

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80381-MARRA-JOHNSON

JANE DOE NO. 5,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.

Defendant, Jeffrey Epstein's Reply to Plaintiff's Response In Opposition To Defendant's Motion To Stay And/Or Continue Action For Time Certain With Incorporated Memorandum Of Law

Defendant, JEFFREY EPSTEIN, (hereinafter "EPSTEIN") by and through his undersigned attorneys, hereby files his Reply to Plaintiff's Response In Opposition to Defendant's Motion to Stay and/or Continue Action, and states:

I. Introduction and Argument

Plaintiff's Response in Opposition challenging the stay should not prevail when 5th Amendment principles are at issue and when there exists a real, substantial and not remote possibility that Epstein may face criminal prosecution by the United States Attorneys' Office ("USAO") if the USAO unilaterally determines that Epstein somehow violated that certain Non-Prosecution Agreement dated June 30, 2008 ("NPA") and/or if Epstein is forced to waive those 5th Amendment rights and participate in civil discovery in order to defend this civil action.

Epstein should not be confronted with the substantial risk of losing this civil action by virtue of asserting his 5th Amendment privileges. Despite Plaintiff's contention, Epstein's Motion does not concentrate solely on the fact that the pleadings are not at

Jane Doe No. 5 v. Epstein
Page 2

the summary judgment stage. The motion also concentrates on Epstein's risk of losing this entire civil action as a result of Epstein invoking his 5th Amendment rights. Severino v. Klytie's Developments, Inc., 2008 WL 1782637, *2 (D. Colo)(recognizing that a stay is appropriate under similar circumstances as in the instant case); see also infra.

In fact, waiver of Epstein's 5th Amendment privileges should not be compelled to defend this civil action (and could be remedied by a reasonable stay), especially when civil discovery may lead to the USAO unilaterally declaring a violation of the NPA.

The USAO has already unilaterally claimed that EPSTEIN violated the NPA by, among other things, ***"investigating the Plaintiffs (by and through his attorneys) whom brought civil suits against him for purposes of defending those civil actions" and "by contesting damages in this action and in the other civil actions."*** See Motion to Stay and Jack Goldberger Affidavit attached thereto as Exhibit "B". Thus, these are not vague assertions as Plaintiff claims. How can Epstein truly defend these matters and be afforded his due process rights when to do so might result in the USAO claiming a breach of the NPA? The fact is that he cannot. Notwithstanding the allegations against Epstein, this Court has an obligation to ensure his due process rights are upheld in both the civil and criminal contexts.

Next, in her response, Plaintiff claims that a stay should not be entered because a parallel criminal proceeding against Epstein does not exist. Not only is Plaintiff's theory incorrect for reasons set out herein and in the Epstein's Motion to Stay, but her response ignores the significant fact that a stay may be issued in light of an ongoing investigation. It is clear from the NPA and Jack Goldberger's Affidavit (attached to the

Jane Doe No. 5 v. Epstein
Page 3

Motion to Stay) “. . .that the criminal matters against Epstein remain ongoing until the NPA expires by its terms in late 2010. . . , and the threat of criminal prosecution against Epstein by the USAO continues presently and through late 2010.” See Jack Goldberger’s Affidavit, ¶¶5 (attached to the Motion to Stay). In fact, the FBI refused to provide information regarding this case and other related cases filed against Epstein “. . .stating the materials are at this time exempt from disclosure because they are in an investigative file, i.e., the matter is still an ongoing criminal investigation.” See Jack Goldberger’s Affidavit, ¶¶7 (attached to the Motion to Stay)

Additionally, Plaintiff’s response downplays the fact that civil discovery may result in the USAO claiming a breach of the NPA. Epstein wishes to vigorously defend this case and others filed against him; however, he does not wish to risk waiver of his 5th Amendment privileges, at least before the NPA expires or any investigation is closed.

Further, Plaintiff adopts the arguments set forth in Jane Doe’s Response to the Motion to Stay filed in 08-CIV-80893, which asserts that the NPA is not attached to Epstein’s Motion to Stay. The Court has a copy of the NPA. While it may be sealed, this Court may review same, in camera. As such, Plaintiff’s Best Evidence argument (as adopted in the instant response) is entirely misplaced and should be disregarded.

a. Justice Requires The Entry of A Stay

As set out in the Motion to Stay, once the NPA expires, EPSTEIN intends to testify to all relevant and non-objectionable inquiries made to him in discovery be it a deposition, in interrogatories or in production requests. However, the current circumstances are such that by testifying or responding to discovery, EPSTEIN will be

Jane Doe No. 5 v. Epstein
Page 4

required to waive his constitutional privileges, thereby subjecting himself to scrutiny by the USAO as a result of matters alleged in this civil action (and others before this Court and in the State of Florida 15th Judicial Circuit Court, Palm Beach County).

When an ongoing criminal investigation exists, courts have granted motions to stay civil proceedings. In St. Paul Fire and Marine Insurance Company v. U.S., 24 Cl.Ct 513 (1991), the court held that staying a civil action for 6-9 months was reasonable in light of a pending criminal investigation so long as the movant met certain elements (see *infra*) and the stay was not immoderate or unreasonable. Taking into consideration the Motion to Stay and this Reply as well as facts alleged by Plaintiff in her operative pleading against Epstein, it is clear that Epstein has met the elements of St. Paul Fire necessary for this Court to enter a stay:

1. Epstein has made a clear showing, by direct or indirect proof, that the issues in the civil action are "related" as well as "substantially similar" to the issues in the criminal investigation.
2. Epstein has made a clear showing of hardship or inequity if required to go forward with this civil case while the NPA and/or the ongoing investigation exist. (see *supra* and see also Motion to Stay and attached affidavit of Jack Goldberger, Esq. discussing Epstein's 5th Amendment Rights and how those rights affect this civil litigation – see *supra*); and
3. Epstein, in light of the stays granted by other courts, has shown that a stay in the instant matter until late 2010 (the date the NPA expires) and the likely date any ongoing investigation will be closed is not immoderate or unreasonable.

St. Paul Fire and Marine Insurance Company v. U.S., 24 Cl.Ct at 515-16; see also Wilson v. National Association of Letter Carriers, 2006 WL 3791313, *1 (E.D. La. 2006)(granting motion to stay civil proceeding for 2 years and 7 months pending

Jane Doe No. 5 v. Epstein
Page 5

criminal investigation); Ostrow v. U.S., 1986 WL 6855, *1 (M.D. Fla.)(recognizing a defendant's constitutional rights and allowing for a stay of the civil case until the criminal aspects/investigation of Defendant's companion case are closed).

Here, Epstein is not required to "contemplate an in *haec verba* iron-clad comparison of separate issues by direct proof." St. Paul Fire and Marine Insurance Company v. U.S., 24 Cl.Ct at 516. Instead, a reading of the complaint, the NPA (in camera), the pleadings in support of and against Epstein's Motion to Stay along with other pleadings in the clerk's file, makes it clear that the facts in the instant matter and those in the ongoing investigation are "related" and/or "substantially similar." Id. As such, permitting this civil action to go forward would create a hardship on Epstein in that he will be forced to invoke his 5th Amendment Privilege and risk losing this case by virtue of not being able to present evidence, or waive that right and risk a potential criminal prosecution. Eastwood v. U.S., 2008 WL 5412857, *1 (E.D. Tenn.)(“When a party to a civil action is subject to criminal proceedings and/or investigations that relate to such civil action, courts will often stay the civil proceeding so as to prevent the use of civil discovery and evidentiary procedures to obtain evidence for use in the criminal matter). Id. Courts will also stay a civil case to preserve 5th Amendment rights. Id. Further, a comparison of Fed.R.Civ. Pro. 26 may expand the rights of criminal discovery beyond the limits of Fed.R.Crim.Pro. 16(b). Epstein satisfies the requirements to stay this action as set forth in St. Paul Fire and in Eastwood, including the similarity of issues underlying the civil litigation and ongoing criminal investigation. As such, a stay should

Jane Doe No. 5 v. Epstein
Page 6

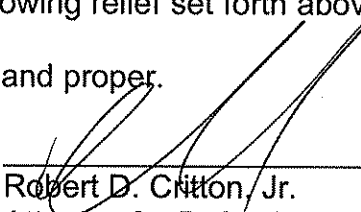
be entered in the instant matter. See also U.S. v. \$75,020.00 In United States Funds, et al., 2009 WL 1010359 (M.D. G.a. 2009).

III. Conclusion and Request for Relief

Based upon the foregoing, Epstein is entitled to a full stay of this proceeding (and other related matters) until such time as the NPA expires and until the ongoing investigation by the USAO is closed (i.e., until late 2010). Alternatively, in an effort to protect Epstein's 5th Amendment and his due process rights in connection with defending these civil matters, this court should enter a stay of any discovery directed to Epstein and strike this case from the trial docket until the NPA and the ongoing investigation are both concluded and/or expired. In this manner, Plaintiff's investigation and discovery as to third parties will continue and will not be delayed. Epstein is invoking his 5th Amendment rights in the first place, which means that objections to discovery and deposition questions are being asserted so as not to waive those 5th Amendment rights. Once the NPA and the ongoing investigation terminate, this court could allow additional time for Plaintiff to complete Epstein's deposition and discovery directed to him, and then set this case on the Court's most available docket. Despite Plaintiff's contentions, Epstein's 5th Amendment rights and his due process rights associated therewith and in connection with defending this civil case should trump any civil claim for money damages when it comes to timing. Eastwood v. U.S., 2008 WL 5412857, *6 (reasoning that a stay is warranted when the risk to an individual's constitutional rights is magnified).

Jane Doe No. 5 v. Epstein
Page 7

WHEREFORE, Epstein requests the following relief set forth above, and for such other and further relief as this court deems just and proper.



Robert D. Critton, Jr.
Attorney for Defendant Epstein

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this 12 day of May, 2009:

Stuart S. Mermelstein, Esq.
Adam D. Horowitz, Esq.
Mermelstein & Horowitz, P.A.
18205 Biscayne Boulevard
Suite 2218
Miami, FL 33160
305-931-2200
Fax: 305-931-0877
ssm@sexabuseattorney.com
ahorowitz@sexabuseattorney.com
Counsel for Plaintiff Jane Doe #2

Jack Alan Goldberger
Atterbury Goldberger & Weiss, P.A.
250 Australian Avenue South
Suite 1400
West Palm Beach, FL 33401-5012
561-659-8300
Fax: 561-835-8691
jagesq@bellsouth.net
Co-Counsel for Defendant Jeffrey Epstein


Respectfully submitted,

By: _____
ROBERT D. CRITTON, JR., ESQ.
Florida Bar No. 224162
rcrit@bclclaw.com

MICHAEL J. PIKE, ESQ.
Florida Bar #617296
mpike@bclclaw.com

BURMAN, CRITTON, LUTTIER & COLEMAN
515 N. Flagler Drive, Suite 400
West Palm Beach, FL 33401
561/842-2820 Phone
561/515-3148 Fax
(Co-Counsel for Defendant Jeffrey Epstein)