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VIA EMAIL

The Honorable Alison J. Nathan
United States District Court
Southern District of New York
[redacted]

Re: Reply in Support of Request to Modify Protective Order (Under Seal)[1]
United States v. Ghislaine Maxwell, 20 Cr. 330 (AJN)

Dear Judge Nathan,

Defendant Ghislaine Maxwell filed a simple request: that she be permitted to disclose *under seal* to the Second Circuit Court of Appeals and a separate district court in this same court (the "Civil Litigation") the fact that her adversary in the civil case pending in those two fora already handed over nearly 90,000 pages of "confidential" protective-order materials, much of it also filed under seal, to the U.S. Attorney's Office pursuant to a subpoena while those two courts have *sub judice* whether to unseal many of the very same materials.

The government proposes to keep both courts in the dark about the fact and method of the disclosure. They claim the civil litigation is "unrelated," that issuance of the subpoena was "standard practice," and that disclosure will jeopardize an ongoing criminal investigation and "permit dissemination of a vast swath of materials." Each of the government's arguments lack merit.

The Civil Litigation is Not "Unrelated":
First, the government claims the civil action is "unrelated." Resp. at 1. The assertion is frivolous. In the same pleading, the government touts its production of "more than 165,000 pages of discovery to the defense," of which (they neglect to mention), nearly 90,000 of the

[1] Ms. Maxwell has filed a letter motion which seeks leave to file this reply under seal, while providing the unredacted version to the government and the Court. This reply describes and discusses sealed materials and materials subject to the Protective Order in this case. Ms. Maxwell also simultaneously files under separate cover her proposed redactions to her Request to Modify Protective Order (Aug. 17, 2020), and this Reply, in accordance with the Court's Order of August 18, 2020 (Doc. 44).

pages were taken wholesale from the adversary party to the Civil Litigation pursuant to the subpoena at issue. That more than one-half of the criminal discovery originated in the Civil Litigation, that the government intends to rely on those Civil Litigation materials to prosecute this criminal action, and that the sealed Civil Litigation materials are quoted in Counts 6 and 7 of the Indictment and Superseding Indictment renders the Civil Litigation far from "unrelated." Equally frivolous, and wholly circular, is the government's contention that Ms. Maxwell has been provided with a "trove of materials she can mine to her advantage in the civil discovery." Resp. at 2. The 90,000 pages of criminal discovery that the government now has *are the civil discovery and pleadings*; Ms. Maxwell already has them to use in the Civil Litigation.

What Ms. Maxwell does not have is (and hereby seeks) permission to disclose (a) the fact that her adversary has given those materials to the government and (b) those materials now constitute more than ½ of all the 165,000 pages of criminal discovery to be used in this prosecution. The government's *ad hominem* suggestion that Ms. Maxwell has "cherry-pick[ed] materials" to seek an "advantage in their efforts to defend against accusations of abuse" or "delay court-ordered disclosure of previously sealed materials" reveals a fundamental (or feigned) lack of understanding as to how the unsealing process works. It also begs the question, to be fleshed out at a later time, why the government, if it thinks the sealed materials are "confidential" and important to their prosecution, is not itself objecting to the unsealing of the materials to the general public, to the press, and to other witnesses to this action, as is standard practice by their office and others in this jurisdiction. *See, e.g., Securities and Exchange Commission v. Carroll,* 19 Civ. 7199 (AT), 2020 WL 1272287, at *1 (S.D.N.Y. Mar. 17, 2020); *Securities and Exchange Commission v. Abraaj Investment Management Limited*, 19-CV-3244 (AJN), 2019 WL 6498282, at *1 (S.D.N.Y. Dec. 3, 2019); *Nesbitt v. Bemer*, 18-CV-00699 (VLB), 2018 WL 5619716 (E.D.N.Y. Oct. 30, 2018) (staying Trafficking Victims Protection Act civil case during pendency of related state court prosecution).

Ms. Maxwell simply seeks to alert the judicial officers in the related Civil Litigation to facts about which her adversary is already aware.

Issuance of the Subpoenas Not "Standard Practice":
Second, the government tries to normalize, without citation to authority, its conduct as "standard practice." Resp. at 2. To the contrary, the controlling case in this Circuit, *Martindell v. Int'l Telephone & Telegraph Corp.,* 594 F.2d 291, 293 (2d Cir. 1979), mandates a wholly different procedure: the use of a non-*ex parte* subpoena with an opportunity for the aggrieved party to move to quash. Similar cases in this district demonstrate the "non-standard" nature of the government's conduct regarding these subpoenas. For example, Judge Koeltl observed when considering whether to release a single deposition transcript to the government: "the Second Circuit has made clear that the Government may not use its 'awesome' investigative powers to seek modification of a protective order merely to compare the fruits of the plaintiff's discovery in a civil action with the results of a prosecutorial investigation in a criminal action." *Botha v. Don King Prods., Inc.,* No. 97 CIV. 7587 (JGK), 1998 WL 88745, at *3 (S.D.N.Y. Feb. 27, 1998) (citing *Minpeco S.A. v. Conticommodity Servs., Inc.*, 832 F.2d 739, 743 (2d Cir. 1987) and *Martindell,* 594 F.2d at 297). Judge Sweet, the same judge who approved the civil protective order upon which Ms. Maxwell relied, held that the defendant's "continuing need for the

confidentiality stipulation's protection outweighs by far the government's need for the deposition transcript…." *United States v. Oshatz*, 700 F. Supp. 696, 703 (S.D.N.Y. 1988); *see also Palmieri v. State of New York,* 779 F.2d 861 (2d Cir. 1987); *Abbott Laboratories v. Adelphia Supply USA*, Case 2015-cv-5826 (CBA) (MDG), 2016 WL 11613256 (S.D.N.Y. Nov. 22, 2016) ("In the Second Circuit, there is a presumption in favor of enforcing protective orders against grand jury subpoenas."); *United States v. Kerik,* 07 CR 1027, 2014 WL 12710346 (S.D.N.Y. July 23, 2014). It seems that a majority of courts in this district have rejected the claimed "standard practice" arguments made by the Government before Judge McMahon. A notable difference is that the other applications were not conducted *ex parte*. Review of the sealed materials further illustrates the point. One of the two judicial officers presented with the government's application *ex parte* agreed that it was not appropriate and denied the request. The other questioned the irregularity of the procedure, applied a legal test not urged by the government, but ultimately agreed to grant the application. That she may have been incorrect remains to be litigated; Ms. Maxwell is not asking this Court to decide that question today.

But Ms. Maxwell is seeking in both the Second Circuit and before Judge Preska that the status quo be maintained until the issue can be litigated. If, for example, without the benefit of this information, the Second Circuit and/or Judge Preska order Ms. Maxwell's deposition unsealed, the cat will be out of the bag. Should this Court ultimately decide that it was inappropriate for the government to have obtained the materials pursuant to the subpoena, the government most assuredly will claim inevitable discovery, that even though it was unconstitutional to have obtained the discovery when they did, there is no harm because the documents are now in the public domain thanks to the unsealing process. Perhaps the government's desire to have the materials publicly unsealed, or at least their failure to intervene to stay the unsealing process, can be explained by their hope to rely on that doctrine when the ultimate question is presented to this Court.

<u>The Government Does Not Explain How Any "Secret" Investigation Will be Compromised.</u>
Third, the government claims that the materials at issue are "Confidential" because the "full scope and details" of their very-public proclamations of an ongoing criminal investigation "have not been made public." Resp. at 3. This argument too is nonsensical: the sealed materials that Ms. Maxwell seeks to file, *under seal*, do not disclose the "full scope and details" of the government's criminal investigation, as a simple review of the materials makes clear. The sealed materials are comprised of applications to serve a subpoena on a law firm and the two courts' rulings on those applications. Nothing in the sealed materials reveals the names of other targets, even though the criminal discovery produced to date reveals that other named targets are fully aware of their status as such and have been interacting with the government lawyers, as Ms. Maxwell was prior to her indictment. Further, the indictment itself makes clear that the government has obtained the sealed materials from the subpoena recipient because it quotes from those materials. Certainly the subpoena recipient, otherwise known as counsel for the adverse party to the Civil Litigation, knows the two things that Ms. Maxwell seeks to file *under seal* in

that matter: that the government obtained the subpoena for the materials and that they complied with the subpoena by producing 90,000 pages in response.[2]

The government does not explain, because they cannot, how it will harm an ongoing criminal investigation to reveal the sealed materials under seal to two arbiters: Judge Preska and the Second Circuit panel assigned to the unsealing process. Clearly those judicial officers are fully capable of maintaining files under seal and confidences. Nor is there any support for the argument that this limited request will "permit dissemination of a vast swath of materials." Resp. at 3. The slippery slope contention is belied by the limited nature of Ms. Maxwell's request. The sealed materials are a discrete set of judicial documents, not a "vast swath of materials," and Ms. Maxwell seeks to file them under seal for those Courts to use in their determinations. Hyperbole aside, the request is appropriately limited.

Further, the government's suggestion that "there is no impediment to counsel making sealed applications to Court-1 and Court-2, respectively, to unseal the relevant materials" is, at best, baffling. Resp. at 3 n.5. Such a "sealed application" in furtherance of her Civil Litigation would be "using" the materials for the civil case, exactly the conduct proscribed by the Protective Order here. If the Court disagrees, Ms. Maxwell is more than happy to make such sealed applications to those judicial officers. The government does not explain its thinking, nor did the government suggest this course of action during the conferral process.

The Sealed Materials Are Important to the Courts' *Sub Judice* Determinations

Fourth, the government decries the sealed materials' lack of relevance to the Civil Litigation's unsealing process. Among the legal questions pending before those two courts are whether Ms. Maxwell and the other non-parties relied on the protective order when they provided the civil discovery that now forms the basis of the indictment in this case and may soon provide the substance of indictments against the other non-parties. That Ms. Maxwell reasonably feared exactly what actually happened – that her adversary is working with the government to prosecute her – illuminates the reasonableness of her reliance, as well as the reliance of other non-parties who provided discovery under the promise of confidentiality. Moreover, those courts also must decide whether the unsealing will impact Ms. Maxwell's ability to receive a fair criminal trial in this case; that the soon-to-be-unsealed materials constitute over ½ of the criminal discovery in this case is a fact that the courts cannot know unless Ms. Maxwell tells them. Further any application to stay the civil unsealing process will necessitate telling those courts that the sealed materials are the one and same "confidential" criminal discovery.

By way of support, Ms. Maxwell directs the Court to her opening brief, filed in the Second Circuit on August 20, 2020. In that brief, she explains, *inter alia*, her arguments for maintaining

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[2] Ms. Maxwell strenuously opposes the government's suggestion that it "further elaborate on the nature of the ongoing grand jury investigation" in a supplemental *ex parte* and sealed pleading. This Court is overseeing the criminal case pertaining to Ms. Maxwell and any *ex parte* pleading concerning this case to this judicial officer is inappropriate. *See* Standard 3-3.3 Relationship with Courts, Defense Counsel and Others, "Criminal Justice Standards for the Prosecution Function," American Bar Ass'n (4th ed. 2017) ("A prosecutor should not engage in unauthorized *ex parte* discussions with, or submission of material to, a judge relating to a particular matter which is, or is likely to be, before the judge.").

her first deposition under seal, including her reliance on the protective order, the need to preserve the status quo pending any rulings regarding the propriety of the government's possession of the sealed materials, and the need to preserve her right to a fair trial. *See* [redacted]. *Maxwell,* Case No. 20-2413, Doc. 68 (Aug. 21, 2020). To contend as the government does that the Second Circuit, and Judge Preska in upcoming unsealing proceedings, should be kept in the dark about the government and her adversary's actions in circumventing the protective order, reveals a fundamental ignorance of the issues in the Civil Litigation at best, or a desire to have them undermined at worst.

Protective Orders May Be Modified As Circumstances Change

Finally, the government suggests in a myriad of ways without directly arguing that this Protective Order cannot be modified, that Ms. Maxwell somehow waived her ability to seek modification by agreeing to a Protective Order before she knew what was contained in the criminal discovery, or that there is no precedent for such a modification. These suggestions are disingenuous. Of course, the Government ignores that the Protective Order itself provides that it may be modified "by further order of the Court." *Id*, ¶ 18(b).

There is no precedence for this case. That is true because the Second Circuit has outlined a process for the government to seek civil materials subject to protective orders for use in grand jury investigations, a process the government circumvented. It also is true because typically, the government is the party to intervene in civil cases and seek a stay where materials the government has marked "Confidential" may be disclosed publicly or where the government contends the rules of criminal discovery will be circumvented. Finally, there is no other case that defense counsel has located where a U.S. district and appeals court are actively considering the unsealing of "confidential" materials simultaneous with the criminal prosecution. *Nixon v. Warner Commc'ns,* 435 U.S. 589 (1978), is the closest, yet even there, the U.S. Supreme Court refused press access to the tapes obtained from third parties played in the criminal trial while the matter remained on appeal.

That Ms. Maxwell did not know what was in the sealed materials before she signed the Protective Order, or proposed a draft, is self-evident. That a Court can modify a protective order at any time is likewise well-established. Fed. R. Crim. P. 16(d)(1) authorizes the Court to regulate discovery through protective orders and modification of those orders. *See Smith Kline Beecham Corp. v. Synthon Pharmaceuticals, Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C. 2002) ("[c]ourts have the inherent power to modify protective orders, including protective orders arising from a stipulation by the parties"); *see also United States v. Gurney,* 558 F.2d 1202, 1211 n.15 (5th Cir. 1977) (trial court's decisions as to which documents "will be placed in the public domain, and which are entitled to privacy and confidentiality" are discretionary and "form an integral part of trial management"); *United States v. Wecht*, 484 F.3d 194, 211 (3d Cir. 2007), *as amended* (July 2, 2007) ("it would have been proper for the District Court to unseal the records pursuant to its general discretionary powers"); *Poliquin v. Garden Way, Inc.,* 989 F.2d 527, 532 & 535 (1st Cir. 1993).

"The standard of review for a request to vacate or modify a protective order depends on the nature of the documents in question. There is a presumptive right of public access to judicial

documents, that is, documents that are 'relevant to the performance of the judicial function and useful in the judicial process.'" *Kerik*, 2014 WL 12710346, at *1 (S.D.N.Y. July 23, 2014), (*quoting United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)).

The Materials that Ms. Maxwell seeks to disclose (to judicial officers under seal) are, without question, judicial documents. The 90,000 pages of criminal discovery that Ms. Maxwell seeks to reference are materials already in her possession by virtue of her involvement in the Civil Litigation. And, at a minimum, Ms. Maxwell's opponent in the Civil Litigation knows both that the Government obtained an *ex parte* order to subpoena the information and what was produced. Accordingly, the argument that somehow grand jury secrecy will be compromised by disclosure, under seal to judicial officers reviewing the very material at issue, is absurd. Ms. Maxwell has demonstrated good cause for her very limited request to present a discrete set of sealed materials under seal to the two Courts deciding whether to unseal those materials to the public, for purposes of arguing against the unsealing of the 90,000 pages of confidential material that the government in this case has marked "confidential" and apparently intends to use to prosecute this action. The government has not articulated a cogent reason for that information to be kept from the other judicial officers.

Sincerely,

Jeffrey S. Pagliuca

CC: Counsel of Record (via ECF)