

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE II)	CASE NO.: 09-80469-CIV-MARRA
)	
Plaintiff,)	
)	
vs.)	
)	
JEFFREY EPSTEIN,)	
and SARAH KELLEN,)	
)	
Defendants.)	

**PLAINTIFF'S MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANT EPSTEIN'S MOTION TO DISMISS**

Plaintiff, JANE DOE II, through counsel, opposes Defendant's RICHARD EPSTEIN's Motion to Dismiss. Defendant's argument for a dismissal is premised on the following: 1) Plaintiff is not permitted to file a claim under Florida law in a State of Florida court and then file a federal claim in a federal court; 2) the remedies amendment to 18 U.S.C. §2255 are not retroactive based on the dates Defendant EPSTEIN is alleged to have violated the statute; 3) damages under §2255 cannot be obtained on a per incident basis, but must be lumped together into a single recovery despite multiple violations occurring in temporally distinct time frames, and therefore being different incidents; 4) Plaintiff has failed to state a cause of action under §2255 because she has failed to "allege facts constituting a predicate act"; and 5) Plaintiff has failed to state a cause of action for conspiracy to violate §2255.

I. LEGAL STANDARD

Defendant's motion to dismiss must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of her claims that would entitle her to relief.

Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Court must accept all of plaintiff's factual allegations as true. Schuer v. Rhodes, 416 U.S. 232 (1974). Rule 8(a)(2) of the Federal Rules of Civil Procedure provides that a complaint need only be "a short and plain statement of the claim," and as long as the pleadings "give defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," notice pleading has been satisfied. Conley v. Gibson, 355 U.S. at 47. For a claim to state a cause of action however, facts, not labels and conclusions must be asserted. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)

II. ARGUMENT

Point 1. Plaintiff has every right to proceed in State court for a Florida common law claim, and in this Court for a federal claim.

Defendant EPSTEIN's argument on this point is frivolous. Plaintiff's claims in State court are based on the common law of Florida, while the federal claims are based on a federal statutory remedy.¹ There are different facts that prove each claim and different elements to the claims. Defendant seems to be arguing that the Plaintiff forfeits a right to a federal remedy when she invokes a parallel, but independent and wholly distinct right to a State remedy. That is simply not supported by any case or reasonable interpretation of any case. The lynchpin of Defendant's argument is that concurrent jurisdiction is available to hear all claims in one forum; that is simply not the case, since the state claims are vastly different than the federal statutory remedy. If the State claims had been filed in this Court, this Court would not be obligated to exercise concurrent jurisdiction. It is well established that the exercise of supplemental jurisdiction is discretionary with the court, and is properly rejected

¹On a Motion to Dismiss, the Court is of course confined to the four corners of the Complaint, and it is completely improper for the Defendant to attach as Exhibits copies of a Complaint from a different proceeding, a fact that is not alleged anywhere in the Complaint at issue before this Court. Nevertheless because the Defendant's argument on this issue is meritless, Plaintiff addresses it on the merits.

under many circumstances.²

28 U.S.C. §1337, "supplemental jurisdiction," provides that:

- ©) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if--
 - (1) the claim raises a novel or complex issue of State law,
 - (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
 - (3) the district court has dismissed all claims over which it has original jurisdiction, or
 - (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

Courts routinely "are obligated to raise and decide issues of subject matter jurisdiction *sua sponte* any time it appears subject matter jurisdiction is absent." Carias v. Lenox Financial Mortgage Corporation, 2008 U.S. DIST. LEXIS 20345 *1 (N.D. Cal. March 5, 2008). In Carias, after granting summary judgment on the sole federal claim, the Court remanded the State claims to state court, stating: "The Court declines to exercise pendent jurisdiction over the state law claims and remands the action to state court. The Court finds that the issues of economy, convenience, fairness and comity collectively weigh in favor of remand. See Harrell, 934 F.2d at 205. **Comity weighs especially strong, given that the remaining claims are pure state law claims with no connection to federal law.** Economy also weighs in favor of remand as state courts are better equipped to efficiently handle state

² In United Mine Workers v. Gibbs, 383 U.S. 715 (1966), a jury's verdict against a union based on State law claims was reversed, in part, because the federal law claim failed. The Court noted that: "It has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right. Its justification lies in considerations of judicial economy, convenience and fairness to litigants; if these are not present a federal court should hesitate to exercise jurisdiction over state claims, even though bound to apply state law to them, Erie R. Co. v. Tompkins, 304 U.S. 64. Needless decisions of state law [by a federal court] should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law."

law claims." Id. at *5-6 (emphasis added). In Daimler Chrysler Corporation v. Charlotte Cuno, 547 U.S. 332, 351-52 (2006) the Supreme Court stated:

Gibbs held that federal-question jurisdiction over a claim may authorize a federal court to exercise jurisdiction over state-law claims that may be viewed as part of the same case because they "derive from a common nucleus of operative fact" as the federal claim. 383 U.S., at 725, 86 S. Ct. 1130, 16 L. Ed. 2d 218. Plaintiffs assume that Gibbs stands for the proposition that federal jurisdiction extends to all claims sufficiently related to a claim within Article III to be part of the same case, regardless of the nature of the deficiency that would keep the former claims out of federal court if presented on their own.

Our general approach to the application of Gibbs, however, has been markedly more cautious. For example, as a matter of statutory construction of the pertinent jurisdictional provisions, we refused to extend Gibbs to allow claims to be asserted against nondiverse parties when jurisdiction was based on diversity, see Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 98 S. Ct. 2396, 57 L. Ed. 2d 274 (1978), and we refused to extend Gibbs to authorize supplemental jurisdiction over claims that do not satisfy statutory amount-in-controversy requirements, see Finley v. United States, 490 U.S. 545, 109 S. Ct. 2003, 104 L. Ed. 2d 593 (1989). As the Court explained just last Term, "we have not . . . applied Gibbs' expansive interpretive approach to other aspects of the jurisdictional statutes." Exxon Mobil Corp. v. Allapattah Servs., 545 U.S. 546, 553, 125 S. Ct. 2611, 162 L. Ed. 2d 502 (2005) (applying 28 U.S.C. § 1367, enacted in 1990, to allow a federal court in a diversity action to exercise supplemental jurisdiction over additional diverse plaintiffs whose claims failed to meet the amount-in-controversy threshold).

What we have never done is apply the rationale of Gibbs to permit a federal court to exercise supplemental jurisdiction over a claim that does not itself satisfy those elements of the Article III inquiry, such as constitutional standing, that "serve to identify those disputes which are appropriately resolved through the judicial process." Whitmore, 495 U.S., at 155, 158, 110 S. Ct. 1717, 109 L. Ed. 2d 135.

(Emphasis added)

Defendant's argument that the Court should abstain from deciding the purely federal issues in this case because there is an independent action under State law is absurd. For this argument the Defendant relies on the Colorado River abstention doctrine, clearly

inapplicable to this case. Only in “exceptional” circumstances, to promote conservation of judicial resources and comprehensive disposition of litigation, would a federal court be authorized to dismiss federal parallel³ claims that are initiated in state court. Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). However, for the Colorado River doctrine to even apply, there must be clear Congressional direction that would preclude a federal court’s “virtually unflagging obligation ...to exercise federal jurisdiction.” Id. at 817. In that case, the Supreme Court found that clear Congressional direction from the McCarran Amendment, which the Court read to counsel against “piecemeal litigation” concerning issues of water rights in a river system, favored abstention Id. at 819. Even with this clear Congressional direction, if other factors had not favored abstention, it may not have been ordered. Id. at 820.

Defendant EPSTEIN does not offer *any* evidence of any Congressional direction that would direct this Court to abstain for claims under 18 U.S.C. §2255.⁴ Further, the Colorado River doctrine only applies when federal courts are presented with “difficult questions of state

³The federal claims that are the subject matter of this action are not necessarily parallel, although the incidents that gave rise to both the federal and state claims arise from the same series of events. A Florida appellate court, for example, has refused to apply principles of *res judicata* to bar State discrimination claims after the plaintiff lost federal discrimination claims. Andujar v. National Property & Casualty Underwriters, 659 So. 2d 1214 (Fla. 4th DCA 1995) (adverse judgment against plaintiff in federal court for federal discrimination claims did not bar subsequent action under state discrimination laws). Here, although some of the elements for some of the claims may be similar, they are sufficiently different that application of Andujar would preclude *res judicata*. To determine whether a case is parallel, courts have looked to whether the same issues are being litigated. Calvert Fire Ins. Co. v. American Mut. Reins. Co., 600 F.2d 1228, 1229, n. 1 (7th Cir. 1979); the issues in the State court and in this Court are not the same.

⁴The Supreme Court said that Congressional direction is the “[m]ost important factor.” Id. at 819.

law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar.” Id. at 814 (emphasis added).⁵ Plaintiff in this case is not asking this Court to adjudicate any claims under State law, nor do the claims presented “policy problems of substantial public import.” This case involves claims against an individual brought by another individual.

Just how narrow the circumstances under which abstention is appropriate under the Colorado River doctrine, was demonstrated in the subsequent decision of the Supreme Court in the case of Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1979). In Will, the Supreme Court further narrowed the contours of when a federal court may abstain when there is a parallel state action. In that case, a bare majority of one held upheld the District Court’s decision to abstain, however, Justice Blackmun, in casting the deciding vote, did so because he was of the opinion that the remedy sought (mandamus) was premature, since the Appellate Court which had reversed the District Court, should have simply directed it to reconsider the issue in light of the very limited circumstances under which abstention is appropriate under the Colorado River doctrine. Id. at 668.

While the Will case recognizes that Colorado River abstention is a matter generally left to the sound discretion of the District Court, the Eleventh Circuit has abolished its application for claims predicated on 42 U.S.C. §1983. Alacare, Inc. v. Bagiano, 785 F. 2d 963 (11th Cir. 1986); See also: Tovar v. Billmeyer, 609 F. 2d 1291 (9th Cir. 1979) (rejecting application of abstention in Section 1983 cases). Defendant cites no cases where the

⁵Colorado River has been applied where the plaintiff is pursuing federal civil rights claims in state *and* federal courts, at the same time, which is not the case here. See for example: Atchinson v. Nelson, 460 F. Supp. 1102 (D. Wyo. 1978).

Colorado River doctrine has been applied to a federal claim under §2255. The cases cited by Defendant EPSTEIN do not support a decision by this Court to abstain over what is a purely federal claim. In American Bankers Ins. Co. v. First State Ins. Co., 891 F.2d 882 (11th Cir. 1990), the District Court dismissed a purely state law claim for equitable subrogation because there had been an earlier claim for declaratory relief in State Court; the Eleventh Circuit reversed, concluding

...that no exceptional circumstances require dismissal of this case in deference to the pending state court proceeding. If it were simply a question of judicial economy, this litigation probably should proceed in the New York court. A federal court cannot properly decline to exercise its statutory jurisdiction, however, simply because judicial economy might be served by deferring to a state court. Federal courts have a 'virtually unflagging obligation' to exercise the jurisdiction given them.' Colorado River, 424 U.S. at 816, 96 S. Ct. at 1246. The interest in preserving federal jurisdiction mandates that this action not be dismissed.

891 F.2d at 886.

Finally, Plaintiff has pled that Defendant EPSTEIN has made an agreement with the United States Attorney's Office to not contest the jurisdiction of this Court in exchange for a avoiding prosecution under federal law for solicitation of minors for prostitution. Complaint, ¶15. Defendant EPSTEIN appears to be violating the agreement in contesting the jurisdiction of this Court; at a minimum, at this stage of the pleadings he should be estopped from contesting jurisdiction, since the allegations of ¶15 must be accepted as true.⁶

Point 2. The retroactivity of the amendments to §2255 is not appropriately addressed in a motion to dismiss; but if the Court is so inclined to consider it, there are insufficient facts pled in the Complaint to render the 2006 amendments inapplicable to the case at bar.

⁶Plaintiff acknowledges that Defendant EPSTEIN's agreement is between the United States and he; however, the Plaintiff and the other victims of his sexual predation may be considered third party beneficiaries to the agreement.

The only issue properly before the Court is whether the Complaint states a cause of action. ¶14 of the Complaint claims that the Plaintiff is entitled to the sum of \$150,000 for each event wherein Defendant EPSTEIN solicited the Plaintiff for prostitution. Each event is set forth in the Complaint in ¶13.⁷ There are two related issues before the Court: 1) the amount of minimum damages recoverable, \$50,000, or \$150,000; and, 2) whether the Plaintiff can recover the minimum amount of damages for each temporally distinct event, or whether she is restricted to a single recovery of the minimum damages recoverable under the statute.

For the first issue, it is Plaintiff's position that the matter cannot be decided on a motion to dismiss, because what Defendant EPSTEIN is asking the Court to do is to declare, prematurely, that when the Court instructs the jury, it instruct them that the minimum recovery for the Plaintiff, if she proves the allegations, is either \$50,000 (for the entire set of events, Defendant EPSTEIN's position) or \$150,000 for each event (Plaintiff's position); this issue cannot be settled on a motion to dismiss, but is better reserved for the charging conference at trial. On the second issue, as will be addressed later, under the plain language of the statute, since Defendant EPSTEIN can be criminally prosecuted for each temporally distinct event where he solicited this minor for prostitution, he can be subjected to the civil remedy for damages for each such event, under either version of the statute. This second

⁷Plaintiff alleges that Defendant EPSTEIN, or others working on his behalf, solicited the Plaintiff for prostitution, while she was a minor, on "6/16/03, 7/2/03, 4/9/04, 6/7/04, 7/30/04, 8/30/04, 10/9/04, 10/12/04, 10/30/04 and 11/9/04. In addition, Plaintiff believes that there were as many as 10 to 20 other occasions during this time frame that Defendant EPSTEIN solicited her and procured her to perform prostitution services, all during the time that she was a minor."

issue would be better addressed on a summary judgment motion, and again, has nothing to do with whether Plaintiff has pled a cause of action pursuant to Rule 12(b)(6), Fed. R. Civ. P.

Plaintiff agrees with the general proposition that a new law that creates new substantive rights, absent Congressional direction to the contrary, does not have retroactive effect, but this is not a new law. §2255 was amended in 2006, to, *inter alia*, provide an enhanced minimum recovery for damages caused by sexual predators such as Defendant EPSTEIN. However, the change in the civil remedies available of a statute is a procedural, not a substantive change in the law, and procedural changes to a statute are routinely applied retroactively.⁸ Where substantive changes in a law are made by Congress, a slim majority of the Supreme Court has declined retroactive application, even where the law was ostensibly enacted to overrule a Court precedent that had itself, in the view of Congress, overruled earlier Court precedents. Rivers v. Roadway Express, 511 U.S. 298, 308 (1994).⁹

⁸Defendant EPSTEIN also cites to United States v. Siegel, 153 F.3d 1256 (11th Cir. 1998), wherein, based on a defendant's inability to pay restitution mandated by a penal statute, the Court reversed a restitution order. An amendment to the statute removed from consideration the defendant's ability to pay restitution; the Court said such an amendment could not be applied retroactively because the provision amounted to a punishment under a penal statute, and would violate the *ex post facto* provision in the U. S. Constitution. This case is clearly distinguished our case: the statute here is a civil, not a penal remedy; the amendment to the statute modifies the minimal exposure of the Defendant, but does not, as in the Siegel case, dispense with a substantive defense to a restitution claim. United States v. Whiting, 165 F.3d 631 (8th Cir. 1999), where a conviction for possession of child pornography was upheld, despite the fact that the conduct of the defendant was arguably not specifically proscribed by statute at the time the images were possessed; the Court held the legislative amendment was a mere clarification of the prior legislation and not an *ex post facto* law.

⁹ Justice Scalia cited the statement of purpose of the Civil Rights Act of 1991, to hold that, for example, the amendments specifically designed to overrule Patterson v. McLean Credit Union, 491 U.S. 164, 105 L. Ed. 2d 132, 109 S. Ct. 2363, should be

Similarly, in the companion case of Landgraf v. Usi Film Prods., 511 U.S. 244, 275, n. 28 (1994), the Court declined to retroactively apply substantive changes to Title VII cases, but noted that

While we have strictly construed the Ex Post Facto Clause to prohibit application of new statutes creating or increasing punishments after the fact, we have upheld intervening procedural changes even if application of the new rule operated to a defendant's disadvantage in the particular case. See, e. g., Dobbert v. Florida, 432 U.S. 282, 293-294, 53 L. Ed. 2d 344, 97 S. Ct. 2290 (1977); see also Collins v. Youngblood, 497 U.S. 37, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990); Beazell v. Ohio, 269 U.S. 167, 70 L. Ed. 216, 46 S. Ct. 68 (1925).

The question becomes then is an increase in the minimum guaranteed damages of a civil remedy statute a substantive or a procedural change? A careful reading of Landsgraf compels a finding that it is a procedural change only that must be given retroactive application. Although the Landsgraf Court declined to give retroactive application to the change most analogous to the one at issue here, it did so because it found the newly created right to compensatory damages, previously *not* available under Title VII, and made available by the Civil Rights Act of 1991, was in effect the creation of a new statute:

The provision of § 102(a)(1) authorizing the recovery of compensatory damages is not easily classified. It does not make unlawful conduct that was lawful when it occurred; as we have noted, *supra*, 511 U.S. at 252-255, § 102 only reaches discriminatory conduct already prohibited by Title VII. Concerns about a lack of fair notice are further muted by the fact that such discrimination was in many cases (although not this one) already subject to monetary liability in the form of backpay. Nor could anyone seriously contend

applied prospectively only, based on a statutorily expressed Congressional intent to do so: "The statute that was actually enacted in 1991 contains no comparable language. Instead of a reference to 'restoring' pre-existing rights, its statement of purposes describes the Act's function as 'expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination.' 1991 Act, § 3(4), 105 Stat. 1071 (emphasis added)."

that the compensatory damages provisions smack of a "retributive" or other suspect legislative purpose. Section 102 reflects Congress' desire to afford victims of discrimination more complete redress for violations of rules established more than a generation ago in the Civil Rights Act of 1964. At least with respect to its compensatory damages provisions, then, § 102 is not in a category in which objections to retroactive application on grounds of fairness have their greatest force.

Nonetheless, the new compensatory damages provision would operate "retrospectively" if it were applied to conduct occurring before November 21, 1991. Unlike certain other forms of relief, compensatory damages are quintessentially backward looking. Compensatory damages may be intended less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. They do not "compensate" by distributing funds from the public coffers, but by requiring particular employers to pay for harms they caused. The introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning. In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct. The new damages remedy in § 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent.

In cases like this one, in which prior law afforded no relief, § 102 can be seen as creating a new cause of action, and its impact on parties' rights is especially pronounced. Section 102 confers a new right to monetary relief on persons like petitioner who were victims of a hostile work environment but were not constructively discharged, and the novel prospect of damages liability for their employers. Because Title VII previously authorized recovery of backpay in some cases, and because compensatory damages under § 102(a) are in addition to any backpay recoverable, the new provision also resembles a statute increasing the amount of damages available under a preestablished cause of action. Even under that view, however, the provision would, if applied in cases arising before the Act's effective date, undoubtedly impose on employers found liable a "new disability" in respect to past events. See Society for Propagation of the Gospel, 22 F. Cas. at 767. The extent of a party's liability, in the civil context as well as the criminal, is an important legal consequence that cannot be ignored. Neither in Bradley itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment. See Winfrey v. Northern Pacific R. Co., 227 U.S. 296, 301, 57 L. Ed. 518, 33 S. Ct. 273 (1913) (statute creating new federal cause of action for wrongful death

inapplicable to case arising before enactment in absence of "explicit words" or "clear implication"); United States Fidelity & Guaranty Co. v. United States ex rel. Struthers Wells Co., 209 U.S. 306, 314-315 (1908) (construing statute restricting subcontractors' rights to recover damages from prime contractors as prospective in absence of "clear, strong and imperative" language from Congress favoring retroactivity).

Id. at 281-86 [footnotes omitted].

Here, we have an increase in the potential damages remedy, but it was a damages remedy that already existed at the time of Defendant EPSTEIN's commission of the acts against the minor. Hence, here, unlike Landsgraf, there was an existing civil remedy prior to Defendant EPSTEIN's commission of the acts against the minor Plaintiff, and there continues to be such a remedy. Similar to our fact situation here, in Bradley v. School Bd. of Richmond, 416 U.S. 696, 40 L. Ed. 2d 476, 94 S. Ct. 2006 (1974), a unanimous Court applied an intervening statute authorizing an award of attorney's fees for parties seeking to end school segregation, to a case pending on appeal at the time the statute was enacted. Noting that the statute created an "additional basis or source for the Board's potential obligation to pay attorneys' fees," 416 U.S. at 721, the Court found that the statute's retroactive application did not adversely affect the settled expectations of the parties. It is difficult to imagine, particularly when the Court is contemplating a motion to dismiss, that Defendant EPSTEIN had a "settled expectation" that if and when he was caught for solicitation of minors for prostitution he would be liable for only a minimum of \$50,000; it is highly probable that he never believed he would be caught and he never knew of or contemplated the civil penalties he would face under §2255. It is highly unlikely that Defendant EPSTEIN made those calculations when he committed the crimes against this or any other minor. Hence the rationale usually advanced for prospective application of

statutory enactments is simply not present here, and the record is devoid of any factual material that would support such a conclusion.¹⁰ As Justice Blackmun said in dissent in Landsgraf, there is no vested right to break the law.¹¹

Bottom line is, a motion to dismiss a claim is not the correct procedural mechanism to determine the retroactivity of a statute. Landsgraf was decided after a trial on the merits of the claim, wherein the trial court determined that although the sexual harassment was serious, the employer, upon learning of it, had taken prompt remedial measures to correct it, and the plaintiff did not have sufficient cause to warrant quitting her job. Id. at 247-48. Rivers v. Roadway Express, 511 U.S. 298 (1994) was decided after a trial on the merits as well, wherein the Court dismissed the 1981 claims based on the holding in Patterson, supra, and exonerated the Defendant on the Title VII claims in a bench trial. On appeal, the plaintiff sought relief under the 1991 Civil Rights Act amendments, which overruled Patterson. These

¹⁰ Although outside the pleadings and not appropriate for consideration on a Motion to Dismiss, Defendant EPSTEIN has refused to answer any substantive questions in the only two (2) depositions he has given in all these cases, including in the State court case involving this Plaintiff. Accordingly, Plaintiff has not been able to ascertain whether Defendant EPSTEIN had settled expectations about the limits of his civil liability under §2255.

¹¹ “At no time within the last generation has an employer had a vested right to engage in or to permit sexual harassment; ‘there is no such thing as a vested right to do wrong.’ Freeborn v. Smith, 69 U.S. 160, 2 Wall. 160, 175, 17 L. Ed. 922 (1865). See also 2 N. Singer, Sutherland on Statutory Construction § 41.04, p. 349 (4th rev. ed. 1986) (procedural and remedial statutes that do not take away vested rights are presumed to apply to pending actions). Section 102 of the Act expands the remedies available for acts of intentional discrimination, but does not alter the scope of the employee’s basic right to be free from discrimination or the employer’s corresponding legal duty. There is nothing unjust about holding an employer responsible for injuries caused by conduct that has been illegal for almost 30 years.” Id. at 297. Similarly in this case, soliciting minors for acts of prostitution, has been unlawful and the civil remedy associated therewith has long preceded the acts in question.

cases where in a much different procedural posture than the present case, and the law that is applicable, including the raise of the minimum cap to \$150,000, was in place well before this suit was filed. Further, well before this suit was filed Defendant EPSTEIN entered into a deferred prosecution agreement wherein he agreed to not contest the jurisdiction of this Court and liability for claims under §2255, and Plaintiff has so alleged in ¶15 of the Complaint. Plaintiff did not allege that Defendant EPSTEIN made this agreement with a specification that his damages would be limited to a single claim of a minimum recovery under the former statute, which was amended in 2006.

Point 3. 18 U.S.C. §2255 permits a claim for each temporally distinct event.

(a) In general. Any person who, while a minor, was a victim of a violation of section 2241©), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title [18 USCS § 2241©), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423] 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.

The statute makes reference to "a violation" and "such violation," both references being in the singular. The statute does not say that if there are multiple violations, the Plaintiff is limited to a single recovery for all. Such a construction would to the plain language of the statute and common sense. Plaintiff has alleged that Defendant EPSTEIN violated the statute on 10 confirmed occasions and up to 20 additional occasions. Each date for each violation is different. There is no language in the statute that prohibits the Plaintiff from suing for each violation, and the dicta set forth in Tilton v. Playboy Entertainment Group, Inc., 554 F. 3d 1371 (11th Cir. 2009), vaguely noting that the District Court awarded the Plaintiff "the

minimum 'actual damages", *Id.* at 1379, but there is no suggestion in this Opinion that the Plaintiff was so limited, no reference to whether Plaintiff sought the relief being sought here or that the events she complained of occurred on multiple occasions. In fact, it appears clear from the Opinion that the pro se Defendant that Plaintiff prevailed against by default was sued for a singular violation of recording the Plaintiff's sexually oriented performance at a Spring Break gathering. There is no indication that the conduct that was recorded by the defaulted Defendant occurred on multiple occasions, as here.

Point 4. The Eleventh Circuit has foreclosed Defendant EPSTEIN's argument that for a violation of 18 U.S.C. 2422(b) to occur, he must travel in interstate commerce; moreover, he has waived his right to contest the jurisdiction of the Court according to the allegations of the Complaint.

In United States v. Yost, 479 F.3d 815 (11th Cir. 2007), a defendant was convicted of two counts of attempting to induce persons he believed were minors (they were government agents posing as minors) to commit acts of prostitution under 18 U.S.C. §2422(b); he sought to void his convictions on appeal because he didn't get to the meeting place. The Court rejected the argument, holding:

We are not convinced by Yost's argument that his failure to arrive at the meeting place precludes a finding of a substantial step. Although this is the first time we have been confronted with an attempt conviction under 18 U.S.C. § 2422(b) where travel is not involved, two other circuits have examined the issue and determined travel is not necessary to sustain such a conviction. In United States v. Bailey, 228 F.3d 637, 639-40 (6th Cir. 2000), the Sixth Circuit affirmed a conviction under Section 2422(b) where the defendant sent e-mails proposing oral sex and attempted to set up meetings with minor females, albeit unsuccessfully. Similarly, in United States v. Thomas, 410 F.3d 1235, 1246 (10th Cir. 2005), the Tenth Circuit affirmed a Section 2422(b) attempt conviction, despite a lack of evidence of travel. The Tenth Circuit stated: "Thomas crossed the line from 'harmless banter' to inducement the moment he began making arrangements to meet [the minor], notwithstanding the lack of evidence that he traveled to the supposed meeting place." *Id.* Viewing the

totality of Yost's actions, we likewise conclude Yost crossed the line from mere "talk" to inducement. In addition to his online chats with Lynn, Yost called Lynn on the telephone, posted pictures of his genitalia online, and made arrangements to meet her. Despite a lack of evidence of travel, the totality of Yost's actions convinces us that a reasonable jury could have found Yost committed a substantial step.

Id. at 820.

As a practical matter, although not pled, the manner in which Defendant EPSTEIN solicited Plaintiff to commit acts of prostitution as alleged was by telephone, by use of one of his surrogate "assistants," in this case Defendant SARAH KELLEN.¹² Plaintiff would receive a phone call on her cell phone (with a 561 exchange) from the cell phone of Defendant KELLEN, who used a cell phone with a New York exchange (917 area code). In United States v. Drury, 396 F.3d 1303 (11th Cir. 2005), the Court had to determine whether a murder for hire conviction, where the defendant made calls from a Georgia land line to a federal agent posing as a hit man on a cell phone that routed calls through Jacksonville, was sufficient to establish use of interstate commerce for commission of the crime in question. The Court affirmed the conviction, even where there was no intent to use an instrumentality of interstate commerce, since the Defendant believed he was calling a number in Georgia.

In this case, the facts will demonstrate that for 99 per cent of the solicitations for prostitution, Plaintiff was called by Defendant KELLER, who used her cell phone with a 917 exchange, a New York exchange, and presumably set up the event after being instructed by Defendant EPSTEIN when and at what time the Plaintiff should appear at his home for the

¹²Ms. Kellen has been served in accordance with New York law after seeking to avoid service with the assistance of a doorman at her building. She has thus far failed to respond to the Complaint, and Plaintiff intends to move for a default against her next week.

sexual services he paid the Plaintiff for. Defendant KELLER resides and is believed to have resided in New York at all times relevant to this suit, although she was present at Defendant EPSTEIN's home on some of the occasions when the Plaintiff appeared after being summoned there. However, since she used a cellular phone, that is clearly a facility of interstate commerce as contemplated by 18 U.S.C. 2422(b), which encompasses conduct where "any facility or means of interstate commerce" is used.¹³ The Eleventh Circuit has recognized that "[t]he telephone system is clearly a 'facility of interstate . . . commerce.'" United States v. Covington, 2009 U.S. App. LEXIS 8263 (11th Cir. April 22, 2009).

Defendant EPSTEIN is alleged in the Complaint to have waived the right to contest the jurisdiction of this Court for claims under §2255, he should therefore be estopped from asserting the failure to allege predicate acts, particularly when he has refused to answer any questions based on his claimed right against self incrimination. However, if the Court is of the view that these predicate facts must be alleged despite the agreement, then Plaintiff requests leave to do so.

Point 5. Plaintiff has pled sufficient facts to establish a conspiracy to violate §2255.

_____A civil conspiracy is an agreement by two or more persons, to do an unlawful act or a lawful act by unlawful means, the doing of an overt act in furtherance of the

¹³ "(b) Whoever, using the mail **or any facility or means of interstate or foreign commerce**, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life." (Emphasis added).

conspiracy, resulting in damage to the Plaintiff. Walters v. Blankenship, 931 So. 2d 137 (Fla. 5th DCA 2006); Blatt v. Green, Horn, et al., 456 So. 2d 949 (Fla. 3rd DCA 1984).

To support her claim of a civil conspiracy, Plaintiff has pled the following:

9. Defendant EPSTEIN, in agreement with two (2) persons he employed for this purpose, HALEY ROBSON and Defendant KELLEN, conspired with these other two, and others, to solicit young women of the type Defendant EPSTEIN preferred, blonde, attractive in appearance, and younger than 18 years of age, to provide sexual gratification for him by engaging in acts of prostitution.

10. Defendants EPSTEIN and KELLEN entered into a criminal conspiracy to solicit young women for acts of prostitution, including the Plaintiff, here in Palm Beach County.

11. From about June, 2003 until on or about February, 2005, Defendants EPSTEIN and KELLEN persuaded, induced, or enticed the Plaintiff to come to Defendant EPSTEIN's home and provide Defendant EPSTEIN with "massages" which escalated into sexual encounters between Defendant EPSTEIN and the Plaintiff designed to fulfill his unnatural sexual desires for young women or even younger girls who were minors. These acts included Defendant EPSTEIN's request that he wanted the encounter to be like a "porn video." Defendant EPSTEIN would script lines for the Plaintiff to say, including calling out his name and requesting that he perform a certain sexual act "harder," while he touched the Plaintiff's vagina with a vibrator or with his fingers; alternately, he would masturbate in the presence of the Plaintiff after demanding her to disrobe and walk in front of him in provocative sexual poses. Defendant EPSTEIN would pay the Plaintiff a fee of \$200 on each occasion after he ejaculated while masturbating in the presence of the Plaintiff.

Plaintiff has pled the elements of a civil conspiracy to violate §2255.

CONCLUSION

Defendant's Motion to Dismiss must be denied. Plaintiff's Complaint states a cause of action pursuant to §2255. The Colorado River doctrine for abstention is not remotely applicable to this case, which is grounded on a purely federal statutory cause of action. It is

inappropriate for the Defendant to seek to limit his minimum statutory exposure on a Motion to Dismiss, where there is no factual record or legislative history to determine the retroactivity of an enhanced damages provision to a cause of action that existed at the time of the wrongful acts. §2255 claims permit a Plaintiff to assert multiple claims for multiple violations that occur in temporally distinct time frames, no differently than any claim, whether based on tort or statutory law, that encompasses multiple events that occur at different times. Defendant EPSTEIN has waived the right to contest the issue of whether his conduct impacted interstate commerce; but Plaintiff is prepared to allege, if the Court deems it necessary, how his employee and co-conspirator, Defendant KELLEN, used an instrumentality of interstate commerce, her cell phone, to solicit the Plaintiff, then a minor, on behalf of Defendant EPSTEIN who solicited her sexual services for money. Finally, Plaintiff has pled all necessary elements to establish a civil conspiracy to violate §2255. For these reasons, Defendant EPSTEIN's Motion to Dismiss must be denied; however, if the Court determines otherwise, Plaintiff respectfully requests leave to amend.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished **VIA ECM TRANSMISSION** to: Robert D. Critton, Esq. and Michael Pike, Esq., BURMAN CRITTON LUTTIER & COLEMAN, 515 N. Drive, Suite 400, West Palm Beach, Florida 33401 this 22nd day of May, 2009.

BY:s/ Isidro M. Garcia
ISIDRO M. GARCIA