

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
[REDACTED],
Plaintiff,
v.
GHISLAINE MAXWELL,
Defendant.
-----X

15-cv-07433-RWS

**RESPONSE TO PLAINTIFF'S NOTICE OF INTENT TO OFFER STATEMENTS
UNDER, IF NECESSARY, THE RESIDUAL HEARSAY RULE**

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[REDACTED]

Defendant Ghislaine Maxwell (“Ms. Maxwell”) hereby files her Response to Plaintiff’s Notice of Intent to Offer Statements Under, If Necessary, the Residual Hearsay Rule and states as follows:

INTRODUCTION

Plaintiff is correct that Ms. Maxwell will move, either *in limine* or at trial, to exclude the evidence listed in her notice. Many of the documents identified must be excluded as hearsay without applicable exceptions, or based on other evidentiary grounds. Those issues will be argued at the appropriate time. For purposes of this Response, Ms. Maxwell simply notes the fundamental errors in the Notice, failure to comply with the rules, and general principles that make the residual hearsay clause inapplicable.

I. THE RESIDUAL HEARSAY CLAUSE CANNOT BE USED TO CURE UNAVAILABLE DECLARANT

Plaintiff’s first fundamental error is her failure of proof that the identified declarants are unavailable to be called as witnesses. Fed. R. Evid. 807(a)(3) requires the proponent of hearsay to demonstrate that the evidence “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” Courts routinely forbid use of the residual hearsay clause to admit hearsay statements from declarants who are available for trial or deposition. Absent evidence to the contrary, the proponent of the proffered evidence could obtain the actual declarant to testify testimony either at trial or in deposition by reasonable efforts. *Elizararras v. Bank of El Paso*, 631 F.2d 366 (5th Cir. 1980) (absent showing that bank officials could not be procured to testify about certain actions taken with respect to an account, testimony of the account holder concerning those actions was not admissible under the residual exceptions to the hearsay rule); *United States v. Czachorowski*, 66 M.J. 432, 436 (C.A.A.F. 2008) (“courts have found the residual hearsay exception inapplicable when the evidence is not

unreasonably difficult to obtain directly from an available declarant”); *United States v. Scrima*, 819 F.2d 996, 1001 (11th Cir. 1987) (holding Fed. R. Evid. 803(24) inapplicable absent showing that proponent made reasonable efforts to produce witness with direct, personal knowledge); *United States v. [REDACTED]*, 792 F.2d 1019, 1027 (11th Cir. 1986) (error in the trial court's admission of hearsay evidence when the declarant could have been questioned about her own statements); As such, Rule 807 is inapplicable to all declarants absent a demonstration that they cannot testify directly.

Such rule makes all the more sense for declarants who actually were deposed in this matter or will testify at trial. Plaintiff deposed David Rodgers, [REDACTED], Juan Alessi and Ghislaine Maxwell. Having had the opportunity to question them concerning hearsay statements contained in the now proffered documents and to obtain their sworn testimony on such matters, Plaintiff should not now be permitted to resort to the improper use of hearsay evidence. Likewise, [REDACTED] will testify at trial, and thus there is no need for her self-serving hearsay in the form of a heavily-redacted FBI 302 statement, with multiple other evidentiary problems as noted in detail below.

II. PLAINTIFF FAILS TO IDENTIFY THE PARTICULARS OF THE ACTUAL DECLARANTS

Plaintiff acknowledges her duty to provide the “particulars” for each of the hearsay statement she presents, including the “declarant’s name and address, so that the party has a fair opportunity to meet it.” She, however, completely fails to provide this information for the vast majority of the declarants identified, as demonstrated in the chart below:

Statement	Particulars	Declarant Name and Address	Problem with Notice
Telephone Log Book	Names, addresses,	Alfredo Rodriguez	There is no testimony or other evidence to suggest that Mr. Rodriguez is the actual

"Black Book"	phone numbers, email address, and other descriptive information	(now deceased)	"declarant" as to the names, addresses, phone numbers or any non-handwritten information
Palm Beach Police Report	Statements collected by the Palm Beach Police Department from witnesses who had been inside the Epstein mansion	Names of witnesses listed in the report; also [REDACTED];	Plaintiff fails to provide any contact information for any of the declarants, and fails to identify the witnesses listed in the report with their particulars; no basis to claim unavailability as to any declarant
Message Pads from police trash pulls	Telephone memo pads indicating calls received at the Epstein residence	Various persons completing the memo pads, including Ghislaine Maxwell, [REDACTED], whose addresses or attorney is known to Defendant	Plaintiff fails to identify each of the declarants for whom she seeks to introduce hearsay statements; no proof of unavailability.
Non-Prosecution Agreement	Statement of particulars of a nonprosecution agreement between Jeffrey Epstein and the U.S. Attorney's Office for	Jeffrey Epstein, c/o attorney Jack Goldberger; attorney for the U.S. Attorney's Office for the Southern	The "attorney for the U.S. Attorney's Office for the Southern District of Florida" is not properly identified, and may not be the only additional hearsay declarant as there are likely multiple drafters; no proof of unavailability

	the Southern District of Florida Giuffre 007597-007605	District of Florida	
Justice Department Victim Notification	Statement to [REDACTED] that she had been identified as a victim	[REDACTED], c/o U.S. Attorney's Office, Southern District of Florida	Declarant not fully identified; likely additional declarants, including the declarant who provided ant purported "identification"; no proof of unavailability
FBI 302 of interview of [REDACTED]	[REDACTED] to FBI reporting sexual abuse	Ms. [REDACTED]; FBI Agent name redacted, c/o FBI Office	Unidentified "redacted" FBI Agent name is not properly identified; no proof of unavailability
Deposition of Juan Alessi (2009)	Statements regarding [REDACTED] presence at Epstein's home, massages given to girls and young adults, and Defendant's awareness and presence, as particularly designated in [REDACTED] designations	Juan Alessi, [REDACTED]	Available declarant; improper use of prior sworn testimony prohibited by Fed. R. Civ. P. 32 and 804.
Bank statements	Statements indicating Defendant authorized signatory on Epstein's bank accounts	Colonia Bank, 125 Worth Ave., Palm Beach, FL 33480	Declarant not unavailable
Deposition of Alfredo	Statements regarding	Alfredo Rodriguez is	<i>See Motion to Exclude Depositions In Toto and Motion in Limine re: Diane Flores</i>

Rodriguez and handwriting on exhibits.	Ms. Maxwell's involvement in massages given to girls and young adults, as particularly designated in [REDACTED] designations	deceased.	
New York Presbyterian Hospital Records for [REDACTED]	Statement indicating that [REDACTED] was treated at NY Presbyterian Hospital for female medical related issues when she was under the age of 18.	[REDACTED]	Declarant not unavailable; second declarant, the person providing the information put into form, is not identified

CONCLUSION

For the foregoing reasons, Ms. Maxwell requests that any attempt by Plaintiff to utilize the residual hearsay clause be prohibited.

Dated: February 24, 2017

Respectfully submitted,

/s/ Laura A. Menninger

Laura A. Menninger (LM-1374)

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CERTIFICATE OF SERVICE

I certify that on February 24, 2017, I electronically served this *Response to Plaintiff's Notice Of Intent To Offer Statements Under, If Necessary, The Residual Hearsay Rule* via ECF on the following:

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