UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-CIV- 80469 – MARRA/JOHNSON

JANE DOE II,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.
_____/

DEFENDANT EPSTEIN'S REPLY TO & MOTION TO STRIKE PORTIONS OF *PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS*

Defendant, JEFFREY EPSTEIN, ("EPSTEIN"), by and through his undersigned attorneys, replies to and moves to strike Point 4 of *Plaintiff's Memorandum Of Law In Opposition To Defendant Epstein's Motion To Dismiss*, dated May 22, 2009, ("MOL"). Accordingly, Defendant states:

I. Legal Standard (pp. 1-2 of Plaintiff's MOL)

Plaintiff's reliance on Conley v. Gibson, 355 U.S. 41, 45-46 (1957), as the Rule 12(b)(6) pleading standard is misplaced. As discussed in Defendant's motion to dismiss, (pp. 16 – 17), the standard as detailed in Bell Atlantic Corp. V. Twombly, 127 S.Ct. 1955 (2007), is now the applicable standard, not Conley. Although the complaint need not provide detailed factual allegations, the basis for relief in the complaint must state "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Twombly, at 1965. Further, "[f]actual allegations must be enough to raise a right to relief above the speculative level ... on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* The United States Supreme Court very recently made clear in Ashcroft v. Iqbal, No. 07-1015 (U.S. May 18,

2009)(slip copy op. at 20), that Twombly expounded the pleading standard for "all civil actions" and not just pleadings made in the context of an antitrust dispute. Significantly, the Supreme Court in Twombly abrogated the often cited observation from Conley that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id, (abrogating and quoting Conley, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957)). The Supreme Court rejected the notion that "a wholly conclusory statement of claim [can] survive a motion to dismiss whenever the pleadings le[ave] open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." Id. See also Berry v. Budget Rent A Car Systems, Inc., 497 F.Supp.2d 1361, 1364 (S.D. Fla. 2007)("... pursuant to *Twombly,* to survive a motion to dismiss, a complaint must now contain factual allegations which are 'enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true.'").

II. ARGUMENT

Point 1. There is already pending a previously filed state action arising from the same factual allegations requiring dismissal of the federal action. (MOL, pp. 2 – 7).

First and foremost, contrary to Plaintiff's assertion that Defendant's argument regarding jurisdiction is "frivolous" is without basis. As discussed in Defendant's motion, Plaintiff chose to file a prior action based on the identical underlying facts in state court. It makes no sense for two actions – involving the same parties, witnesses, evidence, etc., to proceed separately in two separate forums. Plaintiff cites to no case law to

counter and does not appear to directly dispute Defendant's position that the state court would have concurrent jurisdiction over the claim brought pursuant to 18 U.S.C. §2255.

Secondly, Plaintiff's assertion, (MOL, p.2, fn. 1), that it is somehow improper to attach a copy of this same Plaintiff's Complaint from the state court proceeding in support of Defendant's motion is ridiculous. It is completely proper and in essence required of any party to give notice to a court of a related pending proceeding. (See for example, Loc. Gen. Rule 3.8 (S.D. Fla. 2009).[1] The fact that there does exists a previously filed action by Plaintiff against Defendant is directly relevant to this Court's decision of whether or not to exercise jurisdiction over the §2255 claim when there exists a previously filed proceeding in which the claim might also be brought. Needless to say, whether or not a Court exercises jurisdiction over a matter is a critical issue.

Finally, Plaintiff completely mischaracterizes what she herself alleged in paragraph 15 of her Complaint. In her MOL, p. 7, Plaintiff falsely asserts that in par. 15 she "pled that Defendant made an agreement with the United States Attorney's Office to not contest the jurisdiction of this Court in exchange for avoiding prosecution under federal law for solicitation of minors for prostitution." What is actually alleged in par. 15 is the following: "***Defendant EPSTEIN has made an agreement with the United States Attorney's Office to not contest liability for claims brought exclusively***

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[1]See also Bray & Gillespie Management LLC v. Lexington Ins. Co., 2008 WL 4826115, 1 (M.D. Fla. 2008) – "[t]he Court 'may take notice of proceedings in other courts, both within and without the federal judicial system, if those proceedings have a direct relation to matters at issue.' St. Louis Baptist Temple, Inc. v. FDIC, 605 F.2d 1169, 1172 (10th Cir.1979); accord Coney v. Smith, 738 F.2d 1199, 1200 (11th Cir.1984). Counsel should be given notice of and an opportunity to be heard as to the propriety of taking judicial notice. Fed.R.Civ.P. 201(e)." Here, Plaintiff filed the state court action and is, thusly, well of aware of its existence and details.

pursuant to 18 U.S.C. §2255, in exchange for avoiding federal prosecution under 18 U.S.C. §2422(b), *which provides a sentence of 10 years for each violation of the law."* (See also p. 14 of MOL, where Plaintiff again misrepresents what is actually alleged in her Complaint). Not only does Plaintiff misrepresent what is alleged in her complaint, but she also ignores the fact that she chose to bring claims (in the first filed state court action) in addition to the 18 U.S.C. §2255 claim. Thus, there is no violation of the alleged agreement and EPSTEIN has not agreed to not contest liability (or jurisdiction); Plaintiff did not choose to proceed exclusively under §2255.

Accordingly, it is well within this Court's discretion to require that Plaintiff bring her §2255 claim in the previously filed state court action.

Point 2. The issue of the applicable version of 18 U.S.C. §2255 is properly raised at this time as Plaintiff alleged in her complaint that the 2006 version applies to conduct that occurred prior to the effective date of the amendment. (pp. 7 – 13, Plaintiff's MOL).

Contrary to Plaintiff's assertion, what version of 18 U.S.C. §2255 is appropriately raised in Defendant's motion to dismiss. Plaintiff's complaint attempts to allege a cause of action based on the 2006 amended version of the statute. As discussed in Defendant's motion, it is Defendant's position that Plaintiff has failed to state a cause of action thereunder as she is improperly bringing her claim under the 2006 amended version instead of the statute in effect at the time of the complained of conduct, the 2005 version. Related to the issue of what version of §2255 applies to this action is Plaintiff's improper attempt to multiply the presumptive minimum of actual damages, ($50,000 under the 2005 statute; $150,000 under the 2006 amended version), based on the number of incidents alleged, notwithstanding that the plain language of the statute

does not provide for a multiplier and speaks in terms of "personal injury" suffered and "actual damages."

Supporting the fact that Defendant properly raised these issues in his motion to dismiss are the allegations set forth in Plaintiff's complaint. In paragraph 11, Jane Doe II alleges that – "From about June, 2003 until about February, 2005, Defendants, EPSTEIN and KELLEN persuaded, induced, or enticed Plaintiff to come to Defendant EPSTEIN's home and provide Defendant EPSTEIN with 'massages' … ." In paragraph 13, Plaintiff further alleges – "In violation of §2422(b), Defendants EPSTEIN and KELLEN knowingly persuaded, induced, or enticed the Plaintiff to engage in acts of prostitution, when the Plainitff was undr the age of 18, approximately on or about the following dates that Plaintiff can document based on payments received: 6/16/03, 7/2/03, 4/9/04, 6/7/04, 7/30/04, 8/30/04, 10/9/04, 10/12/04 and 11/9/04. … ." In paragraph 14, Plaintiff alleges – "Plaintiff seeks damages for personal injury in accordance with 18 U.S.C. §2255(a) for each of the acts of prostitution set forth above which Defendants solicited her, $150,000 for each violation, for a total range of damages between $1.5 million dollars and $4.5 million dollars, jointly and severally, and a reasonable attorney's fees and costs, as permitted by the statute."

Plaintiff chooses to analyze whether the statute in effect at the time of the alleged conduct or the amended statute applies under a procedural versus substantive analysis. Plaintiff, in short, argues that "the change in the civil remedies available of a statute is a procedural, not a substantive change in the law, and procedural changes to a statute are routinely applied retroactively." (MOL, p. 9). Clearly , the change to the statute was

not a procedural one. As discussed more fully in Defendant's motion to dismiss, the statutory scheme enacted and amended under "Masha's Law" is consitently referred to as criminal penalties and punishments directed at those who sexually exploit and abuse minors.

Also, Plaintiff ignores the axiom that courts generally apply the statute in effect at the time of the underlying conduct unless there is a clear statement that an amendment is to apply retroactively to prior conduct. See, e.g., Hughes Aircraft Co. v. U.S. ex rel Schumer, 520 U.S. 939, 952 (1997)("Given the absence of a clear statutory expression of congressional intent to apply the 1986 amendment to conduct competed before its enactment, we ... hold that, under the relevant 1982 version of the [statute], the District court was obliged to dismiss the action."). There is absolutely no expression of any intent that the amended version of the statute is to apply retroactively. This lack of clear of expression can be contrasted with those statutory enactments or amendments where such intent is clearly expressed by including language to the effect that the amendment applies in proceedings "commenced on or after the date of enactment." See generally, Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1282-1283 (11th Cir. 2005).

In Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1283 (11th Cir. 2005), this Circuit discussed in detail the presumption against retroactivity where there is no clear expression that a statute is to apply retroactively in the text. In amending §2255, there does not exist any statement by Congress of its unambiguous intention that the statute apply retroactively to pre-enactment conduct. The Tello Court's analysis is worth

quoting as it confirms and supports that an amendment to a statute, such as in the instant case – increasing the penalty or liability for damages by at least triple fold, or under Plaintiff's analysis, by 90 times from $50,000 to $4.5 million! - and with no expression that it is to apply retroactively – will not be interpreted to apply retroactively.

> Congress may prescribe the temporal reach of a statute by stating that it applies to pre-enactment conduct, the first step in the *Landgraf* analysis, **or a statute may be silent regarding temporal reach, in which case courts apply the judicial presumption against retroactivity**. This presumption and analysis, however, are unwarranted when Congress states its unambiguous intention that the statute apply retroactively to pre-enactment conduct, in language comparable to § 1658(b), that the new or amended statute applies to proceedings commenced on or after enactment. *See Landgraf,* 511 U.S. at 259-60, 114 S.Ct. at 1494 (stating that, if had Congress intended retroactive application, then "it surely would have used language comparable to ... 'shall apply to all proceedings pending on or commenced after the date of enactment' ") (citation omitted); *accord INS v. St. Cyr,* 533 U.S. 289, 318-19 & n. 43, 121 S.Ct. 2271, 2289-90 & n. 43, 150 L.Ed.2d 347 (2001) (collecting examples of unambiguous temporal statutory language providing that the statute applies to actions filed "on or after" the date of enactment, which includes violative conduct that occurred prior to the effective date of the statute); *Martin v. Hadix,* 527 U.S. 343, 354, 119 S.Ct. 1998, 2004, 144 L.Ed.2d 347 (1999) (stating that " 'new provisions shall apply to all proceedings pending on or commenced after the date of enactment,' " referenced in *Landgraf,* "unambiguously addresses the temporal reach of the statute" (citation omitted)); *Lindh v. Murphy,* 521 U.S. 320, 329 n. 4, 117 S.Ct. 2059, 2064 n. 4, 138 L.Ed.2d 481 (1997) (recognizing from *Landgraf* that statutory language such as, " '[This Act] shall apply to *all* proceedings pending on or commenced after the date of enactment of this Act,' " "might possibly have qualified as a clear statement for retroactive effect" (quoting *Landgraf,* 511 U.S. at 260, 114 S.Ct. at 1494)); *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 307-08, 114 S.Ct. 1510, 1517, 128 L.Ed.2d 274 (1994) (noting that the subject statute omitted a provision in the bill that the amendment " 'shall apply to all proceedings pending on or commenced after' " a fixed date and describing the bill as containing "express retroactivity provisions"). ...

Unlike other statutory enactments or amendments (cited above) where Congress unambiguously expressed its intent regarding retroactive application, there is no expression with respect to Masha's Law, the 2006 amended version of §2255. An

example where Congress expressed its intent regarding retroactivity was when it enacted an expanded sex-offender registry ("SORNA") meant to bolster tracking of convicted sex offenders, like Masha's Law, also enacted as part of the Adam Walsh Act. See Pub.L. 109-248 §§1-155, 120 Stat. 587, 590-611 (2006). Congress recognized that applying expanded version of SORNA to past offenders would raise retroactivity concerns, and therefore, expressly addressed the concern –

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders. 42 U.S.C. §16913(d).

As the Supreme Court and this Circuit have long observed, "where Congress includes particular language in one section of a statute but it omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in disparate inclusion or exclusion." U.S. v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990), quoting Rodriguez v. U.S., 480 U.S. 522, 525 (1987). In this case, there is no basis for departing from this well established rule. The only evidence regarding §2255, as amended 2006, is that Congress did not intend it to apply retroactively, and, accordingly, the 2005 version of the statute applies.

Accordingly, under well established legal principles, the statute in effect at the time of the alleged conduct applies, not the amended version.

Point 3. 18 U.S.C. §2255 does not allow Plaintiff assert multiple claims against a Defendant in an effort to multiply the presumptive actual damages minimum. (pp. 14-15, Plaintiff's MOL).

Plaintiff cites to no case law in support of its nonsensical view that §2255 allows them to multiply the presumptive damages amount on a per incident basis. As

discussed in Part III, A. of Defendant's motion to dismiss, unlike other statutes, there is absolutely no language in the statute that suggest that the presumptive damages amount is subject to multiplication on a per violation/incident basis. The statute on its face speaks in terms of "actual damages" and "personal injury suffered."

The recent case of United States v. Berdeal, 595 F.Supp.2d 1326 (S.D. Fla. 2009), further supports Defendant's argument that the "rule of lenity," (Part. III.C. of Defendant's motion), requires that the Court resolve the statutory interpretation conflict in favor of Defendant. Assuming for the sake of argument that Plaintiff's multiple causes of action, leading to a multiplication of the statutory damages amount, is a reasonable interpretation, like Defendant's reasonable interpretation, under the "rule of lenity," any ambiguity is resolved in favor of the least draconian measure. In Berdeal, applying the rule of lenity, the Court sided with the Defendants' interpretation of the Lacey Act which makes illegal the possession of snook caught in specified jurisdictions. The snook had been caught in Nicaraguan waters. The defendants filed a motion to dismiss asserting the statute did not encompass snook caught in foreign waters. The United States disagreed. Both sides presented reasonable interpretations regarding the reach of the statute. In dismissing the indictment, the Court determined that the rule of lenity required it to accept defendants' interpretation.

Point 4. Point 4 is required to be stricken as Plaintiff attempts to argue facts not alleged in the Complaint, and misrepresents what is alleged in the Complaint.

Point 4 of Plaintiff's MOL, p. 15-17, is required to be stricken as it not only argues facts outside of the four corners of the complaint, but it continues to misrepresent what is actually alleged in paragraph 15 of Plaintiff's complaint. See discussion under "Point

1" above herein. Rather than address the deficiencies of her Complaint, Plaintiff attempts to argue the merits of her case by asserting what the evidence may (or may not) show. If Plaintiff is seeking to reallege her claims, she should do so by proper procedure requesting she be allowed to amend. The discussion in Point 4 addresses none of the arguments in Defendant's motion to dismiss and should be stricken. Rule 12(f), Fed.R.Civ.P. (2009). Defendant stands on its position that Plaintiff has failed to sufficiently plead the requisite predicate acts as set forth in his motion to dismiss.

Point 5. Plaintiff has failed to plead the requisite predicate acts or any conspiracy to commit such acts. (MOL, pp 17-18).

Finally, Plaintiff has failed to allege under the Twombly standard of pleading sufficient facts to allege the underlying predicate acts required by §2255. See Part III. B and C of Defendant's motion.

WHEREFORE, Defendant requests that this Court grant his motion to dismiss and strike.

By: _____
ROBERT D. CRITTON, JR., ESQ.
Florida Bar No. 224162
rcrit@bclclaw.com
MICHAEL J. PIKE, ESQ.
Florida Bar #617296
mpike@bclclaw.com

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following service list in the manner specified via transmission of Notices of Electronic Filing generated by CM/ECF on this 1st day of June, 2009:

Isidro M. Garcia, Esq.
Garcia Law Firm, P.A.
224 Datura Street, Suite 900
West Palm Beach, FL 33401
561-832-7732
561-832-7137 F
isidrogarcia@bellsouth.net
Counsel for Plaintiff

Jack Alan Goldberger, Esq.
Atterbury Goldberger & Weiss, P.A.
250 Australian Avenue South
Suite 1400
West Palm Beach, FL 33401-5012
561-659-8300
561-835-8691 Fax
jagesq@bellsouth.net
Co-Counsel for Defendant Jeffrey Epstein

Respectfully submitted,

By: _____
ROBERT D. CRITTON, JR., ESQ.
Florida Bar No. 224162
rcrit@bclclaw.com
MICHAEL J. PIKE, ESQ.
Florida Bar #617296
mpike@bclclaw.com
BURMAN, CRITTON, LUTTIER & COLEMAN
515 N. Flagler Drive, Suite 400
West Palm Beach, FL 33401
561-842-2820
Fax: 561-515-3148
(*Co-counsel for Defendant Jeffrey Epstein)*