UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-2868 Caption [use short title]

Motion for: to Reconsider and Vacate Court's Order to Show Cause and March 13 Order to Produce Sealed Materials, and to Hold the Orders in Abeyance

Set forth below precise, complete statement of relief sought:

Order to Show Cause and March 13 Order should be reconsidered and vacated

[redacted] v. Maxwell

MOVING PARTY: Defendant Ghislaine Maxwell **OPPOSING PARTY:** Plaintiff [redacted]

☐ Plaintiff ☑ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Ty Gee **OPPOSING ATTORNEY:** Paul Cassell

[name of attorney, with firm, address, phone number and e-mail]

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Court- Judge/ Agency appealed from: Hon. Robert W. Sweet, District Judge (S.D.N.Y.)

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☑ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☑ Yes ☐ No ☐ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☑ No

Has this relief been previously sought in this court? ☐ Yes ☑ No

Requested return date and explanation of emergency:

The motion requests that post argument orders be held in abeyance pending resolution of the motion.

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: March 6, 2019

Signature of Moving Attorney:

s/ Ty Gee **Date:** 3/15/2019 Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[redacted],

Plaintiff-Appellee,

v.

GHISLAINE MAXWELL,

Defendant,

v.

SHARON CHURCHER, JEFFREY EPSTEIN,

Respondents,

JULIE BROWN, MIAMI HERALD MEDIA COMPANY,

Intervenors-Appellants

No. 18-2868

Appellee Maxwell's Motion to Reconsider and Vacate the Court's Order to Show Cause and March 13 Order to Produce Sealed Materials, and to Hold the Orders in Abeyance Pending Disposition of This Motion

Appellee Ghislaine Maxwell, through her attorneys Haddon, Morgan and Foreman, P.C., moves the Court (1) to reconsider and vacate its Order to Show Cause and its Order of March 13, 2019, to Produce Sealed Materials, and (2) to hold in abeyance the Orders until the disposition of this Motion.

Introduction

The panel's Order to Show Cause and March 13 Order directing the appellees to produce the sealed and redacted summary judgment papers that were not part of the joint appendix suggest the panel intends to supplant the district court in determining whether the summary-judgment papers should be unsealed. We respectfully submit that the panel is acting well outside and contrary to the Supreme Court and this Court's own precedents.

The question before the panel is whether the district court abused its discretion in denying motions to unseal court filings. If the Court concludes the district court abused its discretion, the remedy is remand to the district court for further proceedings consistent with the Court's directions. That consistently and without exception has been the relief this Court has afforded appellants successfully challenging an order denying a motion to unseal.

In the event this Court determines the district court abused its discretion in denying the unseal motions, the only means to adequately protect the compelling interests at stake is to remand to the district court. It is that court—not the Second Circuit—that authorized the discovery into the sexual and other private acts and history of the parties and non-parties based on Ms. [redacted] representations about the relevance of the discovery. And it is the district court—not this Court—that

has the ability to balance the public's interest in access to the discovery in court filings against Ms. Maxwell's and the non-parties' compelling interests.

This is an extraordinary case. Ms. [redacted] for more than a decade has actively pursued publicity and money for her story of alleged child sex trafficking. She has publicly accused numerous private and public individuals of having sex with her. When Ms. Maxwell, a private figure, denied Ms. [redacted] accusation that she was involved in the alleged sex trafficking, Ms. [redacted] sued her for "defamation." In an expansive fishing expedition she then used the discovery process to coerce Ms. Maxwell and dozens of non-parties to disclose to her highly sensitive, embarrassing and confidential information about their personal lives, including information about their consensual sexual activities with their significant others.

To persuade the district court to permit her intrusive discovery, Ms. [redacted] counsel readily agreed to the restrictions on disclosure imposed by the protective order. Now, having secured this sensitive, embarrassing and confidential information with the protective order, Ms. [redacted], with the aid of the Miami Herald, is seeking to make public all the information she secured with the district court's authority and assistance. If Ms. [redacted] prevails in opening up all the sealed and redacted information, not only will she be able to continue pursuing

publicity for profit, but also she will be able to engage in the prurient trafficking of others' private, personal and confidential information in service of her ongoing business of selling her exotic and false story. By using unsealed judicial documents, she will be insulated from any recourse by those whose privacy interests she has destroyed in unsealing and then publicizing their information.

The Supreme Court was correct that "the decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 599 (1978). The panel lacks the context and familiarity with the facts, the parties and the non-parties to adequately protect the compelling privacy interests at stake, and it will be unable to narrowly tailor an order that balances the presumptive right of access and the compelling interests of the parties and non-parties. Accordingly the panel should vacate the Order to Show Cause and the March 13 Order, decide the appeals and, if appropriate, remand the matters to the district court for further proceedings. To the extent expedition is required, the panel has the authority to direct the district court to act promptly—as it did in *Lugosch*[1]—on the unseal motions.

[1] *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006).

Factual Background

Two related appeals are pending before the panel. The appeals were consolidated for oral argument, which was held on March 6, 2019.

Appeal No. 18-2868. This is the appeal at bar. In April 2018, nearly a year after the underlying defamation action was settled and the case closed, Intervenors-Appellants Julie Brown and Miami Herald Media Company's (collectively, "Miami Herald") moved to make available to the public all sealed and redacted court filings. District Judge Sweet held a hearing in May 2018, and denied the motion in August 2018.

In its appellate briefs the Herald did not argue the district court misconstrued the law, only that it failed to conduct a sufficiently detailed analysis on the record. *See, e.g.*, Doc.51 at 16 ("At a [m]inimum," the district judge "should have" made the "judicial document determination "on a document-by-document basis."); *id.* at 17-18 ("The District Court should have explained—*and must now be instructed to explain*—whether or not each individual document falls within the broad definition of judicial documents . . . .") (emphasis supplied).

Ms. Maxwell argued in her answer brief that if the Court concludes the district court abused its discretion, the appropriate remedy is to remand the case for further proceedings so that the district court—with the benefit of the Court's

opinion and directions—may "balance the competing interests on a document-by-document basis." Doc.95 at 30.

The Herald included in its joint appendix (which was compiled with co-appellee [redacted] but not Ms. Maxwell) only redacted submissions. It did not request that the district court transmit any unredacted or sealed court submissions.

Appeal No. 16-3945. Appellant Dershowitz moved to unseal various documents in August 2016; the district court denied the motion in November 2016. Appellant Cernovich moved to unseal the summary judgment submissions in January 2017; the district court denied the motion in May 2017. Both appealed.

Mr. Dershowitz appealed first. In February 2017 he moved to hold his appeal in abeyance. Then in April 2017 he stipulated to dismissal of his appeal without prejudice. In July 2017 he moved to reinstate his appeal and to consolidate it with Mr. Cernovich's appeal. Merits briefing concluded by early 2018. Supplemental briefing was concluded by April 2018.

Discussion

None of the appellants is entitled to circumvent the protections afforded the parties and non-parties under this Court's right-to-access jurisprudence.

The appellants Miami Herald, Dershowitz and Cernovich—and the Court in its Order to Show Cause—rested heavily on *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). With respect, neither *Lugosch* nor any of the other

Second Circuit cases supports the position the panel appears to be taking here—that it should substitute itself for the district court on an expedited basis to exercise the discretion reposed in the district judge, contrary to the Supreme Court's teaching in *Nixon*.

Reposing this discretion in the district court is founded on two principles. One is that the sealed materials were filed in that court, and every court has "inherent 'supervisory power over its own records and files,'" *United States v. Erie Cty., N.Y.*, 763 F.3d 235, 240 (2d Cir. 2014) (quoting *Nixon*, 435 U.S. at 598); *accord Newsday LLC v. County of Nassau*, 730 F.3d 156, 163 (2d Cir. 2013). The second principle is that "balanc[ing] the public's interest in access to judicial documents against the privacy interests of those resisting disclosure" and the decision whether and how much to seal the record are "'best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.'" *Application of Utica Mut. Ins. Co. v. INA Reinsurance Co.*, 468 Fed. Appx. 37, 39 (2d Cir. 2012) (citing *Lugosch*, 435 F.3d at 119-20; quoting *Nixon*, 435 U.S. at 599); *accord, e.g.*, *United States v. Aspinall*, 211 F. App'x 41, 42 (2d Cir. 2007); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997).

At oral argument the appellants recognized that if this Court found an abuse of discretion, remand was appropriate with directions to review the sealed materials document by document and make specific findings. Counsel for the Miami Herald argued that the district judge, with counsel present, could review each document and decide all the seal and redaction questions within a matter of several hours.

The panel has indicated it intends to deviate substantially from *Nixon*: it will "unseal"[2] documents filed and placed under seal in another court, i.e., the district court, rather than permit that court to exercise its discretion under *Nixon* and its Second Circuit progeny. The deviation from *Nixon* is predicated on the panel's apparent conclusions that the district court (or the appellees) unjustifiably delayed resolution of the unseal motions and its abuse of discretion in failing to adhere to the Second Circuit's "clear[]"[3] precedent. We respectfully submit that neither conclusion warrants the extraordinary action being contemplated by the panel.

A. The district court caused no delays in the judicial resolution of the unseal motions.

The panel's issuance of the post-argument orders within days of the oral argument and the short deadlines imposed for compliance with the orders suggest

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[2]Doc.138 at 2.

[3]*Id.*

the panel has concluded that the district court (or Ms. Maxwell or Ms. [redacted]) unjustifiably delayed public access to the summary judgment papers. This is incorrect.

In *Lugosch* the Second Circuit was understandably impatient with the district court's delay in acting on two newspapers' motion to intervene to unseal the summary judgment filings, including 4,000 pages of exhibits. The newspapers filed the intervention motion in June 2004, six weeks after the defendants moved for summary judgment. The district court referred the motion to a magistrate judge. When the newspapers requested to attend oral argument on the summary judgment motion, the district court said it would not hear oral argument. 435 F.3d at 114.

In August 2004 the magistrate judge noted that "in light of the pace of this litigation and the fact that the pending summary judgment motion has not been fully briefed, the Court does not share the [newspapers'] sense of urgency in terms of expediting the within matter." *Id.* at 114. The magistrate judge set a briefing schedule on the intervention motion that resulted in its being fully briefed in late September 2004, "three months"—this Court noted—"after the motion had been filed." *Id.* While awaiting the magistrate judge to act on the intervention motion, the newspapers and parties agreed the newspapers would have access to the

summary judgment papers except for attorney-client communications. They submitted the agreement to the magistrate judge.

"Months passed" without any action on the intervention motion. *Id.* In March 2005 the newspapers "requested a prompt determination of their motion," noting that it had been fully submitted "for over five months" and that the sole issue remaining was the extent to which privileged information would be open to the public. "Another month passed." *Id.* at 115.

In April 2005 the newspapers again requested action from the magistrate judge. Three days later the magistrate judge "finally" issued an order on the intervention motion. *Id.* "Instead of resolving the motion on the merits, however," he ordered that the motion be held in abeyance pending the district court's determination of the summary judgment motion. *Id.* He ruled it was "'premature'" to decide whether the documents at issue were relevant for right-to-access purposes until after the district judge had ruled on the summary judgment motion. *Id.*

The newspapers objected to the order under Federal Rule of Civil Procedure 72. The parties disputed the importance of some of the documents sought by the newspapers, with the defendants suggesting they were unimportant and the plaintiffs arguing otherwise. The district court scheduled oral argument to

June 29, 2005. *Id.* The newspapers said they would object to the court's closing the courtroom without on-the-record, particularized findings of fact and articulation of a compelling interest. *Id.* at 116.

In late June, more than a year after the newspapers moved to intervene, the district court entered an order overruling the Rule 72 objections and approve the magistrate judge's order. The court ruled in part that it was doubtful "'the entirety of this massive motion record'" would be relevant and useful to the judicial function and premature to decide whether the contested documents were judicial documents. *Id.* When the newspapers again objected to closing any part of the oral argument, the district court canceled the oral argument, "saying only that the motion would be decided on submission without providing any explanation for the change in plans." *Id.*

The newspapers filed an "expedited appeal." *Id.* This Court noted it heard oral argument "approximately 17 months after the intervention motion was filed and approximately 18 months after the summary judgment motion was filed," yet "no decision on the summary judgment motion had yet been rendered." *Id.*

The *Lugosch* facts stand in sharp contrast to the case at bar:

- In August 2016 Mr. Dershowitz moved to unseal certain papers. In November 2016 the court denied the motion. Mr. Dershowitz immediately appealed, and then voluntarily delayed, dismissed and subsequently asked to reinstate his appeal. Because of his own self-

inflicted delays, Mr. Dershowitz's appeal was not orally argued until March 6, 2019.

- In January 2017 Ms. Maxwell moved for summary judgment. The parties filed more than 2,000 pages of materials. In March 2017 the district court denied the summary judgment motion.
- In January 2017 Mr. Cernovich moved to unseal the summary judgment papers. In May 2017 the court denied the motion. Mr. Cernovich appealed.
- In May 2017 Ms. [redacted] and Ms. Maxwell settled the lawsuit and the district court dismissed the case with prejudice.
- Eleven months later, in April 2018, the Miami Herald filed its unseal motion. In August 2018, the district court denied it. This appeal followed, with oral argument heard earlier this month, after Mr. Dershowitz moved to continue the argument scheduled originally for February 2019.

In short, whatever the panel may decide about the merits of Judge Sweet's orders denying the unseal motions, each of the orders was entered promptly, particularly given the volume of court submissions (by the conclusion of the action, the docket contained some 1,000 court filings spanning more than 25,000 pages).

Instructive is the Second Circuit's resolution of *Lugosch*, where (a) the district court failed to rule on the newspapers' intervention motion after it had been pending for more than a year, and (b) the Second Circuit's suggested the district court deliberately had delayed resolution of the motion. The Second Circuit held "the district court erred not only in failing to make the specific, on-the-record findings required . . . but also in failing to act expeditiously." 435 F.3d at 126.

Despite its concerns about the district court's delay, the Second Circuit did *not* issue an order to show cause to the parties requiring them to establish why the Second Circuit itself on appeal should not unseal the summary judgment materials. Instead, it remanded the case to the district court to conduct expeditiously the appropriate balancing of the public's right of access and the parties' interests with this admonition: "We take this opportunity to emphasize that the district court must make its findings quickly. Our public access cases . . . emphasize the importance of immediate access where a right to access is found." *Id.*; *see id.* at 113 ("we remand for the district court to make specific—and immediate—findings"). The Second Circuit directed that the mandate issue "forthwith" "to avoid any further delay in determining *whether and to what extent the Newspapers are entitled to the relief they seek*." *Id.* at 127 (emphasis supplied).

We respectfully submit that to the extent the panel's post-argument orders suggest the district court unjustifiably delayed the resolution of the unseal orders, it misapprehended the facts. To the extent it concluded that the panel itself should conduct the right-to-access balancing, it misapprehended *Nixon* and its Second Circuit progeny.

B. An appellate court is ill-positioned to conduct the fact-specific balancing of the competing interests in public access to sealed documents and to narrowly tailor an appropriate seal order.

The Second Circuit held in *Lugosch* that documents submitted to a court in support of or in opposition to a summary judgment motion are judicial documents to which a presumption of immediate public access attaches under the First Amendment. 435 F.3d at 126. But a First Amendment presumption is not a talisman throwing open all sealed materials. It may be overcome by "specific, on-the-record findings that higher values necessitate a narrowly tailored sealing." *Id., quoted in* Opinion Denying Miami Herald's Unseal Motion, *reprinted in* Special Appendix 26 (Doc.51); *see Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) ("[O]ur recognition of a qualified First Amendment right of access to the motion papers filed here does not mean that the papers must automatically be disclosed. The First Amendment right of access to criminal proceedings is not absolute. Proceedings may be closed and, by analogy, documents may be sealed if 'specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'") (quoting *Press-Enter. Co. v. Superior Court of Cal. for Riverside Cnty.*, 478 U.S. 1, 9 (1986); internal quotations altered); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (cited with approval in *Lugosch* and applying presumption of access to summary judgment

papers: "We do not say that every piece of evidence, no matter how tangentially related to the issue or how damaging to a party disclosure might be, must invariably be subject to public scrutiny. An exercise of judgment is in order. The importance of the material to the adjudication, the damage disclosure might cause, and the public interest in such materials should be taken into account before a seal is imposed.").

At oral argument, neither the parties to the appeals nor the panel itself suggested the district court's opinion denying the Miami Herald's unseal motion misstated the right-to-access law. To the contrary the Opinion correctly summarized the law, and properly identified the leading cases from the United States Supreme Court and this Court. *See, e.g.*, Sp.App. 16-26.

The gravamen of the appellants' argument centered on—and many of the panel's questions were directed to—whether the district court examined each of the sealed and/or redacted filings and made the findings required under *Nixon* and this Court's access cases. Appellants argued and the panel's questions suggested the district court did not make the requisite findings, and we conceded during oral argument that the court did not explicitly make those findings.

Upon an appellate conclusion that the district court failed to make the requisite findings, this Court's "precedent clearly establishes," Doc.138, that

vacatur of "the district court's decision and remand for further proceedings consistent with [the Second Circuit's] opinion" are the appropriate remedies. *Lugosch*, 435 F.3d at 126; *see Hardy v. Equitable Life Assur. Soc'y of U.S.*, 697 Fed. Appx. 723, 725 (2d Cir. 2017) ("Courts have found that interests such as protection of ongoing investigations, safety of witnesses, national security, and trade secrets may be sufficient to defeat the presumption. We leave it to the district court to identify any interest in favor of secrecy sufficient to defeat the presumption that court orders be open to the public."); *id.* at 726 (On remand, the district court shall consider whether any interests can overcome the common law and First Amendment presumptions of access to the two court orders."); *Lugosch*, 435 F.3d at 125 (noting that issues of appeal involved "fact-specific inquiry" over whether contested documents were subject to attorney-client privilege, and whether defendants waived privilege, but "[t]here is nothing in the record to allow us to review or conduct such an inquiry. Accordingly, we remand for the district court to make the necessary findings."); *United States v. Amodeo*, 71 F.3d 1044, 1053 (2d Cir. 1995) (remanding on appeal from first remand: "We reverse the district court's unsealing . . . as an abuse of discretion. We recognize that the present posture of the case has caused us to add some definition to the balancing of the presumption of access against competing considerations. . . . [T]he district

court should reconsider its decision to [unseal] in light of this opinion, because it is in the best position to weigh the factors described above. . . . The matter need not be prolonged because . . . either unsealing or denying public access to [the document] is within the court's discretion."); *see also United States v. Doe*, 356 Fed. Appx. 488, 490 (2d Cir. 2009) ("Nevertheless, even if total and permanent sealing is unjustified, it may be possible to protect the 'compelling interest' at issue here by sealing the sentencing transcript in a way that is less than total and permanent. Accordingly, we AFFIRM the district court's denial of the application for a total and permanent sealing . . ., but we REMAND the case to the district court to afford the parties an opportunity to apply for a sealing of the sentencing transcript that is partial, non-permanent, or both. If the parties make such an application, the district court should determine, in the first instance, whether such a partial or non-permanent sealing is justified . . . . Any renewed appeal following the disposition of the remand shall be referred to this panel.") (footnote omitted).

The panel's Order to Show Cause provides a different, unprecedented remedy. Instead of returning the case to the district court to conduct *Nixon*'s interest-balancing analysis, the panel has indicated it will itself conduct the analysis. The Order to Show Cause accordingly declares that the panel will "unseal[]"the summary judgment order and the summary judgment motion along with "any

materials filed in connection with this motion" unless the parties "establish good cause" for the sealing or redaction of the order, motion and motion "materials." Doc.138 at 2. Any party seeking to establish good cause must do so via objections that "must not exceed ten pages in length" and that must be filed by March 19, 2019—eight days after the Order to Show Cause was served on the parties.

The Order to Show Cause rests on a number of premises that we respectfully submit are flawed.

As the Court noted in the Order, under *Lugosch* a "strong presumption of access" attaches to documents submitted to a court for its consideration in a summary judgment motion. Doc.138 at 2. But a strong presumption of access is not an irrebuttable one. As *Lugosch* holds, it can be overcome by "specific, on-the-record findings that higher values necessitate a narrowly tailored sealing." 435 F.3d at 126. The Order to Show Cause is improperly dismissive both of the rebuttal of the presumption Ms. Maxwell is entitled to make and the procedure *Nixon* prescribes for receiving that rebuttal.

The Order to Show Cause requires that objections be limited to no more than ten pages, but the summary judgment papers total more than 2,000 pages,[4] of

[4]The Order to Show Cause is unclear whether the panel is contemplating public disclosure of all summary judgment papers—the motion and attachments, the response and attachments, the reply and attachments, and the summary

which a substantial portion has been sealed or redacted. The ten-page limit presupposes—prejudges—that the vast majority of the pages should not have been sealed or redacted. That is incorrect.

The Order presupposes that all objections to unsealing and unredacting a given document, or a given page within a document, will be simple, such as "the document (or a particular page within the document) is protected from disclosure by the attorney-client privilege." That is not the case. The merits to many of the objections, e.g., relating to privacy rights, to the unsealing or unredacting of a document are established through context and familiarity with the underlying facts, the source of the document, the reference by witnesses or other documents to the document, a party's or nonparty's understanding of whether his or her testimony or documents would be disclosed to the public, and other factors.

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judgment order. The Order states that the parties are ordered to show good cause why the Court should not "unseal the summary judgment motion, including any materials filed in connection with this motion." Doc.138 at 2. "Materials" might refer to the exhibits to the *summary judgment motion* and related materials, e.g., the Local Rule 56.1 statement, or to *all summary judgment materials filed in the case*, including the response and attachments and the reply and attachments.

The Court's March 13 Order directing the parties to submit electronic copies of all the summary judgment filings suggest that "materials" in the Order to Show Cause means all the summary judgment filings. However, in her partial dissent to the Order to Show Cause, Judge Pooler refers to "the materials *attached to the motion for summary judgment*." *Id.* (emphasis supplied).

As noted during oral argument, some of the sealed documents contain highly confidential, sensitive, embarrassing and/or oppressive information, including personal and financial information, about a party or nonparty that does not bear on the factual issues in the case. Ms. [redacted] counsel attached many such documents to Ms. [redacted] response to the summary judgment motion. An objection to public disclosure of a document properly may be based on whether Ms. [redacted] deliberately included such documents in her summary judgment filing knowing that (a) the document was irrelevant to summary judgment, yet (b) this Court's right-to-access jurisprudence likely would require its disclosure to the public. That is to say, "courts have the power to insure that their records are not 'used to gratify private spite or promote public scandal,' and have 'refused to permit their files to serve as reservoirs of libelous statements for press consumption.'" *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995) (quoting *Nixon*, 435 U.S. at 598); *see id.* at 1052 ("The nature of some parts of the Report militate against unsealing, however. Portions of the Report are hearsay, and may contain misinformation. There is a strong possibility that the report will contain material which is untrustworthy or simply incorrect.") (internal quotations, brackets, citation and ellipsis omitted).

The Order to Show Cause presupposes that Ms. [redacted] has standing as one of the "parties" to object to the public disclosure of the summary judgment papers, yet she does not. In her briefing and in her oral argument—as the Miami Herald and this Court noted—Ms. [redacted] argued that with the exception of Social Security numbers and the identities of minors, all sealed and redacted materials in this case should be unsealed and unredacted. As we argued in our motion to dismiss her from this appeal and to strike her brief, Ms. [redacted] lacks standing to participate in this appeal; and her position that all materials filed in the district court should be unsealed and unredacted estops her from "objecting" to the disclosure of any such materials.

The Order to Show Cause presupposes that the "parties" adequately will protect the interests of non-parties who provided documents or testimony on the district court's orders and under the auspices of—and on the representations of Ms. [redacted] and Ms. Maxwell's counsel that their information would be protected by—the Court's Protective Order. Depending on the facts, a non-parties' privacy and other interests can rise to the level of a compelling interest sufficient to overcome any presumption of right to access. *See, e.g.*, *United States v. Longueuil*, 567 F. App'x 13, 16 (2d Cir. 2014) (holding that district court properly sealed contested documents "as they reflected sensitive information about

cooperating witnesses," and concluding that sealing was justified in part "to safeguard the privacy of individuals involved in an investigation"; "[t]he district court was in the best position to weigh these factors") (internal quotations and citation omitted); *In re N.Y. Times Co.*, 828 F.2d 110, 116 (2d Cir.1987) ("Certainly, the privacy interests of innocent third parties as well as those of defendants that may be harmed by disclosure . . . should weigh heavily in a court's balancing equation. . . ."); *Amodeo*, 71 F.3d at 1050 ("We have previously held that the privacy interests of innocent third parties . . . should weigh heavily in a court's balancing equation.") (internal quotations and brackets omitted). We are confident the parties will not adequately protect these interests. Neither Ms. [redacted] or Ms. Maxwell's counsel represents these non-parties, many of whom have their own counsel, some of whom attended the depositions or facilitated the production of documents pursuant to the district court's subpoenas.

The Order to Show Cause, we respectfully submit, improperly gives short shrift to the parties' and non-parties' reliance on the district court's protective order. "In *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979), this Court established a strong presumption against access to sealed documents when there was reasonable reliance on a previously granted protective order, absent extraordinary circumstances or a compelling need." *Gambale v.*

Deutsche Bank AG, 377 F.3d 133, 142 n.7 (2d Cir. 2004). Reliance may be unreasonable if the protective order is temporary or limited, *see id.*, or if it may be modified by anyone, *see Lugosch,* 435 F.3d at 126.[5] In the case at bar, both parties and non-parties explicitly and repeatedly relied on the confidentiality and secrecy afforded by the protective order. Ms. [redacted] counsel explicitly and repeatedly induced such reliance when they encountered resistance to discovery on grounds of privacy, confidentiality, secrecy, sensitivity and embarrassment. Even if *Lugosch* could overrule *Martindell* and *Gambale* with respect to the strong presumption against access when there is reasonable reliance on a protective order, the *Lugosch*

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[5]In *Lugosch*, this Court held that it was not reasonable for defendants to rely on a protective order because it "specifically contemplates that relief from the provisions of the order may be sought at any time" by anyone, party or not; so "it is difficult to see how the defendants can reasonably argue that they produced documents in reliance on the fact that the documents would always be kept secret." 435 F.3d at 126. The Herald argued that under *Lugosch* Ms. Maxwell and non-parties could not reasonably rely on Judge Sweet's protective order because it always was subject to modification up to the date of trial. That argument proves too much.

As an initial matter, every Rule 26(c) protective order is always subject to modification for good cause, and that was true when *Martindell* established the "strong presumption against access to sealed documents when there was reasonable reliance on a previously granted protective order," *Gambale*, 377 F.3d 142 n.7. Moreover, the Herald's unwarranted extension of *Lugosch* would result in the *sub silentio* overruling of *Martindell* and *Gambale*, contrary to this Circuit's black letter rule that one panel may not overrule another. *See, e.g.*, *Veltri v. Bldg. Serv. 32B-J Pension Fund*, 393 F.3d 318, 327 (2d Cir. 2004).

panel expressly held that the reasonableness of a party's or non-party's reliance would be determined as a factual matter on remand by the district court. *See* 435 F.3d at 126 (holding that where defendants asserted reasonable reliance on protective order to produce documents, "on remand, the defendants should have the opportunity to call the district court's attention to any particular circumstances surrounding the production of a contested document"); *see also United States v. Longueuil*, 567 F. App'x 13, 16 (2d Cir. 2014) ("we see no abuse of discretion in requiring Jiau to comply with the Protective Order to which she consented"). We respectfully submit that this panel is in no position to make findings about the reasonableness of Ms. Maxwell's or the non-parties' reliance on the protective order in connection with information that they supplied and the parties used in the summary judgment proceedings.

Finally, the Order to Show Cause presupposes that an appellate court, requesting and ruling on ad hoc appellate submissions, competently may stand in for the district court. We respectfully disagree. There is history, context and nuance to this case—within and beyond the 1,000 district court filings in this case—that this Court does not have and cannot acquire in appellate proceedings. The district court resolved numerous discovery disputes and resolved them based on arguments and representations by counsel. Those disputes concerned among

other things the scope of Ms. [redacted] discovery, the relevance of the information she was seeking, and her improper submission to the district court as "judicial documents" of wholly irrelevant and highly sensitive, confidential and embarrassing materials, including, as noted, her submission of such materials in the summary judgment record.

Conclusion

As *Nixon* and its Second Circuit progeny recognize, the district court—not this Court—should determine the proper balance between the public's interest in access and Ms. Maxwell's and the nonparties' interests in maintaining the confidentiality of court submissions, including the summary judgment filings. We respectfully submit that the Order to Show Cause and March 13 Order were improvidently entered and should be reconsidered and vacated.

Respectfully submitted,

s/ Ty Gee

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Certificate of Service

I certify that on March 15, 2019, I served via CM/ECF a copy of this *Appellee Maxwell's Motion to Reconsider and Vacate the Court's Order to Show Cause and March 13 Order to Produce Sealed Materials, and to Hold the Orders in Abeyance Pending Disposition of This Motion* on the following persons:

The Hon. Robert W. Sweet
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s/ Nicole Simmons