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' REPLY TO JANE DOE #1 AND JANE DOES #2'S RESPONSE IN OPPOSITION TO INTERVENORS' MOTION TO STAY

Intervenors' Motion for Stay Pending Appeal should be granted. Contrary to plaintiffs' contentions, the Eleventh Circuit will have jurisdiction over their appeal from the Court's disclosure order, and the standard for granting a stay pending appeal is amply satisfied in this case.

I. THE ELEVENTH CIRCUIT WILL HAVE JURISDICTION OVER THE INTERVENORS' APPEAL UNDER THE *PERLMAN* DOCTRINE.

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

Plaintiffs first accuse intervenors of ignoring recent Supreme Court precedent which, in their view, precludes an appeal by intervenors from this Court's order that correspondence which they contend is privileged and confidential must be disclosed to plaintiffs. Opposition at 2-3. Intervenors did not, however, ignore controlling Supreme Court precedent, for the simple reason that *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), does not affect the intervenors' ability to take an appeal from this Court's disclosure order. There are two

interrelated reasons why it does not. First, and most important, *Mohawk* involved an attempted interlocutory appeal by a party to the litigation, which this case does not. Second, *Mohawk* was concerned with an interlocutory appeal under the collateral order doctrine of *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), not with the *Perlman* exception to the final judgment rule; indeed, it did not so much as mention *Perlman.* Those two distinctions are critical. In analyzing the issue of whether a party was entitled under the *Cohen* collateral order doctrine to appeal from an order compelling it to produce documents which it contended were protected by the attorney-client privilege, the *Mohawk* Court emphasized that the Court had "stressed that [the *Cohen* collateral order doctrine] must never be allowed to swallow the general rule that *a party* is entitled to a single appeal, to be deferred until final judgment has entered." *Mohawk*, 558 U.S. at 106 (emphasis added; internal quotation marks omitted). *See id.* at 112 ("Permitting *parties* to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals" (emphasis added)). In holding that an interlocutory appeal would not lie, the *Mohawk* Court concluded that

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

Id. at 606-07 (emphasis added). This conclusion underscores that inapplicability of *Mohawk* in the present circumstances. Quite unlike the *Mohawk* appellant, Mr. Epstein and the attorney intervenors are not parties to the litigation, having intervened solely for the limited purpose of seeking to prevent the disclosure of confidential communications; accordingly, they have no right of appeal from the final judgment in this case, and the injury done by disclosure cannot be remedied through the appellate remedy of granting of a new trial. Instead, in the absence of the ability to take an appeal at this juncture, intervenors are "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13.

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

The two cases on which the plaintiffs rely do not support the proposition that appellate review under the *Perlman* doctrine is not available to intervenors in this case. In *Wilson v. O'Brien*, 621 F.3d 641 (7th Cir. 2010), *see* Opposition at 3-4, plaintiff and the individual whose deposition defendants wished to use to support a summary judgment motion sought to appeal, under the *Cohen* collateral order doctrine, the district court's order compelling the individual to

answer deposition questions over a claim of work product privilege. The Seventh Circuit did not in fact decide the question of *Mohawk*'s impact on *Perlman*, finding the appeal moot because the deposed individual had complied with the order and answered the objected-to deposition questions. *Id.* at 643. The Court noted that, if the district court did ultimately permit the defendants to use the deposition testimony, plaintiff, who was the privilege holder rather than the deponent, could appeal that decision after final judgment. Here, intervenors have no such remedy available to them. Notably, the *Wilson* Court stated that "when the person who asserts a privilege is a non-litigant," "an appeal from a final judgment [will] be inadequate."

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

Neither Mr. Epstein nor the attorney intervenors are "litigants" or parties in this action, and, under both *Wilson* nor *Holt-Orsted*, Mr. Epstein would retain the right to appeal under *Perlman.* Plaintiffs seek to cast Mr. Epstein as a "litigant" in this action, but his limited intervention to challenge disclosure of confidential communications does not make him a litigant, *i.e.*, a party, to the action, nor, contrary to plaintiffs' argument, does Mr. Epstein's

"current posture" in this litigation provide him with an avenue "to appeal any adverse privilege ruling that harms him at the conclusion of the case." Opposition at 4. There will be no "adverse judgment *against him*," *id.* (emphasis added), from which he could take an appeal. Plaintiffs cite no authority for the proposition that a non-party to the litigation can appeal from a final judgment, and the law is to the contrary. *See Marino v. Ortiz*, 484 U.S. 301 (1988)("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled").

> A "party" to litigation is "[o]ne by or against whom a lawsuit is brought." Black's Law Dictionary 1154 (8th ed.2004). An individual may also become a "party" to a lawsuit by intervening in the action. See *id.,* at 840 (defining "intervention" as "[t]he legal procedure by which . . . a third party is allowed to become a party to the litigation").

United States ex rel. Eisenstein v. City of New York, 556 U.S. 928, 933 (2009). Plaintiffs action was not brought against Mr. Epstein, nor has be sought by intervention to become a party to the action.[1] The *Perlman* doctrine is fully applicable in the circumstances of this case.

B. Mr. Epstein and the Intervenors are "Privilege Holders" for Purposes of *Perlman.*

The *Perlman* doctrine is not, as the plaintiffs contend, strictly limited to fully recognized privileges such as the attorney-client privilege. The confidentiality/nondisclosure privilege for which intervenors contend falls squarely within *Perlman*. Indeed, the Supreme Court has recognized that "Rules 410 and 11(e)(6) 'creat[e], in effect, a privilege of the defendant . . . .'" *United States v. Mezzanatto*, 513 U.S. 196, 205 (1995). Contrary to the plaintiffs' characterization, what Mr. Epstein and the attorney intervenors seek to appeal is *not* an issue of

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[1] **Even if Mr. Epstein did decide to seek limited intervention at the remedy stage, should the proceedings reach that stage, *see* Opposition at 4, he still would not become a party with full rights to appeal from a final judgment in the case. Moreover, the attorney intervenors have their own independent interests in the nondisclosure order, and they will never be parties to the action.**

admissibility of evidence, *see* Opposition at 5, but one of *disclosure*: whether their confidential communications with the government in the course of settlement/plea negotiations may be ordered disclosed to third parties such as plaintiffs. *See* Intervenors' Motion for Stay Pending Appeal (Doc. 193)("Motion"), Section I. The plaintiffs' arguments that Mr. Epstein is not a privilege holder and that *Perlman* does not extend to cases in which the appellant will be arguing for the recognition of a privilege, rather than asserting an existing one, are foreclosed by *In re Grand Jury Proceedings*, 832 F.2d 554 (11th Cir. 1987). In that case, appellants asserted that their state grand jury testimony was protected from disclosure to a federal grand jury by a nondisclosure privilege grounded in the state grand jury secrecy requirement. The Court held that it had jurisdiction to hear the appeal under *Perlman*, but concluded that the privilege for which appellants contended did not exist. Thus, the fact that a privilege has not yet been formally recognized is not a bar to *Perlman* jurisdiction. The controlling factor is whether the appellants assert a right or privilege, *see In re Sealed Case*, ___ F.3d ___, 2013 WL 2120157 at *4 ([redacted]. March 5, 2013)("The *Perlman* doctrine permits appeals from some decisions that are not final but allow the disclosure of property or evidence over which the appellant asserts a right or privilege"), as they do here – the right or privilege of confidentiality in their settlement/plea communications with the government and their concomitant protection from disclosure to the plaintiffs. *See, e.g., Ross v. City of Memphis*, 423 F.3d 596, 599 (6th Cir. 2007)(*Perlman* jurisdiction "does not depend on the validity of the appellant's underlying claims for relief"); *Gill v. Gulfstream Park Racing [redacted], Inc.*, 399 F.3d 391, 398, 402 (1st Cir. 2005)(asserting jurisdiction under *Perlman*, but concluding that informant privilege was not available to private parties).

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

The Eleventh Circuit has never limited *Perlman* to the grand jury context, and there is no principled reason why the doctrine should be so limited, so long as its requirements are met. "[U]nder the . . .*Perlman* doctrine, a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology v. United States*, 506 U.S. 9, 18 n.11 (1992). The danger to the privilege holder – that privileged or confidential documents will be disclosed and his powerlessness to prevent the disclosure absent an immediate appeal remedy – is the same, regardless of whether the order is made in the context of grand jury proceedings or in another context. Only by referring solely to Eleventh Circuit applications of *Perlman* "over the last fifty years," Opposition at 6, are the plaintiffs able to ignore the fact that the Eleventh Circuit cited *Perlman* n support of its finding of jurisdiction in *Overby v. U.S. Fidelity & Guar. Co.*, 244 F.2d 158, 162 & n.5 (11th Cir. 1955), a civil case. In just the few years since *Mohawk*, the Fourth Circuit found jurisdiction based on *Perlman* in a civil case, *Mezu v. Morgan State University*, 495 Fed. Appx. 286, 289 (4th Cir. 2012); the Ninth Circuit has applied *Perlman* in a case arising under 28 U.S.C. §2255, *United States v. Gonzalez*, 669 F.3d 974, 977 n.2 (9th Cir. 2012), and in a civil case, *S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829, 830-31 (9th Cir. 2011); the Sixth Circuit has indicated in a civil case that *Perlman* jurisdiction is still viable after *Mohawk* where the privilege holder is not a party to the action, *Holt-Orsted*, 641 F.3d at 239; and the Seventh Circuit has indicated in a civil case that *Perlman* jurisdiction still attaches where the person asserting the privilege is a non-litigant, *Wilson*, 621 F.3d at 643.[2] The grand jury limitation for which plaintiffs argue simply does not exist.

[2] Plaintiffs rely on the Tenth Circuit's lack of awareness that *Perlman* had ever been applied outside the grand jury context, Opposition at 6, but a quick Westlaw search demonstrates that *Perlman* has often been applied outside the grand jury context. *See, e.g., Gotham Holdings, LP v.*

D. The United States is a Disinterested Third Party.

Under the circumstances of this case, the government, contrary to plaintiffs' argument, Opposition at 7-8, must be considered a disinterested party for purposes of application of the *Perlman* doctrine. The government has never asserted a nondisclosure privilege with respect to the settlement/plea negotiations between it and Mr. Epstein, and its intention not to assert such a privilege is obvious from its Response to Petitioners' Motion to Use Correspondence to Prove Violations of the Crime Victim's Rights Act and to Have Their Unredacted Pleadings Unsealed (Doc. 60), in which, while noting that it was not conceding the admissibility of the documents, the government states that it *took no position* on the portion of plaintiffs' motion seeking to use the correspondence in this action. *Id.* at 1-2. The government is not, therefore, contrary to the plaintiffs' contention, "actively litigating in opposition to the victims' argument." Opposition at 7. Insofar as is known to intervenors, the government has not asserted that the correspondence is privileged from disclosure to third parties such as plaintiffs, nor has it indicated in any way that it will refuse to disclose the correspondence to plaintiffs. While the government may challenge the *admissibility* or "improper use" of the correspondence in the district court or on appeal, *see id.*, those arguments would not be directed at the *disclosure* of the correspondence, which is the gravamen of intervenors' claim of privilege. Thus, in the absence of the ability to take an appeal at this juncture, intervenors are "powerless to avert the mischief of the order," *Perlman*, 247 .U.S. at 13, as their interest in nondisclosure will not be protected by the government. Whether or

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Health Grades, Inc., 580 F.3d 664, 665 (7th Cir. 2009)(civil case); *United States v. Williams Cos., Inc.*, 562 F.3d 387, 392 ([redacted]. 2009)(criminal case; rejecting effort to distinguish *Perlman* on the ground that it arose in the grand jury context); *Ross v. City of Memphis*, 423 F.3d 596, 599-600 (6th Cir. 2007); *Gill v. Gulfstream Park Racing* [redacted], *Inc.*, 399 F.3d 391, 398 (1st Cir. 2005)(civil case); *Sheet Metal Workers Intern. v. Sweeney*, 29 F.3d 120, 212 (4th Cir.1994)(civil case).

not the privilege for which intervenors contend would, if recognized, extend to the government as well, *see* Opposition at 7, is of no moment in the *Perlman* analysis, as the government has not asserted the privilege to prevent disclosure, at least to the extent that intervenors have been able to review its unsealed pleadings.

I. THE STANDARD FOR OBTAINING A STAY PENDING APPEAL IS SATISFIED IN THIS CASE.

A. Likelihood of Success on the Merits.

Plaintiffs begin their argument by contending that intervenors' statement that "the Court's order is the first decision anywhere . . . that orders disclosure to third-party litigants of private and confidential communications between attorneys who were seeking to resolve a criminal matter," Opposition at 8, quoting Motion at 2, is incorrect in light of Magistrate Judge Johnson's decision in No. 08-80893. Magistrate Judge Johnson's order, however, concerned only documents provided *to* Epstein by the government. That order (Jane Doe #2 v. Epstein, No. 08-80893-MARRA, Doc. 226), refers to correspondence received by plaintiff through discovery, Doc. 226 at 2, and appears to relate back to a discovery order entered in Jane Doe #2 v. Epstein, No. 08-80119-MARRA, in which Magistrate Judge Johnson ordered Epstein to produce documents given to Epstein by the government during the course of settlement/plea discussions. Doc. 462. Magistrate Judge Johnson's rejection of the privilege arguments advanced was, accordingly, focused on documents which were given to Epstein by the government, as those were the only documents in plaintiffs' possession. It did not resolve the issues arising with respect to correspondence authored by Epstein's counsel which are pivotally at issue here. While intervenors would contend that both sides of the settlement correspondence are protected from disclosure, contrary to Magistrate Judge Johnson's ruling, her ruling did not encompass the full scope of the important issues at stake here.

As Epstein argued in his Motion, "the Court's decision drastically reshapes the landscape of criminal settlement negotiations . . . .," Opposition at 9, *quoting* Motion at ___. Plaintiffs, however, contend that it is not this Court's decision that reshaped the landscape of plea discussions but instead the CVRA. Opposition at 9. They are wrong. The CVRA only affords victims "[t]he reasonable right to confer with the attorney for the Government in the case," 18 U.S.C. §3771(a), and specifically provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." §3771(d)(6). "What the government chooses to do after a conferral with the victims is a matter outside the reach of the CVRA, which reserves absolute prosecutorial discretion to the government." *Doe v. United States*, ___ F.Supp.2d ___, 2013 WL 3089046 at *5 ([redacted]. June 19, 2013). *See, e.g., United States v. Thetford*, ___ F.Supp.2d ___, 2013 WL 1309851 at * 1 ([redacted]. March 29, 2013)(CVRA rights "do not extend to giving crime victims veto power over the prosecutor's discretion"); *id.* at *4 (CVRA does not confer "they do not have the right to dictate Government strategy or demand who to prosecute"); *United States v. Rubin*, 558 F.Supp.2d 411, 418 ([redacted]. 2008)(CVRA "gives victims a voice, not a veto"). Thus, even if CVRA affords crime victims a "reasonable" right to confer with government attorneys even before charges are brought, it does not provide them with any power to insist that an individual be prosecuted, nor does it confer on them the right to be privy to communications between the government and the individual's counsel. It does not, therefore, alter the landscape of negotiation communications between counsel for an accused or potential accused and the government. Moreover, and equally importantly, the CVRA imposes obligations only on the government, not on Mr. Epstein and his counsel. Nothing in the CVRA affects the existence and applicability of the privilege for confidential settlement/plea communications asserted by intervenors.

As for plaintiffs' Rule 410 argument, which is predicated on this Court's opinion, Opposition at 10, intervenors have already fully addressed this issue, including this Court's reasoning, in their Motion at ___-___. As they pointed out there, in *United States v. Paden*, 908 F.2d 1229 (5th Cir. 1990), the defendant pled guilty to *federal* charges pursuant to his plea agreement, not to state charges as here, rendering *Paden* inapposite to the issue before the Court. Intervenors have also already addressed the creation of a privilege under Fed. R. Evid. 501 and the reasons why they believe the Court's ruling, on which the plaintiffs rely, Opposition at 10-11, in their Motion at ___. Nothing which the plaintiffs have to say about either Rule 410 or Rule 501 detracts in the slightest from the arguments already advanced by intervenors.

B. Irreparable Injury to Intervenors.

Where privileged or confidential communications are concerned, the irreparable injury inheres in their very disclosure. *See* Motion at ___, and cases cited therein. The single case cited by plaintiff, *Northeastern Florida Chapter of* [redacted] *of Gen. Contractors of America v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990), did not involve privileged or confidential communications but instead the question whether the plaintiff had demonstrated the irreparable prejudice necessary essential for the entry of a preliminary injunction. It is, accordingly, quite irrelevant to the present case. Nor, for irreparable injury purposes, does it matter that the cases cite by intervenors were decided pre-*Mohawk*. *See* Opposition at 11-12. *Mohawk* was concerned with interlocutory appealability, not with whether the standard for a stay pending appeal have been satisfied. Nor does it detract in any way from intervenors' irreparable injury argument, as they have no remedy through appeal from a final judgment, as would a party in the action.

C. Lack of Prejudice to the Plaintiffs.

Much of the delay was caused by the failure of plaintiffs to expedite the CVRA litigation

because of their uncertainty about remedy and then because of their non-CVRA interest in litigating the issue of damages in parallel civil litigation. As this Court has recognized, "[o]ver the course of the next eighteen months [following the filing of the action], the CVRA case stalled as petitioner pursued collateral claims against Epstein." Order Denying Government's Motion to Dismiss (Doc. 189) at 5. The timing of the granting of relief to plaintiffs, should that be the ultimate outcome of these proceedings, does in fact matter little, contrary to plaintiffs' argument. Opposition at 13. Even if rescission of the agreement is a potentially permissible remedy, which intervenors continue to dispute, although they recognize that the Court had decided the matter otherwise, *see* Opposition at 13, that does not mean that Mr. Epstein will be prosecuted. As discussed at page ___, *supra*, even should the court rescind the non-prosecution agreement, the plaintiffs cannot force the government to prosecute Mr. Epstein, and the government has made it abundantly plain that, whatever the outcome of this litigation, the agreement it made with Mr. Epstein will stand. *See* Doc. 189 at 5-7. Accordingly, the statute of limitations for the offenses with which the government, in the exercise of its absolute discretion, decided not to charge Mr. Epstein is irrelevant.

The plaintiffs' argument that they have a right to a speedy resolution of their CVRA claim, Opposition at 13-14, rings hollow, given that the action has been pending for five years, and the plaintiffs themselves told the Court shortly after the action was filed that there was no need to proceed on an emergency basis and that they were not seeking rescission of the non-prosecution agreement, and given that the plaintiffs did not even seek access to the correspondence at issue for two and a half years after they commenced the action. *See* Motion at ___.

D. The Public Interest.

Even if members of the public are interested in how the government arrived at its non-prosecution agreement with Mr. Epstein, Opposition at 14, that is not question which will be answered by a ruling on plaintiffs' claim that the government violated their rights under the CVRA, nor is it a matter of "the public interest" for purposes of a stay pending appeal. There is no public interest which will be harmed by granting the requested stay, but there is a significant one if the stay is denied insofar as the effect on the confidentiality of future plea bargaining when the negotiations are in the context of possible civil litigation.