

**From:** [REDACTED]

**To:** [REDACTED]

**Cc:** [REDACTED]

**Subject:** Judge Marra's Order re Epstein

**Date:** Wed, 20 May 2009 00:15:29 +0000

**Importance:** Normal

---

Hi everyone – I am back and have had a chance to review Judge Marra’s order, Epstein’s motion to stay the civil litigation, and the responses from some of the plaintiffs’ lawyers.

In short, Epstein is seeking a “discretionary stay” of all of the civil litigation until the end of his term of house arrest when, according to Epstein’s lawyers, the Non-Prosecution Agreement “expires.” (I don’t really agree that the Agreement “expires” then, but that is another issue.) According to Epstein’s calculation, this would be the end of 2010. Epstein claims that we have the sole right to declare that the agreement has been breached and move forward with a prosecution. He has been asserting his Fifth Amendment privilege to answer any and all interrogatories or to produce any documents (including the Non-Prosecution Agreement). Normally, this would result in the drawing of an adverse inference against him, and, basically, an automatic finding of fault for the plaintiffs. As usual, Epstein wants to have his cake and eat it, too. He wants our agreement to expire and then be free to breach the agreement with impunity. (I note that, while Epstein has refused to provide any discovery, he has insisted on receiving discovery from the plaintiffs, including a list of names and phone numbers of every man with whom they have had a sexual relationship, beginning when the plaintiffs were 10 years’ old.)

Judge Marra has asked for our opinion on the matter.

Here is my proposal: We respond to Judge Marra by stating that, as has been noted in the plaintiffs’ pleadings, it was the United States’ intent to place the victims in the same position where they would have been if Epstein had been convicted after trial. As Judge Marra noted in his initial order on Epstein’s first motion to stay, Epstein has the keys to his own handcuffs – if he abides by the Non-Prosecution Agreement, the criminal matter will remain in abeyance. As to Epstein’s assertion that the USAO has unfettered discretion in declaring the agreement breached, this is no different than any other contract. If one party believes that the other has breached, they may seek the remedy set forth in the contract. If the other party believes that it hasn’t breached the agreement, that is what courts are for. I will insert some cases where a prosecution has been dismissed because of the breach of an agreement.

With respect to Epstein’s claim that we will “trump up” some claim of breach and then use the civil discovery to prosecute him, I will note that, as part of the Non-Pros Agreement, each party accepted that risk. We provided Epstein with the list of the victims, which we otherwise would not have been obligated to do, and he is being allowed extensive civil discovery of them, which he would be able to use in his defense if a criminal prosecution were instituted. Also, if this claim is legitimate, Epstein would have recourse during the criminal prosecution to try to exclude that evidence from being used against him.

Lastly, Epstein relies on some 11<sup>th</sup> Circuit cases that say that it is unfair to draw a negative reference against a defendant who legitimately asserts the 5<sup>th</sup> Amendment privilege where drawing that inference would automatically result in the grant of summary judgment for the plaintiff. For this reason, according to Epstein, the Court should grant a stay. I would point out that this result doesn’t apply to the Epstein case. In order to succeed on a 2255 claim, the victim must show: (1) that she was a victim of a crime committed by Epstein; (2) that she

suffered personal injury as the result of such a violation; and (3) the amount of damages that she suffered. While the negative inference may satisfy element (1), each plaintiff must still meet her burden on elements (2) and (3).

I would like to refrain from opining about what constitutes a breach of the NPA and what doesn't.

Please let me know if you concur in this plan. Judge Marra has asked for a response by May 29<sup>th</sup>, and I know that there will be a good week's worth of wordsmithing. If we do not intend to file a response, we should let the Judge know as soon as possible.

I have not copied Alex on this e-mail as per his earlier instructions. Jeff, if you believe Alex should receive a copy, can you forward to him?

Thank you.

[REDACTED]

Assistant U.S. Attorney

500 S. Australian Ave, Suite 400

West Palm Beach, FL 33401

[REDACTED]