UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 and JANE DOE #2,
Petitioners,
vs.
UNITED STATES,
Respondent.
_____/

RESPONDENT'S MOTION TO STAY DISCOVERY PENDING
RULING UPON RESPONDENT'S MOTION TO DISMISS

Respondents, by and through their undersigned counsel, file their Motion to Stay Discovery Pending Ruling upon Respondent's Motion to Dismiss, and state:

I. FACTUAL BACKGROUND

On October 3, 2011, petitioners served on respondent their First Request for Production to the Government Regarding Information Relevant to Their Pending Action Concern (sic) The Crime Victims Rights Act. The request for production contains twenty-five lengthy requests for documents, each containing petitioners' editorial narrative as a preface to stating what documents are being sought. This Court has ruled that the rights in 18 U.S.C. § 3771(a) apply prior to the filing of a formal charge. DE 99. The issues that remain to be resolved by this Court are: (1) whether the government used its best efforts to comply with the Crime Victims Rights Act (CVRA); and (2) if the Court finds the government did not use its best efforts, the remedy for a violation of the CVRA.

Many of petitioners' requests for documents go well beyond the issues pending in this litigation. Petitioners seek many documents pertaining to the criminal investigation of Jeffrey Epstein, including the prosecution memo prepared in the case. Request for Production No. 1. Petitioners rely upon a comment made by the Court, in its September 26, 2011 Order, where this Court referenced petitioners' assertion that the FBI and U.S. Attorney's Office had developed a strong case for prosecuting Epstein, based on "overwhelming" evidence. Request for Production at 2. The Court, according to petitioners, stated that this was an allegation that needed "further factual development." Id. at 2, citing DE 99 at 2 n.2. Presumably, the obligation to confer with the attorney for the government under 18 U.S.C. § 3771(a)(5) applies to criminal cases, without regard to whether the evidence in the case is overwhelming or not. Therefore, the relative strength of the government's case is irrelevant to the issues of whether best efforts were utilized by the government to comply with the CVRA, and the appropriate remedy if they were not.

Many of petitioners' other requests clearly reveal an intention to delve into how the non-prosecution agreement was negotiated, including inquiries into: whether Epstein sought to provide inexperienced personal

injury lawyers for the victims (Request for Production No. 5); alleged efforts to avoid public criticism of the non-prosecution agreement (Request for Production No. 6); alleged deception of the FBI by the U.S. Attorney's Office as to the status of a non-prosecution agreement (Request for Production No. 10); alleged improper conduct by a former Assistant U.S. Attorney who left the employ of the U.S. Attorney's Office and subsequently represented witnesses in some of the civil litigation involving Epstein (Request for Production No. 16).

Petitioners also seek documents regarding the handling of the December 10, 2010 letter from petitioners' counsel to the U.S. Attorney, asking for an investigation of various alleged improprieties occurring in the negotiation of the non-prosecution agreement with Epstein (Request for Production No. 17). This allegation of misconduct was referred to the Department of Justice's Office of Professional Responsibility. How this complaint was investigated, and what OPR relied upon, has no relevance to the issues pending in this case.

Petitioners have even requested correspondence between the U.S. Attorney's Office and components within the Department of Justice, dealing with the issue of whether there was a conflict of interest in the U.S. Attorney's Office handling different aspects of issues relating to Epstein (Request for Production No. 18). Aside from the fact such communications are protected by the attorney-client privilege, because the U.S. Attorney's Office was seeking legal advice, it has no bearing to the CVRA litigation.

It is plain that petitioners intend to go well beyond the issues relevant to this CVRA lawsuit. The CVRA lawsuit is not a vehicle to question and challenge the manner in which the United States exercised its prosecutorial discretion, or to delve into whether individual members of the U.S. Attorney's Office had engaged in misconduct (Request for Production Nos. 19 and 22).

Petitioners' Request for Production is overbroad and unduly burdensome. Respondent will be filing a motion to dismiss for lack of subject matter jurisdiction on November 7, 2011. Respondent should not be required to engage in the labor intensive process of culling out responsive materials, to requests for production that seek much information that is irrelevant. Instead, discovery should be stayed until this Court can determine whether it possesses subject matter jurisdiction.

II. DISCOVERY SHOULD BE STAYED PENDING THIS COURT'S RULING UPON RESPONDENT'S MOTION TO DISMISS

Respondentt respectfully requests discovery be stayed pending this Court's ruling upon respondentt's motion to dismiss for lack of subject matter jurisdiction. Respondent's motion is based upon facts that are not disputed by the parties. Consequently, responding to the request for production is unnecessary in order to petitioners to respond to respondent's motion.

Respondent contends in its motion to dismiss that the Court lacks subject matter jurisdiction because of petitioners' lack standing, and the cause is unripe. Specifically, respondent argues that the redressability prong of the three-prong constitutional standing test is absent, and petitioners have the present ability to "consult with the attorney for the government in the case."

The Court can resolve the issue of subject matter jurisdiction, without discovery being conducted by the parties, since it involves a legal question. In Chudasama v. Mazda Motor Corporation , 123 F.3d 1353 (11 th Cir. 1997), the Eleventh Circuit observed that "[f]acial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should, however, be resolved before discovery begins. Such a dispute always presents a pure legal question; there are no issues of fact because the allegations in the pleading are presumed to be true." Id. at 1367 (citation omitted). The Chudasama court also noted that "discovery imposes several costs on the litigant from whom discovery is sought." Id. The burdens include the time spent searching for and compiling relevant documents, and the time, expense, and aggravation of preparing for and attending depositions. Id. Moreover, the party propounding discovery also incurs costs. Id.

Respondent bears the burden of demonstrating good cause and reasonableness, in order to obtain a stay of discovery. McCabe [redacted] Foley , 233 F.R.D. 683, 685 (M.D.Fla. 2006). Respondent submits this Court lacks jurisdiction because petitioners lack constitutional standing because it cannot provide a remedy. As the Eleventh Circuit in Chudasama observed, "neither the parties nor the court have any need for discovery before the court rules on the motion." 123 F.3d at 1367 (citation omitted). Such is the situation in the instant case. Respondent respectfully submits that good cause exists to grant a stay of discovery, and it is reasonable for this Court to do so because respondent's motion to dismiss is meritorious and potentially dispositive.

On November 7, 2011, respondent's counsel spoke with petitioners' counsel regarding petitioners' position on this motion. Petitioners opposes the instant motion.

DATED: November 7, 2011 Respectfully submitted,

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