

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE 1 AND JANE DOE 2,

Petitioners,

vs.

UNITED STATES,

Respondent.

GOVERNMENT'S STATEMENT OF UNDISPUTED
MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

Respondent United States of America, by and through its undersigned counsel, files its Statement of Undisputed Material Facts in Support of Cross-Motion for Summary Judgment, and states:

1. The Honorable Alberto Gonzales was sworn in on February 3, 2005, as Attorney General of the United States.
2. As Attorney General, Alberto Gonzales was the head of the Department of Justice. 28 U.S.C. § 503.
3. Under 28 U.S.C. § 515, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.
4. Under 28 U.S.C. § 519, the Attorney General is responsible for supervising all litigation in which the United States, an agency, or officer thereof is a party, "and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of [Title 28] in the discharge of their respective duties."

5. In May 2005, then Attorney General Gonzales issued his *Attorney General Guidelines for Victim and Witness Assistance*. Ex. M. When the non-prosecution agreement was negotiated in 2007-2008, these Guidelines were in effect.

6. Article II(D) of the Guidelines provides a definition of “crime victim.”

1. Enforcement of Rights. For purposes of enforcing the rights enumerated in article 1.B, a victim is “a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia” (18 U.S.C. § 3771(e)), if the offense is charged in Federal district court. If a victim is under 18 years of age, incompetent, incapacitated, or deceased, a family member or legal guardian of the victim, a representative of the victim’s estate, or any other person so appointed by the court may exercise the victim’s rights, but in no event shall the accused serve as a guardian or representative for this purpose. (18 U.S.C. § 3771(e)). A victim may be a corporation, company, association, firm, partnership, society, or joint stock company. (1 U.S.C. § 1).

7. During 2006 to 2008, when the U.S. Attorney’s Office for the Southern District of Florida investigated Jeffrey Epstein, no criminal charge was filed against Epstein in Federal district court. Ex. S, ¶ 4. Although the U.S. Attorney’s Office opened a matter to conduct an investigation of Epstein and to evaluate a possible prosecution, it never accepted the matter for federal prosecution, that is, the U.S. Attorney’s Office never authorized the presentation of a proposed indictment to a federal grand jury or the filing of any federal charge in a criminal complaint or an information, and no case was ever filed. Id.

8. On September 10, 2008, Jane Doe No. 1 filed an action (E.W. v. Jeffrey Epstein, Case No. 50-2008-CA-028058-XXXXMB) in Palm Beach County, Florida, seeking money damages from Jeffrey Epstein for sexually abusing her. Ex. P.

9. On September 11, 2008, Jane Doe No. 2 file an action (L.M. v. Jeffrey Epstein, Case No. 50-2008-CA-28051-XXXXMB) in Palm Beach County, Florida, seeking money damages

from Jeffrey Epstein for sexually abusing her. Ex. Q.

10. In Jane Doe No. 1's complaint, she alleged in part:

20. The Plaintiff is included in the list of victims identified by the Federal Government as victims of the Defendant, Jeffrey Epstein's illegal conduct. The Defendant, Jeffrey Epstein, is thus estopped by his plea and agreement with the Federal Government from denying the acts alleged in this Complaint, and must effectively admit liability to Plaintiff.

11. In Jane Doe No. 2's complaint, she alleged in part.

20. The Plaintiff is included in the last of victims identified by the Federal Government as victims of the Defendant, Jeffrey Epstein's illegal conduct. The Defendant, Jeffrey Epstein, is thus estopped by his plea and agreement with the Federal Government from denying the acts alleged in this Complaint, and must effectively admit liability to the Plaintiff.

12. Both Jane Doe No. 1 and Jane Doe No. 2 obtained monetary settlements of their lawsuits against Jeffrey Epstein.

13. During the course of the federal criminal investigation of Epstein, Jane Doe No. 2 was represented by attorney James Eisenberg, Esq., whose services were paid for by Epstein. Ex. S, ¶ 7.

14. Through her attorney, Jane Doe No. 2 refused to be interviewed by the FBI and U.S. Attorney's Office unless she was granted immunity pursuant to 18 U.S.C. § 6001 *et seq.* Ex. A; Ex. S, ¶¶ 6-12. Jane Doe No. 2 was unwilling to provide any information regarding her encounters with Epstein unless she was assured her statements would not be used against her in a criminal prosecution. Ex. A; Ex. S, ¶¶ 6-12. In accordance with her request, the Government obtained immunity under 18 U.S.C. § 6001 in order to obtain information from Jane Doe No. 2. Ex. B; Ex. S, ¶¶ 6-12.

15. After being provided with a subpoena, statutory immunity, and an order compelling

her to testify, Jane Doe No. 2 appeared on April 24, 2007, for a videotaped interview conducted by FBI Special Agents E. Nesbitt Kuyrkendall and Jason Richards and AUSA Marie Villafaña, in the presence of her attorney, James Eisenberg, Esq. Ex. C; Ex. R, ¶ 5; Ex. S, ¶ 12. Jane Doe No. 2 described her meetings with Epstein, and Epstein's offer to pay her \$200 to bring girls to him. Ex. C at 20. When asked whether Epstein "pulled you closer to him in a sexual way," Jane Doe No. 2 replied:

A. I wish. No, no, never, ever, ever, no, never. Jeffrey is an awesome man, no.

Id. at 22. At the end of her interview, Jane Doe No. 2 was asked if she had any questions for the agents or AUSA Villafaña. Id. at 57. Jane Doe No. 2 responded:

A. No, but I hope – I hope Jeffrey, nothing happens to Jeffrey because he's an awesome man and it would really be a shame. It's a shame that he has to go through this because he's an awesome guy and he didn't do nothing wrong, nothing.

Id. at 58.

16. Several months after the videotaped interview of April 24, 2007, AUSA Villafaña asked attorney Eisenberg whether she could contact Jane Doe No. 2 directly and was told that any contact with Jane Doe No. 2 had to occur via Mr. Eisenberg. Ex. S, ¶ 14.

17. On or about August 4, 2006, Jane Doe No. 2 was sent a letter describing her rights under the CVRA and providing contact information for the prosecutor. Ex. E; Ex. S, ¶ 5. On or about August 11, 2006, Jane Doe No. 1 received a similar letter. Ex. F; Ex. S, ¶ 5. Both letters provided the name of the FBI agent handling the Epstein investigation (Nesbitt Kurykendall), her phone number, the identity of the prosecutor (AUSA Villafaña), and her phone number.

Although Jane Doe No. 1 and Jane Doe No. 2 had been furnished the means to contact the FBI agent and the prosecutor regarding any concerns about the investigation, they never contacted

AUSA Villafaña or Special Agent Kurykendall seeking to confer about the investigation, potential charges, or a potential resolution of the matter. Ex. S, ¶¶ 5, 13, 31; Ex. R, ¶¶ 6, 7.

18. During the course of its investigation of Epstein, the Government learned that many of Epstein's victims were troubled by the existence of the Government's criminal investigation and a majority expressed concern that their identities and their involvement with Epstein might be made public. Ex. R, ¶ 12. Many were emotionally distressed because of the investigation and these concerns. Id. Some were reluctant to talk to the Government, and some refused to talk to the Government. Id. At the same time, during the interviews that were conducted with victims from 2006 to 2008, none expressed a strong view that Epstein be prosecuted. Id. ¶ 13. Some, like Jane Doe No. 2, had even expressed the view that nothing should be done to Epstein, provided accounts that Epstein had done nothing wrong, and/or maintained that Epstein had committed no crime. See, e.g., Ex. C; Ex. R, ¶ 5; Ex. S, ¶¶ 10, 12, 19, 24-26, 31.

19. Informed by these circumstances and the strengths and weaknesses of the case against Epstein, the U.S. Attorney's Office sought to resolve the matter in its prosecutorial discretion in a manner that obtained a guaranteed sentence of incarceration for Epstein, that did not subject victims to the scrutiny and travails associated with a trial, that provided victims with the equivalent of uncontested restitution from Epstein, and that guaranteed the sexual offender registration of Epstein, which would help protect other minors throughout the country in the future. Ex. S, ¶ 18. While the U.S. Attorney's Office did not provide victims with advance notice of the negotiated resolution, it did so to ensure that additional impeachment evidence would not be created to which the victims, prosecutor, and agents would be subjected to the detriment of a future prosecution of Epstein in the event the negotiated resolution of the investigation were not perfected. Ex. R, ¶ 9; Ex. S, ¶ 21.

20. After the NPA was signed in September 2007, four victims were contacted and the NPA's provision for a federal restitution remedy was discussed. D.E. 14, ¶ 8. Jane Doe No. 1 was among the victims contacted and informed about the NPA. Ex. R, ¶ 8. During a meeting with Jane Doe. No. 1 in October 2007, FBI agents advised Jane Doe. No. 1 about the main terms of the NPA, informing her, among other things, that under the agreement that had been reached, Epstein was going to plead guilty to two state charges and there would not be a federal prosecution Id.

21. When Epstein's attorneys learned that the Government was informing victims about the NPA, they complained that the Government was incentivizing the victims to overstate their involvement with Epstein in order to increase their damage claims. D.E. 14, ¶ 8. Moreover, Epstein's attorneys were expected to mount vigorous impeachment of the victims at any trial; indeed, Epstein's attorneys furnished the Government with previews of their preparations to impeach the victims and the credibility of the investigative team. Ex. L at 9-12; Ex. S, ¶ 21. AUSA Villafaña and the FBI agents concluded that informing additional victims could compromise both the witnesses' credibility and the agents' credibility at a later trial if Epstein reneged on the agreement. D.E. 14, ¶ 8; Ex. R, ¶ 9; Ex. S, ¶ 34. The Government, in an effort to avoid creating additional impeachment material by not alerting the victims that the Government was seeking a resolution that would facilitate their collecting money damages from Epstein, see Ex. R, ¶ 9; Ex. S, ¶¶ 21, 34-35, thus delayed further notifying victims about the NPA until after Epstein entered his plea for legitimate prosecutorial reasons.

22. Following the entry of the NPA, Epstein also raised challenges to the United States Attorney's exercise of his prosecutorial discretion with the Assistant Attorney General and with the Child Exploitation and Obscenity Section (CEOS), within the Criminal Division of the DOJ

in Washington, D.C. Exs. G, K, L. From late 2007 to May 2008, Epstein's attorneys attempted to convince senior attorney at CEOS that Epstein had not committed any federal crimes, and they submitted lengthy documents reviewing the evidence and case law, advocating the position that Epstein had only violated Florida law, if any crime had even been committed, and suggesting that the Florida state courts were the appropriate forum for adjudicating his criminal responsibility. E.g., Exs. G, V. Meetings were held between CEOS officials and Epstein's attorneys, in which Epstein sought to have the NPA overturned. See Ex. H at 1.

23. On May 15, 2008, the Chief of the CEOS sent Jay Lefkowitz, Esq., a five-page letter, explaining the inquiry it conducted of the federal criminal investigation of Epstein. Ex. H. The letter concluded that "federal prosecution in this case would not be improper or inappropriate."

24. Epstein next sought further review, ultimately pursuing that review to the Office of the Deputy Attorney General, during which Epstein's attorneys submitted additional letter briefs to the Deputy Attorney General. Ex. V.

25. On June 23, 2008, John Roth, Senior Associate Deputy Attorney General, wrote to Messrs. Lefkowitz and Starr, advising them that "federal prosecution of this case is appropriate." Ex. I. Mr. Roth also told Epstein's attorneys that their allegations of prosecutorial misconduct had been reviewed and that the Office of the Deputy Attorney General saw "nothing in the conduct of the U.S. Attorney's Office that gives us any reason to alter our opinion." Id.

26. While Epstein and his attorneys engaged in efforts to set aside the NPA, the U.S. Attorney's Office and the FBI proceeded with the investigation and preparation for a criminal prosecution in a reasoned exercise of prudence to be ready to move forward with a criminal prosecution of Epstein because the signed NPA might not resolve the matter. Ex. S, ¶¶ 34-36; see also Ex. R, ¶ 10. The January 2008 letters from the FBI to Jane Doe No. 1 and Jane Doe No.

2 that referenced the ongoing investigation were not deceptions but a reflection of the still-ongoing federal investigation and the investigative team's view that there might well be a federal prosecution and that at least some of the victims would become prosecution witnesses at trial. Ex. S, ¶¶ 35-36; see also Ex. R, ¶ 10. Indeed, when the January 2008 letters were sent by the FBI, Epstein's attorneys were actively engaged in attempts to attack the NPA and to convince higher levels of the DOJ that there was no basis for a federal prosecution of Epstein and that the U.S. Attorney's Office had abused its prosecutorial discretion in negotiating the NPA. E.g., Exs. K, L.

27. When the Government found out on Friday, June 27, 2008, at approximately 4:15 p.m., that Epstein's plea had been scheduled by state officials for 8:30 a.m., Monday, June 30, 2008, AUSA Villafañá and the Palm Beach Police Department attempted to provide notice to all the victims. D.E. 14, ¶ 11; Ex. S ¶ 38. AUSA Villafañá specifically called and informed Brad Edwards, the attorney who at that time was representing both Jane Doe No. 1 and Jane Doe No. 2, of the date and time of Epstein's state court plea hearing. Ex. S, ¶ 38. Attorney Edwards informed AUSA Villafañá that someone would be present for him at the hearing. Id.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 2, 2017, the foregoing Statement of Undisputed Material Facts in Support of Cross-Motion for Summary Judgment was filed with the Clerk of the Court and served on counsel on the attached service list using CM/ECF.

/s/ Dexter A. Lee

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