UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE 1 AND JANE DOE 2,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant
_____/

INTERVENORS' MOTION FOR STAY PENDING APPEAL

Intervenors Roy Black, Martin Weinberg, Jay Lefkowitz, and Jeffrey Epstein hereby request that this Honorable Court stay its order of June 18, 2013 (Doc. 188), denying their Motion for a Protective Order and ordering disclosure to plaintiffs of the intervenor attorneys' written communications with federal prosecutors in the Southern District of Florida made with the specific purpose of obtaining a favorable resolution of the criminal investigation of Mr. Epstein through attorney-to-attorney settlement negotiations. In determining whether to grant a stay pending appeal, the Court is to consider four factors: "(1) the likelihood that the moving party will ultimately prevail on the merits of the appeal; (2) the extent to which the moving party would be irreparably harmed by denial of the stay; (3) the potential harm to opposing parties if the stay is issued; and (4) the public interest." *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 957 (11th Cir. 1981). *See, e.g., In re Federal Grand Jury Proceedings (FGJ 91-9)*, *Cohen*, 975 F.2d 1488, 1492 (11th Cir. 1992). Those factors are amply satisfied in this case: there is a strong likelihood that intervenors will prevail on appeal (or at a minimum,

they have a "substantial case on the merits," and the "harm factors" militate in favor of granting a stay, *Merial Ltd. v. Cipla Ltd.*, 426 Fed.Appx. 915 (11th Cir. 2011), *citing Hilton v. Braunskill*, 481 U.S. 770, 778 (1987)); they will be immediately and irreparably harmed by the disclosure of the communications at issue; the plaintiffs will suffer no harm from the granting of a stay until these critically important issues can be resolved by the Eleventh Circuit; and to the extent that the public has an interest in the matter, it would favor considered appellate resolution of the issues presented prior to the release of the communications at issue.

The Court's order is the first decision anywhere, insofar as undersigned counsel are aware, which has ordered disclosure to third party civil litigants of private and confidential communications between attorneys seeking to resolve a criminal matter favorably to their clients and government prosecutors. While framed as a disclosure order in this particular case, the Court's decision, which drastically reshapes the landscape of criminal settlement negotiations and sets at nought 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, 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 communication 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 the case. Such communications often necessarily involve explicit or implicit admissions regarding their client's conduct – what he did, what he did not do, what he knew, what he intended, and the like – and the attorney's 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 civil adversaries of the attorney's client. This case is far from *sui generis* – the cases are legion in which there is related civil litigation seeking damages or other recovery from an individual who was the subject of criminal investigation or prosecution and in which, after becoming aware of this Court's decision, plaintiffs will begin clamoring for access to communications between defendants' counsel and prosecuting authorities in the belief that it may help support their civil case against the defendant. In addition to the stay factors addressed below, the importance of these issues for the functioning of the criminal justice system counsels in favor of granting the requested stay.

Intervenors have standing under *Perlman v. United States*, 247 U.S. 7 (1918), to pursue an interlocutory appeal of the Court's order, and questions of privilege and confidentiality asserted by non-parties to the litigation are paradigmatic examples of circumstances in which interlocutory appeals are allowed, yet the value of that appeal will be severely undercut, if not destroyed entirely, if a stay pending appeal is not granted. Forced disclosure of confidential or privileged communications cannot be undone on appeal; the protections afforded the documents will have been irretrievably lost before the appellate court can pass on the matter, to the intervenors' irremediable prejudice. For all the reasons addressed herein, the Court should grant the requested stay.

I. LIKELIHOOD OF SUCCESS ON THE MERITS.[1]

[1] Intervenors incorporate by reference herein the arguments set forth in their Motion for a Protective Order and Opposition to Motions of Jane Doe 1 and Jane Doe 2 for Production, Use, and Disclosure of Settlement Negotiations (Doc. 160); Supplemental Briefing of Intervenors Roy Black, Martin Weinberg, and Jay Lefkowitz in Support of Their Motion for a Protective Order Concerning Production, Use, and Disclosure of Plea Negotiations (Doc. 161); Intervenor Jeffrey Epstein's Motion for a Protective Order and Opposition to Motions of Jane Doe 1 and Jane Doe 2 for Production, Use, and Disclosure of Plea Negotiations (Doc. 162); Notice of Supplemental Authority of the United States Supreme Court (Doc. 163); and Reply in Support of Supplemental Briefing By Limited Intervenors Black, Weinberg, Lefkowitz, and Epstein (Doc. 169).

A. The Applicability of Rule 410.

Any assessment of the merits of the 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":

> ninety-four percent of state convictions are the result of guilty pleas. 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. Because ours "is for the most part a system of pleas, not a system of trials," it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process.

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 (2012). 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 conducting the criminal investigation or the bringing of fewer, or less serious, charges against the client. 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. Defendants and people under criminal investigation would not engage in plea negotiations and waive their Fifth Amendment rights if they believed that statements made during those negotiations could be used against them later in litigation with third parties. Candid discussions simply cannot take place if defendants or persons under criminal investigation fear that statements made during negotiations can be divulged to third parties in other proceedings and used to harm them, send them to prison, or invalidate their bargains years after they have served prison sentences and suffered all the consequences of their deals. Few if any lawyers would engage in candid and open discussions with a prosecutor if their statements could later be used against their clients. 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 this Court's Order enshrines. The strong policy considerations mitigating against the result reached by the Court weigh heavily in favor of the likelihood of intervenors' success on appeal.

Contrary to the result reached by this Court, 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". The cases on which the Court relied in concluding that the settlement negotiations at issue here do not fall within Rule 410 are uniformly inapposite and do not support the proposition that the settlement negotiations in this case are not subject to the protections of Rule

410. *United States v. Merrill*, 685 F.3d 1002, 1013 (11th Cir. 2012), concerned statements made by the defendant himself in informal meetings with the prosecution prior to his scheduled grand jury testimony, *see id.* 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 Court that settlement discussions in advance of the return of an indictment categorically do not fall within Rule 410.[2] Moreover, the circumstances present here were dispositively different from those in *Merrill*. Here, the communications were made attorney-to-attorney under circumstances which leave no room to doubt that the parties were engaged in serious negotiations to resolve the federal criminal investigation of Epstein. *United States v. Adelman*, 458 F.3d 791 (8th Cir. 2006), also involved statements made by the defendant to federal prosecutors; the defendant's statements were made in 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.

[2] In any event, there was, as the Court notes elsewhere in its opinion, an indictment pending in the state courts which was related to the matters under federal investigation and which was addressed during the settlement negotiations between intervenors and federal prosecutors. Moreover, there was an active federal grand jury investigation ongoing at the time of the settlement negotiations, further differentiating this case from the cases relied on by the Court.

Under the Court's ruling, the attorneys for a person under federal criminal investigation may never enter into negotiations 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 used, either by the government or by adversarial third parties, to the severe detriment of their client. This is not and cannot be the law and is certainly unsound policy, and there is a substantial likelihood that the Eleventh Circuit will agree. Indeed, the 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 Court's decision will encourage whenever the progress of the negotiations or the attainment of the desired objective require 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.

The Court also rejected the applicability of Rule 410 because the communications between Epstein's counsel and the government led to Epstein's plea of guilty in state court. In the sole case cited by the Court for this proposition, *United States v. Paden*, 908 F.2d 1229 (5th Cir. 1990), the defendant pled guilty to *federal* charges pursuant to his plea agreement. That Mr. 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 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).

Even when plea negotiations result in a guilty plea, not all statements made during those negotiations are thereby subject to disclosure. The plain meaning of Rule 410 is that any disclosure of plea negotiations must relate to the plea that was actually entered. The broad reading adopted by the Court would frustrate the purpose and policy of Rule 410. In this case, there was no plea to the offenses that the government was investigating or to the matters discussed in the plea negotiation letters and emails. There was never a federal plea that closed out all the federal issues that were the subject of the continuing exchanges of letters and memos in which Mr. Epstein's counsel addressed the reasons why Mr. Epstein should not be federally prosecuted.

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). Thus, the most reasonable construction of Rule 410 is that all plea discussions in this case were about offenses for which there was no plea of guilty, and therefore Rule 410 facially and fully applies. Any other reading would render Rule 410 ambiguous and would violate Mr. Epstein's Fifth Amendment rights.

> The rule's central feature 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. Such candid discussion will often include incriminating admissions . . . To allow the government to introduce statements uttered in reliance on the rule would be to use the rule as a sword rather than a shield. This we cannot allow; the rule was designed only as a shield.

Id. at 797. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress . . . The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

B. Recognition of a Privilege Under Rule 501.

The Court rejected intervenors' contention that the Court should recognize a privilege for communications 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. 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. Rules 11(f) and 410 deal only with what is admissible; they do not purport to extend to what is discoverable. Rule 410 begins with the assumption that a litigant is 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. That question must be answered by reference to Fed. R. Civ. P. 26, which refers to Federal Rule of Evidence 501, which "empower[s] the federal courts to 'continue the evolutionary development of [evidentiary] privileges.'" *Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007), quoting *Trammel v. United States,* 445 U.S. 40, 47 (1980).

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. The legislative history, too, "shows that the purpose of Rule 410 and Rule 11(e)(6) is to permit the unrestrained candor which produces effective plea discussions between the . . . government and the . . . defendant." *Committee on Rules of Practice And Procedure of The Judicial Conference of The United States, Standing Committee On Rules of Practice And Procedure*, 77 [redacted]. 507 (February 1978) (emphasis added). For these reasons, criminal defense lawyers negotiate with prosecutors in an environment of confidentiality, fostered by the protections of Rules 410 and 11. These rules encourage a process of searching and honest disclosures, and parties expect that their negotiations, and the information they exchange, will be protected from future use by an adversary. And because criminal defense lawyers are *required,* by ethical and constitutional considerations, to engage in plea negotiations to discharge their duty to represent the client's *best interest*, they do so with the well-founded expectation that communications made during those negotiations will not later be used *to harm the client*.

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 204.This privilege encourages disposition of criminal cases by plea agreement, which is essential to the administration of justice:

> The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged. If 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 fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Blackledge v. Allison,* 431 U.S. 63, 71 (1977). Those sentiments are just as true today. The Bureau of Justice Statistics of the Department of Justice reports that in 2005, 96.1% of federal criminal cases were resolved by way of a plea bargain. www.ojp.usdoj.gov/bjs/pub/html/fjsst/2005/fjs05st.htm. That today's justice system depends on plea negotiations is a monumental understatement.

Whether to negotiate a plea or contest a criminal charge "is ordinarily the most important single decision in any criminal case." *Boria v. Keane*, 99 F.3d 492 (2d Cir. 1996). In the age of the Sentencing Guidelines, with the severe sentences called for in federal criminal cases, minimum mandatories, and the abolition of parole, engaging in meaningful and effective plea negotiations is perhaps one of the most important roles of a criminal defense attorney. Today, the lawyer's "ability to persuade the judge or the jury is . . . far less important than his ability to persuade the prosecutor" during plea negotiations. *United States v. Fernandez*, 2000 WL 534449 (S.D.N.Y. May 3, 2000) at *1. Counsel's failure to discharge his duties during plea negotiations is malpractice: "[I]t is malpractice for a lawyer to fail to give his client timely advice

concerning" pleas. *Id.* It also constitutes ineffective assistance of counsel, and violates the Constitution. Thus, counsel has a duty to advise clients fully on whether a particular plea is desirable, since "[e]ffective assistance of counsel includes counsel's informed opinion as to what pleas should be entered." *United States v. Villar,* 416 F. Supp. 887, 889 (S.D.N.Y. 1976); *Boria v. Keane*, 99 F.3d 492, 497 (2d Cir. 1996), citing ABA Model Code of Professional Responsibility, Ethical Consideration 7-7 (1992). Counsel also has a constitutional obligation to seek out information from the government, especially information that the government intends to use against the client. Failure to do so constitutes ineffective assistance of counsel. ain *Rompilla v. Beard*, 545 U.S. 374 (2005). "The notion that defense counsel must obtain information that the state has and will use against the defendant is not simply a matter of common sense, . . . it is the duty of the lawyer . . . ." *Id.* at 387, citing 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp). The Constitution also requires that criminal defense lawyers conduct "a prompt investigation of the circumstances of the case," and this includes making every effort to secure information directly from the prosecutors: The Supreme Court has "long . . . referred [to these ABA Standards] as 'guides in determining what is reasonable.'" *Id.* at 387.

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case. The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

Id. at 386, citing 1 ABA Standards for Criminal Justice 4–4.1 (2d ed. 1982 Supp). The lawyer's duty to investigate and obtain information from the prosecutor goes hand-in-hand with the lawyer's additional duty to "make suitable inquiry" to determine whether valid defenses exist. *Jones v. Cunningham*, 313 F.2d 347 (4th Cir.1963) ("Of course, it is not for a lawyer to fabricate

defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist"). And regardless of whether valid defenses exist, counsel has a duty *to initiate plea negotiations* if he is to discharge his duty to faithfully represent the client's interests. *Hawkman v. Parratt,* 661 F.2d 1161, 1171 (8th Cir. 1981)(counsel's "failure to initiate plea negotiations concerning the duplicitous felony counts constituted ineffective assistance of counsel which prejudiced Hawkman").

Reason and experience tell us that the system we have in place of sentencing laws, ethical rules, federal court dockets, and constitutional considerations, will not function if plea negotiations 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. Plea negotiations are "rooted in the imperative need for confidence and trust," *Jaffee v. Redmond,* 518 U.S. 1, 10 (1996), and maintaining their confidentiality advances significant public and private ends. Discovery and use of plea negotiations 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,* 957 F.2d at 1533. For these reasons, plea negotiations are properly subject to a common law privilege under Rule 501.

II. THE SEVERE AND IRREMEDIABLE PREJUDICE TO INTERVENORS FROM DISCLOSURE OF THE COMMUNICATIONS.

The communications which would be disclosed under the Court's order were made by intervenor attorneys on behalf of their client, intervenor Epstein as part of a full, open, and frank negotiation with government counsel directed toward resolving the federal criminal investigation of Mr. 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 – what to say, how much to say, when to say it, and how to say it – were made in reliance upon those communications not being disclosed outside the attorney-to-attorney settlement negotiation process. Indeed, for the reasons addressed in the preceding section, the settlement/plea negotiation process so central to our system of criminal justice cannot function in the absence of counsel's ability to represent their clients vigorously in pursuing a favorable resolution for them through confidential communications with government counsel.

Now, without persuasive precedent, the Court has drastically reshaped the settlement negotiation landscape to retroactively eliminate the reasonable expectation of confidentiality generated by Rule 410 and the work product privilege, in reliance on which these communications were authored by competent and responsible attorneys, that settlement communications between counsel would remain confidential and not be subject to disclosure to third parties seeking to harm their client and ordering the disclosure of the communications to Mr. Epstein's civil adversaries. If such communications are ultimately found on appeal to be entitled to remain confidential under Rule 410 and the work product privilege and/or found to be subject to Rule 501 common law privilege, as intervenors have every confidence they will be,

their disclosure in advance of appellate resolution of the important issues raised in this case will inflict immediate and completely irremediable harm on intervenors, as, if disclosure is not stayed pending appeal, the protections of privilege and confidentiality will have been irretrievably lost. What has been disclosed cannot be undisclosed and returned to its protected state; the damage against which privilege and confidentiality rules are designed to protect will have been done. The value to intervenors of their appeal to the Eleventh Circuit would be entirely vitiated, as, absent a stay, a victory on appeal cannot ever undo the injury already caused. And the anticipated damage here is not simply limited to disclosure to plaintiffs and their counsel, serious as that damage would be; as past is prologue, there can be little doubt, based on the prior conduct of plaintiffs and their attorneys, that these communications, if disclosed to them, will quickly make their way into the public press for wide-ranging dissemination.

Because it is impossible for appellate courts to undo the damage caused by forced disclosure of privileged or confidential communications or information, courts have consistently recognized that the harm caused by an erroneous order to disclose privileged or confidential information is irreparable. *See, e.g., In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009)(finding risk of irreparable harm because "a court cannot restore confidentiality to documents after they are disclosed"); *Gill v. Gulfstream Park Racing Ass'n, Inc*., 399 F.3d 391, 398 (1st Cir. 2005)("once the documents are turned over to Gill with no clear limitation on what he may do with them, the cat is out of the bag, and there will be no effective means by which TRPB can vindicate its asserted rights after final judgment"); *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir.1997)("We find . . . that forced disclosure of privileged material may bring about irreparable harm"); *In re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir. 1994)(forced disclosure of privileged documents would cause irreparable harm). The serious and irreparable

injury to intevenors from the Court's order weighs profoundly heavily in favor of granting a stay pending appeal.

III. THE ABSENCE OF PREJUDICE TO THE PLAINTIFFS.

In stark contrast to the severe risk of serious and irreparable injury which the failure to grant a stay pending appeal would cause to intervenors stands the clear absence of prejudice to plaintiffs if a stay is granted. The plaintiffs commenced this action in 2008; they did not even seek disclosure of the communications at issue until two and a half years later, in March, 2011 (Doc. 51). Before doing so, plaintiffs had already moved for summary judgment (Doc. 48), a filing conveying plaintiffs' belief that the record as it existed at that juncture was sufficient to demonstrate their entitlement to the requested relief. That motion remains pending, and no trial date has been set. Indeed, the plaintiffs knowingly sat on their CVRA claims for years as Mr. Epstein served a prison sentence in solitary confinement and as he satisfied all the requirements of his non-prosecution agreement. Rather than seek emergency relief from the Court, the plaintiffs appeared at a status conference on July 11, 2008, *knowing that Mr. Epstein was in prison*, and they told the Court that they saw no reason to proceed on an emergency basis. [Trans. July 11, 2008 at 24-25]. In a hearing one month later, the plaintiffs specifically asked that the Court *not* invalidate the non-prosecution agreement because they wanted to make sure not to undo any benefits they could gain from it. [Trans. August 14, 2008 at 4]. There will be no prejudice to plaintiffs from waiting until an appellate court can address the critically important issues at stake here. If they are entitled to relief – something intervenors strenuously deny – they will obtain it, and the timing of that relief matters little, if at all. Having been in no hurry to seek rescission of the non-prosecution agreement, plaintiffs should not now be heard to contend that the time awaiting appellate resolution really matters.

To the extent that communications authored by Mr. Epstein's counsel and sent to federal prosecutors during settlement negotiations could ever, *arguendo*, be deemed relevant to plaintiffs' action against the government for alleged breaches of their rights under the CVRA,[3] a dubious proposition at best, any such relevance could be no more than tangential. Plaintiffs already know full well what the government did or did and did not do with respect to communicating with them during the course of the negotiations; the communications of Mr. Epstein's counsel could add little, or, more likely, nothing to the plaintiffs' quantum of proof.

Moreover, the government has made it abundantly plain that, whatever the outcome of this litigation, the agreement it made with Mr. Epstein will stand. Indeed, controlling Supreme Court case law prevents it from doing otherwise. Mr. 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). Failure to enforce the government's side of a plea bargain violates Due Process. *United States v. Yesil*, 991 F.2d 1527, 1532-33 (11th Cir. 1992). Mr. Epstein has a Due Process right to the continued specific performance and enforcement of the non-prosecution agreement. *United States v. Haber*, 299 Fed. Appx. 865, 867 (11th Cir. 2008). Rescission of the non-prosecution agreement at this juncture would, moreover, undermine Mr. Epstein's reasonable expectations of finality in a contract into which he entered with the government, a particularly inequitable result where it was the government, alone, which had duties to third parties under the CVRA. Relying on the non-prosecution agreement, Mr. Epstein served his state sentence in a county jail, served community

[3] The Court's order expressly did not rule on whether any particular piece of correspondence was relevant or admissible. Doc. 188 at 10.

control probation, paid huge legal fees under his obligation to the attorney representing certain alleged victims who were relying on the non-prosecution agreement to seek damages under 18 U.S.C. §2255, and paid civil settlements to these claimants because the non-prosecution agreement precluded his contesting liability. The rescission remedy sought by plaintiffs could never restore the status quo to Mr. Epstein or to the third-party beneficiaries of the agreement. Other civil settlements would also not have occurred but for the non-prosecution agreement.[4] Even if the Court could validly set aside the non-prosecution agreement based on the alleged violations of the CVRA, which intervenors maintain that it cannot, although they acknowledge that the Court has ruled otherwise (Doc. 189), the ultimate result under both contract and constitutional law would be the re-entry of the non-prosecution agreement after compliance by the government with its obligations under the CVRA. The confidentiality and privilege rights of intervenors should not be destroyed, as they would be by the failure to grant a stay pending appeal, for so little reason.

IV. THE PUBLIC INTEREST.

There is no interest of the public which will be harmed by the granting of the requested stay. Ordinarily the public may have little interest at all in a dispute between private civil litigants regarding access to documents. The public does, however, have a great interest in the fair conduct of plea negotiations – an interest that is profoundly affected by the Court's Order of June 18, 2013. Since more than 95% of all criminal cases are resolved by pleas, the public must have an interest in how the courts function in regard to pleas. The public needs to see that justice not only is done but appears to be done in the courts and would likely regard the Court's new

[4] In addition, the State Attorney relied on the non-prosecution agreement when returning a criminal charge that resulted not from the actions of the grand jury but instead as a corollary of the non-prosecution agreement.

rule of disclosure to private litigants as introducing injustice and unfairness into the settlement/plea negotiation process. The public's interest strongly lies in awaiting appellate resolution of the important issues raised in this case before forcing disclosure of documents which there is a substantial likelihood the appellate court will rule are not subject to disclosure and where the implementation of an un-stayed district court order will risk a change in the way in which attorneys provide effective assistance of counsel to defendants in the pivotal plea bargaining stages that are at issue in this matter.