

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80811-CIV-MARRA/JOHNSON

C.M.A.,

Plaintiff,

vs.

JEFFREY EPSTEIN and SARAH KELLEN,

Defendants.

PLAINTIFF'S MEMORANDUM IN RESPONSE TO DEFENDANT, JEFFREY EPSTEIN'S, MOTION TO DISMISS FIRST AMENDED COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION, AND MOTION FOR MORE DEFINITE STATEMENT; MOTION TO STRIKE, AND SUPPORTING MEMORANDUM OF LAW

The Plaintiff, C.M.A., by and through undersigned counsel, files this Response to Defendant, Jeffrey Epstein's, Motion to Dismiss First Amended Complaint for Failure to State a Cause of Action, and Motion for More Definite Statement; and Motion to Strike (D.E. 47).

As a preliminary matter, the Plaintiff submits that she has pled sufficient factual bases to support the 31 claims set forth against the Defendant in this case. In this Court's *Opinion and Order on Motion to Dismiss and Motion for More Definite Statement* in the case styled Jane Doe No. 6 v. Jeffrey Epstein, Case No. 08-80994-CIV-Marra ("Jane Doe No. 6) this Court rejected any contention by the Defendant that the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955 (2007) requires a heightened fact pleading of specifics in the typical case to withstand a motion to dismiss under Fed.R.Civ.P. 12(b)(6) (*Opinion and Order on Motion to Dismiss and Motion for More Definite Statement, Jane Doe No. 6*, pages 6-7). In this case, the Plaintiff alleges that at age 15 while in middle school, she was first brought to the Defendant and thereafter was subjected to various lewd, lascivious, and sexual acts, including,

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but not limited to, masturbation, touching of her breasts and buttocks, and solicitation and enticement to engage in sexual acts with another female in the Defendant's presence (First Amended Complaint, ¶¶ 12 and 15). It is further alleged that the Defendant engaged in a scheme to gain access to economically disadvantaged minor girls, including the Plaintiff, for the purpose of sexually assaulting the girls and/or coercing them to engage in prostitution in return for the payment of monies. (First Amended Complaint, ¶ 9). The scheme was motivated by the Defendant's sexual preference and obsession for minor girls. Id. Pursuant to the scheme, minor girls, including the Plaintiff, were brought to the Defendant's residence (i.e. mansion) by the Defendant's employees and assistants. The girls were generally left in a room alone with the Defendant at which time the various victims would be instructed to remove their clothing and then be subjected to one or more sexual acts. (First Amended Complaint, ¶ 10). It is further alleged that from June 2002 until approximately August of 2003 the Defendant coerced and enticed the minor plaintiff to commit various acts of sexual misconduct and that these acts occurred, on average, one to three times per week. In addition to the acts described above, the Defendant encouraged the minor Plaintiff to become involved in prostitution. (First Amended Complaint, ¶ 13). Furthermore, Counts I through XXX allege the specific details of each event which gave rise to the particular cause of action in each Count. Additionally, it is alleged that the Defendant entered into an agreement with the Federal Government that allows the minor Plaintiff in this case to assert that the Defendant is estopped by virtue of that agreement from contesting liability to the Plaintiff and otherwise denying the acts alleged in the Amended Complaint. (First Amended Complaint, ¶¶ 18 and 19).

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Based on the foregoing, it is apparent that the Plaintiff's allegations provide the Defendant with sufficient notice of the underlying factual bases for the claims raised in the 31 counts. Issues involving the pleading of the requisite elements of the claims are discussed hereafter.

The Defendant has raised four arguments in support of his motion that Counts I through XXX, which allege violations of 18 U.S.C. §2255, should be dismissed. The Plaintiff will address those arguments *seriatim*.

I. Title 18 U.S.C. §2255 creates a separate cause of action for each separate incident

18 U.S.C. §2255 reads:

§2255. Civil remedy for personal injuries.

- (a) In general.—Any person who, while a minor, was 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, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than \$150,000.00 in value.
- (b) Statute of limitations. — 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.

The Plaintiff maintains that the clear wording of the statute creates a separate cause of action for each incident during which a defendant perpetrates an act which is in violation of one

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of the predicate federal criminal statutes. The underlying approach to statutory construction was succinctly set forth in the Fifth Circuit decision in *Hammers v. Internal Revenue Service*, 988 F.2d 32 (5th Cir. 1993):

The sole purpose of statutory construction, including, when appropriate, a review of all available legislative history, is to ascertain the intent of the legislative authority. The most certain expression of legislative intent in nearly every instance is the words of the subject statute. We may not look beyond them when, taken as a whole, they are rational and ambiguous. (Citations omitted).

“Absent unambiguous contrary expression, legislative provisions must be accorded the clear meaning of the ordinary language terms employed in those provisions.” *Union of Needle Trades, Industrial and Textiles Employees, AFL-CIO, CLC v. United States Immigration and Naturalization Service*, 202 F. Supp. 2d 265, 270 (S.D.N.Y. 2002). Most importantly, courts must give “effect to every clause and word of a statute...and to avoid reading legislation in a way that renders some words altogether redundant.” *Union of Needle Trades*, 202 F.Supp.2d at 271.

A review of the wording of 18 U.S.C. §2255 demonstrates no ambiguity. The intent is clear. The statute allows a minor, who was a victim of a violation of any one of a number of serious federal statutes and who suffers personal injury as a result of such violation to recover not less than \$150,000.00 in damages. The Defendant, in his argument that the statute contemplates only one recovery regardless of the number of incidents suffered by a minor victim, totally ignores the use of the descriptive article and adjective emphasized above.

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Each of the predicate acts identified in 18 U.S.C. §2255 are distinct offenses aimed at the sexual exploitation of minors and involve separate elements. For example, 18 U.S.C. §2251 criminalizes actions of those who coerce minors to engage in sexually explicit conduct for the purpose of producing a visual depiction of such conduct or for the purpose of transmitting live visual depictions of such conducts if the person knows or has a reason to know that such visual depiction will be transported or transmitted using means or facilities of interstate or foreign commerce. 18 U.S.C. §2422(b) prohibits utilizing the mail or any facilities or means of interstate or foreign commerce to coerce any individual who has not attained the age of 18 years to engage in prostitution or any sexual activity for which any person could be charged with a criminal offense. It is simply not plausible to believe that Congress would have intended a minor victim of such disparate acts would be restricted to a single floor of \$150,000.00. Under the defense's interpretation of the statute a minor child who is coerced into engaging in prostitution and who is subsequently videotaped engaging in separate sexual offenses and further victimized by the distribution of the videos throughout the world would be entitled to a single remedy with a single floor on damages. Clearly, each such offense is so outrageous that a child victim of such disparate acts of exploitation should give rise to separate damages with each incident having its own floor of damages of \$150,000.00. This interpretation is consistent with the gravity of the offenses which form the predicate acts under Section 2255. Any other interpretation would not be harmonious with the overall purpose of compensating minor victims for these outrageous acts of exploitation. If Congress intended only one remedy for multiple separate violations of a single or multiple predicate acts, it clearly would have utilized other language to say so.

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No decision can be found which addresses the precise issue before the court in this matter. None of the decisions cited by the Defendant remotely address this issue. The defense has failed to refer to any legislative history which would shed light on the issue or would suggest in any way that the statute should be interpreted differently than that urged by the Plaintiff. Indeed, a review of the history of 18 U.S.C. §2255 is reflective of the compelling concerns of Congress that minor victims be fully compensated for acts of exploitation. 18 U.S.C. §2255 was first adopted as part of the Child Abuse Victims Rights Act of 1986. Amended PL 99-591, Title I, §101(b) [Title VII, §703(a)], October 30, 1986, 100 Stat. 3341-75. In 1998, as part of the Protection of Children From Sexual Predators Act of 1998, Congress added additional federal crimes as predicate acts under 18 U.S.C. §2255. PL 105-314, Title VI, §605, October 30, 1998, 112 Stat. 2984. In 2006, Congress adopted what was referred to as Masha's Law, which is part of the Adam Walsh's Child Protection Safety Act of 2006. (PL 109-248, Title VII(b)(c), July 27, 2006, 120 Stat. 650). Pursuant to Masha's Law, Congress changed the wording of the statute to ensure that a child who is victimized by a violation of one of the predicate acts could recover even if she is injured after the age of majority. For example, a child victim, like the real Masha, will continue to be victimized after she reaches adulthood by the distribution worldwide of sexually explicit photos taken of her as a child and should be compensated. Additionally, Masha's Law increased the floor for actual damages to \$150,000.00 as a result of the recognition by Congress of the inadequacy of the \$50,000.00 floor which previously existed. *See* Senator Kerry's remarks concerning Masha's Law at 152 Cong. Rec. S8012-02, 2006 WL 2034118 (Cong. Rec.). In fact, Senator Kerry's remarks lend support for the construction of the statute

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urged by the Plaintiff. Masha was victimized in at least two separate ways by her adopted American father and by others throughout the world who download her images:

Senator Kerry explained:

“Masha’s Law is named after a very brave 13-year-old girl—a Russian orphan who was adopted by a Pennsylvania man at the age of 5 and sexually exploited from the moment she was placed in his care. Masha suffered unspeakable atrocities in the hands of her abusive father, a man with a history of child exploitation. She continues to suffer as photographs of this abuse, taken by her father and posted on the Internet, are downloaded every day. Yet Masha does not cower in fear. She is taking a stand. She is using her experiences to demonstrate why the law must change. And it is because of her that we are now closing unacceptable loopholes in our child exploitation laws.

Masha’s photographs are among the most commonly downloaded images of child pornography. Law enforcement estimates that 80 percent of child pornography collections contain at least one of her photographs. In fact, it was the high volume of images being distributed by this one individual that raised suspicions and led law enforcement officials to the home of Masha’s adopted father. While he is currently in jail accused of sexual abuse and facing Federal charges, the damage to Masha continues every day as her pictures continued to be downloaded. Masha has sought compensation through a little used provision in the Child Abuse Victims’ Rights Act of 1986 that provides statutory damages for the victims of sexual exploitation. Nothing will ever compensate Masha for the horrific experiences she has had, but the penalties provided in current law are embarrassingly low—they are one-third of the penalty for downloading music illegally.”

Support for the position advanced by the Plaintiff in this case is found in the decision in *Re: Hawaiian Airlines, Inc.*, 355 B.R. 225 (Dist. of Haw. 2006). In that case, the District Court

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held that a party may obtain statutory damages under the Stored Communications Act on a per violation basis and therefore, multiple violations of the Act may warrant multiplying the \$1,000.00 minimum statutory award. In that case, the claimant asserted that the debtor's vice president gained unauthorized access to the claimant's website on thirty-six separate occasions. The Bankruptcy Court capped the claim at \$1,000.00 for all of the alleged instances in which the debtor unlawfully accessed the claimant's website rather than at the \$1,000.00 minimum per alleged unlawful access. The District Court concluded that the Bankruptcy Court erred as a matter of law in ruling that the claim should be capped at \$1,000.00 for all accesses rather than \$1,000.00 for each alleged access. The damages provision of the Stored Communications Act reads as follows:

The court may assess as damages in a civil action under this section the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation, but in no case shall a person entitled to recover receive less than the sum of \$1,000.00.

18 U.S.C. §2707(c). The court observed that the language of the statute was susceptible to different interpretations. The court recognized there was no controlling case law on the issue and that the legislative history of the Act failed to shed any light on congressional intent as to whether the minimum statutory should be multiplied by the number of violations. In finding that the statute should be interpreted to allow a minimum floor of damages for each violation, the court noted that to construe the statute otherwise would conflict with the overall purpose of the statute by providing little deterrence against repeated intrusions once the first intrusion occurred. The interpretation of Section 2255 urged by the Defendant Epstein implicates the same concerns

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over deterrence recognized by the court in *Hawaiian Airlines*. Under Defendant Epstein's construction of the statute a defendant who has victimized a minor by violating one of the predicate acts on a single occasion would be free to continue to violate that child without any exposure to a separate damage floor. The deterrent value inherent in the statutory scheme would be undermined by such an interpretation. The *Hawaiian Airlines* court also observed that the Stored Communications Act provided for criminal penalties and a criminal indictment under the Stored Communications Act could contain a count for each separate unauthorized stored communication. The court stated that it would not read the Act to provide that a party could face multiple criminal counts for unlawful intrusion in the stored communications while his or her civil liability for the same conduct would be kept as if only one intrusion occurred. The court also rejected an attempt by the debtor to persuade the court that if Congress intended multiple intrusions to be compensated it would have used language similar to that provided for the unauthorized disclosure of tax returns under 26 U.S.C. §7431(c)(1)(A). The court stated that it would not find that the more precise language in an entirely different statute would resolve the issue. Defendant's attempt to rely on a reference to civil penalties provided under 18 U.S.C. §216(b) should be similarly rejected.

In summary, therefore, the Defendant's unwarranted interpretation of the remedies provided under 18 U.S.C. §2255 is inconsistent with the clear wording of the statute which is designed to fully compensate child victims from outrageous acts of sexual exploitation. The interpretation of the statute advanced by the Plaintiff is fully consistent with the purpose and aims of the civil remedies provision.

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II. Plaintiff agrees to re-plead predicate acts under 18 U.S.C. §2255 in light of this Court's ruling in *Jane Doe No. 6.*

On February 12, 2009, this Court entered the *Opinion and Order on Motion to Dismiss and Motion for More Definite Statement* in the case styled *Jane Doe No. 6 v. Jeffrey Epstein*, Case No. 08-80994-CIV-Marra.¹ In that Order, the Court granted the Defendant's Motion for More Definite Statement with respect to allegations concerning the predicate Act 18 U.S.C. §2422(b). The Court ruled that although the Complaint stated a cause of action for violation of that statute the plaintiff should be required to state upon which part of "to engage in prostitution or sexual activity for which any person can be charged with a criminal offense" the Plaintiff was relying. The Court observed that the Plaintiff's pleading in that case was ambiguous as to whether or not the plaintiff claimed prostitution or another criminal offense with which the defendant could have been charged. In light of that ruling, and in light of the fact that the Plaintiff, C.M.A., maintains that she is entitled to damages under Section 2255 as a result of the defendant's violation of that particular predicate act, the plaintiff agrees that she should re-plead Counts I through XXX to address the court's concerns. The plaintiff respectfully requests that this Court authorize the plaintiff to so amend. Additionally, if so permitted, the plaintiff will specifically identify any other predicate act upon which she relies in advancing the claim under 18 U.S.C. §2255.

¹ Similar rulings were entered in the separately filed cases styled *Jane Doe Nos. 1-5 v. Epstein*.

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III. Punitive damages should be allowed under 18 U.S.C. §2255 pursuant to Federal Common Law

Federal courts have recognized that even though a particular federal statute which gives rise to a tort related claim does not specifically provide for punitive damages, the remedy of punitive damages can be supplied through federal common law. For example, in *Tachiona v. Mugabe*, 216 F.Supp.2d 262 (S.D.N.Y. 2002) the court upheld an award of compensatory damages and punitive damages under the Torture Victim Protection Act (TVPA) even though the language of TVPA provided no methodology for determining the amount or type of damages. The TVPA simply provides that “an individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture...or (2) subjects an individual to extra-judicial killing” shall be “liable for damages.” 28 U.S.C. §1350 Note at Section 2(a). The court determined that it was appropriate to rely on federal common law to determine the amount and type of damages available. Quoting from the decision in *In Re: Estate of Marcos*, 910 F. Supp. 1460, 1469 (Dist. Haw. 1995) the court stated:

As one court noted, “[b]ecause Congress in the TVPA offered no methodology as to how damages should be determined, federal courts are free to and should create federal common law to provide justice for any injury contemplated by the Alien Tort Statute and the TVPA or treated these dealings with the protection of human rights.”

The *Tachiona* court, therefore, ruled that with respect to the TVPA the federal common law concerning damage awards allows for both compensatory and punitive damages in the amounts requested by the plaintiff in that case.

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Similarly, the Supreme Court addressed the availability of punitive damages in a Section 1983 action against correctional officials in a case involving the violation of the plaintiff's Eighth Amendment rights. In *Smith v. Wade*, 461 U.S. 30 (1983) the Court held that a guard could be liable for punitive damages upon a finding of reckless or careless disregard or indifference to an inmate's rights or safety. The Court recognized that it has assumed the availability of punitive damages under Section 1983 even though the statute itself does not address that issue. *Wade v. Smith*, at 35-36. After addressing the standard which would govern the imposition of punitive damages in that case, the Court addressed the remaining question of whether the policies and purposes of Section 1983 itself would require a departure from the rules of common law to which it referred in adopting the standard. The Court stated that "as a general matter, we discern no reason why a person whose federally guaranteed rights have been violated should be granted a more restrictive remedy than a person asserting an ordinary tort cause of action." *Smith v. Wade* at 48-49.

The setting of a floor on damages in Section 2255 at \$150,000.00 does not detract from the availability of punitive damages under common law. In fact, the floor on damages confirms that Congress recognized the severity of injury which would befall a victim of cruel acts of exploitive behavior upon children. It would be inconsistent with the significant policy considerations given rise to Section 2255 to disallow the availability of punitive damages. The remedy specifically provided under the statute is compensatory only. There is no indication in the statute that the floor represents anything other than a means to compensate an injured child victim. Punitive damages, on the other hand, are designed to punish the defendant for

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outrageous conduct and to deter him and others like him from similar conduct in the future. *Wade v. Smith* at 54. There is nothing in the language of the statute that otherwise precludes the availability of punitive damages to effectuate the goals of punishment and deterrence for those who would perpetrate significant harm upon minors through violation of the predicate acts recognized under Section 2255.

The defendant urges principles of due process, judicial restraint, and the rule of lenity as barriers to the recognition of punitive damages under Section 2255. That contention is without merit. As set forth above, the recognition of punitive damages under the statute is consistent with the approach of the federal courts in recognizing the availability of punitive damages through the application of federal common law. Moreover, the Plaintiff submits that the cases cited by the Defendant which bear upon the restrictions placed on the scope of criminal statutes and penalties have no application to the case at bar.

More problematic, however, is the recognition that in the Senate draft of the 1986 Child Abuse Victim's Rights Act, a minor was entitled to recover "three-fold the damages such minor sustains" and any such minor "shall be deemed to have sustained damages of no less than \$50,000.00 in value". *Proceedings and Debates on Child Abuse Victim's Rights Act*, 132 Cong. Rec. S17295-02, 1986 WL 792002 (Cong. Rec.) (Oct. 18, 1986). This three-fold damages provision was eliminated by the House version in favor of the language "actual damages". *Conference Report on House Joint Resolution, 738, Continuing Appropriations, Proceedings and Debates*, 132 Cong. Rec. H10599-04, 1986 WL 789223 (Cong. Rec.), (Oct. 15, 1986). Of equal concern also is the Defendant's argument that the adoption of punitive damages under the

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civil remedies provision of 18 U.S.C. §2252(A) impacts a recognition of punitive damages under Section 2255. It is acknowledged that subsection (f) of 18 U.S.C. §2252(A) provides for the recovery of compensatory and punitive damages by any person assigned by the prohibited conduct under that statute. It is further acknowledged that this provision was adopted as part of P.L. 108-21, *Prosecutorial Remedies and other Tools to End the Exploitation of Children Today Act of 2003 (Protect Act)* enacted on April 30, 2003. This enactment occurred three years prior to Masha's Law, discussed above. The Plaintiff contends, however, that the nature of the relief provided under Section 2252(A) and the timing of the adoption of that enactment are not dispositive of the issue. It is clear from the discussions surrounding the adoption of the civil remedies provision under the Protect Act that Congress was specifically concerned over the eradication of the child pornography industry and adopted this specific provision to achieve that end. Senator Leahy in explaining this provision commented as follows:

Finally, the Bill provides a new private right of action for the victims of child pornography. This is something we have not done before in this arena. This provision has real teeth. It includes injunctive relief and punitive damages to help put those who produce child pornography out of business for good. I commend Senator Hatch for his recognition that punitive damage provisions are an important means of deterring misconduct. Some of these people think if they just move from place to place and nothing happens to them, they are free. If they know that whatever profits they make are gone and they are going to have punitive damages assessed and still may face, on top of that, criminal action, then they would think twice. These are important, practical tools not only to put child pornography out of business but to put them in jail."

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Comments of Senator Leahy Re Prosecutorial Remedies and Tools Against Exploitation of Children Act of 2003, 149 Cong. Rec. S2573-02, at 2003 WL 432400 (Cong. Rec.).

That Congress determined to specifically focus on those involved in the child pornography business in adopting the punitive damages provision of Section 2252(a), does not undermine the Plaintiff's contention that federal common law should provide for punitive damages to effectuate the other violations of federal rights under Section 2255. The Plaintiff urges the court to view the two statutes as parallel and complimentary acts all designed to further the goals of Section 2255. *Cf.*, *Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* claim including the remedy of punitive damages, available to family of decedent even though allegations could also support a suit against the United States under Federal Tort Claims Act; statutory remedy compliments *Bivens* remedy and was not intended to replace *Bivens* remedy).²

IV. Count XXXI adequately pleads a common law cause of action for sexual battery

Count XXXI sets forth a claim for the common law tort of battery under Florida law. The elements of battery are adequately set forth in that Count. As this court recognized in its *Order* on the Motion to Dismiss in *Jane Doe No. 6*, a battery under Florida law is defined "as an unlawful touching or striking or the use of force against the person of another with the intention of bringing about a harmful or offensive contact or apprehension thereof. *Id* at 6, (quoting *McDonald v. Ford*, 223 S.2d 553, 555 (Fla.2d DCA 1969), (quoting 3 Fla. Jur. Assault and

² It is noted that the Defendant has not challenged the availability of punitive damages under Florida common law for the sexual battery claim. Indeed, there is nothing in the statutory scheme under either Section 2255 or 2252(A) which would adversely impact the availability of punitive damages under state common law. *See Silkwood v. Kerr-McGee Corporation*, 464 U.S. 238 (1984) (award of punitive damages under state common law not preempted by federal laws concerning the regulation of nuclear energy).

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Battery, Section 3)). Paragraphs 202 and 203 combined with the allegations concerning the unlawful acts in the first thirty counts adequately plead the essential elements of a cause of action for common law battery (sexual battery) under Florida law. Paragraph 15 of the Amended Complaint is also incorporated in this count but simply reflects the fact that the offensive acts against the minor are also prohibited as a matter of statute. However, a fair reading of Count XXXI does not in any way suggest that the claim under that count is based on an implied cause of action under any of those federal or state criminal statutes. This claim is brought as a matter of common law.

WHEREFORE, in light of the foregoing, the Plaintiff respectfully requests this court enter an order authorizing the plaintiff to amend the First Amended Complaint to more specifically plead the predicate acts which are relied upon in advancing the claim under 18 U.S.C. §2255. Plaintiff also requests this court enter an order denying the remaining contentions by the defendant in his Motion to Dismiss.

Respectfully submitted,

/s/ Jack P. Hill

JACK SCAROLA

Florida Bar No. 169440

JACK P. HILL

Florida Bar No.: 0547808

Searcy Denney Scarola Barnhart & Shipley, P.A.

West Palm Beach, Florida 33409

Attorneys for Plaintiff

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 13, 2009, I electronically filed the foregoing document with the Clerk of Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified above via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Jack P. Hill

JACK SCAROLA
Florida Bar No. 169440
JACK P. HILL
Florida Bar No.: 0547808
Searcy Denney Scarola Barnhart & Shipley, P.A.

West Palm Beach, Florida 33409

Attorneys for Plaintiff

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COUNSEL LIST

Jack A. Goldberger, Esquire
Atterbury, Goldberger & Weiss, P.A.

~~250 Australian Avenue S.~~

West Palm Beach, FL 33401

[REDACTED]

Bruce E. Reinhart, Esquire

Bruce E. Reinhart, P.A.

~~250 South Australian Avenue~~

Suite 1400

West Palm Beach, FL 33401

[REDACTED]

Robert Critton, Esquire

Burman Critton Luttier & Coleman LLP

~~515 North Flagler Drive, Suite 400~~

West Palm Beach, FL 33414

[REDACTED]

Richard H. Willits, Esquire

Richard H. Willits, P.A.

[REDACTED]

Lake Worth, FL 33461

[REDACTED]