UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

[redacted]

Plaintiff,

v.

15-cv-07433-LAP

GHISLAINE MAXWELL,

Defendant.

----------X

Ms. Maxwell's Reply In Support Of Her Objections to Unsealing Sealed Materials

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[redacted]

Introduction

This Court asked the parties to brief three issues: "(a) the weight of presumption of public access that should be afforded to an item, (b) the identification and weight of any countervailing interests supporting continued sealing/redaction of the item, and (c) whether the countervailing interests rebut the presumption of public access to the item." DE 1044 at 1. Plaintiff and the *Miami Herald*'s responses improperly afford the highest level of presumption to discovery dispute documents, deny that *any* countervailing interests exist, and protest that Ms. Maxwell's numerous proposed countervailing interests, and those of yet unheard-from Non-Parties, cannot possibly rebut the presumption of public access. Because their Responses ignore both the law and the facts, Ms. Maxwell's Objections to Unsealing various of the documents should be granted.

Plaintiff's *ad hominem* attacks -- that the Objections are intended to "stall the unsealing process," are "unjustified obstacles" or that the public will *never* have access to these documents -- reflect unjustified criticisms of the Protocol itself and the Second Circuit's decision in *Brown,* both of which fairly outline the legal process for parties and Non-Parties alike to be heard with respect to unsealing. Notably, many of the documents were sealed in the first instance at the request of Plaintiff and her counsel. And as to, for example, Plaintiff's medical records, no one interposed any objection to their unsealing until Plaintiff's belated request to do so in her Response. As detailed in Ms. Maxwell's Objection and further below, there are numerous documents to which Ms. Maxwell does not interpose objections to unsealing, subject to Non-Parties' opportunity for notice to be heard. That the process for review of literally thousands of pages of sealed materials takes time to accomplish is not a reason to unseal. Rather, the hundreds of interested Non-Parties together with Ms. Maxwell have every right and reason to expect that the promises of confidentiality afforded by a Protective Order, to which Plaintiff and

her counsel agreed, would be honored subject to the few very limited situations in which the public right to access the court files overcomes the privacy interests at stake.

ARGUMENT

I. Weight of Presumption

Each of the Sealed Items currently under consideration relates to a resolved discovery dispute. *Brown* held, yet Plaintiff and the *Miami Herald* dispute, that the "weight of presumption of public access" afforded to discovery disputes, which "play only a negligible role in the performance of Article III duties," is "only a low presumption that 'amounts to little more than a prediction of public access absent a countervailing reason.'" 929 F.3d at 49-50 (quoting *Amodeo II*, 71 F.3d at 1050); *id.* at 50 (describing these "remaining sealed materials" as "subject to at least some presumption of public access"); *id.* at 53 (discovery motion materials "subject to a lesser – but still substantial – presumption of public access"); *see also Securities and Exchange Comm'n v. Telegram Grp. Inc.*, Case No. 19-cv-9439 (PKC), 2020 WL 3264264 at *2 (S.D.N.Y. June 17, 2020) ("The presumption attached to non-dispositive motions… 'is generally somewhat lower than the presumption applied to material introduced at trial, or in connection with dispositive motions such as motions for dismissal or summary judgment.'") (*quoting Brown*, 929 F.3d at 50).

A. Non-Response from Does 1 and 2 Not Dispositive of Countervailing Interests

Plaintiff argues that all documents mentioning Does 1 and 2 should be released because neither requested excerpts nor interposed any objection. She also claims that some information, specifically Doe 1's name, has already been made public, or that a "Google search" reveals other information about Doe 1 and 2. Obviously, the contested sections of the Sealed Materials are not already public or no unsealing issue would exist. The fact that Doe 1's name has already been

made public is a different issue from whether there exist other substantially valid countervailing reasons to keep Sealed Items mentioning Doe 1 or quoting from Doe 1 sealed. There are.

a. There is no evidence that Doe 1 received or read the Notice from the Court, nor even that Doe 1 is still living. The return receipt was signed for by someone other than Doe 1. Ex. A.

b. Doe 1 detailed during [redacted] Ex. B, 159:4 – 160:17.

c. Doe 1 repeatedly testified that [redacted] did not like to be involved in this matter. DE 204-3 at 5-13 [redacted] Ex. B, 199:10-12 [redacted]; Ex. B, 234:23-235:2 [redacted] After this statement, *Plaintiff's counsel* agreed that it "made sense" to mark Doe 1's entire deposition as "Confidential." *Id.* at Ex. B, 235:3-7. (CI-1 – Reliance on Protective Order; CI-3 Annoyance, embarrassment, oppression, undue burden).

d. Regarding the fact that Doe 1's name is already available via a Google search, Doe 1 [redacted] attributed false statements to [redacted] Ex. B, 198:4-199:19.

e. There was no legitimate reason to attach Doe 1's deposition to a garden-variety request to exceed the presumptive 10-deposition limit. (CI-5 Improper submission of papers).

f. Plaintiff repeatedly misstated Doe 1's testimony and misled the Court as to its contents, either by omitting critical pieces of the testimony or out-right falsely relaying its contents. By way of example, in DE 203 at page 5, Plaintiff's counsel claimed that Doe 1 [redacted] citing DE 204-3 at 36-41. In fact, Doe 1 testified in excerpts that were not attached to pleadings that [redacted] Ex. B, 174:21-176:2. [redacted] Ex. B, 36:17-37:3. [redacted] Without including other portions of Doe 1's

testimony, Plaintiff's counsel's factually incorrect and misleading statements will be presented without the necessary explanations provided by the witness. (CI-2; CI-6)

g. Contrary to Plaintiff's chart in her Response at 7-8, Ms. Maxwell identified numerous reasons to keep those references to Doe 1 and 2 under seal. *See* DE 173-6 (Obj. 7-11).

h. Plaintiff incorrectly claims that DE 152 "summarizes publicly available statements." Resp. at 8. This is not true. DE 152 selectively quotes from the deposition testimony of a deceased individual, who Ms. Maxwell never had the opportunity to cross-examine, and who (contemporaneous with his deposition) was convicted of a felony and sent to prison for stealing, and then trying to *sell*, documents related to Jeffrey Epstein. *See* DE 679, [redacted] It also quotes from Doe 1's prior sworn statements and testimony, which he explained earlier, e.g., [redacted] Given Doe 1's further explanations, which are not included among the Sealed Materials, countervailing interests CI-2 and CI-6 rebut the minimal presumption of access attendant to these Sealed Items.

See SEC v. Telegram Grp., Inc., 2020 WL 3264264 at *3 (finding "privacy interests of non-parties … represents a legitimate basis for sealing judicial documents").

B. Effect of Previous Unsealing of Documents by Second Circuit

Plaintiff claims that if a document is already public in another context, then it should be unsealed. She cites no law for this proposition, which runs contrary to the Second Circuit's holding in *Brown*. The Circuit made clear that this District Court must engage in its own review with respect to each document and provide notice to the Non-Parties for documents that were not

entitled to the highest presumption of access, *i.e.,* those attached to summary judgment pleadings.

II. Identification and Weight of Any Countervailing Interests

A. DE 143 and Related Pleadings

Docket Entry 143 and its associated pleadings involve Plaintiff's effort [redacted] which were not and should not have been relevant to Plaintiff's false claim that she was sexually abused by Epstein as a minor. The Second Circuit in *Brown* itself redacted from the summary judgment pleadings and exhibits all of Ms. Maxwell's deposition answers involving her intimate, sexual matters, based on its apparent finding that the selected questions involved "deposition responses concerning intimate matters where the questions were likely only permitted – and the responses only compelled – because of a strong expectation of continued confidentiality." 929 F.3d at 48 n.22; *Brown,* 18-2868, DE 280 at 15 (redacting Plaintiff's contention [redacted]; DE 283 at 195-201 (redacting four pages of defendant's deposition testimony concerning private, intimate matters).

Even though the Second Circuit itself found a countervailing interest on these matters significant enough to remove the materials from summary judgment pleadings and exhibits, which enjoy the highest presumption of public access, Plaintiff makes a number of frivolous arguments that a Motion to Compel her to answer deposition questions [redacted] has insufficient countervailing interests, even though the dispute relates to a judicial document with lesser presumptive access. Plaintiff's Response represents a gross distortion of the record in this case and highlights the substantial, countervailing need for the Motion and all associated pleadings to remain sealed. DE 143 contains material

misrepresentations of fact, and the attached portions of deposition testimony demonstrate that Plaintiff's questions themselves were packed with inadmissible, false representations.

1. Reliance on a protective order by a party or non-party (CI-1)

As it pertains to DE 143 and related pleadings, the issue is not, as Plaintiff complains, that Ms. Maxwell must demonstrate she relied on the protective order in answering *every single question* during her deposition. Resp. at 10. The subject matter of DE 143, the representations in the Motion and Reply, and the associated deposition excerpts attached, each pertain to the topic of Ms. Maxwell's refusal to answer irrelevant questions concerning her [redacted] That she relied on the Protective Order in answering questions, or refusing to answer questions, is obvious from the procedural posture of the case:

- March 2, 2016 (DE 38): Defendant moved for a Protective Order, citing Plaintiff's anticipated deposition of Ms. Maxwell would include questions "concerning her personal and professional relationships as well as matters concerning her private affairs."
- March 17, 2016 (DE 66 at 9): At hearing on the Protective Order, Ms. McCawley stated "I can have the deposition of the defendant in this case and move this case forward. I will agree to their protective order. I just want that deposition….It is that important to me."
- March 22, 2016 (DE 63): Maxwell moves for a Protective Order regarding her Deposition in part due to Plaintiff's attempt to ambush her at her deposition without having produced requested, responsive documents in advance.
- April 22, 2016: At deposition of Ms. Maxwell, the excerpts of which are attached to DE 143, 144-1, 144-2, 144-4, 144-5, 144-6, 144-7, 150-1, and 153-1, the first substantive question posed to Ms. Maxwell was [redacted] Ex. C, at 1, 6-7.

Even a cursory review of the deposition excerpts at issue, as well as the redactions in the associated pleadings, reveals that Ms. Maxwell reasonably relied on the Protective Order in responding to the questions, which provides ample grounds (as the *Brown* court found with

respect to other of her deposition answers) a sufficiently compelling countervailing interest to maintain the records under seal.

Plaintiff and *Miami Herald* also complain the Protective Order at issue is "an umbrella protective order" that only governed until trial and so there could have been no reasonable reliance that the "documents would always be kept secret." Resp. at 11; Miami Herald Resp. at 3. For the reasons recently briefed to the Court concerning Professor Dershowitz's identical argument, the position is without merit. *See* DE 892 (Judge Sweet's May 2017 Order); DE 1059 (law of the case that parties and deponents reasonably relied on protective order); DE 1062 at 3-6 (protective order tracks permissible scope under Rule 26(c)(1), includes provisions to challenge improper designation of confidentiality, contained no temporal limit, and appropriately limited use of confidential materials to "preparation and trial of this case").

2. Prevention of the abuse of court records and files (CI-2) and Untrustworthy, unreliable and incorrect information (CI-6)

Remarkably, Plaintiff claims as *dicta* the Circuit's clear directive in *Brown* that a district court should exercise the full range of its substantial powers to ensure their files do not become vehicles for defamation. 929 F.3d at 51. Her position is nonsense. The *Brown* court described the district court's "supervisory function" not merely as within its "power, but also among its responsibilities." *Id.* The Circuit then described the "several methods" of fulfilling this function to include "issu[ance of] protective order forbidding dissemination of certain materials to protect a party or person from annoyance, embarrassment, oppression or undue burden" and "requir[ing] that filings containing such materials be submitted under seal." *Id.* That is precisely what occurred in this case. To contend that the *Brown* court meant to strip this district court of such power on remand of this case, to decide whether to *un*-seal documents which were sealed for that very purpose, borders on the frivolous.

Moreover, that Plaintiff hopes and intends for the court records and files in this case to be abused by the media is readily apparent in DE 143 and its related pleadings combined with Plaintiff and her counsel's extensive media participation. For example, in DE 144-6 at 55, Plaintiff's counsel asked Ms. Maxwell the questions, [redacted] In fact, [redacted] in connection with her current lawsuit filed a lawsuit against Mr. Epstein [redacted] failed to produce [redacted] Similarly, in DE 144-4 at 62, Plaintiff's counsel insinuated during her questions [redacted]. *See* [redacted]. Unsealing the deposition question posed by Plaintiff's counsel, which suggests that there *was* [redacted], when in fact there was not, would promote a defamation-proof lie to be perpetuated by the media. The deposition transcript also reflects numerous meritorious objections to the questions, including foundation, asked and answered, form of the question, and otherwise improper questions. Were this case to have gone to trial, many of the questions would never have been admitted in a court of law; opening them up to the press presents an opportunity for abuse and misuse of the court's files. *See United States v. Gatto*, 17-CR-686 (LAK), 2019 WL 4194569, at *4 (S.D.N.Y. Sept. 3, 2019) ("documents merely shown to witnesses or otherwise discussed in Court but not offered into evidence" do not constitute judicial documents because "neither relevant to the performance of the judicial function nor useful in the judicial process").

Plaintiff's counsel's persistent and repeated statements to the press, including those that on their face appear to violate Rule of Professional Conduct 3.6 given the ongoing litigation in this district, also reflect her hope and intent that the misrepresentations, untested allegations and other inadmissible evidence contained in the pleadings and their attachments will be abused by the press. *See, e.g.,* *https://www.dailymail.co.uk/news/article-7896171/Lawyers-Ghislaine-Maxwell-[redacted]-hash-plan-release-docs.html* (Plaintiff's counsel statements to the press that the "document dump" would include evidence that would "expose that sex trafficking scheme," implying it contains evidence that young females "as young as 11" were abused, despite absolute lack of any such evidence in the Sealed Materials); Kevin G. Hall, "Ghislaine Maxwell says she was Epstein's employee not his madam," MIAMI HERALD (Mar. 18, 2020) (quoting Sigrid McCawley, "It is absolutely appalling that Ghislaine Maxwell, who committed crimes with Epstein against these victims, is seeking to drain funds from the very estate that should be paying the Epstein victims' claims...We view her actions as unconscionable but this is an individual who lost sight of right from wrong a very long time ago.").

The potential for abuse by the press is all the more acute because, as Judge Sweet noted, this case did not go to trial, nor will it ever, given the settlement of the matter more than three years ago. Were there a trial, then each of the allegations could be met with contrary evidence, the witnesses would be subject to cross-examination, and inadmissible evidence (such as deposition questions lacking a good faith foundation) would be excluded. Instead, by unsealing materials that were never subject to cross examination or rebuttal will permit these inaccurate and false statements to be widely publicized in the media without a fair opportunity to reply, even if one takes the wholly unsupported leap to assume that the types of publications covering this story are interested in the truth versus the salacious gossip that Plaintiff and her counsel

peddle with great frequency. In the absence of continued Sealing these items, the Second Circuit's prediction that the court files will be "used to gratify private spite or promote public scandal" is an assured result.

3. Annoyance, embarrassment, oppression, undue burden (CI-3)

Although Rule 26(c) and *Brown* expressly permit continued sealing of materials that cause *a party* or non-party "annoyance, embarrassment, oppression or undue burden," Plaintiff and *Miami Herald* dismiss these concerns as unspecific or, worse, suggest that the Sealed Materials contain evidence of "misconduct." Resp. at 13; Miami Herald Resp. at 4. To the extent that Plaintiff makes this assertion, implying knowledge of the contents of the Sealed Materials, that alone is a violation of the Protection Order.

As Plaintiff well knows, Ms. Maxwell was forced to answer substantial, numerous, ill-founded questions regarding her private life, her [redacted], her residences, her friends, and her living arrangements. She is not citing this countervailing interest because she believes there is any evidence of "misconduct" or the "sexual abuse of young girls at the hands of the wealthy and powerful," as the Miami Herald speculates. While the Court's review of the Sealed Materials will speak for itself on this score, to be specific, a few examples the "annoying" and "embarrassing" items contained in DE 143 and its related documents to which Ms. Maxwell asserts this countervailing interest are:

[redacted]

These annoying, embarrassing, and highly personal questions are exactly the type that the *Brown* court itself redacted and the very type of questions that Rule 26(c) shields via a protective order.

4. Ongoing criminal investigation and other pending civil lawsuits warrant continued sealing.

Feigned ignorance aside, Plaintiff and her counsel are well aware of the purportedly ongoing criminal investigation into all persons surrounding Mr. Epstein; Plaintiff and her counsel have been the primary instigators of such a prosecution.[1] Indeed, Plaintiff's counsel has objected to production of responses and documents in another pending civil case "insofar as it calls for information related to an ongoing criminal investigation." *See* Ex. D.

Moreover, Plaintiff's counsel also is well aware of the numerous civil actions pending in this district against Ms. Maxwell and related to Ms. [redacted] claims; she is counsel of record in one of them and filed another in which Plaintiff is a party, after which this Court disqualified her from continued representation. *See, e.g., Farmer v. Indyke,* Case No. 19-cv-10475-LGS

[1] *See, e.g.,* [redacted] wants Ghislaine Maxwell to 'rot in jail,'" NY Post (Dec. 4, 2019); Andrew Denney and Bruce Golding, "Jeffrey Epstein's no-bail ruling may encourage more accusers to come forward," NY Post (July 18, 2019) ("McCawley wouldn't identify her new clients but said she encouraged them to report their alleged abuse to the FBI. McCawley declined to say if any had been interviewed by the feds, but Manhattan federal prosecutor [redacted] … told Berman that the case against Epstein was 'getting stronger every day.'"); Mark Townsend, "Prince Andrew: US prosecutor leading inquiry into Epstein links refuses to quit," The Guardian (June 20, 2020) ("Geoffrey Berman says he will continue to investigate duke's relationship with sex offender despite pressure to resign.").

(S.D.N.Y.); [redacted] *v. Dershowitz*, Case No. 19-cv-3377-LAP. This Court recently presided over a telephone conference in which Mr. Dershowitz has asserted that *all* of the pleadings in this matter are relevant to his dispute with Ms. [redacted] because she has put her credibility at issue. While Ms. Maxwell disagrees with that assertion, no doubt many of the same witnesses will be relevant in both disputes and pre-trial publicity concerning exhibits and deposition testimony could work to undermine the right to a fair and impartial trial based on the evidence for any of the defendants, including Ms. Maxwell and Professor Dershowitz, should any of these pending matters eventually be tried. Plaintiff's efforts to publicize the court files, again, present a countervailing interest to their unsealing.

5. Privacy Rights of Non-Party Does 1 and 2

Doe 1 is mentioned in DE 152 at 6. Although many of the attachments (DE 153-4, 153-5 and 153-6) are unsealed, Plaintiff's misrepresentations contained in DE 152 are countervailing interests to the unsealing of that pleading. As described more fully above, *see Section* I(A)(f) *supra,* Plaintiff's counsel claimed in her Reply that [redacted] testified [redacted] Coupled with [redacted] repeated statements that [redacted] does not want to be hounded by the media, some of whom had broken into [redacted] home, Doe 1's privacy interests should be respected.

B. DE 164 and Related Pleadings

Ms. Maxwell does not assert any countervailing interests to the unsealing of DE 164 and its related pleadings. However, the Court should be aware that DEs 165-3, 185-2 and 185-15 are pleadings that were stricken pursuant to Rule 12(f) by U.S. District Court Judge Marra and thus are not, as Plaintiff claims, "publicly available on the docket of *Doe v. United States*, 08-cv-80736 (S.D.Fla.)." Resp. at 15 n.5. These three documents were "restricted/sealed until further

notice" by U.S. District Court Judge Marra in that proceeding after he *sua sponte* found the materials contained in those pleadings were "redundant, immaterial, impertinent, or scandalous." *See Doe v. United States,* 08-cv-80736 (S.D.Fla.), DE 324 at 4. Ex. F. Specifically as to Jane Doe 3, [redacted], Judge Marra found her allegations of being "sexually trafficked to several high-profile non-party individuals" to be "lurid" and "unnecessary" to the determination of whether she should be allowed to join the proceedings, particularly given that "these details involve non-parties who are not related to the respondent Government" and "shall be stricken." *Id.* at 5. Therefore, although Ms. Maxwell does not object to their unsealing, this Court may wish to preserve the seal on these documents, and any related argument contained in the pleadings, in deference to Judge Marra's findings. *See also Brown*, 929 F.3d at 51-52 (documents stricken per Rule 12(f) "not relevant to the performance of the judicial function," "not considered a judicial document" and enjoys "no presumption of public access.").

Further, in addition to Doe 1, other Non-Parties are included in DE's 185-3, 185-11, 185-14 and 185-15 each of whom has not yet been notified or had the opportunity to object under this Court's Protocol. (CI-1)

C. DE 172 and Related Pleadings (CI-1 through CI-7)

In asking the Court to permit her to exceed the presumptive ten deposition limit, Plaintiff attached **803 pages** of exhibits including, as is pertinent, the complete 160-page deposition transcript of Doe 162 (DE 173-5) and the complete 418-page deposition of Ms. Maxwell (DE 173-6). Plaintiff's Reply and Corrected Replies additionally attached deposition transcripts of Doe 151 (DE 204-2, 212-2), additional excerpts from Doe 162's deposition (DE 204-1, 212-1), and portions of Doe 1's deposition (DE 204-3, 212-3). Additional sealed and related items include DE 190-1 (portions of Plaintiff's deposition) and redactions of the motion papers consistent with the sealed materials.

As to these Sealed Materials, Ms. Maxwell asserted countervailing interests that overlapped with those she raised as to DE 144 and related pleadings (CI-1 through CI-6), as well as asserting that the exhibits each are non-judicial documents (CI-7) because none "would reasonably have the tendency to influence a district court's ruling on a motion…." *Brown*, 929 F.3d at 49 (quoting *Amodeo I*, 44 F.3d at 145). In Response, Plaintiff makes no effort to explain to this Court why the wholesale attachment of deposition transcripts "would reasonably have a tendency to influence a district court's ruling on a motion." *See* Resp. at 15-18. Her silence is unsurprising because there is no reasonable explanation for the attachment of entire deposition transcripts. The failure to establish that the exhibits are "judicial documents" alone justifies their continued sealing. *See, e.g., United States v. Gatto,* 17-CR-686 (LAK), 2019 WL 4194569, at *4 (S.D.N.Y. Sept. 3, 2019) (documents not offered into evidence not judicial documents); *Newsday LLC v. County of Nassau*, 730 F.3d 156 (2d Cir. 2013) (report used to refresh witness's recollection not a judicial document).

1. DE's 204-3 and 212-3 are excerpts from Doe 1's Deposition That Should Remain Sealed (CI-1)

DEs 204-3 and 212-3 contain the same portions of Doe 1's deposition discussed *supra* at Section I(A)(f) and should remain sealed for the same reasons, as should the redactions at DE 203-5 and 211-5. Additionally, Plaintiff has not explained why excerpts from a deposition she had already is something upon which a court would reasonably rely to determine whether additional depositions of other witnesses are justified.

2. DE 172 and 173-6 Should Remain Sealed (CI-1 through CI-6)

Ms. Maxwell incorporates by reference her argument, *supra* at Section II(A), as it pertains to her deposition transcript (DE 173-6) and purported references to the transcript contained in DE 172. At least with regard to DE 144 and its related pleadings, however, the

deposition bore some relationship to the topic of the motion and Plaintiff only attached a few excerpts. By contrast, regarding DE 172 and exhibit DE 173-6, Ms. Maxwell's full deposition bears *no relationship* to Plaintiff's request to take additional depositions of *other* witnesses; Plaintiff does not even attempt to explain how it might. In DE 172, Plaintiff purports to summarize in sound-bites her spin on the content of Ms. Maxwell's 7 ½ hour deposition, but as is her wont, inaccurately summarizes the deposition and falsely claims that Ms. Maxwell refused or failed to answer a number of questions concerning events purportedly occurring 15 years prior. *See* DE 172 at 5-8. Ms. Maxwell pointed this out in her Response. DE 189 at 1 & n.1. Further, Plaintiff's argument that Ms. Maxwell did not rely on the Protective Order in sitting for the 7 ½ hour deposition is belied by the record regarding the origins of the Protective Order and the exclusion of non-entered attorneys from attending the deposition.

As a last gasp, Plaintiff claims that certain of her "summary" bullet points should be unsealed because, she claims, the bullet points summarize citations to Ms. Maxwell's deposition transcript that the Second Circuit already unsealed. Resp. at 15-16. This is the proverbial cart before the horse. Plaintiff's inaccurate "summaries" are not judicial documents, nor are the deposition pages to which they cite, and so it is of no moment that the excerpts may have been unsealed by the Second Circuit as relates to a pleading which undisputedly was a "judicial document."

But DE 172 contains much more than summaries of Ms. Maxwell's deposition. Plaintiff fails to mention that DE 172's redactions also include purported "summaries" of Doe 162's deposition and the purported anticipated deposition testimony of Doe 84 (whose name and testimony the Second Circuit redacted in *Brown*). Both Does were represented by counsel and requested and relied upon confidentiality pursuant to the Protective Order prior to their

testifying. Obviously, any ruling on DE 172 is premature in advance of their participation in the unsealing protocol.

3. DE 203, 211 and 224

Plaintiff also seeks to unseal certain of the redactions that her counsel made at the time she filed DE 203 (and corrected/amended versions at DE 211 and 224). All of the portions she cites include either (a) argument of counsel purporting to summarize the testimony, or anticipated testimony, of witnesses Non-Parties who have yet to receive notice or an opportunity to be heard pursuant to the Court's protocol, or (b) purport (but fail) to summarize Ms. Maxwell's deposition testimony. For the Countervailing Interests 1-4, as well as the fact that the inclusion of these materials "would not have a tendency to influence" the court's determination of the motion and thus fail the "judicial documents" test, the cited redactions should remain sealed.

4. DE 173-5, 189, 190, 190-1, 204-1, 204-2, 204-3 (and related 211, 212, 212-1, 212-2, 212-3, 224)

Each of these documents include materials pertaining to other Does and any ruling would be premature at this time.

D. DE 199's Related Pleadings Should Remain Sealed Pending Notification to the Referenced Non-Parties Pursuant to this Court's Protocol

In DE 199's related pleadings, the redactions and sealed exhibits contain numerous references to Non-Parties who have yet to be provided notice or an opportunity to be heard pursuant to his Court's protocol. These include: DE 228 (numerous Non-Parties); 229-1 (excerpt of deposition of Doe 151); DE 229-4 (deposition of Plaintiff including multiple Non-Party names); DE 229-10 (including Non-Parties); DEs 248, 249-4, 249-13, 249-15, 249-15 (same).

Plaintiff contends that these DEs each should be immediately unsealed, without regard to notice to the Non-Parties discussed therein. She cites no support for doing so and fails to acknowledge that her request runs counter not only to this Court's Protocol, but also the Second Circuit's requirement in *Brown* the District Court can "notify[] any outside parties whose privacy interests might be implicated by the unsealing." 929 P.2d at 51. Plaintiff's request should be denied.

E. DE 230 and Related Pleadings

Plaintiff's response regarding DE 230 is largely the same as her response to DE 199 *infra*, with one significant exception: buried on page 19 of her Response to Ms. Maxwell's Objection to Unsealing, Plaintiff takes the position for the first time that she herself is objecting to the unsealing of a number of pleadings because they contain her "medical records" or "medical history." Resp. at 19.

Of course, Plaintiff neglected to actually follow this Court's Protocol and object to the unsealing by the deadline to do so, June 10, 2020. *See* DE 1044 at 2(f). Nor did she seek leave to file her objection to unsealing out of time, nor explain the "good cause" for failing to object on a timely basis, nor explain why she is making such objection at the end of her response to Ms. Maxwell's objection. Without any such request, or leave, this Court should deem her untimely objection to the unsealing of those records waived. *See Mattel, Inc. v. Animefun Store*, 18 CIV. 8824 (LAP), 2020 WL 2097624, at *1 (S.D.N.Y. May 1, 2020) ("By failing either to file their reply papers or to request an extension to do so within the allotted time, Defendants waived their right a reply."). Because the records do not otherwise contain the names of Non-Parties (medical providers having been excluded from the list), and no party has asserted a countervailing interest with respect to those records, they may be released forthwith.

With respect to the other DE's related to DE 230, however, those contain the names and references to numerous Non-Parties apart from Does 1 and 2, and any unsealing determination should await notice and an opportunity to be heard by those Non-Parties.

Conclusion

For the foregoing reasons, Ms. Maxwell respectfully requests that the Court grant her Objection to Unsealing the following DE's:

1. 143, 144, 144-1, 144-2, 144-4, 144-5, 144-6, 144-7, 149, 150, 150-1, 152, 153, 153-1
2. 172, 173, 173-5, 173-6, 189, 190, 190-1, 203, 204-1, 204-2, 204-3, 211, 212, 212-1, 212-2, 212-3, 224

Ms. Maxwell respectfully requests that the Court defer ruling on the following pleadings pending notification to other Non-Parties referenced therein:

1. 164, 165, 165-3, 165-8, 165-10, 165-11, 184, 185, 185-2, 185-3, 185-11, 185-13, 184-14, 185-15, 185-16, 194-3.
2. (Related to 199) 228, 229-; 229-4, 229-10, 248, 249-4, 249-13, 249-15, 249-15.
3. 230, 235, 235-4, 235-5, 235-7, 235-11, 235-13, 235-14, 260, 268

Ms. Maxwell has no objection to the immediate unsealing of the following pleadings:

1. 235-8, 235-6, 235-8, 235-9, 260, 260-1, 260-2, 267, 268-1.

Dated: July 1, 2020

Respectfully submitted,

/s/ Laura A. Menninger

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CERTIFICATE OF SERVICE

I certify that on July 1, 2020, I electronically served this *Ms. Maxwell's Reply In Support of Her Objections to Unsealing Sealed Materials* via ECF on the following:

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/s/ Nicole Simmons
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

[redacted],

Plaintiff,

v.

GHISLAINE MAXWELL,

Defendant.

----------X

15-cv-07433-RWS

Declaration Of Laura A. Menninger In Support Of Ms. Maxwell's Reply In Support of Her Objection to Unsealing Sealed Materials

I, Laura A. Menninger, declare as follows:

1. I am an attorney at law duly licensed in the State of New York and admitted to practice in the United States District Court for the Southern District of New York. I am a member of the law firm Haddon, Morgan & Foreman, P.C., counsel of record for Defendant Ghislaine Maxwell ("Maxwell") in this action. I respectfully submit this declaration in support of Ms. Maxwell's Reply In Support of Her Objection to Unsealing Sealed Material.

2. Attached as Exhibit A (filed under seal) are true and correct copies of the certified mail return receipts for J. Doe 1 and J. Doe 2.

3. Attached as Exhibit B (filed under seal) are true and correct copies of excerpts from the deposition of [redacted], designated Confidential under the Protective Order.

4. Attached as Exhibit C (filed under seal) are true and correct copies of excerpts from the deposition of [redacted] designated Confidential under the Protective Order.

5. Attached as Exhibit D (filed under seal) is a true and correct copy of [redacted]

6. Attached as Exhibit E is a true and correct copy of an Order Denying Motion to Join Under Rule 21, *Doe v. United States,* No. 08-80736-Civ-Marra/Johnson (S.D. Fla. Apr. 7, 2016).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 1, 2020.

By: */s/ Laura A. Menninger*
Laura A. Menninger

CERTIFICATE OF SERVICE

I certify that on July 1, 2020, I electronically served this *Declaration of Laura A. Menninger in Support of Ms. Maxwell's Reply In Support of Her Objection to Unsealing Sealed Material* via ECF on the following:

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/s/ Nicole Simmons
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EXHIBIT A
FILED UNDER SEAL

EXHIBIT B
FILED UNDER SEAL

EXHIBIT C
FILED UNDER SEAL

EXHIBIT D
FILED UNDER SEAL

EXHIBIT E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:08-CV-80736-KAM

JANE DOE 1 and JANE DOE 2,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER DENYING PETITIONERS' MOTION TO JOIN UNDER RULE 21 AND MOTION TO AMEND UNDER RULE 15

This cause is before the Court on Jane Doe 3 and Jane Doe 4's Corrected Motion Pursuant to Rule 21 for Joinder in Action ("Rule 21 Motion") (DE 280), and Jane Doe 1 and Jane Doe 2's Protective Motion Pursuant to Rule 15 to Amend Their Pleadings to Conform to Existing Evidence and to Add Jane Doe 3 and Jane Doe 4 as Petitioners ("Rule 15 Motion") (DE 311). Both motions are ripe for review. For the following reasons, the Court concludes that they should be denied.

I. Background

This is an action by two unnamed petitioners, Jane Doe 1 and Jane Doe 2, seeking to prosecute a claim under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. (DE 1). Generally, they allege that the respondent Government violated their rights under the CVRA by failing to consult with them before negotiating a non-prosecution agreement with Jeffrey Epstein, who subjected them to various sexual crimes while they were minors. (Id.). Petitioners initiated this action in July 2008. (Id.).

On December 30, 2014, two other unnamed victims, Jane Doe 3 and Jane Doe 4, moved to join as petitioners in this action pursuant to Federal Rule of Civil Procedure 21. (DE 280). Petitioners (Jane Doe 1 and Jane Doe 2) support the Rule 21 Motion. (Id. at 11). Jane Doe 3 and Jane Doe 4 argue that they "have suffered the same violations of their rights under the [CVRA] as the" Petitioners, and they "desire to join in this action to vindicate their rights as well." (Id. at 1). The Government vehemently opposes joinder under Rule 21. (DE 290). The Government argues that Rule 15 is the proper procedural device for adding parties to an action, not Rule 21. (Id. at 1).

"[O]ut of an abundance of caution," Petitioners filed a motion to amend their petition under Rule 15, conforming the petition to the evidence and adding Jane Doe 3 and Jane Doe 4 as petitioners. (DE 311 at 2). The Government opposes the Rule 15 Motion as well. (DE 314). Among other things, the Government argues that amending the petition to include Jane Doe 3 and Jane Doe 4 should be denied because of their undue delay in seeking to join the proceedings, and the undue prejudice that amendment will cause. (Id.).

After considering the parties' submissions and the proposed amended petition, the Court finds that justice does not require amendment in this instance and exercises its discretion to deny the amendment.

II. Discussion

"The decision whether to grant leave to amend a complaint is within the sole discretion of the district court." Laurie v. Ala. Ct. Crim. Apps., 256 F.3d 1266, 1274 (11th Cir. 2001). "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Justice does not require amendment in several instances, "includ[ing] undue delay, bad faith, dilatory motive

on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.'" Laurie, 256 F.3d at 1274 (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). In addition to considering the effect of amendment on the parties, the court must consider "the importance of the amendment on the proper determination of the merits of a dispute." 6 Wright & Miller, Fed. Prac. & Fed. P. § 1488, p. 814 (3d ed. 2010). Justice does not require amendment where the addition of parties with duplicative claims will not materially advance the resolution of the litigation on the merits. See Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1024 (9th Cir. 1989).

A. Rule 21 Motion

Jane Doe 3 and Jane Doe 4's first attempt to join in this proceeding was brought under Rule 21. (DE 280). "If parties seek to add a party under Rule 21, courts generally use the standard of Rule 15, governing amendments to pleadings, to determine whether to allow the addition." 12 Wright & Miller, Fed. Prac. & Fed. P., p. 432 (3d ed. 2013); see also Galustian v. Peter, 591 F.3d 724, 729-30 (4th Cir. 2010) (collecting cases and noting that Rule 15(a) applies to amendments seeking to add parties); Frank v. U.S. West, Inc., 3 F.3d 1357, 1365 (10th Cir. 1993) ("A motion to add a party is governed by Fed. R. Civ. P. 15(a) . . . .").

Rule 21, "Misjoinder and Non-joinder of Parties," provides the court with a tool for correcting the "misjoinder" of parties that would otherwise result in dismissal. Fed. R. Civ. P. 21. Insofar as Rule 21 "relates to the addition of parties, it is intended to permit the bringing in of a person, who through inadvertence, mistake or for some other reason, had not been made a party and whose presence as a party is later found necessary or desirable." United States v. Com. Bank of N. Am., 31 F.R.D. 133, 135 (S.D.N.Y. 1962) (internal quotation marks omitted).

In their Rule 21 Motion, Jane Doe 3 and Jane Doe 4 do not claim that they were omitted from this proceeding due to any "inadvertence" or "mistake" by Petitioners; rather, they seek to join this proceeding as parties that could have been permissively joined in the original petition under Rule 20 ("Permissive Joinder of Parties"). As courts generally use the standards of Rule 15 to evaluate such circumstances, the Court will consider the joinder issue as presented in the Rule 15 Motion.[1] The Court will consider the arguments presented in the Rule 21 Motion as if they are set forth in the Rule 15 Motion as well. Because the arguments are presented in the Rule 15 Motion (and because the Court is denying the Rule 15 Motion on its merits, as discussed below), the Rule 21 Motion will be denied.

The Court also concludes that portions of the Rule 21 Motion—and related filings—should be stricken from the record. Pending for this Court's consideration is a Motion for Limited Intervention filed by Alan M. Dershowitz, who seeks to intervene to "strike the outrageous and impertinent allegations made against him and [to] request[] a show cause order to the attorneys that have made them." (DE 282 at 1). The Court has considered Mr. Dershowitz's arguments, but it finds that his intervention is unnecessary as Federal Rule of Civil Procedure 12(f) empowers the Court "on its own" to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Petitioners' Rule 21 Motion consists of relatively little argumentation regarding why the Court should permit them to join in this action: they argue that (1) they were sexually abused by

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[1] The Court notes that, regardless of which motion it considers, the same standard governs the addition of parties under Rule 21 and Rule 15. See Goston v. Potter, No. 08-cv-478 FJS ATB, 2010 WL 4774238, at *5 (N.D.N.Y. 2010) (citing Bridgeport Music, Inc. v. Universal Music Grp., Inc., 248 F.R.D. 408, 412 (S.D.N.Y. 2008)).

Jeffrey Epstein, and (2) the Government violated their CVRA rights by concealing the non-prosecution agreement with them. (DE 280 at 3; see id. at 7-8). However, the bulk of the Rule 21 Motion consists of copious factual details that Jane Doe 3 and Jane Doe 4 "would prove" "[i]f allowed to join this action." (Id. at 3, 7). Specifically, Jane Doe 3 proffers that she could prove the circumstances under which a non-party introduced her to Mr. Epstein, and how Mr. Epstein sexually trafficked her to several high-profile non-party individuals, "including numerous prominent American politicians, powerful business executives, foreign presidents, a well-known Prime Minister, and other world leaders." (Id. at 3-6). She names several individuals, and she offers details about the type of sex acts performed and where they took place. (See id. at 5).[2]

At this juncture in the proceedings, these lurid details are unnecessary to the determination of whether Jane Doe 3 and Jane Doe 4 should be permitted to join Petitioners' claim that the Government violated their rights under the CVRA. The factual details regarding with whom and where the Jane Does engaged in sexual activities are immaterial and impertinent to this central claim (i.e., that they were known victims of Mr. Epstein and the Government owed them CVRA duties), especially considering that these details involve non-parties who are not related to the respondent Government. These unnecessary details shall be stricken.

The original Rule 21 Motion (DE 279) shall be stricken in its entirety, as it is wholly superseded by the "corrected" version of the Rule 21 Motion (DE 280). From the corrected Rule 21 Motion, the Court shall strike all factual details regarding Jane Doe 3 between the following sentences: "The Government then concealed from Jane Doe #3 the existence of its NPA from

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[2] Jane Doe 4's proffer is limited to sexual acts between Mr. Epstein and herself. (See DE 280 at 7-8).

Jane Doe #3, in violation of her rights under the CVRA" (id. at 3); and "The Government was well aware of Jane Doe #3 when it was negotiating the NPA, as it listed her as a victim in the attachment to the NPA" (id. at 6). As none of Jane Doe 4's factual details relate to non-parties, the Court finds it unnecessary to strike the portion of the Rule 21 Motion related to her circumstances. Regarding the Declaration in support of Petitioners' response to Mr. Dershowitz's motion to intervene (DE 291-1), the Court shall strike paragraphs 4, 5, 7, 11, 13, 15, 19 through 53, and 59, as they contain impertinent details regarding non-parties. Regarding the Declaration of Jane Doe 3 in support of the Rule 21 Motion (DE 310-1), the Court shall strike paragraphs 7 through 12, 16, 39, and 49, as they contain impertinent details regarding non-parties. Jane Doe 3 is free to reassert these factual details through proper evidentiary proof, should Petitioners demonstrate a good faith basis for believing that such details are pertinent to a matter presented for the Court's consideration.

As mentioned, Mr. Dershowitz moves to intervene "for the limited purposes of moving to strike the outrageous and impertinent allegations made against him and requesting a show cause order to the attorneys that have made them." (DE 282 at 1). As the Court has taken it upon itself to strike the impertinent factual details from the Rule 21 Motion and related filings, the Court concludes that Mr. Derschowitz's intervention in this case is unnecessary. Accordingly, his motion to intervene will be denied as moot.[3] Regarding whether a show cause order should

[3] This also moots Mr. Dershowitz's Motion for Leave to File Supplemental Reply in Support of Motion for Limited Intervention. (DE 317). Denying Mr. Dershowitz's motion to intervene also renders moot Petitioners' motion (DE 292) to file a sealed document supporting its response to Mr. Dershowitz's motion. It will accordingly be denied as moot, and DE 293 (the sealed response) will be stricken from the record.

issue, the Court finds that its action of striking the lurid details from Petitioners' submissions is sanction enough. However, the Court cautions that all counsel are subject to Rule 11's mandate that all submissions be presented for a proper purpose and factual contentions have evidentiary support, Fed. R. Civ. P. 11(b)(1) and (3), and that the Court may, on its own, strike from any pleading "any redundant, immaterial, impertinent, or scandalous matter," Fed. R. Civ. P. 12(f).

B. Rule 15 Motion

Between their two motions (the Rule 21 Motion and Rule 15 Motion), Jane Doe 3 and Jane Doe 4 assert that "they desire to join in this action to vindicate their rights [under the CVRA] as well." (DE 280 at 1). Although Petitioners already seek the invalidation of Mr. Epstein's non-prosecution agreement on behalf of all "other similarly-situated victims" (DE 189 at 1; DE 311 at 2, 12, 15, 18-19), Jane Doe 3 and Jane Doe 4 argue that they should be fellow travelers in this pursuit, lest they "be forced to file a separate suit raising their claims" resulting in "duplicative litigation" (DE 280 at 11). The Court finds that justice does not require adding new parties this late in the proceedings who will raise claims that are admittedly "duplicative" of the claims already presented by Petitioners.

The Does' submissions demonstrate that it is entirely unnecessary for Jane Doe 3 and Jane Doe 4 to proceed as parties in this action, rather than as fact witnesses available to offer relevant, admissible, and non-cumulative testimony. (See, e.g., DE 280 at 2 (Jane Doe 3 and Jane Doe 4 "are in many respects similarly situated to the current victims"), 9 ("The new victims will establish at trial that the Government violated their CVRA rights in the same way as it violated the rights of the other victims."), 10 (Jane Doe 3 and Jane Doe 4 "will simply join in motions that the current victims were going to file in any event."), 11 (litigating Jane Doe 3 and

Jane Doe 4's claims would be "duplicative"); DE 298 at 1 n.1 ("As promised . . . Jane Doe No. 3 and Jane Doe No. 4 do not seek to expand the number of pleadings filed in this case. If allowed to join this action, they would simply support the pleadings already being filed by Jane Doe No. 1 and Jane Doe No. 2."); DE 311 at 5 n.3 ("[A]ll four victims (represented by the same legal counsel) intend to coordinate efforts and avoid duplicative pleadings."), 15 (Jane Doe 3 and Jane Doe 4 "challenge the same secret agreement—i.e., the NPA that the Government executed with Epstein and then concealed from the victims. This is made clear by the proposed amendment itself, in which all four victims simply allege the same general facts.")). As the Does argue at length in their Rule 15 Motion, Jane Doe 1's original petition "specifically allege[s] that the Government was violating not only her rights but the rights of other similarly-situated victims." (DE 311 at 2). The Court fails to see why the addition of "other similarly-situated victims" is now necessary to "vindicate their rights as well." (DE 280 at 1).

Of course, Jane Doe 3 and Jane Doe 4 can participate in this litigated effort to vindicate the rights of similarly situated victims—there is no requirement that the evidentiary proof submitted in this case come only from the named parties. Petitioners point out as much, noting that, regardless of whether this Court grants the Rule 15 Motion, "they will call Jane Doe No. 3 as a witness at any trial." (DE 311 at 17 n.7). The necessary "participation" of Jane Doe 3 and Jane Doe 4 in this case can be satisfied by offering their properly supported—and relevant, admissible, and non-cumulative—testimony as needed, whether through testimony at trial (see DE 280 at 9) or affidavits submitted to support the relevancy of discovery requests[4] (see

[4] The non-party Jane Does clearly understand how to submit affidavits. (See DEs 291-1, 310-1).

id. at 10). Petitioners do not contend that Jane Doe 3 and Jane Doe 4's "participation in this case" can only be achieved by listing them as parties.

As it stands under the original petition, the merits of this case will be decided based on a determination of whether the Government violated the rights of Jane Doe 1, Jane Doe 2, and all "other similarly situated victims" under the CVRA. Jane Doe 3 and Jane Doe 4 may offer relevant, admissible, and non-cumulative evidence that advances that determination, but their participation as listed parties is not necessary in that regard. See Herring, 894 F.2d at 1024 (District court did not abuse its discretion by denying amendment where "addition of more plaintiffs . . . would not have affected the issues underlying the grant of summary judgment."); cf. Arthur v. Stern, 2008 WL 2620116, at *7 (S.D. Tex. 2008) (Under Rule 15, "courts have held that leave to amend to assert a claim already at issue in [another lawsuit] should not be granted if the same parties are involved, the same substantive claim is raised, and the same relief is sought.").[5] And, as to Jane Doe 4 at least, adding her as a party raises unnecessary questions about whether she is a proper party to this action.[6]

Petitioners also admit that amending the petition to conform to the evidence—by including references to the non-prosecution agreement itself—is "unnecessary" as the "existing petition is broad enough to cover the developing evidence in this case." (DE 311). The Court

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[5] The Court expresses no opinion at this time whether any of the attestations made by Jane Doe 3 and Jane Doe 4 in support of their motion will be relevant, admissible, and non-cumulative.

[6] The Government contends that Jane Doe 4 is not a true "victim" in this case because she was not known at the time the Government negotiated the non-prosecution agreement, and accordingly she was not entitled to notification rights under the CVRA. (See DE 290 at 10). Any "duplicative" litigation filed by Jane Doe 4 would necessarily raise the issue of whether she has standing under the CVRA under these circumstances.

agrees, and it concludes that justice does not require amending the petition this late in the proceedings.

III. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows: the Rule 21 Motion (DE 280) is **DENIED**; the Rule 15 Motion (DE 311) is **DENIED**; Intervenor Dershowitz's Motion for Limited Intervention (DE 282) and Motion for Leave to File Supplemental Reply in Support of Motion for Limited Intervention (DE 317) are **DENIED AS MOOT**; Petitioners' Motion to Seal (DE 292) is **DENIED AS MOOT**; the following materials are hereby **STRICKEN** from the record:

- DE 279, in its entirety.
- DE 280, all sentences between the following sentences: "The Government then concealed from Jane Doe #3 the existence of its NPA from Jane Doe #3, in violation of her rights under the CVRA" (DE 280 at 3); and "The Government was well aware of Jane Doe #3 when it was negotiating the NPA, as it listed her as a victim in the attachment to the NPA" (DE 280 at 6).
- DE 291-1, paragraphs 4, 5, 7, 11, 13, 15, 19 through 53, and 59.
- DE 310-1, paragraphs 7 through 12, 16, 39, and 49.
- DE 293, in its entirety.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 6th day of April, 2015.

KENNETH A. MARRA
United States District Judge