UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted],
Plaintiff,

v.
Ghislaine Maxwell,
Defendant.
_____/

Case No.: 15-cv-07433-LAP

THE GOVERNMENT OF THE UNITED STATES VIRGIN ISLANDS' MEMORANDUM OF LAW IN SUPPORT OF EX PARTE MOTION TO INTERVENE AND FOR CONFIDENTIAL ACCESS TO JUDICIAL RECORDS AND DISCOVERY DOCUMENTS

The Government of the United States Virgin Islands (the "USVI") moves to intervene in this action for the limited purpose of obtaining confidential access to both: (a) all sealed documents related to the parties' motions for summary judgment [ECF No. 540 to 543, 586 to 586-3, 620 to 621, and 872]; and (b) all unfiled discovery deposition transcripts and exhibits thereto. The USVI seeks to modify the Protective Order [ECF No. 62] solely to be granted confidential access to these materials, and, if granted access, agrees to be bound by the Protective Order.

The USVI seeks confidential access to these sealed documents and unfiled discovery materials because they are very likely relevant to its pending Virgin Islands Criminally Influenced and Corrupt Organizations Act ("CICO") enforcement action against the Estate of Jeffrey E. Epstein and several Epstein-controlled entities before the Superior Court of the U.S. Virgin Islands. *See* Exhibit A hereto (USVI's operative First Amended Complaint, filed February 11, 2020). Access to other judicial documents in this action has already been granted to intervening private parties in interest, *see Brown v. Maxwell*, 929 F.3d 41 (2d Cir. 2019), and also is the subject of ongoing litigation before this Court. *See*, *e.g.*, ECF No. 1096-1108. The

Court therefore should grant the USVI's motion and enter an order allowing the USVI to intervene as of right or by leave and to obtain confidential access to all sealed documents relating to the parties' motions for summary judgment and all unfiled deposition transcripts and exhibits thereto for use in its pending law enforcement action against the Epstein Estate.

BACKGOUND

Under Virgin Islands law, the CICO authorizes the USVI through its Attorney General to prosecute a civil action against any persons engaged in a pattern of criminal activity through association with any enterprise. 14 V.I.C. §§ 605, 607. The USVI alleges in its CICO action that decedent Jeffrey E. Epstein engaged in a criminal sexual trafficking enterprise in the Virgin Islands, wherein he used his vast wealth and property holdings and a deliberately opaque web of corporations and companies to transport young women and girls to his privately-owned islands where they were held captive and subject to severe and extensive sexual abuse. *See* Ex. A, ¶¶ 40-114. Epstein and his associates lured these girls and young women to his island with promises of modeling and other career opportunities. *Id.*, ¶ 49. Once they arrived, though, they were sexually abused, exploited, and held captive. *Id.*

By way of background, Epstein's privately-owned islands in the Virgin Islands were essential to the sex-trafficking enterprise. Little St. James is a secluded, private island, nearly two miles off-shore from St. Thomas with no other residents while Epstein resided there. *Id.*, ¶ 66. It is accessible only by private boat or helicopter, with no public or commercial transportation servicing the island. *Id.* Flight logs show that between 2001 and 2019, girls and young women were transported to the Virgin Islands and then helicoptered to Little St. James. *Id.*, ¶ 46. Air traffic controller reports state that some victims appeared to be as young as 11 years old. *Id.*, ¶ 51. Evidence also shows that when two of the victims, one age 15, attempted to

escape from Little St. James, Epstein was able to organize search parties, locate them, return them to his house, and then confiscate the 15-year old girl's passport to hinder her ability to escape again. *Id.*, ¶¶ 57-58.

Epstein's Virgin Islands-based corporations and companies also played central roles in the criminal sex-trafficking enterprise. CICO action Defendant Plan D, LLC, for example, knowingly and intentionally facilitated the trafficking scheme by flying underage girls and young women into the Virgin Islands to be delivered into sexual servitude. *Id.*, ¶ 97. CICO action Defendants Great St. Jim, LLC and Nautilus, Inc.—for which CICO action Defendants and Epstein Estate Executors Darren Indyke and [redacted] served, respectively, as Secretary and Treasurer—knowingly participated in the Epstein Enterprise and facilitated the trafficking and sexual servitude of underage girls and young women by providing the secluded properties at, from, or to which Epstein and his associates could transport, transfer, maintain, isolate, harbor, provide, entice, deceive, coerce, and sexually abuse them. *Id.*, ¶¶ 23-29, 98.

The Government alleges that Epstein and the CICO Defendants violated CICO by committing and conspiring to commit criminal human trafficking offenses based upon the foregoing conduct. *See id.*, ¶¶ 115-170 (Counts I-VIII). The Government further alleges that they violated CICO by committing and conspiring to commit various child-abuse, neglect, rape, unlawful-sexual-contact, prostitution, and sex-offender-registry-related offenses based upon the foregoing sexual-abuse conduct. *See id.*, ¶¶ 171-258 (Counts IX-XIX). The Government also alleges that Defendants engaged in a civil conspiracy to conceal the unlawful sexual abuse alleged. *See id.*, ¶¶ 281-287 (Count XXII).

In the present motion, the USVI seeks access to the following sealed documents and unfiled discovery:

- (a) All currently sealed documents filed in support of Defendant Ghislaine Maxwell's motion for summary judgment (ECF No. 540 to 543, inclusive);
- (b) All currently sealed documents filed in support of Plaintiff [redacted] opposition to Defendant's motion for summary judgment (ECF No. 586 to 586-3, inclusive);
- (c) All currently sealed documents in support of Defendant's Reply in support of motion for summary judgment (ECF No. 620 to 621, inclusive);
- (d) All currently sealed parts of the Court's Opinion on Defendant's motion for summary judgment (ECF No. 872);
- (e) All currently unfiled discovery deposition transcripts and exhibits thereto in this action.

The USVI expects that these sealed documents and unfiled discovery contain critical information related to Epstein's criminal enterprise in the Virgin Islands and beyond, and will be invaluable for its CICO law enforcement action against the Estate and other named parties.[1]

LEGAL ARGUMENT

A. The USVI's Motion to Intervene Should be Granted.

Federal Rule of Civil Procedure 24 provides for intervention as of right by anyone claiming "an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a). Rule 24(b) permits intervention to anyone "who has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b). Rule 24(b) gives the Court "broad discretion to permit a nonparty to intervene where the that party's claims and the pending civil action share questions of law and fact and where such intervention would not

[1] The USVI has attempted to obtain these documents by serving a Virgin Islands Court-issued subpoena, domesticated by a New York Court, upon counsel for Plaintiff herein, who was unable to produce the documents because of this Court's Protective Order.

'unduly delay and prejudice the adjudication of the rights of the original parties.'" *Bridgeport Harbour Place I, LLC v. Ganim*, 269 F. Supp. 2d 6, 8 (D. Conn. 2002) (internal citation omitted).

District courts in this Circuit have permitted government actors to intervene in civil actions. *See Twenty First Century Corp. v. LaBianca*, 801 F. Supp. 1007, 1009 (E.D.N.Y. 1992). Where an intervening party seeks modification of a protective order to allow access to documents, this Court has found a motion to intervene to be the appropriate mechanism. *See* [redacted] *v. Maxwell*, 325 F. Supp. 3d 428, 444 (S.D.N.Y. 2019), *rev'd on other grounds, Brown v. Maxwell*, 929 F.3d 41 (2d Cir. 2019); [redacted] *v. Maxwell*, No. 15 Civ. 7433 (RWS) (S.D.N.Y. Nov. 2, 2016), ECF No. 496 (Opinion Granting Dershowitz Motion to Intervene); [redacted] *v. Maxwell*, No. 15 Civ. 7433 (RWS) (S.D.N.Y. May 3, 2017), ECF No. 892 (Opinion Granting Cernovich Motion to Intervene). Intervention may be permitted even years after a case has been administratively closed. *Counihan v. Allstate Ins. Co.*, 907 F. Supp. 54 (E.D.N.Y. 1995); *AB v. Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. 144, 155 (S.D.N.Y. 2004) (noting the "district court has discretion with regard to determining the timeliness of a motion to intervene.").

Under Rule 24(a), this Court and others in this Circuit recognize a four-part test for a non-party to be granted intervention as of right:

> Upon 1) timely application anyone shall be permitted to intervene in an action when the applicant claims 2) an interest relating to the property or transaction which is the subject of the action and 3) the applicant is so situated that the dispositions of the action may as a practical matter impair or impede the applicant's ability to protect that interest, 4) unless the applicant's interest is adequately represented by existing parties.

Rhinebeck Cent. Sch. Dist., 224 F.R.D. at 155 (citing *Wash. Elec. Cooperative, Inc. v. Mass. Municipal Wholesale Elec. Co.*, 922 F.2d 92, 96 (2d Cir. 1990)). For timeliness, courts consider "'(1) how long the applicant had notice of the interest . . . ; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any

unusual circumstances militating for or against a finding of timeliness.'" *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (quoting *United States v. Pitney Bowes*, Inc., 25 F.3d 66, 70 (2d Cir. 1994)). The interest asserted must be "'direct, substantial, and legally protectable'" and not "'speculative or remote.'" *Abondolo v. GGR Holbrook Medford, Inc.*, 285 B.R. 101, 109 (E.D.N.Y. 2002) (quoting *United States v. Peoples Benefit Life Ins. Co.*, 271 F.3d 411, 415 (2d Cir. 2001)).

Under Rule 24(b), courts in this Circuit consider the following factors in assessing whether to grant permissive intervention:

> (i) whether permitting the intervention would unduly delay or prejudice the adjudication of the dispute among the original parties to the litigation; (ii) the nature of the intervenor's interests; (iii) whether those interests could be adequately represented by existing parties; and (iv) whether permitting intervention will assist in developing and resolving the factual and legal disputes in the litigation.

In re Visa Check/MasterMoney Antitrust Litig., 190 F.R.D. 309, 312 (E.D.N.Y. 2000). When considering permissive intervention, "courts must examine whether intervention will prejudice the parties to the action or cause undue delay." *Abondolo*, 285 B.R. at 110.

Pursuant to Rule 24, the USVI has a right to intervene in this action. Turning first to the Rule 24(a) four-part test, the USVI satisfies each of the factors. The timeliness of the USVI's Motion is not at issue because this litigation has closed, and there is no prejudice to the parties. Moreover, intervention has been permitted years after a litigation has ended. *See* [redacted], 325 F.Supp. 3d at 437. Therefore, the USVI satisfies this factor.

The USVI also asserts interests that are "'direct, substantial, and legally protectable.'" *Abondolo*, 285 B.R. at 109 (internal citation omitted). The USVI has a substantial law enforcement interest to protect in its CICO enforcement action currently pending in the Virgin Islands. The Attorney General of the Virgin Islands is responsible for advocating for the public's

interest and enforcing the criminal laws of the Virgin Islands. *See* 3 V.I.C. § 114(3) (USVI Attorney General has power and duty to "prosecute in the name of the People of the Virgin Islands, offenses against the laws of the Virgin Islands"); 14 V.I.C. § 607(a) (USVI "Attorney General . . . may institute civil proceedings against any person . . . in order to obtain relief from conduct constituting a violation or in order to prevent or restrain a violation of any provision or provisions of [the CICO]."). To protect and uphold that law enforcement responsibility, the USVI seeks to intervene in this action. The individuals involved with *this* action, both named parties and non-parties, are potentially victims, perpetrators and/or witnesses to the conduct at issue in the USVI's CICO enforcement action. Moreover, the facts of this case substantiate at least some of the USVI's claims, making it necessary to seek intervention to access information that will aid in the enforcement of both federal law and the laws of the Virgin Islands.

The USVI also satisfies factors three and four because, absent intervention, its ability to prove its causes of action in its law enforcement action may be hindered. *Rhinebeck Cent. Sch. Dist.*, 224 F.R.D. at 156. No party to the present litigation has the responsibility of either protecting the interests of the people of the Virgin Islands or enforcing its laws, as the USVI itself does. Moreover, the USVI also may be hindered absent intervention because this action involves testimony by and/or about Epstein, whereas his direct testimony is unavailable in the CICO action due to his death while in federal custody. Furthermore, the allegations brought in the present complaint are demonstrably distinct from those brought by the USVI in its CICO enforcement action. Therefore, the USVI satisfies this and all factors for intervention as of right.

The USVI also satisfies Rule 24(b)'s requirements for permissive joinder, as a nonparty whose claims "share questions of law and fact" with the litigation and whose intervention "would not 'unduly delay and prejudice the adjudication of the rights of the original parties.'"

Bridgeport Harbour, 269 F. Supp. 2d at 8 (internal citation omitted). The USVI's intervention would not unduly delay or prejudice the adjudication of the dispute among the original parties to the litigation because this litigation is closed (*other than with respect to pending disputes over unsealing and third-party access to documents*) and because the USVI's substantial interests, discussed *inter alia*, were not represented by the existing parties. *In re Visa Check/MasterMoney Antitrust Litig.*, 190 F.R.D. at 312.

For all of the reasons set forth, the USVI's Motion to Intervene should be granted.

B. The USVI's Motion for Access to Sealed Documents Should be Granted.

The First Amendment and federal common law each establish a presumption in favor of access to certain judicial documents. *Guzik v. Albright*, No. 16-CV-2257 (JPO), 2018 U.S. Dist. LEXIS 196006, at *9 (S.D.N.Y. Nov. 16, 2018); *see Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004). The initial issue on a non-party's request for access to a document filed in a court is whether it is a "judicial document." *Trump v. Deutsche Bank AG*, 940 F.3d 146, 150-51 (2d Cir. 2019) (citing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006)). Merely filing a document with a court "'is insufficient to render that paper a judicial document subject to the right of public access.'" *Trump*, 940 F.3d at 150 (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*")).

To be designated a judicial document, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *Amodeo*, 44 F.3d at 145. Judicial documents are considered on a "continuum," ranging from "matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("*Amodeo II*"); *United States v. All Funds on Deposit at Wells Fargo Bank*, 643 F. Supp. 2d 577, 583 (S.D.N.Y. 2009). "Especially

great weight is given to documents that are material to particular judicial decisions and thus critical to 'determining litigants' substantive rights -- conduct at the heart of Article III -- and . . . public monitoring of that conduct.'" *All Funds*, 643 F. Supp. 2d at 583 (quoting *Amodeo II*, 71 F.3d 1049).

Federal courts "'employ two related but distinct presumptions in favor of public access to court proceedings and records: a strong form rooted in the First Amendment and a slightly weaker form based in federal common law.'" *United States v. Doe*, No. 3:19-MC-00027-AWT, 2019 U.S. Dist. LEXIS 36605, at *3 (D. Conn. Mar. 6, 2019) (quoting *Newsday LLC v. County of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013)). In the Second Circuit, courts utilize two methods approaching the First Amendment right. *Doe*, 2019 U.S. Dist. LEXIS 36605, at *3. The "experience-and-logic" approach applies to both judicial proceedings and documents, and asks "both whether the documents have historically been open to the press and general public and whether public access plays a significant positive role in the functioning of the particular process in question." *Lugosch*, 435 F.3d at 120. The second, applied only when the court considers documents in proceedings covered by the First Amendment, asks whether the documents "are derived from or are a necessary corollary of the capacity to attend the relevant proceedings." *Id.*

For the "experience-and-logic" approach, courts employ a two-pronged inquiry. *Doe*, 2019 U.S. Dist. LEXIS 36605, at *4; *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir. 2004). First, courts must consider "whether the place and process have historically been open to the press and general public. *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735 (1986) ("*Press-Enterprise II*"). Second, courts must consider "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*; *Hartford*, 380 F.3d at 92 ("The courts that have undertaken this type of inquiry have generally

invoked the common law right of access to judicial documents in support of finding a history of openness."). For the second approach, access to judicial documents has been "derived from or a necessary corollary of the capacity to attend the relevant proceedings." *Hartford*, 380 F.3d at 93.

The federal common law right to access judicial documents attaches with different weight depending on two factors. *Doe*, 2019 U.S. Dist. LEXIS 36605, at *6. Those factors assess "the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts." *Amodeo II*, 71 F.3d at 1049. The common law right must be weighed against countervailing interests favoring privacy, namely:

> (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

United States v. Harris, 204 F. Supp.3d 10, 16-17 (D.D.C. 2016); *Doe*, 2019 U.S. Dist. LEXIS 36605, at *6-7. Only when competing interests outweigh the presumption may access be denied, and "[w]here the presumption of access is 'of the highest' weight, as to material sought by the public or press, the material 'should not remain under seal absent the most compelling reasons.'" *Lugosch*, 435 F.3d at 123 (quoting *Joy v. North*, 692 F.2d 880 (2d Cir. 1982)); *Guzik v. Albright*, No. 16-CV-2257 (JPO), 2018 U.S. Dist. LEXIS 196006, at *6-7 (S.D.N.Y. Nov. 16, 2018) (noting neither "the mere '[b]road and general' invocation of a privacy interest," nor "[v]ague allusion to unelaborated primacy concerns" warrants denial of access.) (quoting *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987)).

The sealed documents to which the USVI seeks access here are judicial documents under both the common law and First Amendment analysis. *See Brown*, 929 F.3d at 47; *Lugosch*, 435 F.3d at 123 (noting documents submitted in support a motion for summary judgement, whether

or not relied upon, "are unquestionably judicial documents under the common law."). And, as at least one Court has found that "there is no countervailing privacy interest sufficient to justify their continued sealing." *Brown*, 929 F.3d at 48. Due to the "strong First Amendment presumption," denial of access to the summary judgment documents "may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values . . . ." *Id.* at 47. Here, as the Court noted in *Brown*, none exist. *Id*. at 48.

Moreover, the USVI seeks access to the summary judgment documents for use in its own law enforcement action. *See generally Foltz v. State Farm Mut. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) ("Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding wasteful duplication of discovery."). Since the USVI seeks access to the sealed documents for use in its own related law enforcement action, subject to a protective order that will maintain appropriate confidentiality, and not to publicize the information contained therein, any concerns related to the privacy of parties identified therein is absent. The Court thus should grant the USVI access to these sealed documents.

C. The USVI's Motion for Confidential Access to Unfiled Discovery Documents Should be Granted.

The Court also should modify the existing Protective Order (ECF No. 62) to permit the USVI to confidentially access any discovery deposition transcripts and exhibits that have not been filed with the Court. The Second Circuit has held that "[w]here there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) 'absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.'" *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (quoting *Martindell v. IT&T Corp.*, 594 F.2d 291, 296 (2d Cir. 1979)). Here, two

circumstances support the Court's modification of the Protective Order to grant the USVI confidential access to unfiled discovery deposition documents.

First, the existing Protective Order (ECF No. 62) is a blanket protective order, not a targeted order making findings with respect to particular documents or testimony. Courts in this Circuit, including this Court, have held that litigating parties have lesser reliance interests in blanket protective orders than in more targeted orders. *See*, *e.g.*, *In re EPDM Antitrust Litig.*, 255 F.R.D. 308, 319 (D. Conn. 2009) ("When considering a motion to modify, it is relevant whether the order is a blanket protective order, covering all documents and testimony produced in a lawsuit, or whether it is specially focused on protective certain documents or certain deponents for a particular reason. A blanket protective order is more likely to be subject to modification than a more specific, targeted order because it is more difficult to show a party reasonably relied on a blanket order in producing documents or submitting to a deposition."); *Nielsen C. (U.S.), LLC v. Success Systems, Inc.*, 112 F. Supp. 3d 83, 120 (S.D.N.Y. 2015) ("A broad protective order is less likely to elicit reliance 'because it is more difficult to show a party reasonably relied on a blanket order in producing documents or submitting to a deposition.'") (quoting *In re EPDM*, 255 F.R.D. at 319). Since the Protective Order does not address specific deposition testimony or exhibit documents, the parties do not have demonstrated reliance interests in applying the Order to this testimony or these documents.

Second, the USVI's interest in obtaining access to testimony and documents in this action relating to Epstein's sex-trafficking conduct that also is at issue in its CICO law enforcement action is considerable. The USVI seeks access to this discovery through this action because it already has been provided and therefore *at the very least* may be obtained more expeditiously herein than through duplicative discovery in its separately-filed action. *See generally In re*

EPDM, 255 F.R.D. at 324 ("Whether the collateral litigant could retrieve the same materials in question through its own discovery requests or whether it is attempting to subvert a limitation on discovery, such as the close of the factual record, should be taken into account. Certainly, if the litigant could access the same materials and deposition testimony by conducting its own discovery, it is in the interest of judicial efficiency to avoid such duplicative discovery."); *Foltz*, *supra*, 331 F.3d at 1131 ("Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding wasteful duplication of discovery.").

Moreover, the USVI's interest in accessing this discovery may be far greater than a matter of procedural efficiency. In light of Epstein's death in federal prison after the discovery in this action was taken, his direct testimony is unavailable to the USVI. Thus, any testimony by or about Epstein in this action may be critical to the USVI's law enforcement action.

Either or both of these considerations provide compelling grounds for modifying the Protective Order to grant the USVI access to unfiled discovery deposition transcripts and exhibits to those depositions in this action.

CONCLUSION

For all of the foregoing reasons, the USVI respectfully moves this Court to GRANT the Ex Parte Motion to Intervene and for Access to Judicial Records and Discovery Documents.

Dated: September 1, 2020

Respectfully submitted,

/s/ William H. Narwold

William H. Narwold, Esq.
Motley Rice LLC
One Corporate Center
20 Church Street, 17th Floor
Hartford, CT 06103

Tel: [redacted]

Counsel of Record for Proposed Intervenor
Government of the United States Virgin Islands