

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 9:08-80736-Civ-Marra/Johnson

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____ /

**JANE DOE NO. 1 AND JANE DOE NO. 2'S REPLY IN SUPPORT OF THEIR
PROTECTIVE MOTION PURSUANT TO RULE 15 TO AMEND THEIR PETITION**

COME NOW Jane Doe No. 1 and Jane Doe No. 2 (the "current victims"), by and through undersigned counsel, to file this reply in support of their protective motion pursuant to Federal Rule of Civil Procedure 15(a)(2) to amend the petition that they have filed in this case. The amendment would (1) conform their petition to the evidence in the case, and (2) add Jane Doe No. 3 and Jane Doe No. 4 (the "new victims") as petitioners. The Court should grant both requests.

First, with regard to the motion to amend to conform to the evidence in this case, the Government makes no real claim of prejudice. Nor would any such claim be possible, because both the victims and the Government have litigated in light of the evidence that has developed.

Second with regard to the motion to amend to add new victims, the motion is timely because it complies with the CVRA's requirements and with the statute of limitations that the Government claims is applicable.

As noted in their initial pleading (DE 311 at 1-2), this motion is "protective" because it may be unnecessary. The victims' currently-filed pleadings are broad enough to encompass the

evidence that has been developed, and the Court has before it the victims' parallel motion to add new victims under Rule 21 (DE 290). In order to eliminate any doubt, however, the victims also proceed with their motion to amend under Rule 15.¹

I. JANE DOE NO. 1 AND JANE DOE NO. 2 SHOULD BE ALLOWED TO AMEND THEIR PETITION TO CONFORM TO EXISTING EVIDENCE.

The current victims first seek leave to amend their petition to conform to the evidence that has developed over the many years of litigation in this case. DE 311 at 5-8. In response, the Government does not focus on this issue, devoting the vast bulk of its response to the issue of whether an amendment should be allowed to add new victims. To the extent that any response can be gleaned from the Government's pleadings, the Government appears to claim that the victims have unduly delayed in seeking to amend. The Government, however, never addresses the critical fact that this case is still in a discovery phase. Indeed, the Government has yet to provide its initial disclosures to the victims. And despite having been ordered to provide discovery to the victims more than one-and-a-half years ago, the Government has yet to complete its production. No scheduling order has been entered. Against this backdrop, the victims' motion to amend now is timely. The victims have been waiting for the Government to make its productions before filing to amend their pleadings, but have now decided that they can wait no longer. Under these circumstances, there has been no undue delay.

¹ The Government claims that binding 11th Circuit precedent holds that Rule 15 rather than Rule 21 governs motions to add new plaintiffs, citing *McLellan v. Miss. Power & Light Co.*, 526 F.2d 870 (5th Cir. 1976). But the 11th Circuit has specifically noted that *McLellan* involved a motion to add new *defendants*, not new plaintiffs. See *Jaffree v. Wallace*, 837 F.2d 1461, 1466 (11th Cir. 1988) ("We believe that *McLellan* does not control this case. First, *McLellan* involved the amendment of a complaint to add parties defendants rather than plaintiffs."). The issue of whether Rule 15 or Rule 21 governs motions to amend to add new plaintiffs remains open.

The Government also fails to show how it will suffer any prejudice from an amendment. Remarkably, rather than suggest any prejudice to itself, the Government claims that Jeffrey Epstein – the man who sexually molested Jane Doe Nos. 1, 2, 3, and 4 – somehow has been harmed because he lacks “notice” that the victims are challenging the validity of the non-prosecution agreement. DE 312-1 at 7. The Government lacks standing to raise possible prospective claims of a criminal – particularly in a lawsuit against the Government alleging that it colluded with that criminal to violate crime victims’ rights. But in any event, Epstein is well aware of the challenge to the non-prosecution agreement. Indeed, the Court has already allowed Epstein to intervene “with regard to any remedy issue concerning the non-prosecution agreement in this case.” DE 246 at 1.

District courts “should freely allow an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party’s action or defense on the merits.” *Developers Sur. & Indem. Co. v. Bi-Tech Const., Inc.*, 979 F. Supp. 2d 1307, 1320 (S.D. Fla. 2013). In seeking to conform their pleadings to the existing evidence, the victims are simply asking to proceed with a complaint that reflects the way this case is currently being litigated by all parties.

II. JANE DOE NO. 1 AND JANE DOE NO. 2 SHOULD BE ALLOWED TO AMEND THEIR PETITION TO INCLUDE JANE DOE NO. 3 AND JANE DOE NO. 4.

The current victims also seek to amend their petition to include the new victims, Jane Doe No. 3 and Jane Doe No. 4. The Government’s main objection appears to be that this motion is somehow barred by time limits found in either the CVRA itself or 28 U.S.C. § 2401. Neither claim has merit and, in any event, the motion to amend relates back to the initial complaint.

A. The CVRA Does Not Contain a Time Limit Barring Amendment.

The Government first argues that “the CVRA limitations period” bars any amendment. DE 312-1 at 18. Of course, the fundamental problem with this argument is that the CVRA contains no such limitations period! The Government’s brief does not quote any language in the CVRA that would bar this action, instead referring generally to a time limit that, it argues, involves circumstances “very similar” to the victims’ claims. DE 312-1 at 18 (citing time limit for motions to re-open a plea or sentence found in 18 U.S.C. § 3771(d)(5)). As the victims have explained at length elsewhere, this time limit simply is inapplicable. See DE 310 at 2-5.

If any statute of limitations applies in this case, it would be the statute of limitations applicable to Epstein’s crimes against the victims. See DE 310 at 8-9 (citing 18 U.S.C. § 3282, permitting prosecution for federal sex crimes “during the life of the child”). The Government protests that this would mean that a victim could challenge a defendant’s sentence at any point during her life. DE 312-1 at 19. But the Government fails to recognize that a challenge to a sentence would be barred under 18 U.S.C. § 3771(d)(5), which contains a time limit for challenging pleas and sentences. Challenges involving the failure to file charges are different. Congress has seen fit to give the Government a great deal of time in which to file federal sex offense charges—and, as a consequence, Congress has given victims a great deal of time in which to challenge the Government’s compliance with the CVRA during that charging process.

B. Title 28 U.S.C. § 2401 Does Not Contain a Time Limit Barring Amendment by Jane Doe No. 3.

In an effort to find a statute of limitations that prevents the Court from reaching the merits of the victims’ claims, the Government points to 28 U.S.C. § 2041. DE 312-1 at 20-25.

The victims have already explained at length why this statute of limitations is inapplicable. *See* DE 310 at 5-9. But even if it were applicable, Jane Doe No. 3 was “beyond the seas” in Australia and thus is exempted from the time limit. *Id.* at 10-13 (citing 28 U.S.C. 2401(a)).

The Government does not dispute that if the statute is read “literally,” then Jane Doe No. 3 is not barred from filing. DE 312-1 at 20. It is obviously hard to argue that Jane Doe No. 3 was not “beyond the seas” when she was thousands of miles away in Australia. The Government, however, suggests that the Court should ignore the plain meaning of the statute, interpreting it based not on “the letter” of the law, but rather its alleged underlying intention. *Id.* at 25. The Government relies on *Holy Trinity Church v. United States*, 143 U.S. 457, 516-17 (1892), as support for this proposition, citing *Webb v. United States*, 21 Cl.Ct. 137 (1990), which also relies on *Holy Trinity* for support. The Government does not seem to recognize that *Holy Trinity* is a nineteenth-century case that has been implicitly overruled by (at least) several decades of Supreme Court jurisprudence. *See* John F. Manning, *Second-Generation Textualism*, 98 CAL. L. REV. 1287, 1313 (2010) (recent Supreme Court opinions have “succeeded in dispatching *Holy Trinity* from the mainstream of the Court’s jurisprudence”). As Justice Scalia recently wrote in his book on statutory construction, “*Holy Trinity* is a decision that the Supreme Court stopped relying on more than two decades ago.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 12 (2012).

Recent Supreme Court decisions have emphasized that courts “must enforce plain and unambiguous statutory language according to its terms.” *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 251 (2010) (citing *Carcieri v. Salazar*, 129 S.Ct. 1058, 1063-64 (2009); *Jimenez v. Quarterman*, 129 S.Ct. 681, 684-85 (2009)). The Supreme Court has commanded

that “when [a] statute’s language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms.” *Sebelius v. Cloer*, 133 S. Ct. 1886, 1896 (2013) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)). Here the Government makes no claim that tolling a statute of limitation while someone is out of the country is somehow so absurd that the statutory text can simply be ignored. The Court must enforce the text as written.

Rather than rely on recent Supreme Court decisions, the Government cites *Webb v. United States*, 21 Cl.Ct. 137 (1990). *Webb* is non-binding trial court authority and is unpersuasive because it relied almost exclusively on the ancient *Holy Trinity* case for support. But it is important to understand that *Webb* involved a quite distinguishable situation from the present facts, specifically a former service member who sought backpay and had been absent from this country *voluntarily*. *Id.* at 142. The Claims Court refused to apply the beyond-the-seas exception because it would have allowed the service member “to institute suit whenever he voluntarily chose to return to the U.S.” *Id.* In Jane Doe No. 3’s earlier briefing on this issue, she specifically argued that “[t]his case does not present any occasion for the Court to consider how § 2401(a)’s statute of limitations applies when a person is voluntarily absent from the United States.” DE 310 at 13 n.7. She then provided an affidavit that specifically explained that “my absence from the United States was not voluntary – I was hiding from Epstein out of fear of what he would do to me if I returned” DE 310, Ex. 1 at 3. The Government has challenged neither Jane Doe No. 3’s position that this case is distinguishable from *Webb*, nor the factual underpinning for that distinction. Accordingly, *Webb* provides no good reason for the Court to ignore Congress’ command that the statute tolled while Jane Doe No. 3 was “beyond the seas.”

The Government also fails to explain how the “logic” of *Webb* (or the underlying “intention” of Congress) could begin to support the extreme position it is taking. The Government asks this Court to hold that a victim of international sex trafficking, who was hiding out in Australia from the criminals who had sexually abused her, was required to surface and file a public court pleading to meet a ticking clock on a statute of limitations. And even more remarkably, the Government claims that the statute was running even though her claim was that the Government had failed to file criminal charges or otherwise take action against those criminals who were forcing her to hide out. If anything, these facts provide a compelling case for recognizing why, even in 2015, Congress might want a beyond-the-seas exception to otherwise-applicable statutes of limitation. These facts certainly provide no occasion for ignoring the plain text of the statute Congress enacted.

C. The Amendment to Add New Victims “Relates Back” to Earlier Pleadings that Specifically Alerted the Government to the Existence of their Claims.

An additional reason for finding the amendment to be proper here is that the amendment “relates back” to the initial complaint. *See* Rule 15(c) (allowing amendments to “relate[] back” to an earlier pleading). The Government concedes the complaint in this case was timely filed. But the Government takes the position that relation back cannot occur because it somehow lacked “fair notice” that a legal claim existed for the new parties who are seeking to join this case. DE 312-1 at 15. The Government then cites two cases (from 1981 and 1968) in which, on the facts of those cases, the courts concluded that the defendant lacked such notice.

The Government, however, fails to recognize that Rule 15(c) was specifically amended in 1991 to *expand* the circumstances in which relation back is allowed. *See* Fed. R. Civ. P. 15,

Adv. Comm. Note to 1991 Amendment. Under the current version of the rule, the policy in favor of amendment “is to be applied with *extreme liberality*.” *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985 (9th Cir.2011) (emphasis added).

Moreover, the Government fails to address the pleadings that exist in *this* case. The victims explained at length in their opening motion that the initial complaint specifically recounted that the Government had violated the rights of “other victims.” DE 311 at 2-4. For example, the initial complaint alleged that “[o]n information and belief, roughly the same crimes were committed [by Epstein] against several *other young females*. *These victims, too, are in danger of losing their right to confer* under the CVRA.” DE 1 at 7 n.2 (quoted in DE 311 at 2). Thus, from literally the first docket entry in this case, the Government knew that issues were being raised about how “other young females” had lost their CVRA rights. Courts have found “relation back” in similar circumstances. *See, e.g., Nielsen v. Professional Financial Management, Ltd.*, 682 F. Supp. 429, 436 (D. Minn. 1987) (allowing additional investors to be added where “the original complaint noted that ‘Plaintiffs are [but] one of several hundred . . . investors nations nationwide and one of several investors in this district.’”).

Even under the older cases on which the Government relies, relation back would be proper here. The Government cites *Williams v. United States*, 405 F.2d 234 (5th Cir. 1968), but does not disclose the actual result in that case. *Williams* concluded that an amendment to add a new party was proper, because “the Government had fair notice” of the existence of the new party. *Id.* at 238-39. The Fifth Circuit explained that “the occurrence as an operational set of facts was stated fully” and that the complaint had to be “read with required liberality.” *Id.* at 239. In light of these facts, “the Government was put on notice” that a claim by the new party

“was also involved” in the case. *Id.* The Fifth Circuit also specifically rejected an argument like the one the Government advances here: “True, [the Government] must now defend a claim which—from the mere passage of time—it might have thought was barred, and to this extent it has ‘lost’ something it thought it had. But neither limitations nor laches . . . affords such an automatic insulation in some mechanical way. The amendment should have been allowed.” *Id.*

The Government also relies on *Leachman v. Beech Aircraft*, 694 F.2d 1301 (D.C. Cir. 1982). But *Leachman* denied relation back to a new plaintiff because there was “no showing that [the defendant] had notice of the potential involvement of [the new plaintiff].” *Id.* at 1309. *Leachman* interpreted the Fifth Circuit’s earlier *Williams* decision as involving a situation where the Government “had reason to know of the *potential* claim” that the new plaintiff might add. *Id.* (emphasis added). *Leachman* refused to allow the new party’s claim to relate back because the new party was “an essentially unrelated victim.” *Id.* Here, of course, Jane Does No. 3 and No. 4 can hardly be described as “unrelated” to Jane Does No. 1 and No. 2. To the contrary, they wish to assert identical claims that their rights have been violated—claims that were specifically and directly mentioned in the opening pleadings in this case. *See e.g.*, DE 9 at 2 (asking this Court to “hold that [Jane Doe No. 1] *and the other victims in this case* had the right to confer with the Government before it reached the non-prosecution agreement.”); *id.* at 12 (asking for the “obvious remedy” that the court “declare the non-prosecution agreement illegal and direct that the Government proceed to negotiate a new agreement . . . in a process that respects [Jane Doe No. 1’s] (and *the other victims*)’ rights.”

D. No Undue Delay Exists Where a Motion is Timely Filed.

For all the reasons just explained, Jane Doe Nos. 1 and 2's motion to amend to add new plaintiffs complies with the time for filing such motions provided in the CVRA and the 28 U.S.C. § 2401, and in any event it relates back to a timely-filed complaint. No scheduling order bars adding new plaintiffs at this time. *Cf. Jackson v. United Parcel Serv., Inc.*, 593 F. App'x 871, 875 (11th Cir. 2014) ("in civil cases, a district court must issue a scheduling order in which it limits the time to amend the pleadings, Fed.R.Civ.P. 16(b)(3)(A), and *once a scheduling order is entered*, a party must demonstrate good cause for seeking leave to amend its complaint after the deadline" (emphasis added)). While it "is not an abuse of discretion for a district court to deny a motion for leave to amend following the close of discovery, past the deadline for amendments and past the deadline for filing dispositive motions," *S. Grouts & Mortars, Inc. v. 3M Co.*, 575 F.3d 1235, 1242 (11th Cir. 2009), here none of those events have happened. Moreover, if the motion to amend is not allowed, Jane Doe No. 3 and Jane Doe No. 4 could simply file their own, separate CVRA lawsuit against the Government. Clearly the approach of amending to add them in to a single consolidated action is to be preferred to multiplication of separate lawsuits. The Court should allow the amendment here.

CONCLUSION

Jane Doe No. 1 and Jane Doe No. 2 should be allowed to amend their initial petition, pursuant to Rule 15 of the Federal Rules of Civil Procedure to conform to the evidence in this case and to add Jane Doe No. 3 and Jane Doe No. 4 as petitioners. A proposed first amended petition has been provided to the Court and the Government and, because no objection as to form has been raised, it should be entered as the operative petition in this action.

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Respectfully Submitted,

/s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on March 19, 2015, on the following using the Court's CM/ECF system:

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