

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

..... X
IN RE APPLICATION TO QUASH :
SUBPOENAS TO DAILY NEWS, L.P., : No. 10 M8-85 (LLM)
AND GEORGE RUSH :
..... X

STIPULATION

WHEREAS on or about March 19, 2010 the Daily News, L.P. and reporter George Rush (collectively, the "Daily News Parties") received subpoenas served on them in New York by the attorney for the plaintiff in an action pending in the United States District Court for the Southern District of Florida, *Jane Doe v. Jeffrey Epstein* (08 Civ. 80893 KAM), in which plaintiff Jane Doe ("Doe") alleges that she was sexually abused by defendant Jeffrey Epstein when she was a minor (the "Doe Action"); and

WHEREAS the subpoenas sought a recording that reporter Rush had made of a 22-minute telephone interview he had conducted of Epstein and recorded on a digital hand-held device (the "Epstein Recording"), which the Daily News Parties assert is confidential material and which Jane Doe asserts is not; and

WHEREAS on April 7, 2010 the Daily News Parties instituted an ancillary proceeding in the United States District Court for the Southern District of New York, *In Re Application To Quash Subpoenas To Daily News, L.P. and George Rush* (No. 10 M8-885) (the "Ancillary Proceeding"), in which the Daily News Parties moved to quash the subpoenas under the qualified reporter's privilege; and

WHEREAS in connection with their motion to quash, the Daily News Parties submitted the original Epstein Recording (as it exists on the hand held digital recording

device) and a written transcript thereof (the "Transcript") to the district court judge in the Ancillary Proceeding (McKenna, J.) for *in camera* review; and

WHEREAS, the Daily News Parties do not have in their possession a copy of the Epstein Recording; and

WHEREAS, by Memorandum and Order dated May 20, 2010, Judge McKenna denied the motion to quash, granted Doe's counsel access to the entire Epstein Recording and Transcript for use in the Doe Action and directed Rush to appear for deposition to authenticate the Epstein Recording and the Transcript (the "May 20 Order"); and

WHEREAS Judge McKenna has not returned to the Daily News Parties the Epstein Recording or Transcript that had been submitted to the district court for *in camera* review; and

WHEREAS, in the May 20 Order, Judge McKenna directed that the Epstein Recording and Transcript be maintained by the District Court in chambers or under seal until after any appeal from the May 20 Order is decided; and

WHEREAS the trial in the Doe Action is currently scheduled to commence on July 19, 2010; and

WHEREAS the Daily News Parties intend to seek expedited appellate review of the May 20 Order by the Second Circuit Court of Appeals (the "Second Circuit"); and

WHEREAS, on June 8, 2010, the Daily News Parties filed a motion in the Ancillary Proceeding, by way of order to show cause, requesting certification of the May 20 Order for interlocutory appeal under 28 U.S.C. § 1292(b) and expedited determination of the motion (the "Certification Motion"); and

WHEREAS, upon further consideration and consultation with each other regarding the finality of the May 20 Order, Doe's counsel and counsel for the Daily News Parties now believe in good faith that the May 20 Order is a final appealable order under 28 U.S.C. § 1291 and the doctrine set forth in *United States v. Cuthbertson*, 651 F.2d 189 (3d Cir. 1981) (the "*Cuthbertson* Doctrine"); and

WHEREAS, in the alternative, if the Second Circuit does not find the May 20 Order to be a final appealable order, Doe consents to the Daily News Parties' motion for issuance of an order certifying the May 20 Order for interlocutory appeal (the "Certified Order"); and

WHEREAS both Doe and the Daily News parties intend to request that the Second Circuit review the May 20 Order and issue a decision by the July 19, 2010 start date of the Doe Action trial;

NOW THEREFORE, the undersigned counsel for Doe and the Daily News Parties stipulate and agree as follows:

1. On June 11, 2010, counsel for the Daily News Parties shall submit to the district court in the Ancillary Proceeding a joint letter on behalf of all parties indicating Doe's consent to certification of the May 20 Order for interlocutory appeal under 28 U.S.C. § 1292(b) in the event that the Second Circuit disagrees with the parties' conclusion that the Order is a "final" order that can be appealed under 28 U.S.C. § 1291.

2. No later than or before the end of the day on June 15, 2010, the Daily News Parties shall file with the Second Circuit and serve a Notice of Appeal from the May 20 Order (the "Appeal").

3. In the event the district court grants the Certified Order, and, if possible, simultaneously with the Notice of Appeal, the Daily News Parties will file in the Second Circuit and serve a consent motion requesting permission to appeal from the May 20 Order, accompanied by the Certified Order. Doe agrees to consent to, and not oppose, the Daily News Parties' motion to the Second Circuit requesting permission to appeal from the May 20 Order pursuant to the Certified Order.

4. By June 21, 2010, the Daily News Parties shall file with the Second Circuit a consent motion requesting expedited consideration and determination of the Appeal before the July 19 trial commencement date in the Doe Action. The Daily News Parties shall submit with their motion their Appellants' Brief and the Appendix. In their motion for expedited consideration and determination of the Appeal, the Daily News Parties shall request that the Second Circuit set the following schedule:

- (a) that Doe's Appellee's Brief be filed and served by June 28, 2010;
- (b) that the Daily News Parties' Reply Brief be filed and served by July 2, 2010;
- (c) that the Second Circuit determine the Appeal before July 19, 2010. The Daily News Parties will also request that oral argument be scheduled for the earliest possible date on the grounds that oral argument will assist in resolution of the Appeal and will not cause delay; and Jane Doe will oppose oral argument on the grounds that the issues are sufficiently presented in the briefs, that no oral argument is need to illuminate the issues and that scheduling an oral argument might lead to delay until after the start of the July 19 trial date.

5. Doe shall submit her Appellee's Brief by June 28, 2010, or by whatever other date the Second Circuit fixes, and the Daily News Parties shall submit their Reply Brief by July 2, 2010, or by whatever other date the Second Circuit fixes.

6. The parties agree that the Epstein Recording and the Transcript may be transmitted under seal to the Second Circuit for *in camera* review by the Second Circuit in connection with its determination of the Appeal. The parties agree to cooperate with each other in seeking access by a representative of the Daily News Parties to the Epstein Recording device being held by the district court for the sole purpose of making multiple copies of the Epstein Recording (and no other material on the Recording Device) to submit under seal to the Second Circuit in connection with the Appeal, provided that the Daily News Parties shall not remove the Epstein Recording device from the district court or Second Circuit and the Daily News shall pay the costs of making such multiple copies.

7. Both Doe and the Daily News Parties agree to take the position on appeal that, under the *Cuthbertson* Doctrine, the May 20 Order is a final order within the meaning of 28 U.S.C. § 1291 because the district court has possession of the Epstein Recording and, accordingly, the Daily News Parties cannot go into contempt by refusing to turn over the Epstein Recording.

8. In the event that the Second Circuit dismisses the Appeal on the ground that the May 20 Order is non-final and denies permission for interlocutory appeal from the May 20 Order (in the event the Certified Order is issued), the parties agree as follows:

- (a) the Daily News Parties shall not consent to the turn over of the Epstein Recording or Transcript by the district court to Doe;

- (b) Doe's counsel shall promptly file an expedited motion (the "Contempt Motion") with the district court to hold the Daily News Parties in contempt and/or requesting other relief as would be necessary to secure a final appealable order requiring production of the Epstein Tape and Transcript (the "Contempt Order"). In the Contempt Motion, Doe shall not request a monetary fine, jail time or any criminal penalty or other sanction against the Daily News Parties, and shall ask the district court in its Contempt Motion to not impose a monetary fine, jail time or any criminal penalty or other sanction against the Daily News Parties;
- (c) the Daily News Parties shall not oppose the issuance of a contempt citation or other order necessary to secure a final appealable order, except that the Daily News Parties shall be entitled to oppose the imposition of any monetary fine, jail time, criminal penalty or other sanction by the district court in its Contempt Order;
- (d) within one business day following the district court's issuance of the Contempt Order and actual notice of the same, the Daily News Parties shall file with the Second Circuit and serve a Notice of Appeal from the Contempt Order (the "Contempt Appeal");
- (e) Doe shall consent to any motions made by the Daily News Parties (whether in the district court or Second Circuit) to stay enforcement of the Contempt Order and/or production of the Epstein Recording and Transcript to Doe pending the Contempt Appeal, and shall not seek production of the Epstein Recording or Transcript pending the Contempt Appeal;

(f) Within four business days following the district court's issuance of the Contempt Order and actual notice of the same, the Daily News Parties shall file with the Second Circuit a consent motion requesting expedited consideration and determination of the Contempt Appeal. The Daily News Parties shall submit with their motion their Appellants' Brief and the Appendix. In their motion for expedited consideration and determination of the Contempt Appeal, the Daily News Parties shall request that the Second Circuit set the following schedule:

- (i) that Doe's Appellee's Brief be filed and served within four business days after the Appellants' Brief;
- (ii) that the Daily News Parties' Reply Brief be filed and served within two business days after the Appellee's Brief;
- (iii) that the Second Circuit set oral argument for the earliest available date and determine the Appeal at the earliest possible date.

9. In the event that the Second Circuit, either in the Appeal or in any Contempt Appeal, determines that the district court was correct in ordering the Daily News parties to turn over the Epstein Recording and Transcript to Doe (the "Affirmance"), (a) the Daily News Parties shall seek no further appeal or review of the Affirmance; and (b) the Daily News Parties, if requested by Doe's counsel, shall promptly take reasonable steps necessary to assist with the release of the Epstein Recording and Transcript to Doe's counsel.

10. In the event that the Second Circuit, either in the Appeal or in any Contempt Appeal, reverses the district court finding and orders that the Epstein

Recording and Transcript not be produced to Doe (the "Reversal"), Doe agrees not to seek further appeal or review of the Reversal.

11. In the event the Second Circuit, either in the Appeal or in any Contempt Appeal, remands to the district court for further proceedings consistent with its opinion, all parties reserve their right to appeal and seek review from any further decision by the district court.

12. The undersigned counsel for Doe agrees that this Stipulation and the decisions in this proceeding shall be binding on the other plaintiffs they are representing in other proceedings against Jeffrey Epstein. Doe's counsel further agrees to adjourn *sine die* the return date of any of the other subpoenas directed to the Daily News Parties in these other proceedings until after the decision by the Second Circuit in the Appeal or in any Contempt Appeal and, to the extent the Second Circuit remands to the district court for further proceedings, after any district court decision following remand. Doe's counsel further agrees that they will recommend to counsel for other plaintiffs who they are not representing in suits against Epstein to similarly adjourn *sine die* the return dates of any subpoenas directed to the Daily News Parties in those proceedings until after the decision by the Second Circuit in the Appeal or in any Contempt Appeal and, to the extent the Second Circuit remands to the district court for further proceedings, after any district court decision following remand.

13. The Daily News' Parties agree to be bound by the Second Circuit decision in this proceeding, and the district court decision on any remand, in connection with subpoenas from other plaintiffs in claims against Epstein.