

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.

**MEMORANDUM OF LAW OF PLAINTIFF CA HOLDINGS, LLC IN OPPOSITION
TO THE STATE ATTORNEY'S FLA. STAT. SECTION 57.105 MOTION**

Plaintiff, CA Florida Holdings, LLC, publisher of the largest and most prominent newspaper in Palm Beach County, Florida, *The Palm Beach Post*, submits this Memorandum of Law In Opposition to the State Attorney's Fla. Stat. § 57.105 Motion, and for the reasons set forth below, the State Attorney's Motion should be denied, with prejudice.

I. THE PURPOSE OF *THE PALM BEACH POST'S* SUIT

As extensively detailed in its Amended Complaint, the criminal prosecution of the late Jeffrey Epstein by former State Attorney Barry Krischer, Palm Beach Circuit Court Case No. 50-2008-CF-AXXXMB, raises serious and troubling questions as to whether it was properly conducted. The Amended Complaint provides numerous examples of the prior State Attorney's "highly unusual" – in the words of the former Town of Palm Beach Police Chief – treatment of the numerous complaints of sexual misconduct and assault made against Epstein, including but not limited to the former State Attorney's refusal to cooperate with the investigation of the Town of Palm Beach Police Department, his focus on only one underage sexual assault victim though there were other known victims, his use

Party JOINT

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DATE ADMITTED: 9/6/2022

Case No. 2019-CA-014681

KJOSEPH ABRUZZO CLERK

Joint Exhibit
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of information provided by Epstein's defense team to undermine the State's witness and his approval of a plea agreement and sentence that enabled Epstein to spend his days on furlough where he likely committed additional sexual crimes. While much of the Epstein saga is a matter of public record, the public still does not know how former State Attorney Krischer used the grand jury process – and the secrecy that comes with it – to shield Epstein and his equally powerful and corrupt accomplices from the public and justify Epstein's lenient treatment. Access to the Epstein grand jury materials will reveal how the instrumentality of the grand jury was used in this case, which is unquestionably a matter of vital public concern.

II. THE STATE ATTORNEY'S 57.105 MOTION IMPROPERLY SEEKS TO DETER *THE PALM BEACH POST* FROM SERVING THE PUBLIC INTEREST

In moving pursuant to Fla. Stat. § 57.105 against *The Palm Beach Post* and its counsel, the current State Attorney improperly seeks to deter further media inquiry into the Epstein grand jury proceeding. Whether the current State Attorney is motivated by animus against *The Palm Beach Post* or is trying to protect grand jury secrecy is not important. What is important, and troubling, is that the State Attorney does not want to litigate the novel and important public issues on their merits, but instead is using the threat of sanctions to suppress *The Palm Beach Post*'s investigative reporting.

The State Attorney has answered the Amended Complaint, and disclaimed possession of the Epstein grand jury materials, he has not moved for summary judgment on the remaining claim; Count I – Declaratory Judgment. Further, the State Attorney has now shown – and presumably cannot show – that he lacks the authority under Chapter 905, Fla. Stats., to request and obtain access to the Epstein grand jury materials from the Clerk of the Court (the “Clerk”).

In response to *The Palm Beach Post*'s Request to Produce, the Clerk's office recently provided internal email communications, but none were relevant to the Request. According to its officials, the Clerk's office does not maintain logs or registers and that it is impossible to determine whether the State Attorney's office sought or obtained access to the Epstein grand jury materials during or after its Epstein prosecution. Given this uncertainty, *The Palm Beach Post* will serve discovery demands upon the State Attorney's office to determine whether it accessed or exercised control over the grand jury materials.

Also, the Clerk, who admittedly has both possession and control of the Epstein grand jury materials, has not followed the State Attorney's lead in seeking to sanction *The Palm Beach Post*: the Clerk has neither provided the 21-day safe harbor notice contained in Section 57.105 nor has she moved for sanctions. The Clerk's decision supports the inference that the State Attorney is using the threat of sanctions to avoid litigating the case on its merits.

III. THE STATE ATTORNEY MISREPRESENTS THE COURT'S JUNE 8, 2020 ORDER

In its bare-bones Section 57.105 motion, the State Attorney's main argument is that this Court's June 8, 2020 Order Granting Defendant's Motions to Dismiss Count II of Plaintiff's First Amended Complaint with Prejudice (the "Order") held that all *The Palm Beach Post*'s claims are without any merit. The Order does no such thing.

Though the parties' motion papers and the oral argument on June 2, 2020 covered a range of complex statutory issues, the Order addresses only one—whether Fla. Stat. § 905.27 creates a private right of action. This issue was not the principal focus of either the State Attorney's or the Clerk's motions to dismiss Count II. Instead, they primarily asserted that *The Palm Beach Post* lacked standing under section 905.27 to seek grand jury materials "in furtherance of justice." The State

Attorney and the Clerk argued that the statute prohibited the use of grand jury materials except for limited purposes in a civil or criminal proceeding in which the movant is a party. Because, according to the State Attorney and the Clerk, *The Palm Beach Post* did not intend to use the Epstein grand jury materials in a civil case in which it was a party, nor in a criminal case, the State Attorney and the Clerk asserted it lacked standing.

The Palm Beach Post, as set forth in its Opposition to Defendant Dave Aronberg, As State Attorney of Palm Beach County, Florida's Motion to Dismiss Count II of the First Amended Complaint ("Plaintiff's Opposition"), views § 905.27 as encompassing three possible scenarios—(1) use by a party in her civil case; (2) use by a party in her criminal proceeding; or (3) use by the media as a representative of the public "in furtherance of justice" as recognized by the First Amendment to the U.S. Constitution and the Florida Constitution.

This Court, in its Order, did not address these arguments, though it did acknowledge during oral argument that *The Palm Beach Post* had standing—page 8 of the transcript. Rather, the Order focused solely on whether § 905.27 creates an implied private right of action and held that it did not. *See* Order at 3. That ruling did not interpret – no less apply – the statute's "in furtherance of justice" exception to grand jury secrecy to the Epstein case. Given this Court's narrow ruling, the State Attorney wrongly claims that the Court determined that the "justice" provision of § 905.27 has been adjudicated against *The Palm Beach Post*, and that Count I is frivolous.

IV. THE ISSUES RAISED IN COUNT II ARE NOVEL AND COMPLEX

As set forth above, this Court limited its inquiry to "whether a cause of action under section 905.27 should be judicially implied. [citation omitted]." *See* Order at 3. In determining that the Florida legislature did not intend to create a statutory cause of action and remedy, this Court addressed a novel and complex issue. As such, section 57.105, on its face, is not implicated.

Section 57.105(1)(a)-(b) provides that a court shall award fees to the prevailing party if:

the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial: (a) was not supported by the material facts necessary to establish the claim or defense; or (b) would not be supported by the application of then-existing law to those material facts.

Section 57.105(3)(a) further provides that monetary sanctions shall *not* be awarded

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if the court determines that the claim or defense was initially presented to the court as a good faith argument for the extension, modification, or reversal of existing law *or the establishment of new law*, as it applied to the material facts, with a reasonable expectation of success. [Emphasis added.]

The Florida Supreme Court has held that attorneys' fees should not be awarded unless there is "a total or absolute lack of a justiciable issue, which is tantamount to a finding that the action is frivolous ... and so clearly devoid of merit both on the facts and law as to be completely untenable."

Muckenfuss v. Deltona Corp., 508 So. 2d 340, 341 (Fla. 1987) (quoting *Whitten v. Progressive Cas. Ins. Co.*, 410 So. 2d 501, 505 (Fla. 1982)). Where an issue is novel and complex, sanctions under section 57.105(a) may not be imposed. *Grove Key Marina, LLC v. Casamayor*, 166 So. 3d 879 (Fla. 3d DCA 2015).

It cannot be contested that the Order rejecting a section 905.27 implied private right of action for the media is a case of first impression; indeed, neither this Court nor the State Attorney and the Clerk cite to any case that previously resolved this issue.

In contrast, *The Palm Beach Post* presented various reasoned arguments why section 905.27 creates a private right of action in favor of the media on both constitutional and statutory grounds. See Plaintiff's Opposition at 10-15. *The Palm Beach Post* first analyzed the Florida Statutes themselves and U.S. Supreme Court case law, both of which confirm that Florida's grand jury secrecy laws are not absolute. See Plaintiff's Opposition at 10-11; *Butterworth v. Smith*, 494 U.S. 624, 626 (1990) (section 905.27 unconstitutional to the extent it prohibits grand jury witnesses from disclosing

their own testimony).

Florida has also held that the media is entitled to know of grand jury reports that find public corruption, notwithstanding section 905.27 secrecy. *See Miami Herald Pub. Co. v. Marko*, 352 So. 2d 518 (Fla. 1977). In *Marko*, the Florida Supreme Court recognized that the media plays a vital role in informing the public of the misdeeds of public servants and statutory grand jury secrecy cannot outweigh the public's right to be informed through its constitutionally protected news reporting.

Here, *The Palm Beach Post* alleges overwhelming facts that raise serious questions as to why Epstein was prosecuted and sentenced in such a highly unusual and lenient manner. At the heart of this issue is the public's right to know, through the media, whether the attorneys then working the case at the State Attorney's Office fulfilled their public duties or acted either corruptly or recklessly by misusing the grand jury process.

In this regard, *The Palm Beach Post* analyzed section 905.27 and presented a well-reasoned argument supporting the existence of a private right of action, it properly focused on the interplay between section 905.27's allowance for disclosure "in furtherance of justice", on the one hand, with the public's right to know through the media under the First Amendment and the Florida Constitution.

This Court did not expressly address *The Palm Beach Post*'s reliance on a combined constitutional and statutory basis for a section 905.27 private right of action. Instead, it focused exclusively upon section 905.27 and in holding that the "in furtherance of justice" exception is constrained by the statute's other secrecy provisions.

The State Attorney's section 57.105 motion also ignores the constitutional role of the media in informing the public. The fallacy of a purely statutory analysis, without consideration of *The Palm Beach Post*'s constitutional rights and obligations in conjunction with section 905.27, is that justice can never be furthered, as the statute authorizes, unless the media is able to provide facts to the public

as to whether its officials may have violated their oaths.

The Palm Beach Post acted in good faith and presented reasoned bases to justify the interplay between the federal and state constitutions and section 905.27. It properly sought to enforce the rights of the media in the Epstein case through the application of complex constitutional and statutory arguments to create new law. Though the Court dismissed one of *The Palm Beach Post*'s two claims, such partial dismissal cannot support the State Attorney's section 57.105 motion.

V. THIS COURT'S LIMITED ORDER DISMISSING COUNT II DID NOT RESOLVE COUNT I

The State Attorney's threadbare section 57.105 motion assumes that this Court's Order extinguishes Count I – Declaratory Judgment, and renders Count I frivolous. The State Attorney is demonstrably wrong.

Count II alleges that *The Palm Beach Post* has constitutional and statutory standing for it to overcome grand jury secrecy provisions "in furtherance of justice." Count I, in contrast, does not allege a section 905.27 private right of action. Instead, Count I seeks a declaration that the U.S. Constitution's First Amendment and the Florida Constitution's analogous provisions, along with section 905.27, provide ample grounds for this Court to direct the release of the Epstein grand jury materials to *The Palm Beach Post*, or require the Court to conduct an *in camera* examination of the same, to balance the public's right to know through a free media with Florida's qualified statutory interest in grand jury secrecy.

These issues have yet to be addressed by a dispositive motion or by either Defendant. The State Attorney's motion to dismiss Count II focused exclusively on section 905.27 and did not acknowledge nor address any constitutional issues. The same is true of the Clerk's motion to dismiss. Concomitantly, as stated above, the Order was limited to the four corners of section 905.27, and expressly did not consider *The Palm Beach Post*'s constitutional arguments.

VI. THE STATE ATTORNEY IS A PROPER PARTY

The State Attorney also argues that it does not possess the Epstein grand jury materials, and based upon this unsworn claim, sanctions are also justified. Again, the State Attorney is incorrect, as there is no factual or legal basis to impose sanctions upon its unsupported allegation.

While the State Attorney alleges his office does not currently have physical possession of the Epstein grand jury materials, he has argued, relying on section 905.27, that the Clerk should not produce them. By taking a position against disclosure, the State Attorney has, in effect, asserted his right to the secrecy of the Epstein grand jury materials. Stated another way, the State Attorney claims the statutory right to *prevent* access to the Epstein grand jury materials; the inverse of such a claimed right is that he has the right to *provide* access to the same materials.

The State Attorney's position actually supports *The Palm Beach Post*. He was not named as solely a custodian of the grand jury records. Rather, he is a defendant in his official capacity as his office has "as its *primary* interest the protection of its grand jury system." [Italics in original.] *In re Grand Jury Proceedings*, 832 F. 2d 554, 559 (11th Cir. 1987). In that case, the federal government petitioned a Florida State Attorney to turn over state grand jury transcripts. In opposition, the Broward State Attorney argued against their release citing to section 905.27. Later, a federal grand jury served a subpoena upon the same State Attorney seeking grand jury transcripts. The State Attorney advised the federal court that he would produce the transcripts, thereby demonstrating that whether or not he has physical possession, he had legal authority to obtain and deliver them pursuant to the subpoena. For these same reasons, the State Attorney, in his official capacity, is a necessary party.

Also, assuming the State Attorney does not have physical possession, Florida law does not prohibit his office from requesting Epstein grand jury materials from the Clerk. Indeed, as the State Attorney is well aware, Chapter 905, Fla. Stats. does not bar any State Attorney from accessing grand jury materials, even after a defendant has been convicted and sentenced.

VII. THE STATE ATTORNEY'S MOTION IS ADMITTEDLY PREMATURE

The State Attorney also admits that his sanctions motion – which is based on the motion to dismiss proceedings and resulting Order – is “premature”. *See* Exh. “A” attached hereto for a copy of Douglas Wyler’s September 18, 2020 email. As set forth above, those proceedings and the Order were focused on *The Palm Beach Post*’s statutory claim, not the declaratory relief claim. The State Attorney acknowledges that his motion is not ripe because it first requires this Court’s resolution of his later-filed summary judgment motion. Unlike his motion to dismiss, his summary judgment motion addresses *The Palm Beach Post*’s remaining declaratory action claim for relief.

The State Attorney’s admission demonstrates that his motion is contrary to the express language of section 57.105. As stated above, section 57.105(1)(a)-(b) examines a claim or defense “when initially presented to the court”. Because the merits of the State Attorney’s sanctions motion admittedly depend upon this Court’s resolution of his yet-unscheduled summary judgment motion, the State Attorney’s sanctions motion is premature. *Reznek v. Chase Home Fin., LLC*, 152 So. 3d 793 (Fla. 3d DCA 2014). As a premature motion, it should be denied.

WHEREFORE, *The Palm Beach Post* respectfully requests that the State Attorney’s Fla. Stat. section 57.105 motion be denied, with prejudice, and that the Court grant such other relief it deems just and proper.

Respectfully submitted,

GREENBERG TRAURIG, P.A.

*Attorneys for CA Florida Holdings, LLC, Publisher
of The Palm Beach Post*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of October, 2020, 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 51489309v9

EXHIBIT “A”

NOT A CERTIFIED COPY

From: Douglas Wyler
To: Mendelsohn, Stephen A. (Shld-FTL-LT)
Subject: Re: PALM BEACH POST (Epstein)
Date: Friday, September 18, 2020 1:11:43 PM

Mr. Mendelsohn:

Again, we will not withdraw the motion. Please let me know when you are available for the case management conference or I will unilaterally schedule the hearing.

Doug Wyler, Esq.
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From: <MendelsohnS@gtlaw.com>
Date: Friday, September 18, 2020 at 1:04 PM
To: "Douglas Wyler, Esq." <doug.wyler@comcast.net>
Cc: <BoyajianN@gtlaw.com>, <grygielm@gtlaw.com>
Subject: RE: PALM BEACH POST (Epstein)

Mr. Wyler, we appreciate your candor in admitting your 57.105 motion is premature.

You must withdraw it as the motion has no basis, which you acknowledge, because the court has yet to address the merits of the dispute.

Please do so without further delay.

Thank you.

From: Douglas Wyler <doug.wyler@comcast.net>

Sent: Friday, September 18, 2020 11:54 AM

To: Mendelsohn, Stephen A. (Shld-FTL-LT) <MendelsohnS@gtlaw.com>

Cc: Boyajian, Nina D. (Shld-LA-LT) <BoyajianN@gtlaw.com>; Grygiel, Michael J. (Shld-ALB-LT) <grygielm@gtlaw.com>

Subject: Re: PALM BEACH POST (Epstein)

EXTERNAL TO GT

Mr. Mendelsohn:

I spoke with my client we will not withdraw our motion for attorneys' fees. Again, we insist that the motion for summary judgment be heard first as it would be premature to have an attorney fee hearing when there is no prevailing party and no substantive hearings held since the motion for fees was filed . Being that we are unable to agree on the order of the motions to be heard, I am filing the attached motion to set case management conference. Please see the attached available hearing times for this motion and let me know what works best for you so we can resolve this matter.

Sincerely,

Doug Wyler, Esq.
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Fernandina Beach, FL 32034
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From: <MendelsohnS@gtlaw.com>

Date: Wednesday, September 16, 2020 at 10:04 AM

To: "Douglas Wyler, Esq." <doug.wyler@comcast.net>

Cc: <BoyajianN@gtlaw.com>, <grygielm@gtlaw.com>

Subject: PALM BEACH POST (Epstein)

Mr. Wyler, please let us know if the State Attorney will withdraw its sanctions motion without prejudice.

Thank you.

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