No. 13-12923

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE NO. 1 AND JANE DOES NO. 2,
Plaintiffs-Appellees

[redacted].

UNITED STATES OF AMERICA,
Defendant-Appellee

ROY BLACK *ET AL.*,
Intervenor/Appellants

**INTERVENORS/APPELLANTS' RESPONSE TO PLAINTIFFS/APPELLEES' RENEWED MOTION FOR EXPEDITED RULING ON PENDING MOTION FOR STAY OF DISTRICT COURT DISCOVERY ORDER**

Intervenors/Appellants oppose plaintiffs/appellees' Renewed Motion for Expedited Ruling on Pending Motion for Stay of District Court Discovery Order. This is the second time that plaintiffs/appellees have sought an expedited ruling on intervenors/appellants' motion for a stay pending appeal. On the first occasion, this Court denied the motion, stating in an August 13, 2013, order that

intervenors/appellants' stay motion would be held in abeyance until the Court issued an order on plaintiffs/appellees' motion to dismiss for lack of jurisdiction. On August 19, 2013, the Court ordered that plaintiffs/appellees' motion to dismiss should be carried with the case. Full briefing on the merits and the jurisdictional issues has now been completed. Both parties have requested oral argument. Plaintiffs/appellees decline to address the merits of the stay motion, claiming that their motion relates only to the timing of the ruling on the motion, Motion at 5-6, but an expedited ruling could, for all practical purposes, moot the appeal, as, were the stay to be denied, the government would be required to disclose to plaintiffs/appellees the very correspondence which intervenors/appellants seek to preserve as privileged and confidential before the decision on the merits of this appeal is rendered, thus completely nullifying the potential that intervenors/appellants' appeal would result in a decision which would actually protect their communications from disclosure to plaintiffs/appellees. Given the readiness of the case for argument and decision, the Court should again deny plaintiffs/appellees' motion for an expedited decision on intervenors/appellants' stay motion, schedule oral argument, and decide the critically important issues raised in this appeal after full and plenary consideration.

The substantial merits of intervenors/appellants' contentions have been set forth in their Motion for Stay pending Appeal filed with this Court on July 12, 2013,

and have been amplified by the arguments set forth in their opening merits brief and reply brief. As intervenors/appellants' brief demonstrates, the issues raised in this appeal are of fundamental importance to the criminal justice system, and intervenors/appellants have presented compelling arguments for why plea/settlement negotiation correspondence authored by defense counsel and sent to government prosecutors should be protected from disclosure to third parties such as plaintiffs/appellees. *See* Brief of Appellants/Intervenors at 10-44.

The plaintiffs/appellees have also failed to show that they will be harmed by the requested stay . On July 19, 2013, the government filed, in the underlying CVRA action, a detailed and lengthy privilege log (DE212-1) in which it properly asserted various privileges, including the opinion work product privilege, the investigative privilege, the deliberative process privilege, and the grand jury disclosure prohibition of Fed. R. Crim. P. 6(e), against disclosure of 13,468 pages of documents, which have been submitted to the district court *in camera*. The correspondence which is the subject of this appeal is only a tiny subset of the discovery issues before the district court; indeed, the government's extensive privilege log contains only a few line items relating to the correspondence at issue. There are literally hundreds of discovery issues pertaining to thousands of documents, as to which the government has asserted principled claims of privilege, *see* DE212-1, 229, including numerous issues of

importance and complexity, and the district court will predictably be engaged in a time consuming process to determine which documents, if any, should be ordered disclosed over the government's objections, a process likely to take at least several months. A stay in this appeal presents no material impediment to the litigation in the district court with respect to the many privilege claims asserted by the government below, as the district court litigation with respect to those privilege issues can proceed entirely independently of the questions presented in this appeal regarding the confidentiality and privilege of defense counsel's plea/settlement negotiation correspondence. The case below, will not, therefore, be at a standstill pending this Court's decision in this appeal.

Plaintiffs/appellees contend that they need access to the correspondence to respond to a government filing on the issue, Motion at 5, but they in fact do not. The government's anticipated September 20, 2013, filing, to which plaintiffs/appellees must respond by September 30, 2013, relates to the government's invocation of the deliberative process privilege (DE231, 236), which is not applicable to defense counsel's plea/settlement negotiation correspondence, rendering the correspondence wholly irrelevant to litigation of the deliberative process privilege issues raised by the government. Moreover, as with all matters concerning assertions of privilege or confidentiality, the applicability of the deliberative process privilege will need to be

litigated *before* plaintiffs/appellees would be entitled (if at all) to access to the documents as to which the government has asserted the deliberative process privilege, as well as other privileges asserted in its privilege log.

It also bears noting that, while plaintiffs/appellees express a great need for hurry now, they did not always express such urgency. While the underlying CVRA action was commenced as an emergency petition, plaintiffs shortly thereafter appeared at a status conference and told the district court that they saw no reason to proceed on an emergency basis. Trans. July 11, 2008 (DE15) at 24-25. Plaintiffs spent the next eighteen months pursuing civil remedies against Mr. Epstein, and ultimately obtaining settlements, while their CVRA action remained dormant. Indeed, so inactive were plaintiffs that the district court dismissed the case for lack of prosecution in September, 2010. DE38. *See also* Order Denying Government's Motion to Dismiss (DE189) at 5 ("Over the course of the next eighteen months, the CVRA case stalled as petitioners pursued collateral civil claims against Epstein"). Only after plaintiffs had successfully pursued their civil damages remedies did they reactivate their CVRA action. Given plaintiffs' choices not to invoke the emergency provisions of the CVRA and to hold the underlying CVRA action in abeyance for eighteen months while they pursued their civil remedies against Epstein, it is entirely reasonable that the Court's decision on the issues raised in this appeal should await

decision in the normal course.

Maintaining the status quo until this Court can carefully consider the important issues raised in this appeal is of vital importance. The value of intervenors/appellants' appeal will be largely lost if the plea/settlement communications at issue are disclosed to plaintiffs/appellees in advance of the Court's decision on the merits, as they would be absent a continuation of the stay. Intervenors/appellants have no objection to the Court's expediting the scheduling of oral argument in this case.

## CONCLUSION

For all the foregoing reasons, plaintiffs/appellees' motion for an expedited ruling on intervenors/appellants' motion for a stray pending appeal should be denied.

Respectfully submitted,

**/s/ Roy Black**
Roy Black
Jackie Perczek
Black, Srebnick, Kornspan & Stumpf

**/s/ Martin G. Weinberg**
Martin G. Weinberg
[redacted]

*Intervenor/Appellants and Attorneys for Intervenor/Appellants*

## CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that on this 20th day of September, 2013, the foregoing document was served, through this Court's CM/ECF system, on all parties of record.

**/s/ Martin G. Weinberg**
Martin G. Weinberg