UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 AND JANE DOE 2,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant
_____/

MOTION OF JEFFREY EPSTEIN FOR LIMITED INTERVENTION

Jeffrey Epstein hereby moves, pursuant to Fed. R. Crim. P. 24(a)(2) and 24(b)(1)(B), that he be permitted to intervene for the limited purpose of protecting his interests in the secrecy of matters which occurred before the federal grand juries of which he was the target. On July 19, 2013, the government filed a privilege log in response to this Court's order of June 19, 2013 (Doc. 190), in which it asserted that it could not disclose an array of materials because of the prohibition against disclosure of matters occurring before the grand jury set forth in Fed. R. Crim. P. 6(e). The Court's order gives the plaintiffs 30 days after the filing of the government's privilege log to move to compel production of materials with respect to which the government has asserted a privilege or bar to disclosure. If the plaintiffs move to compel production of any materials as to which the government has asserted the Rule 6(e) disclosure prohibition, Mr. Epstein has enforceable private interests in the continued secrecy of matters which occurred before the two grand juries which investigated the issue of whether he committed indictable federal offenses and should be permitted to intervene to ensure that those interests are protected.

If he is permitted to intervene, he will comply with the time and page limitations for pleadings set forth in the Court's June 19, 2013, order.

I. INTERVENTION AS OF RIGHT.

A party may intervene as of right under Rule 24(a) if "(1) the application to intervene is timely; (2) the party has an interest relating to the property or transaction which is the subject matter of the action; (3) the party is situated so that disposition of the action, as a practical matter, ma impede or impair its ability to protect that interest; and (4) the party's interest is represented inadequately by the existing parties to the suit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). The circumstances here easily satisfy all four elements of the standard.

A. Timeliness.

In assessing the timeliness of motions to intervene, courts are to consider "(1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating either for or against a determination that the application is timely." *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983). "Timeliness" is "not limited to chronological considerations but is to be determined from all the circumstances." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263-64 (5th Cir. 1977). Among the circumstances which must be considered is

"the purpose for which intervention is sought." *National Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C.Cir. 1977).

Mr. Epstein's motion is timely because it seeks intervention only for the limited purpose of opposing disclosure to plaintiffs of matters which occurred before the grand juries at issue. That issue did not become ripe until July 19, 2013, when the government filed its privilege log asserting that the disclosure of various listed materials is prohibited by Rule 6(e), which first provided notice to Mr. Epstein that his interests in maintaining the secrecy of grand jury matters were at issue. Plaintiffs will not be prejudiced by the requested intervention, as Mr. Epstein has promptly moved to intervene, and plaintiffs must in any event litigate the Rule 6(e) issue with the government if they choose to challenge the government's reliance on Rule 6(e) through a motion to compel. Mr. Epstein, on the other hand will be severely prejudiced if his motion is denied, as he will be denied the opportunity to seek to protect his private interests in the matter. *See* Section I(B), *infra.*

B. Mr. Epstein Has an Interest Relating to the Property or Transaction Which Is the Subject Matter of the Action.

Maintaining the confidentiality of grand jury proceedings protects several important interests of the government *and of private citizens*." *In re Grand Jury Proceedings*, 610 F.3d 202, 213 (5th Cir. 1980)(emphasis added). Rule 6(e) prohibits disclosure of matters occurring before a grand jury "to protect the secrecy which is critical to the grand jury process," including "protect[ion of] the reputation of a person under investigation who is not indicted." *United States v. Eisenberg*, 711 F.2d 959, 961 (11th Cir. 1983). *See, e.g., Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 611 (2d Cir. 1988)("Not the least important consideration is to protect the good name and reputation of those investigated, but not indicted, by the grand jury"); *Lucas v.*

Turner, 725 F.2d 1095, 1100 (7th Cir. 1984)("One of the principal reasons for preserving the secrecy of grand jury proceedings is to protect the reputations of both witnesses and those under investigation"); *In re Grand Jury Investigation*, 610 F.2d at 213 ("The rule of secrecy avoids injury to the reputation of those persons accused of crimes whom the grand jury does not indict").

So important are the private interests at stake in grand jury secrecy that private parties may bring civil actions for injunctive relief to prevent future violations of Rule 6(e) by government actors subject to the Rule 6(e) disclosure prohibition. *See, e.g., United States v. Barry*, 865 F.2d 1317 (D.C.Cir. 1989); *United States v. Blalock*, 844 F.2d 1546 (11th Cir. 1988); *Eisenberg*, *supra*. If, as in these cases, private individuals may be entitled to relief *after* there has been a Rule 6(e) violation, then surely a private individual has recognizable and important interests in preventing a Rule 6(e) violation from occurring in the first place. The materials to which the government has asserted the Rule 6(e) bar to disclosure include materials which would disclose substantial portions of the evidence presented to the grand jury, both documentary and testimonial, and draft indictments of Mr. Epstein, all of which relate to allegations, now more than five years old, of a highly sensitive nature which Mr. Epstein never had the opportunity to refute and which, if the non-prosecution agreement remains in force, as it contractually and constitutionally should, he will never refute. He has a profound interest in opposing the release to plaintiffs of this grand jury material, which can only redound to his severe prejudice and injury.

Mr. Epstein's interests assume enhanced importance in light of the fact that the content of most, if not all, of the materials to which the government has asserted the Rule 6(e) disclosure prohibition are fundamentally irrelevant to the issues before the Court in plaintiffs' CVRA

action, namely, whether the government violated their rights under the CVRA. While it may be material for the plaintiffs to know, for example, that the grand jury investigation continued beyond September 24, 20017, and apparently into 2009, as the privilege log reveals, the details of the grand jury's investigation – such as who testified before the grand jury, who the grand jury was investigating in addition to Mr. Epstein, what documents were produced in response to grand jury subpoenas, and what the content of those documents did or did not reveal – is not information which plaintiffs need or to which they should be permitted access to support their effort to prove that the government violated their CVRA rights.

C. Mr. Epstein Is Situated So That Disposition of the Action, as a Practical Matter, May Impede or Impair His Ability to Protect That Interest.

While Mr. Epstein might theoretically be able to bring a separate civil action seeking to enjoin any future violation of the grand jury secrecy requirement by the government, the issue is before the Court now and will be resolved by the Court if the plaintiffs move to compel production of any of the materials with respect to which the government has asserted the Rule 6(e) disclosure prohibition. As a practical matter, therefore, the Court's ruling on any motion to compel filed by plaintiffs will determine Mr. Epstein's interests as well as those of the government, and he should be permitted to intervene to oppose any such disclosures.

D. Mr. Epstein's Interests in the Continued Secrecy of Matters Which Occurred Before a Grand Jury Would Not Be Adequately Represented by the Existing Parties to the Suit.

Mr. Epstein and the government may share a common goal of opposing disclosure of matters occurring before the grand jury, but their interests, as well as what they would bring to the Court on the issue, vary substantially. Although the Eleventh Circuit has said that "[t]here is a presumption of adequate representation where an existing party seeks the same objectives as

the interveners," *Stone v. First Union Corp*., 371 F.3d 1305, 1311 (11th Cir. 2004), that presumption is a "weak" one, *id.*;"[i]nterveners need only show that the current [party's] representation '*may* be inadequate,' and the burden for making such a showing is 'minimal.'" *Id.* (emphasis added), *quoting Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999). *See, e.g., Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1255 (11th Cir. 2002)("The proposed intervenor has the burden of showing that the existing parties cannot adequately represent its interests, but this burden is treated as minimal"); *Federal Sav. and Loan Ins. Corp. v. Falls Chase Special Taxing District*, 983 F.2d 211, 216 (11th Cir. 1993)("The proposed intervenor's burden to show that their interests *may* be inadequately represented is minimal" (emphasis in original)).

The government has its own institutional interests in preserving grand jury secrecy, but those interests differ from the private interests of Mr. Epstein. The government has several interests protected by the grand jury secrecy requirement:

> First, if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There would also be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment.

In re Sealed Case No. 98-3077, 151 F.3d 1059, 1070 (D.C.Cir. 1998), *quoting Douglas Oil Co. of California v. Petrol Stops Northwest*, 441 U.S. 211, 219 (1979). Mr. Epstein, on the other hand has his own personal privacy and reputational interests in maintaining the secrecy of matters which occurred before the grand jury, which belong to him individually and which the government is uncertain to stress or even assert in opposition to disclosure or to adequately protect. *See Matter of Special March 1981 Grand Jury*, 753 F.2d 575, 578 (7th Cir.

1985)(contrasting "institutional interests," "which range from not forewarning the targets of the grand jury's investigation to protecting witnesses and grand jurors from reprisals" with "personal [and] private interests, mainly in reputation, that the ex parte nature of the grand jury puts at risk: for example, the reputation of a person accused of wrongdoing by a witness before the grand jury").

The divergence of interests between the government and Mr. Epstein is illustrated by the government's privilege log itself. While government was required to file the privilege log on the public docket, Doc. 190 at 2, and to provide certain specified information, including the "general subject matter" of each withheld document, *id.*, Rule 26.1(g), to which the Court cited, expressly provides that the information specified in the rule is to be provided "*unless divulgence of such information would cause disclosure of the allegedly privileged information*" (emphasis added). Although Mr. Epstein does not wish to be unduly critical of the government's efforts to comply with the Court's order, the government's privilege log has itself breached the grand jury secrecy requirement, going beyond "general subject matter" to reveal the names of entities and individuals which were the subject of grand jury subpoenas and which produced documents and records relating to Mr. Epstein pursuant to those subpoenas, *see* Doc. 221-1 at 1, 2, 3, 4, 6, 7, 8, 10, the name of an individual for whom immunity was requested, *id.* at 11, and the names of subjects and targets of the grand jury's investigation, *id.* at 4, 6, 7, 14, as well as Mr. Epstein's. The Government's privilege log even referenced the existence of draft *and signed* indictments, id at 11, 18. This is all information falling within the core grand jury secrecy protection mandated by Rule 6(e). *See, e.g., Hodge v. F.B.I.*, 703 F.3d 575, 580 (D.C.Cir. 2013)(identities of individuals who received grand jury subpoenas fell within Rule 6(e)); *In re Sealed Case*, 192

F.3d 995, 1004 (D.C.Cir. 1999)("[I]t would ordinarily be a violation of Rule 6(e) to disclose that a grand jury is investigating a particular person"); *In re Grand Jury Proceedings*, 851 F.2d 860, 866-67 (6th Cir. 1988)("[C]onfidential documentary information not otherwise public obtained by the grand jury by coercive means is presumed to be 'matters occurring before the grand jury' just as much as testimony before the grand jury"); *United States v. Velez*, 344 F.Supp.2d 329, 332 (D.P.R. 2004)(materials containing names of targets of grand jury investigation fell within Rule 6(e)); *United States v. Diaz*, 236 F.R.D. 470, 479-80 (N.D.Cal. 2006)(grand jury subpoenas *duces tecum* fall within Rule 6(e)); *United States v. White Ready-Mix Concrete Co.*, 509 F.Supp. 747, 750 (N.D. Ohio 1981)(names of grand jury witnesses fall within Rule 6(e)). The government, however, despite the fact that the identities of the subpoenaed entities and individuals and the named targets are subject to the grand jury secrecy requirement of Rule 6(e), chose to disclose the names rather than refer to these individuals and entities by a general descriptive term such as "subpoenaed entity" or "target" or "subject" or "witness," much as it did in using the term "victim" rather than name the individual, which would have fully complied with the Court's order. The government's privilege log plainly shows that Mr. Epstein cannot rely on the government to protect his interests in maintaining the required secrecy of the grand jury proceedings. Ultimately, the government's interests lie in prevailing in the plaintiffs' CVRA litigation against it, while, in the context of this motion to intervene, Mr. Epstein's interests lie in protecting his personal privacy and guarding against the personal and professional injury which would be the inevitable consequence of the release of information which Rule 6(e) commands should remain secret.

II. PERMISSIVE INTERVENTION.

The Court need not reach the issue of permissive intervention, as Mr. Epstein so plainly satisfies the criteria for intervention as of right. For the same reasons addressed in the preceding section, Mr. Epstein "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). That common question of law or fact is whether Rule 6(e) prohibits disclosure to plaintiffs of the grand jury materials identified by the government in its privilege log.

CONCLUSION

For all the foregoing reasons, Mr. Epstein's motion to intervene is timely and should be granted as of right under Rule 24(a)(2). Alternatively, permissive intervention should be granted under Rule 24(b)(1)(B).