IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

CA FLORIDA HOLDINGS, LLC, Publisher of *THE PALM BEACH POST*,

Plaintiff,

v.

DAVE ARONBERG, as State Attorney of Palm Beach County, Florida; SHARON R. BOCK, as Clerk and Comptroller of Palm Beach County, Florida,

Defendants.

CASE NO.: 50-2019-CA-014681-XXXX-MB

DIVISION: AG

PLAINTIFF CA FLORIDA HOLDINGS, LLC'S REPLY IN FURTHER SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

I. INTRODUCTION

The Clerk does not dispute any of the 76 statements of fact set forth in *The Palm Beach Post's* Motion for Summary Judgment. Instead, the Clerk belabors the uncontested point of law that it may not, without a court order, release the Jeffrey Epstein grand jury records. That is correct, as *The Palm Beach Post* acknowledged at the June 2020 hearing on the motions to dismiss its complaint. And that is why it is before this Court – to obtain such an order. The Clerk further claims that it is "not aware of any authority or standing granted to its office to advocate for or against the release of any grand jury materials," but then proceeds for 23 pages of its Opposition to argue that this Court should deny *The Palm Beach Post's* request to release the grand jury records. This position represents a complete about-face from its position at the June 2020 motion to dismiss hearing, during which it unequivocally stated that it was "not trying to block access to the records." Appendix at 13 (June 3 Hearing Transcript at 18:23–19:5).

More remarkably, the Clerk wrongly asserts that "[t]he specific subject matter of the underlying grand jury proceedings is ***irrelevant*** to th[e] preliminary question concerning the legality of *The Palm Beach Post's* suit against the Clerk." Opp. at 2 (emphasis added). The underlying subject matter of the grand jury records sought is *precisely* what allows for their exceptional release and what *justifies* this Court's exercising its discretion to order public access. The underlying subject matter is the *fundamental basis* for the relief sought by *The Palm Beach Post*. The undisputed facts support the Court's exercise of its discretion to order the Clerk of this Court to release the Jeffrey Epstein grand jury records.

II. UNDISPUTED FACTS & PROCEDURAL HISTORY

The Palm Beach Post's Motion identified 76 material facts, relying on evidence such as police reports, sworn deposition testimony, court transcripts, and a voluminous United States Department of Justice inquiry into the mishandling of the Epstein prosecution – a report which was compiled after "review[ing] materials relating to the state investigation and prosecution of Epstein, including sealed pleadings, grand jury transcripts, and grand jury audio recordings . . . " Appendix at 3 (OPR Report, p. 283).

The Clerk fails to address a single one of these 76 facts. Instead, it characterizes the comprehensive factual assertions as "somewhat slanted and argumentative." Opp. at 4. The Clerk does not specify which of the factual assertions were "somewhat slanted and argumentative," in what way they were "somewhat slanted and argumentative," or to challenge the evidence on which any of the facts were based. The Clerk, though, attempts to dispute the material facts – again without identifying any fact in particular – by stating in a footnote that *The Palm Beach Post's* assertion that the material facts are uncontested is "clearly not accurate." Opp. at 3 n.4. The Clerk's vague argument is deficient.

Because the Clerk's commentary should be disregarded, its intentional avoidance of the evidence means that *The Palm Beach Post's* facts are undisputed. Under Florida Rule of Civil Procedure 1.510(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." In Florida, the moving party no longer needs to conclusively disprove the nonmovant's theory of the case in order to eliminate any issue of fact. *See* In re Amendments to Fla. R. of Civ. P. 1.510, 309 So. 3d 192, 193 (Fla. 2020). Rather, "the burden on the moving party may be discharged by 'showing'—that is, pointing out to the [] court—that there is an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Then, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) ("[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact."). Under this standard, *The Palm Beach Post* fulfills the first summary judgment prong. Below, it will show that the law supports release of the Epstein grand jury materials.

III. ARGUMENT

A. RULE 2.420 IS INAPPLICABLE

Contrary to the Clerk's argument, Rule 2.420 of the Florida Rules of Judicial Administration is inapplicable. Rule 2.420 establishes procedures for maintaining the confidentiality of certain records and granting public access to non-confidential records. It lists 23 presumptively confidential categories, which include grand jury materials. Rule 2.420(d)(1)(B)(xvi). For records not automatically confidential, Rules 2.420 (e), (f), (g) and (h)

include procedures to determine confidentiality. *Poole v. South Dade Nursing & Rehab. Ctr.*, 139 So. 3d 436, 440 (Fla. 3d DCA 2014). As grand jury materials are automatically confidential, they do not fall within the procedures of subsections (e), (f), (g), and (h). Further, the Epstein materials are not "trial court records in non-criminal cases" subject to subsection (e). Nor are they "trial court records in criminal cases" subject to subsection (f), which is limited to motions made by the "state, a criminal defendant or an affected non-party." None of these requirements are present.

The Clerk's citations to subsections (j), (l), and (m), and its argument that Rule 2.420 is the exclusive method to seek grand jury materials, are also inaccurate. Although the Clerk uses the term "must" for subsection (j), that subsection expressly states that a "court order allowing access to confidential court records *may* be obtained by filing a written motion." (Emphasis added). That rule assumes an on-going criminal or civil action involving "court records." Rule 2.420(b)(1)(A). As the Clerk alleges that grand jury materials are "administrative records," Rule 2.420(b)(1)(B), they are not included in subsection (j). Thus, the Clerk's argument refutes itself.

The Clerk further mischaracterizes subsection (l) by claiming that "an action for mandamus" is the only process for seeking administrative records. However, subsection (l) states that while an action for mandamus may be brought, so may "other appropriate relief." And, subsection (l) only pertains to instances where a party is seeking "expedited review," which is not sought here.

Similarly, subsection (m) does not create a condition precedent for seeking grand jury materials. Subsection (m) merely provides that where a request is made for documents, it must be in a reasonable manner and in writing to the custodian. Nowhere does subsection (m) make these actions a condition precedent to suit. In any event, this lawsuit fulfills the writing requirement and it is undisputed that the Clerk has not provided any Epstein grand jury materials and is opposing

their production.

Finally, the Clerk's reliance upon *Times Publishing Co. v. Ake*, 660 So. 2d. 255 (Fla. 1995), is misplaced. *Ake* did not address grand jury materials nor Fla. Stat. Section 905.27. It merely holds that the Florida Public Record Act is not applicable to requests for judicial databases while Rule 2.420 is applicable.

B. A DECLARATORY JUDGMENT ACTION IS PROPER

The Clerk complains that this declaratory judgment action is improper. The Clerk is wrong. It is well-settled that where constitutional or statutory rights are in dispute, a declaratory judgment action is appropriate. *Rosenhouse v. 1950 Spring Term Grand Jury,* 56 So. 2d 445, 448 (Fla. 1952); *Hildebrandt v. Dep't. of Nat. Resources,* 313 So. 2d 73, 74 (Fla. 3d DCA 1975). Ironically, the Clerk ignores its previously relied-upon *Ake* case, where a clerk brought a declaratory judgment action to determine the applicability of Rule 2.420 and the Florida Public Record Act. The Clerk's opposition to *The Palm Beach Post's* access to Epstein grand jury materials also proves the relevance of this declaratory judgment action.[1]

C. THE CLERK IMPLICITLY CONCEDES THAT *THE PALM BEACH POST* HAS STANDING TO SEEK PUBLIC ACCESS TO THE EPSTEIN GRAND JURY RECORDS

In its Motion, *The Palm Beach Post* argued that it has standing under Section 905.27. *See* Motion at ¶¶ 83-85. This is a related – but separate – issue from whether Section 905.27 provides a private right of action. The Clerk addresses the latter argument, but aside from acknowledging that "*The Post's* Motion repeats the same arguments about its alleged standing . . . that it alleged in the Amended Complaint and which it argued in its Opposition to the Clerk's Motion to Dismiss

[1] In a case discussing a clerk's role as custodian of grand jury materials, a federal court observed that a clerk is a proper party to receive a subpoena for state grand jury materials. *Whittier v. City of Sunrise,* No. 07-60476, 2007 U.S. Dist. LEXIS 114239, at *12 n.4 (S.D. Fla. Aug. 22, 2007).

Count II" (Opp. at 14 n.10), does not address *The Palm Beach Post's* standing arguments or the authorities supporting standing. Similarly, in granting the State Attorney and Clerk's motions to dismiss Count II of the Amended Complaint, former Chief Judge Marx relied on arguments that there is no private right of action under Section 905.27, but did not address the threshold standing argument.[2] In ignoring the First Amendment bases supporting *The Palm Beach Post's* standing, the Clerk implicitly concedes that *The Palm Beach Post* has standing to pursue the relief it seeks – whether that be under the private right of action implicit in Section 905.27 (as elaborated further below), under the Constitution, or by invoking the Court's inherent authority and discretion.

D. FLA. STAT. SECTION 905.27 CREATES A PRIVATE CAUSE OF ACTION

At all times in this proceeding, *The Palm Beach Post* has acknowledged that Section 905.27 does not explicitly create a private right of action – no excessive boldfacing, italicizing, or underscoring is necessary on that undisputed point. *See* Opp. at 17. But that does not end the inquiry, as former Chief Judge Marx herself acknowledged in her June 2020 Order. *See* June 3, 2020 Order at 3-4.

Where there is no express right of action in a statute, legislative intent has become the primary factor[3] that most courts rely on to determine whether a cause of action exists. *See Murthy v. N. Sinha Corp.*, 644 So. 2d 983, 985 (Fla. 1994). Given the dearth of legislative history

[2] Notably in this regard, during the hearing on the motions to dismiss, former Chief Judge Marx stated, "I don't think anybody is saying that there isn't a cause of action [under Section 905.27] or that the press doesn't have standing." Appendix at 13 (June 3, 2020 Hearing Transcript before the Honorable Krista Marx ("June 3 Hearing Transcript")), at 8:2–4; *see also* 8:7–8 ("nowhere have I said there isn't a cause of action."); 15–16 ("So I'm not telling you, you don't have a cause of action.")).

[3] While legislative intent has become the "primary factor" in determining whether a cause of action exists when a statute does not expressly provide for one, this does not mean that other factors, such as potential public benefit, are excluded from consideration. *See, e.g.*, *Fischer v. Metcalf*, 543 So.2d 785 (Fla. 3d DCA 1989). Just as the Clerk fails to address the legislative history argument, he also fails to address any other factors, including public benefit. As set forth in the Motion, balancing the public benefit that would result from disclosure outweighs the customary reasons for grand jury secrecy. *See* Motion at ¶¶ 103-110.

surrounding the enactment of Section 905.27, it is appropriate to consider acts passed at other legislative sessions.[4] *Fischer*, 543 So.2d at 790. In 1994, at the same time Section 905.27 was reenacted to expressly provide three exceptions to grand jury secrecy, including furthering justice, the Florida legislature also reenacted Fla. Stat. § 905.395, which concerns the secrecy of statewide grand juries. 1994 Fla. ALS 285, 1994 Fla. Laws ch. 285, 1994 Fla. SB 114; Fla. Stat. § 905.395. Like Section 905.27, Section 905.395 has a general prohibition on disclosure of grand jury proceedings, absent a court order. Fla. Stat. § 905.395. Tellingly, however, Section 905.395 does not provide any specific exceptions to nondisclosure. Through the intentional omission of these exceptions, including the fundamental "furthering justice" exception, it can be understood that the legislature did not intend for court-ordered disclosure of statewide grand jury records to further justice, and did not anticipate such disclosures would benefit the public. By contrast, the legislature's decision to include the catchall "furthering justice" exception in Section 905.27 reflects an intent to protect and inform the public — the ultimate benefactors of the criminal justice system — by providing a means of access in those rare situations where the integrity and legitimacy of the grand jury process have been called into serious question. Accordingly, implying a private right of action is consistent with the purposes underlying the legislative scheme in Chapter 900 of the Florida Statutes.[5]

[4] Neither the Clerk nor Judge Marx addressed or challenged this analysis.

[5] There are a number of cases where litigants have sought grand jury materials under Section 905.27 and its predecessors with varying degrees of success. In none of these cases did the court question or hold that the statute did not create a private right of action. *See State ex rel. Brown v. Dewell,* 167 So. 687, 689-90 (Fla. 1936) (using the phrase "in furtherance of justice" to require a grand jury witness to provide his testimony to a criminal defendant); *Gosciminski v. State,* 132 So. 3d 678, 707 (Fla. 2014); *Bing v. State,* 46 Fla. L. Weekly D1580 (Fla. 1st DCA July 6, 2021); *James v. Willie,* 480 So. 2d 253 (Fla. 4th DCA 1985) (involving a deceased inmate's estate bringing suit against prison officials). Judge Marx failed to address these and other cases.

E. SECTION 905.27, THE FIRST AMENDMENT, AND THIS COURT'S INHERENT POWER CONSTITUTE THREE INDEPENDENT GROUNDS FOR RELEASING THE GRAND JURY RECORDS

As set forth in *The Palm Beach Post's* Motion, even in the absence of Section 905.27's statutory framework, disclosure is appropriate pursuant to this Court's inherent authority over grand jury proceedings because of the exceptional public interest in this case and the compelling circumstances supporting transparency rather than continued secrecy.

Unlike the cases the Clerk cites for the proposition that "more than surmise or speculation" about what the grand jury records may contain is needed to lift the veil of secrecy (Opp. at 21), the overwhelming and undisputed evidence before this Court far exceeds "surmise or speculation" about what the grand jury records may contain. By way of just one example, during his investigation of the Epstein sex crimes, the Deputy Chief of the Criminal Division of the U.S. Attorney's Office told Criminal Chief Matthew Menchel: "The state intentionally torpedoed [the case] in the grand jury so it was brought to us." Appendix at 3 (OPR Report, p. 26). The Clerk cannot credibly maintain that *The Palm Beach Post* has not laid a "proper predicate" (Opp. at 22), or that the relief it seeks is based on "surmise or speculation." *The Palm Beach Post* does not deny that it bears the burden of justifying this exceptional release of grand jury records, but maintains that the extraordinary and serial criminal acts at issue, and the evidence already publicly revealed regarding official misconduct in prosecuting Epstein, has "satisfactor[ily] establish[ed] [its] right to its use." *State v. Tillett*, 111 So. 2d 716, 724 (Fla. 2nd DCA 1959).

The Clerk does not dispute that this Court has the inherent power to release the records, only that it should not do so because such release would conflict with other laws. It does not. First, as set forth above, the release of grand jury records would be consistent with the press and public's right of access under the First Amendment. Second, the release would be pursuant to an express

statutory provision that serves as an exception to the secrecy of grand jury records. Third, because *The Palm Beach Post* is not seeking these materials "for use in a criminal [or civil] case," the limitations on its use of those materials (i.e., "only . . . in the defense or prosecution of the civil or criminal case and for no other purpose whatsoever") is not so limited. *See* Fla. Stat. § 905.27(2).

In sum, *The Palm Beach Post* has constitutional standing to request the release of the Epstein grand jury records, and such request should be granted in the furtherance of justice.

IV. CONCLUSION

The Palm Beach Post respectfully requests that this Court, pursuant to Fla. Stat. Section 905.27(1) and the Court's inherent authority, order the Clerk of the Court to lodge with this Court copies of the testimony, minutes, and other evidence presented in 2006 to the Palm Beach County grand jury during the first Epstein sex abuse investigation so that, following an *in camera* inspection, it can be made available to *The Palm Beach Post* and the public.

Respectfully submitted,

GREENBERG TRAURIG, P.A.
Attorneys for CA Florida Holdings, LLC, Publisher of The Palm Beach Post

Stephen A. Mendelsohn, Esq.
401 East Las Olas Blvd., Ste. 2000
Fort Lauderdale, Florida 33301
Telephone: (954) 768–8225
Facsimile: (561) 338–7099

By: */s/ Stephen A. Mendelsohn*
STEPHEN A. MENDELSOHN
Florida Bar No. 849324
mendelsohns@gtlaw.com
smithl@gtlaw.com
FLService@gtlaw.com

By: */s/ Michael J Grygiel*
MICHAEL J. GRYGIEL

(Admitted *Pro Hac Vice*)
54 State St., 6th Floor
Albany, New York 12207
Telephone: (518) 689–1400
Facsimile: (518) 689–1499
grygielm@gtlaw.com

By: /s/ *Nina D. Boyajian*
NINA D. BOYAJIAN
(Admitted *Pro Hac Vice*)
1840 Century Park East, Ste. 1900
Los Angeles, California 90067
Telephone: (310) 586–7700
Facsimile: (310) 586–7800
boyajiann@gtlaw.com
riveraal@gtlaw.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of October, 2021, a true and correct copy of the foregoing has been filed with the Clerk of the Court using the State of Florida e-filing system, which will send a notice of electronic service for all parties of record herein

/s/ Stephen A. Mendelsohn
STEPHEN A. MENDELSOHN

ACTIVE 60572600v7