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 MOTION TO DISMISS PLAINTIFF'S COMPLAINT, AND SUPPORTING MEMORANDUM OF LAW

Defendant, Jeffrey Epstein, (hereinafter "Epstein"), by and through his undersigned attorneys, moves to dismiss Plaintiff's Complaint for failure to state a cause of action, and for more definite statement. Rule 12(b)(6), (e), Fed.R.Civ.P. (2008); Local Gen. Rule 7.1 (S.D. Fla. 2008). In support of dismissal, Defendant states:

At the outset, Defendant gives notice to the Court that issues pertaining to 18 U.S.C. §2255 in this motion to dismiss are also raised in the case of C.M.A. v. Jeffrey Epstein, Case No. 08-CV-80811-MARRA/JOHNSON, in Defendant's Motion to Dismiss directed to Plaintiff C.M.A.'s Amended Complaint, Plaintiff C.M.A.'s Response, and Defendant's reply to C.M.A.'s response (which has yet to be filed).

In this action, Plaintiff's Complaint attempts to allege a cause of action pursuant to 18 U.S.C. §2255 – *Civil Remedies for Personal Injuries.* Significantly, Plaintiff previously a filed lawsuit on July 10, 2008, based on the same facts as alleged herein in the Fifteenth Judicial Circuit In and For Palm Beach County, State of Florida, Case No.

50 2008CA020614 MBAF, Jane Doe II v. Jeffrey Epstein, and Sarah Kellen, (hereinafter "state action"). In attempting to allege a claim under 18 U.S.C. §2255, Plaintiff improperly relies on the §2255, as amended, effective July 27, 2006. As discussed more fully below herein, the statute in effect during the time of the alleged conduct applies.

Dismissal is required on several grounds: (1) Plaintiff previously filed a state action approximately 10 months ago against the same defendant involving the same alleged facts; (2) Plaintiff improperly relies on 18 U.S.C. §2255, as amended, effective July 27, 2006, rather than the version of the statute in effect during the time of the alleged conduct; (3) Plaintiff improperly asserts that the presumptive damages minimum under §2255 is subject to multiplication on a per violation basis; (4) Plaintiff has failed to allege a cause of action under 18 U.S.C. §2255 as she has failed to sufficiently allege facts constituting a predicate act; (5) Plaintiff has failed to state a cause of action of conspiracy to violate §2255.

Supporting Memorandum of Law

I. Court is required to dismiss Plaintiff's action as there is already pending a previously filed state action arising from the same factual allegations.

Exceptional circumstances merit the dismissal of this action as Plaintiff first filed a lawsuit on July 10, 2008, in the in the Fifteenth Judicial Circuit In and For Palm Beach County, State of Florida, Case No. 50 2008CA020614 MBAF, Jane Doe II v. Jeffrey Epstein, and Sarah Kellen, based on the same factual allegations that she asserts in the instant case. Attached here to as **Exhibit A** is Plaintiff's First Amended Complaint filed in the state action. A comparison of the complaint allegations of fact in the state and

federal actions reveals that they are almost identical. Based on the same allegations, in the state action, Plaintiff attempts to assert claims based on state law for Sexual Battery (Count I) and Civil Conspiracy (Count II); in this action, Plaintiff is attempting to assert a cause of action pursuant to 18 U.S.C. §2255, which applicable version provides –

> PART I--CRIMES
> CHAPTER 110--SEXUAL EXPLOITATION AND OTHER ABUSE OF CHILDREN
> § 2255. Civil remedy for personal injuries
>
> **(a)** Any minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation may sue in any appropriate United States District Court and shall recover the actual damages such minor sustains and the cost of the suit, including a reasonable attorney's fee. Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than $50,000 in value.
>
> **(b)** Any action commenced under this section shall be barred unless the complaint is filed within six years after the right of action first accrues or in the case of a person under a legal disability, not later than three years after the disability.
>
> CREDIT(S)
> (Added Pub.L. 99-500, Title I, § 101(b) [Title VII, § 703(a)], Oct. 18, 1986, 100 Stat. 1783-75, and amended Pub.L. 99-591, Title I, § 101(b) [Title VII, § 703(a)], Oct. 30, 1986, 100 Stat. 3341-75; Pub.L. 105-314, Title VI, § 605, Oct. 30, 1998, 112 Stat. 2984.)

(Emphasis added).

Plaintiff is likely to argue that the jurisdiction of the federal court over §2255 claims is exclusive. However, unlike other Congressional enactments, there is no language in the statute which expressly states that jurisdiction of such cause of action lies exclusively with the federal courts. Furthermore, there is a presumption of concurrent jurisdiction of state courts. See generally, Yellow Freight System, Inc. v. Donnelly, 494 U.S. 820, 823, 110 S.Ct. 1566, 1568-69 (1990). "Under our 'system of dual sovereignty, we have consistently held that state courts have inherent authority, and are thus

presumptively competent to adjudicate claims arising under the laws of the United States.'" Id, and cases cited therein. Significantly, in order to give federal courts exclusive jurisdiction over a federal cause of action, Congress must, in an exercise of its powers under the Supremacy Clause, affirmatively divest state courts of their presumptively concurrent jurisdiction. Id.

§2255, unlike other federal statutes, does not unequivocally state that the jurisdiction of the federal court is exclusive or that it takes away the presumptive jurisdiction of the state courts. See e.g., 28 U.S.C. §1338(a)("...Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.") As phrased, the statute uses the term "may" which under a plain meaning analysis is permissive as opposed to mandatory. The omission of any such exclusive jurisdictional provision is strong evidence of Congress' intent. Yellow Freight, supra. The fact that the statute is completely silent on the role of the state courts in such a cause of action still does not overcome the presumption of concurrent jurisdiction. Id.[1]

Because concurrent jurisdiction exists over this federal claim, the six factor analysis as discussed in American Bankers Ins. Co. v. First State Ins. Co., 891 F.2d 882, 884 (11th Cir. 1990), applies in determining whether the exceptional circumstances exist requiring dismissal of the federal action in favor of the first filed action. As explained in by the Eleventh Circuit in American Bankers Ins. Co., because EPSTEIN is seeking dismissal of this action in deference to a pending state court action, "it is governed by

[1] See 45 U.S.C. §56, pertaining to liability for injuries to railroad employees, as an example of a federal statute which expressly states that "jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

the principles articulated in Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483 (1976) and Moses H. Cone Memorial Hosp. v. Mercury Constr., 460 U.S. 1, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)."

The six factors considered are (1) whether one of the courts has assumed jurisdiction over property; (2) the inconvenience of the federal forum; (3) the potential for piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5) whether state or federal law will be applied; and (6) the adequacy of the state court to protect the parties' rights. "The test for determining when exceptional circumstances exist, therefore, involves the careful balancing of six factors. The weight to be given any one factor may vary greatly depending on the case; however, the balance is "heavily weighted" in favor of the federal court exercising jurisdiction. *Id.* at 16, 103 S.Ct. at 937." American Bankers Ins. Co. of Florida v. First State Ins. Co., 891 F.2d 882, 884 (11th Cir. 1990). The list of factors is neither exhaustive, nor is it a mechanical checklist. See AM.JUR. FED. COURTS, § 1114.

In the instant case, the third, fourth, fifth, and sixth factors are implicated. Clearly, more than a "potential" for piecemeal litigation exists if Plaintiff were allowed to proceed in two separate forums alleging the identical facts against the identical parties. Discovery and rulings thereon would involve the same set of facts, yet could result in inconsistent and varying rulings thereon. Should the cases proceed separately to trial, factual findings and judgments rendered in one could be inconsistent with the other. Appeals would proceed separately and in a piecemeal fashion. The piecemeal effect would be both excessive and deleterious if these cases were to proceed in parallel

fashion. The state court obtained jurisdiction over the action first as Plaintiff chose to first file in state court. See **Exhibit A** hereto. Defendant has already filed his answer and affirmative defenses and discovery is ongoing in the state action. As to the fifth factor, state law will be applied to Plaintiff's attempted state law claims for sexual battery and conspiracy, while federal substantive law will apply to the 18 U.S.C. §2255 claim. Finally, the state court is perfectly capable and able to protect the rights of the parties. In fact, there are currently before the 15th Judicial Circuit Court, Palm Beach County, Florida, additional cases against EPSTEIN based on similar allegations of sexual exploitation and abuse. In the Jane Doe II state action, an Order was entered reassigning the state action to a Division in which other Jane Doe cases against EPSTEIN had been filed. See "Clerk's Notice Of Reassignment," dated April 10, 2009, and attached hereto as **Exhibit B**. The state court is well aware of the underlying factual allegations which are identical in both cases and which form the basis of the state and federal' claims which Plaintiff is attempting to pursue.

Accordingly, in balancing these factors, Defendant is entitled to dismissal of the federal court action. Plaintiff should not be allowed to pursue parallel actions in state and federal court based o the identical underlying factual allegations. Her claims should be brought in one forum – state court - so that Defendant is not forced to defend himself in two separate forums.

II. 18 U.S.C. §2255 in effect prior to the 2006 amendments applies to this action.

A. The statute in effect during the time the alleged conduct occurred is 18 U.S.C. §2255 (2005) – the version in effect prior to the 2006 amendment, eff. Jul. 27, 2006,

(quoted above). See endnote 1 hereto, Complaint ¶11, 13.[1] It is an axiom of law that "retroactivity is not favored in the law." Bowen, 488 U.S., at 208, 109 S.Ct., at 471 (1988). As eloquently stated in Landgraf v. USI Film Products, 114 S.Ct. 1483, 1497, 511 U.S. 244, 265-66 (1994):

> ... the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.[FN18] For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." *Kaiser,* 494 U.S., at 855, 110 S.Ct., at 1586 (SCALIA, J., concurring). In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.
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> FN18. See *General Motors Corp. v. Romein,* 503 U.S. 181, 191, 112 S.Ct. 1105, 1112, 117 L.Ed.2d 328 (1992) ("Retroactive legislation presents problems of unfairness that are more serious than those posed by prospective legislation, because it can deprive citizens of legitimate expectations and upset settled transactions"); [Further citations omitted].
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> It is therefore not surprising that the antiretroactivity principle finds expression in several provisions of our Constitution. The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation.[FN19] Article I, § 10, cl. 1, prohibits States from passing another type of retroactive legislation, laws "impairing the Obligation of Contracts." The Fifth Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of vested property rights except for a "public use" and upon payment of "just compensation." The prohibitions on "Bills of Attainder" in Art. I, §§ 9-10, prohibit legislatures from singling out disfavored persons and meting out summary punishment for past conduct. See, *e.g., United States v. Brown,* 381 U.S. 437, 456-462, 85 S.Ct. 1707, 1719-1722, 14 L.Ed.2d 484 (1965). The Due Process Clause also protects the interests in fair notice and repose that may be compromised by retroactive legislation; a justification sufficient to validate a statute's prospective application under the Clause "may not suffice" to warrant its retroactive application. *Usery v. Turner Elkhorn Mining Co.,* 428 U.S. 1, 17, 96 S.Ct. 2882, 2893, 49 L.Ed.2d 752 (1976).
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> FN19. Article I contains two *Ex Post Facto* Clauses, one directed to Congress (§ 9, cl. 3), the other to the States (§ 10, cl. 1). We have construed the Clauses as applicable only to penal legislation. See *Calder v. Bull,* 3 Dall. 386, 390-391, 1 L.Ed. 648 (1798) (opinion of Chase, J.).

> These provisions demonstrate that retroactive statutes raise particular concerns. The Legislature's unmatched powers allow it to sweep away settled expectations suddenly and without individualized consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals. As Justice Marshall observed in his opinion for **1498 the Court in *Weaver v. Graham,* 450 U.S. 24, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981), the *Ex Post Facto* Clause not only ensures that individuals have "fair warning" about the effect of criminal statutes, but also "restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.,* at 28-29, 101 S.Ct., at 963-964 (citations omitted). [FN20]
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> FN20. See *Richmond v. J. A. Croson Co.,* 488 U.S. 469, 513-514, 109 S.Ct. 706, 732, 102 L.Ed.2d 854 (1989) ("Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of *ex post facto* laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed") (STEVENS, J., concurring in part and concurring in judgment); *James v. United States,* 366 U.S. 213, 247, n. 3, 81 S.Ct. 1052, 1052, n. 3, 6 L.Ed.2d 246 (1961) (retroactive punitive measures may reflect "a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").

As discussed more fully below herein, these well entrenched constitutional protections and presumptions against retroactive application of legislation establish that 18 U.S.C. §2255 (2005) in effect at the time of the alleged conduct applies to the instant action, and not the amended version as claimed by Plaintiff.

B. Not only is there no clear express intent stating that the statute is to apply retroactively, but applying the current version of the statute, as amended in 2006, would be in clear violation of the Ex Post Facto Clause of the United States Constitution as it would be applied to events occurring before its enactment and would increase the penalty or punishment for the alleged crime. U.S. Const. Art. 1, §9, cl. 3, §10, cl. 1. U.S. v. Seigel, 153 F.3d 1256 (11th Cir. 1998); U.S. v. Edwards, 162 F.3d 87 (3d Cir.

1998); and generally, Calder v. Bull, 3 U.S. 386, 390, 1 L.Ed. 648, 1798 WL 587 (*Calder*) (1798).

> The United States Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress. U.S. Const. art. I, § 9, cl. 3. A law violates the Ex Post Facto Clause if it " 'appli[es] to events occurring before its enactment ... [and] disadvantage[s] the offender affected by it' by altering the definition of criminal conduct or increasing the punishment for the crime." Lynce v. Mathis, 519 U.S. 433, 117 S.Ct. 891, 137 L.Ed.2d 63 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29, 101 S.Ct. 960, 67 L.Ed.2d 17 (1981)).

U.S. v. Siegel, 153 F.3d 1256, 1259 (11th Cir. 1998).

In improperly attempting to multiply the presumptive minimum actual damages amount, Plaintiff's Complaint alleges a time period "from about June, 2003 until on or about February, 2005." See endnote 1. In paragraph 14 of her Complaint, Plaintiff references the 2006 amended version of §2255 which raised the presumptive actual damages amount from $50,000 to $150,000; Plaintiff also improperly claims that she is entitled to "$150,000 for each violation, for a total range of damages between $1.5 million dollars to $4.5 million dollars, jointly and severally, ..." ¶14.

§2255 is contained in Title 18 of the United States Codes - "Crimes and Criminal Procedure, Part I. Crimes, Chap. 110. Sexual Exploitation and Other Abuse of Children." 18 U.S.C. §2255 (2005), is entitled *Civil remedy for personal injuries*, and imposes a presumptive minimum of damages in the amount of $50,000, should Plaintiff prove any violation of the specified criminal statutes and that she suffered personal injury with actual damages sustained. Thus, the effect of the 2006 amendments, effective July 27, 2006, would be to triple the amount of the statutory minimum previously in effect during the time of the alleged acts. If one were to take Plaintiff's

position, and multiply the increased damages amount on a per violation/incident basis, the result would be an increase in damages by 30 to 90 times more! Clearly, the result is punitive in nature.

No case has yet decided the specific issue before this Court – whether application of the 2006 version of §2255, which increased the statutorily presumed minimum damages from $50,000 to $150,000, regardless of the actual amount of damages sustained, is prohibited from application under the Ex Post Fact Clause to the specified criminal acts occurring prior to the statutes effective date of July 27, 2006. The statute, as amended in 2006, contains no language stating that the application is to be retroactive. Thus, there is no manifest intent that the statute is to apply retroactively, and, accordingly, the statute in effect during the time of the alleged conduct is to apply. Landgraf v. USI Film Products, supra, at 1493, ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.").

This statute was enacted as part of the Federal Criminal Statutes targeting sexual predators and sex crimes against children. H.R. 3494, "Child Protection and Sexual Predator Punishment Act of 1998;" House Report No. 105-557, 11, 1998 U.S.C.A.N. 678, 679 (1998). Quoting from the "Background and Need For Legislation" portion of the House Report No. 105-557, 11-16, H.R. 3494, of which 18 U.S.C. §2255 is included, is described as "the most comprehensive package of new crimes and increased penalties ever developed in response to crimes against children, particularly assaults facilitated by computers." Further showing that §2255 was enacted as a criminal

penalty or punishment, "Title II – Punishing Sexual Predators," Sec. 206, from House Report No. 105-557, 5-6, specifically includes reference to the remedy created under §2255 as an additional means of punishing sexual predators, along with other penalties and punishments. Senatorial Comments in amending §2255 in 2006 confirm that the creation of the presumptive minimum damage amount is meant as an additional penalty against those who sexually exploit or abuse children. 2006 WL 2034118, 152 Cong. Rec. S8012-02. Senator Kerry refers to the statutorily imposed damage amount as "penalties." Id.

The cases of U.S. v. Siegel, supra (11th Cir. 1998), and U.S. v. Edwards, supra (3d Cir. 1998), also support Defendant's position that application of the current version of 18 U.S.C. §2255 would be in clear violation of the Ex Post Facto Clause. In Siegel, the Eleventh Circuit found that the Ex Post Facto Clause barred application of the Mandatory Victim Restitution Act of 1996 (MVRA) to the defendant whose criminal conduct occurred before the effective date of the statute, 18 U.S.C. §3664(f)(1)(A), even though the guilty plea and sentencing proceeding occurred after the effective date of the statute. On July 19, 1996, the defendant Siegel pleaded guilty to various charges under 18 U.S.C. §371 and §1956(a)(1)(A), (conspiracy to commit mail and wire fraud, bank fraud, and laundering of money instruments; and money laundering). He was sentenced on March 7, 1997. As part of his sentence, Siegel was ordered to pay $1,207,000.00 in restitution under the MVRA which became effective on April 24, 1996. Pub.L. No. 104-132, 110 Stat. 1214, 1229-1236. The 1996 amendments to MVRA required that the district court must order restitution in the full amount of the victim's loss

without consideration of the defendant's ability to pay. Prior to the enactment of the MVRA and under the former 18 U.S.C. §3664(a) of the Victim and Witness Protection Act of 1982 (VWPA), Pub.l. No. 97-291, 96 Stat. 1248, the court was required to consider, among other factors, the defendant's ability to pay in determining the amount of restitution.

When the MVRA was enacted in 1996, Congress stated that the amendments to the VWPA "shall, to the extent constitutionally permissible, be effective for sentencing proceedings in cases in which the defendant is convicted on or after the date of enactment of this Act [Apr. 24, 1996]." Siegel, supra at 1258. The alleged crimes occurred between February, 1988 to May, 1990. The Court agreed with the defendant's position that 1996 MVRA "should not be applied in reviewing the validity of the court's restitution order because to do so would violate the Ex Post Facto Clause of the United States Constitution. See U.S. Const. art I, §9, cl. 3."

The Ex Post Facto analysis made by the Eleventh Circuit in Siegel is applicable to this action. In resolving the issue in favor of the defendant, the Court first considered whether a restitution order is a punishment. Id, at 1259. In determining that restitution was a punishment, the Court noted that §3663A(a)(1) of Title 18 expressly describes restitution as a "penalty." In addition, the Court also noted that "[a]lthough not in the context of an ex post facto determination, ... restitution is a 'criminal penalty meant to have strong deterrent and rehabilitative effect.' United States v. Twitty, 107 F.3d 1482, 1493 n. 12 (11th Cir.1997)." Second, the Court considered "whether the imposition of restitution under the MVRA is an increased penalty as prohibited by the Ex Post Facto

Clause." Id, at 1259. In determining that the application of the 1996 MVRA would indeed run afoul of the Constitution's Ex Post Facto Clause, the Court agreed with the majority of the Circuits that restitution under the 1996 MVRA was an increased penalty.[2] "The effect of the MVRA can be detrimental to a defendant. Previously, after considering the defendant's financial condition, the court had the discretion to order restitution in an amount less than the loss sustained by the victim. Under the MVRA, however, the court must order restitution to each victim in the full amount." Id, at 1260. See also U.S. v. Edwards, 162 F.2d 87 (3rd Circuit 1998).

In the instant case, in answering the first question, it is clear that that imposition of a minimum amount of damages, regardless of the amount of actual damages suffered by a minor victim, is meant to be a penalty or punishment. See statutory text and House Bill Reports, cited above herein, consistently referring to the presumptive minimum damages amount under §2255 as "punishment" or "penalties." According to the Ex Post Facto doctrine, although §2255 is labeled a "civil remedy," such label is not dispositive; "if the effect of the statute is to impose punishment that is criminal in nature, the ex post facto clause is implicated." *See generally*, Roman Catholic Bishop of Oakland v. Superior Court, 28 Cal.Rptr.3d 355, at 360, citing Kansas v. Hendricks, 521 U.S. 346, 360-61 (1997). The effect of applying the 2006 version of §2255 would be to triple the amount of the presumptive minimum damages to a minor who proves the

[2] The Eleventh Circuit, in holding that "the MVRA cannot be applied to a person whose criminal conduct occurred prior to April 24, 1996," was "persuaded by the majority of districts on this issue." "Restitution is a criminal penalty carrying with it characteristics of criminal punishment." Siegel, supra at 1260. The Eleventh Circuit is in agreement with the Second, Third, Eighth, Ninth, and D.C. Circuits. See U.S. v. Futrell, 209 F.3d 1286, 1289-90 (11th Cir. 2000).

elements of her §2255 claim, or to increase to it 30 to 90 times more if one were to agree with Plaintiff's position. The fact that a plaintiff proceeding under §2255 has to prove a violation of a criminal statute and suffer personal injury to recover damages thereunder, further supports that the imposition of a minimum amount, regardless of a victim's actual damages sustained, is meant and was enacted as additional punishment or penalty for violation of criminal sexual exploitation and abuse of minors.

Accordingly, this Court is required to apply the statute in effect at the time of the alleged criminal acts. Not only is there no language in the 2006 statute stating that it is to apply retroactively, but further, such application of the 2006 version of 18 U.S.C. §2255 to acts that occurred prior to its effective date would have a detrimental and punitive effect on Defendant by tripling (or increasing by 30 or 90 times under Plaintiff's interpretation) the presumptive minimum of damages available to a plaintiff, regardless of the actual damages suffered.

C. As discussed above, 18 U.S.C. §2255 was enacted as part of the criminal statutory scheme to punish and penalize those who sexually exploit and abuse minors, and thus, the Ex Post Fact Clause prohibits a retroactive application of the 2006 amended version. Even under the analysis provided by the United States Supreme Court in Landgraf v. USI Film Products, 511 U.S. 244, 114 S.Ct. 1483 (1994), pertaining to civil statutes, not only is there no express intent by Congress to apply the new statute to past conduct, but also, the clear effect of retroactive application of the statute would be to increase the potential liability for past conduct from a minimum of $50,000 to $150,000, and thus in violation of the constitutional prohibitions against such

application. As noted, 18 U.S.C. §2255 is entitled "*Civil remedy for personal injuries.*" Notwithstanding this label, the statute was enacted as part of the criminal statutory scheme to punish those who sexually exploit and abuse minors. Regardless of the actual damages suffered or proven by a minor, as long as a minor proves violation of a specified statutory criminal act under §2255 and personal injury, the defendant is held liable for the statutory imposed minimum.

As explained by the Landgraf court, supra at 280, and at 1505,[3]

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.,* whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Here, there is no clear expression of intent regarding the 2006 Act's application to conduct occurring well before its enactment. Clearly, however, as discussed in part B herein, the presumptive minimum amount of damages of $150,000 was enacted as an punishment or penalty upon those who sexually exploit and abuse minors. See discussion of House Bill Reports and Congressional background above herein. The amount triples the previous amount for which a defendant might be found liable, regardless of the amount of actual damages a plaintiff has suffered and proven. The new

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[3] In Landgraf, the United States Supreme Court affirmed the judgment of the Court of Appeals and refused to apply new provisions of the Civil Rights Act of 1991 to conduct occurring before the effective date of the Act. The Court determined that statutory text in question, §102, was subject to the presumption against statutory retroactivity.

statute imposes a substantial increase in the monetary liability for past conduct. (As discussed below, Plaintiff also proposes that the minimum damage amount is to apply on a per violation basis; the absurdity of such position is further magnified when one considers that the presumptive damages amount was tripled to $150,000).

As stated in Landgraf, "the extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored." Courts have consistently refused to apply a statute which substantially increases a party's liability to conduct occurring before the statute's enactment. Landgraf, supra at 284-85. Even if plaintiff were to argue that retroactive application of the new statute "would vindicate its purpose more fully," even that consideration is not enough to rebut the presumption against retroactivity. Id, at 285-86. "The presumption against statutory retroactivity is founded upon sound considerations of general policy and practice, and accords with long held and widely shared expectations about the usual operation of legislation." Id.

Accordingly, this Court is required to apply the statute in effect at the time of the alleged conduct. 18 U.S.C. §2255 (2005).

III. Standard - Motion To Dismiss, More Definite Statement, Pleading, & Motion to Strike

As established by the Supreme Court in Bell Atlantic Corp. V. Twombly, 127 S.Ct. 1955 (2007), a motion to dismiss should be granted if the plaintiff does not plead "enough facts to state a claim to relief that is plausible on its face." Id, at 1974. 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." Id, 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.* On a motion to dismiss, the well pleaded allegations of plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff. M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1156 (11th Cir.2006).

In discussing Twombly, the Eleventh Circuit in Watts v. Fla. International Univ., 495 F.3d 1289, 1295 (11th Cir. 2007), noted - "The Supreme Court's most recent formulation of the pleading specificity standard is that 'stating such a claim requires a complaint with enough factual matter (taken as true) to suggest' the required element." In order to sufficiently allege the claim, the complaint is required to identify "facts that are suggestive enough to render [the element] plausible." Watts, 495 F.3d at 1296 (quoting Twombly, 127 S.Ct. at 1965).

Pursuant to Rule 12(e), a party may move for more definite statement of a pleading to which a responsive pleading is allowed where the pleading "is so vague or ambiguous that the party cannot reasonably frame a response." The motion is required to point out the defects and the desired details. Id. As to the general rules and form of pleading, Rules 8 and 10, a claim for relief must contain "a short plain statement of the claim showing that the pleader is entitled to relief;" Rule 8(a)(3); and may contain alternative claims within a count or as many separate claims. Rule 10(d)(2) and (3).

A. 18 U.S.C. §2255(a) does not allow the Plaintiff to multiple the presumptive minimum damages amount on a per incident or per violation basis.

In attempting to allege a §2255 claim, Plaintiff alleges that she is entitled to a multiplication of the presumptive minimum damages amount based on the number of

incidents. See endnote 1, Complaint, ¶¶13-14. Under the plain meaning of the statutory text, §2255 does not allow for a multiplication of the presumptive "actual damages" by the number of incidents or violations alleged. No where in the statutory text is there any reference to the "civil remedy" afforded against a defendant by this statute as being on a "per violation" or "per incident" basis. 18 U.S.C. 2255(a) creates a "civil remedy" for "a minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation ... ." The presumptive minimum damages amount speaks in terms of "actual damages." See 18 U.S.C. §2255 (2005), quoted above in part I; Smith v. Husband, 428 F.Supp.2d 432 (E.D. Va. 2006); Smith v. Husband, 376 F.Supp.2d 603 (E.D. Va. 2006); Doe v. Liberatore, 478 F.Supp.2d 742, 754 (M.D. Pa. 2007); and the recent cases in front of this court on Defendant's Motions to Dismiss and For More Definite Statement – Doe No. 2 v. Epstein, 2009 WL 383332 (S.D. Fla. Feb. 12, 2009); Doe No. 3 v. Epstein, 2009 WL 383330 (S.D. Fla. Feb. 12, 2009); Doe No. 4 v. Epstein, 2009 WL 383286 (S.D. Fla. Feb. 12, 2009); and Doe No. 5 v. Epstein, 2009 WL 383383 (S.D. Fla. Feb. 12, 2009).

There is no reported case supporting Plaintiff's tortured and nonsensical interpretation of §2255. In all of these cases (cited above), each of the Plaintiffs brought a single count or cause of action attempting to allege numerous violations of the "predicate acts" specifically identified in §2255; in none of the cases did the Court award the presumptive amount of damages based on a per incident or per violation basis. "18 U.S.C. §2255 gives victims of sexual conduct who are minors a private right of action."

Martinez v. White, 492 F.Supp.2d 1186, 1188 (N.D. Cal. 2007), (emphasis added). 18 U.S.C.A. §2255 "merely provides a cause of action for damages in 'any appropriate United States District Court.'" Id, at 1189. In Tilton v. Playboy Entertainment Group, Inc., 554 F.3d 1371 (11th Cir. Jan. 15, 2009), the District Court granted plaintiff "the minimum 'actual damages' prescribed by §2255(a)," wherein plaintiff alleged that defendants had violated three of the statutory predicate acts; there was no multiplying of the award.

It is well settled that in interpreting a statute, the court's inquiry begins with the plain and unambiguous language of the statutory text. CBS, Inc. v. Prime Time 24 Venture, 245 F.3d 1217 (11th Cir. 2001); U.S. v. Castroneves, 2009 WL 528251, *3 (S.D. Fla. 2009), citing Reeves v. Astrue, 526 F.3d 732, 734 (11th Cir. 2008); and Smith v. Husband, 376 F.Supp.2d at 610 ("When interpreting a statute, [a court's] inquiry begins with the text."). "The Court must first look to the plain meaning of the words, and scrutinize the statute's 'language, structure, and purpose.'" Id. In addition, in construing a statute, a court is to presume that the legislature said what it means and means what it said, and not add language or give some absurd or strained interpretation. As stated in CBS, Inc., supra at 1228 – "Those who ask courts to give effect to perceived legislative intent by interpreting statutory language contrary to its plain and unambiguous meaning are in effect asking courts to alter that language, and '[c]ourts have no authority to alter statutory language.... We cannot add to the terms of [the] provision what Congress left out.' *Merritt,* 120 F.3d at 1187." See also Dodd v. U.S., 125 S.Ct. 2478 (2005); 73 Am.Jur.2d *Statutes* §124.

As quoted above, Title 18 of the U.S.C. is entitled "Crimes and Criminal Procedure." §2255 is contained in "Part I. Crimes, Chap. 110. Sexual Exploitation and Other Abuse of Children." 18 U.S.C. §2255 (2003), is entitled *Civil remedy for personal injuries.* Reading the entire statute in context, no where is there any language indicating that presumptive minimum damages amount is to be multiplied on a "per violation" or "per incident basis." Under the statutory rules of construction, had the legislature intended to include a multiplier with respect to the damages amount, the statute would have included such language. Had Congress wanted to create such a remedy as Plaintiff attempts to bring, it could have easily included language of "such damages shall be multiplied on a per violation" or "per incident" basis in subsection (a).

By its own terms, the statute provides for the recovery of "actual damages the minor sustains and the cost of the suit, including attorney's fees." The next sentence expressly states – "Any minor as described in the preceding sentence shall be deemed to have sustained damages of no less than $50,000 in value." (Even the 2006 amended version provides – "Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.") There is absolutely no language that allows for a plaintiff to multiply the specified or presumptive damages recoverable on a "per violation" or "per incident" basis. The Plaintiff's position on §2255 puts a strained interpretation with an absurd result.

In Martinez v. White, supra, the defendants sought to dismiss plaintiffs' 18 U.S.C. §2255 action based on forum non conveniens. The Northern District of California Court, relying on the rules of statutory construction, rejected plaintiffs' argument that Congress

had intended to abrogate the forum non conveniens doctrine in a §2255 action; the District Court noted that the statute does not contain a mandatory venue provision. Had Congress wanted to get rid of the forum non-conveniens doctrine, it would have said so in the statute. Also, in Smith v. Husband, 428 F.Supp. 432; and 376 F.Supp.2d 603, the plaintiff invoked "the accompanying civil remedy for these criminal violations, stating that she has sustained and continues to sustain physical and mental damages, humiliation, and embarrassment as a result of Defendant's criminal acts." In other words, she brought a single cause of action, based on allegations of multiple violations of the §2255 predicate acts. Furthermore, the court refused to add a venue interpretation that simply was not written into the statutory text. See other §2255 cases cited herein.

For an example of a statute wherein the legislature included the language "for each violation" in assessing a "civil penalty," see 18 U.S.C. §216, entitled "*Penalties and injunctions,*" of Chapter 11 – "Bribery, Graft, and Conflict of Interests," also contained in Title 18 – "Crimes and Criminal Procedure." Subsection (b) of §216 gives the United States Attorney General the power to bring a "civil action ... against any person who engages in conduct constituting an offense under" specified sections of the bribery, graft, and conflicts of interest statutes. The statute further provides in relevant part that "upon proof of such conduct by a preponderance of the evidence, such person shall be subject to a civil penalty of not more than $50,000 for each violation or the amount of compensation which the person received or offered for the prohibited conduct, which ever amount is greater." As noted, 18 U.S.C. §2255 does not include such language.

Accordingly, Plaintiff has failed to allege a cause of action under §2255, as the statute does not allow for the multiplication of the presumptive damages amount on a per incident or per violation basis. Plaintiff Complaint is required to be dismissed.

B. Also requiring dismissal Plaintiff has failed to sufficiently allege any requisite §2255 predicate act.

Also requiring dismissal of Plaintiff's purported §2255 claim is Plaintiff's failure to sufficiently allege any violation of a requisite predicate act as specifically identified in subsection (a). Relevant to Plaintiff's complaint, 18 U.S.C. 2255(a) creates a cause of action for "a minor who is a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation ... ." See cases cited above herein. The referenced statutes are criminal statues all contained in Title 18. In paragraph 13 and 15, Plaintiff makes reference by citation only to "18 U.S.C. §2422(b)." See endnote 2 for the complete statutory text.[2] See also this Court's recent orders on motions to dismiss in other actions filed against EPSTEIN by "Jane Does," Case Nos: 08-CV-80119-MARRA/JOHNSON; 08-CV-80232-MARRA-JOHNSON; and 08-CV-80380-MARRA-JOHNSON; requiring sufficient allegations of predicate acts.

A reading of §2422(b) shows that no where in Plaintiff Complaint are there any allegations setting forth the requisite elements of the cited predicate act. See Smith v. Husband, 376 F.Supp.2d, and 428 Supp.2d, supra; and Gray v. Darby, 2009 WL 805435 (E.D. Pa. Mar. 25, 2005), requiring allegations/evidence to establish predicate act under 18 U.S.C. §2255 to state cause of action. There are no allegations what so ever regarding EPSTEIN "using the mail or any facility or means of interstate or foreign

commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, ..."

Plaintiff appears to be relying solely on an "agreement with the United States Attorney's Office to not contest liability for claims brought exclusively pursuant to 18 U.S.C. §2255, in exchange for avoiding federal prosecution under 18 U.S.C. §2422(b)." Complaint, ¶15. As noted above herein, Plaintiff already has additional claims against EPSTEIN pending in state court. See Exhibit A hereto. Even taking Plaintiff's allegation in paragraph 15 as true, Plaintiff is not proceeding exclusively under §2255. Accordingly, under the standard of pleading as established in Twombly, supra, Plaintiff has failed to sufficiently allege the requisite elements of a §2255 claim, thus requiring dismissal for failure to state a cause of action.

C. In the alternative, pursuant to constitutional law principles of statutory interpretation, 18 U.S.C. §2255 is required to be interpreted as creating a single "civil remedy" or cause of action on behalf of a minor plaintiff against a defendant. The "civil remedy" afforded is not on a "per violation" or "per incident" basis.

As set forth above, it is Defendant's position that the text of 18 U.S.C. §2255 does not allow a Plaintiff to pursue the damages afforded under the statute on a "per violation" or "per incident" basis. In the alternative, if one were to assume that the language of §2255 were vague or ambiguous, under the constitutional based protections of due process, judicial restraint, and the rule of lenity applied in construing a statute, Defendant's position as to the meaning of the statute would prevail over

Plaintiff's view. See United States v. Santos, 128 S.Ct. 2020, 2025 (2008). As summarized by the United States Supreme Court in Santos, supra, at 2025:

> ... The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. See *United States v. Gradwell,* 243 U.S. 476, 485, 37 S.Ct. 407, 61 L.Ed. 857 (1917); *McBoyle v. United States,* 283 U.S. 25, 27, 51 S.Ct. 340, 75 L.Ed. 816 (1931); *United States v. Bass,* 404 U.S. 336, 347-349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971). This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead. ...

In Santos, the Court was faced with the interpretation of the term "proceeds" in the federal money laundering statute, 18 U.S.C. §1956. "The federal money-laundering statute prohibits a number of activities involving criminal 'proceeds.'" Id, at 2023. Noting that the term "proceeds" was not defined in the statute, the Supreme Court stated the well settled principle that "when a term is undefined, we give it its ordinary meaning." Id, at 2024. Under the ordinary meaning principle, the government's position was that proceeds meant "receipts," while the defendant's position was that proceeds meant "profits." The Supreme Court recognized that under either of the proffered "ordinary meanings," the provisions of the federal money-laundering statute were still coherent, not redundant, and the statute was not rendered "utterly absurd." Under such a situation, citing to a long line of cases and the established rule of lenity, "the tie must go to the defendant." Id, at 2025. See portion of Court's opinion quoted above. "Because the 'profits' definition of 'proceeds' is always more defendant friendly that the 'receipts' definition, the rule of lenity dictates that it should be adopted." Id.

Plaintiff's position would subject Defendant EPSTEIN to a punishment that is not clearly prescribed – an unwritten multiplier of the "actual damages" or the presumptive minimum damages. The rule of lenity requires that Defendant's interpretation of the remedy afforded under §2255 be adopted. As noted above, Plaintiff's interpretation would allow Plaintiff to multiply her recovery without any regard to what the actual damages are.

In addition, under the Due Process Clause's basic principle of fair warning -

> ... a criminal statute must give fair warning of the conduct that it makes a crime ... . As was said in United States v. Harriss, 347 U.S. 612, 617, 74 S.Ct. 808, 812, 98 L.Ed. 989,
>
> > 'The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.'
>
> Thus we have struck down a [state] criminal statute under the Due Process Clause where it was not 'sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties.' Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322. We have recognized in such cases that 'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law,' ibid., and that 'No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.' Lanzetta v. New Jersey, 306 U.S. 451, 453, 59 S.Ct. 618, 619, 83 L.Ed. 888.

Thus, applying these well-entrenched constitutional principles of statutory interpretation and application, Plaintiff's cause of action attempting to multiply the presumptive amount of damages is required to be dismissed for failure to state a cause of action.

D. Plaintiff's action is also required to be dismissed for failure to state a cause of action sounding in conspiracy under §2255.

Finally, Plaintiff's entire action is subject to dismissal to the extent that she is attempting to allege a conspiracy to violate §2255 for the same reasons she has failed to state a cause of action against EPSTEIN individually as discussed above herein. See Complaint ¶¶9, 10, 11, 13, and 14.

Conclusion

Plaintiff improperly relies on the 18 U.S.C. §2255, as amended, eff, July 27, 2006, in her attempt to plead a cause of action. The statue in effect during the time of the alleged conduct applies. Plaintiff has also improperly sought to multiply the presumptive minimum damages amount imposed on a per incident or per violation basis. Not only is there nothing in the statute which would allow for such interpretation, but such interpretation is in violation of well established constitutional principles. Finally, Plaintiff has failed to state a cause of action under §2255 either individually against EPSTEIN or as a conspiracy. There are absolutely no underlying factual allegations setting forth the elements of the predicate act relied upon.

WHEREFORE, Defendant respectfully requests that this Court dismiss Plaintiff's entire action.

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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 6th day of May, 2009:

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Respectfully submitted,

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ENDNOTES:

[1] In paragraph 11 of her Complaint, 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, Jane Doe II 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 addition, Plaintiff believes that there were as many as 10 to 20 other occasions during this time frame that Defendant EPSTEIN solicited her and procured her to perform prostitution services, all during the time that she was a minor."

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."

2

TITLE 18. CRIMES AND CRIMINAL PROCEDURE
PART I--CRIMES
CHAPTER 117--TRANSPORTATION FOR ILLEGAL SEXUAL ACTIVITY AND RELATED CRIMES
§ 2422. Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 5 years and not more than 30 years.

CREDIT(S)
(June 25, 1948, c. 645, 62 Stat. 812; Nov. 7, 1986, Pub.L. 99-628, § 5(b)(1), 100 Stat. 3511; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7070, 102 Stat. 4405; Feb. 8, 1996, Pub.L. 104-104, Title V, § 508, 110 Stat. 137; Oct. 30, 1998, Pub.L. 105-314, Title I, §

102, 112 Stat. 2975; Apr. 30, 2003, Pub.L. 108-21, Title I, § 103(a)(2)(A), (B), (b)(2)(A), 117 Stat. 652, 653.)

Amendments
2006 Amendments. Subsec. (b). Pub.L. 109-248, § 203, struck out "not less than 5 years and not more than 30 years" and inserted "not less than 10 years or for life".