UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 08-80736-Civ-Marra/Johnson

JANE DOES #1 AND #2,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.
_____/

UNITED STATES' RESPONSE TO SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO INTERVENE OF ROY BLACK, MARTIN WEINBERG, AND JAY LEFKOWITZ [DE94]

The United States of America, by and through the undersigned Assistant United States Attorney, hereby files this Response to the Supplemental Briefing of Attorneys Roy Black, Martin Weinberg, and Jay Lefkowitz (DE94). The Court asked the United States to address the Intervenor Attorneys' argument that special concerns or rules should apply to the disclosure and use of documents prepared and exchanged during plea negotiations between the Intervenors (on behalf of Jeffrey Epstein) and the U.S. Attorney's Office. The Intervenor Attorneys seek to preclude the unsealing of certain documents already filed with the Court as well as the use of their contents, and the discovery and use of additional plea negotiation documents and information.

For the reasons set forth herein, the United States agrees that the Petitioners are attempting to use plea negotiations "against" Jeffrey Epstein, in violation of the Federal Rules of Evidence, and that the work product privilege is not automatically waived by disclosure in the context of confidential plea negotiations. Thus, the Court must determine, on a document-by-document basis, whether a document contains attorney work produce and, if so, whether that work product privilege has been waived. The United States further agrees that, in light of the Supreme Court's guidance on the Sixth Amendment Right to Counsel, the protections provided to civil mediation and arbitration proceedings should extend to confidential plea negotiations where a non-party seeks to use statements made during those negotiations against either party.

BACKGROUND

The Court is very familiar with this matter, having handled the civil suits filed against Jeffrey Epstein pursuant to the Non-Prosecution Agreement and this actions filed by Jane Does #1 and #2 against the United States. For purposes of this Supplemental Briefing, the relevant facts are that, through the civil litigation between the Jane Does and Jeffrey Epstein, the Jane Does obtained portions of correspondence and draft agreements between counsel for Jeffrey Epstein and counsel for the United States that were exchanged during the course of confidential [F1] plea negotiations. To the knowledge of the government, the Jane Does have only received the portions of the correspondence written by government attorneys – all of the writings of Mr. Epstein's attorneys, excepts for a few short portions by Jack Goldberger – have been redacted. The Intervenor

Attorneys ask that the Court order that the Jane Does cannot use the unredacted portions and deny their motion to use those documents in support of their claims. [F2] The Intervenor Attorneys further ask that the Jane Does be barred from delving further into the confidential plea negotiations.

At the hearing on August 12, 2011, the Court heard oral argument from Attorney Black, who suggested that the ban on discovering and using plea negotiations was broader than what is simply stated in Rule 410 of the Federal Rules of Evidence and Rule 11 of the Federal Rules of Criminal Procedure. The Court ordered supplemental briefing, and the Intervenor Attorneys have raised a number of arguments in their supplemental briefing: (1) that the plea negotiations may not be used against Mr. Epstein pursuant to Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f); (2) that because the Jane Does are seeking inadmissible evidence, they bear a burden of showing a proper basis for discovery; (3) that the plea negotiations are irrelevant because the Jane Does are not entitled to invalidate the Non-Prosecution Agreement; (4) that the documents and information should be privileged under a common law plea negotiations privilege. In addition, in its initial briefing and at oral argument, the Intervenors argued that the communications were governed by the attorney work-product privilege.

ARGUMENT

A. The Petitioners Appear to Be Seeking to Use the Plea Negotiation Documents Against Jeffrey Epstein; However, This Argument Is Premature.

With regard to the Intervenors' first argument, the United States agrees that the Jane Does have made clear that their ultimate goal is to have the Non-Prosecution Agreement set aside and to have Jeffrey Epstein prosecuted. Thus, although the United States is the named Respondent, the Petitioner have made clear that their true target is Jeffrey Epstein: "The victims very specifically advised Epstein more than one year ago that they would be filing U.S. Attorney correspondence in this case in an effort to invalidate his non-prosecution-agreement." (Pets.' Resp. to Epstein Mot'n for Limited Intervention, DE96 at 1.) As such, the Intervenors correctly note that "any statement made in the course of plea discussions with an attorney for the prosecuting authority [the U.S. Attorney's Office] which do not result in a plea of guilty" cannot be used against Jeffrey Epstein. Fed. R. Evid. 410(4).

On today's date, September 26, 2011, the Court granted in part the Petitioners' Motion seeking a finding of violations of the Crime Victims' Rights Act ("CVRA"), but deferred ruling on the merits pending completion of discovery and denied the Petitioners' Motion to Have Their Facts Accepted as True. (*See* DE99 at 13-14.) Accordingly, it is premature to speculate as to how the Petitioners will try to "use" the information currently within their possession. The United States suggests, for the reasons set forth below, that the parties enter into a Protective Order governing the use and filing of such material until such time as the matter is ripe.

B. The Intervenors' Objection to Discovery Before Any Has Been Served Is Premature.

The Intervenors' second argument also is premature. In it, they argue that because they *anticipate* that the Jane Does will seek the discovery of inadmissible plea negotiations, the Court should made some sort of ruling requiring the Jane Does to make a showing of a proper basis for the discovery. As noted above, today the Court issued an Order wherein it allowed the Petitioners limited discovery via document requests and requests for admissions from the U.S. Attorney's Office. (DE99 at 11.) Rather than impose a preliminary restriction, the United States recommends that the Court require Petitioners to serve a copy of all discovery requests on the Intervenors so that they may interpose any objections and have those objections ruled upon prior to the United States serving any of its responses.

C. The Attorney Work-Product Privilege Applies to These Communications. [F3]

In a federal criminal case, the parties are prohibited from obtaining via discovery "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigation or prosecuting the case," and "reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the case's investigation or defense[.]" Fed. R. Crim. P. 16(a)(2), (b)(2)(A). In a federal civil case, the parties are prohibited from obtaining via discovery documents and tangible things that were prepared in preparation for litigation (including previous litigation), especially "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." Fed. R. Civ. P. 26(b)(3)(B).

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s the motion to intervene, Movant Epstein and his counsel must expect to be subject to discovery at least as to his claims of privilege, on which he bears the burden of proof.

Respectfully submitted,

WIFREDO A. FERRER

UNITED STATES ATTORNEY

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Attorneys for Intervenors Jeffrey Epstein, Roy Black, Martin Weinberg, and Jay Lefkowitz

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[F1]The United States uses the term "confidential" plea negotiations as a term of art. By definition, all plea negotiations are confidential and, pursuant to Rule 11, are not to be made part of the Court record until a final agreement is reached and a guilty plea is entered.

[F2]Pursuant to S.D. Fla. Local Rule 5.4(c), this would require that DE52 be destroyed or returned to counsel for the Jane Does and that DE63 and DE64 be destroyed or returned to counsel for the United States and that DE48 remain in the Court file only in its redacted form.

[F3]The Intervenors also argue that the Court should find that the documents and information are irrelevant because the Petitioners are not entitled to invalidate the Non-Prosecution Agreement. In the Court's Order of September 26, 2011, granting in part the Petitioners' Motion for finding violations of the CVRA, the Court did not address the United States' argument that there is no remedy available for the Petitioners due in part to their failure to seek a prompt resolution of the case. However, in light of the Court's Order, it would seem that this issue is better resolved in a Motion for Reconsideration or on appeal of that ruling rather than in this Supplemental Briefing. Accordingly, the Intervenors' third argument is not addressed herein.