EXHIBIT M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION TO QUASH SUBPOENAS TO DAILY NEWS, L.P., AND GEORGE RUSH	M8-85 MEMORANDUM AND ORDER

McKENNA, D.J.,

1.

Daily News, L.P., the publisher of the Daily News, and George Rush, a Daily News reporter, move, pursuant to Fed. R. Civ. P. 45(c)(3)(A)(iii), for an order quashing subpoenas issued by counsel for the plaintiff in an action pending in the United States District Court for the Southern District of Florida entitled Jane Doe v. Jeffrey Epstein (08 Civ. 80893 KAM), in which the plaintiff seeks to recover damages arising out of the defendant's alleged sexual abuse of her when she was a minor. The subpoenas seek the production of "[a]ll taped conversations between George Rush and Jeffrey Edward Epstein, including telephone recordings, all emails to and from Jeffrey Edward Epstein or someone representing themselves to be Jeffrey Epstein," and the testimony of George Rush and Anne B. Carroll, a Vice President and General Counsel of Daily News, L.P. (Carroll Decl., Apr. 7, 2010, Exs. A & B.) In the alternative, the subpoenaed parties seek a protective order barring disclosure under Fed. R. Civ. P. 26(c).

2.

The subpoenaed parties base their motion on "the qualified reporter's privilege accorded by the First Amendment to the United States Constitution and federal common law." (Revised Notice of Mot., Apr. 12, 2010, at 1.)

3.

Mr. Rush states that he (with his wife) is a weekly columnist in the Daily News, that in the fall of 2009 he began to follow criminal and civil legal proceedings in Florida relating to Mr. Epstein (Rush Aff., Apr. 6, 2010 [Carroll Decl., Apr. 7, 2010, Ex. G] ¶¶ 1-2), and that in November of 2009 he was able to arrange a telephone interview of Mr. Epstein (who was apparently in Florida) from the New York City office of the Daily News. (Id. ¶ 4.) Mr. Rush made a recording of the conversation (which lasted about 22 minutes) and a transcription thereof, both of which have been submitted to the Court for in camera inspection. Mr. Rush advised counsel for the plaintiff in Jane Doe v. Jeffrey Epstein that he had interviewed Mr. Epstein (id. ¶ 7) and declined to give counsel a copy of the interview recording. (Id. ¶ 8.) Mr. Rush subsequently corrected the date of the interview to "prior to October 22, 2009." (Rush Supp. Aff., Apr. 30, 2010 [Carroll Reply Decl., May 3, 2010, Ex. C] ¶ 2.)

At the outset of the interview, Mr Epstein said that it was off-the-record, and Mr. Rush agreed. (Rush Aff., Apr. 6, 2010

¶ 5.) Several days after the interview, Mr. Rush played a three or four minute segment of the recording to three persons whom he regarded as valuable news sources, under an agreement of strict secrecy. (Id. ¶ 6.) On an occasion after he first told counsel for Jane Doe that he had interviewed Mr. Epstein, Mr. Rush gave him "a one or two word characterization of what [he] perceived to be Epstein's overall stance and repeated to him one sentence from the interview -- both of which [he] believed made the point that there was nothing there for [counsel] or his client." (Id. ¶ 8.)

Mr. Rush also, on October 22, 2009, spoke with Michael Fisten, an investigator for counsel to Jane Doe, who had heard from a third party about Mr. Rush's interview of Mr. Epstein. (Fisten Aff., Apr. 23, 2010 [Real Party in Interest Jane Doe's Resp. in Opp'n to Mot. of Daily News, L.P., to Quash Subpoena, Ex. B] ¶ 3.) Mr. Rush paraphrased the interview relatively thoroughly. (Id. ¶ 7.)

4.

As noted above, the present motion has been argued on the qualified reporter's privilege.[1]

The Second Circuit recognizes not only a qualified

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[1] The First Amended Complaint in Jane Doe v. Jeffrey Epstein (Carroll Decl., Apr. 7, 2010, Ex. E) asserts two claims under Florida common law (Counts I & III), one claim under federal law (18 U.S.C. § 2255) (Count II), and two claims under Florida statutes (Counts IV & V); federal subject matter jurisdiction is premised on diversity of citizenship, Jane Doe being alleged to be a resident of Florida, and Mr. Epstein a resident of New York (First Am. Compl. ¶¶ 3, 4 & 7).

privilege protecting journalists' confidential sources but also a privilege that extends to nonconfidential materials. Gonzales v. Nat'l Broad. Co., Inc., 194 F.3d 29, 33 (2d Cir. 1999) ("Gonzales III").[2]

In the present case, Mr. Rush's source -- Mr. Epstein -- is not confidential: Mr. Rush disclosed his source to counsel for Jane Doe not long after the interview. The Second Circuit, in Gonzales III, held that

> while nonconfidential press materials are protected by a qualified privilege, the showing needed to overcome the privilege is less demanding than the showing required where confidential materials are sought. Where a civil litigant seeks non-confidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.

194 F.3d at 36.

5.

This Court has reviewed both the recording and Mr. Rush's transcript in camera. The Court finds that portions of the recording "are of likely relevance to a significant issue in [Jane

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[2] In Gonzales v. Pierce, 175 F.R.D. 57 (S.D.N.Y. 1997) ("Gonzales I"), the district court granted in part and denied in part a motion to compel production of unedited videotapes from NBC and the deposition of certain NBC personnel. In Gonzales v. Nat'l Broad. Co., Inc., 155 F.3d 618 (2d Cir. 1998) ("Gonzales II"), the Second Circuit affirmed Gonzales I. In Gonzalez III the Second Circuit, on rehearing, withdrew its Gonzales II opinion (see 194 F.3d at 30 & n.**), and affirmed the district court.

Doe v. Epstein],” Gonzales III, 194 F.3d at 36, or, rather, depending on how used, two issues, liability and damages. The Court notes, in particular, a statement included in the first full paragraph attributed to Mr. Epstein at page 15 of the transcript.

The Court also finds that the materials at issue “are not reasonably obtainable from other available sources,” id., since the record is quite clear that Mr. Epstein has regularly been asserting, and will continue to assert, his Fifth Amendment privilege to relevant questions. The fact that the recording is in Mr. Epstein’s own voice is also significant from a trial perspective.

The deposition of Mr. Rush is to be limited to authentication of the recording and the transcript.

6.

Not everything in the recording is relevant, but some non-relevant statements may (or may not) have context value. Ultimately, the amount of the recorded conversation that it would be appropriate to admit in a jury trial is one for the trial judge, with input from counsel on both sides. This Court defers to the trial court in this regard.

7.

Plaintiff’s counsel’s access to the recording and transcript has been given for a specific purpose only: use in the trial of Jane Doe v. Epstein. This order does not authorize the

use of, or reference to, the conversation reflected in the recording and the transcript in any other context, unless so authorized by the trial court in the case in which such use is sought, and it does not in any way authorize dissemination to the press or other media of all or any part of the conversation, the recording, or the transcript.[3]

8.

The recording and transcript will be held in chambers or under seal until any appeal from this decision is decided or the time to file a notice of appeal has expired.

SO ORDERED.

Dated: May 18, 2010

Lawrence M. McKenna
U.S.D.J.

[3] Persons other than Jane Doe and Mr. Epstein are mentioned in the conversation.