

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80119-MARRA/JOHNSON

JANE DOE NO. 2,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

_____ /

**PLAINTIFF'S MEMORANDUM OF LAW IN
RESPONSE TO DEFENDANT'S MOTION FOR STAY**

Plaintiff, Jane Doe No. 2, by and through her undersigned counsel, submits this Memorandum of Law in Response to Motion for Stay, as follows:

INTRODUCTION

Defendant Jeffrey Epstein's Motion to Stay this action is based on the incorrect premise that there are criminal actions pending against him in Palm Beach Circuit Court, *State of Florida v. Jeffrey Epstein*, Case No. 2006 CF 09454 AXXMB (Fifteenth Judicial Circuit, Palm Beach County), and in the Southern District of Florida, *In re Grand Jury*, No. FGJ 07-103 (WPB) (S.D. Fla.). The Motion to Stay as to the state court criminal action was rendered moot on June 30, 2008 when Jeffrey Epstein entered a plea of guilty to violations of Florida Statute §796.07 (felony solicitation of prostitution) and §796.03 (procurement of minors to engage in prostitution) in the state criminal action. (See Defendant's Notice Concerning Motion to Stay dated July 1, 2008). Jeffrey Epstein, now an admitted sex offender, was sentenced to a term of imprisonment followed by community control and sex offender registration.

As to the federal prosecution, Defendant's mistitled "Notice of Continued Pendency of

Federal Criminal Action,” which has now been unsealed, makes clear that there is in fact **no** criminal federal action pending. This Notice discloses a confidential Agreement between the U.S. Attorney and Defendant, the terms of which were triggered when Epstein began serving his state imposed criminal sentence. Under the Agreement, according to the Notice, the U.S. Attorney “agreed to suspend its grand jury investigation”, while “retain[ing] the right to reactivate the grand jury and indict Mr. Epstein should he breach any part of the Agreement during its term, which runs for 33 months, beginning on the date Mr. Epstein began serving his sentence in the Florida Criminal Action.” (The terms of this Agreement are also described in the notice letter to the victim Plaintiff, a redacted copy which is attached hereto as Exhibit “A”.) Accordingly, as represented in Defendant’s own filing, Mr. Epstein is not under indictment and the grand jury is not active in his case. There is simply no pending criminal action, a necessary prerequisite for a stay under 28 U.S.C. §3509(k).

Additionally, the stay provision of 18 U.S.C. 3509(k) is limited to circumstances in which the plaintiff is a “a person who is under the age of 18...” The Statute is therefore inapplicable in that Plaintiff is not a minor, and was not a minor when she filed this lawsuit. The Motion is also procedurally defective because (i) Defendant failed to comply with the Local Rules of the United States District Court for the Southern District of Florida in that Defendant’s counsel neither conferred nor attempted to confer with counsel for the Plaintiff as to the relief request prior to filing the Motion to Stay; and (ii) in light of changed circumstances after the filing of the Motion to Stay, the Motion fails to inform the Plaintiff or the Court of the grounds for the relief sought.

For the foregoing reasons, Defendant’s Motion to Stay must be denied in its entirety.

**THE DEFENDANT HAS NOT DEMONSTRATED THAT
28 U.S.C. §3509(k) IS APPLICABLE AND A STAY MANDATED**

As the movant, it is the Defendant's burden to demonstrate that the requirements for a stay have been met. He has not met this burden. 18 U.S.C. §3509(k) states as follows:

Stay of civil action. -- If, at any time that a cause of action for recovery of compensation for damage or injury to the person of a child exists, **a criminal action is pending which arises out of the same occurrence and in which the child is the victim**, the civil action shall be stayed until the end of all phases of the criminal action and any mention of the civil action during the criminal proceeding is prohibited. As used in this subsection, a criminal action is pending until its final adjudication in the trial court.

(emphasis added).

A threshold inquiry in determining whether to invoke the stay provision of 18 U.S.C. §3509(k) is whether the plaintiff in a civil action is also the victim of a "criminal action . . . *pending* which arises out of the same occurrence and in which the child is the victim..." (Emphasis supplied). Given Jeffrey Epstein's plea of guilty to the criminal charges in the state case and the Agreement entered into with the U.S. Attorney, his argument that a stay of this lawsuit should be granted because of pending criminal charges appears at this point to be specious. Nonetheless, Defendant Epstein represents to this Court in his "Notice Concerning Motion to Stay" dated July 1, 2008 that "the federal criminal proceeding . . . remains pending." No further explanation is provided. The argument supporting this assertion is unknown to Plaintiff.¹ There is no indication in the statutory language or elsewhere that 18 U.S.C. §3509(k) can be applicable in a situation, such as here, where there is an agreement concerning federal crimes but there has been no indictment.

The notice letter attached hereto as Exhibit "A" further sets forth one of the conditions imposed by Mr. Epstein's Agreement with the U.S. Attorney, as follows: "Any person [including

¹The developments relating to the Defendant's plea deal arose after the Defendant filed his Motion to Stay. As a result, the Motion does not explain why a stay is justified under the present circumstances. Plaintiff is at a disadvantage in filing this Memorandum in Response, and is left to guess as the present grounds for the Motion. For this reason alone, the Motion should be denied.

this plaintiff], who while a minor, was a victim of a violation of an offense enumerated in Title 18, United States Code, Section 2255, will have the same rights to proceed under Section 2255 as she would have had, if Mr. Epstein had been tried federally and convicted of an enumerated offense.” Thus, not only is a necessary prerequisite for a statutory stay missing in that no criminal case is pending, but a stay under 28 U.S.C. §3509(k) would be inconsistent with Mr. Epstein’s Agreement with the U.S. Attorney, which contemplates civil claims by victims pursuant to federal law. Defendant Epstein apparently contends that a stay should nonetheless apply for the next 33 months, preventing for this extended period the civil litigation of these claims, to see if Mr. Epstein complies with his Agreement. Needless to say, this would be absurd. It cannot be seriously argued in the circumstances of this case that a stay under 28 U.S.C. §3509(k) is mandated because there is a “pending” federal criminal action.

**18 U.S.C. §3509(k) DOES NOT AUTHORIZE A STAY
OF A CIVIL LAWSUIT FILED BY AN ADULT PLAINTIFF**

Even if there were a criminal case pending, which there is not, 18 U.S.C. §3509(k) would not apply to the claim of a child victim who is now an adult. This Statute applies in situations in which a child who has been the victim of sexual abuse is the plaintiff in a civil lawsuit at the same time that the child is a victim in a criminal proceeding arising out of the same occurrence. That is not the case here. The Plaintiff is an adult and was an adult at the time she filed this civil lawsuit. Defendant misinterprets 18 U.S.C. §3509(k) to suggest that the Statute also applies in instances where an adult plaintiff in the civil lawsuit was a victim of sexual abuse during childhood. A careful reading of the definitions section of 18 U.S.C. §3509 reveals that Defendant’s interpretation is incorrect. See 18 U.S.C. §3509(a)(2) (defining “child” as person who *is* under the age of 18).

18 U.S.C. §3509(k) states, in relevant part, as follows:

(k) Stay of civil action. -- **If, at any time that a cause of action for recovery of**

compensation for damage or injury to the person of a child exists, a criminal action is pending which arises out of the same occurrence and in which the child is the victim, **the civil action shall be stayed** until the end of all phases of the criminal action....

(emphasis added).

18 U.S.C. §3509(2) defines as a “child” as “a person who *is* under the age of 18.” Thus, the term “child” is limited for purposes of 18 U.S.C. §3509 to a person who is *currently* under the age of 18. While the statute could have been written to say “a person who *is* under the age of 18 or was under the age of 18 at the time of the abuse”, it does not. Yet, this is the precise interpretation suggested by the Defendant.

The plaintiff’s interpretation of 18 U.S.C. §3509(k) is not only consistent with the plain language of the statute, but also with the policies underlying the stay provision. The statute is designed to protect children who are involved in legal proceedings arising from physical, sexual, or mental abuse. For instance, 18 U.S.C. §3509 provides protections for persons under the age of 18, including alternatives to live in-court testimony, competency examinations, psychological examinations, privacy issues, filing under seal, closing the courtroom, the handling of videotaped testimony, adult attendants, speedy trials, the use of guardians ad litem and testimonial aids. Each of these protections is only implicated when the victim “*is* under the age of 18.” See 18 U.S.C. §3509(a)(2). In the context of a civil lawsuit, a child similarly needs protection from the possibility of concurrent proceedings involving deposition or trial testimony, psychological examinations, and competency examinations. Moreover, the use of a stay of a civil lawsuit involving a child-plaintiff may be particularly warranted in circumstances where the child may not have had made the decision to file the lawsuit in the first instance. Thus, the law protects the children from multiple concurrent proceedings. These concerns do not exist to the same degree when a competent adult such as the Plaintiff elects to file suit on her own behalf. Yet, the Defendant seeks to carve out an exception

where none exists by arguing that the “Stay of Civil Action” provision in subsection (k) must be applied to victims who are 18 or older who were under the age of 18 at the time of their abuse. This argument is unsupported by the statute or its underlying policies.

The unpublished, trial court decisions cited by Defendant of Doe v. Francis, 2005 WL 517487 (N.D. Fla. Apr. 20, 2005) (*Francis I*) and Doe v. Francis, 2005 WL 950623 (N.D. Fla. Apr. 20, 2005) (*Francis II*) are readily distinguishable. The Plaintiffs in *Francis I* and *Francis II* “offered no legal authority or evidence to support their argument that the stay should be lifted.” *Francis II*, at *1. By contrast, in this case, the Plaintiff has cited the definition of “child” found in 18 U.S.C. §3509(a)(2). The *Francis* cases also involved seven plaintiffs, three of whom were victims in the criminal case. That is not the case here where the only plaintiff in this lawsuit is not a victim in a pending criminal case. Additionally, the stay in the *Francis* cases was imposed before the plaintiffs reached the age of majority. Here, the civil lawsuit was not even filed until after the plaintiff reached the age of majority.

**DEFENDANT’S MOTION SHOULD BE DENIED IN THAT
DEFENDANT DID NOT CONFER WITH PLAINTIFF’S
COUNSEL PRIOR TO FILING HIS MOTION, AND THE MOTION
FAILS TO INFORM PLAINTIFF OR THE COURT OF THE
GROUND FOR RELIEF IN LIGHT OF CHANGED CIRCUMSTANCES**

Defendant’s Motion should be denied in that Defendant failed to comply with the Local Rules of the United States District Court for the Southern District of Florida in that Defendant’s counsel neither conferred nor attempted to confer with counsel for the Plaintiff as to the relief request prior to filing the Motion to Stay. See S.D. Fla. L. R. 7.1.A.3. Notably, Defendant’s Motion also contains no certification as to any such attempt as required by the Local Rules. See id. The Local Rules provide that the “[f]ailure to comply with the requirements of this rule may be cause for the court to grant or deny the motion and impose on counsel an appropriate sanction, which may

include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee." Id.

Finally, when the circumstances materially changed after the filing of the Motion, it was incumbent upon the Defendant to either withdraw the Motion or at least amend it to explain the grounds for a stay in light of the plea deal. Defendant has not done so, to the prejudice of Plaintiff in preparing this Memorandum in response. For this reason alone the Motion to Stay should be denied.

CONCLUSION

Based on the foregoing, Plaintiff requests that this Court deny Defendant's Motion to Stay pursuant to Title 18, United States Code, Section 3509(k) in its entirety, award attorney's fees to Plaintiff for Defendant's failure to comply with Southern District of Florida Local Rule 7.1.A.3, and all other relief this Court deems just and appropriate.

Dated: July 18, 2008.

Respectfully submitted,

By: s/ Jeffrey M. Herman.
Jeffrey M. Herman (FL Bar No. 521647)
jherman@hermanlaw.com
Stuart S. Mermelstein (FL Bar No. 947245)
ssm@hermanlaw.com
Adam D. Horowitz (FL Bar No. 376980)
ahorowitz@hermanlaw.com
HERMAN & MERMELSTEIN, P.A.
Attorneys for Plaintiffs Jane Doe
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Tel: 305-931-2200
Fax: 305-931-0877

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2008, I electronically filed the foregoing document with the

Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Jeffrey M. Herman .

SERVICE LIST
DOE vs. JEFFREY EPSTEIN
CASE NO.: 08-CV-80119-MARRA/JOHNSON
United States District Court, Southern District of Florida

Jack Alan Goldberger
jagesq@bellsouth.net

Michael R. Tein
tein@lewistein.com

/s/ Jeffrey M. Herman