UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE No. 101,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.

Case No.: 9:09-CV-80591-KAM

DEFENDANT JEFFREY EPSTEIN'S MOTION TO DISMISS THE FIRST AMENDED COMPLAINT OR, IN THE ALTERNATIVE, FOR A MORE DEFINITE STATEMENT

Defendant JEFFREY EPSTEIN, by and through his undersigned counsel, moves to dismiss or, alternatively, for a more definite statement of, the First Amended Complaint. Fed. R. Civ. RR. 12(b)(6) & 12(e) (2009); Loc. Rule 7.1 (S.D. Fla. 2009). In support, Defendant states:

Pleading Standard & Summary of Argument

The First Amended Complaint ("FAC") alleges claims under 18 U.S.C. § 2255 that explicitly incorporate, and thus necessarily require Plaintiff to prove that Defendant is guilty of violating, specific criminal prohibitions set forth in Title 18 of the U.S. Code. While the Supreme Court has held that ***every*** complaint "'must contain something more than a statement of facts that merely creates a suspicion of a legally cognizable right of action,'" Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007), and just last week made clear that "*Twombly* expounded the pleading standard for 'all civil actions' and not just pleadings made in the context of an antitrust dispute," Ashcroft v. Iqbal, No. 07–1015 (U.S. May 18, 2009) (slip op. at 20) (quoting Fed. R. Civ. P. 1), the need to enforce these pleading requirements is especially acute in this context. After all, the defendant in a § 2255 action is essentially being put on trial for violating criminal laws, and the statutory penalty is obviously and intentionally punitive.

As a result, it not only is appropriate to require "more than an unadorned, the-defendant-

unlawfully-harmed-me accusation" before allowing plaintiffs to launch a fishing expedition for evidence of possible crimes, *Iqbal*, slip op. at 14 (citing *Twombly*, 550 U.S. at 555), but essential that the accused be given "'such a statement of the facts and circumstances as will inform [him] of the specific offense ... with which he is charged,'" including a "specific identification of fact[s]" required to establish "fully, directly, and expressly, without any uncertainty or ambiguity, ... all the elements necessary to constitute the offence." Russell v. United States, 369 U.S. 749, 764-65 (1962) (quoting United States v. Hess, 124 U.S. 483, 487 (1888); United States v. Carll, 105 U.S. 611, 612 (1881)). The FAC does not come close to discharging that burden.

A. The applicable version of § 2255 only permits "minors" to sue: "***Any minor*** who is a victim of a violation of [certain criminal statutes] and who suffers personal injury as a result of such violation ***may sue***." 18 U.S.C. § 2255(a) (2003) (emphasis added). Yet the FAC affirmatively admits that Plaintiff is over the age of 18. *See* FAC ¶ 18 ("Plaintiff was first brought to Defendant's mansion in or about the spring of 2003, when she was merely 17 years old."). Plaintiff is bound by that admission, and the FAC must be dismissed with prejudice. Best Canvas Prods. & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983) ("[A] party is bound by the admissions in his pleadings.").

B. Nor is Plaintiff the "victim of a violation" of a predicate criminal statute within the meaning of § 2255. 18 U.S.C. § 2255(a). In our system of justice, those accused of "violating" a criminal statute are innocent until proven guilty beyond a reasonable doubt in a criminal court. With due respect to the courts that have concluded otherwise, it defies common sense to think that Congress intended to invert that fundamental legal norm, and the legislative history of § 2255 expressly confirms that Congress intended to condition § 2255 actions on an antecedent criminal conviction. The FAC therefore must be dismissed because it does not—and cannot—allege that Defendant has been convicted of a predicate criminal offense.

C. Even if the applicable version of § 2255 were construed to allow adults to sue in the

absence of a predicate conviction, the FAC not only fails to meet the modest pleading standards elucidated by Twombly and Iqbal, but—even taken as true—would not establish a legally "plausible" claim that Plaintiff is a victim of any predicate criminal offense giving rise to a § 2255 cause of action. *See* Iqbal, slip op. at 15 (explaining that every civil complaint must state "a plausible claim for relief," and that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'") (quoting Fed. R. Civ. P. 8(a)(2)).

D. Finally, Plaintiff's attempt to multiply the penalties recoverable under § 2255(a) by pleading six separate counts is inconsistent with the language and structure of § 2255. The law allows for a single action predicated on any and all predicate criminal acts, and entitles the plaintiff only to a single recovery of actual damages (subject only to a presumptive minimum).

I. THE COMPLAINT MUST BE DISMISSED BECAUSE PLAINTIFF IS NOT A MINOR.

A. The Version of 18 U.S.C. § 2255 In Effect When The Predicate Acts Allegedly Were Committed Allowed Only "Minors" To File Suit.

The FAC is predicated exclusively on acts that allegedly occurred in 2003. FAC ¶ 18 ("Plaintiff was first brought to Defendant's mansion in … the spring of 2003."); *id.* ¶ 19 ("Defendant thereafter lured [Plaintiff] to [his home] on at least one and perhaps two other occasions in the spring and/or summer of 2003."). At that time, 18 U.S.C. § 2255(a) provided:

> ***Any minor who is a victim*** of a violation of [certain specified federal statutes] and who suffers personal injury as a result of such violation ***may sue*** in any appropriate United States District Court and shall recover the actual damages ***such minor sustains*** and the cost of the suit, including a reasonable attorney's fee. ***Any minor as described in the preceding sentence shall be deemed*** to have sustained damages of no less than $50,000 in value.

It is well settled that in interpreting a statute, the court's inquiry begins with the text and structure of the law. CBS, Inc. v. Prime Time 24 Venture, 245 F.3d 1217, 1222 (11th Cir. 2001) ("We begin our construction of [a statutory provision] where courts should always begin the process of legislative interpretation, and where they often should end it as well, which is with the

words of the statutory provision.'") (quoting Harris v. Garner, 216 F.3d 970, 972 (11th Cir. 2000) (*en banc*)) (first alteration omitted). In this case, the plain text of the 2003 statute is both clear and unmistakable. It allowed only minors (or the representative of a then-minor, *see* Fed R. Civ. P. 17(c)) to initiate suit under § 2255. It provided only that "any ***minor*** … may sue" and that "any ***minor*** … shall recover the actual damages ***such minor*** sustains" as a result of the predicate acts. *Id.* (emphasis added). The law's use of the present tense further underscored its limited scope: It spoke of "any minor who ***is*** a victim," provided that "such minor … shall recover" damages arising from the underlying offense, and stated that "any minor … shall be deemed" to have sustained at least $50,000 in damages. *Id.* (emphasis added). Where the statute's words are unambiguous—as the are here—the "judicial inquiry is complete." Merritt v. Dillard Paper Co., 120 F.3d 1181, 1186 (11th Cir. 1997) (citation omitted)). Under the 2003 version of the statute, only minors could initiate suit.

To the extent there is any ambiguity in the text—and there is none—the law's legislative history further underscores Congress's intent to limit the right of action to minors: "Current law provides for a civil remedy for personal injuries resulting from child pornography offenses. This section expands the number of sex offenses ***in which a minor may pursue a civil remedy*** for personal injuries resulting from the offense." H.R. Rep. 105-557, at 23 (1998), *as reprinted in* 1998 U.S.C.C.A.N. 678, 692. And perhaps most telling, Congress amended § 2255 in 2006—three years after the alleged misconduct in this case supposedly took place—to make the civil action available to persons who had turned 18 by the time they filed suit:

> (a) In general.—***Any person who, while a minor, was a victim*** of a violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title and who suffers personal injury as a result of such violation, regardless of whether the injury occurred ***while such person was a minor, may sue*** in any appropriate United States District Court and shall recover the actual damages ***such person*** sustains and the cost of the suit, including a reasonable attorney's fee. ***Any person*** as described in the preceding sentence shall be deemed to have sustained damages of no less than $150,000 in value.

18 U.S.C. § 2255 (2006) (emphasis added).

The contrast between the 2003 and 2006 versions of § 2255 is stark. The 2006 law replaces each of the 2003 law's uses of the term "minor" with the term "person." Where the 2006 law does refer to a "minor," it changes the 2003 law's present-tense references ("is") to past-tense references ("was"). And the 2006 law's new language now makes clear that, unlike the 2003 statute, those victimized while under the age of 18 may sue after they turn 18. Given that amendments must be interpreted "to have real and substantial effect," Stone v. I.N.S., 514 U.S. 386, 397 (1995), there can be no doubt that Congress recognized the prior statute's strict limitations and for the first time expanded the right of action to adults.

Indeed, the history of the 2006 amendments clearly shows that Congress intended to change the law, not merely to clarify it. Those amendments were made by § 707 of the Adam Walsh Child Protection and Safety Act, Pub. L. No. 109-248, 120 Stat. 587, 650 (2006), and are known as "Masha's Law." As Senator Kerry—the author of Masha's Law—explained:

> What Masha's law does, and what is incorporated in here, is ***it changes "any minor" to "any person," so that if a minor is depicted in photographs pornographically that are distributed over the Internet, but by the time the abuser is caught, the minor is an adult, they can still recover. They cannot now, and that is ridiculous. It makes sure that recovery on the part of a minor can take place when they become an adult***....
>
> Although I don't think there is any price too high to cost an individual who would take advantage of a minor, ***I think it is only appropriate to ... make sure that reaching the age of adulthood does not exempt someone from recovery***. It is a tribute to continuing to do what this bill does, and that is look after the protection of minors and ensure that those who violate them are caught and punished and have to pay to the maximum extent.

152 Cong. Rec. S8012-02 at S8016 (July 20, 2006) (statement of Sen. Kerry) (emphasis added). Courts typically give special weight to the statements of a bill's sponsor, Corley v. U.S., 129

S.Ct. 1558, 1569 (Apr. 6, 2009) ("[A] sponsor's statement to the full Senate carries considerable weight.").[1] There is no basis to depart from that rule here.

It thus is no answer that the 2003 statute's limitations clause provided that "in the case of a person under a legal disability, [the complaint may be filed] not later than three years after the disability," 18 U.S.C. § 2255(b) (2003), such that the unamended version of the law ***implicitly*** must have permitted victims to sue even after they turned 18. That interpretation not only would render Masha's Law superfluous; it would make Masha's Law's internally redundant, because Masha's Law retained the "legal disability" language from the 2003 version of § 2255(b). *See* 18 U.S.C. § 2255(b) (2006). In short, the retained "legal disability" language in § 2255(b) of the 2006 statute would be entirely redundant were it construed to do ***implicitly*** what the law elsewhere did ***expressly***. In these circumstances, the traditional rules against surplusage and redundancy apply with double force. *See, e.g.*, Duncan v. Walker, 533 U.S. 167, 174 (2001). The "legal disability" language in § 2255(b) should be interpreted to reference classic legal disabilities like insanity, mental disability, or imprisonment—not age.

Indeed, that is precisely how Congress typically uses the term "legal disability": most federal statutes that use the term make clear that it doesn't include age. *See, e.g.*, 25 U.S.C. § 590c ("A share or interest payable to enrollees less than eighteen years of age ***or*** under legal

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[1] Similarly, the official summary prepared by the Congressional Research Service ("CRS") explained that Masha's Law "[r]evises provisions allowing victims of certain sex-related crimes to seek civil remedies ***to: (1) allow adults as well as minors to sue*** for injuries; and (2) increase from $50,000 to $150,000 the minimum level of damages." Official Summary of Pub. Law No. 109-248 (July 27, 2006), *as reprinted at* http://thomas.loc.gov/cgi-bin/bdquery/z?d109:HR04472:@@@L&summ2=m& (emphasis added) (last visited May 10, 2009). Courts have long consulted official CRS summaries to assess legislative intent, *see, e.g.*, Rettig v. Pension Ben. Guar. Corp., 744 F.2d 133, 145 & n.7 (D.C. Cir. 1984); DIRECTV Inc. v. Cignarella, No. Civ.A 03-2384, 2005 WL 1252261 at *7 (D.N.J. May 24, 2005); Clohessy v. St. Francis Hosp. & Healthcare, No. 98-C-4818, 1999 WL 46898 *2-*3 (N.D. Ill. Jan. 28, 1999), and there is good reason to do so. By design, CRS summaries are intended to "objectively describe[] the measure's … effect upon … current law" so that Congress can make informed judgments about the impact of proposed bills. *See* The Library of Congress, *About CRS Summary*, *available at* http://thomas.loc.gov/bss/abt_dgst.html (last visited May 10, 2009).

disability shall be paid ....") (emphasis added); *id.* § 783 ("Funds payable under sections 781 to 785 of this title to minors ***or*** to persons under legal disability shall be paid....") (emphasis added); *id.* § 1128 ("Sums payable to enrollees ... who are less than eighteen years of age ***or*** who are under a legal disability shall be paid....") (emphasis added); *id.* § 1253 ("Sums payable ... to enrollees ... who are less than eighteen years of age ***or*** who are under a legal disability shall be paid....") (emphasis added); *id.* § 1273 (same); *id.* § 1283 (same); *id.* § 1295 (same); *id.* § 1300a-3 (same); *id.* § 1300c-3 (same); *id.* § 1300d-7 (same); *see also* 38 U.S.C. § 3501.

Needless to say, Congress would not have had to address age expressly in any of these statutes if the term "legal disability" necessarily included one's status as a minor; instead, Congress's mere use of the term "legal disability" already would account for a would-be plaintiff's minority status. Given the rule "against reading a text in a way that makes part of it redundant," Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644 (2007) (citing TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001)), and the canon that "where words are employed in a statute which had at the time a well-known meaning ... in the law of this country, they are presumed to have been used in that sense," Standard Oil Co. v. United States, 221 U.S. 1, 59 (1911), § 2255's reference to "legal disability" can only be interpreted as a reference to classic disabilities like insanity or mental incapacity, but not age.

But this Court need not even reach that issue in this case. Regardless of whether § 2255(b) would allow a minor to sue within three years of turning 18, that carve-out would not help Plaintiff in this case. After all, she openly admits that she was 17 years-old in 2003. FAC ¶¶ 18, 19. That means that she was either 22 or 23 when she filed this case in April 2009—at least a full year beyond the three-year period set forth in § 2255(b), regardless of how the "legal disability" language in that subsection of the statute is construed. In short, and under any reasonable interpretation of the law, the version of the statute in effect at the time of the alleged criminal conduct giving rise to this suit would preclude Plaintiff from maintaining this action.

B. Masha's Law Does Not Apply To This Case.

The presumption against retroactivity and the *Ex Post Facto* clause preclude application of Masha's Law in this case, where the alleged predicate conduct was completed before 2006.

1. Congress Did Not Intend To Apply Masha's Law Retroactively.

It is axiomatic that "retroactivity is not favored," Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988), and the "traditional presumption teaches that [an amended statute] does not govern absent clear congressional intent favoring such a result." Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994). As the Supreme Court has explained, this presumption

> embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal." Kaiser Alum. & Chem. Corp. v. Bonjorno, 494 U.S. 827, 855 (1990) (Scalia, J., concurring).

Id. at 265 (footnote omitted). Courts therefore apply the statute in effect at the time of the underlying conduct unless there is a clear statement that an amendment should apply retroactively to pre-enactment conduct. *See, e.g.*, Hughes Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 952 (1997) ("Given the absence of a clear statutory expression of congressional intent to apply the 1986 amendment to conduct completed before its enactment, we … hold that, under the relevant 1982 version of the [statute], the District Court was obliged to dismiss this action.").

There is no clear indication that Congress intended Masha's Law to apply retroactively. Unlike the many cases in which Congress has specified that a particular amendment applies in proceedings "commenced on or after the date of enactment," Tello v. Dean Witter Reynolds, Inc., 410 F.3d 1275, 1283 (11th Cir. 2005) (collecting examples), Masha's Law was subject only to a standard effective date provision that sheds no light on its retroactivity. *See* Landgraf, 511 U.S. at 1493 ("A statement that a statute will become effective on a certain date does not even

arguably suggest that it has any application to conduct that occurred at an earlier date.").

Far more important, the only expression of congressional intent regarding retroactivity strongly suggests that Congress did not intend Masha's Law to apply retroactively. As set forth above, Masha's Law was enacted as part of the Adam Walsh Act. The centerpiece of that Act was an expanded sex-offender registry ("SORNA") intended to bolster tracking of convicted sex offenders. *See* Pub. L. 109-248 §§ 1-155, 120 Stat. 587, 590-611 (2006). To effectuate SORNA, Congress provided that offenders must register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement, or not later than 3 business days after being sentenced" if no prison term was imposed. 42 U.S.C. § 16913(b). It also imposed penalties on offenders who fail to register. *See* 18 U.S.C. § 2250(a). At the same time, and of particular relevance in this case, Congress recognized that applying SORNA to past offenders would raise retroactivity concerns. It therefore addressed retroactivity expressly:

> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders.

42 U.S.C. § 16913 (d).

While Congress clearly provided that SORNA could be applied retroactively, it did not do so with respect to Masha's Law. As the Supreme Court and the Eleventh Circuit have long observed, "'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.'" United States v. Jordan, 915 F.2d 622, 628 (11th Cir. 1990) (quoting Rodriguez v. United States, 480 U.S. 522, 525 (1987) (itself quoting Russello v. United States, 464 U.S. 16, 23 (1983))). There is no basis for departing from that rule. Given the strong evidence that Congress did not intend retroactively to apply Masha's Law, the 2003 version of § 2255 supplies the governing law.

2. The *Ex Post Facto* Clause Bars Application Of Masha's Law.

Even if Congress did intend Masha's Law to apply retroactively, doing so would violate the *Ex Post Facto* clause. U.S. CONST. art. 1, § 9, cl. 3. As the Eleventh Circuit has explained:

> [The] Constitution provides that "[n]o Bill of Attainder or ex post facto Law shall be passed" by Congress. U.S. Const. art. I, § 9, cl. 3. A law violates the Ex Post Facto Clause if it "'applies to events occurring before its enactment and disadvantages the offender affected by it' by altering the definition of criminal conduct ***or increasing the punishment for the crime***." Lynce v. Mathis, 519 U.S. 433, 441 (1997) (quoting Weaver v. Graham, 450 U.S. 24, 29 (1981)).

United States v. Siegel, 153 F.3d 1256, 1259 (11th Cir. 1998) (emphasis added; internal alterations omitted). Even though this case nominally involves a civil cause of action, the *Ex Post Facto* Clause is triggered ***both*** because Masha's Law dramatically increased the penalties for predicate criminal violations ***and*** because its retroactive application would revive Defendant's exposure to penalties that previously had become barred as a matter of law.

a. Retroactive Application Of Masha's Law Would Increase The Penalties For Violating The Predicate Criminal Statutes.

While the 2003 statute provided that "[a]ny minor … shall be deemed to have sustained damages of ***no less than $50,000***," 18 U.S.C. § 2255 (2003) (emphasis added), Masha's Law trebles the minimum statutory damages by providing that plaintiffs "shall be deemed to have sustained damages of ***no less than $150,000***." *Id.* (2006) (emphasis added). As a result, the enhanced monetary penalties provided by Masha's Law "increas[e] the punishment for the crime," Lynce, 519 U.S. at 441, and make "the punishment for crimes committed before its enactment 'more onerous'" than the punishment would have been under the unamended statute. *Id.* at 442 (quoting Weaver, 450 U.S. at 36). Those penalties are the direct consequence of a defendant's commission of a predicate criminal offense and form a deliberate part of the punishment for that crime. *See, e.g.*, 134 Cong. Rec. S372-01 (Feb. 1, 1998) (statement of Sen. Grassley) ("[T]he ***sanctions*** provided for in my bill, such as … the amended civil remedy section … provide much needed ***criminal enforcement tools***.") (emphasis added); 152 Cong. Rec.

S8012-02 at S8016 (July 20, 2006) (statement of Sen. Kerry) ("[Masha's Law] raises from $50,000 to $150,000 ***the penalty*** … if, in fact, someone … is caught and convicted.") (emphasis added). Accordingly, Masha's Law cannot lawfully be applied in this case.

The Eleventh Circuit's decision in United States v. Siegel, 153 F.3d 1256 (11th Cir. 1998), is virtually on point. In Siegel, the defendant pleaded guilty to charges under 18 U.S.C. § 371 and § 1956(a)(1)(A) that arose out of actions taken he took between February 1, 1988 and May 1, 1990. *Id.* at 1259. Under the restitution statute in effect when the crimes were committed ("VWPA"), courts had discretion "to order 'that the defendant make restitution to any victim of the offense.'" *Id.* at 1259 (citing 18 U.S.C. § 3663 (1985)). But that discretion was limited: "In exercising this discretion, the court was required to consider 'the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate,' before fixing the amount of the restitution, if any, that the defendant was required to pay." *Id.* at 1260 (citing 18 U.S.C. § 3664(a) (1985)).

Before Siegel pleaded guilty in July 1996, Congress passed the Mandatory Victims Restitution Act ("MVRA"). *Id.* at 1258-59 (citing Pub. L. No. 104-132, § 211). That law mandated the award of full restitution without regard to the defendant's economic circumstances. *Id.* at 1260. Congress expressly made those changes "effective for sentencing proceedings in cases in which the defendant is convicted on or after April 24, 1996." *Id.* at 1258 (quoting statute; alteration omitted). The district court applied MVRA at Siegel's sentencing and ordered him to pay restitution totaling $1,207,000 without considering his inability to do so. *Id.* at 1258. The Eleventh Circuit reversed, holding that MVRA "cannot be applied to a person whose criminal conduct occurred prior to [its effective date]." *Id.* at 1260. It explained:

> At the time [of sentencing], the amended VWPA thus had the potential to increase the amount of restitution they would have to pay, from an amount set by the court by taking into account appellants' financial circumstances, to full restitution.

> Accordingly, if the court determines that the VWPA should apply to this case, it must use the old version to avoid running afoul of the Ex Post Facto Clause.

Id. (quoting United States v. Baggett, 125 F.3d 1319, 1322 (9th Cir. 1997)).

This case is indistinguishable from *Siegel*. As in Siegel, Masha's Law caused "a substantive change … to [defendant]'s detriment," by trebling the minimum statutory penalty payable to the victim of a predicate crime. *Id.* at 1260. As in Siegel, Masha's Law thus has "the potential to increase the amount of restitution [defendants] would have to pay" to victims of a predicate crime. *Id.* Accordingly, and as in Siegel, Masha's Law cannot be applied where the predicate criminal conduct allegedly occurred prior to the amended statute's effective date.

It is no answer that the law at issue in Siegel provided "restitution" to the victim of a criminal offense while this statute provides "damages" to the victim of a criminal offense; by definition, damages paid by an offender to the victim of a criminal offense ***are*** restitution. *See Black's Law Dict.* (8th ed. 2004) (defining restitution as "[c]ompensation for loss; esp., full or partial compensation paid by a criminal to a victim."). Indeed, the case for applying *ex post facto* principles is even stronger here than in Siegel: While MVRA mandated the award of actual damages to the victim, Masha's Law mandates the payment of at least $150,000 to the victim even if the victim did not actually sustain $150,000 in damages. *See* 18 U.S.C. § 2255 (2006) ("Any [victim] ***shall be deemed to have sustained damages of no less than $150,000 in value.***") (emphasis added). Given its obviously penal nature, there is little wonder why Senator Kerry repeatedly described Masha's Law as increasing "***the penalty***" for persons convicted of a predicate crime. 152 Cong. Rec. S8012-02, S8016 (July 20, 2006) (statement of Sen. Kerry).

Because applying the 2006 amendments would increase the punishment for violating a predicate criminal statute, Masha's Law cannot lawfully be applied in this case.

b. Retroactively Applying Masha's Law Impermissibly Would Revive Defendant's Exposure To Previously Barred Penalties For His Alleged Violation Of The Predicate Criminal Statutes.

Perhaps more important, the *Ex Post Facto* clause precludes application of Masha's Law here because it would revive Defendant's exposure to penalties that previously had become barred by operation of law—no matter their amount. As set forth above, the 2003 statute allowed only "minors" to file suit. Because Plaintiff was 17 when the predicate offenses allegedly were committed, she could have sought the statutory penalty under the 2003 version of § 2255. Once Plaintiff turned 18, however, she lost her ability to sue. That extinguished Defendant's exposure to penalties for his alleged crimes. Applying Masha's Law thereby would revive Defendant's exposure to penalties in direct contravention of the *Ex Post Facto* clause.

The Supreme Court's decision in California v. Stogner, 539 U.S. 607 (2003), perfectly illustrates the point. In Stogner, the defendant was charged in 1998 based on sex crimes that he allegedly committed between 1955 and 1973. While the original three-year statute of limitations for those offenses long had lapsed, a California law purported to "revive" stale claims by authorizing the filing of charges within one year of a new police report alleging past child sexual abuse. 539 U.S. at 609-10 (discussing Cal. Penal Code Ann. § 803(g) (2003)). The defendant moved unsuccessfully to dismiss the indictment, and later appealed to the Supreme Court.

That Court reversed, explaining that "the new statute threatens the kinds of harm that … the Ex Post Facto Clause seeks to avoid," because its revival of previously barred claims would subject the defendant to penalties for criminal conduct "after the State has assured 'a man that he has become safe from its pursuit,'" and thus would "deprive the defendant of the 'fair warning' that might have led him to preserve exculpatory evidence." 539 U.S. at 611 (quoting Falter v. United States, 23 F.2d 420, 426 (2d Cir. 1928) (Hand, J.) and Weaver, 450 U.S. at 28). More important, the Court observed, California's revival of otherwise barred claims fell squarely within a category of *ex post facto* laws condemned by the Supreme Court's seminal *ex post facto* decision, Calder v. Bull—namely, laws providing for "punishments, where the party was not, by law, liable to any punishment." *Id.* at 612 (quoting Calder, 3 Dall. 386, 391 (1798)).

> The second category—including any "law that aggravates a crime, or makes it greater than it was, when committed," describes California's statute as long as those words are understood as Justice Chase understood them—i.e., as referring to a statute that "inflict[s] punishments, where the party was not, by law, liable to any punishment." After (but not before) the original statute of limitations had expired, a party such as Stogner was not "liable to any punishment." California's new statute therefore "aggravated" Stogner's alleged crime, or made it "greater than it was, when committed," in the sense that, and to the extent that, it "inflicted punishment" for past criminal conduct that (when the new law was enacted) did not trigger any such liability.

Id. at 613 (quoting Calder, 3 Dall. at 391) (internal citations omitted). The Court held that the *Ex Post Facto* clause precludes the revival of claims predicated on past crimes.

The precise concerns animating Stogner are present in this case. As in Stogner, Defendant was "liable to punishment" under § 2255 before Plaintiff turned 18, but once she attained that age, he no was longer "liable to punishment" under § 2255 for his alleged commission of the predicate crimes against her. And as in Stogner, retroactively applying Masha's Law in a manner that would revive Defendant's exposure to statutory penalties would "aggravate" his alleged crimes "in the sense, and to the extent that, it 'inflicted punishment' for past criminal conduct that (when the new law was enacted) did not trigger any such liability." *Id.* (quoting Calder, 3 Dall. at 391). At bottom, then, well-settled retroactivity and *ex post facto* principles preclude application of Masha's Law to Defendant's alleged pre-enactment conduct.

C. The FAC Must Be Dismissed Because Plaintiff Concededly Is Not A Minor.

As the FAC makes clear, Plaintiff was 17 in the spring of 2003, and she thus was either 22 or 23 when she filed this suit in April 2009. FAC ¶ 18. Because Masha's Law cannot lawfully be applied to the alleged conduct in this case, and because the prior statute provided that only "minors" may sue, the FAC must be dismissed with prejudice.

II. THE FAC MUST BE DISMISSED BECAUSE DEFENDANT HAS NOT BEEN CONVICTED OF A PREDICATE OFFENSE.

Even if Plaintiff were entitled to maintain this suit—and without regard to which version of § 2255 applies—the FAC still would fail as a matter of law because it does not (and cannot

consistent with Rule 11) allege that Defendant is guilty of "a violation" of a predicate statute. *See* 18 U.S.C. § 2255(a) (2003 & 2006) (plaintiff must be "a victim of a violation of [certain federal statutes]"). As set forth below, the plain text of the statute and its legislative history demonstrate that § 2255 is conditioned on a prior federal conviction. Because Defendant has never been convicted of a predicate federal offense, the FAC must be dismissed.

A. The Statute Requires Proof Of A Prior Federal Conviction.

By its plain terms, § 2255 only permits "a victim of a violation" of certain federal criminal statutes to seek statutory penalties. *See* 18 U.S.C. § 2255(a) (2003 & 2006). Given the presumption of innocence that animates our system of criminal justice, Congress's reference to "a victim of a violation" of a criminal statute can only be interpreted to require proof that the defendant has been convicted of a predicate federal offense against the plaintiff. After all, an individual accused of "violating" a criminal statute is deemed innocent until proven guilty beyond a reasonable doubt. It would turn that principle upside down if plaintiffs could sue in the absence of an antecedent criminal conviction. Given that "Congress is understood to legislate against a background of common-law adjudicatory principles," Astoria Fed. Sav. & Loan Assn. v. Solimino, 501 U.S. 104, 108 (1991), "the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'" *Id.* (quoting Isbrandtsen Co. v. Johnson, 343 U.S. 779, 783 (1952)).

In this case, however, the Court need not take anything "as given." Even if the statute's language were not clear—which it is—§ 2255's legislative history confirms that Congress intended to require a prior criminal conviction. While the history accompanying the passage of the original 1986 statute is sparse—§ 2255 was inserted with little debate into an omnibus appropriations bill for 1987, *see* Pub. L. No. 99-500, 100 Stat. 1783 (1986)—the 1998 and 2006 extensions of § 2255 produced clear statements regarding Congress's intent. In 1998, for instance, Congress added additional predicate statutes to § 2255. Senator Grassley, who wrote

the amendments, explained that "the sanctions provided for in my bill, such as … the amended civil remedy section [would] provide much needed ***criminal enforcement tools***" against convicted offenders. 134 Cong. Rec. S372-01 (Feb. 1, 1998) (statement of Sen. Grassley). Not surprisingly, the House Report accompanying that legislation used classic terms associated with an adjudicated conviction in order to make clear that the bill targeted those convicted of the predicate crimes: "It is the intention of the Committee that only ***the offender who perpetrated the offense*** against the minor is liable for damages under this section." H.R. Rep. 105-557, *P.L. 105-314: Protection of Children From Sexual Predators Act of 1998*, at 23 (emphasis added).

The legislative history of Masha's Law is even more explicit:

> What Masha's law does, and what is incorporated in here, is it … makes sure that recovery on the part of a minor can take place when they become an adult, whether or not ***the guilty person*** is incarcerated. It raises from $50,000 to $150,000 the penalty for which that individual can be recompensated ***if, in fact, someone*** who depicts that picture and puts it on the Internet and uses them ***is caught and convicted***.

152 Cong. Rec. S8012-02 at S8016 (July 20, 2006) (statement of Sen. Kerry). These references could hardly be clearer: for the statute to apply, the defendant must be arrested, tried, and found "guilty"—the "penalty" is available only "if, in fact, someone … is caught and convicted." *Id.* As noted above, courts give special weight to the statements of a bill's sponsor. Corley, 129 S.Ct. at 1569. Given these clear statements from Senator Kerry, the only plausible conclusion is that § 2255 requires proof of an antecedent criminal conviction.

That having been said, we do recognize that two district courts have held that plaintiffs may pursue a § 2255 action even without a prior conviction. Smith v. Husband, 376 F. Supp. 2d 603 (E.D. Va. 2005); Doe v. Liberatore, 478 F. Supp. 2d 742 (E.D. Pa. 2007). But with due respect, these decisions overlook the relevant legislative history set forth above and rely instead on legislative history that is at best inapposite, and at worst irrelevant. In particular, Smith and Liberatore (which itself rested entirely on Smith) hinge on two pieces of legislative history

relating to ***unenacted*** drafts of the legislation. *See* Smith, 376 F. Supp. 2d at 610-12; Liberatore, 478 F. Supp. 2d at 754-55.

First, both courts found it significant that § 2255 initially was proposed as an amendment to the civil RICO statute, and in particular that an early draft of the legislation allowed "[a]ny person injured (1) personally by reason of a violation of [RICO] if such injury results ***from an act indictable*** under sections 2251 and 2252 of this title (relating to sexual exploitation of children) ... [to] sue therefor." Smith, 276 F. Supp. 2d at 611 (quoting 132 Cong. Rec. E1983-01 (June 5, 1986) (statement of Rep. Siljander during extension of remarks)); Liberatore, 478 F. Supp. 2d at 755 (relying on *Smith*, 276 F. Supp. 2d at 611). As Smith concluded, "[t]his language ... indicates that it was not Congress's intent that a conviction under the other sexual exploitation statutes be a prerequisite to the initiation of a civil suit for damages," because the draft bill grounded the cause of action on "'an act indictable' under the statute" instead of one that actually produced an indictment and conviction. Smith, 276 F. Supp. 2d at 612.

Smith's analysis draws precisely the wrong conclusion from this unenacted draft language. After all, the law Congress actually passed did ***not*** contain the language on which Smith and Liberatore relied. Instead, it allowed only by minors injured by an actual "violation" of the predicate statutes to sue—not those who merely alleged that a defendant could have been indicted (but was neither indicted nor convicted) for conduct that allegedly breached those statutes. It is odd to treat the removal of language from draft legislation as proof that the enacted bill carried the same meaning. Instead, courts draw the opposite inference. Russello, 464 U.S. at 23-24 ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

Smith and Liberatore also relied on excerpts from a CRS report analyzing another early draft of the legislation. Smith, 376 F. Supp. 2d at 611 (citing 132 Cong. Rec. E3242-02 (Sept. 23, 1986) (statement of Rep. Green during extension of remarks)); *see also* Liberatore, 478 F.

Supp. 2d at 755 (citing Smith). According to Smith, the CRS report stated that "violations are to be determined by a preponderance of the evidence. Successful plaintiffs are entitled to recover the cost of the suit, including a reasonable attorney's fee, from those found guilty of a violation." *Id.* (quoting 132 Cong. Rec. E3242-02 (Sept. 23, 1986)). Smith thus held that "[t]he analysis of that proposed draft indicated that a violation under § 2255 was to be proven only by a preponderance of the evidence," and "indicates that 18 U.S.C. § 2255 was intended to provide a remedy … without requiring a criminal conviction." *Id.* at 611-12.

Set aside that Congress eventually ***deleted*** from the bill the preponderance-of-the-evidence standard discussed in the CRS report; while that alone renders this portion of the CRS report irrelevant, the key point here is that Smith's analysis of the report is flawed on its own terms. To begin with, the fact that draft's proposed preponderance-of-the-evidence standard does not remotely prove that Congress sought to permit § 2255 actions in the absence of a predicate criminal conviction. To the contrary, requiring a prior criminal conviction is perfectly consistent with such a standard, since the plaintiff in a § 2255 case could simply introduce proof of the prior conviction and thereby discharge her burden of proving a violation under a preponderance-of-the-evidence standard. As a result, the (never adopted) preponderance-of-the-evidence standard on its own sheds no light on the question.

Moreover, the Smith court overlooked the key line in its quotation from the CRS report—namely, the report's statement that the draft version of § 2255 would allow plaintiffs to recover penalties from "'those ***found guilty of a violation***.'" Smith, 376 F. Supp. 2d at 611 (emphasis added) (quoting 132 Cong. Rec. E3242-02 (Sept. 23, 1986) (statement of Rep. Green during extension of remarks)). Needless to say, civil courts do not find defendants "guilty"—only criminal courts do. On this point, the report's explicit reference to adjudicated guilt in connection with the statute's use of the term "violation" provides clear and obvious evidence that Congress intended to require proof of a criminal violation as a precondition to suit.

Finally—and perhaps most important—Smith's selective quotation from the CRS report omitted key language showing Congress's intent to require proof of an antecedent criminal conviction. Quoted in its entirety, the relevant portion of the CRS report explained:

> For purposes of this section, violations are to be determined by a preponderance of the evidence. Successful plaintiffs are entitled to recover the cost of the suit, including a reasonable attorney's fee, from those found guilty of a violation. ***Proposed § 2250(d) states that a defendant found guilty in any criminal proceeding brought by the United States under this chapter is estopped from denying the essential allegations of the criminal offense in any subsequent civil proceeding. Since the standard of proof in criminal cases, "beyond a reasonable doubt," is stronger than the "preponderance of the evidence" standard contained in proposed § 2255, this relieves the plaintiff from having to establish those facts which have already been proven under a higher standard of proof in a finalized criminal proceeding***.

132 Cong. Rec. E3242-02 (Sept. 23, 1986) (statement of Rep. Green) (emphasis added).

As the omitted language makes clear, the whole point of the proposed preponderance-of-the-evidence standard was that it would work hand-in-glove with the draft legislation's estoppel provision in order to ensure that plaintiffs would not have to replicate proof of guilt after the defendant was convicted in a prior criminal case. Thus, to the extent the draft bills that eventually led to § 2255 have any bearing on the meaning of the language that Congress actually enacted, the legislative history relied upon by Smith and Liberatore makes clear that Congress intended to authorize a "***subsequent*** civil proceeding" only after a defendant had been convicted "beyond a reasonable doubt … in a ***finalized criminal proceeding***." *Id.* (emphasis added).

At bottom, the plain text and legislative history clearly show that § 2255 authorizes an action only after the defendant has been convicted of violating a predicate criminal statute.

B. Defendant's Plea To Certain State-Law Offenses Is Insufficient To Authorize Suit Under 18 U.S.C. § 2255.

The FAC seeks to overcome this hurdle by asserting that Defendant "entered pleas of 'guilty' to various Florida state crimes involving the solicitation of minors for prostitution and the procurement of minors for the purposes of prostitution [and therefore] is in the same position

as if he had been tried and convicted of the sexual offenses committed against Plaintiff and, as such, must admit liability unto Plaintiff." FAC ¶ 24. While it generally is true that a complaint's allegations must be taken as true, "unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." Oxford Asset Mgnt., Ltd. v. Jaharis, 297 F.3d 1182, 1188 (11th Cir. 2002). Courts likewise may take note of public-record materials subject to judicial notice—even if those materials were not attached to the Complaint. Id. (citing cases).

The key point, then, is that Defendant's plea to two single-count charges ***under Florida law*** (one involving solicitation of prostitution – without regard to the prostitute's age – and one involving procurement of a minor for prostitution) does not remotely establish that Defendant committed any offense ***against Plaintiff***, much less that Defendant was convicted of violating any predicate ***federal statute*** that can give ground liability under § 2255. The official Florida judgment of conviction contains no reference to Plaintiff. *See* Exh. A. The official transcript of Defendant's plea colloquy makes clear that the state-law offenses to which he pleaded guilty took place in 2004 and 2005—years after the events alleged to give rise to this case.

> THE COURT: State, please give me a factual basis.
>
> MS. BELOHLAVEK: In 069454 CF AMB, between August 1, 2004 and October 31, 2005, the defendant in Palm Beach County did solicit or procure someone to commit pros[titution] on three or more occasions. And in 08 CF 9381 CF AMB between August 1, 2004 and October 9, 2005, the defendant did procure a minor under the age of 18 to commit prostitution in Palm Beach County also.

Exh. B at 41-42; *compare id.* with FAC ¶ 18 ("Plaintiff was first brought to Defendant's mansion in or about ***the spring of 2003***.") (emphasis added) *and* FAC ¶ 19 ("Defendant thereafter lured [Plaintiff] to [his home] on at least one and perhaps two other occasions ***in the spring and/or summer of 2003***.") (emphasis added). These official records are subject to judicial notice, *see, e.g.*, Coney v. Smith, 738 F.2d 1199, 1200 (11th Cir. 1984) (citing Moore v. Estelle, 526 F.2d 690, 694 (5th Cir. 1976)), and this Court can and should take note of them. Oxford Asset Mgnt., 297 F.3d at 1188.

But even if Defendants' state-law pleas did involve state-law offenses against Plaintiff—which they did not—§ 2255 only authorizes suit based on predicate convictions under certain ***federal*** statutes: "Any minor who is a victim of a ***violation of section 2241(c), 2242, 2243, 2251, 2251A, 2252, 2252A, 2260, 2421, 2422, or 2423 of this title*** … may sue." 18 U.S.C. § 2255 (2003 & 2006). Needless to say, a conviction under Florida law is not a conviction under federal law, and there is no basis for accepting Plaintiff's assertion that Defendant's Florida pleas put him "in the same position as if he had been tried and convicted of the sexual offenses committed against Plaintiff and, as such, must admit liability unto Plaintiff." FAC ¶ 24. To reiterate, this Court may not accept "unwarranted deductions of facts or legal conclusions masquerading as facts," Oxford Asset Mgnt., 297 F.3d at 1188 (citing Fernandez-Montes, 987 F.2d at 284), and Plaintiff's contrary assertions "will not prevent dismissal." *Id.*

Because Plaintiff has not alleged—and cannot allege—that Defendant has been convicted of committing a predicate federal criminal offense against her, the FAC must be dismissed.

III. COUNT ONE OF THE FAC MUST BE DISMISSED BECAUSE IT DOES NOT PLEAD A VIOLATION OF 18 U.S.C. § 2422(b).

Count I of the FAC asserts a cause of action under 18 U.S.C. § 2255 predicated on a claim that Defendant violated 18 U.S.C. § 2422(b). As set forth above, this Count is legally unsustainable for the simple reason that Defendant has never been convicted of an offense under 18 U.S.C. § 2422(b). *Supra* at § II. In the alternative, Count I must be dismissed because the FAC does not make factual allegations that, even if true, would establish that Defendant violated § 2422(b) or that Plaintiff is the victim of such a violation. That statute provides:

> Whoever, ***using*** the mail or any facility or ***means of interstate … commerce … knowingly persuades, induces, entices, or coerces*** any individual who has not attained the age of 18 years, ***to engage in prostitution or any sexual activity*** for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned.

18 U.S.C. § 2422(b) (2003).

As the statute's text makes clear, the essence of this crime is the misuse of an interstate facility to communicate prohibited things—that is, ***the using*** of a means or facility of interstate commerce ***to persuade, induce, entice or coerce*** a person ***known by the defendant to be a minor*** to engage in prohibited sexual conduct—rather than the sexual conduct itself. As a result, the communication (the inducement of a known minor to engage in prohibited sexual conduct) must occur through the interstate facility (the mail, phone, or internet)—not thereafter—and the *scienter* element must be present while the facility is being used. *See United States v. Murrell*, 368 F.3d 1283, 1286 (11th Cir. 2004) ("[T]he government must first prove that [Defendant], ***using the internet***, acted with a ***specific intent to persuade, induce, entice, or coerce a minor to engage in unlawful sex***.") (emphasis added); United States v. Davis, 165 Fed. Appx. 586, 588 (10th Cir. 2006) ("[T]he government must show: '(1) use of a facility of interstate commerce; (2) to knowingly persuade, induce, entice, or coerce; (3) any individual who is younger than 18; (4) to engage in any sexual activity for which any person can be charged with a criminal offense, or attempting to do so.'") (quoting United States v. Thomas, 410 F.3d 1235, 1245 (10th Cir. 2005)).

A simple example illustrates this point. Suppose that a "John" walks to a downtown area where prostitutes are known to gather. He approaches several women, and asks each one how old she is. The first few women state that they are 18, but eventually one states that she is 16. The "John" then threatens to call the police unless she has intercourse with him. She does so; he pays her $200 and walks away. There is no question that the "John" has knowingly solicited (and, indeed, coerced) prostitution from a minor in violation of state law. But there also is no question that the "John" cannot be convicted under 18 U.S.C. § 2422(b), because he did not ***use a facility of interstate commerce to coerce the victim***: he merely talked to her in person. This point helps explain why the Eleventh Circuit recently noted that federal law "does not criminalize all acts of prostitution (a vice traditionally governed by state regulation)." United States v. Evans, 476 F.3d 1176, n.1 (11th Cir. 2007); *see also* Offense Instruction 80, *Eleventh*

Circuit Pattern Jury Instructions—Criminal (2003) (instructing jury that it must find beyond reasonable doubt that "the Defendant knowingly ***used*** [the mail] [a computer] [describe other interstate facility as alleged in indictment] ***to*** attempt to persuade, induce, entice [or coerce] an individual under the age of eighteen (18) to engage in sexual activity") (emphasis added).

While the statute is unambiguous on this point, it bears note that this plain-text reading of the law finds additional support in the law's legislative history. Congress first enacted § 2422(b) as part of the Telecommunications Act of 1996 to combat sexual predators who solicit minors over the Internet. *See* H.R. Conf. Rep. No. 104-458, at 193 (1996) (expressing "the need for Congress to take effective action to protect children and families ***from online harm***") (emphasis added); *see also United States v. Searcy*, 418 F.3d 1193, 1197 (11th Cir. 2005) (noting that Congress enacted § 2422(b) "after the Senate Judiciary Committee held a hearing regarding child endangerment ***via the internet***") (emphasis added). Prior to that time, § 2422 targeted only inducements ***to travel across state or national borders***: "Whoever knowingly persuades, induces, entices or coerces any individual to travel in interstate or foreign commerce … to engage in prostitution or any [criminal] sexual activity … shall be fined under this title or imprisoned not more than five years, or both." 18 U.S.C. § 2422 (1995). With no nexus to use of an interstate instrumentality, the existing law did nothing to address the problem of internet predators, whose conduct might have nothing to do with interstate or transnational travel.

Accordingly, when Congress added § 2422(b), it borrowed the predecessor statute's language about knowing persuasion, and—with an eye to online communications—criminalized the use of an interstate facility to knowingly persuade a minor to engage in otherwise unlawful conduct. Congress clearly was aiming at the use of the internet to recruit minors into unlawful sexual activity—not in-person solicitation. *See, e.g.*, 144 Cong. Rec. H4491-03, H4491 (statement of Rep. McCollum) (June 11, 1998) ("H.R. 3494 targets pedophiles who stalk children on the Internet. It prohibits contacting a minor over the Internet for the purposes of

engaging in illegal sexual activity.").

This simple point is dispositive. The FAC never alleges that Defendant "persuade[d], induce[d], entice[d], or coerce[d]" Plaintiff to engage in prohibited sexual conduct "using the mail or any facility or means of interstate or foreign commerce." 18 U.S.C. § 2422(b). It does not allege that Defendant ever mailed Plaintiff anything, much less that he coerced her to engage in prohibited sexual activity by doing so. It does not allege that Defendant ever called or text-messaged Plaintiff, much less that he coerced her to engage in prohibited sexual activity by doing so. It does not allege that Defendant ever e-mailed or instant-messaged Plaintiff, much less that he coerced her to engage in prohibited sexual activity using any internet technology.

To the contrary, the FAC alleges that Defendant's efforts to induce Plaintiff to engage in prohibited sexual conduct took place ***exclusively*** in person, without any use of an interstate means or facility. The FAC alleges that "in or about the spring of 2003," Plaintiff "was recruited by one of Defendant's agents to give Defendant a massage for compensation," and that Defendant's agent "drove [Plaintiff] to [Defendant's] mansion." FAC ¶ 18. After she allegedly was led to the massage room, the FAC alleges that a topless woman "with dark hair [and] an accent … tried to coax Plaintiff to remove her shirt." *Id.* Defendant entered the room, and eventually asked Plaintiff to massage his buttocks. *Id.* He then allegedly "ordered Plaintiff to remove her clothes," "began masturbating and fondling her breasts," and "asked her to do more," but "she adamantly declined." *Id.* She allegedly was paid $200, and then driven away by Defendant's agent. *Id.* Plaintiff further alleges that she was "lured" to the mansion "on at least one and perhaps two other occasions in the spring and/or summer of 2003," but provides no details regarding those alleged encounters. *Id.* ¶ 19. Given the lack of any claim that Defendant used the mail, phone, or internet to induce Plaintiff to engage in prohibited sexual conduct—and the FAC's admission that all alleged inducements and solicitations occurred ***in person***, without use of an interstate instrumentality—Count One must be dismissed because it fails to provide

factual allegations that, if true, would show that Plaintiff is the victim of a violation of § 2242(b).

To be sure, Plaintiff does allege that "Defendant or an authorized agent would call and alert Defendant's assistants shortly before or after he arrived at his Palm Beach residence," FAC ¶ 11—just like any professional would alert his or her administrative assistant that he or she was coming to town. But Congress has not made that a crime, and even if Defendant's assistants later "would seek out economically disadvantaged and underage girls from West Palm Beach," *id.*, it cannot reasonably be said that Defendant was "using the mail or any facility or means of interstate … commerce [to] knowingly persuade[], induce[], entice[], or coerce[a minor] to engage in prostitution or any sexual activity." 18 U.S.C. § 2242(b). Again, the statute only prohibits online or telephonic contact with minors—not with one's secretary.

Nor is it sufficient that Plaintiff baldly asserts that Defendant "traveled to his mansion in Palm Beach for the purpose of luring minor girls," and "used the telephone to contact these minor girls for the purpose of coercing them into acts of prostitution." 18 U.S.C. § 2242(b). These bald allegations cannot survive a motion to dismiss. *See Iqbal*, slip op. at 14 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice."); *Twombly*, 550 U.S. at 561 (it is not enough that "the pleadings le[ave] open the possibility that a plaintiff might later establish some set of undisclosed facts to support recovery") (quotation and alteration omitted). And even if they could, these unsupported claims do not demonstrate that ***this Plaintiff*** is entitled to relief: whether or not Defendant ever used to phone to contact ***some*** minor, a bare allegation that he called someone, sometime, does not remotely establish that he called ***Plaintiff***—much less that he used the phone to coerce ***Plaintiff*** into engaging in prohibited sexual contact.

The bottom line is that Plaintiff would have alleged that Defendant called her and induced her over the phone to commit a prohibited sex act if she could, and she would have done so with at least the same amount of detail with which she has alleged the single encounter she

describes. But she hasn't—because she can't—and Count I must be dismissed with prejudice.

IV. COUNT TWO MUST BE DISMISSED BECAUSE IT DOES NOT PLEAD A VIOLATION OF 18 U.S.C. § 2423(b).

Count II of the FAC asserts a cause of action under 18 U.S.C. § 2255 predicated on a claim that Defendant violated 18 U.S.C. § 2423(b). Again, as set forth above, this Count is legally unsustainable for the simple reason that Defendant has never been convicted under § 2423(b). *Supra* at § II. In the alternative, Count II still must be dismissed because the FAC does not make factual allegations that, even if true, would establish that Defendant violated § 2423(b) or that Plaintiff is the victim of such a violation.

As a threshold matter, however, it bears note that the FAC's factual allegations are so vague that it cannot be determined which version of 18 U.S.C. § 2423(b) even applies to this Count. Prior to April 30, 2003, 18 U.S.C. § 2423(b) provided that:

> A person who travels in interstate commerce, or conspires to do so, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, or conspires to do so, ***for the purpose of engaging in any sexual act (as defined in section 2246) with a person under 18 years of age that would be in violation of chapter 109A if the sexual act occurred in the special maritime and territorial jurisdiction of the United States*** shall be fined under this title, imprisoned not more than ***15 years***, or both.

18 U.S.C. § 2423(b) (2002) (emphasis added). On April 30, 2003, the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, or "PROTECT Act," Pub. L. No. 108-21, 117 Stat. 650, became effective, and § 2423 was amended to read:

> A person who travels in interstate commerce or travels into the United States, or a United States citizen or an alien admitted for permanent residence in the United States who travels in foreign commerce, ***for the purpose of engaging in any illicit sexual conduct with another person*** shall be fined under this title or imprisoned not more than 30 years, or both.

18 U.S.C. § 2423(b) (2003) (emphasis added).

The obvious problem is that Plaintiff has not pleaded the dates on which the alleged travel or resulting sexual activity occurred. She merely alleges that she "was first brought to

Defendant's mansion in or about the spring of 2003," FAC ¶ 18, and that she later was "lured … to the Epstein mansion on at least one and perhaps two other occasions in the spring and/or summer of 2003." *Id.* ¶ 19. Since these vague allegations leave open the possibility that the alleged predicate conduct could have occurred either before ***or*** after the PROTECT Act's effective date, it is impossible to determine what law governs. No matter how generously one construes the pleading standards, they at least require allegations that are sufficiently precise to permit the Court to determine what law governs. Yet without alleging any specific dates, the FAC falls well short of that mark and ought to be dismissed for that reason alone.

Under either version of the statute, however, the key point is that § 2423 does not prohibit interstate travel that merely happens to result in illicit sexual conduct. Instead, the courts repeatedly have held that the statute applies only if the defendant's ***dominant*** motive for interstate travel was to engage in unlawful sexual activity. *See, e.g.*, United States v. Tykarsky, 446 F.3d 458, 471 (3d Cir. 2006) ("[T]he government must show that the criminal sexual act was a ***dominant*** purpose of the trip, not a merely incidental one.") (citing United States v. Hayward, 359 F.3d 631, 638 (3d Cir. 2004)) (emphasis added). That interpretation of the law is obviously correct. While § 2423(b) is relatively new—it first was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat 1796, 2037—it was added to the Mann Act (first passed in 1910) and uses the identical "for the purpose of" language set forth in the original version of that statute. *See* 18 U.S.C. § 2423(a) (1986). Accordingly, courts addressing § 2423(b) have relied on longstanding case law interpreting the Mann Act's use of the statutory phrase. *See, e.g.*, United States v. Garcia-Lopez, 234 F.3d 217, 220 n.3 (5th Cir. 2000); United States v. Vang, 128 F.3d 1065, 1069-70 (7th Cir. 1997); United States v. Ellis, 935 F.2d 385, 389-90 (1st Cir. 1991); *see also* United States v. Hoschouer, 224 Fed. Appx. 923, 926-27 (11th Cir. 2007) (unpublished opinion); *cf.* Gustafson v. Alloyd Co., Inc., 513 U.S. 561, 570 (1995) ("[W]e adhere[] to the normal rule … that "identical words used in different parts of

the same act are intended to have the same meaning.") (quotation and citation omitted).

Two Mann Act cases are particularly apt. In Hansen v. Haff, 291 U.S. 559 (1934), the Government charged the defendant with violating the Mann Act after she returned to the country with a man with whom she was having "illicit relations." *Id.* at 561. Despite the fact that the woman intended to "continue her irregular and improper conduct [after] returning," the Court held that she had not violated the Act: "People not of good moral character like others, travel from place to place and change their residence. But to say that, because they indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance." *Id.* at 562-63. Likewise, in Mortensen v. United States, 322 U.S. 369 (1944), defendants were convicted after two women they employed as prostitutes at their Nebraska brothel traveled to Utah and back, where they resumed their unlawful activities. *Id.* at 372. Again, the Supreme Court reversed: "An intention that the women or girls shall engage in the conduct outlawed by [the Mann Act] must be found to exist before the conclusion of the interstate journey and must be ***the dominant motive*** of such interstate movement. And the transportation must be ***designed to bring about such result***." *Id.* at 374.

The FAC does not remotely allege that Defendant's dominant motive for traveling to Palm Beach "in or about the spring of 2003" was to engage in unlawful sexual activity. FAC ¶ 18. Instead, as the FAC makes clear, Defendant is a successful businessman who maintains homes and properties around the world. *Id.* ¶ 8. Even if the FAC's fanciful allegations regarding Defendant's conduct while at those homes were true, the FAC does not remotely allege that his ***dominant motive*** for travel was to engage in illicit sexual acts (much less that he traveled with the dominant purpose of engaging in illicit activities with Plaintiff) or that his travel was specifically "designed to bring about such a result." Mortenson, 322 U.S. at 374. As Iqbal and Twombly make clear, plaintiffs cannot withstand a motion to dismiss by baldy asserting that an offense occurred and holding out hope that they "might later establish some set of undisclosed

facts" to support the claim. Instead, each element must be supported by an adequate factual allegation. Twombly, 550 U.S. at 561; *see also* Iqbal, slip op. at 14 ("The plausibility standard … asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'") (quoting *Twombly*, 550 U.S. at 557 (alteration in original)).

Indeed, Twombly itself supplies an excellent parallel. Plaintiffs there alleged that the defendants engaged in coordinated activities that violated the antitrust laws, and asserted that defendants thus must have agreed to restrain trade. As the Court observed, however, plaintiffs' otherwise specific allegations of parallel conduct were as likely innocent as they were consistent an agreement to restrain trade:

> [A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out…, they must be placed in a context that raises a suggestion of a preceding agreement, not merely parallel conduct that could just as well be independent.

Id. at 556-57.

So too here. The mere fact that Defendant traveled between his residences and allegedly engaged in illicit conduct while at his homes hardly suggests that the dominant purpose of his travel was to engage in illicit sexual activity. Instead, Defendant's travel is equally consistent with the truth: that his vast business operations and charitable activities required frequent travel, and that any sexual activity—legal or not—that occurred was incidental to the legitimate purposes that motivated his trips. *See, e.g.*, Hansen, 291 U.S. at 562-63 ("[T]o say that, because [persons] indulge in illegal or immoral acts, they travel for that purpose, is to emphasize that which is incidental and ignore what is of primary significance."). Without more, the FAC thus fails to allege facts that, even if true, would establish that Defendant engaged in the sort of sex

tourism that violates 18 U.S.C. § 2423(b), or that Plaintiff herself is the victim of such an offense. *See* Twombly, 550 U.S. at 557. Count II muse be dismissed.

V. COUNT THREE MUST BE DISMISSED BECAUSE IT DOES NOT PLEAD A VIOLATION OF 18 U.S.C. § 2251.

Count III of the FAC asserts a cause of action under 18 U.S.C. § 2255 predicated on allegations that Defendant violated 18 U.S.C. § 2251. Again, as set forth above, this Count is legally unsustainable for the simple reason that Defendant has never been convicted under § 2251. *Supra* at § II. In the alternative, Count III still must be dismissed because the FAC does not make factual allegations that, even if true, would establish that Defendant violated 18 U.S.C. § 2251 or that Plaintiff is the victim of such a violation.

Yet again, Plaintiff's failure adequately to plead the dates on which the alleged predicate conduct occurred makes it impossible to determine which version of § 2251 applies in this case. Prior to April 30, 2003, § 2251 provided that:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in … any sexually explicit conduct ***for the purpose of producing any visual depiction of such conduct***, shall be punished … ***if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed***, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, including by computer, ***or if such visual depiction has actually been transported in interstate or foreign commerce or mailed***.

18 U.S.C. § 2251 (2002) (emphasis added). As with § 2423(b), however, Congress made significant changes to the statute when the PROTECT Act became effective on April 30, 2003:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in … any sexually explicit conduct ***for the purpose of producing any visual depiction of such conduct or for the purpose of transmitting a live visual depiction of such conduct***, shall be punished … ***if such person knows or has reason to know that such visual depiction will be transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate or foreign commerce or mailed***, if that visual depiction was produced ***or transmitted*** using materials that have been mailed, shipped, or transported in ***or affecting*** interstate or foreign commerce by any means, including by computer, ***or if such visual depiction has actually been transported or transmitted using any means or facility of interstate or foreign commerce or in or affecting interstate***

or foreign commerce or mailed.

18 U.S.C. § 2251 (2003) (emphasis added; underscored to denote amended text).

Under either version, however, Count III must be dismissed because Plaintiff fails to plead that Defendant's dominant motive for enticing her to engage in sexual conduct was to produce images of that conduct; that Defendant actually produced an image of Plaintiff; or that Defendant either knew that the resulting images would be transported in interstate commerce or actually transported or transmitted those photographs in interstate commerce. Instead, the FAC alleges only that Defendant displayed photos of other women in his homes and on his computer, *see* FAC at ¶¶ 14 & 16, and "***may have*** taken lewd photographs of Plaintiff … and ***may have*** transported lewd photographs of Plaintiff … to his other residences and elsewhere using a facility or means of interstate and/or foreign commerce." *Id.* ¶¶ 16 & 34 (emphasis added).

Those speculative assertions are insufficient to sustain Plaintiff's burden at the pleading stage. In our legal system, defendants cannot properly be subjected to the burden and expense of discovery—and the accompanying pressure to settle—based on claims that they "may have" done something wrong. Instead, "the complaint's allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level; if they do not, the plaintiff's complaint should be dismissed." James River Ins. Co. v. Ground Down Eng'g, Inc., 540 F.3d 1270, 1274 (11th Cir. 2008) (citation and quotation omitted); *see also* Iqbal, slip op. at 15 (complaint must be dismissed "where the well-pleaded facts do not permit the court to infer more than ***the mere possibility*** of misconduct") (emphasis added); Bawa v. U.S., No. C 07-00200 WHA, 2007 WL 1456040, *5 (N.D. Cal. May 17, 2007) (dismissing complaint alleging that defendant "may have played a substantial role" in the underlying crime).

Plaintiff has not remotely alleged that a crime actually was committed, and if she could have done so in good faith, there is little doubt that she would have. Having failed to push her claims from the realm of the possible into the realm of the plausible, there is no basis for

allowing Plaintiff to proceed. Count III must be dismissed with prejudice.

VI. COUNTS FOUR AND FIVE MUST BE DISMISSED BECAUSE THEY DO NOT PLEAD VIOLATIONS OF 18 U.S.C. §§ 2252(a)(1) OR 2252A(a)(1).

Count IV of the FAC asserts a cause of action under 18 U.S.C. § 2255 predicated on allegations that Defendant violated 18 U.S.C. § 2252(a)(1). Count V of the FAC asserts a cause of action under 18 U.S.C. § 2255 predicated on allegations that Defendant violated 18 U.S.C. § 2252A(a)(1). Again, as set forth above, these Counts are legally unsustainable for the simple reason that Defendant has never been convicted under § 2252(a)(1) or § 2252A(a)(1). *Supra* at § II. In the alternative, Counts IV and V still must be dismissed because the FAC does not make factual allegations that, even if true, would establish that Defendant violated either statute or that Plaintiff is a victim of such a violation. By its plain terms, § 2252(a)(1) provides:

> Any person who … ***knowingly transports or ships using any means or facility of interstate or foreign commerce*** … any visual depiction, if … the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct and … such visual depiction is of such conduct … shall be punished as provided in subsection (b) of this section.

18 U.S.C. § 2252(a)(1) (2002 & 2003) (emphasis added). Similarly, the pre- and post-PROTECT Act versions of § 2252A(a)(1) provide:

> Any person who … ***knowingly mails, or transports or ships in interstate or foreign commerce by any means, including by computer, any child pornography*** … shall be punished as provided [by law].

18 U.S.C. § 2252A(a)(1) (2002 & 2003) (emphasis added). In turn, the term "child pornography" was defined both pre- and post-PROTECT Act, and in relevant part, as:

> any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture… of sexually explicit conduct, where … the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct.

18 U.S.C. § 2256(8) (2002 & 2003).

As with Count III, however, the FAC does not remotely allege that Plaintiff is a victim of a violation of §§ 2252(a)(1) or 2252A(a)(1). Instead, the FAC alleges only that Defendant

displayed photos of other unidentified women in his homes and on his computer, *see* FAC at ¶¶ 14 & 16, and "***may have*** taken lewd photographs of Plaintiff … with his hidden cameras and ***may have*** transported lewd photographs of Plaintiff … to his other residences and elsewhere using a facility or means of interstate and/or foreign commerce." FAC ¶¶ 16, 38, 43 (emphasis added). Again, it simply is not enough to allege that Defendant "may have" done something wrong: "the complaint's allegations must plausibly suggest that the plaintiff has a right to relief, raising that possibility above a speculative level; if they do not, the plaintiff's complaint should be dismissed." *James River Ins. Co.*, 540 F.3d at 1274 (citation and quotation omitted); *see also Iqbal*, slip op. at 15 (holding the a complaint must be dismissed "where the well-pleaded facts do not permit the court to infer more than ***the mere possibility*** of misconduct") (emphasis added). Because the FAC only speculates that Defendant "may have" committed a crime, and because Plaintiff surely would have charged that Defendant actually committed a crime if she had a good-faith basis for doing so, Counts IV and V must be dismissed with prejudice.

VII. COUNT SIX MUST BE DISMISSED BECAUSE 18 U.S.C. § 2252A(g) WAS NOT ENACTED UNTIL 2006.

Count VI of the FAC asserts a cause of action under 18 U.S.C. § 2255 predicated on allegations that Defendant violated 18 U.S.C. § 2252A(g). Again, as set forth above, this Count is legally unsustainable for the simple reason that Defendant has never been convicted under § 2251. *Supra* at § II. In the alternative, Count VI still must be dismissed because § 2252A(g) was not enacted until 2006—three years after the alleged conduct underlying this case took place. *See* Pub. L. 109-248, Title VII, § 701, July 27, 2006, 120 Stat. 614, 647. As set forth above, *supra* § I.B.2, the *Ex Post Facto* Clause flatly precludes the application of new statutes to conduct completed prior to the statute's enactment, and there is any event no indication that Congress intended to apply this provision of the Adam Walsh Act retroactively to completed conduct. *See supra* § I.B.1 (noting that Congress expressly made certain provisions of the Adam

Walsh Act retroactive, but not others). Thus, while Plaintiff has not adequately pleaded a violation of § 2252A(g) in the first place, there is no lawful basis under which she could assert a cause of action predicated on that statute. Count VI must be dismissed with prejudice.

VIII. ANY SURVIVING COUNTS SHOULD BE MERGED INTO A SINGLE COUNT.

While we respectfully submit that none of the FAC's counts are viable and that each should be dismissed with prejudice, this Court should require the merger of all claims into a single count to the extent it rejects the foregoing analysis and allows more than one count to proceed. Contrary to Plaintiff's attempt to multiply her recovery by asserting six separate counts, § 2255 creates a single cause of action with a single penalty for all violations of a predicate offense, not separate causes of action and separate recoveries on a "per violation" basis. We have not found a single precedent where a § 2255 plaintiff has been allowed to assert claims on a "per violation" basis—each of the prior cases (including the prior cases involving this defendant in this Court) involved a single count predicated on multiple alleged violations of predicate criminal statutes. *See* Tilton v. Playboy Entertainment Group, Inc., 554 F.3d 1371 (11th Cir. Jan. 15, 2009); Smith, 428 F. Supp. 2d at 432; Doe, 478 F. Supp. 2d at 754; Doe No. 2 v. Epstein, 2009 WL 383332 (S.D. Fla. Feb. 12, 2009); Doe No. 3 v. Epstein, 2009 WL 383330 (S.D. Fla. Feb. 12, 2009); Doe No. 4 v. Epstein, 2009 WL 383286 (S.D. Fla. Feb. 12, 2009); and Doe No. 5 v. Epstein, 2009 WL 383383 (S.D. Fla. Feb. 12, 2009).

There is no basis for indulging Plaintiff's contrary approach. Instead, the plain language and structure of the statute foreclose Plaintiff's unprecedented approach. First, the order of the two sentences establishing the statutory penalty under § 2255(a) demonstrate that Congress did not mean to allow for a minimum mandatory recovery in the amount of $50,000 for each predicate violation. The first sentence provides that "[a]ny person who … suffers personal injury as a result of such violation … shall recover the ***actual damages*** such person sustains and the cost of the suit, including a reasonable attorney's fee." 18 U.S.C. § 2255(a) (emphasis added).

Then, in recognition of the fact that damages in these cases may be hard to prove, the second sentence provides for recovery of a minimum amount: "Any minor as described in the preceding sentence shall be deemed to have sustained damages of ***no less than $50,000***." *Id.* Together, these provisions indicate that Congress intended to provide restitution to victims—that is, to award them "actual damages"—but that where actual damages were less than $50,000 or otherwise impossible to prove, the statute would guarantee a lump-sum, make-whole penalty of $50,000 for all injuries sustained as a result of the predicate acts.

Moreover, the fact that Congress did not expressly provide for damages on a "per violation" basis further underscores the fact that Congress sought to provide only a lump-sum recovery for all injuries sustained by a victim. After all, while Congress knows exactly how to provide for damages on a "per violation" basis when it wants to, it did not do so here. *See, e.g.*, 18 U.S.C. § 216 (authorizing a "civil action … against any person who engages in conduct constituting an offense under" specified sections of the bribery, graft, and conflicts of interest statutes, and authorizing "a civil penalty of not more than $50,000 ***for each violation*** or the amount of compensation which the person received or offered for the prohibited conduct, which ever amount is greater") (emphasis added); *see also* 18 U.S.C. § 49; 18 U.S.C. § 1034; 18 U.S.C. § 2318. As the Eleventh Circuit repeatedly has explained, "where Congress knows how to say something but chooses not to, its silence is controlling." Delgado v. United States Att'y Gen., 487 F.3d 855, 862 (11th Cir. 2007) (quoting CBS, 245 F.3d at 1226 (itself quoting Griffith, 206 F.3d at 1394 with citation and quotations omitted))) (alteration omitted).

Because the statute provides a single cause of action with a single remedy, this Court should order Plaintiff to merge all surviving claims—if any—into a single count.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this 26th day of May, 2009

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