

Nos. 13-12923, 13-12926, 13-12928

IN THE
United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

JANE DOE NO. 1 AND JANE DOE NO. 2,

Plaintiffs-Appellees

■

UNITED STATES OF AMERICA,

Defendant-Appellee

ROY BLACK ET AL.,

Intervenors-Appellants

**REPLY IN SUPPORT OF MOTION TO DISMISS NON-PARTY
INTERLOCUTORY APPEAL**

Bradley J. Edwards
FARMER, JAFFEE, WEISSING
EDWARDS, FISTOS & LEHRMAN, P.L.
105 N. Suite 200



Paul G. Cassell
S. J. Quinman College of Law



Attorneys for Plaintiffs-Appellees Jane Doe No.1 and Jane Doe No. 2

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REPLY IN SUPPORT OF MOTION TO DISMISS NON-PARTY INTERLOCUTORY APPEAL

INTRODUCTION

The victims have moved to dismiss Epstein's interlocutory appeal of a district court discovery order that requires the Government to produce certain correspondence to the victims. The victims made two principal arguments for dismissal: first, that this Court lacks jurisdiction over such an interlocutory appeal in light of the Supreme Court's recent decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009) (attorney-client privilege ruling not immediately appealable; any injury can be addressed at conclusion of case) (Mot. Dismiss at 10-18); and, second, that Epstein failed to make any evidentiary record to support his contention that these materials are "privileged and confidential" and thus lacks any proof of injury necessary to proceed in this Court (Mot. Dismiss at 18-20).

Epstein has now responded to both arguments. But his response concedes the victims' second argument: that that he has failed to create any record in the district court about required injury. Accordingly, in light of that concession, the straightforward disposition of this appeal is for this Court to summarily dismiss it, without requiring any further briefing by the parties. In addition, Epstein admits that last week he filed in the district court a motion to intervene to contest any invalidation of his non-prosecution agreement. That motion is unopposed.

Accordingly, because Epstein has the ability to protect his interests by an appeal at the conclusion of the proceedings below, this Court should dismiss his interlocutory appeal here – just as the Supreme Court dismissed the interlocutory appeal in *Mohawk*. The Court should enter a rapid dismissal without requiring any briefing on the merits.

ARGUMENT

I. THIS COURT SHOULD IMMEDIATELY DISMISS EPSTEIN’S APPEAL IN LIGHT OF HIS CONCESSION THAT HE HAS NOT MADE A RECORD IN THE DISTRICT COURT THAT THE MATERIALS AT ISSUE ARE CONFIDENTIAL.

In their motion to dismiss, the victims argued that Epstein had only made generalized allegations that he would be harmed if the plea bargain correspondence were to be provided to the victims. The victims contend that he had never offered any facts surrounding the alleged confidentiality of the correspondence, much less facts showing how he would be injured if the victims reviewed that correspondence. Mot. Dismiss at 18-20.

In his response, Epstein maintains that the “issues were litigated in the district court as a question of law, based on the acceptance of all parties of the fact that the correspondence at issue was conducted as part of settlement/plea negotiations.” Epstein Resp. Mot. Dismiss at 18. Epstein adds that in the District Court he “contended” that the correspondence was privileged and confidential

(*id.*), and he asserts that this is a “position with which the Government agrees” (*id.*).

Epstein fails to cite any part of the record for these arguments. More important, his response concedes the victims’ essential point: that he has merely “contended” that materials are somehow confidential, and has never laid the required evidentiary foundation that would permit him to take an appeal. He simply lacks *any* proof of *any* injury – much less the required irreparable injury to proceed on an interlocutory basis for this Court.¹

Epstein is, of course, the party with the burden of proof on the issue of privilege and confidentiality. *See, e.g., Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (noting that an alleged privilege holder was not “excused from meeting [his] burden of proving the communication confidential and within the attorney-client privilege”). Simply because he “contended” in the court below that certain documents fell within some new privilege that he wished to see created does not mean that he has provided an evidentiary record that would support an appeal concerning the scope of such privilege. The District Court record in this case does not contain even the rudimentary elements that would allow this Court to make an informed assessment of Epstein’s claim: How many documents are at

¹ Obviously because Epstein has failed to build a record that would support any appeal, he has failed to build the appropriate record to satisfy the more demanding requirements to obtain a stay pending appeal as well.

issue? Who created the documents? Who looked at the allegedly “confidential” documents? Did anyone expect that the documents would be maintained as “confidential”? These are all facts that the Court would have to have before it to allow Epstein to get to first base with his arguments – and these are all facts that are entirely absent from the record.

The District Court specifically noted this evidentiary problem with Epstein’s claim. The District Court gave as one reason for rejecting Epstein’s contention based on Federal Rule of Evidence 410 that the rule does not even possibly protect “general discussions of leniency and statements made in the hope of avoiding a federal indictment - arguably the content of the correspondence at issue here.” Doc. #188 at 4. Because Epstein has failed to make any record about whether the correspondence at issue was just “general discussions of leniency” or just “statements made in the hope” of avoiding indictment, he cannot contest the District Court’s ruling.

More troubling is the fact that Epstein has specifically represented to this Court that his position that the documents are “privileged and confidential” is a “position with which the Government agrees.” Epstein Resp. Mot. Dismiss at 18. This representation is untrue. In the District Court, the Government responded to Epstein’s motion to intervene concerning the correspondence by explaining the District Court had discretion to allow Epstein to intervene to attempt to block

release of the correspondence. Doc. #98 at 3. But the Government also specifically warned Epstein that he would need to build a record to support his arguments:

However, upon intervention, Movant Epstein will have to meet his burden of establishing that he was in fact represented by specific attorneys, and that they had privileged communications in the course of that attorney-client relationship that have been or are at the risk of, unauthorized disclosure. Movant Epstein bears the burden of establishing that the communications he seeks to withhold from disclosure fall within the attorney-client or other privilege. “In meeting this burden, each element of the privilege must be affirmatively demonstrated, and the party claiming privilege must provide the court with *evidence that demonstrates the existence of the privilege*, which often is accomplished by affidavit.”

Doc. #98 at 3-4 (emphasis added) (*quoting El-Ad Residences at Mirarmar Condo. Ass’n, Inc.* ■ *Mt. Hawley Ins. Co.*, 716 F. Supp. 2d 1257, 1262 (S.D. Fla. 2010).

Rather than heed that specific warning from the Government that he needed to provide “evidence that demonstrates the existence of the privilege,” Epstein decided to provide nothing at all.

Nor is it true that the victims have somehow acquiesced in Epstein’s failure to build a record below. The victims specifically argued to the District Court that, for example, “Epstein must *present evidence* that he will be injured if the victims read the correspondence.” Doc. #198 at 11 (emphasis added). As with the Government’s warning, Epstein elected not to heed the warning given by the victims.

Finally, it is worth noting that Epstein's decision to leave the record below devoid of any evidence appears to be a deliberate tactical decision. He appears to want to avoid putting in the record his understanding about whether the prosecutors would inform the victims about the existence of the non-prosecution agreement (NPA). Affidavits from his attorneys, for example, would presumably need to make representations that Epstein believed that prosecutors would not communicate about the NPA to the victims, which is precisely the conspiracy allegation that the victims have been attempting to prove to show a violation of the Crime Victims' Rights Act. Epstein simply cannot have it both ways. He cannot maintain that he expected that the documents would be held "confidentially" by the Government while refusing to place into the record evidence that would show exactly how that confidentiality was to be achieved.

In any event, the undisputed point regarding the state of the record now is that *nothing* exists that would allow Epstein to carry *his* burden of proof that the correspondence was confidential. That failure is fatal to appeal. He cannot show a record that would support even an alleged injury. Therefore his appeal must be immediately dismissed.

II. ANY INJURY TO EPSTEIN CAN BE RESOLVED AT THE CONCLUSION OF THE PROCEEDINGS BELOW AND THEREFORE THIS COURT LACKS JURISDICTION TO ENTERTAIN EPSTEIN'S INTERLOCUTORY APPEAL UNDER MOHAWK.

This Court should also immediately dismiss Epstein's interlocutory appeal under *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In response to the victims' reliance on *Mohawk*, Epstein claims that he will be unable to take an appeal from the final conclusion of this case, at which time the District Court will determine – one way or the other – whether to set aside the NPA negotiated between Epstein and the Government. Epstein Resp. Mot. Stay at 8. Epstein is forced to acknowledge, however, that on July 8, 2013, he moved in the District Court for “prospective” intervention to contest any determination by the District Court to set aside the NPA. *Id.* Epstein's motion to intervene is *unopposed*: On July 12, 2013, the victims filed a statement that they did not oppose intervention. Doc. #209. The Government has also informed the victims that it does not oppose intervention. Accordingly, the district court will presumably soon allow prospective intervention on the issue of setting aside the NPA (and, in the unlikely event that the District Court denied that unopposed motion to intervene, Epstein could immediately appeal that denial as soon as it became ripe – i.e., as soon as the district court was actually deciding whether to set aside the NPA).

As a result of Epstein ability to challenge any invalidation of the NPA at the conclusion of the case, this Court lacks jurisdiction to consider his interlocutory appeal now. *Mohawk* cautioned that “the district judge can better exercise [his or her] responsibility to [to police prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings.” *Id.* at 605. *Mohawk* specifically held that “most discovery rulings are not final” and thus not immediately appealable in the middle of litigation. *Id.* at 606. The clear reason for such a limit is that any ultimate harm to an appellant will be unclear at early phases of litigation. Avoiding unnecessary appellate court review of an issue that may never become ripe is one of “the usual benefits of deferring appeal until litigation concludes.” *Mohawk*, 130 S. Ct. at 605 . That argument applies with particular force here, as the District Court has not yet determined whether the victims have proven that their CVRA rights were violated – much less whether it will set aside the NPA as a remedy for that violation. Until the district court considers whether to make such a determination, Epstein has not suffered any injury that would warrant immediate intervention by this Court.

In an effort to avoid this obvious conclusion, Epstein asserts that he will suffer some sort of breach of confidentiality that requires this Court to move precipitously. But, of course, the appellant in *Mohawk* made precisely the same argument: that he would suffer an irreversible breach of the confidentiality

protected by the attorney-client privilege unless the appellate courts acted immediately. This Court – affirmed by the Supreme Court – disagreed. As the Supreme Court explained: “In our estimation, post-judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege.” 130 S. Ct. at 605. If that conclusion applies to an undisputed holder of a venerable attorney-client privilege claim, it surely applies with even greater force to a disputed holder of a heretofore-unrecognized “plea negotiation” privilege claim. This Court should not jump into the middle of the proceedings below; instead, under *Mohawk*, it lacks jurisdiction and must dismiss Epstein’s appeal

CONCLUSION

For all the foregoing reasons, the Court should dismiss Epstein's interlocutory appeal for lack of jurisdiction. To avoid unnecessary waste of time and resources, the Court should immediately dismiss Epstein's appeal, without requiring the parties to file any briefs on the merits.

DATED: July 16, 2013

Respectfully Submitted,

/s/ Paul G. Cassell
Paul G. Cassell

and

Bradley J. Edwards
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS & LEHRMAN,
P.L.

Attorneys for Jane Doe No. 1 and Jane Doe No. 2

CERTIFICATE OF SERVICE

The foregoing document was served on July 16, 2013, on the following using the Court's CM/ECF system:



Roy Black, Esq.
Jackie Perczek, Esq.
Black, Srebnick, Kornspan & Stumpf, P.A.



Martin G. Weinberg, P.C.
20 Park Plaza



/s/ Paul G. Cassell
Paul G. Cassell