure. Let's go through
2 those really quick. Let's start with Owen Shroyer.
3 Owen Shroyer said the statements. And he said them
4 physically in reality on the 25th. And then they were
5 republished in a different broadcast on the 26th.

6 One thing that's interesting to me is I
7 don't see that there's any way that Owen Shroyer
8 ratifies the 25th's broadcast either. He doesn't
9 control the power switch to InfoWars uploading videos.
10 He's an on-air talent.

11 So in terms of him saying that he has to
12 ratify everything InfoWars does, that his employer does,
13 I don't understand that all. But in terms of him being
14 featured on the Alex Jones Show as a host and publishing
15 a piece of content, he's doing that in the course and
16 scope of InfoWars. I don't think InfoWars in any way
17 needs his consent to publish a piece of him on the 26th.

18 Alex Jones -- first of all, the statements
19 were made on the Alex Jones Show. So this is a thing
20 that he has actual physical responsibility. But more
21 importantly is on the 20th, about a month later,
22 Mr. Jones did his own broadcast. And because he thought
23 that it was important, he reaired the broadcast,
24 Mr. Shroyer's piece, and said I'm going to air it again
25 because I don't think it breaks any rules. So he

1 consciously chose to air it.

2 There's no dispute that Free Speech
3 Systems employs Mr. Shroyer and that that broadcast was
4 part of Free Speech Systems' broadcasts into the public.
5 Right now I'm hearing that apparently, though, I don't
6 have evidence that Free Speech did anything wrong. But
7 at this point, given the representations that are in
8 their own motion that are pleadings as evidence, we know
9 that they employ Mr. Shroyer and they know that they're
10 responsible for this video. So I'm not exactly sure
11 what more I can get from the public domain to prove that
12 involvement.

13 So that is one of those areas where if
14 there's any trick up about that, that's where I need
15 discovery, because there's literally nothing more I can
16 do at this point. I've gotten you -- for InfoWars LLC,
17 I've gotten you their web page, which, you know, we
18 briefed about this in this motion about how that came up
19 in *Warner Brothers*, the exact same situation. And at
20 this stage, you have to accept that what's on that
21 website is true against their interested affidavit, our
22 website evidence wins, and that under those exact facts
23 they had a TMZ privacy policy that was the exact same
24 thing.

25 So for all four of these defendants,

1 whether it come from the July 20th or the June 26th, I
2 think there's plenty of *prima facie* clear evidence that
3 their hands are all over all four. To the extent that
4 any of these arguments, though, are being made, they're
5 being made that plaintiff didn't have access to
6 information that wasn't in the public domain. And so if
7 those do become a sticking point, which I think they now
8 are in this hearing, I think that is what justifies the
9 discovery in this case.

10 I don't think I want to go too much into
11 public figure, but I do want to point out --

12 THE COURT: You're down under two minutes
13 to finish.

14 MR. BANKSTON: Okay. I do want to point
15 out to you, there was a supplemental affidavit filed
16 from Mr. Shroyer and Mr. Jones that says this broadcast
17 was not motivated in any way by Mr. Heslin, not at all.
18 And Mr. Shroyer says not motivated by his acts at all.
19 And you'll notice under the briefing there then it can't
20 be germane to his public acts. It didn't arise because
21 of his public acts. He's not a public figure.

22 We do think we have malice in the case,
23 and we obviously want to do some more discovery on it,
24 but we don't think we have to prove that. I think we
25 have to prove negligence.

1 So to conclude, Your Honor, I think the
2 motion is frivolous. They say it doesn't concern him,
3 but it totally concerns him and his statements. They
4 say it's not an assertion of fact, but they're telling
5 viewers it's been verified by fact checkers. They say
6 they couldn't possibly defame him when he told his
7 viewers it was impossible to hold his dead son and
8 wasn't misspeaking.

9 The third-party defense doesn't apply to
10 them. Even if it did, it doesn't apply under these
11 facts, and our briefing goes very deep into that.

12 And he's not a public figure. And they
13 claim they acted innocently, but the record really shows
14 this was a callus and dishonest hit job and the
15 motivations for it are obvious.

16 I'd like the opportunity to do discovery,
17 not just on these issues we've talked about for those
18 reasons, but also just so I can show just how frivolous
19 this motion is. And I fully expect to be coming back to
20 you in early November and asking you to grant costs on
21 this motion.

22 THE COURT: I don't know that you're
23 entitled to limited discovery to show frivolousness, but
24 I don't know. You are entitled to limited discovery to
25 survive a motion to dismiss. All right. Thank you.

1 MR. BANKSTON: Thank you, Your Honor.

2 THE COURT: I told you I'd give you ten
3 minute. And even though I let you run over, I'm going
4 to give you ten minutes, so you'll get a total of an
5 hour and two. I'll let you know when you're near the
6 end of your ten.

7 MR. BANKSTON: May it please the Court.
8 First of all, let's handle the sanctions matter.
9 Mr. Bankston said that he sent emails to me twice. His
10 August 9th email didn't ask anything about content
11 destruction. What it said is -- actually, I shouldn't
12 say that. He writes regarding the July 20th InfoWars
13 segment.

14 At this time on August 9th, Google has
15 taken these down at Mr. Bankston and his client's
16 insistence, along with a lot of other people. And then
17 he says, "As such, I would like you to confirm whether
18 the June 20th," -- I assume that's July 20th -- "video
19 still exists. And if it does, I'd ask you to produce a
20 copy to Mr. Heslin."

21 This is the video I hand-delivered to him
22 by Fed Ex a month before this. This has nothing to do
23 with the motion for sanction. This is part of the
24 setup.

25 He didn't -- Judge, the idea that he

1 wouldn't send it to Mr. Taube because he doesn't have
2 something coming up quickly, if he needed discovery and
3 confirmation in my case, why didn't he ask Mr. Taube
4 when I didn't call back? "Mr. Taube, I can't get ahold
5 of Mr. Enoch. Would you please tell me that?" This was
6 a setup job from day one.

7 Mr. Dew -- he just told you that we
8 admitted that we caused the destruction. There are no
9 tweets, Judge, that were destroyed. These were the
10 comments. I sent something out there and Fred, Mary,
11 and Jane talked to each other about what I just said.
12 They're not communicating to the president. They're
13 communicating to everybody else about the president on
14 the tweets, for example.

15 The communications of those commenters, if
16 their account is deleted, their tweets go away. The
17 affidavit didn't say we did it. We said it was more
18 likely that the CNN article caused those other accounts
19 or other people to withdraw those tweets. There's
20 actually no evidence that we intentionally destroyed
21 anything.

22 Is his statement that we are required to
23 keep what he claims to be defamatory published? Is his
24 client really saying I want this hurt to continue?
25 Isn't what he wants -- isn't the purpose of the

1 retraction statute to say withdraw your statements, pull
2 those statements down? We've heard that for months.
3 And then the second we do it with good faith, as you've
4 seen in that letter, they claim we spoliated. He didn't
5 wait the week. He sent it on August 12th when he knew I
6 was out of town and then filed this on August 17th,
7 after 72 hours, when he didn't even make a little bit of
8 an effort to contact Mr. Taube.

9 Mr. Dew says that nothing was -- and I
10 just want to refer to it, Judge. I didn't the first
11 time. He filed affidavits on -- in this case on
12 August 23rd. And then about Periscope, the allegation
13 was that Periscope was deleted, that there were no
14 Periscope videos related to Sandy Hook in any way that
15 were deleted and he said that, and we filed that on
16 8-28.

17 Now, let's get to the issue of the TCPA.
18 A lot of broad brush here, Judge. And that's a danger
19 in these things. Because he showed you a video of
20 Mr. Carver. He has no evidence that that was the video
21 that was available to Mr. Shroyer when he played it.
22 You have direct evidence from Mr. Shroyer. I clicked on
23 the videos that were embedded in that article, and I
24 played those videos, and I did not edit those videos.

25 So all the stuff you just saw -- and oh,

1 by the way, he didn't say they were released to the
2 parents. What he did say understandably is we released
3 them to the funeral homes. But that part was not played
4 on the Shroyer program because that part wasn't embedded
5 in the video -- in the article on which he was
6 commenting. They can't get past the fact. I don't know
7 why they think we're not covered by 73.005 of the act.

8 THE COURT: But he's publishing the
9 article. In other words, he's --

10 MR. ENOCH: Oh, yes.

11 THE COURT: Yeah.

12 MR. ENOCH: Yes. But if we have a fair
13 comment under 73.005, this report has just come out, we
14 are reporting this --

15 THE COURT: With fact checkers.

16 MR. ENOCH: Yes. Well, and that's what
17 the article said. That's what he showed. That is on
18 the article and that's what it says in there. So they
19 argue, well, fact checkers could be either InfoWars,
20 some undetermined people or people quoted in the report.
21 Well, the more likely thing is he's showing the report
22 which say there are people that in fact say that in the
23 report. So if he is commenting on the report and
24 doesn't go beyond the report, he is safe under 73.005 as
25 a publisher in the state of Texas.

1 The next thing, we -- you asked, Judge,
2 about the argument on Mr. -- what happened on June 26,
3 why are people liable on June 26, why is Mr. Jones
4 liable for what happens on June 26. And I don't quite
5 understand his arguments, but he didn't do anything on
6 the 26th. He didn't publish it. He -- I mean, the
7 25th. Excuse me.

8 When Mr. Shroyer did what he did, he did
9 it on the 25th. He is not liable for someone else's
10 republication. I don't care that he works for them or
11 anything else. You're just not liable. The law doesn't
12 allow someone to say your product was republished by
13 someone else and therefore you are liable for their
14 publication. If that's the case, NBC is liable for
15 republicizing -- republicating --

16 THE COURT: Republishing.

17 MR. ENOCH: -- republishing,
18 republication -- thank you, Judge -- in April and when
19 Mr. Bankston went on the show recently. Excuse me.
20 That was April.

21 The public figure issue. Judge, in the
22 public -- I cited the AM case, the clock boy case in the
23 Pozner case where he was the subject of lots of turmoil
24 and controversy just singular about his taking to school
25 the clock that looked like a bomb. Just last month they

1 said, guess what, he's a public figure in that debate.

2 Mr. Heslin is a public figure because he
3 went to the show that he knew was centered at the
4 controversy of Alex Jones. And when Mr. Bankston says,
5 oh, he can't be the object because, my gosh, you didn't
6 intend to harm him, you didn't intend to talk about him,
7 he's citing back to a case, Judge, the *Allied* case,
8 where the party says I didn't even know the existence.
9 The defense there was I didn't know Clearinghouse was
10 actually a name. When I used that, it was a spoof on
11 consumers. The Court said if you didn't know about the
12 existence of the party, you can't then complain about
13 the public status of figure.

14 We know the existence. He gets on TV.
15 We're talking about the publicly published article --
16 broadcast in which he appeared.

17 Okay. If these tweets which were the
18 subject of the motion were so dang critical, if they are
19 the subject of spoliation, why didn't you see any with
20 the Pozner response? They're not related -- you saw
21 what they're asking. They're not just asking about
22 Heslin. They're asking about Pozner and about Jim
23 Fetzer and lots of other things.

24 Why -- if these tweets and these comments
25 are so important, why weren't they presented to you in

1 the Pozner hearing and the Pozner documents? They
2 weren't because they were irrelevant. They're not
3 important evidence. They were only a basis for a
4 sanctions motion. And he says, gosh, Judge, I'm up
5 against the licklog. I've got a few days before a
6 hearing. What else would I do?

7 Well, I know what I do as a lawyer, and I
8 don't file a motion for sanctions the first volley out
9 of the batch. I'd call the judge. I'd say I need an
10 emergency hearing. I can't get -- whatever I can do to
11 get an emergency hearing or I file my emergency request
12 for discovery. I do not call the other side dishonest
13 and thieves.

14 The tweets that they want that I just
15 showed them how to get are from 2012 to 2015. How does
16 someone commenting on a tweet that's out of the statute
17 of limitations relate to our malice? It doesn't. And
18 no tweets were deleted. There were comments of other
19 people who may have taken them down themselves. And if
20 you'll go -- Google has been pulling down other sites as
21 well that have been retweeting or republishing.

22 And then, Judge, he said, Judge, there are
23 people that are watching this case; you know, I can't
24 help what they do.

25 THE COURT: And you're down under two

1 minutes now for all the motions.

2 MR. BANKSTON: I'm going to do it.

3 THE COURT: Okay.

4 MR. ENOCH: His first letter saying I'm
5 going to share all correspondence with the press, so
6 it's not a question of how the press are getting this.

7 On the discovery, Judge, I didn't
8 understand how your ruling was going to -- we didn't
9 talk about the request -- the admissions or
10 interrogatories. But very quickly --

11 THE COURT: Well, no, I did. I went
12 through all of them, and I found -- I tried to identify
13 the things that I thought went beyond limited.

14 MR. ENOCH: Oh.

15 THE COURT: Do you see what I mean?
16 That's why I was picking on him about I think you need
17 to limit it a little more; you need to tell me why this
18 is not limited enough after my redactions.

19 MR. ENOCH: Can we go to Owen Shroyer,
20 please?

21 THE COURT: I am there.

22 MR. ENOCH: All right.

23 THE COURT: Which one?

24 MR. ENOCH: Let's see. The -- I'm sorry.
25 Please go to the next one, which is Free Speech.

1 THE COURT: Free Speech. I'm there.

2 MR. ENOCH: The Interrogatory 2, factual
3 basis for all your defenses. Judge, when you file your
4 action, you do not get all discovery, all factual
5 defenses, nor would I have the ability to get their
6 claims.

7 No. 4, principal place of business,
8 mailing address, physical, telephone number. Why is
9 that relevant for the TCPA?

10 Interrogatory 5A --

11 THE COURT: Well, I suppose if you share
12 the same location, it can be some piece of evidence.
13 But I take your point; not in response to the MTD.

14 MR. ENOCH: Right.

15 THE COURT: Is that your point?

16 MR. ENOCH: Yes, sir.

17 THE COURT: You'd get it ultimately.

18 MR. ENOCH: Yes, sir. Oh, yeah.

19 Interrogatory A -- 5A.

20 THE COURT: I'm sorry. Where? 5A?

21 MR. ENOCH: 5A, yes, sir, same thing.

22 Then this, Judge, is asking who owns it?
23 How much did you pay for it? What's the nature of your
24 ownership? They don't have to get that information to
25 get past the TCPA. So I object -- well, I object to all

1 of it because it's not temporally limited. I object to
2 all of it because it's not germane to the TCPA in my
3 judgment.

4 But C, D and E --

5 THE COURT: Well, why wouldn't you get
6 ownership interest by and among the defendants if
7 Shroyer has an ownership interest --

8 MR. ENOCH: Because he can get it in a
9 different way, your contract or control -- they've got
10 the contract.

11 THE COURT: Okay.

12 MR. ENOCH: The ownership doesn't do it.
13 If I'm a 5 percent owner of Exxon, I got nothing.

14 THE COURT: Okay.

15 MR. ENOCH: Okay. Interrogatory -- excuse
16 me. Request for production 3.

17 THE COURT: And we're down -- you're down
18 to -- in fact, you just hit the time, so we're going to
19 have to finish this hearing. What else did I miss
20 because we're --

21 MR. ENOCH: I'll just give less -- in Free
22 Speech, RFP 3 --

23 THE COURT: I'm sorry. RFP. I'm there.

24 MR. ENOCH: Yes, sir. Okay. 3, 6.

25 THE COURT: Hang on. I already said 3.

1 I'm already redacting 3, transcripts of all InfoWars.

2 You remember?

3 MR. ENOCH: Okay.

4 THE COURT: I went through that with him.

5 MR. ENOCH: All right.

6 THE COURT: He's nodding yes. I picked on
7 him about that already.

8 MR. ENOCH: All right. Then the next one
9 would be, please, to No. 25 of Free Speech, all
10 documents relating to any parent of a child killed at
11 Sandy Hook.

12 THE COURT: In other words, that's as
13 broad as asking about Sandy Hook.

14 MR. ENOCH: Yes, sir.

15 THE COURT: Anything else I missed?

16 MR. ENOCH: Request No. 3 to InfoWars,
17 request for admission No. 3 of InfoWars, derives
18 revenue.

19 THE COURT: From supplements?

20 MR. ENOCH: Yes, sir.

21 THE COURT: Okay.

22 MR. ENOCH: And then interrogatory 5 to
23 InfoWars, it's the same thing, all the basis of your --
24 factual basis defenses.

25 THE COURT: Right.

1 MR. ENOCH: Interrogatory 10, mailing
2 address, telephone number.

3 THE COURT: Okay.

4 MR. ENOCH: And 11B, C, D, and E.

5 THE COURT: Okay.

6 MR. ENOCH: Very well. Thank you, Your
7 Honor. I appreciate your time.

8 THE COURT: Thank you. I appreciate you
9 going through that.

10 All right. Here's the ruling. You can
11 tell I thought about this ahead of time. And do we get
12 discovery? Do we not? I read the pleadings to see why
13 plaintiff might need some discovery and, of course, the
14 extensive motion to dismiss, the objections to
15 plaintiff's response, 100 pages of objections, I might
16 add.

17 And so I'm going to let plaintiff have
18 some limited discovery, and I'm going to tell you what
19 it's going to be. Because of the sworn defense about
20 capacity, and because the relationship among the
21 defendants is somewhat opaque, and because I think
22 plaintiff is entitled to know that information, I'm not
23 going to redact everything Mr. Enoch wants redacted, but
24 I am going to redact a good portion of it.

25 Do you have Exhibit H in front of you?

1 Take really good notes because I need this order to sign
2 and I need it tomorrow morning. Why do I need it
3 tomorrow morning? So that I know I will have it in the
4 file before the clerk closes at 5:00 p.m. So if I give
5 you a deadline of 5:00 p.m., I won't have it in the
6 clerk's file and it's not going to work.

7 So I will sign the order tomorrow. You
8 must get it to me and send it simultaneously to opposing
9 counsel. And as long as it says these things I'm going
10 to grant it.

11 MR. BANKSTON: Okay.

12 THE COURT: I'm going to give you the four
13 depositions limited to two and one-half hours each.
14 That seems ample to cover ownership interest, control,
15 and activities.

16 On Exhibit H, you agreed to redact on RFP
17 No. 1, No. 1A Sandy Hook. It's too broad.

18 MR. BANKSTON: Oh, for any one that that's
19 included on, correct.

20 THE COURT: Yes. I'm on Alex Jones --
21 follow me carefully. Make sure you're ready to --
22 because these are my notes. I'm going to look at it
23 tomorrow. The order needs to correspond to what I'm
24 telling you now. So on Alex Jones, request for
25 admissions okay. I-rogs okay.

1 RFP 1A is too broad. It's gone. And we
2 went through that earlier. Do you remember?

3 MR. BANKSTON: Yes, Your Honor.

4 THE COURT: All right. Next, Owen
5 Shroyer. This is where Mr. Enoch started, I believe, on
6 his critique, and I made some notes on that. Again, RFP
7 No. 1A --

8 MR. BANKSTON: Yes, Your Honor.

9 THE COURT: -- that's going. Do you
10 remember?

11 MR. BANKSTON: Yes, Your Honor.

12 THE COURT: That's going out. Understood?

13 MR. BANKSTON: Yes, Your Honor.

14 THE COURT: Starting on the
15 interrogatories, this is what's going out. I think
16 Mr. Enoch's right on interrogatory No. 2, the factual
17 basis for each and every one of your defenses. You can
18 cover that in depositions, but you don't need them to
19 also, you know, go into detail in an i-rog answer about
20 each and every factual basis for each and every one of
21 their defenses. That's a good topic for a deposition.
22 You're going to take four depositions.

23 I-rog 4, I don't know why you need
24 principal place and business, including mailing address,
25 physical address, and telephone number.

1 MR. BANKSTON: You hit it earlier,
2 Your Honor, where you said that if the businesses share
3 addresses, that that can show the unity of the two
4 businesses and their business ventures.

5 THE COURT: I don't think to survive this
6 motion to dismiss that's going to necessarily get you
7 beyond -- I mean, it's not going to really show me
8 anything that will allow you to survive. I understand
9 and even Mr. Enoch agreed, oh, yeah, you get past this
10 motion to dismiss, you get a lot of these things. He's
11 nodding as I say it. You just don't get them now. It's
12 limited discovery. So i-rog 4 is gone.

13 MR. BANKSTON: 4 is gone. Okay.

14 THE COURT: I-rog 5A is gone.

15 MR. BANKSTON: 5A?

16 THE COURT: I-rog 5A is his other
17 objection. Right, Mr. Enoch?

18 MR. ENOCH: Yes, sir.

19 THE COURT: Yes. That's gone. He also
20 objects to 5C. I'm going to allow you to ask 5C.
21 Mr. Enoch may be right about that, but I'm going to ask
22 you to ask that -- I'm going to allow -- I'm going to
23 have them answer that question.

24 MR. BANKSTON: Okay.

25 THE COURT: Now I'm on to RFP No. 3. I

1 had already noted it. I think Mr. Enoch did too.

2 That's too broad.

3 MR. ENOCH: Judge, did you intend to not
4 grant my objections to 5D and E?

5 THE COURT: Oh, I'm sorry. Yeah, I know.
6 Yes, I did mean to not exclude that.

7 MR. ENOCH: Okay.

8 THE COURT: Yeah. So that's -- I know you
9 don't agree with me, but I'm going to leave in 5C
10 through E. I understand your point. Maybe I'm wrong.
11 But I'm going to allow it.

12 Now I'm on RFPs. RFP No. 3 is gone. RFP
13 No. 5 is gone. RFP -- and we talked about this; right,
14 Bankston?

15 MR. BANKSTON: Yes, we did, Your Honor.

16 THE COURT: You're already with me on
17 this. You understand my points about it.

18 MR. BANKSTON: Yes, Your Honor.

19 THE COURT: RFP No. 11 is gone.

20 MR. BANKSTON: Yes, Your Honor.

21 THE COURT: RFP No. 19 is gone. I
22 understand there could be some interesting thing in
23 there. I'm going to let you have RFP 20, which is the
24 employment agreement, which was your main focus of the
25 personnel file.

1 MR. BANKSTON: Absolutely, Your Honor.

2 THE COURT: So 20's not gone, but 19 is.
3 Understood?

4 MR. BANKSTON: Absolutely, understood.

5 THE COURT: All right. Mr. Enoch objects
6 to RFP 25. I agree; I think that's too broad. So
7 that's gone.

8 MR. BANKSTON: Can I -- would you mind if
9 I changed that to just include Neil Heslin's ex-wife?

10 THE COURT: Well, it's a new RFP, but --

11 MR. BANKSTON: Actually, Your Honor, no,
12 that's fine. I withdraw that. We can take that one up.

13 THE COURT: Okay. I appreciate you doing
14 that.

15 MR. BANKSTON: Absolutely.

16 THE COURT: That way we can just work with
17 this document, which is what you said you wanted.

18 MR. BANKSTON: Exactly.

19 THE COURT: All right. And, you know, I
20 don't -- years ago I quit rewriting people's discovery.
21 It was a -- it changed my life. And now I just grant or
22 deny. It's so much simpler. Strike or ball. I don't
23 know why I couldn't figure that out in my first ten
24 years. Anyway, I digress.

25 RFPs 27 through 33 are all gone.

1 MR. BANKSTON: Okay.

2 THE COURT: On InfoWars, Mr. Enoch I
3 believe is right about request for admission No. 3.

4 MR. BANKSTON: Okay.

5 THE COURT: It's gone. Kind of
6 interesting, but it's gone. I don't know why it
7 matters.

8 I-rog No. 5, again, same thing, it's gone.
9 You can cover that in depositions. Got it?

10 MR. BANKSTON: Got it. No. 5 is out.

11 THE COURT: I-rog No. 10, again, is gone
12 for the same reasons I said that earlier.

13 MR. BANKSTON: Understood.

14 THE COURT: He also objects to I think B
15 through E, i-rog 11B through E; right, Mr. Enoch?

16 MR. ENOCH: And A, Judge. I failed to
17 mention that to you, but that's the same business
18 telephone number.

19 THE COURT: Ah, okay. Well, A is -- I
20 guess you already know it's gone because it's gone on
21 i-rog 10. But I'm going to let you ask about B through
22 E.

23 MR. BANKSTON: Okay.

24 THE COURT: I know Mr. Enoch doesn't think
25 I should, but I'm going to leave that in.

1 MR. BANKSTON: All right.

2 THE COURT: I'm now down to request for
3 production now, the last batch here for InfoWars.
4 RFPs 6 through 12 are all gone.

5 MR. BANKSTON: Okay.

6 THE COURT: I think RFP 15 is too broad.
7 But again, we discussed that earlier. You can send an
8 i-roq, describe -- or take a deposition; what kind of
9 documents do you keep? I don't know how that's going to
10 help you survive the motion to dismiss. But your point
11 is, I want to send this because they're going to say
12 none. Well, if so, they'll say it on a deposition under
13 oath. Okay? And if you're wrong, then it's too broad.
14 That's what I think.

15 RFP 17 through 33 are all gone.

16 Any questions so that you can write the
17 order for me to sign tomorrow?

18 MR. ENOCH: Yes, sir.

19 THE COURT: Yes. Not argument, just
20 questions.

21 MR. ENOCH: I understand. You have asked
22 financial information that I do not -- you've asked us
23 to produce financial information in which he paid for
24 something that I don't believe would even be relevant in
25 the case-in-chief. It's a concern --

1 THE COURT: Oh, the amount?

2 MR. ENOCH: Yeah. How did you pay for it?
3 How much did you pay for it? When did you pay for it?
4 What's your percentage ownership?

5 THE COURT: Percentage ownership is okay.
6 This is what I want. I want the ownership. I'm going
7 to make you answer the ownership questions. How much --
8 how much -- can you redact that and fine tune it? I
9 just want control.

10 MR. ENOCH: And that's --

11 THE COURT: It's ownership and control
12 which I'm allowing. So B through E, will you revise
13 them --

14 MR. BANKSTON: Yes, Your Honor.

15 THE COURT: -- so that it's just for
16 ownership and control and not amounts and how you paid
17 for it and that sort of thing? Does that make sense?
18 I'm getting some --

19 MR. BANKSTON: Yes, it does. Let me make
20 sure that I'm looking at the same request we are all
21 looking at.

22 THE COURT: I think that's a good point.
23 Which one do we look at? Free Speech?

24 MR. BANKSTON: A good one would be Free
25 Speech interrogatory 5 I think is what we're looking at

1 here. And I believe this would be 5C is what we're
2 addressing.

3 THE COURT: Yeah. Date acquired I'm going
4 to allow. Consideration paid whether -- you know, just
5 the -- what kind of consideration, not the amount.
6 How's that? Whether it was paid in cash, stock,
7 you know, whatever. What's the -- how did -- what kind
8 of consideration?

9 I know Mr. Enoch doesn't think you even
10 need that, but -- and the nature of percentage. The
11 percentage of your ownership interest I'm going to allow
12 you to have. I don't know what nature of percentage is.
13 I know what percentage is. Isn't that what you mean?

14 MR. BANKSTON: Yes, it is.

15 THE COURT: Okay. What else, Mr. Enoch?

16 MR. ENOCH: I don't see E, but that's not
17 as bad as the amount of ownership.

18 THE COURT: I agree.

19 MR. ENOCH: And then you'd go over,
20 Judge -- he asks a similar one, and I'll try to find
21 that real quick.

22 THE COURT: It's identical, same answer.

23 MR. ENOCH: Yes. Okay.

24 MR. BANKSTON: So Your Honor --

25 MR. ENOCH: It's 11, I believe.

1 THE COURT: The amount you paid, the
2 quantity you paid I don't think you need, but the nature
3 of the consideration I'm going to allow. I know you
4 don't think I should but I will.

5 MR. BANKSTON: So I was thinking for that
6 one, the way to adjust that question to conform with
7 your order -- currently it says the consideration paid
8 is how it starts. If I was to just start that with the
9 manner of consideration paid, and if we agree now we're
10 not talking about amounts --

11 THE COURT: Or the type of consideration
12 paid. The form of consideration paid is what I'm
13 getting at. Does that make sense?

14 MR. ENOCH: Let me write that down so I
15 have the same. The form of consideration paid.

16 THE COURT: I hope everybody knows what
17 that means. That just means, was it cash? Was it,
18 you know, stock transfer? Was it ownership interest in
19 a piece of property I have? You know, what did you give
20 for this?

21 And you can always agree. If Mr. Enoch
22 thinks this just gets too personal now that I know what
23 he conveyed for this, y'all talk about it because the
24 last thing you need to slow this thing down is a
25 mandamus because I somehow let too much discovery get

1 out at this stage of the case. I'm just trying to get
2 you what you need to answer the MTD. That's it. And
3 you need to think very clearly about that.

4 MR. BANKSTON: Absolutely.

5 THE COURT: So if Mr. Enoch can give you
6 another reason over the phone -- and I suggest you talk
7 and not text anymore for a lot of reasons, which I'm
8 going to talk to you about in a minute -- then take that
9 to heart, okay? Any other questions so you can get me
10 an order tomorrow?

11 MR. BANKSTON: No. I think I can get you
12 an order tonight.

13 THE COURT: Great. And you're available
14 to read that order tomorrow morning?

15 MR. ENOCH: I am, Your Honor.

16 THE COURT: Thank you both. That
17 concludes our record.

18 *(Court adjourned)*

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REPORTER'S CERTIFICATE

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THE STATE OF TEXAS)
COUNTY OF TRAVIS)

I, Chavela V. Crain, Official Court Reporter in and for the 53rd District Court of Travis County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, offered in evidence by the respective parties. I further certify that the total cost for the preparation of this Reporter's Record is \$1,086.00 and was paid by counsel for Defendants.

WITNESS MY OFFICIAL HAND this the 15th day of October, 2018.

/s/ Chavela V. Crain
Chavela V. Crain, CSR, RDR, RMR, CRR
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Expiration Date: 12/31/2019
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