

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE NO. 1 AND JANE DOES NO. 2,
Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

ROY BLACK *ET AL.*,
Intervenor/Appellants

**INTERVENORS/APPELLANTS' RESPONSE TO
PLAINTIFFS/APPELLEES' MOTION FOR EXPEDITED RULING ON
MOTION FOR STAY OF DISTRICT COURT DISCOVERY ORDER AND
MOTION TO POSTPONE DUE DATE FOR FILING APPELLEE BRIEF
UNTIL COURT RULES ON PENDING MOTION TO DISMISS FOR LACK
OF JURISDICTION**

On August 8, 2013, plaintiffs/appellees filed two motions, one asking for an expedited ruling by the Court on intervenors/appellants' pending motion for a stay pending appeal and the other asking for a postponement of the due date of their brief on appeal until after the Court rules on their pending motion to dismiss for

lack of jurisdiction. For the reasons addressed herein, those motions should be denied, and the Court instead should consider the important issues raised in this appeal, as well as the jurisdictional issue, in the context of full briefing on the merits.

I. PLAINTIFFS/APPELLEES' MOTION FOR EXPEDITED RULING ON MOTION FOR STAY OF DISTRICT COURT DISCOVERY ORDER SHOULD BE DENIED AND THE REQUESTED STAY SHOULD BE GRANTED.

As to the plaintiffs/appellees' Motion for Expedited Ruling on Motion for Stay of District Court Discovery Order, intervenors/appellants filed their brief on the merits in this appeal on August 5, 2013, two full weeks in advance of the August 19, 2013, due date. They expedited the filing of their brief precisely because of the pendency of the stay and their belief that full briefing would facilitate this Court's consideration not only of the substantive issues raised in this appeal but also whether intervenors/appellants have met the standard for the granting of a stay pending appeal, particularly whether they are likely to prevail on the merits of the appeal and whether it is in the public interest that there be decision on the merits on the important issues raised in this appeal.¹

¹ Intervenors/appellants ask that the Court consider the arguments advanced in their brief in determining "(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).

In that regard, as appellants' brief demonstrates, the issues raised in this appeal are of fundamental importance to the criminal justice system, and intervenors/appellants have presented compelling arguments for why plea/settlement negotiation correspondence authored by defense counsel and sent to government prosecutors should be protected from disclosure to third parties such as plaintiffs/appellees. *See* Brief of Appellants/Intervenors at 10-44.

The plaintiffs/appellees have failed to show that they will be harmed by the requested stay. On July 19, 2013, the government filed a privilege log (Doc. 212-1) in which it asserted various privileges, including the work product privilege, the investigative privilege, and the grand jury disclosure prohibition of Fed. R. Crim. P. 6(e), against disclosure of 13,468 pages of documents, which have been submitted to the district court *in camera*. The correspondence which is the subject of this appeal is, accordingly, not the only discovery matter pending in the district court, and the district court will predictably be engaged in a time consuming process to determine which documents, if any, should be ordered disclosed over the government's objections. The case below, will not, therefore, be at a standstill pending this Court's decision in this appeal.

It also bears noting that, while plaintiffs/appellees express a great need for hurry now, they did not always express such urgency. While the underlying CVRA action was commenced as an emergency petition, plaintiffs shortly thereafter

appeared at a status conference and told the district court that they saw no reason to proceed on an emergency basis. Trans. July 11, 2008 (Doc. 15) at 24-25. Plaintiffs spent the next eighteen months pursuing civil remedies against Mr. Epstein, and ultimately obtaining settlements, while their CVRA action remained dormant. Indeed, so inactive were plaintiffs that the district court dismissed the case for lack of prosecution in September, 2010. Doc. 38. *See also* 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"). While they were doing so, intervenor/appellant Epstein was serving a prison sentence, followed by a highly controlled period of probation, and meeting other obligations under the nonprosecution agreement. Only after plaintiffs had successfully pursued their civil damages remedies did they reactivate their CVRA action. Given plaintiffs' choices not to invoke the emergency provisions of the CVRA and to hold the underlying CVRA action in abeyance for eighteen months while they pursued their civil remedies against Epstein, it is entirely reasonable that the Court's decision on the issues should await full briefing on the merits.

As to the stay factor of the irreparable harm to intervenors/appellants if the requested stay is not granted, maintaining the status quo until this Court can carefully consider the important issues raised in this appeal is of vital importance.

The value of intervenors/appellants' appeal will be largely lost if the plea/settlement communications at issue are disclosed to plaintiffs/appellees in advance of the Court's decision on the merits, as they would be absent a continuation of the stay. Intervenors/appellants have no objection to the Court's expediting the schedule for the filing of plaintiffs/appellees' responsive brief and intervenors/appellants' reply brief.

II. PLAINTIFFS/APPELLEES' MOTION TO POSTPONE DUE DATE FOR FILING OF APPELLEE BRIEF UNTIL COURT RULES ON PENDING MOTION TO DISMISS FOR LACK OF JURISDICTION SHOULD BE DENIED.

With respect to plaintiffs/appellees' motion to dismiss the appeal for lack of jurisdiction, intervenors/appellants have briefed the issue both in their response in opposition to the motion to dismiss and in their brief on the merits. *See* Brief of Intervenors/Appellants at 45-58. As addressed in those filings, it is intervenors/appellants' position that this Court has jurisdiction of this appeal under *Perlman v. United States*, 247 U.S. 7 (1918), which retains its validity² and is fully applicable to the circumstances in this case, in which intervenors/appellants have no other appellate remedy, as they are not parties to the underlying action. *See*

² As recently as May, 2013, the D.C. Circuit affirmed the continuing validity of the *Perlman* doctrine in *In re Sealed Case*, 716 F.3d 603 (D.C. Cir. 2013)(although finding a different standard applicable in that case), citing *inter alia*, this Court's decision in *In re Grand Jury Proceedings*, 142 F.3d 1416, 1420 n. 9 (11th Cir.1998).

Brief of Intervenors/Appellants at 45-52. Unlike *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), Epstein and the attorney intervenors 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. They are thus, absent this appeal, “powerless to avert the mischief of the order.” *Perlman*, 247 U.S. at 13. *See* Brief of intervenors/Appellants at 46-52. The “mischief of the order” is exponentially enhanced in this case, as plaintiffs have made it clear that they not only seek disclosure of the correspondence through discovery but fully intend to use the correspondence, in direct contravention of Fed. R. Evid. 410, in their effort to prove that the government violated their CVRA rights and that, to remedy that violation, Epstein’s nonprosecution agreement with the government should be rescinded so that they can seek to have Epstein prosecuted federally. *See* Doc. 208:32-33, 61, 64-65; *see also* Motion for Expedited Ruling on Pending Motion for Stay at 6 (plaintiffs/appellants argue that if the Court has not ruled on the stay request by August 16, 2013, “victims will be deprived of the ability to review *and use* the correspondence s part of their response”(emphasis added)).

Intervenors/appellants suggest that the most appropriate course is for this Court to consider the jurisdictional issue along with the substantive issues after full

briefing on the merits. Such a course is particularly appropriate in this case, in which the jurisdictional and the substantive issues are intertwined. As plaintiffs/appellees contend in their motion to dismiss that the *Perlman* doctrine is inapplicable because Fed. R. Evid. 410 governs admissibility, not disclosure, and that intervenors/appellants are not privilege holders within the meaning of *Perlman*, see Motion to Dismiss at 15-16, responses to those arguments are contained in the Brief of Intervenor/Appellants at 12-28 (demonstrating that Rule 410 protects the correspondence from both disclosure and admissibility), and 53-54 (demonstrating that they are in fact “privilege holders” within the meaning of the *Perlman* doctrine and entitled to appeal the district court’s order at this stage of the proceedings). For that reason as well, decision of the jurisdictional and substantive issues should not be bifurcated. Should, however, the Court be inclined to consider the jurisdictional issue in advance of the completion of briefing, intervenors/appellants ask that the Court consider the jurisdictional arguments raised in their brief in reaching its decision on the issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that on this 9th day of August, 2013, the foregoing document was served, through this Court's CM/ECF system, on all parties of record.

/s/ Martin G. Weinberg

Martin G. Weinberg