UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 08-CIV-80893 – MARRA/JOHNSON

JANE DOE,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STAY COMPLAINT

Plaintiff, Jane Doe, hereby responds to the motion by defendant Jeffrey Epstein ("Epstein") to stay this action until late 2010. The motion for a stay should be denied. Defendant has not carried his heavy burden of justifying a stay in the action.

A stay pending resolution of a related criminal prosecution is proper only when "special circumstances so require in the interests of justice." *United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 364 (11th Cir. 1994) (internal quotations omitted). Of course, "The proponent of a stay bears the burden of establishing its need." *Clinton v. Jones*, 520 U.S. 681, 708 (1997). To stay a civil action in light of criminal proceedings, "a party bears the heavy burden of demonstrating that there would be a clear case of hardship if a stay did not issue." *GLL GmbH & Co. Messeturm KG v. LaVecchia*, 247 F.R.D. 231, 233 (D. Me. 2008) (internal quotations omitted).

Epstein's motion fails for at least three reasons. First, Epstein has failed to show that any criminal charges are pending against him. Second, there are no special circumstances here justifying a stay. And third, the interests of justice strongly weigh

against any stay -- particularly since it involves allegations of serious sexual abuse against a minor.

I. EPSTEIN IS NOT FACING PENDING CRIMINAL CHARGES AGAINST HIM RELATED TO JANE DOE.

Epstein's initial burden is to show some sort of risk of criminal prosecution that could potentially justify staying this civil action. Ordinarily a party will attempt to show this fact by pointing to an indictment on parallel criminal charges. "A defendant's privilege against self-incrimination is a factor favoring a stay *only after that defendant has been indicted.*" *United States ex rel. Gonzalez v. Fresenius Medical Care North* America, 571 F.Supp.2d 758, 763 (W.D. Tex. 2008) (internal quotation omitted) (emphasis added). *See, e.g., Ventura v.* Brosky, 2006 WL 3392207 (S.D. Fla. 2006) (granting a stay of civil proceedings where civil defendant was incarcerated and awaiting trial on parallel criminal charges). Here Epstein has not been indicted for crimes involving plaintiff Jane Doe, so he is unable to even begin to establish the need for a stay. There simply are not any parallel criminal charges in existence at that this time.

Epstein desperately attempts to carry his burden by alleging that there exists a non-prosecution agreement that has been entered in this case and that he is at risk of being found to have violated that agreement. This does not carry his burden. If the non-prosecution agreement were to magically disappear tomorrow, that would hardly put in place a criminal prosecution of Epstein for sexual abuse by Jane Doe. All that would do is *permit* the U.S. Attorney's Office, if it so chose, to pursue a criminal prosecution. In other words, today there is – at most – a *risk* of a potential criminal

prosecution at some point down the road. And, of course, it is a matter of public record that several dozen girls have alleged that Epstein sexually abused him. Even if the U.S. Attorney's Office were to decide at some point down the road that it was going to exercise its discretion in favor of initiating some sort of criminal process against Epstein, it is a matter of speculation whether that criminal process would involve allegations concerning Jane Doe. Such risk and speculation about possible criminal charges does not establish a real need for a stay. *See Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980) (refusing to grant a stay a civil proceeding before any indictment was returned because Fifth Amendment concerns, if any, were weak).

Not only has Epstein failed to show the existence of a criminal prosecution, he has also failed to even attach a copy of the non-prosecution agreement that serves as the predicate for all his arguments. As Jane Doe explains in her simultaneously filed motion to strike, the Court should strike all references to the contents of the agreement because of the Best Evidence Rule, Fed. R. Evid. 1002, and the principles underlying the rule. If Epstein wants to prove that a document exists with particular language that is creating difficulties for him, he should at a bare minimum be required to produce to the Court – and to Jane Doe -- a copy of the document in question. Epstein, of course, bears the burden of proving the alleged need for the stay, and therefore should have to shoulder the burden of proving the terms of any document that bear on the motion to stay.

The need for Epstein to produce the actual non-prosecution agreement is particularly strong in this case. As the Court is aware from parallel litigation, there are

conflicting representations about precisely what the non-prosecution provides. *See* Respondent's Opp. to Victims' Motion to Unseal Non-Prosecution Agreement at 4, *Doe v. United States*, No. 9:08-CV-80736-KAM (Feb. 12, 2009) (dkt. #29) ("During the telephonic hearing on August 14, 2008, Government counsel advised the Court and petitioners' counsel that there was an ongoing dispute between the Government and Epstein's attorneys over what constituted the Agreement."). Therefore, it is not standing on mere technicalities to require Epstein to prove what the agreement states by producing the agreement itself.

In addition, it is simply unfair for Epstein to use the alleged confidentiality of a document to avoid his duty to produce the document. The confidentiality of the non-prosecution agreement apparently stems from the fact that he himself requested that the U.S. Attorney's Office treat the document as confidential. Moreover, despite the alleged confidentiality of the document, Epstein apparently feels free to make various representations about what that sealed agreement provides – when it is useful to him to do so. For example, in his motion for a stay Epstein states such things as "the [non-prosecution agreement] actually places an affirmative duty upon Epstein to undertake discussions with the [State's Attorney's Office]" and that it "took effect on June 30, 2008 and expires by those same terms in late 2010 so long as Epstein complies with the terms and conditions" and that it "outlines various obligations on the part of Epstein including, but not limited, to pleading guilty to the Indictment and Information before the 15th Judicial Circuit . . . [and] waiv[ing] . . . challenges to the Information filed by the [State's Attorney's Office]." Epstein Motion for Stay at 3. How Epstein can maintain

that the document is confidential and "under seal" while simultaneously making such direct statements about the terms of the agreement is not immediately clear.

Even assuming the existence of a non-prosecution agreement, Epstein's motion for a stay should be denied because of failure to prove the outlandish assertions in his motion. To show a risk of prosecution, Epstein states that the non-prosecution agreement "does not outline or define . . . what constitutes a breach or what act or omission constitutes a breach thereof. Therefore, the [U.S. Attorney's Office] apparently believe it has the discretion to make the unwritten and undefined determination, which places an unreasonable burden upon Epstein in defending the civil claims in that he has no idea what the USAO will define as a breach in the event he does *not* assert his 5th Amendment rights." Epstein Motion to Stay at 2. Epstein goes on to state: "As an example, the USAO has already claimed that Epstein violated the [non-prosecution agreement] by: 1. Investigating the Plaintiffs (by and through his attorneys) whom brought civil suits against him for purposes of defending those civil actions; 2. Contesting damages in this action and in the other civil actions; 3. Making statements to the press about this Plaintiff or other Plaintiffs by and through his attorneys; and 4. Using the word "jail" instead of "imprisonment" in the plea agreement with SA's office. " *Id.* at 2-3.

These are extremely serious allegations. If true, they would mean that the U.S. Attorney's Office has threatened to imprison Epstein simply for conducting an investigation to defend a civil suit or using one word instead of another in a document. The alleged factual support for these serious allegations, however, evaporates on examination. Support purportedly comes from an attached affidavit by one of Epstein's

criminal defense attorneys, Jack Goldberger. Not surprisingly given the seriousness of such allegations, the Goldberger affidavit makes no such contention. Instead, the Goldberger affidavit is carefully worded to assert only that the U.S. Attorney's Office "*might consider*" various actions to be a breach of the non-prosecution agreement. *See* Affidavit of Jack A. Goldberger, Esq., at 2 (emphasis added).[1] This is a far cry from what Epstein's motion to stay asserts – that "the USAO has *already claimed* that Epstein violated the NPA . . . ." Epstein Motion to Stay at 3 (emphasis added). Accordingly, Epstein has not even shown that the U.S. Attorney's Office has already deemed him to be in violation of the agreement – much less that, because of such violation, it would elect to file criminal charges against him pertaining to Jane Doe.

In addition to all these problems, Epstein is simply wrong to allege that the U.S. Attorney's Office has unilateral power to deem him to be in violation of the non-prosecution agreement. Any such determination would be subject to judicial review. Only after a court determination that Epstein had violated the agreement could the U.S. Attorney's Office move forward to prosecute Epstein. *See generally Santobello v. New York*, 404 U.S. 257 (1971).

Finally and most fundamentally, Epstein has it entirely within his power to avoid criminal prosecution by complying with non-prosecution agreement. As this Court explained in a companion case in denying a request for a stay: "Defendant is in control of his own destiny – it is up to him (and him alone) whether the plea agreement reached

[1] As with Epstein's objectionable representations about the non-prosecution agreement, to the extent that Epstein is making representations about any written communications from the U.S. Attorney's Office, the Best Evidence Rule requires that he produce those writings (or a copy thereof). *See* Fed. R. Evid. 1002. Jane Doe objects to any second-hand recounting of written communications that Epstein has received. Epstein should disclose in any reply memorandum whether there has been any written correspondence from the U.S. Attorney's Office about his compliance with the plea agreement and, if so, he should attach copies of that correspondence to his reply.

with the State of Florida is breached. If Defendant does not breach the agreement, then he should have no concerns regarding his Fifth Amendment right against self-incrimination." Order Denying Motion to Stay at 4, *Jane Doe No. 2 v. Epstein*, No. 9:08-CV-80119-KAM (dkt. #33) (S.D. Fla. August 5, 2008). Epstein is currently in jail, and is released only for work release purposes. So long as he complies with the non-prosecution agreement while under this close court supervision, any concern about possible future consequences stemming from the breach of that agreement is speculative and premature.

Indeed, even if the Defendant *chose* to violate the non-prosecution agreement, that would hardly serve as a basis for staying the criminal cases. Allowing Epstein himself to dictate the pace of this civil case by the simple expedient of violating his agreement and then demanding a stay would truly give perverse incentives. Epstein should not, for example, be able to commit a new crime and then argue – because he is a repeat offender – that he is entitled to stop all civil suits against him for sexual abuse he committed in the past.

For all these reasons, Epstein has failed to carry his burden of proving that a criminal prosecution is currently pending against him that would provide a basis for a stay.

II. NO "SPECIAL CIRCUMSTANCES" JUSTIFY A STAY.

Even if Epstein could demonstrate a currently pending criminal action, his request for a stay should still be denied. "'A stay of a civil proceeding during the pendency of a parallel criminal proceeding . . . contemplates 'special circumstances' and the need to avoid 'substantial and irreparable prejudice.'" *United States ex rel.*

Gonzalez v. Fresenius Medical Care North America, 571 F.Supp.2d 758, 761 (W.D. Tex. 2008) (quoting *United States v. Little Al*, 712 F.2d 133, 136 (5th Cir. 1983). Epstein has not shown "special circumstances" and "substantial and irreparable prejudice" that would justify a stay.

Epstein alleges that "special circumstances" exist here because he is at "risk" of losing the civil case that is filed against him. Epstein Motion to Stay at 4. But Epstein should be required to explain more fully what exactly he means by a "risk" of losing the civil suit – and prove that it is something other than mere conjecture. His motion seems to be cagily drafted so that if he loses this motion for a stay and successfully invokes his Fifth Amendment rights, he will still be able to challenge any summary judgment motion that Jane Doe may choose to file. But so long as Epstein has other avenues for contesting a summary judgment motion, then "substantial and irreparable prejudice" does not exist and the Court should not exercise discretion to grant the stay.[2]

A good illustration of judicial reluctance to stay cases such as this one comes from the Eleventh Circuit's decision in *United States v. Lot 5, Fox Grove, Alachua County, Fla.*, 23 F.3d 359, 364 (11th Cir. 1994). There, the Eleventh Circuit affirmed a district court's decision not to stay a civil forfeiture proceeding because the claimant "had not shown that her invocation of the [Fifth Amendment] privilege resulted in the civil forfeiture judgment against her." The Circuit explained that she could have called other witnesses to attempt to prove her position: "Claimant's failure to indicate with

[2] The critical question on the stay is whether Epstein has other avenues to contest liability, not whether his arguments will ultimately be successful. To be clear, even if Epstein does contest a summary judgment motion down the road with testimony from other persons, Jane Doe may well decide to argue that this other testimony does not sufficiently respond to the points on which she is seeking summary judgment and that summary judgment is thus appropriate.

precision why she did not use other parties' testimony to substantiate her defense was fatal. As a result, Claimant's basis for a stay was nothing more than a blanket assertion of the privilege against self-incrimination, which, as discussed, is an inadequate basis for a stay." *Id.*

In addition, Epstein has not stated clearly that any Fifth Amendment invocation is preventing him from presenting evidence contesting liability. Here again, Epstein's motion is cagily worded to dance around the critical point. Epstein states: "Once the non-prosecution agreement expires, Epstein fully intends to testify to all relevant and non-objectionable inquiries made to him in discovery . . . ." Epstein Motion to Stay at 4. But *what* will his testimony be? Unless he is going to deny having sexual interactions with Jane Doe, then his promised testimony down the road will not effectively dispute liability – and there is no reason to stay the case for a year-and-a-half on a peripheral point. It "is the rule, rather than the exception that civil and criminal cases proceed together." *United States ex rel. Gonzalez v. Fresenius Medical Care North America*, 571 F.Supp.2d 758, 761 (W.D. Tex. 2008) (internal quotation omitted). Epstein has shown no good reason for deviating from normal practice here.

One last reason weighing against a stay is that Epstein has not shown that his (apparently blanket) invocation of Fifth Amendment right will be sustained. Among other problems, any blanket invocation would lack the particularization required for a valid assertion of Fifth Amendment rights. It is for the Court, not the claimant, to determine whether the hazard of incrimination justifies invocation of the privilege. *See United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991). "A court must make a particularized inquiry, deciding, in connection with each specific area that the

questioning party wishes to explore, whether or not the privilege is well-founded." *Id.* Typically this is done in an *in camera* proceeding wherein the person asserting the privilege must "substantiate his claims of the privilege and the district court is able to consider the questions asked and the documents requested . . . ." *Id.*

Here Epstein has made sweeping generalizations about the applicability of the Fifth Amendment to Jane Doe's specific discovery requests. But in his motion, he has merely cobbled together a few grandiose quotations about general Fifth Amendment principles and then asserted that *any discovery* against him is invalid. The Fifth Amendment does not operate in this blunderbuss fashion. It is Epstein's obligation to establish his privilege on a "question-by-question" basis." *Id.* Until he carries that burden, he has not even established that the Fifth Amendment invocations he apparently seeks to make will be sustained.

III. THE INTERESTS OF JUSTICE STRONGLY WEIGH AGAINST ANY STAY.

Even if Epstein shows some burden to him from the case moving forward, a stay remains inappropriate unless the interests of justice tip decisively in favor of a stay. "[T]he suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Landis v. North American Co.*, 299 U.S. 248, 255 (1936). A civil defendant who asserts the Fifth Amendment privilege "may have to accept certain bad consequences that flow from that action." *Mid-America's Process Serv. v. Ellison*, 767 F.2d 684, 686 (10th Cir. 1985).