

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

<p>██████████ ██████████,</p> <p>Plaintiff,</p> <p>—<i>against</i>—</p> <p>GHISLAINE MAXWELL,</p> <p>Defendant.</p>	<p>15 Civ. 7433 (RWS)</p>
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**REPLY MEMORANDUM OF LAW IN SUPPORT OF
INTERVENORS' MOTIONS FOR LEAVE TO INTERVENE
AND TO MODIFY THE PROTECTIVE ORDER**

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Third-Party Proposed Intervenors Jeffrey Epstein and Lesley Groff respectfully submit this Reply Memorandum of Law in support of their motions to a) intervene in the ██████ Matter “Motion to Intervene”), and b) modify the Protective Order to permit the Intervenors to use the Jane Doe Evidence in support of their motion to dismiss the *Jane Doe* Matter (“Motion to Modify”) (together the “Motions”), and in response to the opposition submitted by Non-Party Jane Doe and Plaintiff ██████ ██████ (“█████”).¹

SUMMARY OF THE REPLY

Jane Doe and ██████ do not object to the Motion to Intervene. And while Jane Doe and ██████ oppose the Motion to Modify, they concede that the Jane Doe Evidence is relevant to the *Jane Doe* Matter, subject to discovery in the *Jane Doe* Matter, and relevant (at least in part) to the Intervenors’ motion to dismiss the *Jane Doe* Matter. Perhaps most critically, Jane Doe and ██████ both acknowledge that they objected to the designation of a significant portion of the Jane Doe Evidence as “confidential” under the terms of the Protective Order. Jane Doe and ██████ have no good faith basis for objecting to the Motion to Modify. And yet they do, principally because the Jane Doe Evidence is, in fact, dispositive of the Intervenors’ motion to dismiss in the *Jane Doe* Matter.

ARGUMENT

Jane Doe and ██████ assert that the Motion to Modify should be denied, contending that the Jane Doe Evidence should not be considered in support of the Intervenors’ motion to dismiss and because, Jane Doe believes, the Intervenors will use the evidence to embarrass her in a public filing. Neither contention has merit. The Jane Doe Evidence in its entirety is relevant to the Intervenors’ motion to dismiss, and the Intervenors’ have no objection to the entry of an

¹ Unless otherwise specified, capitalized terms here have the same meanings as in Intervenors’ opening brief.

appropriate protective order in the *Jane Doe* Matter if Jane Doe now concludes that her evidence should be given a confidential designation. Moreover, Jane Doe's assertion that portions of the Jane Doe Evidence should nonetheless remain bottled up by the Protective Order is highly disingenuous since Jane Doe previously opposed the confidential designation.

A. The Jane Doe Evidence Is Relevant to the Motion to Dismiss the *Jane Doe* Matter

Jane Doe and [REDACTED] have already conceded that the Jane Doe Evidence is, in significant part, relevant to the motion to dismiss the *Jane Doe* Matter. Opp. at 4-5. The only point of disagreement with the Intervenors is whether all (and not just a portion) of the Jane Doe Evidence should be available to the Intervenors to support the motion to dismiss. Intervenors respectfully submit that the Protective Order should be modified to permit the Intervenors to use the entirety of the Jane Doe Evidence.

A modification of the Protective Order so as to permit the use of all of the Jane Doe Evidence is consistent with preliminary decisions issued in the *Jane Doe* Matter. Specifically, the Intervenors have, on two occasions, asked the Court presiding over the *Jane Doe* Matter to permit the Intervenors to file their motion to dismiss *after* this Court rules on the Motion to Modify. The Intervenors have advised the Court in the *Jane Doe* Matter, as they have this Court in the instant proceedings, that the Jane Doe Evidence bears directly on the motions to dismiss based on the expiration of the applicable statutes of limitations and the lack of personal jurisdiction. The Jane Doe Evidence also strongly supports the view that the *Jane Doe* Matter should be dismissed with prejudice because it would be futile for Jane Doe to attempt to plead a legally sufficient complaint. In response, the Court presiding over the *Jane Doe* Matter has, on two occasions, stayed the schedule for Intervenors to submit their motion to dismiss pending a

decision of this Court on the Motion to Modify. See Judge Koeltl's July 17 Order (Exh. B.) and Order of October 18, 2017 (EFC #67). The decisions of the *Jane Doe* Matter Court to suspend the filing of the motion to dismiss until a decision on the Motion to Modify in this case is entirely consistent with New York law. It is well-settled that a court may consider evidence outside of the complaint on a motion to dismiss based on personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2). See *Pearson Educ., Inc. v. Kumar*, 721 F. Supp. 2d 166, 182 (S.D.N.Y. 2010) (a court may consider documents outside of the complaint on a motion to dismiss for lack of personal jurisdiction under Rule 12(b)(2), as the motion "is inherently a matter requiring the resolution of factual issues outside of the pleadings").

B. Intervenor's Are Agreeable to a New Protective Order

Jane Doe's repeated contention that Intervenor's are seeking to use the evidence to "embarrass her in a public filing" is baseless. Opp. at 4, 6. Intervenor's have already expressly committed in their opening brief that they "are fully prepared to enter into a protective order in the *Jane Doe* Matter setting appropriate limits on their use of the Jane Doe Evidence in that proceeding." Mov. Mem. at 13. That should put Jane Doe's unfounded contention to rest.

C. Jane Doe's Efforts to Preserve the Protective Order is Disingenuous

Jane Doe and ██████ argue that a portion of the Jane Doe Evidence should remain bottled up by the Protective Order despite the fact that all of the Jane Doe Evidence is relevant to the Motion to Dismiss. This position is simply disingenuous. During the pendency of the ██████ Matter, both Jane Doe and ██████ took the position that this evidence was not "confidential" for purposes of the Protective Order. In fact, they expressly objected to the designation of Jane Doe's deposition transcript as confidential. Notably, Jane Doe took this position while being represented by the same attorneys in both the ██████ and *Jane Doe* Matters.

See letter from counsel for both Jane Doe and ██████ attached to the submission from defendant Ghislaine Maxwell dated October 19, 2017. It would appear that they took this position after ██████ had reached settlement in the ██████ Matter, and in anticipation of using the evidence in the *Jane Doe* Matter. They now seek to reverse ground and deem the remaining portion of the Jane Doe Evidence to be confidential simply because they wish to prevent the Court in the *Jane Doe* Matter from having this evidence in its consideration of the motion to dismiss.²

The documents that Jane Doe and ██████ wish to keep under the veil of the Protective Order fall into two categories – Jane Doe’s communications with a tabloid reporter and Jane Doe’s photographs. Opp. at 6. Both categories of documents should be made available to Judge Koeltl in support of the Intervenors’ motion to dismiss.

As to her email communications with a tabloid newspaper, Jane Doe contends that they are not relevant because they are “2016 communications.” Opp. at 6 (emphasis in original). These communications, however, contain Jane Doe’s commentaries on contemporaneous communications, and consist of Jane Doe’s emails that are full of her supposed recollection of the events at issue in the *Jane Doe* Matter. E.g., ██████ (“I thoroughly went through every single email that was sent and received during my time in New York from September 2006-2007”; and “Jeffery [sic] [Epstein] assured me”). Those documents are therefore relevant to the *Jane Doe* Matter and the motion to dismiss, and should be made available to the Court presiding over the *Jane Doe* Matter. Moreover, having sent these emails to a newspaper and for the purpose of having the contents of the emails published, Jane Doe has

² ██████ provided no basis for her, as opposed to Jane Doe, to keep the materials confidential. ██████ does not contend that the Jane Doe Evidence implicates *her* common law or statutory interests as required by the Protective Order in order for her to make a confidential designation. Protective Order, ¶3. There is thus no basis for ██████ to oppose this motion.

no good faith basis to now claim that they are confidential.

As to the photographs, Jane Doe contends that they are not relevant and that they “could only be used to publicly humiliate and intimidate her.” Opp. at 7. There is, however, nothing embarrassing or humiliating about these photographs – they depict various vistas of a Caribbean island and a number of visitors to that island. None of the photographs are prurient in nature. And critically, they all predate 2007 and powerful proof that the relationship at issue in the *Jane Doe* Matter occurred more than ten years before the *Jane Doe* Matter was filed. Indeed, Jane Doe herself describes the photographs as pictures of the “Epstein girls and I, whilst on the island” that housed a residence of Epstein. [REDACTED] Jane Doe’s only visits to the island occurred more than ten years before the lawsuit was filed.

Jane Doe’s position that she does not want these photographs aired publicly also conflicts directly with her position previously taken in objecting to the designation of her transcript as confidential. The photographs were marked at her deposition as exhibits and Jane Doe testified extensively as to them. Dep. 328-48. Having objected to confidential treatment of her testimony, there is no principled reason for Jane Doe now to claim confidentiality of the photographs.

Jane Joe’s current claim of confidentiality is also directly contradicted by how she previously treated the photographs. Before she filed the *Jane Doe* Matter, Jane Doe had no hesitation in sharing the photographs with a tabloid newspaper and to seek a public airing of the photographs. Indeed, she sent the newspaper pictures of her after a supposed suicide attempt for which she blames the Intervenors, stating: “I want everyone to know what they [Intervenors] did to me.” [REDACTED]-78.

Jane Doe also sought a public airing of the materials in a live TV interview.

██████████ (“I am speaking with a PR Agency ... about doing a live TV interview on the whole Epstein story”). In sum, Jane Doe’s own conduct before and after she filed the *Jane Doe* Matter demonstrates that there is nothing confidential about any of the Jane Doe Evidence.

D. The Law Supports the Release of All of the Jane Doe Evidence

Jane Doe and ██████████ argument that Intervenor’s cannot move to modify the Protective Order because they are not parties is baseless. First, the Protective Order does not limit its modification only at the request of the parties in the ██████████ Matter. Instead, anyone may seek a modification of the Protective Order “at any time for good cause.” Protective Order, ¶ 14. Intervenor’s have amply demonstrated good cause, including: (a) judicial efficiency; and (b) the Jane Doe Evidence is not confidential as shown by Jane Doe and ██████████ own conduct; (c) Intervenor’s are already in possession of the documents. Second, the contention that the “Protective Order does not allow for non-parties to challenge” confidential designation (Opp. at 8) is contradicted by Jane Doe’s own conduct when she, a non-party in this action, objected to the confidential designation of her transcript. Third, and in any event, Intervenor’s have first asked this Court for leave to intervene in the action, to which Jane Doe and ██████████ present no objection. Once they have intervened, Intervenor’s will be parties to this action for purposes of this motion, at which time the Court will consider Intervenor’s Motion to Modify.³

Jane Doe and ██████████ next contention that cases cited by Intervenor’s are factually

³ To follow Jane Doe and ██████████ limited reading of the Protective Order to its logical conclusion, Jane Doe never had standing to designate anything confidential pursuant to the Protective Order. The order provides that only those materials implicating the interests of “(a) plaintiff ██████████ ██████████ and (b) defendant’s Ghislaine Maxwell” can be designated confidential. Protective Order, ¶3. It does not provide for confidential designation to protect Jane Doe’s interests. Any confidential designation for the purpose of protecting Jane Doe’s interests would therefore be a nullity.

distinguishable is meaningless since Jane Doe and ██████ do not challenge the underlying legal principles that apply here. Specifically, Jane Doe and ██████ do not challenge two key propositions. First, that it is unreasonable for Jane Doe and ██████ to rely on the belief that the Protective Order would never be modified, particularly since they originally objected to the Jane Doe Evidence being treated as confidential under that Protective Order. Second, that a protective order may be modified to allow a third party to use already-produced documents from one action in a separate action with similar facts. *See Charter Oak Fire Ins. Co. v. Electrolux Home Prods., Inc.*, 287 F.R.D. 130, 134 (E.D.N.Y. 2012) (modifying a protective order to allow documents and testimony in that case to be used in another civil proceeding where the two cases shared the same operative facts); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 n.7 (2d Cir. 2004) (parties cannot rely on protective orders that are on their face temporary); *In re Visa Check/MasterMoney Antitrust Litig.*, 190 F.R.D. 309, 313-14 (E.D.N.Y. 2000) (modifying protective order where the intervenor already had possession of the documents in question). This Court should use its power to modify the Protective Order and allow the Intervenors to use the Jane Doe Evidence to support their motion to dismiss.

In sum, the Jane Doe Evidence is relevant to the Intervenors' motion to dismiss the *Jane Doe* Matter because it was filed after the expiration of the applicable statute of limitations and the Court in the *Jane Doe* Matter lacks jurisdiction over the Intervenors. Moreover, the Jane Doe Evidence proves that the *Jane Doe* Matter should be dismissed with prejudice. While Jane Doe and ██████ opposed the designation of the Jane Doe Evidence as confidential under the Protective Order, the Intervenors welcome the issuance of a protective order in the *Jane Doe* Matter covering this evidence. Jane Doe and ██████ opposition to the Motion to Modify the Protective Order is disingenuous and should be rejected.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request the Court to grant their motion.

Dated: New York, New York
October 26, 2017

Respectfully submitted,

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