**No. 13-12923**

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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**JANE DOE NO. 1 AND JANE DOES NO. 2,**
**Plaintiffs-Appellees**
**v.**
**UNITED STATES OF AMERICA,**
**Defendant-Appellee**

**ROY BLACK *ET AL.*,**
**Intervenors/Appellants**

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**ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA**

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# BRIEF OF INTERVENORS/APPELLANTS ROY BLACK, MARTIN G. WEINBERG, AND JEFFREY EPSTEIN

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, Intervenor/Appellants hereby certify that the following persons have an interest in the outcome of this case:

1. Marra, The Honorable Kenneth

2. Acosta, R. Alexander

3. Black, Roy

4. Cassell, Paul G.

5. Edwards, Bradley J.

6. Epstein, Jeffrey

7. Ferrer, Wifredo A.

8. Howell, Jay

9. Lee, Dexter

10. [redacted]

11.

12.

13.

14.

15.

16. Weinberg, Martin

17. Doe No. 1, Jane

18. Doe No. 2, Jane

**/s/ Martin G. Weinberg**
Attorney for Intervenor/Appellants

## STATEMENT REGARDING ORAL ARGUMENT

Intervenor/Appellants request oral argument in this case, as they believe that oral argument will be of material assistance to the Court in considering and deciding the important questions of first impression presented in this appeal, namely, whether communications made by attorneys during the course of settlement/plea negotiations in a criminal case – communications falling within the heartland of Fed. R. Evid. 410 – are privileged and confidential and protected from disclosure to third parties such as civil plaintiffs or, in this case, plaintiffs suing the government under the Crime Victims Rights Act, 18 U.S.C. §3771, who have openly stated that they intend to use those communications to the detriment of the attorneys' client.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statutes and Rules**

**Other Authorities**

## STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court has jurisdiction of this action as an action by the plaintiffs/appellees against the United States as defendant seeking to enforce their rights under the Crime Victims Rights Act, 18 U.S.C. §3771. The orders of the district court from which this appeal is taken was entered on June 18, 2013 (DE188) and June 19, 2013 (DE200), and intervenors/appellants' notices of appeal were filed on June 27, 2013 (DE194-96). This Court has jurisdiction of this appeal under 28 U.S.C. § 1291 and *Perlman v. United States*, 247 U.S. 7 (1918). *See* Section III, *infra*.

## STATEMENT OF THE ISSUES PRESENTED

1. Whether correspondence authored by defense attorneys and sent to government prosecutors in the process of negotiating a plea to criminal charges or a settlement of an ongoing criminal investigation are privileged and confidential and protected by Fed. R. Evid. 410 from disclosure to third party litigants such as plaintiffs/appellants.

2. Whether a common law privilege under Fed. R. Evid. 501 protects plea/settlement negotiation communications from disclosure to third parties outside the negotiation process.

3. Whether this Court has jurisdiction of this appeal under *Perlman v. United States*, 247 U.S. 7 (1918).

## STATEMENT OF THE CASE AND STATEMENT OF FACTS

In September, 2007, intervenor/appellant Jeffrey Epstein entered into a non-prosecution agreement ("NPA") with the government to resolve a federal criminal investigation in which he was the subject/target of federal grand jury investigations. *See* DE:48-5.[1] In the process of reaching this negotiated settlement, Epstein's counsel, including intervenors/appellants Roy Black and Martin Weinberg, authored and co-authored and sent to government prosecutors the correspondence which is the subject of this appeal, fully expecting, based on Fed. R. Evid. 410 and long-established understanding and practice, that their settlement negotiation communications would remain confidential and not subject to disclosure to third parties such as plaintiffs in civil or other litigation. On June 30, 2008, after further negotiation and pursuant to the NPA, Epstein pled guilty in state court to two state offenses and began serving a combined prison and community control sentence.

In July, 2008, plaintiffs commenced the underlying action, by filing a Petition

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[1] The agreement, with which Epstein has fully complied, also required that he pay the legal fees of the attorney-representative of identified victims and that he not contest liability in any cases brought against him solely under 18 U.S.C. §2255. Many plaintiffs sued under §2255 and received settlements as the direct result of Epstein's agreement not to contest liability in those cases. Other plaintiffs, including the Jane Does in this case, "relied on the [NPA] when seeking civil relief against Epstein . . . and affirmatively advanced the terms of the [NPA] as a basis for relief from Epstein." DE205-6:12-13.

for Enforcement of Crime Victims Rights Act, 18 U.S.C. §3771 ("CVRA"). DE1. While the CVRA action was commenced as an emergency petition, plaintiffs shortly thereafter told the district court that they saw no reason to proceed on an emergency basis. DE15:24-25. Then, a month later, plaintiffs withdrew their request that the district court rescind Epstein's NPA as a remedy for the government's alleged violation of the CVRA, telling the court that because of the legal consequences of invalidating the NPA, it was probably not in their interests to ask for rescission. DE27:4. Plaintiffs spent the next eighteen months pursuing civil remedies against Epstein, and ultimately obtaining settlements, while their CVRA action remained dormant. During the course of that civil litigation, Epstein was ordered, over his strenuous objection, to produce documents given to him by the government during the course of his settlement/plea negotiations with it. *See Jane Doe #2 v. Epstein*, No. 08-80119-MARRA, Doc. 462. In response to that order, settlement negotiation correspondence authored by government prosecutors ( but *not* by Epstein's counsel) was produced to plaintiffs.

Once the CVRA action was re-activated – after plaintiffs had successfully pursued their civil monetary remedies against Mr. Epstein to completion – plaintiffs sought to use that correspondence in their CVRA case in support of their contentions that the government had violated their CVRA rights by not consulting with them

before entering into the NPA with Epstein and that, as a remedy, the district court should order the rescission of the NPA.[2] The government took no position on plaintiffs' proposed use of the correspondence. DE60:1-2. *See* DE208:65 (plaintiffs' counsel states that government does not oppose plaintiffs' request to use the government's side of the correspondence which had already been disclosed to plaintiffs). Plaintiffs also sought disclosure from the government of correspondence authored and sent to the government by Epstein's attorneys in the course of their efforts on behalf of their client to resolve the ongoing criminal investigation of him.

Both Epstein and his criminal defense attorneys – appellants Roy Black and Martin Weinberg – filed motions to intervene for the limited purpose of challenging the use and disclosure of the settlement/plea negotiation correspondence. DE56, 93, followed by supplemental briefing and motions for a protective order, contending that the correspondence was privileged and confidential under Fed. R. Crim. P 11(f) and Fed. R. Evid. 410 and the work-product privilege and that the correspondence fell within the bounds of privilege under Fed. R. Evid. 501. DE:94, 160,161, 162. Following a hearing on the motions to intervene, the government filed a response to

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[2] Plaintiffs' civil settlements with Epstein required that, if they sought to use the correspondence in the CVRA case, they would provide Epstein with advance notice so that he could submit his objections to the district court to be ruled upon before the correspondence was publicly disclosed. DE51:2.

the arguments advanced by intervenors, in which it agreed with intervenors that settlement/plea negotiation communications should remain privileged and confidential. DE100.[3]

The district court granted the motions to intervene, DE158, 159, but ultimately ruled that the correspondence was subject to disclosure. DE188. The district court rejected intervenors' argument based on Rule 410, erroneously concluding that the correspondence fell outside the protections of Rule 410. *Id.* at 4. The district court also rejected – again erroneously – the application of Rule 410 to Epstein's counsel's communications with the government on the ground that the protections of Rule 410 were negated when Epstein pled guilty, albeit in state court. *Id.* at 4-5. Finally, the district court rejected intervenors' argument based on Rule 501 on the ground that Congress had already addressed the issue in Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 and did not see fit to recognize a privilege for plea negotiation communications. *Id.* at 8-9. That too was error.

Intervenors sought a stay of the district court's disclosure order pending appeal to this Court, DE193, which the district court denied. DE206. Thereafter, intervenors renewed their request for a stay pending appeal in this Court, which motion remains

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[3] The government's response was not among the pleadings which the district court indicated that it considered in ruling on the disclosure issue. *See* DE188:1.

pending. During the same time frame, plaintiffs filed a motion to dismiss intervenors' appeal for lack of jurisdiction, which intervenors have opposed. That motion too remains pending.

## STATEMENT OF STANDARD OF REVIEW

The district court's interpretation of federal procedural rules, such as Fed. R. Evid. 410, is subject to *de novo* review. *Long v. Raymond Corp.*, 245 Fed. Appx. 912, 913 (11th Cir. 2007). The decision to recognize a privilege is a mixed question of law and fact which this Court reviews *de novo. Adkins v. Christie*, 488 F.3d 1324, 1327 (11th Cir. 2007). Questions of this Court's appellate jurisdiction are also reviewed *de novo. United States v. Cartwright*, 413 F.3d 1295, 1299 (11th Cir. 2005).

## SUMMARY OF ARGUMENT

The settlement/plea negotiation process, a critical component of the criminal justice system and one with serious Sixth Amendment implications once formal charges have been brought, cannot function properly unless counsel are assured that their communications with prosecutors will not later be subject to disclosure to third parties seeking to harm their clients. The need for open and frank exchanges of information and opinions during plea/settlement negotiations lies at the heart of Fed. R. Evid. 410, which "creat[es], in effect, a privilege of the defendant," *United States v. Mezzanatto*, 513 U.S. 196, 205 (1995). The settlement negotiations at issue lie well

within the heartland of Rule 410's prohibition against the admissibility of plea negotiations "against the defendant who was a participant in the plea discussions" "in any civil or criminal proceeding" and should be protected from disclosure to third parties for that reason. The conjunction of Rule 410, the opinion work product privilege, and the Sixth Amendment right to the effective assistance of counsel during the plea negotiation process require that counsel's plea/settlement negotiation correspondence be protected from disclosure to third parties. Confidentiality of plea negotiation communications is essential to ensure that defense counsel can fulfill their constitutional and professional obligations to provide their clients with effective representation during the plea negotiation process, whether the client is a target of an advanced grand jury investigation, as Epstein clearly was, or has already been charged with criminal offenses.

There is also a common law plea/settlement negotiation process which should be formally recognized by this court under Fed. R. Evid. 501 arising from the expectations of privacy and confidentiality on which defense counsel have reasonably relied for many decades in negotiating with government attorneys on behalf of their clients. In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court focused on four primary considerations governing the recognition of privileges under Rule 501: the needs of the public good, the private interests at stake, the evidentiary benefit of the

privilege, and the consensus among the states. All of these factors militate in favor of recognition of a plea/settlement negotiation privilege. First, the public has a strong interest in the effective functioning of the criminal settlement/plea negotiation process, which is critical to the very ability of the criminal justice system to function at all, as ours is "a system of pleas, not a system of trials." *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012). The effective functioning of that system is dependent on counsel's freedom to engage in the open and candid discussions which lie at the heart of effective plea/settlement negotiation without fear that they will later harm their clients in later litigation.

Second, the private interests at stake are profoundly important. In most criminal cases, it is the negotiations with the prosecution, not a judge or jury, which will determine who goes to jail and for how long. A system in which counsel must evaluate every statement they contemplate making to a prosecutor in the course of plea/settlement negotiations in terms of the damage it may later do their clients if subject to discovery in other litigation is one in which counsel cannot provide the effective assistance of counsel required by the Sixth Amendment. In the pre-indictment context where, as here, negotiations are conducted during an ongoing grand jury investigation, counsel's ethical and professional responsibilities to achieve the best result possible for their clients are no less real or important. Counsel cannot

effectively fulfill those responsibilities unless they are free to communicate with prosecutors openly and frankly, without tempering or censoring their plea/settlement communications to avoid making statements that could later come back to haunt their clients in subsequent litigation.

Third, the evidentiary costs of the privilege are negligible because if defense counsel know that their communications with government counsel may later be subject to discovery in other litigation and then to public disclosure, they will necessarily refrain from making admissions and concessions, either of fact or law, which could later harm their clients. Thus, as in *Jaffee*, the "evidence" which would be available for later discovery would likely never come into being. Fourth, there is a strong consensus in the states that, at least where, as here, no guilty plea was entered to the offenses which were the subject of the negotiations, plea negotiations are protected from public disclosure in the courts.

This Court has jurisdiction of this appeal under *Perlman v. United States*, 247 U.S. 7 (1918), as the district court's order from which this appeal is taken is final as to intervenors/appellants because they are not parties to the underlying action, having intervened only for the limited purpose of challenging the disclosure of the correspondence at issue. In the absence of the ability to take an appeal at this juncture, intervenors/appellants are "powerless to avert the mischief of the order." *Id.*

at 13.

## ARGUMENT

The district court's order is the first decision anywhere, insofar as the undersigned counsel are aware, which has ordered disclosure to third party litigants of private and confidential communications from attorneys seeking to resolve a criminal matter favorably to their clients to government prosecutors. The district court's decision drastically reshapes the landscape of criminal settlement negotiations and overturns expectations of privacy, confidentiality, and privilege on which criminal defense attorneys have reasonably relied for many decades in negotiating with government attorneys on behalf of their clients. That decision has potentially far-reaching and, intervenors contend, seriously deleterious consequences for the ability of attorneys nationwide to effectively represent their clients through open and candid communications with government counsel. The decision will have a predictably chilling effect on attorneys around the country, if they can no longer expect privacy and confidentiality in their written communications with prosecutors aimed at reaching a negotiated resolution to a criminal investigation or prosecution. Such communications often necessarily involve explicit or implicit admissions regarding their client's conduct, legal opinions, and opinions regarding acceptable resolutions of the matter, admissions and opinions which attorneys in many cases will be loath

to commit to written form if they may be subject to later disclosure to litigation adversaries of the attorneys' clients.

This case is far from *sui generis* – the cases are legion in which there is related civil litigation seeking damages or other recovery from individuals who were targets of criminal investigations or prosecutions and in which plaintiffs, after becoming aware of the district court's decision, will begin clamoring for access to communications between defendants' counsel and prosecuting authorities in the belief that they may support their cases against the defendants. The settlement/plea negotiation process, a critical component of the criminal justice system and one with serious Sixth Amendment implications once formal charges have been brought, cannot function properly unless counsel are assured that their communications with prosecutors will not later be subject to disclosure to third parties seeking to harm their clients. The need for open and frank exchanges of information and opinions during plea/settlement negotiations lies at the heart of Rule 410, which itself bars disclosure of the correspondence at issue. The settlement/plea negotiation process is of such profound public and constitutional importance that the Court should recognize the privileged nature of the correspondence under Fed. R. Evid. 501.

## I. THE CORRESPONDENCE IS PROTECTED FROM DISCLOSURE BY RULE 410 AND THE WORK-PRODUCT PRIVILEGE.

### A. The Constitutional Role of Plea Bargaining in the Criminal Process.

Any assessment of the merits of intervenors' contentions must begin with an understanding of the central role of plea bargaining and settlement negotiations in our criminal justice system and the Sixth Amendment protections which surround them. "Plea bargains are . . . central to the administration of the criminal justice system" because ours is "a system of pleas, not a system of trials." *Lafler v. Cooper*, 132 S.Ct. 1376, 1388 (2012); *Missouri v. Frye,* 132 S. Ct. 1399, 1407 (2012). In *Lafler* and *Frye*, the Supreme Court ruled that the Sixth Amendment right to effective assistance of counsel "extends to the plea bargaining process" and that defendants are entitled to "the effective assistance of competent counsel" during plea negotiations. *Lafler*, 132 S. Ct. at 1384; *Frye*, 132 S.Ct. at 1407-09. Under *Lafler* and *Frye*, counsel have an ongoing obligation to provide effective representation in plea bargaining and to engage in communications with the client and the prosecutor to discharge that obligation. Even before formal charges are brought, counsel representing a client under federal investigation have an obligation to secure the best possible outcome for their clients, whether it be one which results, as here, in no charges being brought by the prosecuting authority or the bringing of fewer, or less serious, charges against the

client. By their very nature, effective plea/settlement negotiations necessarily involve counsel's making admissions about the defendant's conduct or concessions as to the applicable law, proposing compromises, and taking positions at odds with those they would advance if the matter were to be litigated. Defense counsel cannot fulfill their professional obligations to their clients if they must temper their communications with the prosecution in the criminal settlement negotiation context for fear that disclosures made now will later enure to the clients' severe detriment in other litigation contexts. The professional, ethical, and constitutional obligations of attorneys representing persons under investigation for, or charged with, crimes are terribly at odds with any ruling which exposes those negotiations to public scrutiny (or to the scrutiny of later litigation adversaries of the client) and makes them admissible in evidence to be used as ammunition to harm the clients, yet that is the very result which the district court's order enshrines.

Under the district court's ruling, the attorneys for a person under federal criminal investigation may never enter into negotiations – at least in writing – with the government with the primary aim of avoiding federal indictment entirely, no matter how serious and good faith those negotiations, without risking that anything they say on behalf of their clients in seeking to arrive at a negotiated settlement may in the future be disclosed to adversarial third parties, to the severe detriment of their

client. This is not and cannot be the law and is certainly unsound policy. Indeed, the district court's opinion creates an incentive for attorneys *not* to do precisely what *Hickman v. Taylor*, 329 U.S. 495 (1947), was intended to encourage attorneys to do: reduce facts, ideas, and opinions to writing. A return to the days of settlement/plea negotiations conducted through oral, rather than written, communications, which the district court's decision will encourage whenever the progress of the negotiations or the attainment of the desired objective requires the attorney to communicate information which, if disclosed in another context, would be detrimental to the client's interests would serve no one's interests – not the defendant's, not the government's, not the judicial system's, and not the public's.

### B. The Protections Afforded By Rule 410 and Its Role in Promoting Effective Plea/Settlement Discussions.

Rule 410 "creat[es], in effect, a privilege of the defendant." *United States v. Mezzanatto*, 513 U.S. 196, 205 (1995), and, along with its cognate, Fed. R. Crim. P. 11(f), "address[es] both individual and systemic concerns in their attempt 'to permit the unrestrained candor which produces effective plea discussions.'" *United States v. Sylvester*, 583 F.3d 285, 288 (5th Cir. 2009), *quoting* Fed. R. Crim. P. 11 Advisory Committee Notes (1979). *See id.* at 291 ("Congress accepted Rules 11(e)(6) and 410 with their goal of permitting candid plea discussions, serving personal as well as

institutional interests"). The "central feature" of Rule 410 "is that the accused is encouraged candidly to discuss his or her situation in order to explore the possibility of disposing of the case through a consensual arrangement." *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977). The Rule is derived from "the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate *without fear that his statements will later be used against him*." *Id.* at 796 (emphasis added). *See, e.g., United States v. Ross*, 493 F.2d 771, 775 (5th Cir. 1974)("If, as the Supreme Court said in *Santobello* [*v. United States*, 404 U.S. 257 (1971)], plea bargaining is an essential component of justice and, properly administered, is to be encouraged, it is immediately apparent that no defendant or his counsel will pursue such an effort if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt"); *see also United States v. Davis*, 617 F.2d 677, 683 (D.C.Cir. 1979)("The most significant factor in [Rule 11(e)(6)'s] adoption was the need for free and open discussion between the prosecution and the defense during attempts to reach a compromise").

The settlement negotiations at issue here lie well within the heartland of Rule 410's prohibition against the admissibility of plea negotiations "against the defendant who was a participant in the plea discussions" "in any civil or criminal proceeding" and should be protected from disclosure to third parties for that reason. Plaintiffs have

made it clear that they intend to use the correspondence to prove that the government violated their CVRA rights and that, to remedy that violation, the NPA agreement should be rescinded so that they could seek to have Epstein prosecuted federally. *See* DE208:32-33, 61, 64-65.[4] Thus, although the government is the defendant in the action, it is plain that the plaintiffs intend to use the correspondence "against" Epstein. The words "not admissible against the defendant" in Rule 410 refer to "*the purpose for which the evidence is offered*" and not "to the kind of proceeding in which the evidence is offered." Fed. R. Crim. P 11, Advisory Committee Notes (1979)(emphasis added). *See* DE100:1, 3-4 (government agrees that plaintiffs are seeking to use the settlement negotiation correspondence against Epstein within the meaning of Rule 410).

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[4] The district court's decision to the contrary notwithstanding, DE189, it is Epstein's position that due process and contract principles preclude the rescission of the NPA. Epstein has fully performed his side of the bargain with the government, and when a bargain is based "on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257 (1971). Rescission of the NPA would violate Epstein's constitutional and contractual rights. *See, e.g., United States v. Al-Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008)("Due process requires the government to adhere to the promises it has made in a plea agreement"); *United States v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir.1998)("Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law. Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform its promises").

### C. Rule 410, the Work-Product Privilege, and the Sixth Amendment.

Without persuasive precedent, by ordering the disclosure of settlement negotiations to Epstein's adversaries, the district court has drastically reshaped the settlement negotiation landscape to retroactively eliminate the reasonable expectation generated by Rule 410 and the work-product privilege, in reliance on which these communications were authored by competent and responsible attorneys. Those communications were made with complete confidence that their contents would remain confidential, known only to counsel for the government and intervenors, and would not be subject to possible future disclosure to third parties, and certainly not to third parties seeking to use the contents of their attorney communications to harm their client. That belief was eminently reasonable and based on established practice and understandings regarding the confidentiality of such communications. The attorney intervenors' decisions regarding the content of the communications sent to the government in the effort to fulfill their professional and ethical obligations to their client were made in reliance upon those communications not being disclosed outside the attorney-to-attorney settlement negotiation process.

If more is needed in addition to the plain language of Rule 410 to preclude disclosure of the correspondence to plaintiffs, it can be found in the conjunction of Rule 410, the work-product privilege, and the Sixth Amendment right to the effective

assistance of counsel in the plea bargaining process. Criminal defendants have a Sixth Amendment right to the effective assistance of counsel in the plea negotiation process. In the course of providing their clients that assistance, counsel will often communicate opinion work product to the prosecutor – opinions as to the facts, opinions as to the controlling law, opinions as to the application of the law to the facts of the case, opinions as to the strength of the government's case and the strength of the defendant's defenses, opinions as to the credibility of government witnesses, opinions as to interpretations of the evidence, and the like. Those opinions will often directly bear on the defendant's guilt or innocence of the offense charged – what he did and did not do, what he knew and did not know, what he intended and did not intend – and are essential to the frank and open exchanges which characterize effective representation in the plea bargaining process. Defense counsel cannot perform their constitutionally-mandated role in the plea negotiation process unless they feel free to make these candid disclosures to the prosecution without fear that they will come back to harm their client in another litigation context; the more defense counsel feel they must pull their punches during plea negotiations to forestall other potential harm to their clients, the less effective their representation will be. As counsel framed the issue for the district court:

And here is the problem, your Honor, just to tell you practically what it's like

> out in the field practicing criminal law: If we believe that our statements in any way during this plea bargaining process would end up coming back to damage our clients in some way, why would we do this? Why would we go through this whole process of sending these briefs and letters and interpretations of the law and discussions of the various offenses and how things could be arranged and the discretion between the federal and the state government and all those kinds of things, even discussing proposed charges and all of that, why would we ever engage in that if we ever thought these things could come back to bite our clients?

DE208:37. While the Sixth Amendment right to counsel had not yet attached in this case, the district court's opinion is equally applicable to cases in which it has. Confidentiality of plea negotiation communications is essential to ensure that defense counsel can fulfill their constitutional and professional obligations to provide their clients with effective representation during the plea negotiation process, whether the client is a target of an advanced grand jury investigation, as Epstein clearly was, or has already been charged with criminal offenses.

The correspondence at issue here is quintessential opinion work product, and addressed matters such as "what the statutes mean, what the import of the statutes are, what the cases are, what the discretion of the Attorney General is, . . . federalism, the differences between state and federal law enforcement, whether or not the government should proceed with this case because of various policy reasons." DE208:18. The Federal Rules have codified the common law protections for attorney

work product. Fed. R. Civ. P. 26(b)(3)(B) exempts from discovery documents that contain "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation." In criminal cases, the rules preclude discovery of "reports, memoranda, or other internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case," Fed. R. Crim. P. 16(a)(2), 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(b)(2)(A).

The Supreme Court has recognized "a qualified privilege for certain materials prepared by an attorney 'acting for his client in anticipation of litigation,'" *United States v. Nobles*, 422 U.S. 225, 237-38 (1975), *quoting Hickman v. Taylor*, 329 U.S. 495, 508 (1947), which applies in both civil and criminal litigation:

> Although the work-product doctrine most frequently is asserted as a bar to discovery in civil litigation, its role in assuring the proper functioning of the criminal justice system is even more vital. The interests of society and the accused in obtaining a fair and accurate resolution of the question of guilt or innocence demand that adequate safeguards assure the thorough preparation and presentation of each side of the case.

*Nobles*, 422 U.S. at 238.

In *Hickman*, the Court described the policy which dictates that opinion work product of attorneys be protected from disclosure. An attorney must "work for the

advancement of justice while faithfully protecting the rightful interests of his clients," 329 U.S. at 510-11, and to perform his duties to his client, "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." Properly preparing a client's case demands that the lawyer "assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories, and plan his legal strategy without undue and needless interference." *Id.* That work will be reflected "in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways . . . ." *Id.* If such materials were open to adverse parties "on mere demand," then "much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own." *Id.* Inevitably, "[i]nefficiency, unfairness and sharp practices would . . . develop in the giving of legal advice and the preparation of cases for trial." *Id.* Ultimately, [t]he effect on the legal profession would be demoralizing. And the interests of clients and the cause of justice would be poorly served." *Id.* For these reasons, attorney opinion work product is afforded the most comprehensive protection under the law. As this Court has recognized, "[o]pinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Cox v. Administrator U.S. Steel & Carnegie*, 17 F.3d

1386, 1422 (11th Cir. 1994).

The district court, examining the work-product issue in isolation, concluded that the work-product privilege had been waived by sending the correspondence at issue to the government. DE188:6-7. However, in the context of plea/settlement negotiations, the question of work-product waiver must be assessed in conjunction with the constitutional right to effective assistance of counsel in the plea negotiation process and the protections of Rules 410 and 11(f). "[C]ommon law principles embodied in the . . . work product doctrine are to be applied in a common sense way in light of reason and experience as determined on a case-by-case basis." *In re Six Grand Jury Witnesses*, 979 F.2d 939, 944 (2d Cir. 1992). "The purposes of the work product privilege . . . are not inconsistent with selective disclosure – even in some circumstances to an adversary." *Williams & Connolly v. S.E.C.*, 662 F.3d 1240, 1244 (D.C.Cir. 2011).

Here, the government was unquestionably Epstein's adversary in the matter of the federal criminal investigation *but not necessarily in the joint attempts by both parties to resolve the investigation through a plea or a non-prosecution agreement, as they ultimately did.* During the negotiations, Epstein and the government had the common goal of reaching an agreement to resolve the matter and thereby avoid the risks to both parties always inherent in a trial. The disclosures were made in

circumstances in which the attorneys were, in light of the protections afforded by Rules 410 and 11(f) and the customary practices of the defense and prosecution function, entitled to assume would remain confidential and would not be disclosed to third parties. *See United States v. Deloitte LLP*, 610 F.3d 129, 141 (D.C.Cir. 2010)(court "*examine[s] whether the disclosing party had a reasonable basis for believing that the recipient would keep the disclosed material confidential*" (emphasis added)). That expectation of confidentiality is bolstered by the utter dearth of precedent even remotely suggesting that plea/settlement negotiation communications may be subject to discovery in civil or other litigation.

Intervenors are aware of no case which has examined the work product privilege in the context of settlement/plea negotiations, Rules 410 and 11(f), and the Sixth Amendment right to the effective assistance of counsel during the plea negotiation process. Certainly none of the cases relied on by the district court did. Invoking a work-product waiver theory for communications made by defense attorneys to prosecutors during settlement/plea negotiations is flatly inconsistent with the policies and purposes underlying Rules 410 and 11(f) and, where the Sixth Amendment right to counsel has attached, would severely compromise counsel's ability to provide his client with the constitutionally-mandated effective assistance of counsel in the plea negotiation process.

### D. The District Court's Reasons for Finding that The Correspondence at Issue Did Not Fall Within Rule 410 Are Unpersuasive.

The district court advanced two reasons for its conclusion that the correspondence at issue was not within the protections of Rule 410: (1) that the correspondence "arguably" constituted only "general discussions of leniency and statements made in the hope of avoiding a federal indictment," DE188:4, and (2) that the communications resulted in Epstein's plea of guilty in state court, DE188:4-5. Both reasons are equally unpersuasive.

As for the first reason, "[t]o determine whether a discussion should be characterized as a plea negotiation the trial court must 'determine, first, whether the accused exhibited an actual subjective expectation to negotiate a plea at the time of the discussion, and second, whether the accused's expectation was reasonable given the totality of the objective circumstances.'" *United States v. Merrill*, 685 F.3d 1002, 1013 (11th Cir. 2012), *quoting United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978). *See United States v. Knight*, 867 F.2d 1285, 1288 (11th Cir. 1989)("suppressing the evidence of plea negotiations serves the policy of ensuring a free dialogue . . . when the accused and the government actually engage in plea negotiations"). Here, the best proof that the communications at issue were not merely "general discussions of leniency" is that they unquestionably resulted in an agreement

which settled the federal criminal investigation of Epstein. This case is, therefore, dispositively different from the cases on which the district court relied.

*Merrill* concerned statements made by the defendant himself in informal meetings with the prosecution prior to his scheduled grand jury testimony. *See* 685 F.3d at 1007-08. The only discussions of leniency involved the government's generalized statement to the defendant that if he cooperated, the government would recommend leniency when he was sentenced. *Id.* Notably, the Court's ruling that the district court had not erred in refusing to suppress the defendant's statements rested on its conclusion that, given the circumstances, the defendant could not have reasonably believed that he was engaged in plea negotiations. *Id.* at 1013. The case does not stand for the general proposition advanced by the district court that settlement discussions in advance of the return of an indictment categorically do not fall within Rule 410. Here, the federal investigation of Epstein was sufficiently intense and advanced that it included a draft indictment, and, unlike *Merrill* and the other cases on which the district court relied, the communications were made attorney-to-attorney – *not* defendant to prosecutors – under circumstances which leave no room to doubt that the parties were engaged in serious negotiations to

resolve the federal criminal investigation of Epstein.[5]

As for the district court's second reason, in the sole case the district court cited for the proposition that Epstein's plea of guilty in state court vitiated the protections of Rule 410, *United States v. Paden*, 908 F.2d 1229 (5th Cir. 1990), the defendant pled guilty to *federal* charges pursuant to his plea agreement. That Epstein entered into a plea in state court to state offenses is irrelevant to the Rule 410 analysis. The plain meaning of Rule 410(4) is that the defendant must enter a plea in *federal* court relating to the *federal* offenses under investigation. If Congress had intended to include state court pleas in subsection (4), it would have expressly done so, as it did in subsection (3). There, Congress expressly provided for change-of-plea proceedings in federal court and "comparable state procedures." Fed. R. Evid. 410(3). Congress did not provide for state court pleas in subsection (4) of the rule, and "where Congress includes particular language in one section of a statute but omits it

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[5] The other two cases relied on by the district court are equally inapposite. *United States v. Edelman*, 458 F.3d 791 (8th Cir. 2006), involved statements made by the defendant to federal prosecutors during meetings at which she was told, according to the government, that she was a "prime suspect" in criminal wrongdoing and that any statements she made could be used against her. *Id.* at 805. In *United States v. Hare*, 49 F.3d 447 (8th Cir. 1995), like the other two cases, the statements at issue were made by the defendant to prosecutors voluntarily and unconditionally in the unilateral hope of bettering his chances. *Id.* at 451.

in another . . . it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

The plain meaning of Rule 410 is that any disclosure of plea negotiation statements must relate to the plea that was actually entered. Here, there was no guilty plea to the federal offenses which the government was investigating and which were the subject of the settlement negotiation correspondence, in which Epstein's counsel addressed the reasons why Epstein should not be prosecuted federally. *The substantive settlement discussions thus revolved around offenses to which Epstein did* ***not*** *ultimately plead guilty, but which are the very offenses for which plaintiffs now seek to have Epstein prosecuted.* Under such circumstances, the protections of Rule 410 should be at their zenith, not their nadir. Under the district court's interpretation of Rule 410, the federal government or a state government could use all the statements made during the settlement negotiations to begin a new investigation of Epstein and then use the statements made by Epstein and his attorneys to prosecute him, even if all the statements related to allegations and potential charges that never resulted in a plea of guilty. Such an interpretation is wholly inconsistent with the purposes of Rule 410 to create a protected sphere within which defendants and their counsel can engage in frank, candid, and open plea/settlement discussions without

fear that their statements will one day be used to the defendant's detriment if the negotiations do not produce a guilty plea to the charges under discussion. *See* Section I(B), *supra.*

## II. THE COURT SHOULD RECOGNIZE THAT THERE IS A COMMON LAW PRIVILEGE FOR SETTLEMENT/PLEA NEGOTIATION COMMUNICATIONS IN CRIMINAL CASES.

In invoking Rule 501, intervenors are not asking for the recognition of a "new" privilege but instead for the *de jure* validation of a *de facto* privilege which has been effectively recognized – and relied upon – for decades by attorneys representing criminal defendants in both federal and state courts. Indeed, the Supreme Court has already recognized that Rule 410 "creat[es], in effect, a privilege of the defendant." *United States v. Mezzanatto*, 513 U.S. 196, 205 (1995).[6]

"The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges . . . 'governed by the principles of common law as they may be interpreted . . . in the light of reason and

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[6] In *Mezzanatto*, the defendant challenged the admissibility of plea negotiation statements he made to a prosecutor, who had conditioned his willingness to enter into discussions with the defendant on the defendant's agreement that any statements he made could be used to impeach him if the case went to trial and he took the stand. In concluding that the protections of Rules 410 and 11(e)(6)(the precursor to Rule 11(f)) could be waived by a defendant, the Court stated that, like other privileges, the privilege created by Rules 410 and 11(e)(6) could be waived by the defendant.

experience.'" *Trammel v. United States*, 445 U.S. 40, 47 (1980), *quoting* Fed. R. Evid. 501. In enacting Rule 501, Congress rejected the proposed rule which limited federally-recognized privileges to a list of nine specific privileges, "manifest[ing] an affirmative intention not to freeze the law of privilege. Its purpose rather was to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis . . . and to leave the door open to change." *Trammel*, 445 U.S. at 47 (internal quotation marks omitted).

In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court explored the considerations which govern the recognition of privileges under Rule 501. Even though the public generally "has a right to every man's evidence," *id.* at 9, exceptions to that general rule "may be justified . . . by a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth.'" *Id.*, *quoting Trammel*, 445 U.S. at 50. The question which must be answered is whether protecting the communications at issue "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.*, *quoting Trammel*, 445 U.S. at 51. In *Jaffee*, "reason and experience" convinced the Court that the psychotherapist-patient privilege did so:

> Effective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the

> problems for which individuals consult psychotherapists, disclosure of confidential communications may cause embarrassment and disgrace. For this reason, the mere possibility of disclosure may impede the development of the confidential relationship necessary for successful treatment.

518 U.S. at 10. The Court then examined "the likely evidentiary benefit that would result from the denial of the privilege," which it concluded was, in the psychotherapist-patient privilege context, "modest" because

> [i]f the privilege were rejected, confidential conversations between psychotherapists and their patients would surely be chilled, *particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation.* Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access – for example, admissions against interest by a party – is unlikely to come into being. The unspoken 'evidence' will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

*Id.* at 11-12 (emphasis added). Lastly, the Court looked to the consensus of the states that recognition of a psychotherapist-patient privilege was appropriate. As this Court has summarized the *Jaffee* factors: "1) the needs of the public good; 2) whether the privilege is rooted in the imperative need for confidence and trust, 3) the evidentiary benefit of the denial of the privilege, and 4) the consensus among the states." *Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007). These factors all militate in favor of the recognition that there is a common law privilege for settlement/plea negotiation communications.

### A. The Public Has a Strong Interest in the Effective Functioning of the Plea/Settlement Negotiation Process.

Recognition of the settlement/plea negotiation communication privilege would serve a critically important public interest in the effective functioning of the criminal justice system. The privilege encourages disposition of criminal cases by plea agreement, "an essential component of the administration of justice" which is "to be encouraged" because "[i]f every criminal charge were subjected to a full-scale trial, the states and the federal government would need to multiply by many times the number of judges and court facilities." *Santobello v. New York*, 404 U.S. 257, 260 (1971). "[T]he guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system" which "benefit all concerned." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Those sentiments are just as true today, when the overwhelming majority of criminal cases are resolved through plea bargaining. Reason and experience counsel that our system of sentencing laws, ethical rules, federal court dockets, and constitutional considerations will not function if plea negotiation communications are not privileged. After all, "it is immediately apparent that no defendant or his counsel [would] pursue [plea negotiations] if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt," *Herman*, 544 F.2d at 797, or are at risk of disclosure to civil litigants or third-

party criminal victims seeking, as here, to invalidate a plea or deferred prosecution agreement with the government.

Similar considerations led the Sixth Circuit to recognize a settlement negotiation privilege under Rule 501 and to conclude that there is a strong public interest in the secrecy of statements made during settlement negotiations in civil cases:

> There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. *Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross-examination*, under the ruse of "impeachment evidence," by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of a trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.

*Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 980 (6th Cir. 2003)(emphasis added).[7] *See Reichenbach v. Smith*, 528 F.2d 1072, 1074 (11th

[7] The Federal Circuit declined to recognize a settlement negotiation privilege in *In re MTSG, Inc.*, 675 F.3d 1337 (Fed. Cir. 2012). In so doing, however, the *MTSG* Court elevated subsidiary considerations – the policy decisions of the states, whether

Cir. 1976)("With today's burgeoning dockets and the absolute impossibility of courts ever beginning to think that they might even be able to hear every case, the cause of justice is advanced by settlement compromises sheparded by competent counsel"). As the *Goodyear Tire* Court noted, "confidential settlement communications are a tradition in this country." 332 F.3d at 980.[8]

For similar reasons, a number of courts have concluded that the public interest in resolving disputes without litigation is sufficiently important to warrant the recognition of a mediation privilege. In *Folb v. Motion Picture Industry Pension & Health Plans*, 16 F.Supp.2d 1164 (C.D.Cal. 1998), the court described several ways in which the mediation privilege serves important public interests: it would encourag[e] prompt, consensual resolution of disputes, minimizing the social and individual costs of litigation," "markedly reduc[e] the size of state and federal court

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Congress had spoken on the issue, the list of privileges which Congress *rejected* in enacting Rule 501, only one of which appears on this Court's summary in *Adkins* of the most important considerations identified in *Jaffee* – over the most important consideration, the strong public and private interests at stake. The *Goodyear Tire* analysis is far more consonant with the Supreme Court's teaching in *Jaffee* than is *MTSG*.

[8] In *Baker v. Secretary, U.S. Dep't of Transportation*, 452 Fed. Appx. 934, 937 (11th Cir. 2012), this Court appeared to assume the existence of a settlement negotiations privilege, stating, citing *Goodyear Tire*, that "the settlement negotiations privilege does not apply" to communications made before litigation was even contemplated.

dockets," *id.* at 1176, and "increas[e] the quality of justice in those cases that do not settle voluntarily." *Id. See, e.g., Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F.Supp.2d 511, 514 (W.D.Pa. 2000)(Absent a mediation privilege, "[t]he effectiveness of mediation would be destroyed, thereby threatening the well established public needs of encouraging settlement and reducing court dockets"); *In re RDM Sports Group, Inc.*, 277 B.R. 415, 430 n.6 (N.D. Ga. 2002)("encouragement of settlement negotiations and alternative dispute resolution is a compelling interest sufficient to justify recognition of a mediation privilege"); *see also Lake Utopia Paper Ltd. v. Connelly Containers, Inc.*, 608 F.2d 928, 930 (2d Cir. 1979)(absence of confidentiality of matters discussed at Civil Appeals Management Plan conferences "would surely destroy the effectiveness of a program which has led to settlements and withdrawals of some appeals and to the simplification of issues in other appeals, thereby expediting cases at a time when the judicial resources of this Court are sorely taxed").[9]

The same compelling public interest in encouraging settlement negotiation to promote the efficient and effective operation of the judicial system exists in the

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[9] Courts have not been uniform in adopting the mediation privilege. *See, e.g., Bird v. Regents of New Mexico State Univ.*, 2010 WL 8973917 (D.N.M. June 15, 2010).

context of criminal cases. "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Frye*, 132 S.Ct. at 1407. Thus, plea/settlement negotiation "is not some adjunct to the criminal justice system, it *is* the criminal justice system." *Id.* (emphasis in original). The plea/settlement negotiation communication privilege is essential to the functioning of that system – indeed, to its very ability to function at all – because absent such a privilege, counsel will not feel free to engage in the open and candid discussions, admissions, and concessions which lie at the heart of effective plea/settlement negotiation.

### B. The Private Interests at Stake Are Profoundly Important.

Plea negotiations are "rooted in the imperative need for confidence and trust," *Jaffee*, 518 U.S. at 10, and maintaining their confidentiality advances significant private as well as public interests. There is an "imperative need" that counsel be able to trust that communications made to prosecutors in the course of the plea/settlement negotiation process will remain confidential and not be subject to later disclosure to third parties seeking to harm their clients. In most criminal cases, it is the negotiations with the prosecution – which commonly include concessions regarding facts or even charges as to which a target or defendant will concede guilt – not a judge or jury, which will determine who goes to jail and for how long. A system in which counsel

must evaluate every statement they contemplate making to a prosecutor in the course of plea/settlement negotiations in terms of the damage it may later do their clients if subject to discovery in other litigation is one in which counsel cannot provide the effective assistance of counsel required by the Sixth Amendment. "The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Frye*, 132 S.Ct. at 1407. The central focus of those responsibilities in the plea negotiation process is achieving the optimum result for the client, which may include conviction on less serious charges or less or no time behind bars. In the pre-indictment context where, as here, negotiations are conducted during an ongoing grand jury investigation, counsel may not have Sixth Amendment responsibilities to the client, but their ethical and professional responsibilities to achieve the best result possible for their clients are no less real or important. Counsel cannot effectively fulfill those responsibilities unless they are free to communicate with prosecutors openly and frankly, without tempering or censoring their plea/settlement communications to avoid making statements that could later come back to haunt their clients in subsequent litigation. As in *Jaffee*, "[b]ecause of the sensitive nature of the problems for which individuals

[facing criminal prosecution or investigation] consult [attorneys], disclosure of confidential communications [made during the plea/settlement negotiation process] may cause embarrassment or disgrace," 518 U.S. at 10, and "confidential communications between [defense attorneys and prosecutors] would surely be chilled, particularly when it is obvious that the circumstances that give rise to [the communications] will probably result in litigation." *Id.* at 11-12.

The reasons which courts have given for applying a settlement or mediation privilege apply with even more force to plea/settlement negotiations in criminal cases, which have constitutional ramifications which do not appear in civil actions. Unlike disputes which are subject to civil mediation, criminal cases involve decisions regarding a defendant's life and liberty. Thus, in plea negotiations, the need for "counsel to discuss matters in an uninhibited fashion" is even more important. *See Lake Utopia Paper*, 608 F.2d at 930. When an individual is facing loss of liberty, he has an even greater "need for confidentiality and trust between participants in a [plea negotiation]," *Folb*, 161 F.Supp.2d at 1175, and the detriment to clients in criminal cases even greater if their attorneys must, as they would in the absence of the privilege, "feel constrained to conduct themselves in a cautious, tight-lipped non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a . . . dispute." *Sheldone*, 104

F.Supp.2d at 514, *quoting Lake Utopia Paper*, 608 F.2d at 930. Counsel will hesitate before "mak[ing] hypothetical concessions, offer[ing] creative *quid pro quos*, and generally mak[ing] statements that would belie their litigation efforts." *Software Tree, LLC v. Red Hat, Inc.*, 2010 WL 2788202 at *3 (E.D.Tex. June 24, 2010), *quoting Goodyear Tire*, 332 F.3d at 980. Discovery and use of plea negotiation communications will cause "a meaningful and irreparable chill" to the "frank and complete disclosures" that result in negotiated resolution of criminal matters. *In re Air Crash Near Cali, Colombia*, 959 F.Supp. 1529, 1533, 1535 (S.D.Fla. 1997). Thus, the private interests at stake, including the preservation of the Sixth Amendment right to the effective assistance of counsel in the plea bargaining process, are sufficiently compelling to warrant the recognition of a plea/settlement negotiation communication privilege.

### C. The Evidentiary Costs of the Privilege Are Negligible.

The communications which would be disclosed under the district court 's order were made by intervenor attorneys on behalf of Epstein as part of a full, open, and frank negotiation by highly experienced criminal defense counsel with a combined eighty years of experience between them with government counsel directed toward resolving the federal criminal investigation of Epstein on the most favorable terms possible. Those communications were made with complete confidence that their

contents would remain confidential, known only to counsel for the government and intervenors, and would not be subject to possible future disclosure to third parties, and certainly not to third parties seeking to use the contents of their attorney communications to harm their client. That belief was eminently reasonable and based on established practice and understandings regarding the confidentiality of such communications on which they relied in making those communications. The attorney intervenors' decisions regarding the content of the communications sent to the government in the effort to fulfill their professional and ethical obligations to their client were made in reliance upon those communications not being disclosed outside the attorney-to-attorney settlement negotiation process. The fact of the matter is that, if defense counsel know that their communications with government counsel may later be subject to discovery in other litigation and then to public disclosure, they will necessarily refrain from making admissions and concessions, either of fact or law, which could later harm their clients. Thus, as in *Jaffee*, the "evidence" which would be available for later discovery would likely never come into being:

> In contrast to the significant public and private interests supporting recognition of the privilege, the likely evidentiary benefit that would result from the denial of the privilege is modest. If the privilege were rejected, confidential communications between psychotherapists and their patients would surely be chilled, particularly when it is obvious that the circumstances that give rise to the need for treatment will probably result in litigation. Without a privilege, much of the desirable evidence to which litigants such as petitioner seek access

> – for example, admissions against interest by a party – is unlikely to come into being. This unspoken "evidence" will therefore serve no greater truth-seeking function than if it had been spoken and privileged.

*Jaffee*, 518 U.S. at 11-12. *See, e.g., Sheldone*, 104 F.Supp.2d at 517 ("the most compelling reason for recognizing the mediation privilege is the Plaintiffs' lack of entitlement to any admission of the Defendant that, but for the mediation process, would not have come into being"); *Folb*, 16 F.Supp.2d at 1177 (concluding that the *Jaffee* reasoning quoted above "applies with respect to party admissions in mediation proceedings"); *In re Air Crash*, 959 F.Supp. at 534-35 (recognizing privilege for pilot's reports to airline of violations of FAA regulations in based on public and private interests in airline safety investigation and because, if the privilege were not recognized, pilots would not make written reports of violations if they had to fear that their reports would be used in litigation or made public); *see also RDM Sports*, 277 B.R. at 430 (because alternate methods of dispute resolution are to be encouraged, "it makes little sense to place the costs of doing so – the requirement that they make communications and generate documents that would not otherwise come into existence – so high as to discourage their participation"). The same is equally true in the settlement/plea negotiation communication context.

Moreover, as the Sixth Circuit noted in *Goodyear Tire*, during settlement

negotiations

> [w]hat is stated as fact on the record could very well not be the sort of evidence which the parties would otherwise contend to be wholly true. That is, the parties may assume disputed facts to be true for the unique purpose of settlement negotiations. The discovery of these sort of "facts" would be highly misleading if allowed to be used for purposes other than settlement.

332 F.3d at 981. Moreover, plea/settlement discussions may be "motivated by a desire for peace rather than from a concession of the merits of the claim." *Id.*, *quoting United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982). In such circumstances, refusing to recognize the common law privilege for settlement/plea negotiation communications would hardly advance the search for the truth.

Finally, the vast majority of plea discussions end with a plea agreement and a guilty plea. In such cases, parties to other litigation will have available to them the far more powerful evidence of the defendant's admissions to criminal wrongdoing in open court. The negotiations to which the privilege would apply would affect only the tiny percentage of criminal cases in which the case goes to trial after plea negotiations fail to resolve the case or cases such as this one, in which the negotiations result in the prosecution's not bringing charges against the defendant.

### D. The Consensus Among the States.

Virtually every state, whether by rule or statute, has guaranteed that, where the negotiations do not result in a guilty plea to the offenses under negotiation, communications made during plea negotiations will not be admissible in evidence against the individual who engaged in those plea negotiations, largely in recognition of the same purposes underlying Rule 410 to promote open and frank plea discussions.[10] A number of state courts have described the prohibition against the admission of plea discussions as a privilege. *See, e.g., State v. Boggs*, 741 N.W.2d

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[10] Alaska: Alaska Rule Evid. 410; Arizona: Ariz. R. Crim. P. 17.4; Arkansas: Ark. R. Evid. 410; California: Cal. Evid. Code §1153; Colorado: Colo. R. Evid. 410; Delaware: Del. R. Evid. 410; Florida: Fla. Stat. Ann. §90.410; Hawaii: Hawaii R. Evid. 410; Idaho: Idaho R. Evid. 410; Illinois: Ill. S.Ct. Rule 402(f); Indiana: Ind. R. Evid. 410; Iowa: Iowa R. Evid. 5.410; Kentucky: Ky R. Evid. 410; Louisiana: LSA-C.E. Art. 410; Maine: Maine R. Evid. 410; Maryland: Md. Rules, Rule 5-410; Massachusetts: Mass. R. Crim. P. 12(f); Michigan: Mich. R. Evid. 410; Minnesota: Minn. R. Evid. 410; Mississippi: Miss. R. Evid. 410; Missouri: Mo. R. Crim. P. 24.02(d)(5); Nebraska: Neb. Rev. Stat. §27-410; New Hampshire: N.H. R. Evid. 410; New Jersey: N.J. R. Evid. 410; New Mexico: N.M. R. Evid. 410; North Carolina: N.C. R. Evid. 410; North Dakota: N.D. R. Evid. 410; Ohio: Ohio R. Evid. 410; Oklahoma: 12 Okl. Stat. Ann. §2410; Oregon: Or. Rev. Stat. §135.435; Pennsylvania: Pa. R. Evid. 410; Rhode Island: R.I. R. Evid. 410; South Carolina: S.C. R. Evid. 410; South Dakota: S.D.C.L. §19-12-12; Tennessee: Tenn. R. Evid. 410; Texas: Texas R. Evid. 410; Utah: Utah R. Evid. 410; Vermont: Vt. R. Evid. 410; Virginia: Va. S.Ct. Rule 3A:8; Washington: Wa. R. Evid. 410; West Virginia: W. Va. R. Evid. 410; Wisconsin: Wisc. Stat. Ann. §904.10; Wyoming: W.R. Crim. P. 11(e)(6).

492, 504 (Iowa 2007)(state cognate to Rule 410 "makes certain plea discussions inadmissible at trial because they are privileged"); *State v. Blom*, 682 N.W.2d 578, 620 (Minn. 2004)("Just as the physician/patient privilege safeguards the confidentiality of physician/patient communications in order to foster open and honest communications between physicians and patients, Rule 410 safeguards the confidentiality of plea negotiations in order to foster meaningful dialogue between the parties and to promote the disposition of criminal cases by compromise"); *Jasper v. State*, 871 So.2d 729, 731 (Miss. 2004)("a statement made during plea negotiations is privileged and its admission is prohibited by M.R.E. 410(4)"); *Shriver v. State*, 632 P.2d 420, 426 (Okla. Crim. App. 1980)(describing "majority view" that even absent state statute, "any communication relating to the plea bargaining process was privileged and inadmissible in evidence unless the defendant subsequently entered a plea of guilty which had not been withdrawn"); *State v. Trujillo*, 93 N.M. 724, 727, 605 P.2d 232, 235 (N.M.1980)("a weighing of conflicting policies demonstrates that the balance is tipped in favor of interpreting Rule 410 as the cloak of privilege around plea negotiation discussions"); *Moulder v. State*, 154 Ind. App. 248, 254, 289 N.E.2d 522, 525-26 (Ind. App. 1972)("The majority of our courts now follow the rule that communications relating to plea bargaining in criminal prosecutions are privileged and are not admissible in evidence"). Thus, there is a strong consensus in the states

that, at least where, as here, no guilty plea was entered to the offenses which were the subject of the negotiations, plea negotiation communications are protected from public disclosure in the courts. A decision such as that of the district court, which would make confidential plea/settlement negotiation communications discoverable in civil or other subsequent litigation upsets the expectations not only of the participants in the criminal plea/settlement negotiation process but of the states as well.

### E. Recognition of the Common Law Settlement/Plea Negotiation Privilege Is Not Inconsistent With Congress' Intention in Enacting Rules 410 and 11(f).

The district court rejected intervenors' contention that the Court should recognize the existence of a common law privilege for communications made in the course of settlement/plea negotiations on the ground that Congress has already addressed the issue in Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 and did not see fit to recognize a privilege for plea negotiation communications. DE188:8-9. Neither the Rules of Evidence nor the Rules of Criminal Procedure, however, have ever dealt with specifying the privileges which will and will not be recognized; instead, they leave that function to the courts under Rule 501. Nothing in Rules 11(f) or 410 suggest that Congress rejected (or even thought about) a privilege for attorney settlement/plea negotiation communications when framing those provisions.

Rule 410 begins with the assumption that a litigant such as the government is already in possession of plea negotiation materials, and thus the Rule describes the circumstances in which those materials may either be admitted or excluded from consideration at trial. It says nothing, however, about whether a nonparticipant in the plea negotiations is entitled to obtain those materials in discovery in the first instance to advance interests distinct from those at issue during the plea or settlement negotiations between a target of a federal criminal investigation and the prosecutors conducting the grand jury investigation of him. That question must be answered by reference to Fed. R. Evid. 501, which "empower[s] the federal courts to 'continue the evolutionary development of [evidentiary] privileges.'" *Adkins*, 488 F.3d at 1328, *quoting Trammel*, 445 U.S. at 47.

## III. THIS COURT HAS JURISDICTION OVER THE INTERVENORS' APPEAL UNDER THE *PERLMAN* DOCTRINE.

The question of this Court's jurisdiction has been addressed in plaintiffs/appellees' Motion to Dismiss Non-Party Interlocutory Appeal, filed with this Court on July 2, 2013, intervenors/appellants' Response to Motion to Dismiss Non-Party Interlocutory Appeal, filed with this Court on July 12, 2013, and Reply in Support of Motion to Dismiss Non-Party interlocutory Appeal, filed with this Court on July 16, 2013. That motion remains pending before the Court.

This Court has jurisdiction of this appeal under *Perlman v. United States*, 247 U.S. 7 (1918). "[U]nder the . . . *Perlman* doctrine, a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). *See, e.g., In re Grand Jury Proceedings*, 142 F.3d 1416, 1420 n.9 (11th Cir. 1998)(under *Perlman*, an order to disclose materials as to which a claim of privilege has been asserted "may be 'considered final as to the injured third party who is otherwise powerless to prevent the revelation"). The requirements for application of the *Perlman* doctrine are satisfied in this case, and this Court has jurisdiction of this appeal.

### A. *Mohawk* Does Not Affect the Operation of the *Perlman* Doctrine in this Case.

In their Motion to Dismiss, plaintiffs argued that *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), superceded *Perlman* and eliminated any basis for this Court's jurisdiction. They are incorrect. *Mohawk* does not affect the right of non-parties such as intervenors to take an appeal from the district court's disclosure order. There are two interrelated reasons why it does not. First, and most important, *Mohawk* involved an attempted interlocutory appeal by a party to the litigation, which this case

does not. Second, *Mohawk* was concerned with an interlocutory appeal under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), not with the *Perlman* exception to the final judgment rule; indeed, it did not so much as mention *Perlman*. Those two distinctions are critical.

In analyzing the issue of whether a party was entitled under the *Cohen* collateral order doctrine to appeal from an order compelling it to produce documents which it contended were protected by the attorney-client privilege, the *Mohawk* Court emphasized that the Court had "stressed that [the *Cohen* collateral order doctrine] must never be allowed to swallow the general rule that *a party* is entitled to a single appeal, to be deferred until final judgment has entered." *Mohawk*, 558 U.S. at 106 (emphasis added; internal quotation marks omitted). *See id.* at 112 ("Permitting *parties* to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals" (emphasis added)). In holding that an interlocutory appeal would not lie, the *Mohawk* Court concluded that

> postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. *Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.*

*Id.* at 606-07 (emphasis added). This conclusion underscores the inapplicability of *Mohawk* in the present circumstances.

Quite unlike the *Mohawk* appellant, Epstein and the attorney intervenors are not parties to the litigation, having intervened solely for the limited purpose of seeking to prevent the disclosure of confidential communications; accordingly, they have no right of appeal from the final judgment in this case, and the injury done by disclosure cannot be remedied through the appellate remedy of granting of a new trial.[11] While Mr. Epstein moved on July 8, 2013, for limited contingent future intervention with respect to the issue of remedy, DE207, should the district court reach that issue, to protect his constitutional and contractual rights with respect to the NPA, which plaintiffs seek to have rescinded as a remedy for the government's alleged violation of the CVRA, DE207, the district court has not yet ruled on that motion and may never reach the remedy issue if the plaintiffs are unable to sustain their burden of proof. As Epstein explained in that motion, he is not seeking to intervene generally in the case, as the duties and obligations imposed by the CVRA apply solely to the government; the statutory requirements do not run to Epstein, and the CVRA imposed upon him no obligations to the plaintiffs. The dispute regarding

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[11] Epstein has also moved to intervene for the limited purpose of preventing disclosure of grand jury materials subject to the disclosure prohibitions of Fed. R. Crim. P. 6(e). DE215. That motion remains pending in the district court.

whether the government violated the plaintiffs' rights under the CVRA is solely between the plaintiffs and the government.

Thus, even should the district court grant the additional limited future remedy-stage intervention which Epstein seeks, Epstein still would not be a party to the litigation within the meaning of *Mohawk*, but instead a party for a limited purpose only. Indeed, he would not become a party at all unless the district court rules that the government violated the plaintiffs' CVRA rights and turns to the issue of remedy, which may never occur. If the district court did find that the government violated the plaintiffs' rights under the CVRA, Epstein would have no right of appeal, as he would not be a party *with respect to that issue*, even if the determination were predicated on the disclosure of the very communications at issue in this appeal. He would likewise not have the right to appeal if the district court decided in plaintiffs' favor but did not order rescission of Epstein's non-prosecution agreement. Even were the court to order rescission of the non-prosecution agreement, and Mr. Epstein had the right, as intervenor as to remedy, to appeal the Court's remedial order, it is unlikely that such an appeal from the Court's order would encompass the issue of the validity of any order regarding the disclosure of his attorneys' plea negotiation communications with the government. In the absence of the ability to take an appeal at this juncture,

intervenors are "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13.

In cases such as this one, *Perlman* does not directly conflict with *Mohawk.* In *United States v. Krane*, 625 F.3d 568 (9th Cir. 2010), the Ninth Circuit permitted an interlocutory appeal by intervenors under *Perlman*, noting that it had, "[w]hen assessing the jurisdictional basis for an interlocutory appeal, . . . considered the *Perlman* rule and the *Cohen* collateral order exception separately, as distinct doctrines," and concluding that "*Perlman* and *Mohawk* are not in tension." *Id.* at 572. In *In re Grand Jury*, 705 F.3d 133, 146 (3d Cir. 2012), the Court concluded, after analysis, that it "[could] not say that the Supreme Court has abandoned [the *Perlman* finality] determination on the basis of a later case, *Mohawk*, that never cites, let alone discusses, *Perlman*").

The two cases on which the plaintiffs relied in their Motion to Dismiss do not support the proposition that appellate review under the *Perlman* doctrine is not available to intervenors in this case. In *Wilson v. O'Brien*, 621 F.3d 641 (7th Cir. 2010), plaintiff and the individual whose deposition defendants wished to use to support a summary judgment motion sought to appeal, under the *Cohen* collateral order doctrine, the district court's order compelling the individual to answer deposition questions over a claim of work product privilege. The Seventh Circuit did

not in fact decide the question of *Mohawk*'s impact on *Perlman*, finding the appeal moot because the deposed individual had complied with the order and answered the objected-to deposition questions. *Id.* at 643. The Court noted that, if the district court did ultimately permit the defendants to use the deposition testimony, plaintiff, who was the privilege holder rather than the deponent, could appeal that decision after final judgment. Notably, the *Wilson* Court stated that "when the person who asserts a privilege is a non-litigant," "an appeal from a final judgment [will] be inadequate."

In *Holt-Orsted v. City of Dickson*, 641 F.3d 230 (6th Cir. 2011), the plaintiffs sought to take an interlocutory appeal from an order compelling the testimony of their former attorney over a claim of attorney-client privilege. The Court agreed with the Ninth Circuit's decision in *Krane*, concluding that the circumstances in *Krane* "support application of the *Perlman* doctrine because, without the ability to raise the issue in an interlocutory appeal, Quellos, as a non-party, would have lost its opportunity to do so in the future." *Id.* at 239. The same is true here. The Court found no appellate jurisdiction, following *Mohawk*, because plaintiffs – the privilege holders – were parties to the litigation and, as such, could avail themselves of a post-judgment appeal to "preserve the vitality of the attorney-client privilege." *Id.* at 240, *quoting Mohawk*, 558 U.S. at 606-07. That, however, is not the case here.

Since the attorney intervenors are not "litigants" or parties in this action, under both *Wilson* and *Holt-Orsted*, they would retain the right to appeal under *Perlman*. Plaintiffs have sought to cast Epstein as a "litigant" in this action, but his limited intervention to challenge disclosure of confidential communications does not make him a party, to the action, nor, contrary to plaintiffs' argument, does Epstein's "current posture" in this litigation provide him with an avenue "to appeal any adverse privilege ruling that harms him at the conclusion of the case." Motion to Dismiss at 14. There will be no "adverse judgment *against him*," *id.* at 13 (emphasis added), from which he could take an appeal. Even if the district court grants Mr. Epstein's contingent motion for future intervention as to remedy, he would not be a party to the action as a whole but only as to that limited facet of the litigation; in fact, he may never actually become a party if the district court does not reach the remedy issue or denies his request for limited contingent intervention. Plaintiffs have cited no authority for the proposition that a non-party to the litigation can appeal from a final judgment, and the law is to the contrary. *See Marino v. Ortiz*, 484 U.S. 301 (1988)("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled"). Plaintiffs' action was not brought against Epstein, nor has he sought by intervention to become a full party to the action. The *Perlman* doctrine is fully applicable in the circumstances of this case.

### B. Intervenors are "Privilege Holders" for Purposes of *Perlman*.

The *Perlman* doctrine is not, as the plaintiffs have contended in their Motion to Dismiss, strictly limited to fully recognized privileges such as the attorney-client privilege. The privilege which intervenors assert falls squarely within *Perlman*. Indeed, the Supreme Court has recognized that "Rules 410 and 11(e)(6) 'creat[e], in effect, a privilege of the defendant . . . .'" *Mezzanatto*, 513 U.S. at 205. What Epstein and the attorney intervenors seek to appeal is *not* an issue of admissibility of evidence, but one of *disclosure*: whether their confidential communications with the government in the course of settlement/plea negotiations may be ordered disclosed to third parties such as plaintiffs. The privilege which intervenors assert has its basis in the implementation of Fed. R. Evid. 410 in the context of its overlap with the work product privilege and counsel's legitimate expectations of confidentiality in their communications with the government in seeking to resolve the investigation or prosecution of their clients.

In *In re Grand Jury Proceedings*, 832 F.2d 554 (11th Cir. 1987), appellants asserted that their state grand jury testimony was protected from disclosure to a federal grand jury by a nondisclosure privilege grounded in the state grand jury secrecy requirement. This Court held that it had jurisdiction to hear the appeal under *Perlman*, but concluded that the privilege for which appellants contended did not

exist under state law. Thus, the fact that a privilege has not yet been formally recognized under Rule 501 is not a bar to *Perlman* jurisdiction. The controlling factor is whether the appellants assert a right or privilege, *see In re Sealed Case*, 716 F.3d 603, 609 (D.C.Cir. 2013)("The *Perlman* doctrine permits appeals from some decisions that are not final but allow the disclosure of property or evidence over which the appellant asserts a right or privilege"), as they do here – the right or privilege of confidentiality in their settlement/plea communications with the government and their concomitant protection from disclosure to the plaintiffs. *See, e.g., Ross v. City of Memphis*, 423 F.3d 596, 599 (6th Cir. 2007)(*Perlman* jurisdiction "does not depend on the validity of the appellant's underlying claims for relief"); *Gill v. Gulfstream Park Racing Ass'n, Inc.*, 399 F.3d 391, 398, 402 (1st Cir. 2005)(asserting jurisdiction under *Perlman*, but concluding that informant privilege was not available to private parties).

### C. *Perlman* is not Limited to the Grand Jury Context.

Plaintiffs also argued in their Motion to Dismiss that *Perlman* does not apply outside the grand jury context. This Court has never limited *Perlman* to the grand jury context, and there is no principled reason why the doctrine should be so limited, so long as its requirements are met. The danger to the privilege holder – that privileged or confidential documents will be disclosed and his powerlessness to prevent the

disclosure absent an immediate appeal remedy – is the same, regardless of whether the order is made in the context of grand jury proceedings or in another context. This Court cited *Perlman* in support of its finding of jurisdiction in *Overby v. U.S. Fidelity & Guar. Co.*, 224 F.2d 158, 162 & n.5 (11th Cir. 1955), a civil case. In just the few years since *Mohawk*, the Fourth Circuit found jurisdiction based on *Perlman* in a civil case, *Mezu v. Morgan State University*, 495 Fed. Appx. 286, 289 (4th Cir. 2012); the Ninth Circuit has applied *Perlman* in a case arising under 28 U.S.C. §2255, *United States v. Gonzalez*, 669 F.3d 974, 977 n.2 (9th Cir. 2012), and in a civil case, *S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829, 830-31 (9th Cir. 2011); the Sixth Circuit has indicated in a civil case that *Perlman* jurisdiction is still viable after *Mohawk* where the privilege holder is not a party to the action, *Holt-Orsted*, 641 F.3d at 239; and the Seventh Circuit has indicated in a civil case that *Perlman* jurisdiction still attaches where the person asserting the privilege is a non-litigant, *Wilson*, 621 F.3d at 643. The grand jury limitation for which plaintiffs have argued simply does not exist.

**D. The United States is a Disinterested Third Party.**

Under the circumstances of this case, the government should be considered a disinterested party for purposes of application of the *Perlman* doctrine. When the plaintiffs first sought leave to use the government's side of the correspondence in their case against the government, the government did not oppose the motion but

instead took no position, DE60:1-2, which led plaintiffs' counsel to state at a hearing that the government did not oppose plaintiffs' request to use the government's side of the correspondence which had already been disclosed to plaintiffs. *See* DE208:65. At the hearing on the issue on August 12, 2011, the government was not even prepared to address the issue. *See* DE206:35-36. At that hearing, the district court set a schedule for further briefing on the issue, and it was not until after intervenors/appellants had filed their supplemental briefing, DE94, that the government filed a responsive pleading in which it voiced its general agreement that correspondence exchanged between defense counsel and the government in pursuit of settlement/plea negotiations is protected by the work product privilege and that the rationale of the mediation privilege cases was applicable to plea/settlement negotiation communications. *See* DE100. However, the government has made it clear that, once the stay is lifted, it will disclose the requested documents; thus, intervenors/appellants' only chance of preventing disclosure of the privileged material lies in this appeal. Moreover, given the government's litigation posture below, and its belated embrace of the concept that plea/settlement negotiation correspondence should be protected as work product, an appellate court might well conclude that the government had forfeited the issue. Certainly it has already forfeited the arguments advanced by intervenors/appellants which it did not adopt. Thus, an

end-of-case appeal by the government would not adequately present the issues to the Court.

In addition, the government's institutional interests differ significantly from those of attorneys who represented a private individual under criminal investigation by the government and who sought, though full and frank exploration of the facts and legal issues involved, to convince the government not to prosecute their client. Only immediate appeal of the Court's order will ensure that intervenors are able to protect their distinct interests in preserving the confidentiality of their communications with the government in the settlement negotiation process. In the absence of the ability to take an appeal at this juncture, intervenors will be "powerless to avert the mischief of the order," *Perlman*, 247 U.S. at 13, as their particular interests in nondisclosure will not be adequately protected by the government.

Likewise, the government and Epstein have significantly different interests in the scope of Rule 410 in the context of a litigant's discovery attempts. The disclosure request here comes from plaintiffs who have previously sued Epstein, the target of a federal prosecution, seeking monetary damages for the very conduct that was at issue during the plea/settlement negotiations between his attorneys and the government. The prior civil discovery order relied upon by Judge Marra, DE188:3-4, resulted from the efforts of the civil litigants to enhance their case through the mechanism of

acquiring the target's attorneys' communications with the government which, in the context of plea or settlement negotiations, are authored in an expectation of privacy, and which include admissions made in the effort to provide a predicate for any plea or agreement to defer prosecution rather than litigate. Although the government in this particular matter is contending that it did not violate the CVRA, its overall litigation position – including urging the Jane Does to advocate for Epstein's prosecution in other districts, *see* DE205-2:8-9, eloquently demonstrates that there is only the most ephemeral and illusory commonality of interests between the government and Epstein – and certainly not one that makes the government Epstein's agent or advocate for purposes of this issue. Epstein's interest in opposing the disclosure of his attorneys' written communications relating to bona fide attempts to resolve concrete federal criminal allegations are substantially distinct from the government's institutional interests and distinct from the government's litigation-related strategies in terms of the underlying CVRA litigation and, accordingly, will not be adequately represented by the government.

## CONCLUSION

For all the foregoing reasons, this Court should hold that the correspondence at issue is protected from disclosure by Rule 410 or by a Rule 501 common law privilege. This Court should also hold that it has jurisdiction of this appeal.

Respectfully submitted,

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No. 13-12923

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE NO. 1 AND JANE DOES NO. 2,
Plaintiffs-Appellees
v.
UNITED STATES OF AMERICA,
Defendant-Appellee

ROY BLACK *ET AL.*,
Intervenors/Appellants

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## CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that on this 5thth day of August, 2013, the foregoing Brief was served, through this Court's CM/ECF system, on all parties of record.

**/s/ Martin G. Weinberg**
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