KIRKLAND & ELLIS LLP

Response to Letter by FAUSA [redacted] Dated May 19, 2008

In a May 19, 2008 letter to Jay Lefkowitz (*See* Tab 1), SDFL First Assistant U.S. Attorney [redacted] provided what purported to be a summary of the events that have occurred during the investigation of Mr. Epstein. Mr. [redacted] letter is fraught with inconsistencies, false and misleading characterizations and outright falsehoods. The comparison below between the false assertions in Mr. [redacted] letter and what actually transpired is only the tip of the iceberg. We respectfully submit that Mr. [redacted] letter alone demonstrates the degree to which the record of facts have been distorted and these distortions have permeated this unprecedented investigation.

1. "INDEPENDENT" AND "DE NOVO" REVIEW.

Mr. [redacted] Letter:

- "[W]e obliged your request for an independent *de novo* review of the investigation and facilitated such review at the highest levels of the Department of Justice." Tab 1, May 19, 2008 Letter from [redacted], p. 5, ¶ 3.

The Truth:

- CEOS' review, concluded in May 2008, was neither independent nor *de novo*.
    - CEOS' review was not "independent:"
        - [redacted], who conducted the review on behalf of CEOS, ***had already reviewed the prosecution memo on this matter eight months earlier***. During a meeting with defense counsel at the United States Attorney's Office in Miami (the "USAO") in September of 2007, he opined that he so believed in the prosecution that he "***would try the case myself***."
        - Indeed, Mr. [redacted] acknowledges that Mr. [redacted] had previously opined on this matter, stating:

> This particular attack on this statute [18 U.S.C. § 2242(b)] had been ***previously*** raised and thoroughly considered ***and rejected by . . . CEOS*** prior to the execution of the [Deferred Prosecution] Agreement [in September 2007].

Id., p. 5 (emphasis added).

        - The statute Mr. [redacted] referred to (§ 2422(b)) lies at the heart of the Epstein investigation. Thus, according to Mr. [redacted], Mr. [redacted] was tasked with ***reviewing his own prior decision*** regarding applying the key statute under which the SDFL proposed prosecuting Mr. Epstein.

- The defense immediately raised concerns regarding the non-independence of the review when told that it would be Mr. [redacted] tasked with providing the review, but was told that when Mr. [redacted] rendered his prior opinion, "he was not really up to speed on the facts"

- CEOS' review was not *de novo*:

  - By letter dated May 15, 2008 (four days before Mr. [redacted] letter), Mr. [redacted] advised Mr. Lefkowitz that CEOS reviewed the matter only for ***abuse of discretion***:

    > ***[T]he question we sought to answer*** was whether U.S. Attorney Acosta would ***abuse his discretion*** if he authorized prosecution in this case.

    See Tab 38, May 15, 2008 Letter from D. [redacted], p. 1 (emphasis added). *See also*, *id.*, p. 2 ("Mr. Acosta would not be ***abusing his discretion*** if he decided to pursue such a course of action."); and p. 5 ("Mr. Acosta would not be ***abusing his*** prosecutorial ***discretion*** should he authorized federal prosecution of Mr. Epstein.").

  - For the factual record of its "abuse of discretion" review, CEOS relied on the very same prosecution memo that it had already reviewed in rendering its prior opinion, stating:

    > As you know, our review of this case is limited, both factually and legally. We have not looked at the entire universe of facts in this case.

    See Id., p. 1 (emphasis added).

  - Nor did CEOS review any facts related to the irregular provisions in the Deferred Prosecution Agreement or the numerous complaints of prosecutorial misconduct, both of which are inextricably intertwined with the impropriety of the investigation. *Id.* at 1.

2. NOTIFICATION OF WITNESSES.

Mr. [redacted] Letter:

- Mr. [redacted] dismissed the totality of the defense's objections to the inappropriate notification the SDFL proposed to send to its witnesses, stating merely that:

  > "[Y]ou objected to victims['] being notified of ***time and place*** of Epstein's state[-]court sentencing hearing."

See Tab 1, May 19, 2008 Letter from [redacted], p. 4, ¶ 1.

The Truth:

- The defense engaged in days of negotiation and made 14 separate ***substantive*** objections to the unprecedented notification letter that Mr. [redacted] threatened to send to an undisclosed list of "victims." The eventual transmission of this highly misleading letter was only halted by an appeal to AAG Fisher. Among those substantive objections (which related to far more than the "time and place" of the state's sentencing hearing) were:

    - Sending the letter would contravene the government's commitment to take no position regarding potential claims of government witnesses. *See* Tab 39, November 28, 2008 Email from [redacted]. Lefkowitz to [redacted].

    - The letter cited to an inapplicable statute (the Justice for All Act of 2004) as its justification for being sent. *Id.* AUSA Acosta later conceded that the citation to this statute as a justification was wholly incorrect.

    - The letter wrongly advised all recipients that Mr. Epstein would be required to register as "a ***sexual predator*** for the remainder of this life."

    - The letter amounted to an invitation to civil litigation against Mr. Epstein, advising recipients that they had the right to seek civil damages from Mr. Epstein, and in an underlined instruction, stated that if they chose an attorney other than the one chosen by the government they would be required to pay his fees, but if they chose the government's choice, Mr. Epstein would be required to pay the fees.

3. MISCHARACTERIZATION OF OUR ARGUMENTS.

Mr. [redacted] Letter:

- Mr. [redacted] letter misleadingly characterizes our substantive defense of the government's investigation as, "the investigation merely produced evidence of relatively innocuous sexual conduct with some minors who, unbeknownst to Mr. Epstein, misrepresented their ages."

  See Tab 1, May 19, 2008 Letter from [redacted], p. 2.

The Truth:

- We never made such a claim. To the contrary, we argued that sworn statements we have taken of the alleged victims demonstrate that law enforcement has presented versions of their testimony that are necessarily sensationalized and fictionalized. We presented

evidence that Mr. Epstein routinely and daily receives massages from adults. Only a small percentage of the masseuses turned out to be minors. The majority of those minors interviewed by law enforcement admitted to lying directly to Epstein about their ages (not "unbeknownst to Epstein"), and inventing further false details to substantiate their lies. Indeed, the civil attorney for several of these women admitted at his recent press conference that they lied to Mr. Epstein about their ages. Numerous witnesses testified that Mr. Epstein asked that all masseuses be over the age of 18. Further, the evidence is undisputed that Mr. Epstein's assistants scheduled the massages and Mr. Epstein did not know which masseuses his assistants had scheduled on a particular day, until the massage took place. We admitted that there was sexual conduct, and argued—not that it was "innocuous" as Mr. [redacted] alleges—but that it was mostly Mr. Epstein's own self-pleasuring, which did not satisfy the requisite federal element of criminal sexual conduct (which is, in turn, defined by state law). These are important distinctions and show that Mr. [redacted] has misrepresented the record about the most basic part of our defense.

4. [redacted] DEMANDS AN UNREALISTIC DEADLINE TO COMPLY WITH AN AGREEMENT HE UNILATERALLY MODIFIES.

Mr. [redacted] Letter:

- "Unless [Mr. Epstein] complies with all of the terms and conditions of the [Deferred Prosecution] Agreement, ***as modified by the United States Attorney's December 19, 2007 letter to Ms. Sanchez*** by close of business on Monday, June 2, 2008, the SDFL will elect to terminate the Agreement." *Id.*, p.1

The Truth:

- The Deferred Prosecution Agreement was **never** modified by U.S. Attorney Acosta's December 19, 2007 letter. Oddly, Mr. [redacted] acknowledges this on page 4 of his May 19 letter, where he writes that Mr. Acosta "proposed" this modification and that "[Mr. Lefkowitz] rejected these proposals." Thus, Mr. [redacted] is threatening to terminate the Deferred Prosecution Agreement, unless Mr. Epstein complies with a unilateral modification that Mr. [redacted] concedes was never agreed to by defense counsel.

- Orchestrating the information, plea and sentencing requirements of the Deferred Prosecution Agreement within the extremely limited two-week timeframe imposed by Mr. [redacted] June 2, 2008 deadline would have been difficult enough.

- More importantly, as explained below, the SDFL has refused to provide the defense with information it requires to enable Mr. Epstein to comply with the additional plea and sentencing requirements of the Deferred Prosecution Agreement (let alone, by the June 2 deadline arbitrarily imposed by Mr. [redacted]).

    - The Deferred Prosecution Agreement requires Mr. Epstein to plead guilty to and be sentenced for an additional offense which requires that he be registered as a sex offender. In different places in his May 19, 2008 letter, Mr. [redacted]

describes the additional charge to which Mr. Epstein is required to plead guilty under the Deferred Prosecution Agreement as "procurement of minors to engage in prostitution" or "solicitation of minors to engage in prostitution." The former is an offense for which Mr. Epstein would be required to register, but one for which the state has no evidence to charge Mr. Epstein and the SDFL refuses or is unable to provide evidence that it claims it has. The latter requires no registration, but it is the offense which, over and over again, Ms. [redacted] insisted upon including in the Deferred Prosecution Agreement, and is one which the State believes is appropriate. The inconsistency between the description of the offense required by the SDFL, the elements of an offense that can be justified on the facts of this case and the SDFL's requirement that the offense be a registrable one has created substantial confusion.

- As a result of this confusion, in December 2007, both the defense and the state requested that the SDFL provide the factual allegations to enable Mr. Epstein and the State to create a truthful factual recitation of a registrable offense required by the Deferred Prosecution Agreement, but, to date, the SDFL has failed to do so without any explanation.

- Mr. [redacted] refuses to provide the requested factual allegations, which the State cannot furnish, and now demands a two week deadline to comply. Thus Mr. [redacted] has unreasonably imposed a deadline with which he himself has made it impossible for Mr. Epstein to comply.

5. WAIVER OF APPEAL TO ASSISTANT ATTORNEY GENERAL FISHER.

Mr. [redacted] Letter:

- "[T]he SDFL provided you with 30 days to appeal the decision to the Assistant Attorney General of the United States Alice Fisher" and "you chose to forego an appeal to AAG Fisher."

Id., p. 2.

The Truth:

- Mr. Acosta tolled an August 17 deadline, acknowledging that there were "serious issues" about the case that needed to be discussed, and scheduled a meeting with the defense for September 7, 2007. At the September 7, 2007 meeting, with [redacted] in attendance, the government dismissed the defense's objections and set a September 21, 2007 deadline to finalize a non-prosecution agreement or the defense would face an already-drafted 53-page indictment, purportedly identifying 40 minors, with a guideline range of 188 months.

- Facing Ms. [redacted] threatened draconian indictment, without the claimed offer of the right to raise objections in an appeal to AAG Fisher, the defense chose to negotiate an

Agreement to Defer Prosecution to the State, an agreement without precedent and fraught with substantial practical and legal hurdles to its implementation.

6. THE SDFL DID NOT DEFER TO THE STATE.

[redacted] **Letter:**

- "[T]he SDFL indicated a willingness to defer to the State the length of incarceration."

  Id., p. 2.

The Truth:

- The SDFL neither deferred to the State, nor even discussed with the State, the length of Mr. Epstein's incarceration. In a letter to the defense, Criminal Division Chief, [redacted] rejected the sentence contemplated by the State's plea agreement, writing that "the federal interest will not be vindicated in the absence of a ***two-year term*** of state imprisonment." *See* Tab 40, August 3, 2007 Email from [redacted]. Of course, this position is contrary to Section 9-2031D of the U.S. Attorney's Manual (indicating that the "result" of a state prosecution is "***presume[d]***" to have vindicated the federal interest). It is understandable, therefore, that Mr. [redacted] might want to retreat from it now. Indeed, the final Deferred Prosecution Agreement (DPA) restricts the state-court judge from exercising any of his rightful discretion and to specifically prohibit the judge from offering probation, community control or any other alternative in lieu of incarceration. DPA, ¶ 2(a).

7. SUGGESTION OF ADDITIONAL STATE PLEA

Mr. [redacted] Letter:

- The parties considered: "as suggested by [the defense], a plea to state charges encompassing Epstein's conduct." *See* Tab 1, May 19, 2008 Letter from [redacted], p.2, ¶ 2.

The Truth:

- It was the government, and not the defense, that suggested a plea to state charges to resolve the federal investigation. [redacted] proposed declining prosecution in favor of the state. Although Mr. Epstein and the State Attorney's Office ***had already reached a plea agreement,*** in August 2007, Mr. [redacted] and AUSA [redacted] warned that they intended to prosecute Epstein federally unless his counsel (*i.e.,* not the U.S. Attorney's Office) sought ***more stringent conditions*** to the State's proposed plea agreement. These stringent conditions included, among other things, the two-year prison term demanded by Mr. [redacted] (discussed above) and a charge requiring him to register as a sex offender.

8. ALL IDENTIFIED VICTIMS BE PUT IN SAME POSITION AS IF EPSTEIN HAD BEEN TRIED.

Mr. [redacted] Letter:

- "The Agreement provides for a method of compensation for the victims such that they would be placed in the same position as if Epstein had been convicted of one of the enumerated offenses set forth in Title 18, United States Code Section, 2255."

  Id.

The Truth:

- Mr. [redacted] continues to mischaracterize the highly irregular provisions of the Deferred Prosecution Agreement. The SDFL did not merely attempt to preserve the compensation rights of those it identified as victims; it attempted to create compensation rights for those it identified, without imposing on them the burden of proving that they were in fact victims under § 2255.

  - In the Deferred Prosecution Agreement, the SDFL required Mr. Epstein to waive the right to contest liability under 18 U.S.C. § 2255 as to a list of individuals that the SDFL would not disclose to Mr. Epstein until after he was sentenced and to pay for an attorney to secure compensation under § 2255 for those undisclosed individuals, or if they decided to sue Mr. Epstein.

  - § 2255 ordinarily provides individuals with a right to recover minimum guaranteed damages of $150,000, without having to prove actual damages, only if: (1) they were victims of an enumerated federal offense, including offenses under 18 U.S.C. §§ 2422 and 2423, (2) they were minors at the time of the offense, and most importantly (3) they were personally injured as a result of the offense.

  - The defense has confirmed examples of women who testified that they were not victims of Mr. Epstein and suffered no personal injury. These women were, nevertheless, on the list of "victims" identified by the government. . In fact, when confronted with the testimony of a women who denied both being a victim and incurring personal injury, Ms. [redacted] actually acknowledged such testimony. To justify inclusion of that woman on the government's list, however, Ms. [redacted] then challenged her own witness's credibility.

- For this reason, it is false to state that these "identified" individuals are in the same position that they would have been had Epstein been convicted at trial. Had there been a trial, Mr. Epstein would have had a right to confront these individuals through cross-examination. Any individual that did not establish that she was a minor victim of conduct that satisfied each element of an enumerated statute under § 2255,or that she suffered personal injury, would not qualify for any treatment under § 2255. However, under the Deferred Prosecution Agreement, as an "identified individual" on the government's list,

this same individual would nevertheless be entitled to engage an attorney paid for by Mr. Epstein to recover $150,000 of damages from Mr. Epstein under § 2255 without ever alleging any injury. In fact, the defense was told that the only question Mr. Epstein would be permitted to ask before paying the girls is " have you ever met Epstein.". Thus, the Deferred Prosecution Agreement places identified individuals in a far better position than they would be in if Mr. Epstein were convicted at trial.

9. ASSIGNMENT OF RIGHT TO SELECT LEGAL REPRESENTATIVE.

Mr. [redacted] Letter:

- "Prior to any issues arising concerning the implementation of the 2255 provision, the SDFL unilaterally agreed to assign its responsibility to select the attorney representative for the alleged victims to an ***independent*** third-party."

  See Tab 1, May 19, 2008 Letter from [redacted], p. 4, f.3.

The Truth:

- That such an assignment was the SDFL's "***unilateral***" decision is false. Before the SDFL decided to assign selection of the "attorney representative" to an independent third party, AUSA [redacted] had already proposed an "attorney representative." She had proposed local products-liability lawyer, Humberto Ocariz, and claimed he had been recommended by a "good friend in the Appellate Division." Ms. [redacted] account was misleading, as it omitted that this "good friend" was her live-in boyfriend, and that Mr. Ocariz was his former law-school roommate. When we discovered this independently, we objected. Only then did the SDFL propose assigning the selection process to an independent special master and agree to amend the Deferred Prosecution Agreement. Thus, while it may be true that the SDFL assigned its selection responsibility to avoid the appearance of favoritism, it did not do it "***unilaterally***," but, rather, only after Epstein uncovered the Office's misleading disclosure and apparent conflict-of-interest.

10. TIMETABLE FOR MOVING FORWARD.

Mr. [redacted] Letter:

- "On February 25, 2008, I sent you an e-mail setting forth a timetable for moving forward in the event that CEOS disagreed with your position. That time is now."

  Id., p. 6.

The Truth:

- Mr. [redacted] provides only part of the history of this case in order to justify his improper actions. He had stated he would close the investigation if CEOS told him to. However, CEOS at our very first contact said that under no circumstances did they see that as their

role. They said they would only advise on an abuse of discretion standard. Making the outcome a foregone conclusion. Furthermore, in response to the February 25 e-mail, which attempted to establish a schedule to limit the entire review process (the defense has repeatedly suggested that the misconduct was intertwined with the investigation and would therefore seek higher review), Mr. Lefkowitz e-mailed Mr. Acosta directly. On February 29, 2008, Mr. [redacted] responded to Mr. Lefkowitz's e-mail to Mr. Acosta, stating that Mr. [redacted] was acting out of frustration, but "[p]lease be assured that it has not, and never has been, this Office's intent to interfere or restrict the "review process" for either Mr. Epstein or CEOS. I leave it to you and CEOS to figure out how best to proceed and will await the results of that process." As stated above, CEOS determined that it would not review many of the defense's objections and as to the remainder of those objections, its review would be limited (contrary to Mr. Acosta's assurances), which left the need, supplemented by the defense's subsequent request, for a more thorough review of critical issues by others at the Department of Justice. Mr. [redacted] re-imposition of the (albeit modestly extended) timetable was an obvious attempt, in violation of his February 29 agreement, to thwart the request made by the defense to the Deputy Attorney general, to complete the review process that Mr. Acosta had promised.

11. "DELAY."

Mr. [redacted] Letter:

- In a section entitled "*Delay,*" Mr. [redacted] states that "the SDFL again agreed to accommodate Epstein's request to appear in state court for plea and sentencing on January 4, 2008."

Id., p. 3.

The Truth:

- Curiously, Mr. [redacted] fails to mention correspondence from the U.S. Attorney stating that delay of that date would be "inevitable" as the defense has raised "serious questions" about the propriety of the prosecution. Strikingly, in that same section, Mr. [redacted] claims that "the Agreement ***did not contemplate a staggered*** 'plea and sentencing,'" despite quoting, three sentences earlier, from the Agreement's ***staggered requirement*** that Epstein plead and be sentenced by October 26, and "begin serving his sentence not later than January 4, 2008."

* * *

We are, like most attorneys seeking Department review, without access to the USAO prosecution summaries or other submissions to the Department. Given the substantial issues that have been raised in this and other submissions, we request that you conduct a de novo review that goes beneath the face of any conclusions being advocated by the USAO; instead, we seek a review that is based on the transcripts of witness testimony themselves so that the reviewer can

make an independent decision not adversely affected by conclusions that over and over have proven, witness by witness, allegation by allegation, to be inaccurate and unwarranted and not an appropriate basis for the exercise of federal prosecutorial authority.