UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO. 08-80119-CIV-MARRA

SCANNED

JANE DOE, et al.,

Plaintiffs,

vs.

JEFFREY EPSTEIN,

Defendant.

WEST PALM BEACH, FLORIDA

JUNE 12, 2009

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE KENNETH A. MARRA,
UNITED STATES DISTRICT JUDGE

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THE COURT: We are here in the various Doe vs. Epstein cases.

May I have counsel state their appearances?

MR. HOROWITZ: Adam Horowitz, counsel for plaintiffs Jane 2 through Jane Doe 7.

THE COURT: Good morning.

MR. EDWARDS: Brad Edwards, counsel for plaintiff Jane Doe.

THE COURT: Good morning.

MR. GARCIA: Good morning, Your Honor. Sid Garcia for Jane Doe II.

THE COURT: Good morning.

MR. WILLITS: Good morning, Your Honor. Richard Willits, here on behalf of the plaintiff C.M.A..

THE COURT: Good morning.

MS. EZELL: Good morning, Your Honor. I'm Katherine Ezell from Podhurst Orseck, here with Amy Adderly and Susan Bennett, and I believe my partner, Bob Josefsberg, is going to appear by telephone.

THE COURT: Mr. Josefsberg, are you there?

MR. JOSEFSBERG: I am, Your Honor.

THE COURT: Good morning.

MR. JOSEFSBERG: Good morning.

THE COURT: All right. Do we have all the plaintiffs stated their appearances? Okay.

Defense?

MR. CRITTON: Your Honor, Robert Critton on behalf of Mr. Epstein, and my partner, Michael Burman.

THE COURT: Good morning.

MR. GOLDBERGER: Good morning, Your Honor. Jack Goldberger on behalf of Mr. Epstein.

THE COURT: I see we have some representatives from the United States Attorney's Office here.

MS. VILLAFANA: Good morning, Your Honor. Ann Marie Villafana for the U.S. Attorney's office.

THE COURT: Good morning.

Who else do we have on the phone?

MR. CRITTON: Your Honor, we have two members of the defense team are on the phone, also.

THE COURT: Who do we have on the phone?

MR. WEINBERG: Martin Weinberg. Good morning, Your Honor.

MR. LEFKOWITZ: Jay Lefkowitz. Good morning, Your Honor.

THE COURT: Good morning.

I scheduled this hearing for very limited issues which, as you all know, there's been a motion by Mr. Epstein to stay the civil proceedings against him. The one issue I have concern about is Mr. Epstein's contention or assertion that by defending against the allegations in the civil proceedings, he

may expose himself to an allegation by the United States in the non-prosecution agreement that he's violated that agreement and therefore would subject himself to potential federal charges.

I had asked for some briefing on this. I asked the United States to present its position to me. And I received the Government's written response, which I frankly didn't find very helpful. And I still am not sure I understand what the Government's position is on it.

So first let me hear from Mr. Epstein's attorneys as to what do you believe the concern is. I don't believe the non-prosecution agreement has ever been filed in this Court; am I correct?

MR. CRITTON: To my knowledge, Your Honor, it has not.

THE COURT: So I don't believe I've ever seen the entire agreement. I've seen portions of it.

MR. EDWARDS: Your Honor, I believe that it was filed under Jane Doe 1 and 2 vs. United States of America, case under seal in your court.

THE COURT: Okay.

MR. EDWARDS: In a separate case.

THE COURT: In that case, okay. Was it actually filed in that case?

MR. EDWARDS: I filed it under seal.

THE COURT: In any event, what's Mr. Epstein's concern about if you defend the civil actions, you're going to expose

yourself to a claim for a breach by the United States of the non-prosecution agreement?

MR. CRITTON: Robert Critton.

Your Honor, our position on this case is, I'd say is somewhat different. When this issue originally came before the Court, as you are aware prior to my firm's involvement in the case, there was a motion filed on behalf of Mr. Epstein seeking a stay. And I think it was in Jane Doe 102 and then subsequently Jane Doe 2 through 5 because all of those cases were filed on or about the same time.

And at that time the Court looked at the issue and it was based upon a statutory provision at that time. And the Court said I don't find that it's applicable, or for whatever reason I think the Court said I don't consider that to be a pending proceeding or a proceeding at that particular time.

In that same order, which was in Jane Doe 2, I believe it's -- not I believe, I know it's docket entry 33, the Court also went on to talk about at that particular point in time dealt with the issue of the discretionary stay.

And the Court said at that time, I'm paraphrasing, but the Court also does not believe a discretionary stay is warranted. And what the Court went on to say is that if defendant does not breach the agreement, then he should have no concerns regarding his Fifth Amendment right against self-incrimination.

The fact that the U.S. Attorney or other law enforcement officials may object to some discovery in these civil cases is not in and of itself a reason to stay the civil litigation, so that any such issue shall be resolved as they arise in the course of the litigation.

And I would respectfully submit to the Court that the position that the Government has taken in its most recent filings changes the playing field dramatically. Because what the Government in essence has said as distinct from the U.S. saying is, well, we object to some discovery, or we may object to some discovery in the civil cases.

What they have, in essence, said is if you take some action, Mr. Epstein, that we believe unilaterally, and this is on pages 13 and 14 of their pleading or of their response memo to the Court's inquiry, they say if Mr. Epstein breaches the agreement. They said it's basically like a contract, and if one side breaches, the other side can sue.

In this instance what the Government will do is if we believe that Mr. Epstein has breached the agreement, we'll indict him. We will indict him. And his remedy under that circumstance, which is an incredible and catastrophic catch 22 is, we'll indict him and then he can move to dismiss. That's a great option.

In this particular instance my mandate in defending -- and that's a dramatic change in the Government's position,

because the Government is not saying, and the Court was pretty specific in what you asked the Government for in its response is, in essence, and it's the same question in a more limited fashion you're posing today is whether Mr. Epstein's defense of the civil action violates the NPA agreement, the non-prosecution agreement, between the U.S. and Mr. Epstein.

And the Government refuses to answer that question. They won't come out and say, yes, it will, or no, it won't. What they're doing is they want to sit on the sideline, and as their papers suggest is, they want us to lay in wait and that if, in fact, they believe he violates a provision of the NPA as it relates to the defense of this case or these multitude of cases, then they can come in and indict him -- no notice, no opportunity to cure.

We don't think that's what the NPA says, but that's certainly what their papers say. We'll indict him, no notice, no opportunity to cure. We will indict him, and his remedy under that circumstance is that he can move to dismiss the indictment.

Well, that's great except Mr. Epstein, his mandate to me and I know his mandate to his criminal lawyers, is: Make certain I don't do anything, in particular in these civil cases that would in any way suggest that I am in willful violation of the NPA.

Now, in the Court's prior ruling in the docket entry

33, certainly some aspects of the NPA are within Mr. Epstein's control. There's no question about that. But aspects that relate to the defense of these cases, either in terms of the civil lawyers who are defending these, I think there's 12 or 13 pending cases in front of you, there's another four cases in the state court, is the risk is substantial, it's real, and it presents a chilling effect for the civil lawyers in moving forward to determine whether or not we're taking some action that in some way may be a violation of the NPA.

And the Government's, again, refusal or non-position with regard to past acts that have been taken in the civil case with regard to the defense or future acts that we may take with regard to these contested litigation casts an extraordinary cloud of doubt and uncertainty and fear that the defense of these cases could jeopardize Mr. Epstein and put him in the irreparable position of violating the NPA and then subsequently being indicted.

In this particular instance, again, Mr. Epstein has no intention of willfully violating the NPA, but it's of great concern to him. And I'd say with the position that the Government has taken, no notice, no cure period, no opportunity to discuss. Again, we think that's not what the NPA provides, it's not what the deal was between the two contracting parties, the United States and Mr. Epstein. But that's clearly what their papers say under the circumstances, and it would create

this irreparable harm to Mr. Epstein under the circumstances.

In essence, we're left with a catch 22 in defending the civil cases. We have a mandate to take no action, to take any action which may be deemed to be a violation of the NPA, either in the past or in the future, which would in any way risk Mr. Epstein being indicted by the United States.

He has the clear risk of an indictment based upon the papers that the Government filed. It's real, it's not remote, and it's not speculative. It chills the action of the defense in this instance of both Mr. Epstein and his attorneys in trying to defend these cases and decide under the circumstances can we do this, can we take this position with regard to depositions, can we take this legal position with regard to motions to dismiss, with regard to responses, with regard to replies?

And we send out paper discovery. Is this in some way if we contact someone who may be an associate of these individuals as part of our investigation, is that potentially in any way a violation of the NPA? Again, we don't think so.

And, obviously, again, my direction has been from my client: Don't take any action that would result in me being indicted under the NPA. Well, that's great. But, generally, civil lawyers or civil lawyers in defending a personal injury case or a tort case, which is exactly what these are, and from a practical standpoint, we use various tools to do discovery.

They're standard. They're specific. They're very temporary. Very typical.

But in this instance, as the Court knows, things are not typical with regard to this case in any way, shape or form. We can't even serve subpoenaes, there's objections and there's -- we can't even serve objections to third parties so we can obtain documents unless we have to filter it through the plaintiffs' attorneys. They won't allow us to use their clients' names, even in a subpoena that would never be filed in the court.

How do we do a deposition of a third party? We wanted to take the deposition of Jane Doe 4. Well, who is she? Well, we can't tell you that. Well, who's the defendant? Well, we can't tell you that because nobody wants anybody to know anything about the case. They want to present it strictly through rose-colored glasses.

And in this particular instance, we simply can't defend this case or take certain action with the spector hanging over us that, in fact, the Government may deem it to be a violation of the NPA, because very clearly in their response papers, they don't say. They say we don't take the position, and then they take a substantial position is we think there's not all that substantial factors that would entitle him to a stay.

Except for the one major issue which the Court posed

in the question is, is can he defend these cases? That's what I really want to know. Can he defend these cases and, in essence, what he has done in the past or what his defense team has done in the past and what they're going to do in the future, can you give him, Epstein, assurances that the Government under this situation, whatever he does, based on advice of counsel, that that cannot be a willful violation of the NPA, which they can -- they, the U.S. -- can then turn around and say that's a violation of the agreement and, therefore, we're going to go proceed to indict you under the circumstances.

Our position is, Your Honor, is that the U.S. has now cavalierly suggested that, as they did in picking up on the court's docket entry or prior order, is, look, compliance with the NPA is solely up to Mr. Epstein. In this type of balance of equities, it doesn't speak in favor of a stay.

Well, that's great. And maybe that was the position back in '08, on August 5th of '08, when the issue came up in front of the Court with regard to the initial stay.

But the Government's papers under these circumstances suggested a very different set of circumstances. Their own unilateral, which is the issue that we argued in the motion for stay, is that the Government's position is that we can unilaterally indict this man if we think he's breached the NPA.

We don't think that's right, but we have no buffer

between us and the Government. They'll say, and as the Court knows, the Government has substantial power. The Government does what it wants. Most of the time hopefully they're right. Sometimes they make mistakes.

But in this particular instance, my client has rights. We think that there's notice provisions, we think there's cure provisions under the NPA. That's not what their paper says under the circumstances.

And what we'd like to know from the Government, and maybe the answer is basically what the Court asks is, let the Government come forward today and say, based on the knowledge that we have, or as of today's date, June 12th, 2009, we, the Government, agree that there is no set of circumstances, not that we're not aware of, but as of today's date, there is nothing that exists that would be a violation of the NPA.

THE COURT: Well, that's way beyond what I'm interested in. I don't know what Mr. Epstein may have done outside the context of defending this case that may constitute a violation. And if he has done something outside the context of defending this case that's a violation, I don't care. That's between the United States and Mr. Epstein.

I'm only concerned about whether anything he does in defending these civil actions is going to be a violation of the non-prosecution agreement. If he has done something else, it's none of my business, and I don't care, and I'm not going to

even ask the Government to give you an assurance that he hasn't done anything that might have violated the agreement up till today. I'm only interested in defending these civil actions.

MR. CRITTON: Then I would respectfully submit to the Court that the Government be asked in that limited context, are they as of today, whether there were or not, but as of today is there anything that has been done or will you take the position, the United States, that any position that Mr. Epstein has taken with regard to defending these civil cases is in any way a violation of the NPA?

THE COURT: Well, I'm not sure what they're going to say, but that might -- that cures the problem up to this point. But then we have to deal with what's going to happen from here on in. And that's another issue that we have to deal with.

So I understand your position.

But has anyone suggested to you on behalf of the United States that there is something that you've done in defending this case that they believe may or could be construed as a violation of the non-prosecution agreement? Has anyone pointed to anything that you've done? For example, the fact that you've wanted to take their -- I don't know if you've noticed depositions or not in this case, but if you've sent notice of taking deposition, if you sent requests for production of documents, if you sent interrogatories, if you issued third party subpoenas? Is anything you've done thus far

in the context of this case been brought to your attention as a potential violation?

MR. CRITTON: I have received no notification nor am I aware that we've received any notification of any action that we have taken today. As I suggested to the Court, I don't know when they've done or not. And in their papers they suggested, well, we don't know everything that's gone on in the civil litigation.

But from a practical standpoint, it was a number of comments that were made in their papers is, we can indict, we can see if there's a breach.

Judge, I may have some --

THE COURT: Before you go on.

MR. CRITTON: I'm sorry.

THE COURT: You've focused a great deal on the Government's response to my inquiry as supporting your position that you're in jeopardy. But you've made the suggestion, even before this brief was filed, that defending the case was going to potentially result in an assertion or allegation that you breached the non-prosecution agreement.

So what was it that caused you to make that initial assertion? Because that's what caught my attention, was not -- this brief that the Government has filed was in response to something that you filed initially in your most recent motion for a stay which raised the issue.

So what was it that gave you some concern to even raise the issue that defending this case is going to constitute a breach?

MR. CRITTON: Because there are other instances where counsel other than myself, not in the civil aspects, where allegations have been made and letters have been sent by the United States suggesting that there's been a violation of the NPA. And under those circumstances, some notification was provided.

THE COURT: Did it have anything to do with defending the civil actions?

MR. CRITTON: It did not.

THE COURT: So then why was that issue raised by you in the first instance?

MR. CRITTON: Because of the prospect that the defendant could take, that the U.S. would take the position under the circumstances that a position that we took with regard to the contested litigation may well impact, that the Government may have a very different view of what the interpretation of the agreement is.

And as an example is a number of the parties, and I know the Court doesn't want to get into a discussion, the issue is, is under 2255 is that from the defendant's perspective the deal that was cut on that, it was a very specific deal. It dealt with both consensual and contested litigation. It dealt

with a secret list of individuals who we had no idea who was on the list, and a commitment that he would under certain circumstances be required to pay a minimum amount of damages, which our position is under 2255 based upon the statute that was in effect at the time, a $50,000 as to anyone who wanted -- who came forward who was on the list and met certain criteria.

The position that now has been asserted by a number of the plaintiffs under the circumstances, and it's been pled, and actually a number of the complainants is, is Epstein agreed, and they cite to a letter that was sent by Ms. Villafana from the Government, that says he has to plead guilty or he can't contest liability. That may be true under very, very limited or specific circumstances.

But what the plaintiffs have done in a number of the cases, and these are pending motions, is they've said is, well, we think C.M.A. cases is a good example, they've pled 30 separate counts of 2255 alleged violations. And they're saying under the circumstances is, therefore, we have 2255 violations, there's 30 of them, so 30 times 150, or should be, or whether it's 150, that's the amount of money that we want, so maybe $15 million, or whatever the number is.

Some of the other plaintiffs' lawyers have been even more creative. They've said is, well, we'll agree that it's only one cause of action but that each number of violations; that is, if 20 alleged incidents occurred, that we would

consider to be, or that we will argue are violations, then we can take 20 times the 50, or the 150, depending on which statute is applicable.

So the Government under that set of circumstance could say, and, again, this is one of the reasons that we raised it, they could say, look, our deal with you was that you couldn't contest liability, that you were waiving liability, or your ability to contest an enumerated offense under 2255.

Again, part of the deal was as to an enumerated offense. Okay. Well, what's that mean? What did he plead to? Well, he really didn't plead to anything, which is another issue associated with the 2255. But if the Government comes in and says, no, wait a minute, our position was, is that you're stuck with 2255 and the language within the NPA. And, therefore, whether it's an offense or whether it's multiple offenses or violations or each one represents an individual cause of action, if the Government takes the position that's adverse to what we think the clear reading of the agreement was under those circumstances, they could claim a violation.

And as a result -- and that's one of the reasons we put -- that was the most glaring one to us, so we raised that issue. And then when the Government's response came with regard to, is we can just proceed to indict if we think that there's been a breach of the agreement.

That puts us at substantial risk and chills our

ability to move forward. Thank you, Your Honor.

THE COURT: Thank you. Who wants to be heard from the plaintiffs first?

Is there any plaintiff's attorney who is contending that the defense of these civil actions by Mr. Epstein is going to constitute a breach of the non-prosecution agreement?

MR. JOSEFSBERG: Your Honor, this is Bob Josefsberg. May I speak?

THE COURT: Yes, sir.

MR. JOSEFSBERG: We're not quite confident that any breaches of any agreement, which were third-party beneficiaries, should be resolved by you. We're not saying it shouldn't. But we have not raised any breach of agreement. We think that is between the United States and Mr. Epstein.

What I find incredulous and disingenuous is that Mr. Epstein is saying that he wants a stay because he may be forced into taking actions in the defense of this case that would violate the agreement.

And let me make our position clear on that. If he wants to move to take depositions, interrogatories, production, and they are according to your rulings appropriate, not invasive of the privacy of someone, and they are relevant, then I don't know how those could in any way be violations of the agreement.

What I find hypocritical is that there are two parts

to the agreement that I am a beneficiary of. One of them is that he has agreed that on any action brought in the 2255, he will admit to liability.

And I received on May 26 a motion to dismiss, which we're prepared to respond to and disagree with, but totally contesting liability, saying that the statute doesn't apply because the girls are no longer minors and saying, and this is the great one, saying that the predicate of the conviction under 2255 has not been satisfied.

Now, the understanding that I have is the agreement between the Government and Mr. Epstein was that the Government desired to see these victims made whole, and wanted them to be in the same position as if Mr. Epstein had been prosecuted and pled or convicted. And they would be able to have the predicate of that criminal conviction, which just as a matter of liability would just be introduced as proof that he's done this.

They, under the agreement, are supposed to admit to liability on limited something that's under 2255. He has filed, but since there is no conviction, there can be no civil suit under 2255, with which we disagree. But it is totally in opposite of the NPA.

The second part is there are many young ladies, and this perhaps he can use this to his great advantage, who are humiliated about this entire situation. Some of them won't

come forward.

We were appointed by Judge Davis as a Special Master to represent these young ladies. And some of them don't even want to file suit. They don't even want to be known as Jane Doe 103. They don't want any of the risks for these motions that are pending.

And part of the agreement was that if we represented them and they settle, Mr. Epstein would pay our fees. And he has written us as of yesterday that he is under no obligation to pay our fees on settling cases.

Now, those two matters, I believe, may be breaches. But I am not asking this Court at this time to do anything about them. Nor am I telling the Government, I'm not running to the Government and saying indict him because I want you to pressure him to do what he agreed to.

I'm a third-party beneficiary for that agreement, and I may move to enforce certain parts of it. But as far as the issue of staying the litigation, that is the exact opposite of the intent and the letter of the NPA. The purpose of the NPA was so that these 34 young ladies, these victims who have been severely traumatized, may move on with their lives.

And to stay this action would be the exact opposite of the purpose of that agreement and would be horrible psychologically for all of my clients.

THE COURT: Mr. Josefsberg, I understand your

position. And I don't want to argue the merits of whether a stay should or should not be granted.

I'm just trying to understand what the ground rules are going to be if I grant a stay or if I deny a stay. And I've already denied a stay once. I have to decide this current motion, and I just want to know what is going to happen if I deny the stay in terms of Mr. Epstein's exposure under the non-prosecution agreement. That's my concern.

So if you're telling me that you're not going to urge the United States, on behalf of any of your clients, to take the position that he's breached the agreement because he's taking depositions, because he's pursuing discovery, because he's conducting investigations that anyone in any other type of civil litigation might conduct with respect to plaintiffs that are pursuing claims against a defendant, that those typical types of actions, in your judgment, are not breaches of the agreement and that he can go forward and defend the case as any other defendant could defend, and you're not going to run to the United States and say, hey, he's breaching the agreement by taking depositions and he's breaching the agreement by issuing subpoenas to third parties in order to gather information necessary to defend, then I don't have a problem. But if he's going to be accused of breaching the agreement because he sends out a notice of deposition of one of your clients, how is he supposed to defend the case?

MR. JOSEFSBERG: Your Honor, you're totally correct. He can depose my client. That's not a problem. But the problem is that these are not typical clients and this is not a typical case. He has written in his pleadings that he wants to publish the names of these girls in the newspapers so that other people may come forward to discuss their sexual activities with these different plaintiffs. That's not your typical case. But are rulings that you'll make in this case, and they're not part of the NPA.

As far as my going to the Government is concerned, I find it very uncomfortable for me to use the Government to try to pursue my financial interest in litigation. And I know that Mr. Epstein and his counsel will make much ado about it. So I am not going to be running there.

However, if they start taking depositions regarding liability, I will consider that to be a breach because they're supposed to have admitted liability.

THE COURT: But, again, I don't have the agreement and I don't remember reading the agreement. But what I'm being told is the part of the agreement that admits liability is only as to a 2255 claim, and there are numerous other personal injury tort claims other than 2255 claims.

And there's a limit of damages on the 2255 claim, as I understand it, but I presume that all the plaintiffs are going to seek more than the limited or capped amount of damages in

the non-prosecution agreement as to the other claims.

And so why aren't they entitled to defend and limit the amount of damages that your client is seeking on the non-2255 tort claims?

MR. JOSEFSBERG: Your Honor, you are correct. On non-2255 tort claims, they are permitted to do the defense, whatever is appropriate.

My cases are pure 2255 on which liability under the agreement is supposed to be admitted. Now, as to the amount of damages, there are legal issues that will be before you and under the C.M.A. cases that are getting before you, as to whether it is 50 or 150. That has nothing to do with the NPA.

There are legal issues that are before you as to whether it is per statute, per count or per incident or per plaintiff. Those have nothing to do with the NPA. There is no amount in NPA. Those will be resolved.

Anyone who has brought a case that is outside of 2255, the defense is permitted to contest liability under the NPA. That's no violation.

Under the NPA if someone brought a case under just 2255, Mr. Epstein, if he is to keep his word, cannot contest liability. And there would no need to stay this. Because it is a self-fulfilling agreement. He can contest liability. And as far as the amount of damages, anyone that wants to go over the statutory minimums, of course, he can contest that in any

way that is proper under the Rules of Evidence and your rulings. The NPA has no limitation on his contesting damages above the minimum statutory amount.

The only thing that he has done is in his actions of refusing to pay for settling defendants, and in his saying that he has no liability under 2255, those appear to be contrary to what's in the NPA.

But I'm not in any position right now to claim a breach, and I don't know whether I'd be claiming a breach or enforcing it in front of you, suing him for fees, asking you to have him admit liability, or complaining to the Government. And that's why I'm not that helpful in this situation because I think it's the Government's role.

But I do not waive the right to be a third-party beneficiary because pursuant to my appointment, which was agreed to by Mr. Epstein, I and my clients have certain rights, and we want to enforce them.

But his defending this lawsuit will not in any way be a violation. His getting this lawsuit stayed would be a violation of the spirit of taking care of these girls, and there would be other issues. Like if there is a stay, Your Honor, would he be posting a bond?

THE COURT: We don't need to talk about those issues. That's not my concern.

MR. JOSEFSBERG: I agree, Your Honor, we don't.

THE COURT: That's not my concern. So, again, I just want to make sure that if the cases go forward and if Mr. Epstein defends the case as someone ordinarily would defend a case that's being prosecuted against him or her, that that in and of itself is not going to cause him to be subject to criminal prosecution.

MR. JOSEFSBERG: I agree, Your Honor.

THE COURT: Any other plaintiff's counsel want to chime in?

MR. WILLITS: Richard Willits on behalf of C.M.A.. I would join, to weigh in on what Mr. Josefsberg said.

MR. JOSEFSBERG: Your Honor, I could not hear.

THE COURT: We'll get him to a microphone. Mr. Willits is speaking.

MR. WILLITS: On behalf of my client, C.M.A., we join in what Mr. Josefsberg said, and we also want to point out something to the Court.

First, we want to make a representation to the Court, we have no intention of complaining to the U.S. Attorney's Office, never had that intention, don't have that intention in the future, but, of course, subject to what occurs in the future.

I want to point out to the Court that Mr. Epstein went into this situation with his eyes wide open, represented by counsel, knowing that civil suits had to be coming. If he

didn't know it, his lawyers knew it.

He appears to be having second thoughts now about he could have negotiated this way or he could have negotiated that way with the U.S. Attorney's Office. And they want to impose their second thoughts on the innocent plaintiffs. We don't think that's fair. We think it's in the nature of invited error, if there was any error whatsoever.

Thank you.

THE COURT: You agree he should be able to take the ordinary steps that a defendant in a civil action can take and not be concerned about having to be prosecuted?

MR. WILLITS: Of course. And we say the same thing Mr. Josefsberg said. It's all subject to your rulings and the direction of this Court as to what is proper and what is not proper. And we're prepared to abide by the rulings of this Court, and we have no intention of running to the State's Attorney.

THE COURT: The U.S. Attorney?

MR. WILLITS: I'm sorry. The U.S. Attorney.

THE COURT: Mr. Garcia.

MR. GARCIA: Thank you, Your Honor.

If I may briefly, I think perhaps defense counsel forgot about this, but on pages 17 and 19 of my memorandum of law in opposition to the motion to dismiss, I did make reference to the non-prosecution agreement, and I did say that

the contesting of the jurisdiction of this Court was a potential breach of the non-prosecution agreement.

So my client happens to have, and they have filed with the Court a copy of her state court complaint, given the fact that the non-prosecution agreement limits the non-contesting of jurisdiction to claims exclusively brought under the federal statute.

I'm going to go ahead and withdraw those contentions on pages 17 and 19 of my memo of law because it doesn't apply to my case. So to the extent that I raised this issue with defense counsel and the Court, I'm going to withdraw that aspect of it.

THE COURT: Can you file something in writing on that point with the Court?

MR. GARCIA: Yes.

THE COURT: What do you say about this issue that we're here on today?

MR. GARCIA: I think that the problem that I have with it is that this non-prosecution agreement is being used by defense counsel for the exact opposite purpose that it was intended. My perception of this thing, and I wasn't around, is that Mr. Epstein essentially bought his way out of a criminal prosecution, which is wonderful for the victims in a way, and wonderful for him, too.

Now he's trying to use the non-prosecution agreement

as a shield against the plaintiffs that he was supposed to make restitution for.

And, certainly, he can take my client's depo. He's done extensive discovery in the state court case -- very intrusive, I might add. And we don't care, because we can win this case with the prosecution agreement or without the prosecution agreement. We are ready to go forward.

THE COURT: You're not going to assert to the United States Government that what he's doing in defending the case is a violation for which he should be further prosecuted?

MR. GARCIA: Absolutely not.

THE COURT: Anyone else for the plaintiffs?

MR. HOROWITZ: Judge, Adam Horowitz, counsel for plaintiffs Jane Doe 2 through 7.

I just wanted to address a point that I think you've articulated it. I just want to make sure it's crystal clear, which is that we can't paint a broad brush for all of the cases.

The provision relating to Mr. Epstein being unable to contest liability pertains only to those plaintiffs who have chosen as their sole remedy the federal statute. My clients, Jane Doe 2 through 7, have elected to bring additional causes of action, and it's for that reason we were silent when you said does anyone here find Mr. Epstein to be in breach of the non-prosecution agreement. That provision, as we understand

it, it doesn't relate to our clients.

THE COURT: Okay. But, again, you're in agreement with everyone else so far that's spoken on behalf of a plaintiff that defending the case in the normal course of conducting discovery and filing motions would not be a breach?

MR. HOROWITZ: Subject to your rulings, of course, yes.

THE COURT: Thank you.

Anyone else have anything to say from the plaintiffs?

Ms. Villafana, if you would be so kind as to maybe help us out. I appreciate the fact that you're here, and I know you're not a party to these cases and under no obligation to respond to my inquiries. But as I indicated, it would be helpful for me to understand the Government's position.

MS. VILLAFANA: Thank you, Your Honor. And we, of course, are always happy to try to help the Court as much as possible. But we are not a party to any of these lawsuits, and in some ways we are at a disadvantage because we don't have access. My access is limited to what's on Pacer. So I don't really know what positions Mr. Epstein may have taken either in correspondence or in discovery responses that aren't filed in the case file.

But your first order was really just what do you think about a stay, and then the second order related to this hearing and asked a much more specific question, which is whether we

believe that Mr. Epstein's defense was a breach of the agreement.

And I've tried to review as many of the pleadings as possible. As you know, they're extremely voluminous. And I haven't been through all of them. But we do believe that there has been a breach in the filing that Mr. Josefsberg referred to, and contrary to Mr. Critton, we do understand that we have an obligation to provide notice, and we are providing notice to Mr. Epstein today.

The pleading that we found to be in breach -- the non-prosecution agreement, sought to do one thing, which was to place the victims in the same position they would have been if Mr. Epstein had been convicted of the federal offenses for which he was investigated.

And that if he had been federally prosecuted and convicted, the victims would have been entitled to restitution, regardless of how long ago the crimes were committed, regardless of how old they were at the time, and how old they are today, or at the time of the conviction.

And it also would have made them eligible for damages under 2255.

And so our idea was, our hope was that we could set up a system that would allow these victims to get that restitution without having to go through what civil litigation will expose them to.

You have a number of girls who were very hesitant about even speaking to authorities about this because of the trauma that they have suffered and about the embarrassment that they were afraid would be brought upon themselves and upon their families.

So we did through the non-prosecution agreement tried to protect their rights while also protecting their privacy. So, pursuant to the non-prosecution agreement -- on the other hand, we weren't trying to hand them a jackpot or a key to a bank. It was solely to sort of put them in that same position.

So we developed this language that said if -- that provided for an attorney to represent them. Most of the victims, as you know from the pleadings, come from not wealthy circumstances, may not have known any attorneys who would be in a position to help them.

So we went through the Special Master procedure that resulted in the appointment of Mr. Josefsberg, and the goal was that they would be able to try to negotiate with Mr. Epstein for a fair amount of restitution/damages. And if Mr. Epstein took the position, which apparently he has, which is that the $50,000 or $150,000 floor under 2255 also would be a cap. That if they were to proceed to file suit in Federal Court to get fair damages under 2255, Mr. Epstein would admit liability, but he, of course, could fight the damages portion, which means that, of course, he would be entitled to depositions; of

course, he would be entitled to take discovery, and we don't believe that any of that violates the non-prosecution agreement.

The issue with the pleading that he filed, the motion to dismiss the case, I believe it's Jane Doe 101, represented by Mr. Josefsberg, is that that is a case that was filed exclusively under 18 U.S.C., Section 2255. She met that requirement. Mr. Epstein is moving to dismiss it, not on the basis of damages, he is saying that he cannot be held liable under 2255 because he was not convicted of an offense.

The reason why he was not convicted of an offense is because he entered into the non-prosecution agreement. So that we do believe is a breach.

The issue really that was raised in the motion to stay and that I addressed in our response to the motion to stay is that Mr. Epstein's -- Mr. Epstein wants to stay the litigation in order to leave, in order to sort of attack the cases of the victims whether they are fully within the non-prosecution or not, non-prosecution agreement or not, and leave the Government without a remedy if he does, in fact, breach those terms. And that is why we opposed the stay.

THE COURT: I'm not sure what you mean by that last statement.

MS. VILLAFANA: Well, because this issue related to the motion to dismiss on Mr. Josefsberg's client came up after

we had filed that response. And what we said in the response to the motion to stay is that the reason why he wants to stay the litigation is so that the non-prosecution agreement terminates based on a period of time, as he puts it. And then afterwards he would be able to come in here and make all of these arguments that clearly violate the non-prosecution agreement but we would be without remedy.

THE COURT: But you're not taking the position that other than possibly doing something in litigation which is a violation of an express provision of the non-prosecution agreement, any other discovery, motion practice, investigations that someone would ordinarily do in the course of defending a civil case would constitute a violation of the agreement?

MS. VILLAFANA: No, Your Honor. I mean, civil litigation is civil litigation, and being able to take discovery is part of what civil litigation is about. And while there may be, for example, if someone were to try to subpoena the Government, we would obviously resist under statutory reasons, all that sort of stuff. But, no, Mr. Epstein is entitled to take the deposition of a plaintiff and to subpoena records, etc.

THE COURT: And even if he seeks discovery from a Government agency, you have the right to resist it under the rules of procedure but that would not constitute a violation, again unless there's a provision in the prosecution agreement

that says I can't do this?

MS. VILLAFANA: Correct.

THE COURT: That's your position?

MS. VILLAFANA: Yes.

THE COURT: Thank you.

MS. VILLAFANA: Thank you, Your Honor.

THE COURT: Mr. Critton, did you want to add anything?

MR. CRITTON: Yes, sir. Just a few responses to some of the issues that have been raised.

The most glaring, at least from our perspective, is both Mr. Josefsberg's comments that he believes that there's a violation of the NPA as well as Ms. Villafana with regard to Jane Doe 101.

Mr. Josefsberg, while he was the attorney rep who was selected by Judge Davis to represent a number of individuals, alleged victims that may have been on the list, he represents many of them. And the type of response that was filed in 101 would probably be very similar to what we will file if he files -- and he filed 102 as well. But if he files 103, 104 and 105, or whatever number he files, we may well take that same legal position in our motions and in our response or in reply.

And what we've been, in essence, told today is we consider that to be a violation of the NPA under the circumstances.

102 is a perfect example that he filed is, we have e-mails going back and forth between the Government and my clients' attorneys at the time that suggested that 102 probably doesn't even fit within the statute of limitations.

So under Mr. Josefsberg's argument is as well, we've only brought a 2255 claim. We don't care whether she's within or is outside the statute of limitations. Because she was on the list and under the circumstances, he has to admit liability, which we contest is under that set of circumstances you're stuck with it. You can fight damages if you can, but she's a real person and you can't raise statute of limitations.

The other point that kind of strikes out is there's probably a difference. And I'm happy to provide a copy of the NPA or a redacted portion of the NPA which deals with the civil issues, which are paragraphs 7, 8, 9 and 10, and the entire addenda in camera for the Court to look at, if plaintiff's counsel and the Government, I guess, really, because they're not a party, is if they have no objection because they all have access based on a prior court order to the non-prosecution agreement.

So I'm happy to provide that to the Court today and show it to counsel so that the Court can review that.

But our position with regard to the 2255 claims is that -- there were two types of claims that could be filed, one was consensual litigation, the second was contested litigation.

And under the consensual, in essence, which Mr. Epstein did, is he's offered $50,000 of the statutory minimum for that time period to all of those individuals.

THE COURT: Can I interrupt you a second?

MR. CRITTON: Yes, sir.

THE COURT: I'm not here, and I don't believe it's my role to decide whether or not there is or is not a breach of the agreement. I'm just trying to understand what the Government's position is regarding your defending these cases.

Now, I'm just saying this as an example. If, for example, in the non-prosecution agreement there was a provision that said explicitly: Jeffrey Epstein shall not move to dismiss any claim brought under 2255 by any victim no matter how long ago the allegations or the acts took place, period.

If that was in the agreement and you filed a motion to dismiss by someone who brought a claim, it might sound like it might be a violation.

MR. CRITTON: I agree.

THE COURT: So you would know that when you filed your motion because it was right there for you to read.

And so to stay the case because I want to do something that the contract expressly prohibits me from doing, so stay the case until the agreement expires so then I can do something that the agreement said I couldn't do so you won't be in fear of prosecuting, I'm not sure that that is what I'm concerned

about.

I'm concerned about discovery, investigation, motion practice, that's not prohibited by a provision of the agreement. If there's something that's prohibited by the agreement that you, knowing what the agreement says, go ahead and do, anyway, I guess that's a risk you're going to have to take. If there's a legitimate dispute about it, I guess some arbiter is going to decide whether it's a breach or not.

But, again, that's something you and Mr. Burman, Mr. Goldberger, and you are all very good lawyers, and he's got a whole list of lawyers representing him, and you've got the agreement and you're going to make legal decisions on how to proceed, and you're going to have to go and make your own decisions.

I'm concerned about things that aren't in the agreement, that aren't covered, that you're going to be accused of violating because, again, you take depositions, you send out subpoenas, you file motions that are not prohibited by the agreement. And that's what I'm concerned about.

MR. CRITTON: And I understand that, Your Honor.

But at the same time, it's as if the lawyers and the clients, based upon our interpretation of the agreement, and, believe me, we would not have filed 101, the motion to dismiss, but for believing that there was a good faith basis to do that under the circumstances.

And now, in essence, we're being accused not only by -- not accused, but it's been suggested that there's a breach of the NPA, not only by Mr. Josefsberg on behalf of 101, but as well Ms. Villafana on behalf of the United States.

That's the perfect example. They're basically saying we think you violated. We may send you notice under the circumstances. So does that mean that on 101 we have to back off of it because we think in good faith that it's a motion and is that something that this Court ultimately will rule?

THE COURT: I don't know that I'm the one who is going to make that decision. Again, that's not the kind of thing that I was concerned about. I was more concerned about the normal, ordinary course of conducting and defending a case that would not otherwise expressly be covered under the agreement, that you're going to then have someone say, ah, he's sent a notice of deposition, he's harassing the plaintiffs. I don't know if there's a no contact provision in the agreement or no harassment type of provision in the agreement. Ah, this is a breach because you sent discovery, or he's issuing subpoenas to third parties trying to find out about these victims' backgrounds, he's breaching the agreement.

Those are the kind of things that I was worried about.

MR. CRITTON: The concern that we have is as part of doing this general civil litigation, it's not just the discovery process. And I understand the issues that the Court

has raised.

But part of it is that often cases are disposed of either on a summary basis or certainly legal issues that come before the Court during the course of the case, just like in a criminal case. That's clearly part of the, I'd say the defense of the case under the circumstances; and if, in fact, an individual can't legally bring a cause of action for certain reasons, such as has been suggested in 101, and may be suggested in 102 when that pleading is filed, that certainly is a position that puts my client at risk.

As another example that I use with C.M.A., that they filed this 30-count complaint. Now, they have the state court claims as well. But they, in essence, have said they filed another pleading with the Court that says depending on what the Court rules, in essence, on whether we can file multiple claims or one cause of action with multiple violations, we may dump the state court claims and, therefore, we'll just ride along on that. That's a very different --

Mr. Epstein would never have entered into, nor would his attorneys have allowed him to enter into that agreement under those circumstances where he had this unlimited liability. That clearly was never envisioned by any of the defendants -- by the defendant or any of his lawyers under the circumstances.

And if that's claimed to be a violation, either by the

attorneys; i.e., he's not recapitulating on liability under the 2255, and that's all we have now. That's our exclusive remedy.

And the Government says, yeah, that's right, that's a violation of the NPA. It again chills us from moving forward, filing the necessary motion papers and taking legal positions that may put my client at risk for violating the NPA and then creating the irreparable harm of, after having been in jail, after having pled guilty to the state court counts, after registering on release as a sex offender, he's complied and done everything, taken extraordinary efforts to comply with the NPA, puts him at substantial risk. And that's what our worry is moving forward.

MR. JOSEFSBERG: Your Honor, may I be heard. May I make three comments? It will take less than a minute.

THE COURT: Yes, sir.

MR. JOSEFSBERG: Mr. Critton refers to the alleged victims. I want you to know that our position is that pursuant to the NPA they're not alleged victims. They are actual, real victims, admitted victims.

Secondly, he argues about the statute of limitations on 102. I know that you don't want to hear about that, and I'm not going to comment about it. But please don't take our lack of argument about this as being we agree with anything.

Last and most important, we totally agree with Mr. Critton in his suggestion that he hand you a copy of the

NPA. I think that many of the questions you asked will be answered when you read the NPA, and I think it's very unfair of everyone who is sitting in front of you who have the NPA to be discussing with you whether it's being breached, whether there should be a stay when you're not that familiar with it.

If we would give you a copy of it, I think it would be much more helpful in making your ruling.

THE COURT: Maybe Judge Colvat will resolve this issue for me.

MR. JOSEFSBERG: Even if he doesn't, Your Honor, I believe we are allowed to show it to you.

THE COURT: I'll tell you what: I'll wait for Judge Colvat to rule, and then if he rules that it should remain sealed, then I'll consider whether or not I want to have it submitted to me in camera.

Anything else, Mr. Josefsberg?

MR. JOSEFSBERG: No. I thank you on behalf of myself and the other counsel on the phone for permitting us to appear by phone.

THE COURT: All right. Anyone else have anything they want to add?

MR. EDWARDS: Brad Edwards on behalf of Jane Doe.

I only had one issue here, and when I read your motion that you wanted to hear on the narrow issue of just defense in the civil actions filed against him violates the

non-prosecution agreement, I was expecting that we were going to hear something from the Government similar to the affidavit that was filed by Mr. Epstein's attorneys wherein he indicates as of the day of this affidavit attached to the motion to stay, the U.S. Attorney's Office has taken the position that Epstein has breached the non-prosecution agreement and it names specifically investigation by Epstein of this plaintiff and other plaintiffs, Epstein's contesting damages in this action. Epstein, or his legal representatives, making statements to the press. And we didn't hear any of those things.

So that's what I was expecting that the U.S. Attorney's Office was going to expound on and say, yes, we've made some communications to Epstein. He's violating.

What we're hearing right now, today, just so that I'm clear, and I think the Court is clear now, is that the non-prosecution agreement is what it is. There have been no violations, but for maybe what Mr. Josefsberg brought up.

But there are very few restrictions on Mr. Epstein. He went into this eyes wide open. And whether or not I agree with the agreement, how it came to be in the first place, is neither here nor there.

But there have been no violations or breaches up to this point. And his affidavit that was filed, I'm just troubled by where it even came from. I mean, it's making specific allegations that the U.S. Attorney's Office is

threatening a breach, and this is part of the motion to stay, which we're all battling here.

So I just wanted to indicate to the Court or remind the Court that there have been specific allegations made, the United States Attorney's Office is making these allegations of breach, which we haven't heard any of the evidence of.

Thank you.

THE COURT: All right.

Ms. Villafana, did you want to respond to that suggestion that there were other allegations of breach besides the one that you've just mentioned today?

MS. VILLAFANA: No, Your Honor.

THE COURT: Thank you. I appreciate your giving me the information, which I think has been very helpful today, and I'll try and get an order out as soon as possible.

[Court adjourned at 11:10 a.m.].

C E R T I F I C A T E

I hereby certify that the foregoing is an accurate transcription of proceedings in the above-entitled matter.

s/Larry Herr

_____ _____

DATE LARRY HERR, RPR-CM-RMR-FCRSC

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