UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 08-CIV-80893 – MARRA/JOHNSON

JANE DOE,

Plaintiff,

[redacted].

JEFFREY EPSTEIN,

Defendant.
_____/

MOTION TO STRIKE REFERENCES TO NON-PROSECUTION AGREEMENT OR, IN THE ALTERNATIVE, TO LIFT PROTECTIVE ORDER BARRING JANE DOE'S ATTORNEY'S FROM REVEALING PROVISIONS IN THE AGREEMENT

Plaintiff, Jane Doe, hereby moves this Court to strike all references to a "non-prosecution agreement" contained in defendant, Jeffrey Epstein's ("Epstein") Motion to Stay these proceedings. Under the Best Evidence Rule, Fed. R. Evid. 1002, and the principles underlying the rule, Epstein is required to produce the written agreement (or a copy thereof) rather than simply rely on his own summary representations about what the agreement provides. In the alternative, the Court should lift the protective order it has entered in parallel litigation that precludes Jane Doe's counsel from revealing in publicly-accessible pleadings the specific language in the non-prosecution agreement.

In his motion to stay these proceedings, defendant Epstein has argued that he must invoke his Fifth Amendment rights lest he be found in violation of a non-prosecution agreement with the U.S. Attorney's Office. Indeed, his pleading makes a number of specific representations about the contents of that agreement. *See, e.g,* Epstein Motion to Stay at 3 (the non-prosecution agreement "outlines various obligations on the part of Epstein including, but not limited to, pleading guilty to the

Indictment and Information before the 15th Judicial Circuit, recommendations for his sentencing before the 15th Judicial Circuit, waiver of challenges to the Information filed by the SAO, waiver of right to appeal his conviction, . . . and the agreement to not prosecute others listed thereon so long as Epstein does not breach and fulfills the requirements of the NPA"). Epstein's pleading makes further representations about what is *not* contained in the agreement. *See, e.g., id.* (the non-prosecution agreement "does not outline or define . . . what constitutes a breach or what act of omission constitutes a breach thereof").

All references in his motion to the content of the non-prosecution agreement should be stricken. The Best Evidence Rule requires Epstein to produce the non-prosecution agreement itself to prove what the agreement says – not some second-hand summary. Federal Rule of Evidence 1002 directly provides: "To prove the content of a writing . . . , the original writing . . . is required, except as otherwise provided in these rules or by Act of Congress." The non-prosecution agreement is undoubtedly a "writing." *See* Epstein Motion to Stay at 2 (conceding this point). Moreover, it is obvious that Epstein is trying to prove its "content" in his motion to stay, as he is relying on various provisions within the agreement to make his case for a stay. As the moving party on his motion for a stay, he is therefore obligated to provide the best evidence of the written agreement – namely, a copy of the agreement itself.

The rationales underlying the Best Evidence Rule clearly apply here. As two leading commentators have explained:

> The continuing existence of the Best Evidence Rule rests upon several considerations. First, writings occupy a central position in the law. The written word has special sanctity, justifying more stringent proof

> requirements. Second, when the contents of a writing are in issue, an y evidence other than the writing itself is distinctly inferior. Language is complex, and the slightest variation in wording can have enormous significance in determining the outcome of a legal dispute. Unless a writing is very short, it is beyond the power of most human memory to summarize the writing with the precision that is often needed in the courtroom. The burden on litigants of requiring them to introduce the writing if available is outweighed by the increased accuracy of the factfinding process. Third, production of the writing . . . ensures completeness and prevents any segments from being presented out of context.

CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 10.1 at p. 1067 (3d ed. 2003); *see also Seiler* [redacted]*. Lucasfilm, Ltd.*, 808 F.2d 1316, 1319 (9th Cir. `1986) ("when the terms are in dispute only the writing itself, or a true copy, provides reliable evidence").

Epstein is making some rather remarkable assertions about what the agreement provides (or fails to provide) and how it operates in practice, as Jane Doe explains at greater length in her accompanying response to his motion for a stay. To prove those assertions, Epstein should not be able to rely on his own inferences from provisions contained in the agreement – but rather should be required to provide the specific language supporting those inferences.

In the alternative, if Epstein is allowed to make his own representation about the contents of the agreement, then Jane Doe should likewise be allowed to make her own representations about what the document provides. Jane Doe's undersigned attorneys have a copy of what is apparently the non-prosecution agreement. They obtained that agreement in parallel litigation under the Crime Victim's Rights Act. *Doe* [redacted]*. United States*, No. 9:08-CV-80736-KAM. The agreement, however, was provided to Jane Doe's counsel subject to a protective order. That protective order precludes Jane Doe's

attorneys from revealing "the Agreement or its terms to any third party absent further court order . . . . ." Protective Order, *Doe [redacted]. United States*, No. 9:08-CV-80736-KAM (dkt. #26) (Aug. 21, 2008). That Protective Order thus precludes Jane Doe from responding to Epstein's allegations in a publicly-filed motion because her response would necessarily involve disclosing the "terms" of the agreement. Jane Doe therefore requests the alternative relief of having the protective order lifted so that her attorney's can respond directly to Epstein's allegations about what the non-prosecution agreement provides.[1] If the protective order is lifted, Jane Doe would accordingly request an opportunity to file a supplemental pleading in opposition to the motion to stay to discuss those provisions.

CONCLUSION

For all these reasons, all references to the non-prosecution agreement in Epstein's motion for a stay should be stricken. In the alternative, the Court should lift its protective order and permit Jane Doe's counsel to file a supplemental response to the motion to stay discussing the specific provisions in the agreement. Because the United States may have an interest in this motion, a copy of the motion is being served on the U.S. Attorney's Office for the Southern District of Florida.

DATED: April 9, 2009

[1] Lifting the protective order may be useful for other reasons as well. For example, Jane Doe intends to question Epstein about the terms of the non-prosecution agreement at his upcoming deposition. If the protective order remains in place, Jane Doe may be required to proceed cumbersomely by first have Epstein reveal the provisions of the agreement and then asking about the provisions. Because only the narrow issue of the motion to stay is currently before the Court, Jane Doe has confined her arguments to that issue. Jane Doe reserves her right to file an appropriate motion at the appropriate time for release of the non-prosecution agreement on other grounds.

Respectfully Submitted,
Plaintiff, by One of Her Counsel,

s/ Bradley J. Edwards
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 9, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing is being served this day upon all counsel of record identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Bradley J. Edwards
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