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VIA ECF

The Honorable Lorna G. Schofield
District Court Judge
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Annie Farmer v. Darren K. Indyke, Richard D. Kahn, & Ghislaine Maxwell*
19-10475-LGS-DCF

Dear Judge Schofield:

Plaintiff Annie Farmer moves to dismiss this action with prejudice pursuant to Rule 41(a)(2). Ms. Farmer incorporates her prior letters on this issue, including her November 17, 2020 request for a premotion conference on this motion. ECF Nos. 97, 103, 106, 109.

The issue before the Court is narrow and straightforward: Ms. Farmer wants to dismiss this lawsuit *with prejudice* so that she can conclude her participation in the Epstein Victims' Compensation Program (the "Program"). Defendant Ghislaine Maxell has refused to stipulate to dismissal (even though she would be getting out of this lawsuit for nothing) contending that she is entitled to know the amount of compensation that Ms. Farmer is to receive from Jeffrey Epstein's Estate (even though she is in no way contributing to that compensation). Maxwell's position is untenable, unsupported by law, and a clear attempt to frustrate Ms. Farmer's ability to resolve her claims. Ms. Farmer respectfully requests that the Court enter an order dismissing this case with prejudice in the form of the proposed order attached hereto.[1]

BACKGROUND

After Judge Freeman encouraged the parties to resolve this dispute, Annie Farmer agreed to participate in the Program. Declaration of Sigrid S. McCawley ("McCawley Decl.") Ex. A at 24:1-23 ("I think that settlement is an important track."); 50:16–19 ("These are serious claims. . . . Let's see if we can get them on a settlement track that everybody is comfortable with."). On June 22, 2020, Judge Freeman stayed this case so that Ms. Farmer could participate in the Program. The Program, the terms of which counsel for the Estate, the victims, and the Attorney General of

[1] The Proposed Order includes language that preserves Maxwell's right to seek indemnification from the Estate, and its terms are consistent with what Judge Freeman outlined at a December 16, 2020, conference. Although Judge Freeman may have initially expected Maxwell to abide by what was negotiated and enter into a *stipulation* dismissing the case, the Court may in any event enter the Proposed Order under Rule 41(a)(2) as a dismissal "by court order" that is "on terms that the court considers proper."

the U.S. Virgin Islands negotiated at length over several months, "is a voluntary, independent Program that has been established to compensate and resolve the claims of victims-survivors of sexual abuse by Jeffrey Epstein." *See* McCawley Decl. Ex. B at 1 (Independent Epstein Victims' Compensation Program Protocol).

Prior to agreeing to participate in the Program, victims (including Ms. Farmer) were ensured that all compensation offers and any information submitted to the Program would be confidential. *Id.* at 6, 8. In order to receive payment, however, a victim must first (1) execute a form release waiving all of the victim's rights to assert claims against the Estate, any entities owned or controlled by the Estate, and any employees of the Estate, Mr. Epstein, or any entities owned or controlled by the Estate, among others (the "General Release") and (2) dismiss with prejudice any existing lawsuits against the Estate or related entities and individuals. *Id.* at 3, 7. All parties to this action, including Maxwell, have had access to the form General Release and its terms since at least June of 2020. McCawley Decl. Ex. C (June 19, 2020, email from B. Moskowitz to L. Menninger attaching copy of General Release).

On June 26, 2020, Ms. Farmer submitted a claim to the Program. On August 27, 2020, Ms. Farmer received an offer of compensation from the Program, which Ms. Farmer accepted on October 5, 2020. Ms. Farmer also executed the General Release. Proof of dismissal with prejudice of any civil claims is required by the Program's protocol. Accordingly, on October 14, 2020, Ms. Farmer informed the Estate and Maxwell that she had accepted an offer of compensation and asked the Defendants to stipulate to a dismissal of this action with prejudice pursuant to Rule 41(a)(1)(A)(ii) with each party to bear its own fees and costs. *See* McCawley Decl. Ex. D at 7 (October 14, 2020, email from S. Mariella to B. Moskowitz and L. Menninger). The Estate agreed to the stipulation, but Maxwell refused, initially contending that she could not agree to bear her own fees and costs without a copy of the executed General Release. *Id.* at 1 (November 10, 2020, email from L. Menninger to A. Villacastin and B. Moskowitz).

Ms. Farmer accordingly filed a request for a pre-motion conference on a motion to dismiss this action with prejudice pursuant to Rule 41(a)(2). ECF No. 97. Magistrate Judge Freeman held a conference on December 16, 2020. McCawley Decl. Ex. E (transcript of December 16, 2020, conference). During that conference, Ms. Farmer explained that after Maxwell refused to stipulate to dismissal, Ms. Farmer offered to provide Maxwell with a copy of Ms. Farmer's executed General Release with *only* the compensation amount redacted. Maxwell stated that she was concerned about the authenticity of a redacted version of the General Release for use in future proceedings. *Id.* at 8:21–23. In addition to stating that she would not order Ms. Farmer to disclose the amount of compensation to Maxwell, Judge Freeman suggested that Ms. Farmer provide a redacted version of the General Release to Maxwell with a letter stating that neither she nor the Estate would contest the redacted General Release's authenticity. *Id.* at 10:16–21, 14:7–8, 11–15. Both Ms. Farmer and Maxwell agreed with that solution. *Id.* at 10:23–11:2, 12:19–22. Yet when Ms. Farmer offered the redacted General Release and letter to Maxwell the next day, Maxwell refused to respond or to provide Ms. Farmer with any timeframe on which she would be able to respond. McCawley Decl. Ex. F (email correspondence between S. Mariella and L. Menninger). Judge Freeman then ordered Maxwell to show cause why the Court should not dismiss the case, and this Court held a hearing on January 14, 2021. ECF Nos. 107, 110. This Court subsequently ordered Ms. Farmer to file the present motion to dismiss pursuant to Rule 41(a)(2). ECF No. 111.

ARGUMENT

Rule 41(a)(2) provides that "an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper." Fed. R. Civ. P. 41(a)(2). "[T]he presumption in this circuit is that a court should grant a dismissal pursuant to Rule 41(a)(2) absent a showing that defendants will suffer *substantial prejudice* as a result." *Paulino v. Taylor*, 320 F.R.D. 107 (S.D.N.Y. 2017) (emphasis added); *see also Jones v. SEC*, 298 U.S. 1, 19 (1936) ("The general rule is settled for the federal tribunals that a plaintiff possesses the unqualified right to dismiss his complaint . . . unless some plain legal prejudice will result to the defendant.").

In light of Ms. Farmer's successful participation in the Program, she seeks to dismiss this case on the two conditions reflected in the Proposed Order attached to this letter: (1) with prejudice and (2) with each party to bear its own fees and costs. Maxwell takes issue with Ms. Farmer's second proposed condition: that each party bear its own fees and costs. She also asks the Court to impose an additional condition on dismissal to which Ms. Farmer does not consent: that Ms. Farmer disclose the amount of compensation that she has been offered through the Program. ECF No. 108 at 6. The conditions that Ms. Farmer proposes are appropriate in this case and will not legally prejudice Maxwell whatsoever, and Maxwell cannot impose additional conditions on dismissal if Ms. Farmer does not agree to those conditions.

I. Maxwell Will Not Be Prejudiced by Dismissal Pursuant to Ms. Farmer's Proposed Conditions.

Maxwell objects to dismissal of Ms. Farmer's claims with each party to bear its own fees and costs because she contends that Ms. Farmer's claims against her are "frivolous." But Maxwell has to date (after submitting *three letters* on this issue) not cited any authority for her argument that she would be entitled to collect fees and costs from Ms. Farmer.

Although courts periodically award fees and costs when plaintiffs move to voluntarily dismiss their claims *without* prejudice, Ms. Farmer seeks to dismiss this case *with* prejudice. *See Colombrito v. Kelly*, 764 F.2d 122, 133 (2d Cir. 1985) (explaining that the purpose of awarding fees and costs to prevailing party when cases are dismissed *without* prejudice "is generally to reimburse the defendant for the litigation costs incurred, in view of the risk (often the certainty) faced by the defendant that the same suit will be refiled and will impose duplicative expenses").[2] Ms. Farmer is not only agreeing to dismiss this case with prejudice, but has also signed a broad General Release that would prevent her from suing Maxwell for claims arising out of Maxwell's sexual abuse of Ms. Farmer again. Maxwell is therefore doubly protected from the risk that Ms. Farmer will bring her claims against Maxwell again, making her contention that she could somehow be entitled to fees and costs untenable. *Id.* at 134 (explaining that when an action is

[2] Maxwell raises for the first time an argument that she is a "prevailing party" under Rule 54(d)(1), but ignores that Rule 54(d)(1) only provides the Court with the discretion to award costs—the Rule does not itself entitle Maxwell to anything. *Figueroa v. City of N.Y.*, No. 00 Civ. 7559 (SAS), 2005 WL 883533, at *1 (S.D.N.Y. Apr. 14, 2005) ("[T]he decision whether to award costs to a prevailing party under Rule 54(d) lies within the sound discretion of the district court."). Maxwell has not even attempted to demonstrate why she would be entitled to costs under Rule 54(d)(1), and *Colombrito* squarely addresses why she would not be entitled to such costs.

dismissed with prejudice, fees "have almost never been awarded" because "the defendant, unlike a defendant against whom a claim has been dismissed without prejudice, has been freed of the risk of relitigation of the issues just as if the case had been adjudicated in his favor after a trial, in which event (absent statutory authorization) the American Rule would preclude such an award").

And even in cases where plaintiffs move for voluntary dismissal *without* prejudice, "[c]ourts within this circuit have refused to award fees and costs following a Rule 41(a)(2) dismissal absent circumstances evincing bad faith or vexatiousness on the part of the plaintiff." *BD ex rel. Jean Doe v. DeBuono*, 193 F.R.D. 117, 125 (S.D.N.Y. 2000) (declining to award fees upon dismissal without prejudice absent showing of bad faith or vexatiousness); *see also, e.g.*, *Brown v. Brooklyn Indus. LLC*, No. 13 Civ. 3695, 2015 WL 1726489, at *3 (S.D.N.Y. Apr. 15, 2015) (same); *Ogden Power Dev.-Cayman, Inc. v. PMR Co.*, No. 14 Civ. 8169, 2015 WL 2414581, at *9–10 (S.D.N.Y. May 21, 2015) (same). Maxwell has not pointed to any such bad faith or vexatiousness here, aside from her unremarkable contention that Ms. Farmer's claims are meritless (as the vast majority of defendants accused of sexual assault contend). Thus, Maxwell would not be entitled to fees and costs even if Ms. Farmer were seeking to dismiss this case *without* prejudice.

Ms. Farmer recognizes that this is not the forum in which to litigate whether her claims are "frivolous," but briefly highlights several facts that directly refute Maxwell's characterization of her claims as such. First, Maxwell has been indicted for the very conduct described in the Complaint—Ms. Farmer is one of the minor victims in the Government's July 2020 Indictment of Maxwell. Second, this Court rejected the notion that Ms. Farmer's claims are frivolous at the pre-motion conference held on Maxwell's anticipated motion to dismiss Ms. Farmer's complaint. At that conference, the Court observed that Maxwell's motion to dismiss did not "strike [the Court] as . . . meritorious," and noted that it would not be "a good use of anybody's time for us to pursue [the] motion." McCawley Decl. Ex. G at 3:23-24, 5:9-11 (transcript of April 16, 2020 premotion conference). Finally, Ms. Farmer is not the only woman who has accused Maxwell of sexually assaulting her. Many other women have accused Maxwell of similar behavior, and countless other victims and eyewitnesses have corroborated her involvement in Jeffrey Epstein's sex trafficking scheme. Evidence of other sexual assaults and Maxwell's involvement in the scheme is relevant and probative evidence supporting Ms. Farmer's claims, and would have supported her claims at trial and corroborated her own testimony.

Finally, Maxwell contends that dismissing this case with prejudice would deny Maxwell the opportunity to clear her name, complaining that Ms. Farmer is being compensated for "untested" allegations. It is entirely unclear, however, how this at all constitutes *legal prejudice* to Maxwell. First and foremost, Maxwell is not compensating Ms. Farmer and thus has no viable, legal interest in whether or how the Program "tested" Ms. Farmer's allegations or what confidential information Ms. Farmer provided in support of her claims to the Program. In fact, the Program has done nothing but *benefit* Maxwell by getting her out of multiple civil lawsuits and insulating her from future liability for any torts she committed against any woman who accepts compensation from the Program, all without having to pay a cent to her victims. Second, Maxwell has been indicted for the very conduct of which she is accused in this case, and thus has a constitutional right to trial by an impartial jury in her criminal case. Finally, as the Court recognized, parties are only entitled to discovery in aid of claims. Here, Ms. Farmer has chosen not to pursue her claims against

Maxwell, and it is not her burden to otherwise provide Maxwell with a forum in which Maxwell can test Ms. Farmer's allegations.[3]

Maxwell has failed to demonstrate any substantial, legal prejudice that she would face if this case were dismissed on the conditions that Ms. Farmer has proposed: with prejudice and with each party to bear its own fees and costs.

II. Maxwell's Request that the Court Require Ms. Farmer to Disclose Confidential Information About Ms. Farmer's Compensation Offer is Improper.

In Maxwell's response to Judge Freeman's Order to Show Cause, she asked the Court not only to strike from Ms. Farmer's proposed order of dismissal "any reference to each party to bear its own costs and attorneys' fees," but also asked the Court to "[r]equire that plaintiff disclose the substantial sum of money that she expects to receive" from the Program. ECF No. 108 at 5–6. But Maxwell cannot, under Rule 41(a)(2), propose her own conditions for the Court to impose in dismissing this case. As the Second Circuit has held:

> [Rule 41(a)(2)] empowers the district court to either dismiss the case on its own terms or to deny a requested dismissal, if those terms are not met. But acceptance of the court's terms, like the motion to dismiss itself, must be voluntary. . . . [W]hen a plaintiff files a motion for dismissal under Rule 41(a)(2), it takes on the risk that its motion will be denied, not that the motion will carry additional consequences to which the plaintiff does not consent. Like our sister Circuits, we emphasize that it is the plaintiff, rather than the court, who has the choice between accepting the conditions and obtaining dismissal and, if [she] feels that the conditions are too burdensome, withdrawing [her] dismissal motion and proceeding with the case on the merits.

Paysys Int'l, Inc. v. Atos IT Servs. Ltd., 901 F.3d 105, 108–09 (2d Cir. 2018) (internal citations omitted). Thus, the Court should not impose additional conditions on dismissal to which Ms. Farmer has not agreed.[4] And if the Court thinks any such additional conditions are appropriate, it should give Ms. Farmer the opportunity to first withdraw her motion for voluntary dismissal.

But even if this Court could impose Maxwell's proposed additional condition on dismissal without Ms. Farmer's consent, doing so would not be warranted in this case. Ms. Farmer was promised confidentiality when she chose to participate in the Program and she cannot be required to waive that confidentiality in order to dismiss this case and receive payment. Such a condition

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[3] Maxwell did not did not seem concerned with clearing her name while litigating this lawsuit prior to the stay. Maxwell refused to participate in discovery whatsoever. She did not produce a single document in response to Ms. Farmer's demands, nor did she respond to a single interrogatory.

[4] Maxwell cites a single case in which a court included a condition to voluntary dismissal allowing the defendant to seek fees and costs, but that was a case in which the voluntary dismissal was *without prejudice*. *Simon J. Burchett Photography, Inc. v. A.P. Moller Maersk A/S*, No. 19 CIV. 1576 (KPF), 2020 WL 1285511, at *1 (S.D.N.Y. Mar. 17, 2020).

would eviscerate the confidentiality promised to victims who chose to participate in the Program, and would deter continued participation in the Program.

During the conference before this Court, Maxwell's counsel stated that she has been "unable to find any precedent for refusing to provide a release to the purportedly released party." She has repeatedly made similar statements in letter briefing on this issue. *See* ECF No. 103 at 2. But this argument is misleading, as it mischaracterizes what Ms. Farmer has agreed to provide Maxwell. Ms. Farmer has at least twice offered Maxwell a copy of the executed General Release, and in fact will still agree to including a provision in an order of dismissal that would provide for Maxwell receiving a copy of the executed General Release (as reflected in the proposed order attached hereto). Maxwell would have the terms of the General Release. Maxwell would know exactly who Ms. Farmer has released, and from what claims she has released them.[5] The *only* information Ms. Farmer has refused to provide Maxwell is the amount of compensation she would receive once this case is dismissed. It is, in fact, Maxwell who has cited no legal precedent for her position: that a party who is not a party to a settlement agreement, and is not contributing *any money* or other consideration to that settlement, is entitled to know the settlement amount.

The only alleged prejudice Maxwell points to based on not knowing the amount of compensation that Ms. Farmer has been offered is that Maxwell seeks to use such information against Ms. Farmer during her criminal trial. But, as this Court recognized, Maxwell's attempt to impede settlement of this action to serve her interests in a separate criminal action is inappropriate. If Maxwell contends that Ms. Farmer's compensation offer is relevant and admissible evidence in her criminal action (which Ms. Farmer takes no position on at this time), she can attempt to obtain that information through the procedural mechanisms available to her in that case and Judge Nathan can rule on her right to use that information. Her inability to get the information she seeks now and through this litigation, as opposed to in her criminal case, does not amount to legal prejudice.

CONCLUSION

For the foregoing reasons, Ms. Farmer respectfully requests that the Court enter an order dismissing this case with prejudice, with each party to bear its own fees and costs, in the form of the proposed order attached hereto.

Respectfully submitted,

/s/ Sigrid S. McCawley

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[5] In fact, Maxwell has had this information since June, when she was provided with a copy of the form General Release. *See* McCawley Decl. Ex. C.

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