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January 21, 2021

VIA ECF

Hon. Lorna G. Schofield
United States District Judge
Thurgood Marshall
United States Courthouse
40 Foley Square
New York, New York 10007

Re: 19-cv-10475 (LGS-DCF), *Annie Farmer v. Darren K. Indyke, et al.*

Dear Judge Schofield:

On behalf of Ghislaine Maxwell, I write pursuant to this Court's Order of January 14, 2021 (Doc. # 111), directing Plaintiff "to file any motion to dismiss pursuant to Rule 41(a)(2)" and Ms. Maxwell to simultaneously "file any opposition to Plaintiff's motion." Ms. Maxwell assumes that Plaintiff will propose same Proposed Order she submitted to Magistrate Judge Freeman on December 23, 2020. *See* Doc. # 106-2. Ms. Maxwell respectfully submits that this Court legally may -- and should -- impose two modifications to Plaintiff's Proposed Order of dismissal:

1) removal of the language of "with each party to bear its own attorneys' fees and costs," and

2) removal of the phrase "with the compensation amount redacted" from the provision concerning the General Release to be shared with Ms. Maxwell.

Both conditions are necessary "terms" that are "proper" within the meaning of Rule 41(a)(2).

I. The Court May Impose the Requested Condition, which Plaintiff May Choose to Accept or Reject

Rule 41(a)(2) specifically permits a court to dismiss a claim "on terms that the court considers proper." Pursuant to Second Circuit precedent, this provision authorizes the Court to impose any conditions it deems "proper" provided that the plaintiff is then given the opportunity to accept those conditions or withdraw her Rule 41(a)(2) motion for dismissal.

In the most recent decision from the Second Circuit on the "rarely litigated" Rule 41(a)(2), the panel concluded that a district court *can* impose conditions on a proposed dismissal with prejudice, so long as the plaintiff is permitted the opportunity to accept dismissal on those conditions or continue the litigation if it deems those conditions too onerous. *Paysys Int'l, Inc. v. Atos IT Servs. Ltd.*, 901 F.3d 105, 109 (2d Cir. 2018). Specifically, the Circuit concluded that courts have the power to impose conditions on the dismissal (in that case, the imposition of attorneys' fees), but plaintiff then had "the choice between accepting the conditions and obtaining dismissal" or "if he feels that the conditions are too burdensome, withdrawing his dismissal motion and proceeding with the case on the merits." *Id.* (quotation omitted).

Later cases are in accord, holding that courts can impose conditions to overcome prejudice to the defendant by the dismissal sought by the plaintiff, giving the plaintiff the opportunity to accept the conditions and obtain the dismissal or reject the conditions and continue suit. In *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), one of the conditions requested is a condition requested here – removal or revision of language that the parties would bear their own attorneys' fees and costs. The Court noted the American Rule and expressed no opinion on whether the defendant might be able to obtain fees and costs in later litigation. However, given the *possibility* of recovery, as a condition of the requested Rule 41(a)(2) dismissal, the Court adopted the defendants' proposed language regarding fees as a condition of dismissal, affording the plaintiff the opportunity to accept or reject that conditions to obtain the dismissal order sought. *Id.*; *accord Grgurev v. Licul*, No. 1:15-CV-9805-GHW, 2020 WL 2415698, at *4 (S.D.N.Y. May 12, 2020) (granting 41(a)(2) dismissal on condition that "Plaintiffs must stipulate that Defendants will be permitted to litigate their counterclaims in state court to cure prejudice to the Defendants").

As such, Ms. Maxwell requests that the Court impose the above conditions on its Rule 41(a)(2) order of dismissal. At that point, Ms. Farmer can elect to accept those conditions and obtain the dismissal she seeks or proceed with the case on its merits.

II. Ms. Maxwell Will be Prejudiced in Absence of Imposition of the Requested Conditions

The Court has specifically requested that Ms. Maxwell address one issue in this letter briefing, "legal prejudice" absent the imposition of the conditions requested.

A. Ms. Maxwell's Confrontation Clause rights are prejudiced

First, as is detailed in Ms. Maxwell's December 31, 2020 Response to the Order to Show Cause (Doc. # 108), plaintiff has falsely and publicly accused Ms. Maxwell by way of this lawsuit yet failed to produce any corroborative evidence in the discovery process. She appeared on Netflix reading from a purported 1996 journal she claimed was a contemporaneous re-counting of her experiences with Mr. Epstein, but when her counsel produced the "journal," Ms. Maxwell's name was not mentioned once. By contrast, there is

substantial evidence that plaintiff and her counsel filed this case with a serious ulterior motive to fabricate a story against Ms. Maxwell some 24 years after the fact. The motives include, but are not limited to, increasing the cash consideration that she might receive from the Epstein Victims Compensation Program ("EVCP"). Indeed, within days of filing this suit, plaintiff's counsel publicly proclaimed the EVCP a "positive [first] step."[1] Neither Ms. Maxwell nor this Court played any role in setting up the terms of the program, but plaintiff's counsel played a substantial role in how it would be structured, including insisting that its prior clients could apply for additional funding from the program even if they had previously settled with Mr. Epstein.[2] Another term negotiated by plaintiff's counsel and included in the ultimate program is the "confidentiality" that plaintiff touts in her dismissal request. *See* Proposed Order (Doc. # 106-2) ("Plaintiff has reached a confidential agreement."). Yet "confidentiality" is only imposed on the program, not on claimants like plaintiff. *See* Epstein Victims' Compensation Program at 8-9 (May 29, 2020) ("Individual Claimants are not bound through the Program by any rules of confidentiality.").[3] To be clear, this is far different from a situation in which a purported #MeToo accuser is forced to remain silent in a "confidential settlement." This is a situation in which plaintiff wants to keep one thing secret, the amount of money she has requested and been awarded. Plaintiff can, if she chooses, share the amount of the award she has been offered. That a woman who has filed a public lawsuit, appeared on Netflix, NYTimes podcasts, ABC News, and the like, all the sudden wants her settlement to remain "confidential" is disingenuous at best. Just as has a public right to make her false allegations in a lawsuit and in the news, so Ms. Maxwell should have the right to make public the simple fact that plaintiff did not have a desire for "justice," she had a desire for money.

Second, as previously explained, Ms. Farmer has publicly self-identified as one of the accusers mentioned in the indictment in the criminal case, 20-cr-330 (AJN). She will no doubt be one of the prosecution's key witnesses. The inability to obtain an unredacted copy of the release, including the consideration received by Ms. Farmer, creates legal prejudice to Ms. Maxwell's ability to confront Ms. Farmer during her criminal trial on general issues of bias and motive for fabrication, as is her right under the Confrontation Clause of the United States Constitution. A criminal defendant "states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness.'" *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (quoting *Davis v. Alaska*, 415 U.S. 308, 318, (1974)). "[T]he exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination.'" *Olden v. Kentucky*, 488 U.S. 227, 231 (1988) (quoting *Davis*, 415 U.S. at 316-17).

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[1] Matthew Goldstein, "Jeffrey Epstein's Estate May Set Up a Program to Pay Accusers," NY Times (Nov. 13, 2019) (https://www.nytimes.com/2019/11/13/business/jeffrey-epstein-accusers-compensation-fund.html)

[2] James Hill, "Jeffrey Epstein victims' compensation fund to finally move forward," ABC News (May 29, 2020) (https://abcnews.go.com/US/jeffrey-epstein-victims-compensation-fund-finally-move-forward/story?id=70964632)

[3] https://www.epsteinvcp.com/documents/4

Full and complete cross-examination of Ms. Farmer, is impossible without understanding the complete terms of her agreement with the Epstein Estate under Program, including the consideration she was able to extract based on her fabrications concerning Ms. Maxwell, as well as others. *C.f. Moore v. Marr*, 254 F.3d 1235, 1244 (10th Cir. 2001) (noting that witnesses' "application for victim compensation payments and application for and receipt of emergency victim compensation payments may well have been 'favorable' within the meaning of *Brady*," requiring government disclosure of exculpatory evidence to criminal defendants).[4]

Not knowing complete terms of the agreements, including the settlement obtained, there is no way to properly prepare for, construct, or undertake such cross-examination. If the sum is large, the motive for fabrication of stories and the existence of bias are obvious. If the sum is small, yet was accepted, the credibility of any allegations are cast into serious doubt. Regardless, Ms. Maxwell is entitled to the information of complete terms, including economic terms, of the agreement with the Epstein Estate under the Program to enable her to fully exercise her Constitutional rights under the Confrontation Clause at her criminal trial in the cross examination of Ms. Farmer. Including the production of an unredacted copy of the Release executed by Ms. Farmer as a condition of dismissal of this case will prevent the legal prejudice of impairing her Confrontation Clause rights.

B. Ms. Maxwell's right to prevailing party costs are prejudiced

Second, Ms. Maxwell is the prevailing party as a result of Ms. Farmer's voluntary dismissal with prejudice and therefore is entitled to costs as a matter of law.

Rule 54(d)(1) provides that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party." Fed. R. Civ. P. 54(d)(1). "Courts consistently have found defendants to be prevailing parties where the action against them was voluntarily dismissed with prejudice." *Ctr. for Discovery, Inc. v. D.P.*, No. 16-CV-3936 (MK) BRER, 2018 WL 1583971, at *14 (E.D.N.Y. Mar. 31, 2018); *see Beer v. John Hancock Life Ins. Co.*, 211 F.R.D. 67, 70 (N.D.N.Y. 2002) ("All circuit courts to have directly addressed this issue have concluded that a defendant [who has obtained a voluntary dismissal with prejudice] is a prevailing party, or alternatively, that a district court has discretion to award costs to the defendant."); *see also Carter v. Inc. Vill. of Ocean Beach*, 759 F.3d 159, 165 (2d Cir. 2014) (disclaiming prior Second Circuit dicta which stated that "generally the defendant is not considered the prevailing party when, as here, there is a voluntary dismissal of the action by the plaintiff with prejudice." (citations omitted)). "A voluntary dismissal of an action with prejudice [is considered to materially alter the relationship of the parties], because it constitutes 'an adjudication on the merits for purposes of *res judicata.*'" *Carter*, 759 F.3d at 165 (citation omitted).

[4] It is unknown if the Government is in possession of a non-redacted copy of Ms. Farmer's agreements and, if so, when it plans to produce them as *Giglio* material in the criminal matter.

It imposes legal prejudice on Ms. Maxwell to include Ms. Farmer's originally proposed ("with each party to bear its own fees and costs" [DE 97]) or subsequently proposed ("with each party to bear its own attorneys' fees and costs" [DE106-]) language relating to costs and fees.[5] Ms. Maxwell will be the prevailing party upon issuance of the dismissal with prejudice and is presumed to be entitled to costs. Ms. Maxwell is not presently seeking attorneys' fees from Plaintiff but should not be precluded from doing so in a different action, most likely in a different forum, if she chooses to proceed. She is legally entitled to be deemed the prevailing party, with all rights that flow naturally therefrom, including an award of costs in this case as the prevailing party and the right to pursue claims for malicious prosecution should she later so choose. The right to recovery of costs is legally prejudiced by inclusion of the language proposed by Ms. Farmer.

For the foregoing reasons, Ms. Maxwell respectfully requests that the Court impose as a condition on granting the Rule 41(a)(2) Order that Plaintiff agree to:

1. Strike from plaintiff's proposed order any reference to each party to bear its own costs and attorneys' fees; and

2. Require that plaintiff produce an unredacted copy of the General Release she has executed with the Epstein Program, including the compensation she will receive.

Respectfully Submitted,

Laura A. Menninger

CC: Counsel of Record *via* ECF

[5] The Court has requested simultaneous submissions, with Plaintiff submitting her Motion and proposed language at the same time this letter brief is filed. As such, it is unclear to Ms. Maxwell what the final Rule 41(a)(2) Proposed Order will read with respect to costs and fees.