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IN THE COURT OF COMMON PLEAS
GEAUGA COUNTY, OHIO

JANE AND JOHN DOES 1-4, individually and on behalf of all others similarly situated,	)	**CASE NO.: 20P000722**
	)	**JUDGE CAROLYN J. PASCHKE**
Plaintiffs,	)	**PLAINTIFFS' RESPONSE IN OPPOSITION TO UNIVERSITY HOSPITALS' MOTION TO DISMISS (JOINED BY COMPUTER AIDED SOLUTIONS)**
v.	)	
UNIVERSITY HOSPITALS HEALTH SYSTEM, INC., *et al.*,	)	
Defendants.	)	

Plaintiffs Jane and John Does 1-4, individually and on behalf of all others similarly situated (collectively, "Plaintiffs"), respectfully respond to the motion to dismiss filed by the University Hospitals Defendants (collectively, "UH"), which was joined by Computer Aided Solutions LLC D/B/A CAS Dataloggers' (collectively "Defendants").

Defendants' motion should be denied for two principal reasons. ***First***, Ohio law does not require permission to proceed pseudonymously prior to filing a complaint. Indeed, Defendants offer no explanation as to how a party can seek leave to proceed pseudonymously before an action is commenced nor do they cite any applicable law that requires dismissal when a party does not immediately seek leave to proceed using a pseudonym. As evidenced by Defendants' non-objection to the use of pseudonyms in over a dozen previously filed cases with this Court, Defendants have suffered and will suffer no prejudice by Plaintiffs proceeding pseudonymously. ***Second***, Defendants' motion is moot because Plaintiffs' have concurrently filed a Motion for Leave to Proceed Pseudonymously or, in the Alternative, for Leave to Amend the Complaint. The Court's adjudication of that motion will be fully determinative of the issues raised in Defendants' motion to dismiss. Moreover, Defendants' motion is form over substance—nothing more than an

improper attempt escape responsibility for their admitted misconduct, which resulted in the destruction of thousands of embryos and has permanently and profoundly affected hundreds of lives.

A memorandum of law in opposition is attached hereto and incorporated herein by reference.

Respectfully submitted,

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MEMORANDUM IN OPPOSITION

I. BACKGROUND

Although this Court is familiar with the facts of this tragedy—having presided over many similar cases in which Plaintiffs proceeded using pseudonyms without objection by Defendants—it is worth noting the public promises that UH made following the devastating events that led to the destruction of approximately 4,000 embryos belonging to approximately 950 families. After Defendants' catastrophic failures to exercise even the most basic level of care, UH sent letters seemingly accepting responsibility and asking for forgiveness:

> These failures should not have happened, we take responsibility for them – and we are so sorry that our failures caused such a devastating loss for you.
>
> * * *
>
> Even as we say, again, how sorry we are, we know that words are not enough. Our actions must now speak for us. We hope our actions will restore your trust in us.

In stark contrast, by their motion, Defendants defiantly seek to evade responsibility for their gross misconduct on purely procedural grounds they have never asserted before—despite dozens of lawsuits previously brought against them by anonymous plaintiffs. Regardless of the outcomes of other cases—which are irrelevant to Plaintiffs' claims here[1]—Ohio law affords Plaintiffs the right to file a class action lawsuit on behalf themselves and other similarly situated individuals that may not have the ability, resources, or wherewithal to file their own claims. Defendants' motion is nothing more than an attempt—contrary to UH's own public promises—to deny these absent class members relief without adjudication of the merits of the case. Rather than

[1] Indeed, Defendants numerous assertions relating to the outcomes of other cases, arguments they made in other cases that were never adjudicated, and complaints in other cases are red herrings that have no bearing on whether Plaintiffs may maintain a proper class action lawsuit here. Further, such assertions are not contained in any of the pleadings in this case nor any judicially noticeable public records and, therefore, are not properly before this Court and cannot be considered in a motion to dismiss.

accept responsibility, UH stoops to attacking Plaintiffs' counsel, who are simply protecting the rights of absent class members. This approach underscores why UH's motion must be denied. This Court should follow Ohio's longstanding "general policy of relaxing or abandoning restrictive rules which prevent hearing of cases on their merits." *MCS Acquistion Corp. v. Gilpin*, 11th Dist. Geauga No. 2011-G-3037, 2012-Ohio-3018, at *4 (internal quotations omitted). Defendants' motion should be denied.

II. ARGUMENT

Defendants claim that Ohio Civil Rule 10(a) requires dismissal when a party fails to immediately request leave to proceed using a pseudonym. Not so. Tellingly, they cite *no* applicable law supporting this peculiar assertion. Contrary to Defendants' position, neither the civil rules nor the applicable precedent dictate the manner and method in which a plaintiff must seek leave to proceed using a pseudonym.[2]

A. Ohio Law Does Not Require Dismissal When a Party Proceeds Using a Pseudonym.

As recognized in *Doe v. Bruner*—a case heavily relied upon by Defendants—"the practice of proceeding under a pseudonym is well established in Ohio. . . ." *Doe v. Bruner*, 12th Dist. Clinton No. CA2011-07-013, 2012-Ohio-761, at *1. Ohio courts routinely allow parties to proceed using pseudonyms with little or no analysis of the issue. *See, e.g., Doe v. Shaffer*, 90 Ohio St.3d 388, 389 n. 1 (2000) (noting that the plaintiff was proceeding under a pseudonym); *Doe v. Trumbull Cnty. Children Servs. Bd.*, 11th Dist. Trumbull No. 2004-T-0034, 2005-Ohio-2260 (same); *Doe v. George*, 12th Dist. Warren No. CA2011-03-022, 2011-Ohio-6795 (allowing but

[2] Defendants spend considerable time in their motion conflating whether the Court should permit Plaintiffs to proceed using pseudonyms versus whether Plaintiffs' Complaint should be dismissed. Because these issues are distinct, Plaintiffs address the propriety of proceeding using pseudonyms in this case in their concurrently filed Motion for Leave to Proceed Pseudonymously or, in the Alternative, for Leave to Amend the Complaint, which Plaintiffs fully incorporate by reference herein.

not commenting on the plaintiffs' use of pseudonyms). No reported Ohio case nor any case relied upon by Defendants holds that Ohio Rule 10(A) requires dismissal of a lawsuit when a plaintiff proceeds using a pseudonym. If a defendant objects to a plaintiff proceeding under a pseudonym and the court determines leave is not appropriate, the remedy is amendment, not dismissal.

Indeed, in *Doe v. Mitchell*, the Southern District of Ohio rejected the *exact same* argument that Defendants make here. 2020 WL 6882601, at *2. In *Mitchell*, the defendants moved for judgment on the pleadings because the plaintiffs had not obtained the court's permission to proceed pseudonymously, arguing that the case had not been commenced and therefore there was no jurisdiction. *Id.* The plaintiff opposed the motion and sought leave to proceed pseudonymously or, in the alternative, to amend the complaint. *Id.* at *3. The Court held that it had jurisdiction despite the use of a pseudonym in the complaint:

> Here, the Court does not lack jurisdiction over plaintiff Jane Doe's complaint. Plaintiff has filed a request to proceed anonymously. Defendants have not cited any case law that supports their position that plaintiff's request is untimely. Defendants rely on the Sixth Circuit's decision in *Marsh*, but the situation there is distinguishable.[3] The anonymous plaintiffs in *Marsh* had not filed a motion seeking to proceed anonymously. Here, in contrast, plaintiff Jane Doe has filed a motion to proceed pseudonymously which is pending before this Court. The Court has the discretion to grant or deny the relief plaintiff seeks. **There is no jurisdictional bar unless and until the Court denied plaintiff leave to proceed under a pseudonym, in which case plaintiff should be given an opportunity to amend the complaint as discussed *infra*. Thus, the complaint should not be dismissed for lack of jurisdiction.**

Id. at *4 (emphasis added); *see also Doe v. Carson*, No. 1:18-cv-1231, 2019 WL 1981886, at *1 (W.D. Mich. Jan. 4, 2019) (permitting the plaintiff to amend the complaint to identify her real name).

[3] Defendants here also erroneously rely on the Sixth Circuit's decision in *Marsh*.

The cases relied upon by Defendants are readily distinguishable. For example, in *Doe v. Bruner* the Twelfth District determined that the trial court did not abuse its discretion in denying a sexual-assault plaintiff the right to proceed pseudonymously. *Bruner*, 2012-Ohio-761. Nowhere did the court suggest that the plaintiff would not be permitted to amend the complaint to provide his or her real name. *Id.* In *Citizens for a Strong Ohio v. Marsh*, the plaintiff used vague allegations about an anonymous plaintiff to circumvent federal abstention principles by using "straw men" to bring their claims in federal court when there was a similar pending case in state court. 123 Fed. App'x 630, 636 (6th Cir. 2005). Unlike here and in *Mitchell*, the *Marsh* plaintiffs *never* asked for leave to proceed using a pseudonym. *Id.* And the court's decision in *Anonymous v. City of Hubbard* actually undercuts Defendants' argument that this case should be dismissed. In that case, the defendants moved for a more definite statement under Federal Rule 12(e), requesting that the plaintiff disclose his or her identity. 2010 WL 148081 (N.D. Ohio Jan. 11, 2010). The court held that the "Plaintiff shall file an amended complaint within ten (10) days of this Order in which he shall provide his identity." *Id.* at *2. It did not dismiss the case.[4]

Defendants' attempt to distinguish this case because it is a class action fares no better.[5] Courts routinely permit named plaintiffs in class action lawsuits to proceed using pseudonyms. For example, in *Jane Does Nos. 1-57 v. Nygard*, class representatives moved to proceed

[4] The remaining cases relied upon by Defendants are also non-binding and distinguishable. *See Plaintiff Doctor v. Hosp. Service Dist. # 3*, No. 18-7945, 2019 WL 351492, at *3 (E.D. La. Jan. 29, 2019) ("[T]he Court finds amendment to be the appropriate course of action, if Plaintiff should wish to proceed."); *see also Estate of Rodriquez v. Drummond Co., Inc.*, 256 F. Supp. 1250, 1256 (N.D. Ala. April 14, 2003) (dismissing complaint without prejudice because the plaintiffs *never* sought leave to proceed pseudonymously and permitting the plaintiffs to file a second amended complaint).

[5] The cases relied upon by Defendants do not support their argument that this case must be dismissed. *See Parker v. Berkeley Premium Nutraeceuticals, Inc.*, Com. Pl. Ct. No. 04-1903, 2004 WL 5335046 (Apr. 8, 2004) (denying motion for protective order); *In re Ashley Madison Customer Data Sec. Breach Litig.*, MDL No. 2669, 2016 WL 1366616, at *5 (declining to permit plaintiffs to proceed using pseudonyms but allowing the filing of a consolidated complaint to identify those using pseudonyms).

pseudonymously nearly three months after filing the initial complaint. *See Jane Does Nos. 1-57 v. Nygard, et al.*, No. 1:20-cv-01288-ER, ECF No. 31 (S.D.N.Y. Apr. 29, 2020) (attached as Ex. 1). The Court granted the plaintiffs' request and ordered that they were not required to provide their real names to the defendants until the appropriate time during discovery. *See* May 7, 2020 Hearing Transcript at 3-19 (attached as Ex. 2). The court further held that withholding the plaintiffs' names would not prejudice defendants "in any way" at the motion-to-dismiss stage. *Id.* at 19; *see also, e.g.*, *In re Rogers Litig.*, 6th Dist. Sandusky No. S-0-042, 2003-Ohio-5976, at *4 ("The fact that the class representatives are anonymous does not affect their right to proceed in this action, particularly in light of the fact that appellees agreed to identify themselves to appellant."); *Rapuano v. Trustees of Dartmouth College*, 334 F.R.D. 637, 649 (D.N.H. Jan. 29, 2020) ("[T]he court permits Jane Doe and Jane Doe 2 to serve as pseudonymous class representatives."); *Doe v. City of Apple Valley*, No. 20-cv-499, 2020 WL 1061442, at *3 (D. Minn. Mar. 5, 2020) ("Plaintiffs' status as putative class representatives strengthens their argument for proceeding under pseudonyms. . . .").

Here, Defendants insist they cannot defend this case because Plaintiffs are proceeding using pseudonyms. But Defendants never asked Plaintiffs to identify themselves (either formally through written discovery or informally through communications among counsel) and have refused to even schedule a Civ.R. 26(F) conference. That Defendants would move to dismiss this case without making any effort to determine Plaintiffs' identities reveals that Defendants are searching for any excuse to avoid having this case decided on its merits. Their motion elevates form over substance.

Plaintiffs understand that they will have to disclose their identities to Defendants during discovery. And Plaintiffs have no objection to doing so subject to Defendants' agreement not to

disclose their identities during pre-trial proceedings. This will give Defendants all the time they need to complete discovery and prepare their defense.

B. Defendants' Motion to Dismiss is Moot.

Plaintiffs' have concurrently filed a Motion for Leave to Proceed Anonymously or, in the Alternative, for Leave to Amend the Complaint. As set forth in that motion, due to the highly sensitive nature of this case—which UH recognizes by its blanket assertion of confidentiality over nearly all documents and testimony relating in any way to the disaster—it is appropriate to permit Plaintiffs to proceed using pseudonyms. But should the Court determine that Plaintiffs must proceed using their real names, Plaintiffs request, under Ohio Rule 15's liberal standard for amending pleadings, leave to file a second amended complaint providing that information. Either way, the Court's adjudication of that motion moots Defendants' motion to dismiss. *See Doe v. Mitchell*, No. 2:20-cv-00459, 2020 WL 6882601, at *2 (S.D. Ohio Nov. 4, 2020).

III. CONCLUSION

This Court should deny Defendants' Motion to Dismiss. At the same time, Plaintiffs respectfully request that the Court grant Plaintiffs' contemporaneously filed motion to proceed using pseudonyms.

Date: February 10, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

This will certify that a true and accurate copy of the foregoing has been forwarded via ordinary U.S. Mail and/or facsimile and/or email and/or hand-delivery and/or through this Court's electronic filing system, **on this 10th day of February 2021**, as follows:

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EXHIBIT 1

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April 20, 2020

By ECF
Honorable Edgardo Ramos

RE: *Jane Doe Nos. 1-46 v. Nygard et. al., No. 1:20-cv-01288 (ER)*

Dear Judge Ramos:

This firm, along with DiCello Levitt Gutzler LLC, represents the Plaintiffs in this matter, to wit: Jane Doe Nos. 1-46. Pursuant to Section 2.A. of this Court's Individual Practices, we respectfully request a pre-motion conference in anticipation of filing a Motion for a Protective Order and Leave to Proceed Anonymously.

This case is brought by Plaintiffs, Jane Doe Nos. 1-46, who are survivors of sex trafficking, rape, sexual assault and/or sexual battery; Plaintiffs are bringing an action for damages against Defendants, under 18 U.S.C. §§ 1591, 1594, 1595, as enacted by the federal Trafficking Victims Protection Reauthorization Act ("TVPRA").

At the time of the acts alleged in the First Amended Complaint, Defendant, Peter Nygard ("Nygard"), was the founder, chairman, figurehead, former chief executive, and icon of Nygard Inc., Nygard International Partnership, and Nygard Holdings Limited (collectively, the "Nygard Companies"). *See First Amended Complaint*, Dkt. No. 30 at ¶¶ 2-8, 96, 122, 141-147, 309. Nygard, using the Nygard Companies' resources, conspired with the Nygard Companies and engaged in a pattern and practice of recruiting, luring, enticing, providing, and obtaining underaged girls and women, and causing them, through force, fraud or coercion, or knowing that the victim had not yet attained the age of eighteen (18) years, to engage in commercial sex acts through, among other means, promising lucrative modeling opportunities, providing cash payments, drugging his victims, confiscating his victims' passports, preventing his victims from exiting his properties and compounds, threatening victims with physical violence, and using physical force against them. *Id.* at ¶¶ 38, 50-95, 155, 216, 311-1336. Nygard made a concentrated and deliberate effort to protect and conceal his criminal activities. *Id.* at ¶¶ 187-215. Specifically, Nygard initiated a scheme to purchase police protection and political cover in the Bahamas by making regular payments of tens of thousands of dollars, if not more, to law enforcement and government officials. *Id.* at ¶¶ 198-207. Nygard has paid people to use fear, intimidation, threats, and acts of violence to silence his victims from coming forward. *Id.* at ¶¶ 201-202, 684-686, 1140, 1205-1206, 1253, 1312, 1337-1350.

Plaintiffs did not come forward for many years due to a legitimate fear of retaliation and public exposure of their identities. Furthermore, each Plaintiffs status as a victim of sex trafficking, rape, sexual assault and/or sexual battery is highly sensitive, personal, and contains private

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information. Moreover, the extreme perverseness and graphic nature of Nygard's sexual misconduct against Plaintiffs, as alleged in the First Amended Complaint, is particularly degrading and sensitive. Requiring Plaintiffs to disclose their identities in public court records, in order to assert their claims against Nygard – the man that raped them, abused them and forced other degrading sexual acts upon them, before covering up his criminal activities – and his companies, will only serve to further re-victimize the Plaintiffs and compound the harm for which they seek redress through this litigation.

Plaintiffs seek a protective order and leave to proceed anonymously because the disclosure of their identities on the public docket will cause the victims harm that outweighs the presumption of open judicial proceedings under these special circumstances.

Although Fed. R. Civ. P. 10(a) requires the title of a complaint to name all the parties, courts have "approved of litigation under a pseudonym in certain circumstances," in order to protect the plaintiffs appearing in federal court. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008). When deciding whether a plaintiff may proceed under a pseudonym, the Second Circuit holds that a non-exhaustive, ten factor balancing test must be used to weigh the plaintiffs' need for anonymity against the countervailing public interests of disclosure and any prejudice to the defendant. *Id.* at 189.

Plaintiffs have a substantial privacy right in guarding the sensitive and highly personal information they must disclose in this sex trafficking litigation. It is well established that victims of rape, human trafficking, sexual assault and sexual battery have a strong interest in protecting their identities, so that other victims will not be deterred from reporting such crimes. *See Doe v. Blue Cross & Blue Shield United of Wisconsin,* 112 F.3d 869, 872 (7th Cir. 1997). Jane Doe Nos. 1-46 each have a substantial privacy right to protect their identities from disclosure.

Several of the Plaintiffs were children when they were sex trafficked, raped, sexually assaulted and/or sexually battered. Additionally, Plaintiffs' First Amended Complaint contains classes consisting of victims who were minors at the time that they were victimized by Nygard. These Plaintiffs are particularly vulnerable to the possible harm of disclosure, which weighs in favor of allowing the Plaintiffs to proceed anonymously. *See Doe v. Stegall,* 653 F.2d 180, 186 (5th Cir. 1981).

If the disclosure of Plaintiffs' identities poses a reasonable risk of retaliatory physical or mental harm to Plaintiffs, then this factor should be weighed in favor of proceeding pseudonymously. *Sealed Plaintiff*, 537 F.3d at 190. The Plaintiffs were each sex trafficked, raped, sexually assaulted and/or sexually battered. Nygard then used money, threats, fear, acts of intimidation, acts of violence, and destruction of property, amongst other things, to intimidate the Plaintiffs, and caused the Plaintiffs to have a substantial and reasonable fear of retaliatory conduct if they ever reported or disclosed his criminal conduct. *First Amended Complaint* at ¶¶ 38, 50-95, 155, 187-216, 311-1336. Additionally, Nygard reinforced fear, control, and

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dominance over his victims by regularly flaunting his political power and control of the Bahamian police and the Bahamian government through bribery and coercion. *Id.* at ¶¶ 187-210. Jane Doe Nos. 1-46 each have a substantial and reasonable fear of retaliatory conduct if the Defendants were to learn their identities at this stage in the litigation.

The Defendants will not be prejudiced by this in any way, in that Plaintiffs and the other class members are willing to provide their full names to Defendants, subject to a protective order that prohibits disclosure to any third-parties. This will allow the Defendants the ability to participate meaningfully in discovery through the course of the litigation. *See Plaintiffs #1-21 v. County of Suffolk*, 138 F.Supp. 3d 264, 276 (E.D.N.Y. 2015).

We look forward to providing this Honorable Court with further argument and details concerning the necessity of allowing the Plaintiffs to proceed in this litigation anonymously and the need for a protective order against release of information to third-parties by the Defendants.

Respectfully Submitted,

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Counsel for the Plaintiffs and the Proposed Class

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EXHIBIT 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JANE DOES NOS. 1-46,

Plaintiffs,

v. 20 Cv. 1288 (ER)

PETER J. NYGARD, et al.,

Defendants.

----------x

May 7, 2020
10:45 a.m.

Before:

HON. EDGARDO RAMOS,

District Judge

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(The Court and all parties appearing telephonically)

(Case called)

THE DEPUTY CLERK: Counsel, please state your name for the record.

MR. ABRAMOWITZ: Elkan Abramowitz, from Morvillo Abramowitz, for the defendant Nygard.

MR. HARWOOD: Chris Harwood, from Morvillo Abramowitz, for defendant, Mr. Nygard.

MR. SPIRO: Edward Spiro from Morvillo Abramowitz.

THE COURT: Anyone else from Morvillo Abramowitz?

Who is on for the plaintiff?

MS. HABA: Lisa Haba, on behalf of the plaintiffs, from The Haba Law Firm.

MR. GUTZLER: Good morning, your Honor. Greg Gutzler, from DiCello Levitt Gutzler, on behalf of plaintiffs.

MS. KELLER: Good morning, your Honor. Amy Keller, also with DiCello Levitt Gutzler, on behalf of the plaintiffs.

MR. HAWAL: Justin Hawal, also from DiCello Levitt Gutzler, for the plaintiffs.

THE COURT: Very well. This matter is on for a premotion conference. I just want to note for the record that this matter is being held telephonically and remotely. On behalf of chambers, in addition to myself and Ms. Rivera, is my law clerk, Camila Vega, and we are also being assisted by a court reporter.

So I think I have had these parties before me in the past in connection with the initial motion or request to move to dismiss. So let's start with the defendants and their renewed request.

MR. ABRAMOWITZ: Your Honor, Mr. Harwood is going to be speaking for the defendant.

THE COURT: Very well, Mr. Harwood. I understand that there are two issues. In addition to the proposed motion to dismiss, there was also the issue concerning whether or not plaintiffs can continue to proceed anonymously, at least for the foreseeable future.

Mr. Harwood, go ahead.

MR. HARWOOD: Thank you, your Honor. Unless you have a preference, I will address the anonymous issue first.

THE COURT: That's fine.

MR. HARWOOD: So the issue with respect to proceeding anonymously, it's not an issue of whether they should be permitted to proceed anonymously. The defendants are willing to agree to that. The question is really one of timing of the disclosure of their identities, and to a lesser extent, the scope of the disclosure.

So where the parties have ended off in negotiations on this topic is the plaintiffs' position is that during discovery, when discovery starts, they will disclose their names, country of origin, and date of birth pursuant to a

protective order, limiting disclosure to counsel, investigators, and the like. And our position is that plaintiffs should immediately be required to disclose their names, country of origin, and date of birth, and in connection with names, also maiden names or aliases, under an appropriate protective order. So immediate disclosure, but under a protective order, limiting disclosure to the same group that plaintiffs had identified -- counsel, investigators, and the like -- with the understanding that the disclosure of that limited information now would be without prejudice to defendants' right to seek additional identifying information when discovery commences.

The reason for our position, your Honor, is that it would prejudice defendants unfairly if they were required to wait until discovery started to obtain plaintiffs' identities. And there are a few reasons for this.

The first is that defendants need to, and they are entitled to, start preparing their merits defense now. The merits defense in this case is going to require investigation of detailed factual allegations alleged by 46 plaintiffs, over 40-plus years, in multiple states and foreign countries. And that's going to require unique investigative approaches and unique witnesses with respect to each of the plaintiff's claims. And so it would unfairly prejudice defendants to have to wait to start preparing their defense, and defendants

wouldn't have to wait if plaintiffs were not requesting to proceed anonymously. Again, defendants aren't objecting to that, but shouldn't be prejudiced in a way that they wouldn't otherwise be prejudiced if plaintiffs weren't proceeding anonymously.

The second reason why defendants -- I should add, actually, before I get to the second reason, the names here are crucially important. And an example for why this is so in connection with preparing the defendants' defense is illustrated by the recent *New York Times* article that we referenced in our premotion letter on this topic. In *The New York Times* article, two women admitted to *The New York Times* making up stories about Mr. Nygard and sexual assault. And those two women acknowledged also that they were paid and coached by a third woman. And that third woman, who was identified by name in *The New York Times* article, who paid and coached these two other women to make up stories about Mr. Nygard, has publicly identified herself as a Jane Doe, and we only know that because she self identified, somewhat contrary to the request of the plaintiffs to proceed anonymously, but she did. And that really calls into question, obviously, the veracity and credibility of her claims.

So it's just sort of an illustration of why it's crucially important that we have the names to start our defense. And for all we know, the other women in *The New York*

Times article are also Jane Does. It would be fundamentally unfair for plaintiffs to make these public allegations about our client, that have been, quite frankly, devastating to him. They resulted in him losing his business, the appointment of a receiver over the companies that he has owned and operated during decades, and it would be unfair to delay him from taking steps to prepare his defense.

THE COURT: Mr. Harwood, can I just ask you a quick question. You say that this particular individual in *The New York Times* article identified herself as a Jane Doe. Did she identify herself as a Jane Doe in this lawsuit?

MR. HARWOOD: She identified herself as a Jane Doe in this lawsuit, yes.

THE COURT: OK.

MR. HARWOOD: Then separate and apart from the need for the defendants to start preparing their defense, the plaintiffs' identities are also relevant to the motion to dismiss briefing and the motion to dismiss that we are requesting permission to bring, and not having the information for that would also be prejudicial.

So with respect to the motion to dismiss, the identities of the plaintiffs are relevant to a couple of different grounds for dismissal, including statute of limitations. The identities of the plaintiffs are relevant to assertions that plaintiffs have already indicated they are

going to make as to why equitable tolling should apply to claims that are otherwise barred by the statute of limitations. To qualify for equitable tolling, they have to make a showing on a plaintiff-by-plaintiff basis that they do qualify, that they exhibited diligence in pursuing their claims and that there was some extraordinary impediment to bringing their claims. We don't think that they can make that showing nor collect facts sufficient to qualify for that showing, but their identities may further undermine any factually specific argument that they would have to raise for why equitable tolling would apply.

THE COURT: Mr. Harwood, I don't understand why that's the case. Why would someone's name and some other limited identifying information give you the ability to determine whether that person has engaged in sufficient diligence in order to toll the statute?

MR. HARWOOD: The plaintiffs would have to make very specific arguments as to why they have been diligent in exploring their rights and why they were blocked from doing so, and who they are, what their background is, what their level of education, what their current professional employment is all may be very relevant to an allegation that they make as to why they were somehow prevented from bringing their claims.

THE COURT: That type of information is not information that you're asking for now. Am I wrong?

MR. HARWOOD: We are looking to see who the people are, and when we know who the people are, that may well indicate to us what their background is. Some of these people may be public personalities. It may be people about which there is publicly available information, and information that would be potentially relevant to any arguments specific to them that they may make as to equitable tolling.

But in addition to that, for statute of limitations, there are also a number of imprecise allegations in the complaint. So, for example, Jane Doe No. 5 alleges conduct that occurred in, quote, July 2009 when she was 17 years old. This plaintiff's claims would be time-barred if she turned 18 before February 13, 2010. And so again, here the identity of this plaintiff would be directly relevant to the statute of limitations defense, because the identity and the date of birth would tell us definitively whether her claims are time-barred or not, notwithstanding the generalized allegation that is in the complaint. And there are a lot of other allegations in the complaint where conduct is alleged, quote, approximately in 2010, or approximately in another year, relevant to statute of limitations purposes. And knowing who these people are and what they are alleging as to interactions with our client may be very relevant to us being able to pin dates that would be relevant for statute of limitations purposes.

And, similarly, for personal jurisdiction, there are

just a small number of individuals with New York-based allegations, and knowing who the individuals are, again, may allow us to pinpoint whether conduct they are alleging occurred in New York in a particular time could possibly have occurred in New York with our client at a particular time.

In terms of the case law that's going back and forth on this topic between the parties in the letters, the cases that we cited are squarely on point and do address the timing of disclosure. For example, the *Kolko* case out of the Eastern District of New York, that case ordered less than a month after the complaint was filed, and before the issue of whether the plaintiffs could even proceed anonymously was briefed, that case ordered disclosure of plaintiffs' names at that early stage, where we are here now. Similarly, the Child Victims Act order that we cited, that was entered in all of the Child Victims Act cases that are being brought in New York at this time, required broader disclosures than we are asking for here now 14 days after filing suit. And the cases that plaintiffs cited don't address timing; they simply address whether plaintiffs should be allowed to proceed anonymously at all, and we are not opposing that. So those cases are not relevant to the timing portion.

Finally, on this issue, any legitimate concerns about disclosing the identities of plaintiffs to us now can be addressed by a protective order, which we are happy to enter

into an appropriate protective order that limits the disclosure that we can make of plaintiffs' names simply to individuals who are working with us in our office, who are retained by us, investigators who are retained by us, to assist in preparing the defense here.

Unless your Honor has questions about that issue, I can move on to the motion to dismiss.

THE COURT: No. Let's go to the plaintiffs so that we can take these issues one at a time.

Who will be speaking for plaintiffs?

MS. HABA: Good morning, your Honor. This is Lisa Haba. I will be addressing this issue for plaintiffs.

First, I would like to say that I believe the standard in this case is pursuant to *Sealed Plaintiff v. Sealed Defendant*, which is cited in our letter motion, as well as at 537 F.3d 185, at page 190. It goes through a ten-factor balancing test. And the basis of a ten-factor test is it's weighing the plaintiff's need for anonymity against the countervailing public interest as well as the prejudice to the defendant. And it's important to note that amongst the ten factors, one of the factors that the Second Circuit has recognized is that the prejudice to the defendant can change at different stages in a lawsuit and within a litigation. So one of the factors they balance of that is the risk of retaliation and physical harm, along with mental health and mental harm to

the plaintiffs involved in the case as well.

So the reason I note that is because we are talking a lot about when and at what point we are considering this, and our court has already determined that that can change throughout a litigation. So I want to go first to the allegations raised by counsel partially in the letter motion as well as in argument today.

Essentially, the plaintiffs have asked for a briefing schedule and the defendants have filed a letter motion in response objecting to the timeline of that. And there's two things that certainly were brought forth that I think are important to note for the Court. One, of course, is they agreed to the motion but they want immediate disclosure. And one of the bases for that, that was raised today, is that they are citing to a New York state court order that was put into place for a very limited, very specific issue that came forth, the Child Victims Act in New York.

I don't think it's appropriate to rely on a state court, limited-issue trial order as a basis for what should be done in federal court for a human trafficking litigation. It's a completely different cause of action, a completely different scenario, and we have a substantially different factual allegation going forth. So although the only common connection to that is that race is involved in both, I don't think that really would be the governing body here. I think federal case

law would be far more appropriate. So I would ask the Court to disregard that as somewhat outside the scope of what we are dealing with and as an insufficient court order from a different jurisdiction.

The other thing I would bring forth is that there has been somewhat of a discussion on where the negotiations lie. I would put out there that in the letter motion, the plaintiffs were accused of not properly informing the Court of the status of negotiation. And I would let the Court know that, although the agreement put forth today by defense counsel is accurate, that is the state of the negotiation, part of the reason we asked the Court to address this is we recognized correctly that we are not at a point of agreement. We are, in fact, at an impasse, and we need the Court to address this issue so we can properly address whether or not our clients can proceed anonymously in this matter.

So we have discussed a little bit today, defense counsel brought forth that there were two girls that came forth in *The New York Times* article and essentially committed perjury, and they either lied at one point when they said that Peter Nygard had raped them or they lied at a later point when they said he had not, but there was perjury committed one way or the other. Then they talked about how *The New York Times* article and their investigation determined that the third woman involved in that was one of our plaintiffs. Her initials are

RR, and RR was in a situation where she was accused, by *The New York Times* essentially, of having paid these women based on statements that were taken. What was not put forth by defense counsel is that RR also -- and this was included in the article as well -- took a polygraph on that issue, and that polygraph showed by 99 percent that she did not pay these women.

So there are facts in dispute on that very issue, and RR was thrust into the public eye by *The New York Times* against her wishes. There was a very concerted effort by plaintiffs' counsel to protect her identity from *The New York Times*. *The New York Times*, on their own volition and against plaintiffs' request, thrust RR into the public eye. So feeling that she had no other alternative, she came forth with her story to protect her own integrity and talk about what really happened, since *The New York Times* frankly got it wrong.

I point that out because I think it's disingenuous to tell the Court that RR is involved in paying people and whatnot because it promotes the, quote unquote, they can pay everyone to lie theory that has been put forth, but it omits key facts that really go against that. So I would say I think that's very muddying, that's very confusing, and that's somewhat disingenuous to bring forth that fact in support of why anybody's name should be put into the public eye or put into the defendants' hands at this point in litigation.

The next thing I would point out to the Court is this.

We certainly are in a position where we agree at this point the defendant is entitled to the names of the plaintiffs at the appropriate time of litigation, and we have cited in our letter motion four cases that go to this point. And while we don't contest that they are entitled to it, I think it's substantially too early at this point to provide those names for the following reason.

One of the most important cases that addresses this is out of the Ninth Circuit from 2000, and it talks about when it is appropriate in litigation. And the Ninth Circuit addresses that defendants do not suffer any prejudice when they don't know the identities of the plaintiffs because they are not in discovery yet; once they are in discovery, it's appropriate to turn that over. And that case out of the Ninth Circuit is *Does I thru XXIII v. Advanced Textile Corporation*. The cite is 214 F.3d 1058, at page 1069.

Another case that is appropriately in the federal arena that addresses this issue is *Roe v. Aware Woman Center for Choice*. The citation for the record is 253 F.3d 678, at page 687, and that's out of the Eleventh Circuit in 2001. Again, there was an argument in the district court that talks about how the defendants felt they would be prejudiced if they didn't receive these names prior to discovery commencing. And the circuit court held that their argument -- their exact words were -- would be eviscerated because the plaintiffs offered

during discovery to give the names over to the defendant.

In our own Southern District of New York, as recently as this year, April 8th of 2020, we had a case *Doe v. The Trump Corporation*. And the court stated, shortly after the motion to dismiss was decided and the discovery stay was lifted, the parties agreed to a protective order which provided the plaintiffs' identities to be disclosed over to defense counsel and their agents. Again, identifying that after the motion to dismiss, once we are in discovery, is the appropriate timeline to put this into play.

Lastly, I would also cite to the Court, again, out of the Southern District in 2013, *John Doe 1 v. Four Brothers Pizza*, and again, the court identified that discovery was the appropriate time to disclose the names and identities of the plaintiffs. And in that case, uniquely, they took an alternative approach, where the court was given the names early on, put them under seal, and after discovery commenced, the court then allowed the defendant to have that information.

So I know the issue comes down to in this case why in discovery, why not now? And I know there are obviously some cases that vary in that, because again, it's a ten-factor test, it's a step-by-step decision, and we can't take a one-size-fits-all for this matter, because, quite frankly, we have a high-risk retaliation by the defendant against the plaintiffs in this case.

THE COURT: Why is that?

MS. HABA: In our complaint, one of the Jane Does owned a business, Jane Doe No. 12 talks about owning a business in the Bahamas, and how Peter Nygard hired two individuals named Toogie and Bobo to go out and, they called it fire-bombing her store, but it was essentially blown up. An arson was committed, it was determined to be arson by the Bahamian police, and an investigation about a year later determined that Peter Nygard was responsible for hiring the individuals that did that to her store because she left him and also had videos that were potentially going to be disclosed that could be bad for his reputation.

In the receiver's report that came forth, there is a substantial amount for the bankruptcy that is currently pending in Canada. Some notations in there by the receiver, they were referencing some prior paternity litigation that had occurred involving Peter Nygard, and the Canadian court actually talked about Peter Nygard's abusive litigation tactics, and one of the quotes was: The respondent has a history of using his infinite resources to frustrate the judicial process.

There has been a substantial amount of disregard for court orders. In the Bahamas, there is actively a court order for his presence based on a failure to appear for a litigation that happened down there. He has failed to appear and that has been several months, if not close to a year at this point. I

apologize, I don't remember the exact date. But I think there is a genuine concern that if he is not obeying court orders, maybe he will not obey a protective order, or maybe he won't obey a court order to not do anything to frustrate this litigation process.

Furthermore, the very woman RR, who we talked about earlier, has told us in her words and under oath to plaintiffs' counsel that she is in fear, that she has received threats in the streets in the Bahamas, and that she has been approached by individuals representing themselves to be associated with Peter Nygard and wanting to either offer her money or influence her position. And she is one of the only people that has been identified publicly so far, so already she has been approached.

The other thing I would offer to the Court is that there was a murder-for-hire plot against Fred Smith, who is an attorney representing Louis Bacon in the Bahamas, as well as Louis Bacon and his associates. The murder-for-hire plot became sufficient that a couple of years ago the Hague had to get involved to order the Bahamian government not to allow a targeted hit orchestrated by Peter Nygard to be continued out.

So while all of these things are up in the air, I think as we can go through the discovery process and vet the veracity and merits of each of these allegations, there certainly is enough there to realize that the victims are at risk potentially. Their safety and their mental well-being is

at risk potentially.

I would also note that one of the dangers we have seen potentially looming is, if the names were to be released right now -- he has declared bankruptcy in his corporate assets. If he were to receive the names, let's say your Honor decided that it was appropriate at this point in the litigation, we see two reasons why that will be prolonged and discovery will be put off for a long amount of time. If he were then to declare personal bankruptcy, which we have from sources is very much a realistic possibility and potentially where things may go, although I can't confirm that, of course, that would put a stay on the entire case, we can't proceed with any discovery, and he is just going to have the names sitting while we have a stay until the bankruptcy proceeding is concluded.

Furthermore, I know that the criminal case that is currently being investigated has publicly been acknowledged. A grand jury subpoena has been served to Nygard Inc. and the receiver is addressing that currently. The FBI publicly raided the American entities owned by the Nygard Corporation and had publicly declared their investigation of Peter Nygard for sex trafficking. So if there is a criminal case, that will put a criminal stay on the proceeding as well.

So now we have a situation where we have an individual who has got a long history of litigious activity, of threats, of danger, and we have got victims that are terrified to come

forward and terrified in knowing that he is sitting there with their names and their identities in his hand, and we can't do anything to move this litigation forward.

THE COURT: I am sorry to cut you off. I am not going to require plaintiffs to turn over the names of the Jane Doe plaintiffs at this point. I do not believe that defendants will be prejudiced in any way. Mr. Harwood mentioned they need to start preparing for their merits case. However, we may never get to a merits defense if I grant their proposed motion to dismiss.

With respect to the other issues that Mr. Harwood mentioned, including that it's relevant to the statute of limitations and diligence, for example, I have read their premotion letter which goes through the various reasons that they believe that a motion to dismiss would be appropriate. At no point in this letter, and correct me if I am wrong, do they say, but we would be able to make an argument but for the fact that we don't have their names. They just talk about particular plaintiffs and their particular situations, and why for various reasons their claims are either expired or lack subject matter jurisdiction, etc. So I am not going to require you to turn over those names at this point.

Mr. Harwood, let's talk about your proposed motion to dismiss.

Mr. Harwood?

MR. HARWOOD: Apologies. I had the phone on mute.

Thank you, your Honor.

For the motion to dismiss, as your Honor noted, there are significant defects in the complaint that the motion is going to result in a substantially narrowed case. Just addressing the one comment you made on the anonymous issue, we have the grounds for the dismissal that we identified in our letter motion, and we identified the number of plaintiffs who those arguments are going to apply to. There were additional plaintiffs who, because of the vague allegations in the complaint with their names and with further information about them, the same arguments that we raise in our letter motion for a motion to dismiss may apply to more plaintiffs. And so there would be a portion of our motion which we would be looking for a more definite statement as to some of the vague allegations. I just didn't want your Honor to be under the impression that we don't think that the vagueness of the information in the complaint would have any effect on our motion to dismiss because it would.

Though, irregardless of that, there are 43 of the 46 named plaintiffs whose claims, based on the face of the complaint, should be dismissed. 41 plaintiffs for lack of personal jurisdiction; 43 plaintiffs when you add the statute of limitations defense; and then 12 of the 43, who fail for personal jurisdiction and statute of limitations reasons, also

fail for subject matter jurisdiction reasons because the conduct they are alleging arose abroad and the defendants are not physically present in the U.S. for purposes of the sex trafficking statute that plaintiffs are proceeding under.

With respect to personal jurisdiction, the 41 plaintiffs whose claims fail for this reason, just to put the issue in context, the plaintiffs' letter gives the impression that Mr. Nygard and his companies have substantial ties to New York, and that is just not the case. Mr. Nygard is not a citizenship or a permanent resident of the United States. He is Canadian and lacks any of the types of contacts to New York that would go to the personal jurisdiction inquiry. He doesn't own property in New York. He doesn't maintain a residence in New York. Similarly, the Nygard companies are operated out of Canada; none is incorporated or has its principal place of business in New York. In fact, the receiver, who plaintiffs' counsel mentioned, has submitted a sworn declaration in which the receiver acknowledges that the, quote, head office and nerve center of the Nygard entities are in Canada. So that's why the focus here for personal jurisdiction is going to be on the links between the specific claims of the specific plaintiffs here and New York.

THE COURT: Mr. Harwood, based on my reading of plaintiffs' letter, I believe they indicate that Mr. Nygard has a permanent residence in New York. Is that wrong?

MR. HARWOOD: That is incorrect, your Honor.

THE COURT: OK.

MR. HARWOOD: So because of what I mentioned, the plaintiffs are going to have to satisfy specific jurisdiction, and specific to the New York long-arm statute satisfy that statute's requirements of constitutional due process, because no other basis for jurisdiction is going to suffice. So there is going to have to be a focus on the alleged New York conduct. But there is no alleged New York conduct for 41 of the plaintiffs, and so their claims are going to have to be dismissed.

Now, to avoid this, the plaintiffs have tried to cobble together arguments for personal jurisdiction that simply don't work on the law or, as your Honor noted concerning the permanent residence allegation, are demonstrably false on the facts.

So plaintiffs, for example, allege that the two companies have their, quote, global headquarters in New York and that their contacts should be applied to Mr. Nygard because he is the alter ego of those entities. Those arguments fail because the alter ego allegations in the complaint are entirely conclusory, and in any event, there is no personal jurisdiction in New York over those entities. As I mentioned, the receiver itself has identified those entities' head office and nerve center as being in Canada. And the plaintiffs point to state

marketing statements on websites about headquarters being in New York, but the fact is that marketing statements on websites don't equate to facts sufficient to establish personal jurisdiction. The relevant factors to establish personal jurisdiction shows that the locus of all of those companies is in Canada and not here.

The plaintiffs also point to alleged routing of funds through New York and Mr. Nygard engaging in private litigation in New York. The routing of funds allegations in the complaint, also conclusory. And in any event, there is no allegation that defendants had a New York bank account or purposely selected a New York bank intermediary for purposes of routing, and those things are required under the law for the routing of funds to have any conceivable relevance for personal jurisdiction.

In terms of the prior litigations, those are irrelevant. As an initial matter, litigations where a party is a defendant have no relevance to personal jurisdiction. And even litigations where a party is a plaintiff have no relevance to personal jurisdiction unless they concern the exact same parties and the exact same transaction and occurrence, and none of that is present in any of the litigations here.

Finally, plaintiffs cite a prior New York case, a state case, which they categorize as a Court of Appeals case. In fact, it was an appellate division case, *Bacon v. Nygard*.

That case also is irrelevant to the personal jurisdiction analysis because it analyzed forum non conveniens, not personal jurisdiction; and for forum non conveniens, the most significant factor was the plaintiff in that case, Louis Bacon, not anything to do with our clients.

So for those reasons, personal jurisdiction is going to fail for 41 of the plaintiffs and require this case to be whittled down for just that reason alone to five plaintiffs. But when you take into account the statute of limitations issues, that then adds two more of the plaintiffs, because two plaintiffs who allege New York contacts, their claims arise more than ten years ago, and so that's going to require the dismissal of 43 of the 46 plaintiffs' claims.

The plaintiffs have indicated that they don't dispute that these claims arose beyond the limitations period; they are going to argue equitable tolling, but equitable tolling doesn't apply. Plaintiffs can't possibly meet the two requirements for equitable tolling: The first one being pursuing their rights diligently and the second being that some extraordinary circumstance stood in their way.

In terms of diligence, according to plaintiffs' own case that they cited in their letter, the SDNY case, *Hongxia Wang v. Enlander*, diligence requires a finding that they could not have discovered their claims with diligence less than ten years before to filing suit. Given the nature of the claims

here, they certainly could have discovered their alleged claims within the statute of limitations period.

The cases where plaintiffs cite where tolling applied were labor cases, cases arising under the trafficking statute but alleging labor related issues as opposed to sex trafficking issues. That's why equitable tolling could conceivably have applied there, because plaintiffs there alleged plausibly that they weren't aware of their labor claims, as opposed to plaintiffs who could not plausibly allege that they acted diligently with respect to alleged sex trafficking claims.

Finally, plaintiffs wouldn't be able to show extraordinary circumstances existed, even if they could show diligence in pursuing their claims, because there are simply no well-pled allegations in the complaint that address the specific plaintiffs to whom the statute of limitations issue applies and would support a reasonable inference that something specific as to them constitute an extraordinary circumstance that precluded them from bringing suit.

Finally, for an additional 12 of the 43 plaintiffs whose claims are dismissible for personal jurisdiction and tolling reasons also fail because, as I mentioned before, they allege exclusively claims under the sex trafficking statute for conduct that occurred abroad. And this Court lacks subject matter jurisdiction for noncitizens, non permanent residents, and individuals who are not present in the U.S. when the

alleged conduct occurred abroad, and here, Mr. Nygard is not a citizen, not a permanent resident, and is not physically in the U.S. So those claims must be dismissed as well. And here, too, the plaintiffs' cases are off point. They involve defendants, for example, who were arrested in the U.S., who were physically present at the relevant time in the U.S., not the case here.

Then, finally, the class claims are appropriately stricken at the motion to dismiss stage. A motion to strike is appropriate where a class defect is apparent from the face of the complaint and no discovery could cure the defect. Here, there is a standing defect. And the cases we cited recognize that a proposed class that includes any members who lack standing are appropriate for a motion to strike. And here, the classes are not limited to women with alleged cognizable assault claims so they necessarily include individuals who lack standing. And even if plaintiffs were to try to cure that standing defect and narrow the proposed classes to women who did allegedly experience some unlawful misconduct, they would then fail the ascertainability requirement because they would necessarily link class membership with the merits of their individual claims. You have to conduct an individualized inquiry to determine whether somebody is a part of the class by determining whether their underlying claim is a viable claim, their underlying claim of sexual misconduct is a viable claim,

and the cases find ascertainability to be appropriate to be decided against class certification at the motion to dismiss stage where the issue of class ascertainability would be linked to the merits of the claim in the way that exists here.

Plaintiffs also can't show predominance for the same reason, because individual class members' claims require individualized proof. Unlike the cases that plaintiffs cite, where under the trafficking statute class certification was appropriate, those cases involved, again, labor related allegations, and allegations where there was a single alleged policy, some uniform course of conduct, that it was readily determinable whether somebody had the policy applied to them or somebody didn't. And here we don't have that to be the case. This is an alleged sex trafficking case with very, very individualized allegations, individualized proof, and inappropriate for class certification for all of the reasons that I have stated.

THE COURT: Thank you, Mr. Harwood. Let me ask you one very quick question and then we will move on to Ms. Haba.

I take it, based on your presentation, that even if you are successful on all of your arguments, there would still be three plaintiffs that would be able to move forward, even if not as a class.

MR. HARWOOD: Yes, your Honor. One of those three is one of the plaintiffs for whom the allegations are imprecise

and who may have a statute of limitations issue. So I would say at most three. But yes, your Honor, that's correct.

THE COURT: Thank you.

Ms. Haba.

MR. GUTZLER: This is Greg Gutzler. I will be addressing this portion and Ms. Haba will talk about the class certification piece, if that's OK with your Honor.

THE COURT: That's fine.

MR. GUTZLER: Your Honor, I know you have limited time so I can sum up our argument very quickly by saying that counsel's argument is the best illustration as to why this is something for summary judgment and not a motion to dismiss.

We heard a presentation filled with factual inaccuracies and alleged facts outside the scope of the pleadings and facts that contradict the pleadings. For example, they have now tried to allege that the worldwide headquarters is not in New York City. I checked their website about 30 minutes ago, and according to Nygard, the world headquarters of the entire operation are in New York City. And most importantly, in a case 160 A.D.3d 565, in 2018, a court found the following fact: The fact is that the Nygard enterprise has its principal place of business in New York. That is the fact that is critical for the inquiry here. So that's been established in the case law.

Moreover, that is confirmed and corroborated by the

Nygard entities themselves affirmatively invoking this court, the Southern District of New York's jurisdiction as recently as last year, Docket No. 19-1559. And the interesting thing about the invocation of the Southern District's jurisdiction by Nygard International and Nygard, Inc. and Peter J. Nygard individually is that there have been certain things that have been done that allegedly damaged the reputation of Peter Nygard personally. And because Peter Nygard is the icon and chairman, and he is synonymous with the companies, the companies are concomitantly disparaged and defamed and injured as well. So he, himself, in his pleading, Peter Nygard, says he and the company are one and the same; therefore, if you hurt me, you hurt my company. And for that case, he brought that case in the Southern District of New York. And in fact, after we filed our complaint in this case with our Jane Does 1-46, of course, Nygard's machine then filed an amended RICO complaint in the Southern District and identified Jane Does as part of a RICO enterprise.

So we can see what the tactics are and very clearly personal jurisdiction is met here, because this is a decades-long sex trafficking conspiracy, with its locus of activity out of the Nygard enterprises, which they say the world headquarters are in New York, and a New York court has found that is correct as the principal place of business, and Nygard International, Nygard, Inc., and Peter Nygard invoked

this court to allegedly protect the reputation of the companies at issue here. So it's very, very clear.

Moreover, we do have specific jurisdiction. We have substantial ties, your Honor, to New York by virtue of, again, the world headquarters here, the flagship store here. Mr. Nygard does, in fact, have a residence above that flagship store. I will note it is in violation of zoning violations, but he does have a residence there. Money does, in fact, have to flow from Canada through New York to the Bahamas to pay for what are called pamper parties. And at those pamper parties, they are paid for entirely by the company, using all company employees, the food, the drugs, alcohol, and the payoffs to victims remain in United States currency, which necessarily means it went through New York through the world headquarters, and we then have that.

So personal jurisdiction is very clearly established by virtue of the defendants having their principal place of business in New York, the defendants' invocation of this court's jurisdiction, and a factual finding that New York is the principal place of business.

Your Honor, next, on statute of limitations, we heard a lot of very, very detailed speculations as to facts, as to whether plaintiffs exhibited due diligence, whether they were in fear for their lives, whether they were intimidated, things of that nature, very clearly subject to fact discovery. And

all their arguments depend on facts that contradict our well-pled allegations in the complaint. And you know now, your Honor, of course, based on that argument, why courts often hold that equitable tolling and statute of limitations arguments are inappropriate at the MTD stage because they are fact-based. Counsel's argument confirmed that.

On subject matter jurisdiction, your Honor, we have a variety of legal theories. We have federal statutes and state causes of action. We have alleged a continuing conspiracy. All of those things are relevant to subject matter jurisdiction and statute of limitations, highly fact-based, your Honor. We have extensive factual allegations in our complaint. And if counsel wants to try to contradict those facts in discovery and argue at summary judgment, they are certainly entitled to do so, but this is not the right time, it is not appropriate. It contradicts our allegations; they are not conclusory.

As you know, your Honor, counsel has been quite upset about how detailed our complaint is and our goal here was to ensure that we pled all the elements correctly, showing a continuing conspiracy, showing the fact of equitable tolling is appropriate here because of intimidation, corruption, and violence, yet we heard today they are somehow conclusory. So I think we have the quintessential fact-based arguments here, your Honor, and certainly not appropriate for an MTD.

Ms. Keller is going to address class cert, your Honor.

If you have any questions, I am happy to answer them.

THE COURT: Thank you, Mr. Gutzler.

Ms. Keller.

MS. KELLER: Yes, your Honor. The defendants have argued that the Court should strike class allegations. However, motions to strike are viewed with disfavor and infrequently granted in this circuit. They made several arguments as to why their extraordinary motion to strike should be granted. And, your Honor, recognizing your limited time, I will be brief here.

First, they argue that class members would lack Article III standing. But when presented with a putative class, the court does not require that each member submit evidence of personal standing; rather, only one of the named plaintiffs is required to establish standing in order to seek relief on behalf of the entire class. Half the members don't need to make any individual showing of standing because the standing issue focuses on whether the plaintiff is properly before the court, not whether representative parties or absent class members are properly before the court.

They next argue, your Honor, heads I win, tails you lose. That even if the defect in the class definition did exist, defendants speculate that plaintiffs cannot amend their class definition because it would fail for ascertainability. But we have already met the standard of ascertainability,

alleging that the defendants very specifically have an extensive database which could be used to identify class members. As we allege in our complaint, paragraph 30 I believe, Nygard employed people to work at what he referred to as Nygard's corporate communications coordinators, or ComCor. Among other duties, those employees were used to ensure that Nygard's victims attended pamper parties by contacting them and arranging for their transportation to the parties. That extensive database can be used to identify our class members.

Ultimately, your Honor, these decisions do not need to be briefed now. Again, a motion to strike is a very extraordinary remedy. Plaintiffs have made credible allegations in their complaint concerning individuals who would be part of this class. Discovery will allow us to further discuss the patterns and practices concerning why class certification is appropriate, and, your Honor, if you would like, we would be happy to further brief those issues for the Court.

THE COURT: Thank you, Ms. Keller.

I am going to grant defendants' request to file a motion to dismiss, although I have to say, Mr. Harwood, as Mr. Gutzler pointed out, you made any number of factual arguments in your presentation. So as you draft your motion, and I know that you will, you will be careful not to make arguments that would require the Court to make factual determinations, which I

would not be able to do on the basis of the record that will be before me.

With that, how much time do you want to file your motion? Do you want a month or three weeks?

MR. HARWOOD: 30 days, if that's acceptable.

THE COURT: That's fine.

30 days, 30 days, and then two weeks to reply.

Let's get some actual dates from Ms. Rivera, if she can.

THE DEPUTY CLERK: Yes, I am getting them now.

MR. HARWOOD: I think 30 days falls on a weekend. So perhaps June 8.

THE DEPUTY CLERK: I am working the dates now.

THE COURT: Although, these days, one day is no different than another.

THE DEPUTY CLERK: So the motion is due May 8, 2020, the opposition is due July 8, and the reply is due July 22.

MR. HARWOOD: Just to clarify, it's June 8 for the initial motion.

THE DEPUTY CLERK: Yes. The motion is due June 8. And then the opposition July 8 and the reply July 22.

THE COURT: OK. Unless there are any other issues, we are adjourned. Everyone, please stay well.

(Adjourned)