UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 9:08-80736-Civ-Marra/Johnson

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____/

JANE DOE NO. 1 AND JANE DOE NO. 2'S PROTECTIVE MOTION PURSUANT TO RULE 15 TO AMEND THEIR PETITION TO CONFORM TO EXISTING EVIDENCE AND TO ADD JANE DOE NO. 3 AND JANE DOE NO. 4 AS PETITIONERS

COME NOW Jane Doe No. 1 and Jane Doe No. 2 (the "current victims"), by and through undersigned counsel, to file this protective motion pursuant to Federal Rule of Civil Procedure 15(a)(2) to amend the petition that they have filed in this case. The amendment would (1) conform their petition to the evidence in the case and (2) add Jane Doe No. 3 and Jane Doe No. 4 (the "new victims") as petitioners.

This motion is a "protective" motion because it may be unnecessary. With regard to amending to conform to the evidence, the current victims believe that their existing petition is broad enough to cover the developing evidence in this case. But the petition was filed on July 7, 2008, before the Government had even disclosed the existence of the non-prosecution agreement (NPA) in this case. The petition, accordingly, does not specifically discuss the Government's concealment of the NPA. To conform to that important fact in this case, it appears desirable to amend the petition to address the NPA.

With regard to amending to add new victims, the Government has argued that Rule 15 (addressing amending pleadings) rather than Rule 21 (addressing joinder of parties) is the applicable rule. While the victims have contested that view in their concurrently-filed Rule 21

reply brief, out of an abundance of caution, they explain here why a Rule 15 motion to amend should be granted. In addition, Rule 15(c)(1) allows an amended pleading to "relate back" to the date of an initial pleading, provided that the amendment asserts a claim "that arose out of the conduct, transaction or occurrence set out . . . in the original pleading." Because the original petition in this case alleged that the Government violated the rights of all the girls who were Jeffrey Epstein's victims, the proposed amendment in this case would relate back to the date the petition was filed: July 7, 2008. This relation back eliminates any statute of limitations or other timelessness concerns.

FACTUAL BACKGROUND

On July 7, 2008, Jane Doe No. 1 filed a petition under the Crime Victims' Rights Act (CVRA), 18 U.S.C. § 3771. *See* DE 1. She sought to enforce both her CVRA rights – and the rights of other victims. As the Court is aware, when Jane Doe No. 1 filed her initial petition in this action, it was unclear whether the Government had even reached a plea arrangement with Jeffrey Epstein and, if so, what crimes were covered. Accordingly, the petition generally alleged that, "[u]pon information and belief, [Epstein] is engaged in plea negotiations with the Office of the United States Attorney for the Southern District of Florida concerning federal crimes he is alleged to have committed against *minor children, including Petitioner.*" DE 1 at 1-2 (emphasis added).[1] Jane Doe No. 1's petition went on to quite specifically allege that the Government was violating not only her rights but the rights of other similarly-situated victims: "On information and belief, roughly the same crimes were committed [by Epstein] against several *other young females. These victims, too, are in danger of losing their right to confer* under the CVRA." DE 1 at 7 n.2 (emphasis added).

[1] Obviously, at that point Jane Doe No. 1 did not know that the Government and Epstein had secretly concluded a non-prosecution deal some nine months earlier, in about October 2007.

The Government filed a response to the petition, and then Jane Doe No. 1 filed a reply in support of her petition. By this time, counsel for Jane Doe No. 1 had heard about the NPA, but had not seen the agreement. Once again, Jane Doe No. 1's pleading very directly mentioned other victims, alleging: "This deferred prosecution agreement was reached without conferral with [Jane Doe No. 1] – or, indeed, with the *many other young victims* of [Epstein's] crimes." DE 9 at 1 (emphasis added). The reply went on to explain that the agreement "remarkably allowed the defendant – a billionaire with extraordinary political connections – to escape all federal prosecutions for *dozens of serious federal sex offenses against minors*." *Id.* at 1-2. The reply explained the relief sought, specifically that "[t]he Court should therefore declare the proposed non-prosecution agreement an illegal one, since it was reached in violation of the CVRA, and order the Government to confer with Petitioner *and the other victims in this matter* before reaching any disposition in this case." *Id.* at 2 (emphasis added). The reply asked the Court to "hold that [Jane Doe No. 1] *and the other victims in this case* had the right to confer with the Government before it reached its non-prosecution agreement." *Id.* at 8 (emphasis added); *see also id.* (the Government kept Jane Doe No. 1 "and *the many other victims* of [Epstein's] federal sex offenses . . . in the dark about the fact that the Government was planning to reach a deal . . . ."); *id.* at 10 (the Government did not use "its 'best efforts' to protect the rights of [Jane Doe No. 1] (*and the other victims*) in this case when it failed to confer with her about the non-prosecution agreement"). Jane Doe No. 1 asked for the "obvious remedy" that would involve all the victims – i.e., that the court "declare the non-prosecution agreement illegal and direct that the Government proceed to negotiate a new agreement . . . in a process that respects [Jane Doe No. 1's] *(and the other victims')* rights." *Id.* at 12 (emphasis added).

The Court rapidly held a hearing. During that hearing, the Government agreed to add Jane Doe No. 2 into the case as a second petitioner. Counsel for Jane Doe No. 1 and No. 2 also began learning about broad outlines of the NPA the hearing. *See* DE 15 (tr. July 11, 2008) at 24 (court notes that victims' counsel "learned today . . . that the agreement was signed . . . in October").

As the case proceeded in the following months, the Court ordered the Government to produce the NPA to the victims (DE 26) and to attempt to reach a stipulated set of facts. Over the next several years, the Government took conflicting positions on whether it would stipulate to facts, ultimately refusing to stipulate to anything. *See generally* DE 225-1 at 2-4. Unable to obtain any stipulations, Jane Doe No. 1 and Jane Doe No. 2 filed a detailed summary judgment motion (DE 48). This motion relied in large measure on the Government's and Epstein's joint decision to conceal the NPA from the victims. *See, e.g.,* DE 48 at 10 (noting that "the U.S. Attorney's Office put itself in a position that conferring with the crime victims (including Jane Doe #1 and Jane Doe #2) about the non-prosecution agreement would violate the terms of the agreement"). In addition to discussing the situation of the two petitioners, the motion also raised very specific allegations about Jane Doe No. 3, i.e., that "Jeffrey Epstein flew at least one underage girl on his private jet for the purpose of forcing her to have sex with him and others. Epstein forced this underage girl to be sexually exploited by his adult male peers, including royalty, politicians, businessmen, and professional and personal acquaintances." DE 48 at 4 (citing complaint filed on behalf of Jane Doe No. 3, identified as "Jane Doe No. 102").

The Court ultimately denied the victims' motion for judgment on the pleadings, but allowed the case to move forward. DE 99. The victims then filed discovery requests. As the

Court is aware, discovery issues are currently pending before the Court. The Government has not yet fully answered the victims' discovery requests.

On December 30, 2014, two new victims filed a motion to join this case, pursuant to Fed. R. Civ. P. 21. DE 280. The Government objected to this motion. DE 290. One of the arguments that the Government made in its response was that the proper vehicle for adding new parties into this case is not a motion for joinder, but rather a motion to amend pleadings under Fed. R. Civ. P. 15. DE 290 at 2.[2] The Government then argued that the Court should deny the current victims leave to amend. *Id.*

In a concurrently-filed reply brief regarding the Rule 21 motion, the victims have replied to Government, arguing that Rule 21 is the proper vehicle for adding new parties to this case. But because of the Government's assertion that Rule 15 is the proper vehicle for adding parties, the current victims have filed this protective motion to amend under Rule 15.[3]

I. JANE DOE NO. 1 AND JANE DOE NO. 2 SHOULD BE ALLOWED TO AMEND THEIR CVRA ENFORCEMENT PETITION TO CONFORM TO THE EVIDENCE IN THIS CASE.

Given the way this case has proceeded, the current petition before the Court does not conform to the evidence that has developed. Indeed, the current petition does not even mention the NPA – which is central to this case – for the simple reason that the Government (and Epstein) had concealed the existence of the NPA at the time the petition was drafted.

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[2] Although he has not yet been allowed to intervene, putative intervenor Alan Dershowitz also has argued that Rule 15 is appropriate vehicle for the new victims to seek to join the CVRA case. *See* DE 282 at 2.

[3] To be clear, in conformance with Rule 15(a)(2), this motion to amend is technically filed by the two current victims – Jane Doe No. 1 and No. 2. However, Jane Doe No. 3 and No. 4 have requested the filing of this motion. In that sense, this motion is brought on behalf of all four victims. As indicated in their motion for joinder, all four victims (represented by the same legal counsel) intend to coordinate efforts and avoid duplicative pleadings.

In such circumstances, it is entirely appropriate for Jane Doe No. 1 and Jane Doe No. 2 to now seek to amend their petition to conform to the current state of the case. Of course, "the Federal Rules of Civil Procedure are to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits and to dispense with technical procedural problems." *Staren v. Am. Nat. Bank & Trust Co. of Chicago*, 529 F.2d 1257, 1263 (7th Cir. 1976). Rule 15(a)(2) of the Federal Rules of Civil Procedure specifically allows an amendment, providing that a party may amend its pleading "with the opposing party's written consent or the court's leave. The court should *freely give leave* when justice so requires." (emphasis added). For reasons that remain unclear to the current victims, the Government has declined to give its consent even to a basic amendment of the petition. Accordingly, the current victims seek leave of court to make such an amendment.

The text of Rule 15 itself reflects a liberal attitude towards amendment, starting with the clear direction that the court "should freely give leave when justice so requires." The Supreme Court has admonished that "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, [she] ought to be afforded an opportunity to test [her] claim on the merits." *Foman v. Davis*, 371 U.S. 178, 182 (1962). The policy in favor of amendment "is to be applied with *extreme liberality*." *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.,* 654 F.3d 975, 985 (9th Cir.2011) (emphasis added).

The Government can have no good reason for opposing a basic amendment. If we understand the Government's objection correctly, it does not deny that the proposed amendment conforms to the evidence that the victims have developed in this case. Instead, the Government apparently believes that the current victims should have filed a motion sooner. But "delay, by itself, is insufficient to justify denial of leave to amend." *DCD Programs, Ltd. v. Leighton,* 833

F.2d 183, 186 (9th Cir. 1987). And the Government has clearly long been on notice that issues surrounding the NPA are at the heart of this case.

District courts "should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits." *Developers Sur. & Indem. Co. v. Bi-Tech Const., Inc.*, 979 F. Supp. 2d 1307, 1320 (S.D. Fla. 2013); *see, e.g., Baker v. Firestone Tire & Rubber Co.*, 793 F.2d 1196 (11th Cir.1986) (Fed.R.Civ.P. 15(b) instructs district courts to grant leave to conform the pleadings to the evidence freely, provided no prejudice to the defendant is shown). The current victims should be allowed to amend their petition to conform to the way the case has proceeded.

The Government cannot credibly claim that it is unaware that its concealment of the NPA is at issue here. For example, as long ago as April 8, 2011, the Government filed a pleading in which it defended its decision to conceal the NPA. *See* DE 62 at 42 (". . . there also was a possibility that Epstein would not perform the NPA. A determination was made to cease notifications . . . ."). And as the Court knows, the parties have briefed at length the issue of whether rescission of the NPA is a possible remedy in this case. *See* DE 119, 127, and 147. In rejecting the Government's argument, the Court said "[t]he petitioners in this action seek to vacate a 'non-prosecution agreement' ('the agreement') between the United States Attorney's Office for the Southern District of Florida . . . and Jeffrey Epstein . . . ." DE 189 at 1. The Court went on to rule for the victims on the rescission issue, explaining that "in their petition and supplemental pleadings, Jane Doe 1 and 2 have identified a remedy which is likely to redress the injury complained of – the setting aside of the non-prosecution agreement as a prelude to the full unfettered exercise of their conferral rights at a time that will enable the victims to exercise those

rights meaningfully." *Id.* at 8. Clearly, the Government is not harmed from an amendment conforming to these rulings. A proposed first amended petition (previously provided to the Government) is attached to this pleading.[4]

II. JANE DOE NO. 1 AND JANE DOE NO. 2 SHOULD BE ALLOWED TO AMEND THEIR PETITION TO ADD JANE DOE NO. 3 AND JANE DOE NO. 4 INTO THIS CASE.

The current victims – Jane Doe No. 1 and Jane Doe No. 2 – should also be allowed to amend their petition to include two new parties as petitioners – Jane Doe No. 3 and Jane Doe No. 4. The current victims continue to believe that Rule 21 is the proper vehicle for joining new parties into the existing CVRA action. To protect their rights, however, Jane Doe No. 1 and Jane Doe No. 2 now file this protective motion for leave to amend to add two new parties under Rule 15(a)(2). Leave to amend should be granted because the interests of justice will be served by allowing these parallel claims of two additional victims to be litigated on the merits in a single action. There has been no undue delay, and the amendment "relates back" to the original filing date, obviating any statute of limitations or other timeliness concern.

A. Leave to Amend to Include New Plaintiffs Should be Freely Given.

As discussed above, courts freely grant leave to amend, because cases should be tried on their merits rather than the technicalities of pleadings. *See, e.g., Jet, Inc. v. Sewage Aeration Sys.*, 165 F.3d 419, 425 (6th Cir. 1999). This already-liberal policy is applied even more generously when the proposed amendment simply adds new plaintiffs, because prejudice to the other party is less likely to result from adding additional plaintiffs than from adding new

[4] The proposed amended petition contains nine words in it referring to Jane Doe No. 3 and Jane Doe No. 4. As argued in the next section of this pleading, Jane Doe No. 1 and Jane Doe No. 2 believe that the two new victims should be added into this case. If the Court disagrees with this argument, then it should allow the amended pleading without those nine words in it.

defendants or new claims. *See King v. Cessna Aircraft Co.,* 2010 WL 5253526, at *10 (S.D. Fla. 2010).

Courts have frequently allowed plaintiffs to amend their pleading to add new plaintiffs. *See, e.g., Joshlin v. Gannett River States Pub. Corp.*, 152 F.R.D. 577 (E.D. Ark. 1993) (amendment to name all purported class members as plaintiffs); *Otto v. Milwaukee Cnty.*, No. 07-C-427, 2007 WL 3228118, at *2 (E.D. Wis. Oct. 30, 2007) (additional plaintiffs allowed); *Grand Lodge of Pennsylvania v. Peters*, 560 F. Supp. 2d 1270, 1274 (M.D. Fla. 2008) (Eleventh Circuit Court test satisfied, additional plaintiffs allowed). And the Government appears to concede that a proper procedure vehicle for the victims to pursue is a motion to amend. *See* DE 290 at 2.

B. There Has Been No "Undue Delay" In Seeking to Amend.

In their parallel filing under Rule 21, the current victims have provided numerous reasons why participation by the new victims is desirable in this case. The Government does not appear to contest these reasons. Instead of dealing with the substance of the issue, the Government argues the victims have "unduly delayed" filing their motion to amend. Of course, "undue" delay requires some reference to some time when the new victims' claims were, in fact, due. As discussed in the victims' contemporaneously-filed reply regarding Rule 21, the statute of limitations for the crimes against minors at issue here has not yet expired. *See* 18 U.S.C. § 3283. And Congress has not seen fit to set a more restrictive time limit for victims to file CVRA enforcement actions, either in the CVRA itself or in civil statutes of limitations. Assessed under these congressional decisions, the motion to amend has not been unduly delayed.

Even more important, this Court has not yet set a time limit for adding new parties to this case. The Court would ordinarily establish such a limit as part of a Rule 16 Scheduling

Conference. *See* Local Rule 16.1 (a Joint Proposed Scheduling shall contain "[a] limitation of the time to join additional parties and to amend the pleadings"). In this case, Jane Doe No. 1 and Jane Doe No. 2 have tried to comply with the civil rules by, for example, providing their initial disclosures to the Government pursuant to Fed. R. Civ. P. 26(a)(1). The Government, however, has not even taken that limited step to move the case forward.

The Eleventh Circuit has highlighted the importance of scheduling orders in considering motions to amend. It has cautioning against "render[ing] scheduling orders meaningless" by granting leave to amend freely *after* a scheduling order deadline has passed. *See, e.g., Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir. 1998). But the converse must be true as well: It would likewise render scheduling orders meaningless if a party was denied a chance to freely add additional parties *before* a scheduling order deadline has passed – particularly where the Government has not sought entry of such a scheduling order and has refused to make its initial disclosures required by the civil rules. In the absence of any court-imposed time limit to add parties, it is hard to understand how the Government can argue that "undue" delay exists.

In assessing whether delay is or is not "undue," the Court should also consider the state to which the case has progressed. Of prime importance is the ability of a party to conduct necessary discovery. *See, e.g., Olech v. Vill. of Willowbrook,* 138 F. Supp. 2d 1036, 1046 (N.D. Ill. 2000) ("The addition of a new party plaintiff can cause undue prejudice . . . where the proposed amendment does not afford defendant adequate time for discovery"). Where there is no evidence of prejudice due to lack of time for discovery, an amendment adding new parties should be freely granted. *Id.* At this juncture, the Government has not yet even produced all of the discovery that the Court has ordered it to produce. Moreover, the Government can clearly

pursue whatever discovery it needs to defend its position. (In its pleading, the Government does not claim that it needs any discovery). The Government suffers no harm from the amendment.

In addition, the new victims have not unduly delayed in seeking to join this action. With regard to Jane Doe No. 3, the Government's lead argument is the claim that "petitioners' counsel have been representing [Jane Doe No. 3] since at least as early as March 2011, yet they have waited more than three years to attempt to add her as a party." DE 290 at 8. This unsupported allegation is simply false. *See* Aff. of Jane Doe No. 3 at 7, Exhibit 1 to Victims' Reply in Support of Motion for Joinder (hereinafter "Jane Doe No. 3 Aff.") (responding to Government's claim of legal representation and attesting "[t]his is completely untrue, and I think the Government knows it is untrue. I was not represented by legal counsel in March 2011"). Undersigned counsel began representing Jane Doe No. 3 (pro bono) in around April 2014 and then contacted the Government over the summer about possibly adding her into the case. As recounted at greater length in an earlier pleading, counsel moved to add Jane Doe No. 3 into this case within seven days of receiving the Government's objection to her motion for joinder. *See* DE 291 at 5-6.

More important, Jane Doe No. 3 had good reason for not seeking to join this case until this past summer. As discussed in the Rule 21 reply brief, she was "beyond the seas" – specifically in Australia from 2002 to 2013. Critically, Jane Doe No. 3 was hiding from Epstein. *See* Jane Doe No. 3 Aff. at 3. Her decision to live away from family and friends was not voluntary. *Id.* And living in Australia kept her from learning about how this CVRA action worked. *Id.* at 5-7. Jane Doe No. 3 did not learn about the specifics of this action – and thus the ability to enforce her rights – until 2014, *see id.* at 8, and she acted promptly at that point to obtain legal counsel and join this case.

With regard to Jane Doe No. 4, she filed her motion to join the case when she felt it was safe and appropriate to do so. Given the fact that sexual assault victims all have different reactions to the crimes committed against them, the Court should not conclude that she has unduly delayed.

In crafting its argument about undue delay, the Government relies heavily on a letter sent to Jane Doe No. 3 on September 3, 2008. *See* DE 290-1. As Jane Doe No. 3 explains in her affidavit, that letter did not directly say that Epstein's crimes against her were not going to be prosecuted. Instead, it said elliptically that "the United States has agreed to defer federal prosecution in favor of this state plea and sentence." Jane Doe No. 3 "did not know what that meant." Jane Doe No. 3 Aff. at 5. Significantly with regard to this CVRA litigation, the Government did *not* tell her (and other victims) that litigation was underway trying to invalidate the NPA. Instead, the Government misleadingly stated that "[t]here has been litigation between the United States and two other victims *regarding the disclosure* of the entire agreement between the United States and Mr. Epstein." DE 290-1 at 3 (emphasis added). This description of the litigation is, in the victims' view, quite deceptive. Of course, the point of the litigation was not to obtain the NPA's "disclosure" but rather the NPA's *invalidation*. Jane Doe No. 3 attests in her affidavit that "[u]nderstanding more about that case now, I realize that the letter did not explain that the real purpose of that litigation was not to get 'disclosure of the entire agreement' but instead to get criminal charges filed against Epstein. I wish that the Government had told me that was what was really going on." Jane Doe No. 3 Aff. at 5-6.

Compounding the confusion that the Government created through its letter, in 2011 FBI agents traveled to Sydney to interview Jane Doe No. 3. During that interview, they discussed her sexual abuse in Florida, giving the impression that criminal charges could still be brought in

Florida. The Government does not contend that it made clear to Jane Doe No. 3 during that interview that the NPA barred prosecutions in Florida. And Jane Doe No. 3 has flatly declared that "I was not told even at this point [in 2011] that [Epstein] could not be prosecuted for the crimes he committed in Florida." Jane Doe No. 3 Aff. at 7. As a result, she left that meeting with the entirely reasonable impression that prosecuting Epstein in Florida was a real possibility. *Id.*

In light of all these facts, Jane Doe No. 3 and Jane Doe No. 4 did not unduly delay in seeking to join this case. But finally, the motion to amend is being filed by Jane Doe No. 1 and Jane Doe No. 2. It was difficult for them to work with Jane Doe No. 3 until her recent return to the United States. They did not unduly delay in filing their amendment by waiting until Jane Doe No. 3's return to this country.

C. The Amended Pleading is Timely Because It "Relates Back" to the Filing of the Initial Pleading in 2008.

The Government's main objection to any amended pleading containing new parties appears to be that it would be "futile." The Government argues that such an amendment is barred by the six-year statute of limitations governing tort claims against the Government. *See* DE 290 at 8 (*citing* 28 U.S.C. § 2401(a)). In their contemporaneously-filed pleading on joinder, the victims have explained that the Government is simply wrong to assert that the limitation found in § 2401(a) applies to this case – specifically because this is not a "civil action" against the Government and (with regard to Jane Doe No. 3) the "beyond the seas" tolling provision applies.[5] But even if the limitation did apply, that would hardly make the victims' proposed

[5] The victims specifically adopt and incorporate by reference all their arguments against applying § 2401(a) to this case into this pleading as well.

amendment futile. The amendment here would "relate back" to the original petition, filed six-and-a-half years earlier, thereby satisfying any applicable statute of limitations.

Relation back is a concept specifically adopted in Fed. R. Civ. P. 15(c)(1)(B). Under that rule, an amended pleading "relates back to the date of the original pleading when . . . the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading . . . ." Relation back typically refers to adding new defendants to a case; nevertheless, the 1966 Amendment to Rule 15(c) confirms that relation back also "extends by analogy to amendments changing plaintiffs." Fed. R. Civ. P. 15, Adv. Comm. Notes, 1966 Amend. According to the Advisory Committee, the new version of Rule 15(c) did not include express language about adding plaintiffs because that "problem is generally easier" than adding defendants. Fed. R. Civ. P. 15.

Circuit Courts have applied varying tests for articulating how to determine when an amendment relates back to the filing of the original pleading. In the Eleventh Circuit, the test for relation back has been generally understood as requiring the court to consider "(1) whether the amended claim arose out of the same conduct, transaction, or occurrence as the original pleading; (2) whether the amendment will unduly prejudice the defendant; and (3) whether the original [pleading] provided adequate notice of the new plaintiff." *See King v. Cessna Aircraft Co.,* 2010 WL 5253526, at *10 (S.D. Fla. 2010) (magistrate judge recommendation), *adopted in relevant part*, 2010 WL 5173152 (S.D. Fla. 2010); *Grand Lodge of Pennsylvania*, 560 F. Supp. 2d 1270, 1274 (M.D. Fla. 2008). This victims' motion to amend satisfies all three requirements of the Eleventh Circuit's test for relation back.

1. The Proposed Amendment Arises Out of the Same Conduct as the Original Petition.

First, the claims of Jane Doe No. 3 and Jane Doe No. 4 arise out of the same operative facts as the original plaintiffs. In particular, both Jane Doe No. 3 and Jane Doe No. 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.

2. The Government Is Not Unduly Prejudiced by the Amendment.

Second, allowing the addition of two plaintiffs from the originally alleged victim class will not unduly prejudice the Government. Various district courts define prejudice with regards to relation back in terms of lost evidence due to the passage of time or inadequate time for discovery. *See Otto v. Milwaukee Cnty.*, 2007 WL 3228118, at *2 (E.D. Wis. 2007) (no evidence of prejudice; additional plaintiffs allowed). In fact, some jurisdictions require the opposing party to bear the burden of proving prejudice. *See, e.g., Padilla v. Sears, Roebuck & Co.*, 2012 WL 5505071, at *1 (N.D. Cal. 2012). In other jurisdictions, a defendant fails to prove prejudice unless it provides substantiated proof of harm. *See Green v. Wolf Corp.*, 50 F.R.D. 220, 224 (S.D.N.Y. 1970). These cases proceed from the premise that the concept of relation back would be undermined if defendants were allowed to bar plaintiffs from joining a case simply by proffering an unsupported protest of prejudice. *Id.*

Here, the Government advances such an unsupported claim of prejudice. The Government seems to be treating this case as no-holds-barred, adversary litigation. In its effort to keep the new victims out of this case, the Government remarkably appears to have forgotten *its* statutory obligations to *protect* the victims. Congress has directed that federal prosecutors "shall make their best efforts to see that crime victims are . . . accorded the rights described in

[the CVRA]." 18 U.S.C. § 3771(c)(1). In order for the Government to show "prejudice," it must demonstrate "[d]amage or detriment to one's legal rights or claims." *Blacks's Law Dictionary* 1218 (8th ed. 2004). Because the Government has a legal obligation to make its "best efforts" to protect the CVRA rights of victims, it does not suffer any undue prejudice from the addition of two new victims seeking to protect their rights – rights that the Government must also protect.

Turning to the specifics of the Government's position, the only argument that the Government advances with respect to Jane Doe No. 3 is that her CVRA claim is "specious." DE 290 at 12. This is, of course, an argument not about prejudice to the Government but rather about the merits of Jane Doe No. 3's claims. But in considering a motion for joinder, the Court must assume as true all relevant factual allegations made by the party seeking to join. *See Lewis v. World Boxing Council*, 914 F. Supp. 1121, 1123 (D.N.J. 1996). Here, Jane Doe No. 3 has alleged – both in her initial affidavit and in her supplemental affidavit filed along with this pleading – that the Government did not properly confer with her or otherwise afford her rights under the CVRA. *See, e.g.,* DE 291-1 at 13 (alleging failure to confer on the NPA); Jane Doe No. 3 Aff. at 5 ("I was never offered a chance to meaningfully confer with the prosecutor for the Government, and I was never notified of any hearing that could affect me or my rights as a crime victim to ever bring charges"). And the proposed amendment would allege that the Government did not extend to her the rights promised in the CVRA. *See* Exhibit 1 at 1-2.

In contending that it will ultimately be able to prevail on such issues, the Government claims that Jane Doe No. 3 told "agents of the Government" not to bother her about the Epstein investigation. DE 290 at 12. The facts surrounding this alleged exchange are highly disputed. To begin with, it appears that the agent did not write any report surrounding this contact, *see* DE 304-1 at 1-3 (general affidavit that does not reference any specific dates) – a possible deviation

from standard procedure that raises questions about what exactly happened. More important, Jane Doe No. 3 strongly disputes that this brief contact was proper notification of her rights. As she explains at length in her affidavit, she had grave doubts about whether a person calling her out of the blue over the telephone and asking her about sex with Epstein was truly a law enforcement investigator. *See* Jane Doe No. 3 Aff. at 4-5. The fact that Epstein and his lawyer called her immediately after this contact only added to her suspicion. *Id.* at 5.

In such circumstances, it is hard to see how a brief telephone call from an FBI agent complies with the CVRA's command that crime victims be reasonably "notified" of their CVRA rights, 18 U.S.C. § 3771(c)(1), as well as actually afforded their rights – such as the right to confer with the prosecutor. Nor would it have been inconsistent with respect for the victims' "dignity and privacy," 18 U.S.C. § 3771(a)(8), for the Government to have followed its standard procedure of sending written notification of rights to Jane Doe No. 3.[6] To be sure, federal prosecutors have "prosecutorial discretion" about which criminal charges to ultimately file. *See* 18 U.S.C. § 3771(d)(6). But that discretion is not a license for the Government to simply decide not to provide proper notification to a victim of serious federal crimes – particularly when that victim was clearly afraid of a dangerous criminal and hiding to escape his wrath. At the very least, the Government can simply deny Jane Doe No. 3 an opportunity to join this case through mere allegation that it complied with the CVRA. The Court should allow an amendment now and make a final determination on CVRA compliance based on an appropriate record.[7]

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[6] Much later, on September 3, 2008, the Government sent notification to Jane Doe No. 3, at her address in Australia, of a possible civil remedy to be pursued. DE 290-1. But it never sent its standard victim notification letter to Jane Doe No. 3 – in contrast to what it did earlier for other victims.

[7] The Court will have to make such determination even if it denies the motion to amend. Jane Doe No. 1 and Jane Doe No. 2 have already stated that they will call Jane Doe No. 3 as a witness at any trial to prove part of a common plan and scheme to deprive the victims of their

The Government will likewise not be prejudiced if Jane Doe No. 4 is added into the case. The initial petition alleged that the Government had no made adequate efforts to notify "victims" about the non-prosecution agreement. Jane Doe No. 4 was in the victim class. The Government churlishly contends that adding her into this case would require "a separate trial over whether or not Jane Doe #4 is a 'victim' who would have been entitled to any rights." DE 290 at 10. Of course, the Government never denies that Jane Doe No. 4 is a victim in this case, presumably because it now possesses ample evidence that Epstein sexually abused her. Undersigned legal counsel has already provided ample information to the Government supporting this fact. The Government has an obligation to use its "best efforts" to protect the rights of victims. Simply demanding a "trial" when it knows what the real facts are is inconsistent with that obligation. The Government also makes other arguments about the merits of Jane Doe No. 4's claims, but those can be handled in due course in this litigation.

3. The Government Is On Notice About Claims from Other Victims.

The third and final requirement of the Eleventh Circuit's relation back test is adequate notice in the original complaint of the potential to add new plaintiffs. The Eleventh Circuit has said "the critical issue [regarding relation back] is whether the original complaint gave notice to the defendant of the claim now being asserted." *Bloom v. Alvereze*, 498 F. App'x 867, 883 (11th Cir. 2012). In *Bloom*, the Eleventh Circuit found that the motion to amend to add Mrs. Bloom to Mr. Bloom's claim did not satisfy the relation back test because Mrs. Bloom was only mentioned in the original pleading vaguely in one instance as Mr. Bloom's wife. *Id*. In contrast, as recounted in the Factual Background section above, the original petition and reply in this case clearly alleged that many victims – including Jane Doe No. 3 and Jane Doe No. 4 – were harmed

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rights. *See* DE 291 at 25-26 (*citing* Fed. R. Evid. 404(b)).

by the Government. For example, the petition alleged "[o]n information and belief, roughly the same crimes were committed [by Epstein] against several *other young females. These victims, too, are in danger of losing their right to confer* under the CVRA." DE 1 at 7 n.2 (emphasis added). And the reply supporting the petition asked the Court to "hold that [Jane Doe No. 1] *and the other victims in this case* had the right to confer with the Government before it reached its non-prosecution agreement." DE 9 at 8 (emphasis added). The reply went on to explain relief sought, specifically that "[t]he Court should therefore declare the proposed non-prosecution agreement an illegal one, since it was reached in violation of the CVRA, and order the Government to confer with Petitioner *and the other victims in this matter* before reaching any disposition in this case." *Id.* at 2 (emphasis added). Building on all these allegations, at the first hearing in this case, the Court allowed an additional victim – Jane Doe No. 2 – to join the action. *See* DE 115 (tr. July 11, 2008) at 14. The current motion for an amended pleading simply builds on that elaboration, naming two additional victims who were in the victim class alleged at the outset of this case. The courts have readily allowed relation back in such circumstances. *See, e.g., Paskuly v. Marshall Field & Co.,* 646 F.2d 1210, 1211 (7th Cir. 1981) (where "the original complaint alleged that defendant engaged in practices that discriminated against women because of their sex; the defendant was thereby on notice that it might be required to defend its employment practices from charges of class-based discrimination").

Clearly the proposed amendment asserts a claim "that arouse out of the conduct, transaction or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). The adding of new "parties after the applicable statute of limitations may have run is not significant when the change is merely formal and in no way alters the known

facts and issues on which the action is based." *Staren v. Am. Nat. Bank & Trust Co. of Chicago,* 529 F.2d 1257, 1263 (7th Cir. 1976). The Court should accordingly allow an amended pleading.

CONCLUSION

Jane Doe No. 1 and Jane Doe No. 2 should be allowed to amend their initial petition, pursuant to Rule 15 of the Federal Rules of Civil Procedure to conform to the evidence in this case and to add Jane Doe No. 3 and Jane Doe No. 4 as petitioners. A proposed first amended petition is attached to this pleading.

DATED: February 6, 2015

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on February 6, 2015, on the following using the Court's CM/ECF system:

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