IN THE CIRCUIT COURT OF THE
SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

CASE NO.: CACE 15-000072

BRADLEY J. EDWARDS and
PAUL G. CASSELL,

Plaintiffs / Counterclaim Defendants,

v.

ALAN M. DERSHOWITZ,

Defendant / Counterclaim Plaintiff.
_____/

DEFENDANT / COUNTERCLAIM PLAINTIFF ALAN DERSHOWITZ'S MEMORANDUM IN OPPOSITION TO NON-PARTY BOIES, SCHILLER & FLEXNER LLP'S MOTION TO QUASH OR FOR PROTECTIVE ORDER

Defendant / Counterclaim Plaintiff Alan Dershowitz ("Dershowitz") respectfully submits this Memorandum in Opposition to the Motion to Quash or for Protective Order Regarding Subpoena (the "Motion to Quash") filed by non-party Boies, Schiller & Flexner LLP ("BSF"). Dershowitz also refers the Court to his memorandum in opposition to Jane Doe No. 3's motion to quash the subpoena served on her for additional details about the nature of this case and why Dershowitz is entitled to the discovery he seeks.[1]

INTRODUCTION

The Court should deny the Motion to Quash because the subpoena *duces tecum* served on BSF by Dershowitz is entirely proper and seeks the production of relevant, non-privileged

[1] Jane Doe No. 3 has no right to proceed anonymously as she has been identified publicly on several occasions and has made public statements to the media using her own name, as indicated by the exhibits that she submitted with her motion to quash. *See* Jane Doe No. 3's Motion to Quash, Exs. 1-4. Nonetheless, Dershowitz will refer to her as "Jane Doe No. 3" until the Court orders otherwise.

documents that are at the heart of this defamation lawsuit. BSF is representing Jane Doe No. 3 in connection with this action. Jane Doe No. 3's credibility and the veracity, or lack thereof, of her outrageous allegations against Dershowitz have been placed directly in dispute by Plaintiffs Bradley J. Edwards ("Edwards") and Paul G. Cassell ("Cassell") (together, "Plaintiffs"), the attorneys who are representing Jane Doe No. 3 in a separate but related litigation. Moreover, Jane Doe No. 3 has waived any possible claims of privacy with regard to her sexual allegations against Dershowitz and others by voluntarily making statements to the media for publication in tabloids (likely being paid for doing so) and including them in pleadings and affidavits. She cannot use these sexual allegations as swords and then hide behind them as shields. Edwards, Cassell, and BSF have all publicly proclaimed that they are representing Jane Doe No. 3 on a pro bono basis, apparently in an effort to lend credibility to her false allegations against Dershowitz. In light of these public statements – which unquestionably waive any possible claim of privilege or confidentiality with regard to fee arrangements and retainers, and which Dershowitz does not accept as true – Dershowitz is entitled to the discovery he seeks from BSF, including with respect to the specific terms of BSF's engagement with the Jane Doe No. 3 and the nature of Jane Doe No. 3's contracts with publishers, media outlets, and entertainment producers

FACTUAL BACKGROUND

This defamation action arises out of an underlying lawsuit that Edwards and Cassell filed against the United States (the "Government") in the United States District Court for the Southern District of Florida (the "Federal Action") more than eight years ago. In the Federal Action, Edwards and Cassell represent certain alleged victims of Jeffrey Epstein ("Epstein"), a client of Dershowitz's, who contend that the Government violated their rights under the Crime Victims' Rights Act (the "CVRA"). Specifically, the two alleged victims – known as "Jane Doe No. 1"

and "Jane Doe No. 2" – assert that the Government violated their rights under the CVRA by failing to consult with them before negotiating a non-prosecution agreement (the "NPA") with Epstein, who allegedly subjected them to various sexual crimes when they were minors.

On December 30, 2014 – more than eight years after the Federal Action began – Edwards and Cassell filed a motion to allow a third alleged victim, Jane Doe No. 3, to join in the suit as an additional plaintiff (the "Joinder Motion"). *See* Counterclaim, at 12. The Joinder Motion alleges that Jane Doe No. 3 first met Epstein in 1999 and that Epstein "kept Jane Doe #3 as his sex slave from about 1999 through 2002, when she managed to escape to a foreign country." *Id.* The Joinder Motion alleges that "Epstein also sexually trafficked the then-minor Jane Doe [No. 3], making her available for sex to politically-connected and financially-power people." *Id.* ADD. Although none of these allegations have ever been validated by any law enforcement authorities or other objective investigators, and cannot be presumed to be true, Edwards and Cassell filed the Joinder Motion on the public docket in the Federal Action, without any accompanying motion to seal.

In response to the false and outrageous allegations asserted against him in the Federal Action on behalf of Jane Doe No. 3 and the subsequent media coverage of those allegations, Dershowitz made a number of public statements defending his previously unblemished personal and professional reputations. Edwards and Cassell used their personal credibility as lawyers, and, in Cassell's case, as a law professor and former judge, to enhance the credibility of Jane Doe No. 3's allegations. Dershowitz had the right to respond by challenging their credibility, as well as Jane Doe No. 3's credibility, in the court of public opinion. Edwards and Cassell then filed this action, alleging that Dershowitz defamed them by "initiat[ing] a massive public media assault on the reputation and character of [Edwards] and [Cassell] accusing them of intentionally

lying in their filing, of having leveled knowingly false accusations against [Dershowitz] without ever conducting any investigation of the credibility of the accusations and of having acted unethically to the extent that their willful misconduct warranted and required disbarment" – even though Dershowitz "knew [the Joinder Motion] to be an entirely proper and well-founded pleading." Compl. ¶ 17.

After the filing of this action, Dershowitz's counsel reached out to Plaintiffs to ask whether they would accept service of a subpoena on behalf of Jane Doe No. 3. Plaintiffs refused and referred Dershowitz to BSF, which is representing Jane Doe No. 3 for purposes of this action. BSF likewise refused to accept service on behalf of Jane Doe No. 3, which forced Dershowitz to use the commission process to serve Jane Doe No. 3 in Colorado with a subpoena for deposition testimony and documents. On March 31, 2015, Dershowitz served a separate subpoena for the production of documents on BSF. *See* Motion to Quash, Comp. Ex. 1. The subpoena seeks, among other things: (1) documents concerning any actual or potential book, television or movie contracts or deals concerning Jane Doe No. 3's allegations about being a "sex slave"; (2) drafts of any of Jane Doe No. 3's declarations referencing Dershowitz by name; (3) documents supporting Jane Doe No. 3's allegations about Dershowitz in the Federal Action; (4) statements provided by, and notes from interviews given by, Jane Doe No. 3 referencing Dershowitz by name; and (5) documents concerning BSF's retention by Jane Doe #3, including but not limited to the signed retainer letter and any reference to fees for the retention. In short, Dershowitz seeks documents and information from BSF that are directly relevant to the issues in dispute in this case.

On April 9, 2015, BSF served objections to the subpoena *duces tecum* and filed a motion to quash the subpoena in its entirety or, in the alternative, for a protective order limiting the scope of the documents it is required to produce.

On April 7, 2015, Judge Marra issued an order in the Federal Action striking the portions of the Joinder Motion and Jane Doe No. 3's declarations referring to Dershowitz. *See* Ex. A. The court concluded that the allegations against Dershowitz, including the "lurid details" included in the Joinder Motion by Plaintiffs on behalf of Jane Doe No. 3, are "immaterial and impertinent" to the issues in dispute in the Federal Action, and were "unnecessary" to resolving the Federal Action. He ruled that striking these allegations was "sanction enough" for Edwards and Cassell. Judge Marra also reminded the attorneys of their obligations under Rule 11 of the Federal Rules of Civil Procedure, which prohibits allegations made for an improper purpose. In a supplemental order also issued on April 7, 2015, Judge Marra ordered that the filings containing the stricken materials be restricted from public access. *See* Ex. B.

During the course of this litigation, BSF has made public statements to the media about the terms of its representation of Jane Doe No. 3. For example, in an article published on April 24, 2015, *The American Lawyer* cites the following statement by BSF to report as a fact that the firm is representing Jane Doe No. 3 on a pro bono basis:

> The firm's pro bono program focuses on meaningful cases including trying to assist women and children who are the victims of abuse. Boies Schiller & Flexner LLP took on Ms. [redacted]' representation because she was a victim of abuse when she was a minor child.

See Ex. C. Plaintiffs' counsel likewise represented to this Court at the hearing of April 10, 2015, that Edwards and Cassell are representing Jane Doe No. 3 in the Federal Action on a pro bono basis. *See* Ex. D, at 20, lns. 6-7. As set forth below, these assertions of fact – which Dershowitz does not accept as true – waive any possible claim of privilege with regard to the retainer and all

related fee agreements entered into between Jane Doe No. 3 and her lawyers. Dershowitz is entitled to test in discovery whether, while purportedly representing Jane Doe No. 3 on a pro bono basis in this case, BSF and/or Plaintiffs have other financial arrangements seeking to cash in with Jane Doe No. 3 by way of book or movie deals or otherwise. Those are fair topics for discovery, and Jane Doe No. 3 and BSF assuredly have waived any privilege on the subject matter of BSF's retention by seeking to benefit from statements made to a national publication on the subject matter.

MEMORANDUM OF LAW

I. The documents sought by the subpoena are directly relevant to this defamation action.

Much like the motion to quash filed by Jane Doe No. 3, BSF's motion asserts that the information Dershowitz seeks in the subpoena served on the firm is not relevant to Plaintiffs' defamation claim. This argument ignores both the broad scope of discovery permitted under the Florida Rules of Civil Procedure and how Plaintiffs themselves have framed the issues – squarely placing in dispute whether Dershowitz in fact "knew" that Jane Doe No. 3's accusations against him were "proper and well-founded," *i.e.*, true.

Under Rule 1.280, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter of the pending action, whether it relates to the claim or defense of the party seeking discovery or the claim or defense of any other party." Put differently, information is discoverable so long as it relates "to the issues involved in the litigation, as framed *in all pleadings*." *Diaz-Verson v. Walbridge Aldinger Co.*, 54 So. 3d 1007, 1011 (Fla. 2d DCA 2010); *see also Richard Mulholland & Assocs. v. Polverari*, 698 So. 2d 1269, 1270 (Fla. 2d DCA 1997) (explaining that a protective order is required only "when the

pleadings indicate that the documents requested are not related to any pending claim or defense").

BSF contends that the subpoena should be quashed because Dershowitz is seeking information that is relevant to the Federal Action and is wholly unconnected to this suit. Motion to Quash, at 6-7. This argument ignores that the Federal Action, as it relates to Dershowitz, is now over. More significantly, it ignores the basis for Plaintiffs' defamation claim and the nature of Dershowitz's affirmative defenses. The complaint in this action expressly alleges that Dershowitz committed the tort of defamation by accusing Edwards and Cassell of having acted improperly by filing the Joinder Motion, even though Dershowitz "knew [the Joinder Motion] to be an entirely proper and well-founded pleading." Compl. ¶ 17. Thus, the face of the complaint establishes that this case *does* directly involve the veracity of the allegations that Jane Doe No. 3 asserted against Dershowitz in the Federal Action. Indeed, although Jane Doe No. 3 is not a party to this case, she is the accuser making allegations of criminal misconduct, which Plaintiffs contend are true and which Dershowitz contends are complete fabrications.

The relevance of the documents sought by the subpoena issued to BSF becomes even more apparent after considering what Plaintiffs must prove to prevail on their defamation claim and defeat Dershowitz's affirmative defenses. Under Florida law and the First Amendment, a defamation plaintiff must establish the following elements: (1) publication; (2) falsity; (3) actor must act with knowledge or reckless disregard as to the falsity on a matter concerning a public official, or at least negligently on a matter concerning a private person; (4) actual damages; and (5) statement must be defamatory. *Jews For Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1106 (Fla. 2008). Because Plaintiffs are public figures or limited public figures, they must also prove that

Dershowitz acted with actual malice in making his statements, *i.e.,* that Dershowitz "knew [the Joinder Motion] to be an entirely proper and well-founded pleading." Compl. ¶ 17.

Testing this allegation requires discovery into the credibility of Jane Doe No. 3's accusations against Dershowitz. The subpoena served on BSF is intended to accomplish precisely that goal. For example, the subpoena seeks "[a]ll documents that reference by name, Alan M. Dershowitz, which support and/or confirm the allegations set forth in" Jane Doe No. 3's declarations submitted in the Federal Action, as well as "[a]ny documents and information that support and/or confirm [Jane Doe No. 3's] presence at the various locations named in [Jane Doe No. 3's declaration] on the particular dates and times when [Dershowitz] was also present." Motion to Quash, Comp. Ex. 1. Similarly, the subpoena seeks Jane Doe No. 3's diaries, cell phone records, and travel records during the time she asserts she was kept as Epstein's "sex slave," *i.e.*, 1999 to 2002 – all of which could contain information that undermines or contradicts her allegations about when and where she allegedly had sex with Dershowitz (and that likewise disproves Plaintiffs' allegation that Dershowitz knew the Joinder Motion was a "well-founded pleading").[2] *Id.*

The subpoena also requests documents that go to Jane Doe No. 3's general credibility regarding her alleged experiences as a "sex slave" for Epstein – an issue that is directly relevant to the truth of Jane Doe No. 3's allegations against Dershowitz, whether Dershowitz knew the Joinder Motion to be "well-founded," and what type of investigation (if any) Plaintiffs conducted into Jane Doe No. 3's allegations. For example, Jane Doe No. 3 has made statements to the

[2] Of course, if Plaintiffs or Jane Doe No. 3 were to identify and disclose the specific dates of the purported six instances when Jane Doe No. 3 purportedly had sex with Dershowitz, the scope of the requested discovery (as well as Plaintiffs' own discovery requests) could easily be narrowed. To date, however, Plaintiffs and Jane Doe No. 3 have refused to make specific allegations of timing.

media about meeting former President Clinton and former Vice President Gore on Epstein's private island in the Caribbean. Dershowitz is entitled to explore the veracity of Jane Doe No. 3's accounts of these meetings, because any inconsistencies are obviously relevant to Jane Doe No. 3's credibility as a witness regarding her alleged experiences as a "sex slave" for Epstein, as well as to the sufficiency of any investigation undertaken by Plaintiffs prior to filing the Joinder Motion. Dershowitz expects the evidence to show that Jane Doe No. 3's public accounts of her alleged interactions with President Clinton and Vice President Gore are complete fabrications, just like her allegations against Dershowitz.

Similarly, Dershowitz has a right to explore Jane Doe No. 3's potential book, movie, and television deals as a means of establishing her bias, as well as the potential bias by Edwards and Cassell (*i.e.*, whether the lawyers had a financial incentive to help sensationalize Jane Doe No. 3's story by identifying Dershowitz by name in a public pleading). *See Steinger, Iscoe & Greene, P.A. v. GEICO Gen. Ins. Co.*, 103 So. 3d 200, 203 (Fla. 4th DCA 2012) (discovery aimed at obtaining evidence of a witness's bias is permissible).

Contrary to BSF's assertions, the subpoena is not an unbounded fishing expedition. Rather, Dershowitz is seeking information that goes to the essence of Plaintiffs' claim against him in this lawsuit and his affirmative defenses to that claim.

II. BSF has failed to meet its burden of establishing that the documents requested by Dershowitz are "entirely privileged."

BSF conclusorily asserts that the subpoena served by Dershowitz should be quashed in its entirety because it "seeks entirely privileged documents from a non-party law firm of communications with a non-party client that are not subject to production." Motion to Quash, at 1. BSF has utterly failed to meet its burden of establishing that all of the documents that Dershowitz seeks are protected by the attorney-client privilege.

"The burden of establishing the attorney-client privilege rests on the party claiming it." *RC/PB, Inc. v. Ritz-Carlton Hotel Co.*, 132 So. 3d 325, 326 (Fla. 4th DCA 2014) (quoting *S. Bell Tel. & Tel. Co. v. Deason*, 632 So.2d 1377, 1383 (Fla. 1994)). A blanket assertion of privilege, without supporting evidence, is insufficient to meet this burden. *See MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 584 (S.D. Fla. 2013) (applying Florida law) (collecting cases).

Here, all BSF has done is make a blanket, unsupported assertion that all of the documents sought by the subpoena are protected from disclosure because "communications between BSF and its client were in the course of rendering legal advice and are privileged." Motion to Quash, at 3. This argument – which is not supported by any attempt to establish that the elements of the attorney-client privilege have been satisfied here with respect to any particular communication – ignores that the subpoena seeks categories of documents that are much broader than communications between BSF and Jane Doe No. 3. For example, Jane Doe No. 3's diaries and travel records are not protected by the attorney-client privilege merely because she has provided BSF with a copy of those documents. *See, e.g., Upjohn Co. v. United States*, 449 U.S. 383, 395, (1981) (the attorney-client privilege protects only disclosures of communications between the client and the attorney made in confidence; it does not protect disclosure of the underlying facts revealed which were communicated to the attorney). Moreover, portions of Jane Doe No. 3's diary has been published in the tabloids, thereby waiving any possible privilege or claim of privacy

BSF also asserted a privilege objection to the portion of the subpoena seeking documents concerning its retention by Jane Doe No. 3, including but not limited to the signed retainer letter and any explanation of the fee agreement between the firm and Jane Doe No. 3. Contrary to

BSF's unsupported assertions, a retainer letter between a client and her attorney generally is not protected by the attorney-client privilege, nor is other information relating to the financial arrangements between the attorney and the client. *See, e.g.*, *Lawfinders Assocs., Inc. v. Legal Research Ctr., Inc.*, 193 F.3d 517, 518 (5th Cir. 1999) ("[T]he attorney-client privilege does not protect the type of information contained in the retainer letters."); *United States v. Davis*, 636 F.2d 1028, 1043-44 (5th Cir. 1981) (explaining that "[f]inancial transactions between the attorney and client, including the compensation paid by or on behalf of the client" generally are not protected by the attorney-client privilege). These principles are particularly apt here, given that BSF has publicly announced that it is representing Jane Doe No. 3 on a pro bono basis given her alleged abuse as a minor. Dershowitz does not accept that statement as true and is entitled to test the veracity of BSF's public assertion, which put the terms of BSF's retention (which BSF has already put at issue) even more directly at issue.

Moreover, BSF's public announcement – which was presumably made with the permission of its client – waives any possible claim of privilege with respect to the fee agreements and retainers entered into between BSF and Jane Doe No. 3. It is hornbook law that the voluntary public disclosure of facts that might otherwise be privileged waives privilege as to the entire subject matter. *E.g.*, *First Union Nat'l Bank of Fla. v. Whitener*, 715 So. 2d 979, 984 (Fla. 4th DCA 1998) (voluntary production of privileged information results in a waiver of privilege for all information on that same specific subject). BSF sought sympathy for Jane Doe No. 3 and good press for itself by claiming to represent Jane Doe No. 3 on a pro bono basis. Dershowitz is entitled to test whether, when all financial arrangements between Jane Doe No. 3 and BSF are considered, that public statement is false or so incomplete as to be a deliberately misleading half-truth.

BSF's related assertions of "confidentiality" are also unavailing. As set forth in detail in Dershowitz's opposition to Jane Doe No. 3's motion to quash, Jane Doe No. 3 has made several detailed, public statements about her interactions with Epstein, as well as her purported encounters with Dershowitz during her self-described time as Epstein's "sex slave." Edwards and Cassell have also submitted numerous unsealed pleadings and declarations on behalf of Jane Doe No. 3 in the Federal Action that were available to the public (until Judge Marra appropriately struck those filings from the record as being lurid and impertinent). Jane Doe No. 3 has given statements and provided documents to the tabloids for publication, and she arranged, with the help of her lawyers, to be interviewed about the alleged details of her sex life by ABC Television. Jane Doe No. 3 made all of these voluntary statements as an adult, many years after she allegedly "escaped" from Epstein. BSF cannot argue that such matters are so "personal" or "private" as to warrant an order from the Court that precludes Dershowitz from obtaining *any* discovery relating to Jane Doe No. 3. Accordingly, Dershowitz's right to discovery outweighs any purported privacy interests held and now waived by Jane Doe No. 3. *See Westco, Inc. v. Scott Lewis' Gardening & Trimming, Inc.*, 26 So.3d 620, 622 (Fla. 4th DCA 2009) (explaining that "[w]hen confidential information is sought from a non-party, the trial court must determine whether the requesting party establishes a need for the information that outweighs the privacy rights of the non-party").

Finally, and in all events, Jane Doe No. 3 has waived any claim of privacy with regard to subject matters that she has voluntarily made public. A party is not permitted to make selective disclosure as to a subject matter and then to assert an exemption from discovery as to other aspects of the same subject matter. *See Berkeley v. Eisen*, 699 So. 2d 789, 791 (Fla. 4th DCA 1997) (voluntarily disclosing confidential information or otherwise taking "steps inconsistent

with a reasonable expectation of privacy" results in a waiver of privacy rights). A person may not publicly disclose otherwise private information publicly, thereby damaging other people's reputations, and then claim privacy as a shield to protect against an adversarial challenge to those same public allegations.

In sum, BSF's blanket, conclusory assertions of privilege and confidentiality are not a valid basis for finding that the subpoena issued by Dershowitz is either "unreasonable" or "oppressive."

III. The subpoena served on BSF is not wholly duplicative of the subpoena served on Jane Doe No. 3.

BSF also argues that the subpoena served by Dershowitz should be quashed because it is merely duplicative of the subpoena that Dershowitz served upon its client, Jane Doe No. 3. This argument likewise fails.

The subpoena that Dershowitz served on Jane Doe No. 3 required the production of certain specified items "now in your custody or control." *See* Motion to Quash, Comp. Ex. 1, at 1. Dershowitz agrees with the proposition that has been advanced by Plaintiffs in this litigation that the term "control" generally means "the legal right to obtain the document." 8B Wright & Miller, Fed. Prac. & Proc. Civ. § 2210 (3d ed.). Dershowitz therefore submits that Jane Doe No. 3 has an obligation, pursuant to the subpoena served on her, to produce responsive documents that are in the hands of her attorneys (*i.e.*, BSF and Plaintiffs) because such documents are under her "control." Out of an abundance of caution, however, Dershowitz also served a subpoena on BSF to circumvent any (baseless) argument by Jane Doe No. 3 that she is unable to produce documents that are stored at the offices of her attorneys.

Moreover, to the extent that BSF has documents that are responsive to the subpoena but are *not* subject to Jane Doe No. 3's control, BSF has an obligation to produce those documents.

For example, internal BSF documents that describe the terms of the firm's engagement with Jane Doe No. 3 or BSF's efforts to market Jane Doe No. 3's story may not belong to Jane Doe No. 3 or otherwise be subject to her control, but nonetheless are responsive to Request No. 22 in the subpoena (and, as discussed above, are relevant to this action and are not subject to the attorney-client privilege). Accordingly, BSF's complaints of duplication are without merit.

CONCLUSION

The Court should deny BSF's motion to quash because (1) the documents that Dershowitz seeks are relevant to this litigation; (2) BSF has failed to meet its burden of establishing that all of the documents sought are protected by the attorney-client privilege; and (3) the subpoena is not wholly duplicative of the subpoena issued to Jane Doe No. 3. The Court should likewise deny BSF's request for a protective order that limits the scope of its document production, as well as its request for fees and costs in connection with the subpoena.

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Dated: May 15, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was sent via E-mail on **May 15, 2015** to: Jack Scarola, Esquire, Searcy Denny et al [redacted] and [redacted], counsel for Plaintiffs, and to Sigrid McCawley, Esquire, Boies Schiller & Flexner, counsel for Jane Doe No. 3, at [redacted].

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:08-CV-80736-KAM

JANE DOE 1 and JANE DOE 2,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

ORDER DENYING PETITIONERS' MOTION TO JOIN UNDER RULE 21 AND MOTION TO AMEND UNDER RULE 15

This cause is before the Court on Jane Doe 3 and Jane Doe 4's Corrected Motion Pursuant to Rule 21 for Joinder in Action ("Rule 21 Motion") (DE 280), and Jane Doe 1 and Jane Doe 2's Protective Motion Pursuant to Rule 15 to Amend Their Pleadings to Conform to Existing Evidence and to Add Jane Doe 3 and Jane Doe 4 as Petitioners ("Rule 15 Motion") (DE 311). Both motions are ripe for review. For the following reasons, the Court concludes that they should be denied.

I. Background

This is an action by two unnamed petitioners, Jane Doe 1 and Jane Doe 2, seeking to prosecute a claim under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. (DE 1). Generally, they allege that the respondent Government violated their rights under the CVRA by failing to consult with them before negotiating a non-prosecution agreement with Jeffrey Epstein, who subjected them to various sexual crimes while they were minors. (Id.). Petitioners initiated this action in July 2008. (Id.).

On December 30, 2014, two other unnamed victims, Jane Doe 3 and Jane Doe 4, moved to join as petitioners in this action pursuant to Federal Rule of Civil Procedure 21. (DE 280). Petitioners (Jane Doe 1 and Jane Doe 2) support the Rule 21 Motion. (Id. at 11). Jane Doe 3 and Jane Doe 4 argue that they "have suffered the same violations of their rights under the [CVRA] as the" Petitioners, and they "desire to join in this action to vindicate their rights as well." (Id. at 1). The Government vehemently opposes joinder under Rule 21. (DE 290). The Government argues that Rule 15 is the proper procedural device for adding parties to an action, not Rule 21. (Id. at 1).

"[O]ut of an abundance of caution," Petitioners filed a motion to amend their petition under Rule 15, conforming the petition to the evidence and adding Jane Doe 3 and Jane Doe 4 as petitioners. (DE 311 at 2). The Government opposes the Rule 15 Motion as well. (DE 314). Among other things, the Government argues that amending the petition to include Jane Doe 3 and Jane Doe 4 should be denied because of their undue delay in seeking to join the proceedings, and the undue prejudice that amendment will cause. (Id.).

After considering the parties' submissions and the proposed amended petition, the Court finds that justice does not require amendment in this instance and exercises its discretion to deny the amendment.

II. Discussion

"The decision whether to grant leave to amend a complaint is within the sole discretion of the district court." Laurie v. Ala. Ct. Crim. Apps., 256 F.3d 1266, 1274 (11th Cir. 2001). "The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Justice does not require amendment in several instances, "includ[ing] undue delay, bad faith, dilatory motive

on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment.'" Laurie, 256 F.3d at 1274 (quoting Foman v. Davis, 371 U.S. 178, 182 (1962)). In addition to considering the effect of amendment on the parties, the court must consider "the importance of the amendment on the proper determination of the merits of a dispute." 6 Wright & Miller, Fed. Prac. & Fed. P. § 1488, p. 814 (3d ed. 2010). Justice does not require amendment where the addition of parties with duplicative claims will not materially advance the resolution of the litigation on the merits. See Herring v. Delta Air Lines, Inc., 894 F.2d 1020, 1024 (9th Cir. 1989).

A. Rule 21 Motion

Jane Doe 3 and Jane Doe 4's first attempt to join in this proceeding was brought under Rule 21. (DE 280). "If parties seek to add a party under Rule 21, courts generally use the standard of Rule 15, governing amendments to pleadings, to determine whether to allow the addition." 12 Wright & Miller, Fed. Prac. & Fed. P., p. 432 (3d ed. 2013); see also Galustian v. Peter, 591 F.3d 724, 729-30 (4th Cir. 2010) (collecting cases and noting that Rule 15(a) applies to amendments seeking to add parties); Frank v. U.S. West, Inc., 3 F.3d 1357, 1365 (10th Cir. 1993) ("A motion to add a party is governed by Fed. R. Civ. P. 15(a) . . . .").

Rule 21, "Misjoinder and Non-joinder of Parties," provides the court with a tool for correcting the "misjoinder" of parties that would otherwise result in dismissal. Fed. R. Civ. P. 21. Insofar as Rule 21 "relates to the addition of parties, it is intended to permit the bringing in of a person, who through inadvertence, mistake or for some other reason, had not been made a party and whose presence as a party is later found necessary or desirable." United States v. Com. Bank of N. Am., 31 F.R.D. 133, 135 (S.D.N.Y. 1962) (internal quotation marks omitted).

In their Rule 21 Motion, Jane Doe 3 and Jane Doe 4 do not claim that they were omitted from this proceeding due to any "inadvertence" or "mistake" by Petitioners; rather, they seek to join this proceeding as parties that could have been permissively joined in the original petition under Rule 20 ("Permissive Joinder of Parties"). As courts generally use the standards of Rule 15 to evaluate such circumstances, the Court will consider the joinder issue as presented in the Rule 15 Motion.[1] The Court will consider the arguments presented in the Rule 21 Motion as if they are set forth in the Rule 15 Motion as well. Because the arguments are presented in the Rule 15 Motion (and because the Court is denying the Rule 15 Motion on its merits, as discussed below), the Rule 21 Motion will be denied.

The Court also concludes that portions of the Rule 21 Motion and related filings should be stricken from the record. Pending for this Court's consideration is a Motion for Limited Intervention filed by Alan M. Dershowitz, who seeks to intervene to "strike the outrageous and impertinent allegations made against him and [to] request[] a show cause order to the attorneys that have made them." (DE 282 at 1). The Court has considered Mr. Dershowitz's arguments, but it finds that his intervention is unnecessary as Federal Rule of Civil Procedure 12(f) empowers the Court "on its own" to "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Petitioners' Rule 21 Motion consists of relatively little argumentation regarding why the Court should permit them to join in this action: they argue that (1) they were sexually abused by

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[1] The Court notes that, regardless of which motion it considers, the same standard governs the addition of parties under Rule 21 and Rule 15. See Goston v. Potter, No. 08-cv-478 FJS ATB, 2010 WL 4774238, at *5 (N.D.N.Y. 2010) (citing Bridgeport Music, Inc. v. Universal Music Grp., Inc., 248 F.R.D. 408, 412 (S.D.N.Y. 2008)).

Jeffrey Epstein, and (2) the Government violated their CVRA rights by concealing the non-prosecution agreement with them. (DE 280 at 3; see id. at 7-8). However, the bulk of the Rule 21 Motion consists of copious factual details that Jane Doe 3 and Jane Doe 4 "would prove" "[i]f allowed to join this action." (Id. at 3, 7). Specifically, Jane Doe 3 proffers that she could prove the circumstances under which a non-party introduced her to Mr. Epstein, and how Mr. Epstein sexually trafficked her to several high-profile non-party individuals, "including numerous prominent American politicians, powerful business executives, foreign presidents, a well-known Prime Minister, and other world leaders." (Id. at 3-6). She names several individuals, and she offers details about the type of sex acts performed and where they took place. (See id. at 5).[2]

At this juncture in the proceedings, these lurid details are unnecessary to the determination of whether Jane Doe 3 and Jane Doe 4 should be permitted to join Petitioners' claim that the Government violated their rights under the CVRA. The factual details regarding with whom and where the Jane Does engaged in sexual activities are immaterial and impertinent to this central claim (i.e., that they were known victims of Mr. Epstein and the Government owed them CVRA duties), especially considering that these details involve non-parties who are not related to the respondent Government. These unnecessary details shall be stricken.

The original Rule 21 Motion (DE 279) shall be stricken in its entirety, as it is wholly superseded by the "corrected" version of the Rule 21 Motion (DE 280). From the corrected Rule 21 Motion, the Court shall strike all factual details regarding Jane Doe 3 between the following sentences: "The Government then concealed from Jane Doe #3 the existence of its NPA from

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[2] Jane Doe 4's proffer is limited to sexual acts between Mr. Epstein and herself. (See DE 280 at 7-8).

Jane Doe #3, in violation of her rights under the CVRA" (id. at 3); and "The Government was well aware of Jane Doe #3 when it was negotiating the NPA, as it listed her as a victim in the attachment to the NPA" (id. at 6). As none of Jane Doe 4's factual details relate to non-parties, the Court finds it unnecessary to strike the portion of the Rule 21 Motion related to her circumstances. Regarding the Declaration in support of Petitioners' response to Mr. Dershowitz's motion to intervene (DE 291-1), the Court shall strike paragraphs 4, 5, 7, 11, 13, 15, 19 through 53, and 59, as they contain impertinent details regarding non-parties. Regarding the Declaration of Jane Doe 3 in support of the Rule 21 Motion (DE 310-1), the Court shall strike paragraphs 7 through 12, 16, 39, and 49, as they contain impertinent details regarding non-parties. Jane Doe 3 is free to reassert these factual details through proper evidentiary proof, should Petitioners demonstrate a good faith basis for believing that such details are pertinent to a matter presented for the Court's consideration.

As mentioned, Mr. Dershowitz moves to intervene "for the limited purposes of moving to strike the outrageous and impertinent allegations made against him and requesting a show cause order to the attorneys that have made them." (DE 282 at 1). As the Court has taken it upon itself to strike the impertinent factual details from the Rule 21 Motion and related filings, the Court concludes that Mr. Derschowitz's intervention in this case is unnecessary. Accordingly, his motion to intervene will be denied as moot.[3] Regarding whether a show cause order should

[3] This also moots Mr. Dershowitz's Motion for Leave to File Supplemental Reply in Support of Motion for Limited Intervention. (DE 317). Denying Mr. Dershowitz's motion to intervene also renders moot Petitioners' motion (DE 292) to file a sealed document supporting its response to Mr. Dershowitz's motion. It will accordingly be denied as moot, and DE 293 (the sealed response) will be stricken from the record.

issue, the Court finds that its action of striking the lurid details from Petitioners' submissions is sanction enough. However, the Court cautions that all counsel are subject to Rule 11's mandate that all submissions be presented for a proper purpose and factual contentions have evidentiary support, Fed. R. Civ. P. 11(b)(1) and (3), and that the Court may, on its own, strike from any pleading "any redundant, immaterial, impertinent, or scandalous matter," Fed. R. Civ. P. 12(f).

B. Rule 15 Motion

Between their two motions (the Rule 21 Motion and Rule 15 Motion), Jane Doe 3 and Jane Doe 4 assert that "they desire to join in this action to vindicate their rights [under the CVRA] as well." (DE 280 at 1). Although Petitioners already seek the invalidation of Mr. Epstein's non-prosecution agreement on behalf of all "other similarly-situated victims" (DE 189 at 1; DE 311 at 2, 12, 15, 18-19), Jane Doe 3 and Jane Doe 4 argue that they should be fellow travelers in this pursuit, lest they "be forced to file a separate suit raising their claims" resulting in "duplicative litigation" (DE 280 at 11). The Court finds that justice does not require adding new parties this late in the proceedings who will raise claims that are admittedly "duplicative" of the claims already presented by Petitioners.

The Does' submissions demonstrate that it is entirely unnecessary for Jane Doe 3 and Jane Doe 4 to proceed as parties in this action, rather than as fact witnesses available to offer relevant, admissible, and non-cumulative testimony. (See, e.g., DE 280 at 2 (Jane Doe 3 and Jane Doe 4 "are in many respects similarly situated to the current victims"), 9 ("The new victims will establish at trial that the Government violated their CVRA rights in the same way as it violated the rights of the other victims."), 10 (Jane Doe 3 and Jane Doe 4 "will simply join in motions that the current victims were going to file in any event."), 11 (litigating Jane Doe 3 and

Jane Doe 4's claims would be "duplicative"); DE 298 at 1 n.1 ("As promised . . . Jane Doe No. 3 and Jane Doe No. 4 do not seek to expand the number of pleadings filed in this case. If allowed to join this action, they would simply support the pleadings already being filed by Jane Doe No. 1 and Jane Doe No. 2."); DE 311 at 5 n.3 ("[A]ll four victims (represented by the same legal counsel) intend to coordinate efforts and avoid duplicative pleadings."), 15 (Jane Doe 3 and Jane Doe 4 "challenge the same secret agreement i.e., the NPA that the Government executed with Epstein and then concealed from the victims. This is made clear by the proposed amendment itself, in which all four victims simply allege the same general facts.")). As the Does argue at length in their Rule 15 Motion, Jane Doe 1's original petition "specifically allege[s] that the Government was violating not only her rights but the rights of other similarly-situated victims." (DE 311 at 2). The Court fails to see why the addition of "other similarly-situated victims" is now necessary to "vindicate their rights as well." (DE 280 at 1).

Of course, Jane Doe 3 and Jane Doe 4 can participate in this litigated effort to vindicate the rights of similarly situated victims there is no requirement that the evidentiary proof submitted in this case come only from the named parties. Petitioners point out as much, noting that, regardless of whether this Court grants the Rule 15 Motion, "they will call Jane Doe No. 3 as a witness at any trial." (DE 311 at 17 n.7). The necessary "participation" of Jane Doe 3 and Jane Doe 4 in this case can be satisfied by offering their properly supported and relevant, admissible, and non-cumulative testimony as needed, whether through testimony at trial (see DE 280 at 9) or affidavits submitted to support the relevancy of discovery requests[4] (see

[4] The non-party Jane Does clearly understand how to submit affidavits. (See DEs 291-1, 310-1).

id. at 10). Petitioners do not contend that Jane Doe 3 and Jane Doe 4's "participation in this case" can only be achieved by listing them as parties.

As it stands under the original petition, the merits of this case will be decided based on a determination of whether the Government violated the rights of Jane Doe 1, Jane Doe 2, and all "other similarly situated victims" under the CVRA. Jane Doe 3 and Jane Doe 4 may offer relevant, admissible, and non-cumulative evidence that advances that determination, but their participation as listed parties is not necessary in that regard. See Herring, 894 F.2d at 1024 (District court did not abuse its discretion by denying amendment where "addition of more plaintiffs . . . would not have affected the issues underlying the grant of summary judgment."); cf. Arthur v. Stern, 2008 WL 2620116, at *7 (S.D. Tex. 2008) (Under Rule 15, "courts have held that leave to amend to assert a claim already at issue in [another lawsuit] should not be granted if the same parties are involved, the same substantive claim is raised, and the same relief is sought.").[5] And, as to Jane Doe 4 at least, adding her as a party raises unnecessary questions about whether she is a proper party to this action.[6]

Petitioners also admit that amending the petition to conform to the evidence by including references to the non-prosecution agreement itself is "unnecessary" as the "existing petition is broad enough to cover the developing evidence in this case." (DE 311). The Court

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[5] The Court expresses no opinion at this time whether any of the attestations made by Jane Doe 3 and Jane Doe 4 in support of their motion will be relevant, admissible, and non-cumulative.

[6] The Government contends that Jane Doe 4 is not a true "victim" in this case because she was not known at the time the Government negotiated the non-prosecution agreement, and accordingly she was not entitled to notification rights under the CVRA. (See DE 290 at 10). Any "duplicative" litigation filed by Jane Doe 4 would necessarily raise the issue of whether she has standing under the CVRA under these circumstances.

agrees, and it concludes that justice does not require amending the petition this late in the proceedings.

III. Conclusion

Accordingly, it is hereby **ORDERED AND ADJUDGED** as follows: the Rule 21 Motion (DE 280) is **DENIED**; the Rule 15 Motion (DE 311) is **DENIED**; Intervenor Dershowitz's Motion for Limited Intervention (DE 282) and Motion for Leave to File Supplemental Reply in Support of Motion for Limited Intervention (DE 317) are **DENIED AS MOOT**; Petitioners' Motion to Seal (DE 292) is **DENIED AS MOOT**; the following materials are hereby **STRICKEN** from the record:

- DE 279, in its entirety.
- DE 280, all sentences between the following sentences: "The Government then concealed from Jane Doe #3 the existence of its NPA from Jane Doe #3, in violation of her rights under the CVRA" (DE 280 at 3); and "The Government was well aware of Jane Doe #3 when it was negotiating the NPA, as it listed her as a victim in the attachment to the NPA" (DE 280 at 6).
- DE 291-1, paragraphs 4, 5, 7, 11, 13, 15, 19 through 53, and 59.
- DE 310-1, paragraphs 7 through 12, 16, 39, and 49.
- DE 293, in its entirety.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 6th day of April, 2015.

KENNETH A. MARRA
United States District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.:08-CV-80736-KAM

JANE DOE 1 and JANE DOE 2,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____/

SUPPLEMENTAL ORDER

This cause is before the Court on its Order Denying Petitioners' Motion to Join Under Rule 21 and Motion to Amend Under Rule 15. (DE 324). In accordance with the portion of that Order striking materials from the record (see id. at 10), the Court informs the parties of the following: The affected docket entries (DEs 279, 280, 291-1, 293, and 310-1) shall be restricted from public access on the docket in their entities. Docket entries 279 and 293, which were stricken in their entirety, shall remain so restricted. Regarding the docket entries of which portions were stricken (DEs 280, 291-1, and 310-1), Petitioners may re-file those documents omitting the stricken portions. The re-filed documents must conform to the originally filed documents in all respects, but with the stricken portions omitted.

DONE AND ORDERED in chambers at West Palm Beach, Palm Beach County, Florida, this 7th day of April, 2015.

KENNETH A. MARRA
United States District Court

EXHIBIT C

Boies Takes on Dershowitz in Sex Case

Vivia Chen, The Careerist

April 23, 2015

I've been worried that the Alan Dershowitz Show is coming to a close. After writing a bunch of posts about the allegations that Dershowitz had sex with an underage girl, I fear the story is getting stale. I mean, how many times can you invoke the image of the septuagenarian Harvard law professor romping naked on some private island? (In March, the judge threw out those "lurid" sex charges against Dershowitz.)

Thank goodness a striking new character has emerged to give the story a second wind. And a bold face name to boot: David Boies, reports Reuters.

Boies and his firm are representing [redacted] [redacted] (also known as Jane Doe 3), who alleges that Dershowitz, Prince Andrew and other luminaries had sex with her when she was a teenager at the behest of billionaire Jeffrey Epstein, a convicted sex offender. ([redacted] is also being represented by Brad Edwards and Paul Cassell—see interview with Cassell—whom Dershowitz has countersued for defamation.)

According to a statement by Boies, Schiller & Flexner, the firm is representing [redacted] on a pro bono basis:

> The firm's pro bono program focuses on meaningful cases including trying to assist women and children who are the victims of abuse. Boies Schiller & Flexner LLP took on Ms. [redacted]' representation because she was a victim of abuse when she was a minor child.

While Dershowitz has been less than flattering about Edwards and Cassell, Robert's other lawyers, he's had cordial relations with Boies. "I wrote him a nice congratulatory note when he did the case of gay rights," says Dershowitz.

That was back then. Now, the two legal giants are locking horns. Beside the soured personal relationship, Dershowitz makes a much more serious charge: Boies Schiller has a conflicts problem. According to Dershowitz, Boies Schiller partner Carlos Sires in Florida had volunteered to represent him in his defamation suit against [redacted]. After delivering a confidential memo to Sires about the matter, Dershowitz said he learned that the firm already represented [redacted].

"I wrote to Sires that you are such a mensch, and I'm sorry you're in the middle of all this," says Dershowitz. "But your firm can't continue to represent [redacted] because you've all read my

material."

Dershowitz says he asked Boies Schiller to recuse itself: "They answered no." He says, "They are arrogant; they think they're above the law." He adds, "they have a long sordid history with conflicts," citing the firm's most recent sanction in Boies Schiller & Flexner v. Host Hotels & Resorts, in which the Second Circuit noted that the firm "willfully refused to recognize the obvious conflict" in taking on a client. (Boies Schiller has not responded to our questions.)

Meanwhile, Dershowitz seems a bit offended that Boies is ignoring him. "I'm willing to talk to him, but he won't talk to me."

So will the legal drama/soap opera keep on going? Oh, yeah, says Dershowitz. "There's more coming."

vchen@alm.com

EXHIBIT D

IN THE CIRCUIT COURT OF THE SEVENTEENTH
JUDICIAL CIRCUIT IN AND FOR
BROWARD COUNTY, FLORIDA

CIVIL DIVISION

BRADLEY J. EDWARDS and PAUL G. CASSELL,

Plaintiffs,

vs. CASE No.: CACE 15-000072

ALAN M. DERSHOWITZ,

Defendant.
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PROCEEDINGS BEFORE THE
HONORABLE JUDGE THOMAS M. LYNCH, IV

Friday, April 10, 2015
9:05 - 9:55 o'clock a.m.

Broward County Courthouse
201 Southeast 6th Street
Room 950
Fort Lauderdale, Florida 33301

JERROLD Wm. SEGAL, Court Reporter
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just shows you that it's the right thing to do in this case, to have Mr. Cassell and to have the accuser, his client, Jane Doe 3, be deposed before my client, Mr. Dershowitz, is deposed. Thank you, Your Honor.

THE COURT: Thank you, very much, counsel.

MR. SCAROLA: Your Honor, let me begin first by acknowledging that the Court has discretion to order discovery.

MR. SCAROLA: There is no question about the fact that whatever ruling Your Honor were to decide was appropriate with regard to the ordering of the discovery is not going to be disturbed except under extraordinary circumstances, by any appellate court and I would assure Your Honor, that that's not a matter that we would consider subject to an appeal.

There are very good reasons why the order of discovery here should be the order in which the discovery has been noticed. Although Mr. Scott has repeatedly paraphrased Rule 1.1.310 as prohibiting the noticing of a deposition within thirty days of the service of a Complaint, that's simply not what the rule says. I will quote directly. "Leave of Court granted with or without notice, must be obtained only if the Plaintiff seeks to take a

deposition within thirty days after service of the process."

So Your Honora, a deposition cannot be taken within thirty days. A deposition may be noticed prior to thirty days, but it may not be taken under the terms of the rules, within thirty days, Your Honor. Service was obtained by consent on January 7. The earliest, under the rule, that we would have been able to take Professor Dershowitz's deposition would have been February 6.

We sent a Notice of Deposition to depose Mr. Dershowitz well outside the thirty day period of time, on February 25, and accompanying that notice was a letter. And that letter is, in fact, attached to the pleadings that Your Honor has already seen.

And what that letter said was, "If this date is not convenient, we are willing to move it to a more convenient time. We move it up or we'll move it back." And in light of Mr. Dershowitz's repeated public proclamations that he's extremely anxious to be able to be deposed to be able to vindicate himself, we will do it as early as you want to do it."

Now, during this period of time Mr. Dershowitz was taking every opportunity that he possibly could

to appear before every audience that would have him, Your Honor, to defame Mr. Bradley Edwards and Mr. Paul Cassell. And I want to be sure than Your Honor is really focused on what this defamation case is really all about.

This defamation case is about two lawyers who are working, pro bono, to vindicate the rights of more than forty women who were sexually abused and trafficked by Mr, Jeffrey Epstein over an extended period of time. And Mr. Jeffrey Epstein, through the work of Alan Dershowitz, had obtained an extraordinary agreement from the federal government. That extraordinary agreement said, that, "If you plead guilty to one state court claim and serve, basically, one year on house arrest, we will grant you immunity from any federal prosecution and we will grant all of your co-conspirators immunity from any federal prosecution, as well."

Your Honor, that deal, if entered into, without the consultation nor with an opportunity to be heard by any of the victims of Jeffrey Epstein, in spite of federal law provisions that expressly state that those victims must be consulted and they must have an opportunity to inform the Court as to their own position with regard to a plea bargain.