UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. GHISLAINE MAXWELL, Defendant.	20 Cr. 330 (AJN)

MEMORANDUM OF GHISLAINE MAXWELL IN SUPPORT OF HER MOTION UNDER THE DUE PROCESS CLAUSE TO SUPPRESS ALL EVIDENCE OBTAINED FROM THE GOVERNMENT'S SUBPOENA TO BOIES SCHILLER AND TO DISMISS COUNTS FIVE AND SIX

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Ghislaine Maxwell moves to suppress all evidence the government obtained from a grand jury subpoena it issued to Boies Schiller Flexner LLP and to dismiss Counts Five and Six, which are the fruits of that unlawful subpoena.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Counts Five and Six allege that Maxwell committed perjury during two civil depositions conducted by Boies Schiller in a defamation action it filed against Maxwell on behalf of one of the firm's clients. [redacted] *v. Maxwell*, Case No. 15-cv-7433 (LAP) (S.D.N.Y). A Protective Order entered in that case prohibited the parties and their lawyers from sharing confidential discovery material (including the two Maxwell depositions) with anyone else, *including* with the government and law enforcement. Faced with that Protective Order, the government issued a grand jury subpoena for Boies Schiller's file and instituted an *ex parte* proceeding before Chief Judge McMahon to modify the Protective Order. By proceeding *ex parte,* the government ensured that no one before the court would be able to contest the accuracy of its representations in support of its application.

The government then took full advantage. Judge McMahon, citing this Court's decision in *Chemical Bank v. Affiliated FM Ins. Co*., 154 F.R.D. 91 (S.D.N.Y. 1994), asked the government, point blank, whether Southern District prosecutors had previously met with the Boies Schiller firm or otherwise "collu[ded]" with that firm in arranging the discovery request. The government lawyer assured Judge McMahon that the prosecutors had no idea what was in Boies Schiller's file. Indeed, he insisted, there had been no contact whatsoever between Boies Schiller and United States Attorney's Office before the government commenced its investigation. Nor, said the prosecutor, did Boies Schiller have any role instigating the Maxwell inquiry.

To paraphrase Mary McCarthy's philippic about Lillian Hellman, every word of the government's representation was untrue, "including 'and' and 'the.'"[1] The government knew what was in the Boies Schiller file; the law firm had provided that information well before the investigation began. The government did indeed have previous contact with the firm. And Boies Schiller was *instrumental* in fomenting the Maxwell prosecution.

The record is surpassingly clear: But for the government's misrepresentation, witting or not, Judge McMahon never would have permitted the circumvention of the civil Protective Order, on which Maxwell relied in agreeing to sit for her depositions. This Court therefore has both the authority and the duty to suppress the fruits of that misrepresentation, including the deposition transcripts and the two perjury counts based on those transcripts. If the Court is disinclined to exercise that inherent authority on the present record, Maxwell should be granted a hearing to examine the circumstances that resulted in the government's misrepresentations to Judge McMahon.

FACTUAL BACKGROUND

A. The Protective Order in [redacted] *v. Maxwell*

Counts Five and Six of the superseding indictment allege that Maxwell committed perjury during two civil depositions taken in [redacted] *v. Maxwell*, a civil defamation case [redacted] filed in 2015. [redacted] claimed that Maxwell defamed her when Maxwell's attorney-hired press agent denied as "untrue" and "obvious lies" [redacted] numerous allegations, over the span of four years, that Maxwell had participated in a scheme to cause [redacted] to be "sexually abused and trafficked" by Jeffrey Epstein.

[1] *See* Norman Mailer, "An Appeal to Lillian Hellman and Mary McCarthy," 5/11/80 New York Times.

[redacted], a public figure required to prove actual malice, had an uphill battle—even she was constrained to acknowledge that many of her public statements were false. Using a time-honored if unfortunate litigation tactic, her lawyers at Boies Schiller therefore sought to turn the lawsuit into a proxy prosecution of Epstein. Not surprisingly, discovery in the case was bitter, hard-fought, and wide-ranging. It spanned more than a year and included large document productions, many responses to interrogatories, and thirty-some depositions, including depositions of [redacted] and Maxwell as well as several third parties. *See Brown v. Maxwell*, 929 F.3d 41, 46, 51 (2d Cir. 2019) (explaining that discovery was "hard-fought" and "extensive" and noting that the court file, which includes only some of the documents created during discovery, totals in the "thousands of pages").

[redacted] sought and obtained a wide variety of private and confidential information about Maxwell and others, including information about financial and sexual matters. *Brown*, 929 F.3d at 48 n.22. Given the intimate and highly confidential nature of the discovery exchanged between the parties, the district court entered a stipulated Protective Order. *See* Ex. A. The Protective Order included a mechanism for one party to challenge another party's confidentiality designation (such a challenge never occurred) and provided that it did not apply to any information or material disclosed at trial. (Because the case settled before trial, that sole exception to the Protective Order was never triggered.)

Notably, Boies Schiller *sought* to add a "law enforcement" exception to the Protective Order, doubtless because the firm was eager to enlist the government in its campaign against Maxwell. In particular, Boies Schiller proposed to include a provision stating that "CONFIDENTIAL information shall not be disclosed or used for any purpose except the preparation and trial of this case *and any related matter, including but not limited to, investigations by law enforcement*." Ex. B ¶ 1(a)(4) (emphasis supplied). Maxwell flatly rejected

this proposal, and it was never included in the Protective Order. Ex. A.[2] To the contrary, the order strictly limited the parties' disposition of Confidential Material, including at the conclusion of the case. In particular, paragraph 12 of the order provided that:

> [a]t the conclusion of this case, unless other arrangements are agreed upon, each document and all copies thereof which have been designated as CONFIDENTIAL shall be returned to the party that designated it CONFIDENTIAL, or the parties may elect to destroy CONFIDENTIAL documents. Where the parties agree to destroy CONFIDENTIAL documents, the destroying party shall provide all parties with an affidavit confirming destruction.

Ex. A ¶ 12.

B. Maxwell's April and July 2016 depositions

Relying on the confidentiality protections of the Protective Order, Maxwell declined to invoke her privilege against compulsory self-incrimination and agreed to testify at her April 2016 deposition. In that deposition, [redacted] attorneys asked Maxwell whether "Jeffrey Epstein [had] a scheme to recruit underage girls for sexual massages? If you know." Maxwell replied, "I don't know what you're talking about." And when asked to "[l]ist all the people under the age of 18 that you interacted with at any of Jeffrey's properties," Maxwell responded, "I'm not aware of anybody that I interacted with, other than obviously [redacted] who was 17 at this point." Count Five of the superseding indictment alleges those two answers were false.

Following the deposition, [redacted] moved to compel Maxwell to answer additional intimate and personal questions that she had previously declined to answer. In support of the motion, Boies Schiller assured the district court that "[s]uch questions are entirely appropriate in the discovery phase of this case, particularly where any answers will be maintained as confidential under the Protective Order in this case."

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[2] This proposal was rejected because of justifiable concerns about the misuse and abuse of this information by plaintiff and her lawyers including the selection and misleading leaking of confidential material to the media, other false claimants, and the government.

The district court granted the motion. In requiring Maxwell to answer highly intrusive questions "relating to [her] own sexual activity" and "her knowledge of the sexual activity of others," the court held that Maxwell's "privacy concerns are alleviated by the protective order in this case."

Secure in the belief that the Protective Order would be honored, Maxwell appeared at a second deposition, in July 2016, and answered hundreds of pages worth of questions about her "own sexual activity" and "her knowledge of the sexual activities of others." From the very first question, Maxwell discussed the intimate details of her sexual activity with Epstein, with other adult men, with other adult women, the use of sex toys, participation in "threesomes," and a full gamut of other sordid sexual topics. She was asked where she had sex, when she had sex, with whom she had sex, what types of sexual predilections Epstein had, whether others watched her having sex, whether she watched other people having sex, and whether she slept with clothes on. She was asked whether Epstein had sex with any number of women, and the names of women he might have had sex with. Maxwell was also grilled extensively about massages: when, where, what she was wearing, who gave them.

Count Six of the superseding indictment alleges that Maxwell provided false testimony when she testified during her July 2016 deposition that: (1) she could not recall whether sex toys or devices were used in sexual activities at Epstein's Palm Beach house; (2) she did not know whether Epstein possessed sex toys or devices used in sexual activities; (3) she wasn't aware that Epstein was having sexual activities with anyone other than herself when she was with him; and (4) she never gave anyone, including Accuser-2[3], a massage.

[3] The indictment refers to the accusers as Minor Victim-1, Minor Victim-2, and Minor Victim-3. We will refer to them as Accuser-1, Accuser-2, and Accuser-3.

C. The Settlement And Boies Schiller's Refusal To Comply With The Protective Order

In 2017, the parties settled the defamation claim, and the case was dismissed. [redacted] *v. Maxwell*, 325 F. Supp. 3d 428, 436 (S.D.N.Y. 2018), *vacated and remanded sub nom. Brown*, 929 F.3d 41. As the district court found, "a significant, if not determinative, factor" in reaching a settlement was its confidentiality. *Id*. at 446.

After the case was settled and concluded, Maxwell repeatedly invoked Paragraph 12 of the Protective Order and demanded that [redacted] either return or destroy all confidential information, including her deposition transcripts. Boies Schiller refused. Instead, and unbeknownst to Maxwell, Boies Schiller produced some 90,000 pages of discovery material to the government, including both of Maxwell's deposition transcripts.

D. The Government's False Statements To Judge McMahon

Only in August 2020, after she was indicted in this case, did Maxwell finally learn that the government had obtained the Boies Schiller file by grand jury subpoena. Maxwell also learned that, to overcome the strictures of the Protective Order, the government had instituted an *ex parte* proceeding before Judge McMahon, Case No. 19-Misc.-149 (CM) (S.D.N.Y). Ex. C. Needless to say, neither Maxwell nor her attorneys were given the opportunity to oppose that application or to contest the government's representations in support of the application. This was all in direct violation of Paragraph 14 of the Protective Order, which provides that the order may be modified by the court only "for good cause shown *following notice to all parties and an opportunity to be heard*." Ex. A ¶ 14 (emphasis added).

In its *ex parte* application, the prosecutors professed that they had sought out Boies Schiller's file only because "publicly available information regarding the [[redacted] *v. Maxwell*]

Litigation, including the complaint and other docketed filings . . . appear[ed] to make reference to certain subjects relating to the Investigation." That "publicly available information," the government claimed, indicated that the Boies Schiller file might "contain information relevant to the ongoing Investigation" of Jeffrey Epstein. Ex. C, ¶ 4. Nowhere did the government acknowledge that Boies Schiller had in fact approached the prosecutors multiple times well before the grand jury subpoena issued.

In March 2019, in the first appearance before Judge McMahon, the Government continued this refrain, professing ignorance about what was in Boies Schiller's file or who was deposed in the case. The prosecutor defended the subpoena's breadth—which sought all "copies of discovery and related materials" in [redacted] *v. Maxwell*—on the ground that the government simply had too little knowledge of what was in the law firm's files to craft a more narrowly tailored subpoena:

> Here, we are essentially unable to significantly narrow the request for information in part for exactly the reasons that you describe. We have either little or no additional information than the Court does in terms of what materials there are, who was deposed, and that is in marked contrast to some of the other cases.

Ex. D, p 17. For all the government knew, according to the Assistant U.S. Attorney, what he was seeking was "page after page of people taking the Fifth." Ex. D, p 19.

The government appeared a second time before Judge McMahon in April 2019. Ex. E. Judge McMahon held that conference for one reason: to learn "about contacts between the United States Attorney's Office and the Boies Schiller law firm prior to the issuance of the subpoena." Ex. E, p 2. The Assistant U.S. Attorney told Judge McMahon that the government's investigation began on either November 30 or December 3, 2018, omitting mention of any contacts between Boies Schiller and the government prior to that time:

> In the initial days and weeks of the investigation, we endeavored to identify information about the subject of the investigation, including, among other things,

> possible victims who we should speak to. In the process of doing so, we identified certain counsel that were identified as representing victims or witnesses either in public filings or in media reports. Boies Schiller was among those plaintiff attorneys. So following the opening of the investigation, we were in touch with Boies Schiller, among other plaintiff and witness counsel, in connection with their representation of witnesses or victims.
>
> With respect to Boies Schiller in particular, we quickly came to learn during the investigation that they had at the time either active or recently completed civil litigation and so asked them, as is our standard practice, told them, I should say, that we expected to make document requests. They generally advised us that they believed there was a protective order that would govern at least some of the materials, and that is why we ultimately made the application to the Court.

Ex. E, 99 pp 2–3.

Those representations were false. At the time the government claims it began the investigation (late November or early December 2018), its knowledge of the civil case was *not* based exclusively on public filings. It knew that Boies Schiller possessed relevant information because the firm had come to the government asking it to open an investigation. In particular, on February 29, 2016, AUSA [redacted] [redacted] met with attorneys from Boies Schiller, who "urged [redacted] to open an investigation of" Epstein and Maxwell.[4] Then, after Maxwell's two depositions, David Boies himself apparently approached the government in the summer of 2016, asking "if the Southern District would consider charging Maxwell with perjury." *Brown*, *supra* n.2. Said Mr. Boies:

> "We were saying to anyone who would listen: We've got clients who were abused. Some of them were underage. We have the evidence. There's a whole record that's been developed. We can establish beyond any reasonable doubt there was a massive sex trafficking ring going on."

Id.

[4] Stephen Rex Brown, *Manhattan federal prosecutors declined to pursue Jeffrey Epstein and Ghislaine Maxwell case in 2016*, New York Daily News (Oct. 13, 2020), https://www.nydailynews.com/new-york/ny-jeffrey-epstein-maxwell-case-20201013-jmzhl7zdrzdgrbbs7yc6bfnszu-story.html.

At that time, however, the government did not act. Boies "was particularly frustrated by the failure to pursue a perjury charge [against Maxwell]," reported one person, who recalled him saying, "We have her dead to rights."[5] *Id*. All of this contradicts The government's representations to Judge McMahon, who specifically asked if the government had any contact with Boies Schiller before it issued the subpoena.

Reassured by the government that no contact had occurred, Judge McMahon modified the Protective Order so that Boies Schiller could comply with the subpoena. Ex. F. Judge McMahon found that Maxwell could not have reasonably relied on the Protective Order as prohibiting Boies Schiller from cooperating with the government. In making this finding, Judge McMahon relied on the Assistant U.S. Attorney's misrepresentations, and she distinguished the government's subpoena to Boies Schiller from the subpoena at issue in *Chemical Bank*. Said Judge McMahon:

> [T]he only thing on which Maxwell or anyone else might reasonably have relied is that [redacted] or her lawyers would not do what the defendant in *Chemical Bank* did—that is, forward discovery materials in their possession to prosecutors for the purpose of fomenting an investigation. But I am not faced with that situation. Nothing in this record suggests to me that [redacted] or Boies Schiller had anything to do with the Government's decision to convene a grand jury to look into the matters that were the subject of the [redacted] Action. On the contrary—the Government has advised the Court that it contacted Boies Schiller as part of its search for parties who might have been victims in its investigation; and that Boies Schiller told the Government that it could not consensually produce at least some documents in its files because of the existence of the Protective Order. There is no evidence of "collusion," to invoke a term of the moment, and it is quite clear that Boies Schiller did not foment the Government's investigation. Moreover, the Assistant United States Attorney has represented to this Court that he has no idea what is in Boies Schiller's files, and that for all he knows every witness who was deposed stood on his/her Fifth Amendment rights and refused to answer questions.

Ex. G, p 21.

[5] Ms. Maxwell strenuously disagrees with Mr. Boies' comments. We reference them here only to show their connection to the perjury counts that the government subsequently charged.

Contrary to the government's misrepresentations, Boies Schiller *did* foment the investigation (or at least it tried to). And the evidence of "collusion" between the government and Boies Schiller was ample, tracing to at least early 2016 and precisely designed to have Maxwell charged with perjury.[6] Had Judge McMahon known the truth, she likely would have denied the government's application to modify the [redacted] *v. Maxwell* Protective Order, and the government would have been unable to secure a copy of Boies Schiller's ninety-thousand-page file, including Maxwell's two deposition transcripts.

E. Judge Netburn Separately Rejects An Identical Gambit By The Government

Around the same time that Judge McMahon granted the government's *ex parte* request, Magistrate Judge Netburn rejected an identical request from the government in a different civil case, *Jane Doe 43 v. Epstein*, Case No. 17-cv-616 (JGK) (SN). Judge Netburn recognized the government's conduct for what it was: an attempt to deprive Maxwell of notice and an opportunity to be heard. Ex. H. Indeed, Judge Netburn rebuffed the government even after it alerted her to Judge McMahon's order. Ex. I. As Judge Netburn found, the government's "abstract concern" about the "secrecy" of its investigation—a concern that exists with *any* investigation and is hardly unique to this case—could not overcome the parties' reasonable reliance on the Protective Order or justify the government's secret, *ex parte* application. Ex. H, p 6. Judge Netburn also implicitly recognized what Judge McMahon never knew—that Boies Schiller was all too eager for the government to investigate and prosecute Maxwell:

[6] Maxwell has not yet been provided discovery of whether Boies Schiller shared actual sealed materials or the contents of sealed materials during its meetings with the United States Attorney's Office in 2016. As noted below, the bare minimum that is required here is an evidentiary hearing to probe the extent to which Boies Schiller "colluded," in a *Chemical Bank* sense, with the prosecutor's office.

> [T]he extraordinary posture of the case requires the Court to police carefully government intrusions into areas of protections agreed to by civil litigants and so-ordered by the Court. The Government is attempting to side-step these protections by serving a subpoena only upon a party who is willing (and perhaps eager) to comply with the Government's investigation.

Ex. H, p 6.

ARGUMENT

A. Pursuant To Its Inherent Power, This Court Should Suppress The Evidence Obtained From Boies Schiller, And Dismiss Counts Five And Six, Which Are The Fruits Of That Evidence

1. The role of protective orders in civil litigation.

Protective orders serve a "vital function" in civil litigation. *Martindell v. Int'l Tel. & Tel. Corp.,* 594 F.2d 291, 295 (2d Cir. 1979). They promote "the 'secure the just, speedy, and inexpensive determination' of civil disputes, by encouraging full disclosure of all evidence." *Id.* (quoting Fed. R. Civ. P. 1). "If protective orders were easily modified . . . parties would be less forthcoming in giving testimony and less willing to settle their disputes." *S.E.C. v. TheStreet.Com*, 273 F.3d 222, 230 (2d Cir. 2001). In particular, as here, "witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders." *Martindell*, 594 F.2d at 295–96. Parties thus rely on protective orders, and courts strictly enforce them. *See, e.g.*, *Stewart v. Hudson Hall LLC*, 20 Civ. 885 (SLC), 2020 WL 7239676, at *2 (S.D.N.Y. Dec. 9, 2020) ("In the Second Circuit, there is a strict standard for modification of a protective order entered by a district court." (citation and quotation marks omitted)).

This case illustrates just how crucial a protective order is. The Maxwell depositions sought highly intrusive evidence of the most personal aspects of Maxwell's life. Her sexual practices. Her sexual preferences. Her sexual partners. In urging the district court to permit these extraordinary intrusions—in what should have been a simple defamation case—Boies Schiller

expressly invoked the assurances of the Protective Order. So did the district court in permitting these intrusions and ordering Maxwell to sit for a second deposition. Maxwell likewise relied on the Protective Order in choosing to render such intimate details, rather than assert her Fifth Amendment privilege as she had every right to do.

And why shouldn't Maxwell have relied on the Protective Order? The central protection in the Order was that none of Maxwell's answers could be disclosed to the government. Boies Schiller had expressly sought a law enforcement exception but was rebuffed. Instead, the law firm was required either to return the confidential material or, at Maxwell's option, to destroy it. Maxwell had every reason to take that assurance seriously, even if Boies Schiller did not.

2. The government circumvented the protective order.

Faced with a duly entered Protective Order—which quite deliberately *omitted* any "law enforcement" exception—the government had lawful options to pursue the confidential [redacted] discovery. It could have moved to intervene in the civil case and to amend the Protective Order. It could have issued a subpoena for the materials and given Maxwell an opportunity to respond. *Martindell*, 594 F.2d at 294. It could even have applied for a search warrant, assuming (counterfactually) that it could show probable cause in support of such a warrant.

The government did none of those things. Instead, it initiated an *ex parte* proceeding and secured a secret modification of the Protective Order based on material misrepresentations to the presiding judge. This was not among the lawful options available to the government.

It cannot fairly be disputed that Judge McMahon's ruling to amend the Protective Order was based on the government's misrepresentations. Immediately before issuing her decision, Judge McMahon held a hearing with the *sole purpose* of asking the prosecutor, point blank, about the government's contacts with Boies Schiller. Judge McMahon's stated reason for so inquiring was to ensure that the government and Boies Schiller had not coordinated as the parties

had in the *Chemical Bank* case. In no uncertain terms, Judge McMahon explained why she had haled the prosecutor back into court:

> I'll be very up-front with you. I want to make sure I'm not in a *Chemical Bank* kind of situation, so I would like to know about contacts between the United States Attorney's Office and the Boies Schiller firm prior to the issuance of the subpoena on the subject of your investigation.

Ex. E, p 2.

In *Chemical Bank,* a protective order precluded parties to a civil case from disclosing confidential documents to others. 154 F.R.D. at 92–93. Despite this prohibition, counsel for the defendant approached the Manhattan District Attorney's Office and suggested that it had evidence of criminal violations relating to the case. *Id.* at 93. A grand jury issued a subpoena, and the defendant produced to the government various confidential documents without complying with any of the specific procedures or exceptions provided in the protective order. *Id.* Once this collusion came to light, the district court reprimanded the defendant for its "disregard of the [protective] order[]" and admonished its behavior as "contrary to the traditions of the Bar which dictate that court orders be respected." *Id*.

In addressing the government's application here, Judge McMahon specifically asked whether Boies Schiller had acted as the defendant did in *Chemical Bank*. The prosecutor omitted any mention of his office's previous meetings with the firm, and falsely led the court to believe that Boies Schiller had not encouraged its investigation. Reassured by the misrepresentations, Judge McMahon commented:

> Nothing in this record suggests to me that [redacted] or Boies Schiller had anything to do with the Government's decision to convene a grand jury to look into the matters that were the subject of the [redacted] Action. On the contrary—the Government has advised the Court that it contacted Boies Schiller as part of its search for parties who might have been victims in its investigation; and that Boies Schiller told the Government that it could not consensually produce at least some documents in its files because of the existence of the Protective Order. There is no evidence of

> "collusion," to invoke a term of the moment, and it is quite clear that Boies Schiller did not foment the Government's investigation.

Had Judge McMahon known the truth, she likely would not have granted the government's application to modify the Protective Order to allow Boies Schiller to comply with the subpoena.

3. The government violated due process.

The government's conduct cannot be squared with elemental due process. U.S. CONST. amend. V. Pursuant to this guarantee, "[t]he responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict." *Young v. United States*, 481 U.S. 787, 803 (1987). The government engages in misconduct and violates due process when it materially misrepresents facts before a court. *See United States v. Valentine*, 820 F.2d 565, 570 (2d Cir. 1987) (holding that the government violated due process and reversing conviction when the government mischaracterized the substance of grand jury testimony).

The prosecutor may well have known that his representations to Judge McMahon were false (or at best misleading). But the Assistant U.S. Attorney's personal knowledge doesn't matter. "An individual prosecutor is presumed . . . to have knowledge of all information gathered in connection with his office's investigation of the case." *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998); *see also Giglio v. U.S.*, 405 U.S. 150, 154 (1972) ("The prosecutor's office is an entity and as such it is the spokesman for the Government. A promise made by one attorney must be attributed, for these purposes, to the Government."). At the barest minimum, a federal prosecutor has a duty to check the entire file to ensure that his representations to a federal judge, submitted on behalf of the office he serves and under oath, are true and complete. The Assistant U.S. Attorney did not discharge that basic function.

4. This court possesses the inherent authority to order suppression.

Incident to its inherent power to superintend proceedings, this Court has the authority to suppress the fruits of the government's misrepresentation. *See, e.g.*, *United States v. Cortina*, 630 F.3d 1207, 1214 (7th Cir. 1980) ("The court has inherent authority to regulate the administration of criminal justice among the parties before the bar . . . . [by] exclud[ing] evidence taken from the defendant by willful disobedience of law." (citation omitted)); *United States v. Lambus*, 897 F.3d 368, 386 (2d Cir. 2018) ("It is within the court's inherent authority to suppress evidence gathered unlawfully in order to maintain the integrity of its own proceedings . . . ."); *Benkovitch v. Gorilla, Inc.*, No. 2:15-cv-7806 (WJM), 2017 WL 4005452, at *2 (D.N.J. Sept. 12, 2017) ("District courts have 'inherent authority' to impose a variety of sanctions, including . . . suppression of evidence . . . .").

It does not matter that the government made its misrepresentations to Judge McMahon and not directly to this Court. "As long as a party receives an appropriate hearing, . . . the party may be sanctioned for abuses of process occurring beyond the courtroom . . . ." *Chambers v. NASCO, Inc.*, 510 U.S. 32, 57 (1991). "Courts have held that inherent authority sanctions may be imposed for misconduct in another court where the misconduct is . . . in some way related to the case before the sanctioning court." *Klein v. Weidner*, Civ. No. 08-3798, 2017 WL 2834260, at *6 (E.D. Pa. June 30, 2017) (citation and alteration omitted); *Manhattan Review LLC v. Yun*, 16 Civ. 0102 (LAK) (JCF), 2017 WL 11455317, *7 n.3 (S.D.N.Y. Sept. 21, 2017) ("The inherent power . . . can punish conduct before a different court if it is intimately related to the relevant case." (citing *Klein*, 2017 WL 2834260, at *4)). Here, the government's misrepresentation to Judge McMahon was not simply "related" to Counts Five and Six; only by the government's deception was it able to obtain the factual predicate for those counts. Accordingly, the Court may exercise its inherent authority to suppress that evidence. And it should.

B. At A Minimum, This Court Should Order A Hearing At Which Maxwell May Inquire Into The Circumstances Surrounding The Government's Misrepresentations To Judge McMahon

If the Court is disinclined to grant relief on the present record, then at a minimum it should hold an evidentiary hearing to probe the government's misstatements to Judge McMahon and the extent to which the prosecutor's office had, in fact, coordinated with Boies Schiller prior to the issuance of the grand jury subpoena. These factual issues go directly to whether the predicate finding for Judge McMahon's ruling—namely, that no *Chemical Bank* collusion had occurred—was mistaken. *See*, *e.g.*, *United States v. Paredes-Cordova*, No. S1 03 CR. 987DAB, 2009 WL 1585776, at *1 (S.D.N.Y. June 8, 2009) ("An evidentiary hearing is normally required to address motions to suppress where a factual issue is in dispute.").

An evidentiary hearing is warranted for an additional reason as well: If it turns out that the prosecutor *knew* (or was reckless in not knowing) that Boies Schiller had previously approached his office, both before and after the Maxwell depositions, in an effort to stir up a criminal prosecution and dangled the deposition transcripts as a carrot, then suppression would be warranted on that basis alone. *Cf. Franks v. Delaware*, 438 U.S. 154, 155-56 (1978); *United States v. Rajaratnam*, 719 F.3d 139, 146 (2d Cir. 2013) ("*Franks* instructs a district court to hold a hearing to determine whether the alleged misstatements or omissions in the warrant or wiretap application were made intentionally or with reckless disregard for the truth and, if so, whether any such misstatements or omissions were material.").

CONCLUSION

For these reasons, this Court should: (1) suppress all evidence the government obtained from Boies Schiller and any other evidence derived therefrom; or (2) suppress the April and July 2016 depositions and all evidence derived therefrom; and (3) dismiss Counts Five and Six. Maxwell requests an evidentiary hearing on this Motion.

Dated: January 25, 2021

Respectfully submitted,

s/ Jeffrey S. Pagliuca

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Certificate of Service

I hereby certify that on January 25, 2021, served by email, pursuant Rule 2(B) of the Court's individual practices in criminal cases, the *Memorandum of Ghislaine Maxwell in Support of Her Motion Under the Due Process Clause to Suppress All Evidence Obtained from the Government's Subpoena to Boies Schiller and to Dismiss Counts Five And Six* upon the following:

[redacted]
U.S. Attorney's Office, SDNY
[redacted]

s/ Christian R. Everdell