UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE NO. 101,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

CASE NO.: 09-CV-80591-MARRA/JOHNSON

PLAINTIFF JANE DOE NO. 101'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT AS MODIFIED BY DEFENDANT'S NOTICE OF WITHDRAWAL OF ARGUMENTS I THROUGH VII OF DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT

Plaintiff, Jane Doe No. 101, by and through her undersigned attorneys, hereby responds to Defendant's Motion to Dismiss Plaintiff's First Amended Complaint [D.E. 29] ("Motion"), as modified by Defendant's Notice of Withdrawal [D.E. 53] ("Notice of Withdrawal") of Arguments I Through VII of Defendant's Motion to Dismiss Plaintiff's First Amended Complaint and, as grounds, states as follows:

Pleading Standard & Summary of Argument

It is well settled in the context of a civil action that a valid complaint requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). Defendant improperly attempts to heighten this standard through his characterization of this action as one that is essentially criminal and punitive in nature. Such a characterization is inappropriate, as this is a civil action that seeks only compensatory damages for the violation of certain of the predicate offenses of Section 2255 of Title 18 of the U.S. Code as set forth in the

First Amended Complaint ("FAC") [D.E. 9]. Accordingly, notice pleading is all that is required. *Lombard's, Inc. v. Prince Mfg., Inc.*, 753 F.2d 974, 975 (11th Cir. 1985).

Under notice pleading, the plaintiff need only provide the defendant fair notice of his claim and the grounds upon which it rests. *See Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007). As this is a liberal pleading requirement, "[s]pecific facts are not necessary; the statement need only 'give the defendant fair notice of what the...claim is and the grounds upon which it rests.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007)) (internal citation omitted). In considering a motion to dismiss, a court places a "very high burden" on a defendant to show that a "plaintiff cannot conceivably prove any set of facts that would entitle him to relief." *Beck v. Deloitte & Touche et al.*, 144 F.3d 732, 735-36 (11th Cir. 1998); *accord H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 249-50 (1989). The FAC satisfies the aforementioned pleading requirements.

I. REQUIRING MERGER OF EACH SEPARATE STATUTORY PREDICATE OFFENSE INTO ONE SINGLE COUNT WOULD BE IMPROPER.

A. Pleading of Multiple Counts Under 18 U.S.C. § 2255 Is Proper.

In his motion, Defendant argues that the multiple counts of the FAC should be merged into a single count. Defendant improperly asserts:

> Contrary to Plaintiff's attempt to multiply her recovery by asserting six separate counts, [18 U.S.C.] § 2255, creates a single cause of action with a single penalty for all violations of a predicate offense, not separate causes of action and separate recoveries on a "per violation" basis.

(Motion 34). In so contending, Defendant both confuses and incorrectly advances two distinct propositions: first, that pleading a separate count for each violation of a predicate offense as set

forth in Section 2255 of Title 18 is improper; and second, that all violations of a particular predicate offense must be pled as a single cause of action to provide for a single recovery, even where multiple violations of that particular predicate offense may exist.

In connection with Defendant's first proposition, a plain reading of Section 2255 demonstrates that this civil remedies statute applies individually to each numerated predicate offense and establishes the minimum amount of civil damages available to a qualifying victim for each violation. Specifically, 18 U.S.C. Section 2255 provides:

> (a) **In General**. - Any person who, while a minor, was a victim of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred while such person was a minor, may sue in any appropriate United States District Court and shall recover the actual damages such person sustains and the cost of the suit, including a reasonable attorney's fee. Any person as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.[1]

18 U.S.C. § 2255(a) (2008). Nowhere does the above statutory text require that the violation of the specified federal statutes be pled as a single count. Section 2255 provides a civil remedy for a violation of *each* of the predicate offenses, and does not, as Defendant maintains, preclude multiple counts from being pled pursuant to its terms. For each predicate offense that Defendant committed, Section 2255 should apply independently and uniquely to properly determine the minimum amount of civil damages to be awarded for such offense. To adopt the contrary approach is to suggest that a victim of a violation of a single predicate offense receive the same compensation as a victim of multiple enumerated predicate offenses. The statute's language, as

[1] July 27, 2006, approximately two years before Defendant pled guilty to state criminal offenses and signed the Non-Prosecution Agreement, Public Law 109-248, the Adam Walsh Child Protection and Public Safety Act, became law and raised the statutory minimum for damages under 18 U.S.C. Section 2255 from $50,000.00 to $150,000.00.

well as principles of equity, provide for recovery for each separate predicate offense; to interpret the statute as Defendant proposes would mean that Congress granted defendants who violate a predicate offense the ability to violate additional predicate offenses without any accountability. This was not Congress' intent.

The underlying approach to statutory interpretation or construction in Florida is set forth in *A.R. Douglass, Inc., v. McRainey*, 137 So. 157 (Fla. 1931):

> The intention and meaning of the Legislature must primarily be determined from the language of the statute itself and not from conjectures aliunde. When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.

Id. at 159. A review of the wording of Section 2255 unambiguously demonstrates that the statute provides damages for both multiple violations of a single predicate act[2] as well as multiple violations of separate predicate acts. In its current form, the statute allows "[a]ny person who, while a minor, was a victim of ***a*** violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, ***or*** 2423 of this title and who suffers personal injury as a result of ***such violation***" to recover damages in an amount of not less than $150,000.00. 18 U.S.C. § 2255(a) (emphasis added). This statute is properly read to apply the damage floor of Section 2255 to ***each*** violation of a predicate offense. Defendant's assertion that the above statute only permits a single recovery based on a single cause of action would require that the statute be rewritten to eliminate the use of the article "a" and to make plural all singular usages of the word "violation."

[2]See Section I. B. of this Reply in support of the pleading of multiple violations of a predicate offense.

The statute, however, was not written in this manner, and where the statute as currently constructed is unambiguous in its meaning, judicial interpretation of the statute would be improper. *See Heredia v. Allstate Insurance Company*, 358 So.2d 1353 (Fla. 1978) (explaining that "[w]here the words selected by the Legislature are clear and unambiguous...judicial interpretation is not appropriate to displace the expressed intent").

In the instant case, where Defendant violated multiple predicate offenses in his sexual exploitation of Plaintiff, it is proper to plead each violation as a separate count and seek damages under each count in accordance with Section 2255.

B. Pleading of Multiple Violations of a Predicate Offense Under 18 U.S.C. § 2255 Is Proper.

Defendant continues his self-serving interpretation of Section 2255 through the advancement of his second proposition. Similar to the above argument that the violation of several predicate offenses should be pled as one count, Defendant argues that, when multiple violations of a single predicate offense occur, a victim's recovery on a "per violation" basis is prohibited. Again, Defendant's contention fails on the basis of a common sense reading of the statute and principles of fairness. Just as it makes no sense to compensate a victim of a violation of a single predicate offense with exactly the same amount as a victim of a violation of multiple predicate offenses, it is equally unsustainable to argue that a victim of multiple violations of a predicate offense should receive the same damage award as a victim of only a single violation of that same offense. To maintain otherwise is to eliminate the deterrent value of the statutory scheme by allowing a defendant to continue to victimize a child without any additional consequences subsequent to such defendant's first violation of the relevant predicate act.

Defendant argues that, "where actual damages were less than [the threshold amount] or otherwise impossible to prove, the statute would guarantee a lump-sum, make-whole penalty of [the threshold amount] for all injuries sustained as a result of the predicate acts." (Motion 35). Defendant fails to provide any support for this contention, either in the case law, legislative history, or otherwise. First, Defendant incorrectly states the amount of the "make-whole" penalty. The statute unambiguously provides that "[a]ny person as described in the preceding sentence shall be deemed to have sustained damages of *no less than* [the threshold amount]." 18 U.S.C. § 2255(a) (2008). As such, the threshold amount is a floor, and not a ceiling, on the amount of damages that can be awarded for a violation of each predicate offense. Consequently, in the instant case, even if all violations of the predicate offenses, as well as all violations of a single predicate offense, were merged into a single cause of action, the recovery would not be limited to the minimum threshold damage award.

Relevant case law provides support for holding Defendant accountable for each time he violated any of the enumerated predicate offenses. In *United States v. Esch*, 832 F.2d 531, 541 (10th Cir. 1987), the court established that a determination of the correct unit of prosecution for violation of a statute "focuses in part on the identification of the key element of the federal offense." In *Esch*, the defendants were convicted on sixteen counts of sexual exploitation of children for photographs taken in violation of Title 18, Section 2251 of the U.S. Code. *Id.* at 533. The court held that the indictment properly charged separate counts[3] for each of the photographs produced. *Id.* at 533, 542. Specifically, the court noted that the charging of

[3]Note that although Defendant contends that all predicate violations of predicate offenses, as well as multiple violations of a single predicate offense, should be pled as a single cause of action with only a single recovery, *Esch* stands for the contrary view.

separate offenses was warranted where "[e]ach photograph depended upon a separate and distinct use of the children" in violation of the key element of the offense. *Id.* at 542; *see also Ebeling v. Morgan*, 237 U.S. 625, 629 (1915) (charging the defendant with a separate count for each mail bag cut open in violation of the statutory offense, despite the transaction being "in a sense continuous"); *United States v. Gallardo*, 915 F.2d 149, 151 (5th Cir. 1990) (explaining that "each separate use of the mail to transport or ship child pornography should constitute a separate crime because it is the act of either *transporting* or *shipping* that is the central focus of [18 U.S.C. § 2252(a)(1)(A), a predicate] statute").

Notwithstanding that the foregoing jurisprudence involved criminal prosecution for the violation of predicate offenses, because Section 2255 exists to provide civil remedies for those predicate offenses, Defendant's contention that a plaintiff seeking recourse under Section 2255 cannot assert a claim on a "per violation" basis is without merit. It is simply illogical to assert, as Defendant does, that multiple counts and violations can be charged in the criminal context, but that, in a civil action under Section 2255 for those same violations, all counts and violations must be lumped together as one with a single penalty.

Multiple counts are proper, as shown, for example, in *Tilton v. Playboy Entertainment Group, Inc.*, 554 F.3d 1371, 1375 (11th Cir. 2009), on which Defendant relies in his Motion. (Motion 34). In *Tilton*, the court did not prohibit the plaintiff from seeking separate damages against several defendants based on a single incident for violations of three predicate offenses under Section 2255: §§ 2251(a), 2252(a), and 2252(A)(a). *Id.* Although the counts brought under Sections 2252(a) and 2252(A) were deemed to be duplicative by the court and thus were merged, the plaintiff was, nevertheless, able to recover on the two remaining counts and was

awarded civil damages for each pursuant to 18 U.S.C. Section 2255. Furthermore, Defendant's reliance on *Tilton* to claim that multiple alleged violations of a single predicate offense have never been allowed is misplaced; this case involved only a single violation of a predicate statute. Moreover, Defendant's reliance on its own *Doe vs. Epstein* line of cases is, at a minimum, premature.

Accordingly, in the instant case, not only was it proper for Plaintiff to plead multiple counts in the FAC for the violation of each predicate statute identified therein, but also, this Court should assess civil damages under Section 2255 for each violation of a particular predicate statute. Defendant's argument is unsupported by case law and is nothing more than a blatant attempt to limit Plaintiff's potential recovery as a victim of Defendant's multiple acts of sexual exploitation and abuse.

Dated this 26th day of June, 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on this 26th day of June, 2009, we electronically filed the foregoing document with the Clerk of the Court using CM/ECF. We also certify that the foregoing document is being served this day on all counsel of record identified on the attached Service List either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

Respectfully submitted,

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United States District Court, Southern District of Florida

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