

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 the 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. Contemporaneously with the filing of this reply, Mr. Epstein has moved for limited contingent future intervention with respect to the issue of remedy, should the Court reach that issue. As Mr. Epstein explained in that motion, he is not seeking to intervene generally in the case, as the duties and obligations imposed by the CVRA apply solely to the government; the statutory requirements do not run to Mr. Epstein, and the CVRA imposed upon him no obligations to the plaintiffs. The dispute regarding whether the government violated the plaintiffs' rights under the CVRA is between the plaintiffs and the government. Thus, should the Court grant the additional limited future remedy-stage intervention which Mr. Epstein seeks, Mr. Epstein still would not be a party to the litigation within the meaning of *Mohawk*, but instead a party for a limited purpose only. Indeed, he would not become a party at all unless the Court rules that the government violated the plaintiffs' CVRA rights and turns to the issue of remedy, which may never occur. If the Court did find that the government violated the plaintiffs' rights under the CVRA, Mr. Epstein would have no right of appeal, as he would not be a party with respect to that issue. He would likewise not have the right to appeal if the Court decided in plaintiffs' favor but did not order rescission. Even were the court to order rescission of the non-prosecution agreement, and Mr. Epstein had the right, as intervenor as to remedy, to appeal the Court's remedial order, it is unlikely that such an appeal from the Court's order would encompass the issue of the validity of any order regarding the disclosure of his attorneys' plea negotiation communications with the government. In the absence of the ability to take an appeal at this juncture, intervenors are "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13.

In cases such as this one, 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. Notably, the *Wilson* Court stated that “when the person who asserts a privilege is a non-litigant,” “an appeal from a final judgment [will] be inadequate.”

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

Since the attorney intervenors are not "litigants" or parties in this action, under both *Wilson* and *Holt-Orsted*, they would retain the right to appeal under *Perlman*. Plaintiffs 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. Even if the Court grants Mr. Epstein's contingent motion for future intervention as to remedy, he would not be a party to the action as a whole but only as to that limited facet of the litigation; in fact, he may never actually become a party if the Court does not reach the remedy issue. 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”). Plaintiffs’ action was not brought against Mr. Epstein, nor has he sought by intervention to become a full party to the action. The *Perlman* doctrine is fully applicable in the circumstances of this case.

B. 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 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

(D.C.Cir. 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 Ass’n, Inc.*, 399 F.3d 391, 398, 402 (1st Cir. 2005)(asserting jurisdiction under *Perlman*, but concluding that informant privilege was not available to private parties).

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

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* in support of its finding of jurisdiction in *Overby v. U.S. Fidelity & Guar. Co.*, 224 F.2d 158, 162 & n.5 (11th Cir. 1955), a civil case. In just the few years since *Mohawk*, the Fourth Circuit found jurisdiction based on

Perlman in a civil case, *Mezu v. Morgan State University*, 495 Fed. Appx. 286, 289 (4th Cir. 2012); the Ninth Circuit has applied *Perlman* in a case arising under 28 U.S.C. §2255, *United States v. Gonzalez*, 669 F.3d 974, 977 n.2 (9th Cir. 2012), and in a civil case, *S.E.C. v. CMKM Diamonds, Inc.*, 656 F.3d 829, 830-31 (9th Cir. 2011); the Sixth Circuit has indicated in a civil case that *Perlman* jurisdiction is still viable after *Mohawk* where the privilege holder is not a party to the action, *Holt-Orsted*, 641 F.3d at 239; and the Seventh Circuit has indicated in a civil case that *Perlman* jurisdiction still attaches where the person asserting the privilege is a non-litigant, *Wilson*, 621 F.3d at 643.¹ The grand jury limitation for which plaintiffs argue simply does not exist.

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, should be considered a disinterested party for purposes of application of the *Perlman* doctrine. Even though the government has voiced its general agreement that correspondence exchanged between defense counsel and the government in pursuit of settlement/plea negotiations is protected by the work product privilege, it stopped short of advocating the recognition of a settlement/plea negotiation privilege under Rules 410 and 501. See United States' Response to Supplemental Briefing in Support of Motion to Intervene (Doc. 100). The government's institutional interests differ significantly from those of attorneys who

¹ 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. Health Grades, Inc.*, 580 F.3d 664, 665 (7th Cir. 2009)(civil case); *United States v. Williams Cos., Inc.*, 562 F.3d 387, 392 (D.C.Cir. 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 Ass'n, 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).

represented a private individual under criminal investigation by the government and who sought, though full and frank exploration of the facts and legal issues involved, to convince the government not to prosecute their client. Only immediate appeal of the Court's order will ensure that intervenors are able to protect their distinct interests in preserving the confidentiality of their communications with the government in the settlement negotiation process. In the absence of the ability to take an appeal at this juncture, intervenors will be "powerless to avert the mischief of the order," *Perlman*, 247 U.S. at 13, as their particular interests in nondisclosure will not be adequately protected by the government. Likewise, the government and Mr. Epstein have significantly different interests in the scope of Rule 410 in the context of a civil litigant's discovery attempts: Epstein does not share the executive branch powers to bring and resolve criminal prosecutions; the policy of Rule 410 was to protect federal targets from the government's disclosure of their attorneys' written settlement proposals. As such, Epstein's interest in opposing the disclosure of his attorneys written communications relating to bona fide attempts to resolve concrete federal criminal allegations are substantially distinct from the Government's institutional interests and distinct from the Government's litigation related strategies in terms of the underlying CVRA litigation and accordingly will not be adequately represented by the Government.

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 (*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. *See* Doc. 462 at 7 (characterizing plaintiffs' requests for production 7, 9, and 10 as "requests for documents the federal government gave to Epstein in the course of its plea discussions with him"); *id.* at 8 (same); *id.* at 9-10 (rejecting claim of attorney-client privilege on ground that "[t]he documents at issue here were given by the Government to Epstein, and as such are clearly not confidential communications protected by the attorney-client privilege" (emphasis in original)). That order resulted in the disclosure only of documents provided by the government to Epstein.² Magistrate Judge Johnson's rejection of the privilege arguments advanced was, accordingly, focused on documents which were given to Epstein by the government. 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, contrary to Magistrate Judge Johnson's ruling, both sides of the settlement correspondence are protected from disclosure, her ruling did not encompass the full scope of the important issues at stake here. Moreover, while her February 4, 2010 order (Doc. 462), addressed Mr. Epstein's argument based on Fed. R. Civ. P. 410, Doc. 462 at 10, Magistrate Judge Johnson did not

² Mr. Epstein's counsel in that case has informed the undersigned that the discovery provided to the plaintiffs pursuant to discovery orders was limited to correspondence sent to Mr. Epstein's counsel by the government. *See* United States' Response to Supplemental Briefing in Support of Motion to Intervene (Doc. 100) at 2 ("To the knowledge of the government, the Jane Does have only received the portions of the correspondence written by government attorneys – all of the writings of Mr. Epstein's attorneys, except for a few short portions by Jack Goldberger – have been redacted").

address Mr. Epstein's arguments regarding the recognition of a privilege under Fed. R. Civ. P. 501.

As Epstein argued in his Motion, "the Court's decision drastically reshapes the landscape of criminal settlement negotiations," Opposition at 9, *quoting* Motion at 2. 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 (S.D.Fla. June 19, 2013). *See, e.g., United States v. Thetford*, ___ F.Supp.2d ___, 2013 WL 1309851 at * 1 (N.D.Ala. 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 on victims "the right to dictate Government strategy or demand who to prosecute"); *United States v. Rubin*, 558 F.Supp.2d 411, 418 (E.D.N.Y. 2008)(CVRA "gives victims a voice, not a veto"). Thus, even if the 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 6-9. 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, to be erroneous, Opposition at 10-11, in their Motion at 10-15. 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 15-17, and cases cited therein. The single case cited by plaintiff, *Northeastern Florida Chapter of Ass'n 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 cited 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. Even assuming *arguendo* that the government decided unilaterally to rescind the agreement, such a rescission would be constitutionally invalid and could not stand. “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”). Rescinding the agreement would also be invalid as a matter of contract law. “Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law. Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform its promises.” *United States v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir. 1998).

The plaintiffs’ argument that they have a right to a speedy resolution of their CVRA claim, Opposition at 13-14, rings hollow. 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 told the Court that they saw no reason to proceed on an emergency basis. [Trans. July 11, 2008 at 24-25]. Thus, plaintiffs waived their right to have the Court “take up and decide any motion asserting a victim's right forthwith,” 18 U.S.C. §3771(d)(3), in favor of pursuing civil settlement actions against Mr. Epstein prior to, rather than concurrently with, litigating their CVRA rights. *See* Order Denying Government’s Motion to Dismiss (Doc. 189) at 5 (“Over the course of the next eighteen months, the CVRA case stalled as petitioners pursued collateral civil claims against Epstein”).

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 the question which is at stake with respect to intervenors’ motion for a stay pending appeal. The relevant question is whether the communications between the government and Mr. Epstein’s counsel should be disclosed to plaintiffs and disclosed again in court by them in their effort to prove their

contention that the government violated the CVRA in the course of arriving at its non-prosecution agreement with Mr. Epstein. As to whether a stay should be granted while the Eleventh Circuit considers this important question, 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.