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 REPLY TO PETITIONERS' RESPONSE TO RESPONDENT'S SEALED MOTION TO STAY DISCOVERY PENDING RULING UPON RESPONDENT'S MOTION TO DISMISS [DE 129] AND RESPONDENT'S RESPONSE IN OPPOSITION TO PETITIONERS' PROTECTIVE MOTION TO COMPEL [DE 130]

Respondent, by and through its undersigned counsel, hereby files this Reply to Petitioner Jane Doe #1 and Jane Doe #2's Response to the Respondent's Sealed Motion to Stay Discovery Pending Ruling upon Respondent's Motion to Dismiss [DE129] and Response in Opposition to Petitioners' Protective Motion to Compel [DE 130]. For the following reasons and the reasons set forth in Respondent's Motion to Stay Discovery, the Court should grant the United States' Motion to Stay Discovery pending the Court's decision on the United States' Motion to Dismiss for Lack of Subject Matter Jurisdiction and, similarly, deny the Petitioners' Protective Motion to Compel.

In both their Response to the Motion to Stay Discovery and their Motion to Compel, Petitioners fail to cite any statute or case law that supports their position that the Court should order the United States to produce discovery while a motion to dismiss for lack of subject matter jurisdiction is pending. The Eleventh Circuit has clearly and repeatedly stated that dispositive motions should be decided before discovery begins:

> Facial 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 purely legal question; there are no issues of fact because the allegations in the pleading are assumed to be true. . . . Therefore, neither the parties nor the court have any need for discovery before the court rules on the motion. . . . [D]iscovery imposes several costs on the litigant from whom discovery is sought. These burdens include the time spent searching for and compiling relevant documents; the time, expense, and aggravation of preparing for and attending depositions; the costs of copying and shipping documents; and the attorneys' fees [F1] generated in interpreting discovery requests, drafting responses to interrogatories and coordinating responses to production requests, advising the client as to which documents should be disclosed and which ones withheld, and determining whether certain information is privileged.

Chudasama ▌ *Mazda Motor Corp.* , 123 F.3d 1353, 1367 (11th Cir. 1997) (citations omitted). *See also Moore* ▌ *Potter* , 141 Fed. Appx. 803, 807-08 (11th Cir. 2005) (quoting *Chudasama* at 1367, 1368) (affirming district court's decision to stay proceedings, including all discovery, pending ruling on defendant's 12(b)(6) motion to dismiss); *Cheshire* ▌ *Bank of America* , 351 Fed. Appx. 386, 388 (11th Cir. 2009) (citing *Chudasama* at 1367) ("a plaintiff has no right to discovery upon the filing of a motion to dismiss that raises a purely legal question");

Horsley ▌ *Feldt* , 304 F.3d 1125, 1131 n.2 (11th Cir. 2002) (affirming district court's decision to suspend discovery pending resolution of motion for judgment on the pleadings); *Smith* ▌ *Potter* , 400 Fed. Appx. 806, 812 (5th Cir. 2010) (affirming district court's stay of discovery pending a motion to dismiss for lack of subject matter jurisdiction); *Cotton* ▌ *Massachusetts Mut. Life Ins. Co.* , 402 F.3d 1267 (11th Cir. 2005) (noting that because every claim has the potential to enlarge the scope and cost of discovery, the need to resolve a facially challenged claim before discovery is based on the extent to which the claim expands discovery).

The concerns raised in *Chudasama* and its progeny are present here. The motion to dismiss for lack of subject matter jurisdiction is dispositive of the entire case. Thus, staying discovery until the Court rules will save the entire cost related to discovery, if the Court rules that it lacks jurisdiction. As noted in the United States' Motion to Stay, the discovery requests that have been propounded by Petitioners far exceed the Court's directive that they could "conduct *limited* discovery in the form of document requests and requests for admissions from the U.S. Attorney's Office" in order to allow " *limited* factual development." (DE 99 at 11 (emphasis added).) The Court ordered that the discovery should address only "whether the particular [CVRA] rights asserted here attached and, if so, whether the U.S. Attorney's Office violated those rights." (*Id.* at 10.) Instead the document requests and the later-served requests for admissions seek documents and information pertaining to the criminal investigation of Jeffrey Epstein, including the prosecution memo and drafts of the indictment prepared in the case, which are governed by the grand jury secrecy rules. *See* Request for Production No. 1. Petitioners also seek discovery regarding events that occurred long after the negotiation of the Non-Prosecution Agreement and, in fact, long after the Petitioners filed their action. For example, in Requests 17 and 18, Petitioners ask for documents and correspondence created as recently as August 2011, approximately three years after the latest of the relevant facts in the case. Petitioners request the production of information and documents that would violate the attorney-client privilege, the work product doctrine, the deliberative process privilege, and the privacy rights of other victims identified in the case. Merely collecting all of the requested materials, cataloguing them, and asserting the various privileges is a tremendous undertaking. Furthermore, unlike a Rule 12(b)(6) motion, the government's motion alleges that the Court lacks jurisdiction – that is, the power – to hear the case. Respondent is the United States, an entity that normally has immunity from suit and, hence, from discovery obligations. Requiring the United States to engage in the overly burdensome discovery that the Petitioners have requested, prior to reaching a determination that the Court has jurisdiction over the subject matter of this dispute, is contrary to both the letter and the spirit of *Chudasama* and *Cotton* , *supra* .

Petitioners' sole argument is their assertion that the United States has filed its Motion to Dismiss as a "stall tactic" and their allegation that the United States has refused to agree to any facts in this case. First, as has been repeatedly asserted, the United States has tried on many occasions to reach agreed statements of *fact* with Petitioners, and is continuing to do so. The difficulty lies in the editorial narratives added by counsel. If the Court should rule against the United States on its Motion to Dismiss, the United States continues to hope that a set of Stipulated Facts can be reached. Second, the United States has agreed to provide some information to Petitioners even during the pendency of the stay and is undertaking a search for that information. Third, the Court has before it a Motion related to whether the Petitioners can use documents and information that they received via discovery from other lawsuits in this litigation, as well as briefing related to Roy Black, et al.'s motion asserting a work product privilege. Much of the *relevant* material cannot be made available until the Court has ruled on those motions.

Lastly, in their Response to the Motion to Stay and in their Protective Motion to Compel, Petitioners ask the Court to Order that within fourteen days of the denial of either the Motion to Stay or the Motion to Dismiss, the government should be ordered to provide:

(1) the Government's initial disclosures pursuant to Fed. R. Civ. P. 26(a)(1);

(2) answers to the requests for admissions;

(3) *all* documents, correspondence, and other information that the Government distributed to persons or entities outside of the federal government or received from persons or entities outside of the federal government;

(4) *all* documents, correspondence, and other information covered by the victims' discovery request that is not subject to a claim of privilege;

(5) a privilege log.

(*See* DE 129 at 3.)

Here again, Petitioners have attempted to go beyond the Court's Order, which allowed only "limited discovery." As the Court acknowledged, this is *not* a civil case, it is a proceeding under the CVRA, which is meant to accompany criminal litigation. As such, the Federal Rules of Civil Procedure do not apply, including the initial disclosure rules at Fed. R. Civ. P. 26(a)(1). [F2] The third request, for all documents distributed to persons outside the government or received from persons outside the government, is not limited by date, subject matter, recipient, sender, or otherwise. As written, it calls for virtually *every* piece of paper and document in electronic storage within the "federal government" that has ever been shown to any third party.

Rather than provide an exhaustive accounting of all of the objections to the discovery requests at this time, the United States means only to show that there are numerous objections that are legally cognizable. Accordingly, the United States respectfully requests that the Court deny the Petitioners' Protective Motion to Compel and Order that, within 30 days following the Court's denial of the Motion to Stay, the United States must serve any responses and/or objections to the Petitioners' Requests for Admissions and First Request for Production.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court:

(1) grant the United States' Motion to Stay Discovery Pending Ruling upon Respondent's Motion to Dismiss; and

(2) deny Petitioners' Protective Motion to Compel.

Respectfully submitted,
WIFREDO A. FERRER
UNITED STATES ATTORNEY
By: s/ [redacted]

CERTIFIC[redacted]

The undersigned hereby certifies and affirms that a copy of the foregoing was served via the Court's CM/ECF system this 24th day of January, 2012, upon Counsel for Petitioners Jane Doe #1 and Jane Doe #2.

[redacted]

SERVICE LIST
Jane Does 1 and 2 [redacted] United States
Case No. 08-80736-CIV-MARRA
United States District Court, Southern District of Florida

Bradley Edwards, Esq.,
Farmer Jaffe Weissing Edwards Fistos Lehrman
425 N Andrews Ave Ste 2
[redacted]

Paul G. Cassell
S.J. Quinney College of Law at the
[redacted]

[redacted]
Attorneys for Jane Doe # 1 and Jane Doe # 2

[F1]Although the Respondent is represented by the U.S. Attorney's Office and, accordingly, does not pay attorneys' fees for its representation, the Court should consider the "costs" to the Office and the public by having criminal prosecutors and civil litigators devoting the tremendous amount of time required to respond to the overbroad requests of the Petitioners in lieu of investigating and prosecuting criminal defendants or affirmative civil cases.

[F2]Although the United States objects to the application of Fed. R. Civ. P. 26(a)(1), part of what it has agreed to voluntarily provide is some, but not all, of the information called for by this Rule.