

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE 1 AND JANE DOE 2,

Petitioners,

vs

UNITED STATES OF AMERICA,

Respondent.

_____ /

JEFFREY EPSTEIN,

Intervenor.

_____ /

**INTERVENOR JEFFREY EPSTEIN'S BRIEF IN
OPPOSITION TO JUDICIAL REFORMATION
OF THE NON-PROSECUTION AGREEMENT**

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INTERVENOR JEFFREY EPSTEIN, through undersigned counsel, respectfully files this opposition to Petitioners' Submission on Proposed Remedies (DE 458).

INTRODUCTION

Petitioners are asking a federal court to do something that, to our knowledge, has never been done in the history of American jurisprudence. On the basis of a judgment finding that *the government* failed to comply with the Crime Victims' Rights Act ("CVRA"), 18 U.S.C. §3771, Petitioners have proposed several lopsided remedies that target only Mr. Epstein, a non-party to the underlying litigation. Specifically, Petitioners seek: 1) a judicially-imposed reformation of the NPA to excise the "immunity provisions" and eliminate all contractual consideration that induced Mr. Epstein to enter into the NPA in the first place, and 2) an advisory opinion that the Constitution would permit a hypothetical future prosecution of Mr. Epstein by the USAO-SDFL (hereinafter the "Epstein Remedies"). (DE 458:4-5, 13 n.5).

Despite having themselves relied on the NPA to settle their civil lawsuits against Mr. Epstein in 2010 and expressly agreed in a settlement agreement to not seek any further remedies against him either in law *or in equity*, Petitioners urge the Court to strip Mr. Epstein the benefits of the NPA ten years after he fully performed its obligations and endured its enormous burdens. At the same time, Petitioners seek to leave intact those provisions of the NPA that benefitted them and imposed criminal and monetary penalties against Mr. Epstein. The Epstein Remedies punish only Mr. Epstein, release the government from its contractual obligations, and allow Petitioners and their counsel to retain all of the financial benefits of Mr. Epstein's full performance.

Petitioners' premise for these drastic and unprecedented remedies against Mr. Epstein is the baseless conclusion that Petitioners draw from a single factual finding in the Court's opinion granting summary judgment against the government. (DE 435). Quoting directly from a stipulation between the Petitioners and the government in connection with summary judgment litigation to which Mr. Epstein was not even a party, this Court found: "Epstein's *counsel* was aware that the [USAO-SDFL] was deliberately keeping the NPA secret from the victims and, indeed, had sought assurances to that effect." *Jane Does 1 and 2 v. United States*, 359 F. Supp. 3d 1201, 1208 (S.D. Fla. 2019) (emphasis added) (DE 435:8) (citing DE 407, at ¶48). From that finding, Petitioners contend that the Court concluded that Mr. Epstein was "the instigator of – the Government's CVRA violations," that Mr. Epstein acted with "unclean hands" and in "bad faith" with the "deliberate plan to violate the law." (DE458:16-19). No such conspiracy existed, and no such conclusions can be legally or logically inferred from the Court's factual findings.

For the reasons set forth below, excising the "immunity provisions" that Mr. Epstein bargained for, relied upon, and suffered the consequences of: a) is not supported by the facts; b) would violate Mr. Epstein's constitutional rights to procedural and substantive due process; c) is neither authorized by statute nor available as an inherent remedy; and d) contravenes well-established principles of contract law. The Court should reject the Epstein Remedies as illegal, unconstitutional, a breach of the civil settlement agreements, and precluded by the doctrines of equitable and judicial estoppel.

BACKGROUND

On July 19, 2006, Mr. Epstein was indicted in the Fifteenth Judicial Circuit in and for Palm Beach County on one count of solicitation of prostitution, in violation of Fla. Stat. §796.07. *See State v. Jeffrey E. Epstein*, 50-2006-CF-009454-AXXX-MB. In or around November 2006, while the state court charge was pending, Mr. Epstein learned that the United States Attorney's Office for the Southern District of Florida ("USAO-SDFL") was investigating whether Mr. Epstein's alleged conduct violated federal law. The USAO-SDFL investigation was led by honorable federal prosecutors with outstanding reputations, including but not limited to: R. Alexander Acosta (U.S. Attorney), Jeffrey Sloman (First Assistant U.S. Attorney), Matthew Menchel (Chief, Criminal Division), Andrew Lourie (Deputy Chief, Northern Region), and AUSA Anna Marie Villafana.

Mr. Epstein retained counsel with expertise in federal law and federal jurisdiction, including a former federal appellate judge, a former United States Attorney and several former Assistant United States Attorneys, the former Principal Deputy Chief of the DOJ Child Exploitation and Obscenity Section ("CEOS"), a distinguished Harvard law professor, and other well-respected members of the defense bar. He also elicited legal opinions from a former federal district judge and a former United States Attorney.

Mr. Epstein's counsel did what they were ethically bound to do: they advocated for their client. Counsel made numerous presentations, both orally and in writing, to the USAO-SDFL disputing many of the alleged underlying facts and alerting the prosecutors to the many contradictory sworn statements and inconsistencies in the various witness accounts of Mr. Epstein's alleged conduct. *See, e.g.*, Letter from Gerald B. Lefcourt to

USAO-SDFL, June 25, 2007 (attached as Exhibit 1). Those presentations also included detailed statutory analysis and discussion of applicable case law, arguing, among other things, that: a) federal jurisdiction did not exist to prosecute these local offenses; b) the federal statutes being contemplated for prosecution did not apply to Mr. Epstein's alleged conduct; and c) federal jurisprudence did not provide precedential support for the application of the federal sex offense statutes to Mr. Epstein's alleged conduct. *See* Lefcourt Letter (Exhibit 1); *see also* Letter from Stephanie D. Thacker, former Principal Deputy Chief of CEOS, to John Roth, Senior Associate Deputy Attorney General, June 19, 2008 (attached as Exhibit ___) (noting that “[t]his is a case about purely local activity, involving local actors, and affecting local interests and thus, should be handled by local authorities” and that “the facts of this case fall squarely outside the heartland of those [federal] statutes – in fact, in law, and in congressional intent”); *see also* Letter from Kenneth Starr, Esq. to John Roth, June 19, 2008 (attached as Exhibit ___). Defense counsel also urged the USAO-SDFL to respect the long-recognized “*Petite* Policy,”¹ set forth at 9-2.031 of the United States Attorneys’ Manual, of avoiding dual state and federal prosecutions regarding the same alleged conduct. *See* Exhibit ___.

Counsel for the government and Mr. Epstein spent months negotiating, at arms-length, a resolution of the pending state charge and threatened federal charges. No bribes were paid. No threats or illegal inducements were made. No one was coerced. No one’s free will was overborne. No one obstructed justice. The seasoned federal prosecutors were

¹ *See Petite v. United States*, 361 U.S. 529 (1960).

not “wowed” by Mr. Epstein’s counsel or impressed by Mr. Epstein’s wealth. There was no backroom deal engineered by U.S. Attorney Alexander Acosta to curry favor with anyone, as has been publicly suggested. The lawyers on both sides were vigorous, but cordial, advocates. Indeed, by our count, approximately thirty (30) respected prosecutors and defense lawyers, including the aforementioned former federal appeals judge, a current federal appeals judge, and a current Under Secretary of the Treasury, all reviewed and either authorized or helped negotiate the resolution of the matter. *See, e.g.*, Supplemental Privilege Log (DE 216-1) (illustrating the number of prosecutors involved in the decision-making over the NPA). No one questioned the legality of the disposition of the case or the loyalty that each advocate demonstrated to his/her client.

Ultimately, the resolution agreed to by the parties was an NPA regarding the federal charges and a guilty plea by Mr. Epstein to both the pending state felony charge (Fla. Stat. §796.07) and an additional state felony charge of violating Fla. Stat. §796.03 (Case No. 2008-CF-009381AXX), which would require, *inter alia*, an 18 month prison sentence, one year of community control, restitution, and sex offender registration within 48 hours of his release from prison. (DE 361-62). This resolution was, as in any hard-fought negotiation, the recognition by all parties of the strengths and weaknesses of their legal positions, the risk of litigation, and the government’s desire to minimize damaging impeachment evidence of its witnesses. As summarized by AUSA Villafana, the USAO-SDFL made the decision to enter the NPA out of a desire to obtain a guaranteed sentence of incarceration, the equivalent of uncontested restitution for the victims, and guaranteed sex offender registration; these were “among the factors that informed the Office’s discretionary

decision to negotiate a resolution of the matter and to ultimately enter the NPA.” (DE 403-19:10, ¶18).

Moreover, as explained by then First Assistant AUSA Jeffrey Sloman in a recent Op-Ed in the Miami Herald, there were “significant legal impediments to prosecuting what was, at heart, a local sex abuse case.” *See* Jeffrey Sloman, Alex Acosta Acted with Professionalism and Integrity in Handling the Jeffrey Epstein Case, Miami Herald Op-Ed, Feb. 15, 2019. The USAO-SDFL’s decision to enter into the NPA was also influenced by its consideration of the privacy interests of certain of the victims. As stated by AUSA Villafana, “our hope was that we could set up a system that would allow these victims to get that restitution without having to go through what civil litigation will expose them to. You have a number of girls who were very hesitant about even speaking to authorities about this...” (DE 403-19:163-64). The NPA endured multiple levels of review by career public servants. Senior members of the Department of Justice, including the heads of CEOS, a high-level representative of the Criminal Division and the Deputy Attorney General were consulted, received legal submissions, and fully approved the exercise of discretion by the heads of the USAO-SDFL.

In the end, the Executive Branch exercised, in good faith, the unreviewable prosecutorial discretion afforded to it by Article II of the Constitution, as even recognized by Congress. *See* 18 U.S.C. §3771(d)(6) (“Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.”). The notion that “well-connected lawyers corrupted [] then-U.S Attorney Alex Acosta and his team into giving Epstein a sweetheart deal” has been soundly debunked;

there is no such evidence – NONE. Sloman, Alex Acosta Acted with Professionalism, Miami Herald Op-Ed, *supra*. The NPA was and is a valid and binding agreement. It contains no illegal provisions. It is not against public policy. Although the media has condemned the NPA, not one of the dozens of professionals who participated in the decision at some level has publicly raised any concerns about whether the NPA was reached in good faith. This was a conspiracy of none.

Mr. Epstein lived up to his end of the bargain and, in reliance upon the promises of the Government, fully performed his obligations under the NPA. He pleaded guilty to two felonies in state court, which resulted in his serving thirteen months in prison followed by a year of community control, and continuous registration as a sex offender for almost ten years. Moreover, in exchange for the immunity provisions in the NPA, Mr. Epstein agreed to waive his right to contest liability and damages as to an unidentified and unknown number of individuals, whom the government would identify only after Mr. Epstein was sentenced. (DE 361-62:5, ¶7). A Special Master – former Chief United States District Judge Edward B. Davis, an esteemed jurist – was assigned the task of selecting and consulting with the Epstein-paid attorney-representative, Robert C. Josefsberg, Esq., to pursue claims on behalf of the victims against Mr. Epstein under 18 U.S.C. §2255. *See* Letter from FAUSA Jeffrey Sloman to Hon. Edward B. Davis, Oct. 25, 2007 (attached as Exhibit ____).

Mr. Epstein settled civil claims for damages with all claimants including those who brought actions against him under §2255 as well as those who brought federal or state monetary tort actions (amounting to millions of dollars), paid the attorney-representative,

and forewent a speedy resolution of any federal criminal charges. The State of Florida also relied upon the NPA: its prosecutors in the Fifteenth Judicial District brought a second more serious felony charge, one that required sex registration as a condition; a state circuit judge imposed the sentence after learning it was induced and resulted from the NPA; and Palm Beach County Sheriffs and Probation Officers implemented the agreed upon sentence.

On June 30, 2008, Mr. Epstein began serving his state prison sentence. When Petitioners appeared at a status conference on this CVRA lawsuit on July 11, 2008, *knowing that Mr. Epstein was in prison*, they chose to not proceed with the CVRA case on an emergency basis despite statutory provisions within the CVRA that required petitioners seeking relief to be heard at both the trial and appellate levels within certain strict time limits measured in days and weeks, not years. (DE 15:24-25). Moreover, at a hearing one month later, Petitioners were non-committal on whether they would be seeking rescission of the NPA and, in fact, stated that “because of the legal consequences of invalidating the current agreement, it is likely not in [the petitioners’] interest to ask for the [rescission] relief that we initially asked for.” (DE 27:4).

Petitioners’ counsel received a copy of the NPA on August 28, 2008. (DE 435:21). Thereafter, for approximately two years, Petitioners deliberately ceased all substantive activity in this CVRA case in favor of pursuing civil damages actions against Mr. Epstein. To that end, while Mr. Epstein was serving his prison sentence, the two Petitioners, represented by the same counsel as in the instant case, filed civil complaints for damages against Mr. Epstein in federal court and Palm Beach Circuit Court. *See Doe v. Epstein*,

Case No. 08-80893-Civ-KAM (S.D.Fla.) (DE 1); *L.M. v. Epstein*, Case No. 09-81092-Civ-KAM (S.D.Fla.) (DE 1); *E.W. v. Epstein*, Case No. 50-2008-CA-028058-XXXX-MB (Fla. 15th Jud. Cir.); *L.M. v. Epstein*, Case No. 50-2008-CA-028051-XXXX-MB (Fla. 15th Jud. Cir.). In each of those complaints, and then again in amended complaints, Petitioners alleged, among other things, that Mr. Epstein: a) had entered guilty pleas to the state crimes noted above; b) entered into the NPA with the federal government “acknowledging that [Petitioner] was a victim of his conduct;” and c) was “estopped by his plea and agreement with the Federal Government from denying the acts alleged in this Complaint, and must effectively admit liability to the Plaintiff.” (DE 403-16, at ¶¶18-20; DE 403-17, at ¶¶18-20; DE 205-6:11-12; 58-59, 89-90). Petitioners leveraged the NPA to their advantage by arguing that it precluded Mr. Epstein from contesting liability. *See Doe No. 1 v. United States*, 749 F.3d 999, 1002 (11th Cir. 2014) (“As a basis for relief against Epstein in the civil suit, the victims relied on Epstein’s waiver of his right to contest liability in the non-prosecution agreement.”).

The Petitioners ultimately settled their federal and state civil lawsuits with Mr. Epstein on or about July 22, 2010, while the CVRA case was pending against the government. *See* Settlement Agreement and General Release (partially redacted) (attached as Exhibit ____). The settlement agreement signed by each Petitioner contained the same “General Release” language, that they:

HEREBY remise, release, acquit, satisfy, and forever discharge [Mr. Epstein and other potential defendants] **from all, and all manner of, action and actions** of [Petitioner], including State or **Federal**, cause and causes of action (common law **or statutory**), suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, **controversies**,

agreements, promises, variances, trespasses, damages, judgments, executions, *claims, and demands whatsoever* in law or *in equity* for compensatory or punitive damages *that said First Parties ever had or now have*, or that any personal representative, successor, heir, or assign of said First Parties hereafter can, shall, or may have, *against Jeffrey Epstein* ... for, upon, *or by reason of any matter, cause, or thing whatsoever* (whether known or unknown), *from the beginning of the world to the day of this release*.

(Emphasis added). Thus, Petitioners expressly released Mr. Epstein from any federal actions, claims or demands in equity that Petitioners may have against Mr. Epstein, by reason of any matter whatsoever, whether known or unknown, from the beginning of the world to the day of the release. Although their CVRA lawsuit had then been pending against the government for more than two years, Petitioners did not carve out from the General Release in the civil settlement agreements an exception for remedies it might seek *against Mr. Epstein* in the CVRA lawsuit. Rather, with respect to the CVRA, Petitioners and Mr. Epstein agreed as part of the civil settlements only that the Petitioners could use Mr. Epstein's correspondence with the government to prove a violation of the CVRA. *See, e.g.,* Exhibit ___, at ___. This Court dismissed the federal civil lawsuits against Mr. Epstein but retained jurisdiction to enforce the terms of the settlement. *See* Case No. 08-80893-Civ-KAM (DE211) (July 20, 2010); Case No. 09-81092-Civ-KAM (DE 22) (July 22, 2010).

On September 8, 2010, this Court ordered the CVRA case closed “[i]n light of the underlying settlements between the victims and Mr. Epstein.” (DE 38). In an effort to persuade the Court to reconsider its dismissal of this CVRA case for lack of prosecution, Petitioners defended their inaction by arguing that “[i]t seemed reasonable to the victim to

resolve those [civil] cases first and then turn to the CVRA case...” (DE 41:6). In seeking to revive the CVRA case that they had abandoned, Petitioners emphasized that “while they had settled their case with Jeffrey Epstein, they had reached no settlement *with the U.S. Attorney’s Office...*” (DE 41:1) (emphasis in original). Petitioners did not disclose at that time that they would seek to engineer an end-run around the General Release language in the civil settlement agreements by utilizing the CVRA lawsuit against the government to obtain additional extraordinary relief against Mr. Epstein: judicial reformation of the very NPA that Petitioners relied upon to obtain the civil settlements.

Thereafter, for the next nine years, Petitioners litigated their CVRA case with the government. When issues arose that potentially implicated Mr. Epstein’s rights and privileges, Mr. Epstein and his counsel intervened to assert their rights, both in the district court, and on appeal to the Eleventh Circuit. *See Doe No. 1, supra*. That there would be no judgment against Mr. Epstein at the end of this CVRA litigation, however, was understood throughout the litigation. As the Eleventh Circuit noted on appeal from this Court’s order requiring disclosure of defense counsel’s plea negotiation correspondence, “Epstein’s only opportunity to challenge the disclosure order is *now* because ***there will not be an adverse judgment against him or his attorneys***. The district court instead will enter any judgment against either the victims or the United States.” *See Doe No. 1*, 749 F.3d at 1005 (emphasis added). Beyond that, when Mr. Epstein suggested he be permitted to participate in mediation in this case, Petitioners opposed that request, writing that:

the case has not yet reached any remedy stage where [Epstein] might have a more direct interest. More important, the issues to be mediated at this stage

involve the victims' pending motion for summary judgment (DE 361), which seeks summary judgment *only against the Government – not Epstein*.

(DE 388:2) (emphasis added).

On February 21, 2019, this Court entered its Opinion and Order granting partial summary judgment against the government “to the extent that Petitioners’ right to conferral under the CVRA was violated.” (DE 435:33). As a result of that judgment *against the government*, Petitioners now seek to impose remedies *against Mr. Epstein* that would deprive him of the entire consideration he received in exchange for pleading guilty, serving time in prison, registering as a sex offender, and paying millions of dollars in damages. Petitioners’ premise for seeking imposition of the Epstein Remedies is Petitioners’ unfounded claim that this Court concluded, in its Opinion and Order, that Mr. Epstein’s counsel acted in “bad faith” and “illegally conspired” with the government to violate the CVRA and that the NPA was an “illegal agreement.”

The Petitioners’ premise, in addition to being provably wrong on this record, does not justify any of the Epstein Remedies as a matter of law. Undersigned counsel know of no precedent, ever, where a citizen who had fully performed his obligations under an immunity or non-prosecution agreement with the government, and did not breach it, was stripped of the benefit of the bargain without having an opportunity to defend himself, simply because the government allegedly violated the statutory rights of third parties prior to entering into the agreement. The Epstein Remedies should be rejected.

ARGUMENT

I. **PRINCIPLES OF PROCEDURAL DUE PROCESS PRECLUDE IMPOSITION OF THE EPSTEIN REMEDIES**

Petitioners' proposal to excise the "immunity provisions" from the NPA (DE 458:13-14 n.5), seeks remedies that substantially harm Mr. Epstein and free the USAO-SDFL from the constraints of the NPA by allowing the USAO-SDFL "to seek prosecution of Epstein and his coconspirators..." (DE 458:22). Petitioners contend that the Epstein Remedies are permitted because the NPA is an "illegal agreement" based on "illegal promises" and because Mr. Epstein's counsel acted in bad faith, have "unclean hands," and were the "instigators" of the CVRA violation. (DE 458:17-19). Remarkably, Petitioners argue that the government has the "power to provide all the various remedies being sought through the lawsuit..." and "agree to the remedies," (DE 458:12), as if the government has the legal authority to breach a binding contract after full performance by its counterparty. Petitioners have lost their way; their arguments are a distortion of the facts and demonstrate a flawed understanding of principles of due process. There is neither a legal basis nor a factual basis for any remedies that impair Mr. Epstein's rights.

A. Mr. Epstein was not a Party to the Underlying Litigation and There is no Judgment Against him

Summary judgment was granted against the government, not against Mr. Epstein. Mr. Epstein was not a defendant or respondent in the underlying lawsuit and did not participate in the summary judgment litigation, as the Petitioners had already "settled their case against Mr. Epstein," (DE 41:1), and agreed to a broad general release in his favor. Therefore, there can be no remedy that exclusively targets him. Moreover, none of the

Court's actual factual findings, nor, more importantly, any of the baseless inferences the Petitioners seek to draw from those findings, may be applied against Mr. Epstein. As such, the entire premise for the Epstein Remedies fails.

“It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard.” *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979). “A person who was not a party to a suit generally has not had a ‘full and fair opportunity to litigate’ the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the ‘deep-rooted historic tradition that everyone should have his own day in court.’” *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (citation omitted). Contrary to Petitioners’ argument that “all of the Court’s previous holdings are now law of the case,” (DE 458:13), the “law of the case doctrine does not bind nonparties.” *Klay v All Defendants*, 389 F.3d 1191, 1198 n.5 (11th Cir. 2004). To direct harsh remedies at Mr. Epstein is “antithetical to the primary axiom of our jurisprudence that no man shall be subject to judicial sanction without the opportunity for a hearing on the merits of the claim.” *Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975). Our law does not countenance the principle of “Sentence first, verdict afterwards.” Lewis Carroll, Chapter 12, Alice in Wonderland.

Permitting extraordinary relief to be granted against Mr. Epstein – relief that frees his adverse party, the government, from its contractual obligations under the NPA -- on the basis of a judgment that the government did not comply with its statutory obligations would violate principles of procedural due process. The fact that Mr. Epstein moved to intervene

at the remedy stage to oppose any prejudicial and illegal relief against him based on a potential judgment against the government is of no moment, as the Eleventh Circuit has already expressly rejected the Petitioners argument that Mr. Epstein “has made himself an ordinary litigant through his intervention.” *Doe No. 1*, 749 F.3d at 1005; *see also State of Indiana ex rel. Zoeller v. Pastick*, 696 F. Supp. 970, 993 n.18 (N.D. Ind. 2010) (“The fact that the Foundations have moved to intervene [] does not now mean that the Foundations have had a right to be heard as to their potential liability in this case. The Foundations moved explicitly ‘for the limited purpose of objecting to any relief sought against the Foundations’ ... and plaintiffs have made no attempt to join them as parties to litigate the issue of the Foundations’ liability.”). Therefore, even assuming there was a factual basis in the record for Petitioners’ *ad nauseum* conclusion that the NPA was an illegal agreement and that Mr. Epstein’s counsel has “unclean hands” and acted in “bad faith” – which there is not, *see* Argument I.B., *infra* – those findings and conclusions cannot be applied against Mr. Epstein.

Significantly, Petitioners cite no case in which a Court has rescinded or reformed a contract to the substantial detriment of a contracting party who was not even a party to the litigation. The reason is rooted in principles of procedural due process. “It is hornbook law that all parties to a contract are necessary in an action challenging its validity....” *School Dist. of City of Pontiac v. Secretary of U.S. Dept. of Educ.*, 584 F.3d 253, 303 (6th Cir. 2009). “No procedural principle is more deeply imbedded in the common law that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.” *Lomayaktewa v. Hathaway*, 520 F.2d 1324,

1325 (9th Cir. 1975). As this Court has recognized, “a contracting party is the paradigm of an indispensable party.” *HDR Engineering, Inc. v. R.C.T. Engineering, Inc.*, No. 08-81040-CIV-KAM, 2010 WL 2402908, *2 (S.D.Fla. June 15, 2010) (citation omitted). “Parties to a contract are indispensable when a suit concerns the rights and obligations afforded by the contract.” *Id.*

Petitioners’ effort to strip Mr. Epstein of his contractual rights under the NPA on the basis of a judgment against the government does not pass constitutional muster. The CVRA imposed no obligations on Mr. Epstein to notify victims of his intent to enter into an NPA with the government. The CVRA contains no provisions imposing liability on a criminal defendant for “aiding and abetting” or “conspiracy.” Mr. Epstein did not violate the CVRA. He did not violate the NPA. He fully performed his contractual obligations. He served his prison sentence. He registered as a sex offender. He paid full restitution as required. Principles of due process preclude the Epstein Remedies.

B. There is no Judicial Finding of “Bad Faith” or an “Illegal Agreement” and no Factual Basis for any Such Finding

Even assuming, over Mr. Epstein’s objection, that the Constitution permits a judgment and factual findings against the government to be the basis for the imposition of extraordinary remedies against Mr. Epstein, nowhere in the Court’s opinion (DE 435) was there a finding that Mr. Epstein’s counsel acted in “bad faith” with the deliberate intent to violate the CVRA or that the NPA was an “illegal agreement.” Thus, there is no *factual* basis in the record for imposition of the Epstein Remedies.

i. Mr. Epstein’s Counsel Acted in Good Faith

The Court's finding that "Epstein's counsel was aware that the [USAO-SDFL] was deliberately keeping the NPA secret from the victims and, indeed, had sought assurances to that effect" was based on a stipulation between the Petitioners (DE 361:19) and the government (DE 407:7), in connection with summary judgment litigation.² From that stipulation, which the government had no motive to contest, clarify, or amplify on Mr. Epstein's behalf, Petitioners now attribute to the Court findings that the Court did not make about the *intent* and *motives* of Mr. Epstein's counsel. It would be grossly unfair to impute "bad faith" to Mr. Epstein for his defense lawyers' advocacy without having heard from them in this litigation. The Court made no such findings and, beyond that, the record conclusively refutes any bad faith.

The essence of the CVRA violation, as found by the Court, was that "the Government failed to advise the victims about its intention to enter into the NPA," *i.e.*, before September 24, 2007. (DE435:32; DE435:7-8). The Court reasoned that "the CVRA required the Government to inform Petitioners that *it intended to* enter into an agreement not to prosecute Epstein" and that the Petitioners "should have been notified of the Government's intention to take that course of action *before* it bound itself under the NPA." (DE 435:27) (emphasis added). Nowhere in the record is there any evidence that Mr.

²On February 10, 2016, Petitioners filed a "Consolidated Statement of Undisputed Material Facts" as part of their motion for partial summary judgment, containing 157 separately-numbered paragraphs with facts the Petitioners claimed were undisputed. (DE 361:7-47). Paragraph 48 of the Petitioners' submission contains the allegation regarding the "awareness" and "assurances." (DE 361:19). On June 6, 2017, the USAO-SDFL filed its response to each of the numbered paragraphs, (DE 407), either admitting or denying (with amplification) those facts. The USAO-SDFL admitted paragraph 48, (DE 407:7), so we refer to it as a stipulation.

Epstein's counsel, prior to September 24, 2007, urged the government not to privately notify the Petitioners of the government's intentions to enter into the NPA.

The stipulation of the Petitioners and the government regarding the "aware[ness]" and "assurances" of confidentiality sought by Mr. Epstein's counsel (DE361:19 & n.62, DE 407:7) relies on exhibits (DE 361-63; DE361-66; DE 361-67) that do not support a finding that Mr. Epstein's counsel urged the government to conceal the NPA from the Petitioners prior its execution. Certainly, Mr. Epstein's counsel never conditioned his agreement to the NPA on non-disclosure to victims of the intended resolution. And, despite full disclosure to the Petitioners during this litigation of all communications between Mr. Epstein and the government, the Petitioners do not cite a single instance, prior to September 24, 2007, where Epstein's counsel either mentioned the CVRA or urged non-disclosure to victims of the intended resolution of the matter. To the contrary, the Petitioners and the government stipulated, and the Court found, as follows: "*After the NPA was signed*, Epstein's counsel and the [USAO-SDFL] *began* negotiations about whether the victims would be told about the NPA." (DE 361-19; DE 407-7; DE 435:8-9) (emphasis added). Thus, there is no record support for the Petitioners' claim "that (as this Court has previously held) the parties *negotiated* [the NPA] in deliberate violation of the victims' rights under the Crime Victims' Rights Act..." (DE 458:16) (emphasis added).

The NPA itself, signed by Mr. Epstein and his counsel, contemplated notification to the victims and even required Mr. Epstein to pay for an "attorney representative" for the victims. (DE 361-62:5). A Special Master, former Chief Judge Davis, was notified about the NPA in October 2007. Evidence that, after the NPA was signed, Mr. Epstein's counsel

advocated for non-disclosure of the NPA (until his plea would be finalized in state court) was not evidence of some illegal conspiracy between Mr. Epstein and the government to deprive Petitioners of their right to consult *before* the Government agreed to the NPA.

Moreover, after the binding NPA was signed, Mr. Epstein's counsel did no more than to expressly urge the USAO-SDFL to follow the "Attorney General Guidelines for Victim and Witness Assistance," issued in 2005, which interpreted the CVRA to apply only "if the offense is charged in Federal district court." (DE 408:20-21, DE 403-13; DE 403-15). The DOJ guidelines were a good faith and reasonable interpretation of §3771, which makes no mention of non-prosecution agreements and requires that a crime victim be harmed by an offense that "is charged in Federal district court." (DE 403-15:1-2). The U.S. Department of Justice, Office of Legal Counsel ("OLC") confirmed this view in 2010, noting that "the CVRA is best read as providing that the rights identified in section 3771(a) are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available if all charges are dismissed either voluntarily or on the merits (or if the Government declines to bring formal charges after the filing of a complaint)." U.S. Department of Justice, Office of Legal Counsel (OLC), The Availability of Crime Victims' Rights Under the Crime Victims' Rights Act of 2004, 1 (Dec. 17, 2010). At the time, just a few years after the CVRA was enacted, there was little additional judicial guidance which would even arguably undermine the DOJ's legal position or indicate that following the OLC guidance could conceivably be construed as acting in bad faith.

The fact that Mr. Epstein’s counsel sought to keep the NPA outside the public record was hardly unusual. The NPA is not a judicial document. *See* Craig S. Morford, Acting Deputy Attorney General, Selection and Use of Monitors in Deferred Prosecution Agreements and Non-Prosecution Agreements with Corporations, at 1 n. 2 (Mar. 7, 2008) (with an NPA, “formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court”). According to AUSA Villafana, confidentiality of an NPA is the norm, not the exception, and there was no concession granted uniquely to Mr. Epstein. (DE 403-19:18, ¶30) (“As courts have acknowledged, NPAs are not made part of a public court file but are maintained by the prosecutor’s office...the assurance that I would not distribute...the NPA was simply an assurance that I intended to abide by Office and Department policy and law.”).

Likewise, the USAO-SDFL’s decision to not disclose the content of the NPA prior to its execution was not done as a concession or favor to Mr. Epstein. Rather, that decision was made by the USAO to protect any potential prosecution in the event the negotiations were unsuccessful. (DE 14:5) (DE 403-19, ¶21) (AUSA Villafana: “I did not want to share with victims that the Office was attempting to secure for them the ability to obtain monetary compensation for the harm they had suffered. I was aware that, if I disclosed that and the negotiations fell through, Epstein’s counsel would impeach the victims and my credibility by asserting that I had told victims they could receive money for implicating Epstein.”); (DE 403-18, ¶21) (FBI Special Agent E. Nesbitt Kuyrkendall: “I was concerned that if the victims were informed of the Non-Prosecution Agreement, which included an option for victims to seek monetary damages in a civil matter, then Epstein’s counsel would use the

notifications to impeach me and the victims if a prosecution were to proceed in the future.”); (DE 403-19, ¶34) (DE 408:17); (DE 427:15).

There is no evidence of sinister behavior by Mr. Epstein or his counsel either before or after the NPA was signed. (DE 408:21-23). The CVRA imposes no duty on targets of federal investigations to assure that the right of conferral is implemented. It was up to the government, not Mr. Epstein, to comply with the CVRA. Mr. Epstein’s counsel were well within their right to advocate a view of the law most favorable to their client, and attempt to persuade the USAO-SDFL and the DOJ of the circumstances and timing when disclosure of the NPA to the Petitioners would be appropriate. It simply cannot be bad faith for defense counsel to urge the USAO-SDFL to follow its own national guidelines regarding the applicability of the CVRA to NPAs, especially considering that there was no developed case law with respect to this issue. After all, it is not considered bad faith for an attorney to propose even novel views of the law when the law is undeveloped. *Cf. Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co. of Florida*, 827 F.2d 1454, 1458 (11th Cir. 1987) (“Rule 11 is intended to deter frivolous lawsuits, not to deter legal arguments or cases of first impression.”); *accord Jelencovich v. Dodge Enterprises, Inc.*, No. 09-81045, 2010 WL 289300 (S.D.Fla. Jan. 12, 2010) (“While the Court ultimately disagreed with Plaintiff’s legal theory, this alone cannot form a basis for sanctions under either Rule 11 or Section 57.105, particularly where there is a lack of developed case law with respect to the particular theory.”).

Defense counsel’s interpretation of the CVRA was hardly novel; it was supported by legal guidance written by the DOJ before Mr. Epstein’s investigation even began. That

counsel may have been motivated to protect the interests of their client to confidentiality is precisely what the Sixth Amendment contemplates: loyalty to one's client.

ii. *The NPA is not an "Illegal Agreement"*

The Court wrote that it was "simply ruling that, under the facts of this case, there was a violation of the victims rights under the CVRA." (DE 435:33). The Court did not rule that the NPA was an illegal agreement. To the contrary, the Court specifically wrote that it was "not ruling that the decision not to prosecute was improper." (DE 435:32-33). To be sure, Petitioners cannot identify a single clause within the NPA that is contrary to law, outside the prosecutor's authority, or against public policy.

Nonetheless, Petitioners repeatedly refer to the NPA as an "illegal agreement," an "illegal non-prosecution agreement," or an agreement "vitiating by illegality," in a misguided effort to analogize the NPA to cases where illegal promises were not enforced by the courts or plea agreements were stricken for illegal provisions within the agreements themselves. (DE 458:15-17). The cases cited by Petitioners, however, are easily distinguished and do not stand for the propositions for which the Petitioners cite them. Rather, they stand for the unremarkable proposition that a court may not enforce promises or contractual terms that are illegal on their face.

For example, Petitioners' discussion of the facts and holding in *United States v. Walker*, 98 F.3d 944 (7th Cir. 1996) – the case on which Petitioners primarily rely -- is entirely confused and off-base. In *Walker*, the issue was whether defendant, who was serving a sentence for a federal parole violation when he was indicted on a new federal charge, was entitled to specifically enforce a mistaken oral representation made by the

district court at his arraignment that entering a detention order on the defendant's new charges would allow any future sentence on the new charges to run concurrent with his parole violation sentence. *Walker*, 98 F.3d at 945-46. The district court ultimately imposed a consecutive sentence, instead of the concurrent one he had mistakenly suggested at the arraignment, because the law required consecutive sentences. On appeal, the Seventh Circuit held that the defendant's remedy was not to specifically enforce the promise made by the district court that was contrary to law but to seek to withdraw his plea on the basis that the district court's mistaken representation about concurrent sentences induced him to plead guilty. *Id.* at 947. The defendant simply chose the wrong remedy because one cannot seek to specifically enforce a sentence that is contrary to law.

Even a cursory reading of *Walker* reveals that it is totally inapposite. Contrary to Petitioners' contention, the defendant in *Walker* had not "forfeited the right to seek specific performance" of an illegal agreement, (DE 458:15-16), but rather had forfeited his right to withdraw his plea by failing to seek that remedy when the district court did not fulfill the representation he made at the arraignment. *Walker*, 98 F.3d at 947. *Walker* has nothing to do with forfeiting rights to specific performance of an NPA. (DE 458:16).

The other state cases cited by Petitioners involved plea agreements containing (or challenged as containing) unlawful terms or promises that, to be performed, would have required the respective courts to impose sentences that were contrary to law. They stand for the unassailable proposition, not present here, that a court cannot enforce facially invalid plea agreements that contain illegal terms or omit the required components of a sentence. *Craig v. People*, 986 P.2d 951, 959-60 (Colo. 1999) (court cannot enforce a plea

agreement that waives the mandatory parole period); *State v. Garcia*, 582 N.W. 2d 879, 881-82 (Minn. 1998) (plea agreement promised a sentence that did not contain the statutorily-required 10-year conditional release term); *State v. Wall*, 348 N.C. 671 (1998) (holding that court cannot enforce a plea agreement for concurrent sentence where law mandated consecutive one); *Ex parte Rich*, 194 S.W.3d 508, 515 (Tex. Crim. App. 2006) (court cannot enforce an illegal sentence below the statutory range; remedy was for defendant to withdraw his plea); *State v. Mazzone*, 212 W.Va. 368 (2002) (court would not enforce plea agreement that called for court to unlawfully sentence the defendant by treating two misdemeanor offenses as felony offenses). None of them stand for the proposition, urged by Petitioners here, that the appropriate remedy for an “illegal agreement” is to excise a *legal* term (*i.e.*, the “immunity provisions”) from the agreement.

Petitioners have not identified a single term of the NPA that is contrary to law. All of its terms are authorized by law and were within the discretion of the USAO-SDFL. Indeed, Petitioners and the Court acknowledged that the USAO-SDFL and Mr. Epstein may legally enter into an enforceable agreement containing the very terms and promises in the NPA. (DE 15:6-7, 22). The fact that the USAO-SDFL failed to confer with the victims prior to entering into the NPA with Mr. Epstein does not render any of the terms of the NPA unenforceable or contrary to law.

II. PRINCIPLES OF CONTRACT LAW PRECLUDE IMPOSITION OF THE EPSTEIN REMEDIES

A. A Court may not Re-write an Agreement Between Two Contracting Parties to Eliminate all Consideration to one Party

Rescission means “[a]nnulling or abrogation or unmaking of [a] contract and the

placing of the parties to it in status quo.” Black’s Law Dictionary (4th ed. 1968). “The effect of rescission is to render the contract abrogated and of no force and effect *from the beginning*.” *Borck v. Holewinski*, 459 So.2d 405, 405 (Fla. 4th DCA 1984) (emphasis added). “A prerequisite to rescission is placing the other party in status quo” and “the necessary pre condition for rescission is tender of the benefits received under the contract.” *Mazzoni Farms, Inc., v. E.I. Dupont de Nemours & Co.*, 671 So.2d 306, 313 (Fla. 2000).

Although Petitioners describe their request as one for “rescission,” they have actually disavowed rescission of the NPA as a remedy. (DE 458:19) (“Jane Doe 1 and 2 are only seeking that these particular provisions be set aside.”). Petitioners have studiously avoided labeling the *entire* NPA void, because they and their counsel do not wish to (and cannot) restore Mr. Epstein to the status quo or disgorge the proceeds of the civil settlement, including their attorneys’ fees. Instead, Petitioners seek to specifically enforce most of the provisions of the NPA and cherry-pick the removal of only the “immunity provisions.” (DE 458:21). Petitioners do not identify any legal authority for excising a limited number of facially valid and legal terms from an agreement on the basis that the entire agreement was purportedly “arrived at illegally.”

Regardless, there is no basis for declaring *any* aspect of the NPA to be “void.” “The fact that a contract may be inconsistent with a statutory or regulatory requirement does not ipso facto render the contract void.” *Seh Ahn Lee v. United States*, 895 F.3d 1363, 1372 (Fed. Cir. 2018). “To the contrary, [i]nvalidation of the contract is not a necessary consequence when a statute or regulation has been contravened, but must be considered in light of the statutory or regulatory purpose, with recognition of the strong policy of

supporting the integrity of contracts made by and with the United States.” *Id.* (internal quotation marks omitted). “A contract in violation of a statutory provision generally is void or illegal only if the legislative body enacting the statute evidences an intention that such contracts be considered void or illegal.” *Ets-Hokin & Galvan, Inc. v. Maas Transp., Inc.*, 380 F.2d 258, 260 (8th Cir. 1967) (emphasis added); *see, e.g., Talco Capital Corp. v. Canaveral Int’l Corp.*, 225 F. Supp. 1007 1013 (S.D.Fla. 1964), *aff’d sub nom. Canaveral Int’l Corp. & Bimini Run, Ltd. v. Talco Capital Corp.*, 344 F.2d 962 (5th Cir. 1965) (“It has been generally held that a contract in violation of a statute, which statute does not expressly declare such contract to be void, will be enforced unless there is some other indication within the statute of legislative intent to invalidate such contract.”).

This is especially so because Mr. Epstein has already fully performed. “Because of the disruptive effect of retroactively invalidating a government contract, the invalidation of a contract after it has been fully performed is not favored.” *Seh Ahn Lee*, 895 F.3d at 1372 (quoting in part *American Tel. & Tel. Co. v. U.S.*, 177 F.3d 1368, 1375 (Fed.Cir. 1999)). In analogous situations involving contracts between the government and a vendor, courts have refused to invalidate a fully-performed contract based on the government’s non-compliance with statutory requirements. *AT&T*, 177 F.3d at 1376.

To the extent Petitioners imply that the “immunity provisions” of the NPA are **voidable** as a result of the government’s failure to comply with the CVRA, Petitioners have waived their right to seek excision of those provisions by affirmatively relying on the NPA in their civil lawsuits against Mr. Epstein.

Where a party, with knowledge of facts entitling him to rescission of a

contract or conveyance, afterward, without fraud or duress, ratifies the same, he has no claim to the relief of cancellation. An express ratification is not required in order thus to defeat his remedy; any acts of recognition of the contract as subsisting or any conduct inconsistent with an intention of avoiding it, have the effect of an election to affirm.

Hendricks v. Stark, 99 Fla. 277, 285 (Fla. 1930); *AVVA-BC, LLC v. Amiel*, 25 So.3d 7, 11 (Fla. 3d DCA 2009) (“[W]here a party seeking rescission has discovered grounds for rescinding an agreement and either remains silent when he should speak or in any manner recognizes the contract as binding upon him, ratifies or accepts the benefits thereof, he will be held to have waived his right to rescind.”); *Mazzoni Farms*, 761 So.2d at 313 (“[A] party’s right to rescind is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission.”); *Abbadessa v. Moore Business Forms, Inc.*, 987 F.2d 18, 23-24 (1st Cir. 1993) (holding that voidable contracts could not be rescinded where parties seeking rescission on basis of duress treated agreements as binding and sought benefits pursuant to the agreements.”). Petitioners “wish to retain the benefits of [the NPA] while simultaneously challenging its burdens. Florida law does not provide them with such a windfall.” *Jackson v. BellSouth Telecommunications*, 372 F.3d 1250, 1279 (11th Cir. 2004).

Petitioners are not seeking “rescission” at all. Instead, they are asking the Court to rewrite, or reform, the NPA to their liking. Reformation of a contract is an equitable remedy, but its purpose is to “conform to the intention, agreement, and understanding of all the parties,” *Jacobs v. Parodi*, 50 Fla. 541 (Fla. 1905), not to change the bargain, punish one of the contracting parties, or provide a windfall to a third party. Here, there is no misunderstanding between the parties to the NPA about any of its terms. Even when there

is a disagreement between two contracting parties, courts cannot simply re-write agreements between them to change the terms. *Cf. United States v. Fernandez*, 960 F.2d 771, 773 (9th Cir. 1991) (district court erred in rejecting one paragraph of the plea agreement rather than accepting or rejecting the entire agreement); *United States v. Skidmore*, 998 F.2d 372, 375 (6th Cir. 1993) (“Nothing in [Rule 11] even remotely allows the district court to accept a guilty plea but rewrite the plea agreement...”).

Even if the Court had the legal authority to judicially modify the terms of an agreement between two contracting parties at the request of a third party, there is simply no logical basis for excising the “immunity provisions” and depriving Mr. Epstein of the benefit of his bargain as a result of a judgment against the government for violating the CVRA. The Court made it clear that it “is *not* ruling that the decision not to prosecute was improper.” (DE 435:32-33) (emphasis added). Thus, there is no finding that the immunity provisions were illegal. They are not; they do not violate public policy. The USAO-SDFL had the legal authority to provide that consideration and continues to have that authority. 18 U.S.C. §3771(d)(6). United States Attorney’s Offices regularly enter plea and deferred and non-prosecution agreements that include provisions precluding future prosecution, sometimes in exchange for “substantial assistance” and sometimes because of agreements to plead guilty to related charges such as occurred in this case. The USAO-SDFL should not be released from the contractual obligations of the NPA as a result of its own purported violation of the CVRA.

Petitioners argue that Mr. Epstein has “forfeited” any right to seek specific performance of the NPA. (DE 458:16). Mr. Epstein, however, is not seeking specific

performance. He is not a party to the underlying litigation and is not seeking any remedies at all. Rather, it is the Petitioners who, having leveraged the NPA during civil litigation and then signed General Releases in favor of Mr. Epstein, now seek to undo essential terms of that agreement.

B. The General Release Signed by the Petitioners Bar Them from Obtaining the Epstein Remedies

The Settlement Agreement and General Release entered into by the Petitioners and Mr. Epstein in the federal and state court civil lawsuits were “negotiated and entered into by the Parties with the advice and assistance of respective counsel.” (Exhibit ____, at p.5). Petitioners were represented in those civil settlement agreements by the same counsel who represent them in this CVRA litigation. The settlement agreements are governed by Florida law; each contained the same “General Release” with the broadest language and no exceptions. (Exhibit ____, at pp. 1-2, 4). The General Release in each settlement agreement expressly encompassed “all, and all manner of, action and actions,” including “State or Federal,” whether “common law or statutory” and “claims, and demands whatsoever in law or in equity ... for, upon, or by reasons of any matter, cause or thing whatsoever (whether known or unknown), from the beginning of the world to the day of this release.” (Exhibit ____, at pp.1-2).

Although the General Release extended to all matters, whether known or unknown, this CVRA case arose from the same subject matter as the civil lawsuits and was well-known to the Petitioners at the time of the settlements as it had already been pending for two years. Petitioners, though well aware of the potential remedies they might seek in this

CVRA case, did not carve out from the General Release any of the Epstein Remedies they now seek relating to the NPA. Nor would such a carve-out have been consistent with the entire purpose of the settlement agreement, which was to ensure finality of all claims between Mr. Epstein and the Petitioners. (Exhibit ____, at p.2) (“It is further agreed that this Settlement Agreement represents a final resolution of a disputed claim and is intended to avoid further litigation.”). Petitioners’ counsel acknowledged the fact of finality vis-à-vis Mr. Epstein when they sought to revive their CVRA case and emphasized to this Court in this case that “*while they had settled their case with Jeffrey Epstein*, they had reached no settlement *with the U.S. Attorney’s Office...*” (DE 41:1) (emphasis added and in original). Petitioners did not inform this Court or Mr. Epstein that, in their view, the General Release did not preclude them from attempting in this CVRA case to reform, to Mr. Epstein’s detriment, the very agreement they relied on in their civil lawsuits against him.

Florida law “favors the finality of settlements,” *Pettinelli v. Danzig*, 722 F.2d 706, 710 (11th Cir. 1984), and Florida courts enforce general releases in settlement agreements “to further the policy of encouraging settlements.” *Mazzoni Farms, Inc.*, 761 So.2d at 314. The construction and enforcement of a release are governed by general principles of contract law. *Weingart v. Allen & O’Hare*, 654 F.2d 1096, 1103 (5th Cir. 1981). “[W]here the language of a release is clear and unambiguous a court cannot entertain evidence contrary to its plain meaning.” *Cerniglia v. Cerniglia*, 679 So.2d 1160, 1164 (Fla. 1996). A general release will ordinarily be regarded as embracing all claims which have matured at the time of its execution. *Mulhern v. Rogers*, 636 F.Supp. 323, 325 (S.D.Fla. 1986).

Florida courts and the Eleventh Circuit have not hesitated to enforce broad general releases in myriad circumstances. For example, in *Cerniglia*, the Florida Supreme Court held that a wife's complete and general release of the husband from "all claims of whatever nature each may have had in or to any assets/property or estate of whatever kind, now or hereafter owned or possessed by the other" was intended by the parties to serve as a complete bar to all claims arising from the marriage and barred the wife's claims to assets based on tort and contract theories. *Id.* at 1164 & n.4; *Jackson v. Bellsouth Telecommunications*, 372 F.3d at 1278-79 (interpreting Florida law and barring Plaintiff's claims based on "the unequivocal terms of the general releases they signed"); *Pettinelli*, 722 F.2d at 710. Where, as here, a release has all-inclusive language such as "any and all liabilities and claims" and covers the time period "from the beginning of the world to the days present," it bars all claims which have matured prior to executing the release. *Plumpton v. Continental Acreage Development Co., Inc.*, 830 So.2d 208, 210 (Fla. 5th DCA 2002); *Hold v. Manzini*, 736 So.2d 138, 141 (Fla. 3d DCA 1999). Indeed, even where a claim is unrelated to the litigation that resulted in the release, it will be barred if the general release in the prior litigation covered "any and all claims" that had matured. *Plumpton*, 830 So.2d at 211.

Applying these principles, it is clear that the Epstein Remedies are barred by the General Release. Petitioners readily acknowledge that the Epstein Remedies are directed only at Mr. Epstein, a non-party, as the government "will obviously suffer no harm if this Court invalidates the immunity provisions in the non-prosecution agreement," (DE 458:20). It makes no difference that the Epstein Remedies are being sought through the

vehicle of a CVRA case filed against the government rather than in a lawsuit directly naming him, as the language of the General Release is all-encompassing and bars any form of relief against Mr. Epstein.³

III. THE CVRA ITSELF DOES NOT AUTHORIZE IMPOSITION OF THE EPSTEIN REMEDIES

Citing a line of cases beginning with *Marbury v. Madison*, 5 U.S. 137 (1803), the Petitioners contend that the CVRA authorizes “the invalidation of an illegal non-prosecution agreement so that they can confer with the Government about an appropriate prosecution...” (DE 458:9). Petitioners argue that because the CVRA has a specific provision entitled “limitation on relief,” which does not include invalidation of an NPA, then “the CVRA clearly leaves open all other remedies.” (DE 458:8, 10). The Petitioners misread the CVRA and fundamentally misunderstand precedent regarding the inherent powers of the district court.

INSERT *MARBURY V. MADISON* SECTION

Not only is judicial reformation of the NPA not specifically authorized by the CVRA, the plain language of the CVRA actually precludes the relief sought by the Petitioners. Section 3771(d)(6) provides that “[n]othing in this chapter shall be construed to impair the discretion of the Attorney General or any officer under his direction.”

³ While, in the ordinary case, release is an affirmative defense which must be pled in the party’s answer to the complaint, *Rakip v. Paradise Awnings Corp.*, 514 F.App’x 917, 920 (11th Cir. 2013), Mr. Epstein was not served with a complaint. Thus, his first and only opportunity to assert the defense of release is now, when Petitioners are seeking remedies **against him** as a result of the government’s CVRA violation. This Court retained jurisdiction to enforce the settlement agreements, including the General Release.

(Emphasis added). Yet, the Petitioners are asking this Court to re-write the NPA to excise provisions that the USAO-SDFL agreed to in the exercise of its discretion. Thus, the remedies being sought are expressly prohibited by the statute. It is of no moment that the Petitioners are not asking the Court to order the USAO-SDFL to prosecute Mr. Epstein. The “discretion” referenced in 3771(d)(6) is not limited to decisions whether to prosecute a criminal defendant. Prosecutors exercise discretion in a variety of ways, including deciding what terms ought to be included in an NPA. By re-writing the NPA to excise the provisions granting Mr. Epstein immunity from federal prosecution, the Court would be *impairing* the discretion of the USAO-SDFL to grant immunity to Mr. Epstein.

The Court’s prior ruling that the CVRA “authorize[s] rescission or ‘re-opening’ of a prosecutorial agreement,” *Doe v. United States*, 950 F.Supp.2d 1262, 1267 (S.D.Fla. 2013), does not change the analysis. It is one thing to reject an agreement in its entirety on a timely basis and restore parties to the status quo *ante* – a remedy which is neither being pursued by the Petitioners nor even possible here. It is entirely another thing for the Court to target specific prosecutorial concessions in an NPA or plea agreement and simply excise them, thereby altering the balance of the agreement. The CVRA does not authorize the remedies being requested.

IV. PRINCIPLES OF SUBSTANTIVE DUE PROCESS PRECLUDE IMPOSITION OF THE EPSTEIN REMEDIES

“Due process requires the government to adhere to the terms of any plea bargain or immunity agreement it makes.” *United States v. Hill*, 643 F.3d 807, 874 (11th Cir. 2011), quoting *United States v. Harvey*, 869 F.2d 1439, 1443 (11th Cir.1989) (en banc). See, e.g.,

Santobello v. New York, 404 U.S. 257, 262 (1971) (“when a plea rests in any significant degree on a promise ... of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled”); *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”). “[W]hen a defendant has entered into a plea agreement with the Government, the court must ensure that he/she receives what is reasonably due him/her under the agreement ... if a defendant lives up to his/her end of the bargain, the Government is bound by its promises.” *United States v. Tilley*, 964 F.2d 66, 70 (1st Cir. 1992) (citation omitted).

An NPA is entitled to no less constitutional protection. *See, e.g., United States v. Stolt-Nielsen*, 524 F. Supp. 2d 609, 615-16 (E.D. Pa. 2007) (non-prosecution agreements “are to be construed in light of ‘special due process concerns’”) (quoting *United States v. Baird*, 218 F.3d 221, 229 (3d Cir. 2000) (citations omitted)). The government is constitutionally required to abide by the terms of the NPA. (DE 205-2:3-4) (“[C]onstitutional due process guarantees do not allow either the Non-Prosecution Agreement – which by its terms induced Epstein to, *inter alia*, plead guilty to state criminal charges and serve an 18-month sentence of state incarceration – or the governmental obligations undertaken therein to be set aside.”). This Court has also recognized the binding nature of the NPA. (DE 435:27) (“Although the binding effect of the NPA was contingent upon Epstein pleading guilty to the state charges, that contingency was out of the control of the government. *The government’s hands were permanently tied if Epstein fulfilled his obligations under the NPA.*”) (emphasis added).

The Petitioners acknowledge this well-established principle but argue that it does not apply because the government “cannot abide by illegal promises.” (DE 458:17). However, as argued *supra*, there were no illegal promises. The “immunity provisions” the Petitioners seek to excise from the NPA are routinely entered into by the government and are not illegal. (DE 435:32-33) (“The Court is not ruling that the decision not to prosecute was improper.”). That distinction renders inapposite the cases cited by the Petitioners, which involved contracts whose very terms were illegal. (DE458:18). For example, in *Power Fin. Credit Union v. Nat’l Credit Union Admin. Bd.*, 494 Fed. Appx. 982, 986 (11th Cir. 2002), the question was whether one party, a Florida credit union, could *prospectively* enforce an agreement it had entered into with a National Credit Union to purchase certain mortgages when a Florida statute expressly prohibited such purchases. The essential term of the contract was illegal. The Eleventh Circuit held that a court could not prospectively enforce any part of a contract that required one party to violate the law. *Id.*

At its core, Petitioners’ claim is not that any particular provision of the NPA is unenforceable as against the law or public policy, but rather that the NPA as a whole was executed before the government complied with its conferral obligations under the CVRA. The government’s failure to comply with its obligation to third parties, however, is simply no basis for unshackling the government from its contractual obligations to its counterparty. Compliance with the CVRA was the duty of the government, not of Mr. Epstein. While Mr. Epstein was understandably concerned about confidentiality, it was for the government to decide the extent to which it could accommodate Mr. Epstein’s desire for confidentiality consistent with its obligations under the CVRA. If the government

believed, as it has told the Court that it did, that the CVRA did not require it to inform Petitioners about the NPA, Mr. Epstein certainly was not obliged to insist that it do so.

Rejection of the Epstein Remedies would not leave Petitioners without any remedies. The CVRA contains a mechanism for remedying prosecutorial violations of the CVRA. *See* 18 U.S.C. §3771(f)(2)(C) (requiring that the AG promulgate regulations that “contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims.”). That is not to say that such sanctions are appropriate here. It is nonetheless clear, however, that Congress thought about how to ensure enforcement of the CVRA and what sanctions should be available for governmental noncompliance. “Where a congressional statute provides specific penalties for violations, a court should not affix the additional sanction of rendering a private contract void unless the legislative history evinces such an intent; it is inappropriate to add judicially to the remedies provided in the statute.” *Land Ocean Logistics, Inc. v. Aqua Gulf Corp.*, 68 F. Supp. 2d 263, 270 (W.D.N.Y. 1999).

The inequities of invalidating the “immunity provisions” of the NPA at this juncture, and depriving Mr. Epstein of the benefit of his bargain, are stark. Mr. Epstein, in good faith reliance on the NPA, fully performed each and every one of his obligations. Solely because of the obligations imposed on him by the NPA, he pled guilty to state court charges and served 13 months of an 18-month prison term, followed by a year of community control. He did not contest liability in civil actions brought against him under 18 U.S.C. §2255, paid the attorney representative, and entered into civil settlements with all such §2255

claimants, amounting to many millions of dollars. He has been continuously registered as a sex offender for nearly 10 years. He settled civil suits brought by other claimants outside of the 18 U.S.C. §2255 context due in significant part to his plea of guilty and the other requirements of the NPA. Mr. Epstein can never be returned to the status quo *ante*—the time he spent in jail and on probation cannot be restored to him, the prejudice he has suffered from being required to register as a sex offender cannot be undone, and he will never recoup the millions of dollars he paid in legal fees and settlements. Invalidating the “immunity provisions” of the NPA after full performance by Mr. Epstein would violate his substantive due process rights.

V. THE DOCTRINE OF SEPARATION OF POWERS PRECLUDES IMPOSITION OF THE EPSTEIN REMEDIES

It is well established that the Executive Branch has broad discretion to decide when to initiate criminal proceedings. *Cnty. For Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C. Cir. 1986) (“The power to decide when to investigate, and when to prosecute, lies at the core of the Executive's duty to see the faithful execution of the laws”); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[t]he decision of a prosecutor in the Executive Branch not to indict ... has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to “take Care that the Laws be faithfully executed) (citing U.S. Const. art. II, §3). This “broad discretion” exists because the Executive Branch is responsible for considering many factors “not readily susceptible to the kind of analysis the courts are competent to undertake,” such as “the strength of the case, the prosecution's general deterrence value, the Government's

enforcement priorities, and the case's relationship to the Government's overall enforcement plan..." *Wayte v. United States*, 470 U.S. 598, 607 (1985). As such, the decision to prosecute is "particularly ill-suited to judicial review." *Id.* "Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . ." *United States v. Fokker Services B.V.*, 818 F.3d 733, 741 (D.C.Cir. 2016), quoting *Newman v United States*, 382 F.2d 479, 480 (D.C.Cir. 1967).

As the Supreme Court noted in *Wayte*, "[j]udicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decision-making to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute." 470 U.S. at 607-08.

Furthermore, "a district judge must be careful not to exceed his or her constitutional role." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1462 (D.C. Cir. 1995). "When a judge assumes the power to prosecute, the number [of branches] shrinks to two." *In re United States*, 345 F.3d 450, 454 (7th Cir. 2003); see also *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965) ("It follows, as an incident of the constitutional separation of powers, that the courts are not to interfere with the free exercise of the discretionary powers of the attorneys of the United States in their control over criminal prosecutions.").

These principles are particularly important in the contexts of NPAs. NPAs are

private contracts between the government and an investigatory target entered into in the exercise of the government's sole discretion to decide whether to bring criminal charges. They are not filed with the court, do not generally become public, and where, as here, there has been full performance on both sides, do not involve judicial proceedings of any sort. Unlike plea agreements and DPAs, which are the result of a "case or controversy" filed in court, NPAs are extrajudicial and do not require court approval or resolution.⁴ Petitioners' proposal that the Court order the excision of the "immunity provisions" from the NPA and declare that the Constitution permits the prosecution of Mr. Epstein by the USAO-SDFL would eliminate all contractual consideration provided to Mr. Epstein. It would thrust the Court into the role of prosecutor and plea negotiator, intrude on the authority and function of the Executive to resolve criminal investigations the way it deems appropriate, and violate the Separation of Powers doctrine.

Even in the context of DPAs, where courts do have limited involvement, courts may not permissibly reject a DPA based on disapproval of its substance, *United States v. Fokker Services B.V.*, 818 F.3d 733 (D.C. Cir. 2016), nor may they oversee the implementation of a DPA. *HSBC Bank USA, N.A.*, 863 F.3d at 138. *Fokker Services* addressed the

⁴ These crucial distinctions between DPAs, which require the involvement of the courts, and NPAs, which do not, may explain why Congress did not include NPAs in the 2015 amendment to §3771(a)(9). Although Mr. Epstein is aware that the Court has decided otherwise, (DE 435:28-30), Congress likely chose not to open up a wholly non-judicial process committed to the exclusive jurisdiction of the Executive to scrutiny under the CVRA. "If, in the context of [N]PAs, Congress intended to rejigger the historical allocation of authority between the courts and the Executive, we would expect it to do so rather clearly." *Cf. United States v. HSBC Bank USA, N.A.*, 863 F.3d 125, 138 (2d Cir. 2017) (discussing DPAs).

intersection of judicial and executive powers with respect to a DPA and held, based on constitutional considerations regarding the powers conferred on the Executive, that the district court could not reject the DPA in that case based on its disagreement with the Executive's charging decisions.

The Executive's primacy in criminal charging decisions is long settled. That authority stems from the Constitution's delegation of "take Care" duties, U.S. Const. art. II, § 3, and the pardon power, *id.* § 2, to the Executive Branch. See *United States v. Armstrong*, 517 U.S. 456, 464 . . . (1996); *In re Aiken Cnty.*, 725 F.3d 255, 262–63 (D.C.Cir.2013). Decisions to initiate charges, or to dismiss charges once brought, "lie[] at the core of the Executive's duty to see to the faithful execution of the laws." *Cnty. for Creative Non-Violence v. Pierce*, 786 F.2d 1199, 1201 (D.C.Cir.1986). The Supreme Court thus has repeatedly emphasized that "[w]hether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States v. Batchelder*, 442 U.S. 114, 124 . . . (1979); see *Bordenkircher v. Hayes*, 434 U.S. 357, 364 . . . (1978).

Fokker Services, 818 F.3d at 741. Accordingly, judicial authority is "at its most limited when reviewing the Executive's exercise of discretion over charging determinations." *Id.* In *Fokker*, the question before the D.C. Circuit was whether the district court had the power to decline to enter a speedy trial waiver because it believed that the terms of the DPA were too lenient. The Court answered that question with a definitive no, reasoning that Congress, in enacting the Speedy Trial Act, "acted against the backdrop of long-settled understandings about the independence of the Executive with regard to charging decisions" and that "[n]othing in the statute's terms or structure suggests any intention to subvert those constitutionally rooted principles so as to enable the Judiciary to second-guess the Executive's exercise of discretion over the initiation and dismissal of criminal charges." *Id.* at 738.

Although *Fokker* addressed DPAs, the same principles apply with even greater force to NPAs, which typically involve no judicial supervision. By imposing the Epstein Remedies and re-writing the terms of the NPA to remove the “immunity provisions,” the Court would in effect be rejecting the deal agreed to by the parties and deciding, on behalf of the Executive, how to resolve Mr. Epstein’s criminal exposure. It does not matter that the Court would not actually be initiating a prosecution; by dictating the outcome of a negotiated contract between the government and Mr. Epstein, the Court would be playing the role of prosecutor. The Separation of Powers doctrine does not permit the shrinking of the number of branches to two.

VI. THE DOCTRINE OF RIPENESS PRECLUDES IMPOSITION OF PROPOSED REMEDY #2

Remedy #2 proposed by Petitioners seeks a declaration from the Court as follows: “If, after consultation with the victims, the U.S. Attorney’s Office determines that prosecution of Epstein for crimes committed against Jane Doe 1 and Jane Doe 2 (or any other victim) is appropriate, the Constitution would permit such a prosecution[.]” (DE 458:4-5). A declaration that “the Constitution would permit” a prosecution of Mr. Epstein should those hypothetical events occur would violate the well-settled principle that federal courts may not issue advisory opinions. This principle is rooted in the constitutional requirement that federal courts consider only “cases” and “controversies,” U.S. CONST. art. III, §2, and in prudential concerns. *National Advertising Co. v. City of Miami*, 402 F.3d 1335, 1339 (11th Cir. 2005).

“Strict application of the ripeness doctrine prevents federal courts from rendering

impermissible advisory opinions and wasting resources through review of potential abstract disputes.” *Id.* The prudential aspect of this doctrine “asks whether it is appropriate for this case to be litigated in a federal court by these parties at this time.” *Id.* A ripeness inquiry requires a two part “determination of (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration.” *Id.* One of the “basic rationales” for the ripeness doctrine is “to protect the [administrative] agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.” *Digital Props., Inc. v. City of Plantation*, 121 F.3d 586, 590 (11th Cir. 1997) (internal quotation marks and citations omitted).

Whether the USAO-SDFL would be constitutionally permitted to prosecute Mr. Epstein *if* the Court judicially reforms the NPA to excise the “immunity provisions” and *if* the USAO-SDFL determines, after consultation with Petitioners, that a federal prosecution is even legally permissible and appropriate, is not ripe for this Court’s review. *National Advertising Co.*, 402 F.3d at 1341 (affirming entry of summary judgment on ripeness grounds, holding that a “binding conclusive administrative decision” was necessary “to ensure that the facts of a case are mature enough to permit meaningful review”). Such a conclusion requires the Court to assume the occurrence of factual events and decisions outside its control, such as the decision whether to prosecute. *See* 18 U.S.C. §3771(d)(6). Moreover, such a declaration would thrust the Court into the role of deciding now, prior to any such hypothetical prosecution on undetermined charges at some point in the future, the myriad of constitutional challenges that Mr. Epstein might have to that prosecution. The

Court should reject Petitioners' invitation to render an advisory opinion.

VII. THE DOCTRINE OF EQUITABLE ESTOPPEL PRECLUDES IMPOSITION OF THE EPSTEIN REMEDIES

The CVRA itself makes clear that it contemplates swift resolution of actions brought to complain of violations of CVRA rights. It provides:

The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. *The district court shall take up and decide any motion asserting a victim's right forthwith.* If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith *within 72 hours after the petition has been filed*, unless the litigants, with the approval of the court, have stipulated to a different time period for consideration.

18 U.S.C.A. §3771(d)(3) (emphasis added). This requirement of a prompt decision suggests a concern that judicial action be taken before the parties have performed their obligations in reliance on an agreement.

Petitioners, far from proceeding with dispatch, stymied the operation of the CVRA because, as they conceded in August 2008, it was “likely not in [the petitioners’] interest to ask for the [rescission] relief that we initially asked for.” (DE 27:4). As this Court has observed, “the CVRA case stalled as petitioners pursued collateral civil claims against Epstein.” (DE 189:5, ¶ 8). In those civil damage lawsuits, Petitioners invoked the NPA as a means to preclude Mr. Epstein from “denying the acts alleged in this Complaint” and to force him to “effectively admit liability to the Plaintiff.” In the interim, Mr. Epstein, to his detriment, served a prison sentence and a year of community control probation, registered

as a sex offender, and settled numerous civil actions that were directly related to his obligations under the NPA. So inactive were Petitioners in this case that the Court dismissed the case for lack of prosecution in September 2010. (DE 38).

One of the proclaimed purposes the USAO-SDFL sought to achieve through the NPA was to ensure monetary compensation for Petitioners and others similarly situated, and Petitioners readily availed themselves of that benefit. Only *after* they had successfully resolved their civil cases against Mr. Epstein, achieving the benefits that the NPA conferred upon them, did Petitioners resurrect their CVRA lawsuit. Petitioners now condemn and assail the same NPA upon which they relied to preclude Mr. Epstein from disputing that he had sexually abused both Petitioners. By affirmatively waiving their right to a prompt decision under the CVRA, and allowing the CVRA lawsuit to remain dormant for two years, Petitioners made a deliberate decision to choose one lawsuit over the other. That decision equitably estops the Petitioners from now seeking to undo any aspect of the NPA.

The doctrine of equitable estoppel precludes the Petitioners from attacking, in this proceeding, the NPA they relied upon in their state and federal civil lawsuits.⁵ “The doctrine of equitable estoppel is grounded in fairness.” *Bahamas Sales Assoc., LLC v. Byers*, 701 F.3d 1335, 1342 (11th Cir. 2012). “The purpose of the doctrine is to prevent a plaintiff from, in effect, trying to have his cake and eat it too; that is, from “rely[ing] on the contract when it works to [his] advantage [by establishing the claim] and repudiat[ing]

⁵ The government raised the issues of equitable estoppel and judicial estoppel in its summary judgment submissions. This Court expressly reserved ruling on those arguments because they “relate only to the remedy.” (DE 435:32).

it when it works to [his] disadvantage” *In re Humana Inc. Managed Care Litigation*, 285 F.3d 971, 976 (11th Cir. 2002), *rev’d on other grounds*, *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003), *quoting Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966).

“Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the burdens that contract imposes.” *Blinco v. Green Tree Servicing LLC*, 400 F.3d 1308, 1312 (11th Cir. 2005), *citing Humana*, 285 F.3d at 976. Petitioners claimed the benefit of the NPA in multiple civil lawsuits. After successfully concluding those lawsuits, Petitioners should not now be heard to contend that Mr. Epstein must be deprived of the only consideration he received in exchange for entering into the NPA in the first place. Significantly, a finding of equitable estoppel would not deprive the Petitioners of all remedies, just the ones that concern the continued viability of the NPA. Petitioners have proposed a host of other remedies against the government that the Court may still consider.

VIII. THE DOCTRINE OF JUDICIAL ESTOPPEL PRECLUDES IMPOSITION OF THE EPSTEIN REMEDIES

A separate doctrine – judicial estoppel – also applies to preclude Petitioners from seeking the Epstein Remedies. Judicial estoppel precludes a party from “asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.” *Burnes v. Pemco Aeroplex, Inc.*, 291 F.3d 1282, 1285 (11th Cir. 2002), *overruled in part*, *Slater v. United States Steel Corp.*, 871 F.3d 1174, 1176–77 (11th Cir. 2017). It is “an equitable concept intended to prevent the perversion of the judicial

process,” *id.*, which prohibits “parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire v. Maine*, 532 U.S. 742, 749-50 (2001). “Stated simply, the doctrine of judicial estoppel rests on the principle that “absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” *Slater*, 871 F.3d at 1180-81, *quoting Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996).

The Eleventh Circuit “employs a two-part test to guide district courts in applying judicial estoppel: whether (1) the party took an inconsistent position under oath in a separate proceeding, and (2) these inconsistent positions were ‘calculated to make a mockery of the judicial system.’” *Slater*, 871 F.3d at 1181, *quoting Burnes*, 291 F.3d at 1285. These two factors “are not inflexible or exhaustive; rather, courts must always give due consideration to all of the circumstances of a particular case when considering the applicability of this doctrine.” *Burnes*, 291 F.3d at 1286.

Judicial estoppel bars Petitioners’ contention that the NPA should be reformed to excise the “immunity provisions” as part of the remedy for the government’s CVRA violation. In their civil actions, Petitioners relied on the NPA as a valid, legal agreement which precluded Mr. Epstein from contesting his liability to them, also telling this Court at about the same time that they were not committed to the NPA’s invalidation because such a course was likely not in their best interest. (DE 27:4). Now, having reaped for themselves the benefits that the NPA conferred upon them, and released Mr. Epstein from further actions related thereto, Petitioners claim that the NPA is an “illegal agreement” and should

be reformed to eliminate entirely the benefits to Mr. Epstein, suggesting that they would have opposed the NPA had they been consulted. Thus, Petitioner are arguing against the very NPA they exploited to their great advantage. If their current position is accepted, Petitioners appear to have misled the courts as to the legal efficacy of the NPA. The first part of the *Slater* standard is plainly satisfied here.

Such blatant inconsistency is certainly calculated to make a mockery of the judicial system: trying to convince one court to rule in favor of Petitioners based on the binding validity of the NPA and then trying to convince this Court that the agreement was an “illegal agreement.” Apparently, the NPA shifted from being an invalid to a valid and then back to an invalid agreement based purely on legal strategy in different proceedings. This was no inadvertence or mistake. Petitioners are represented by able and sophisticated lawyers; their manipulation of the legal system for their benefit was not accidental. The doctrine of judicial estoppel is designed to prevent this type of gamesmanship.

IX. THE CVRA DOES NOT APPLY TO A NON-PROSECUTION AGREEMENT

Rights under the CVRA do not attach if the government chooses to not bring any federal charges and enter into an NPA with an individual. Thus, no remedy is even available to the Petitioners. We recognize that the Court has already rejected this argument and held to the contrary. *Does v. United States*, 817 F.Supp.2d at 1341; (DE 435:26). Nonetheless, Mr. Epstein raises this issue to preserve it in the event of an appeal or cross-appeal in this matter, and adopts the arguments previously raised in support of the argument that the CVRA does not apply. (DE 62:7-30).

CONCLUSION

For the foregoing reasons, this Court should reject the self-styled “Rescission Remedies” (DE 458:4-5) proposed by Petitioners, which seek excision of the “immunity provisions” of the NPA and an endorsement by the Court that the USAO-SDFL is authorized to prosecute Mr. Epstein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the ____ day of July 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. According to the Court’s website, counsel for all parties and intervenors are able to receive notice via the CM/ECF system.

/s/Scott A. Srebnick
Scott A. Srebnick