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
_____/

INTERVENOR JEFFREY EPSTEIN'S MEMORANDUM IN SUPPORT OF HIS ATTENDANCE AT OR PARTICIPATION IN SETTLEMENT CONFERENCE

Intervenor Jeffrey Epstein has requested that he be permitted to attend, through counsel, the settlement conference to be convened in this matter. The right to participate in the settlement conference flows inexorably from Judge Marra's granting of Mr. Epstein's motion to intervene as of right at the remedy stage of these proceedings to advocate for why the remedy in this case—to the extent that the plaintiffs can establish their entitlement to any—should not extend to the rescission of his nonprosecution agreement and from his grant of permissive intervention on the issue of release of information falling within the grand jury secrecy protections of Rule 6(e). Although certain constitutional and contractual arguments for maintaining the inviolability of Mr. Epstein's nonprosecution agreement, if plaintiffs still intend to pursue this remedy, are common to both the government and to Mr. Epstein, other compelling reasons why the nonprosecution agreement should not be invalidated are personal to Mr. Epstein and properly presented by him, through counsel, at any settlement conference to be held in this matter.

To the extent that the settlement conference discussions are limited to the issue of liability—whether the government violated the plaintiffs' rights under the CVRA—Mr. Epstein's counsel's role would remain that of an observer, and he would not seek to interject himself into the discussions. If, however, the settlement discussions touched on issues relating to remedy, Mr. Epstein's counsel would address such issues to safeguard Mr. Epstein's pivotally important interests in avoiding invalidation of his nonprosecution agreement and the release of material protected by Rule 6(e), both of which are remedies which the plaintiffs have said they are seeking. *See* Jane Doe #1 and Jane Doe #2's Response to Government's Sealed Motion to Dismiss for Lack of Subject Matter Jurisdiction, Doc. 127 at 14. While according due respect to Judge Marra's prior opinions indicating that the rescission remedy was potentially available in this case, case law and constitutional and contract principles, as well as theories of constitutional avoidance and the palpable unfairness to Mr. Epstein of setting aside a contract which he has, to his great detriment, fully performed all provide powerful reasons why any settlement of this matter should leave Mr. Epstein's nonprosecution agreement intact. Unless and until the plaintiffs inform the Court, finally and irrevocably, that they will no longer seek rescission of Mr. Epstein's nonprosecution agreement or the release of information protected by the grand jury secrecy provisions of Rule 6(e), Mr. Epstein has a vital role to play in any settlement discussions to protect the important interests personal to him which are not adequately represented by the government, as the granting of intervention as of right confirms.

I. BACKGROUND.

On July 8, 2013, Mr. Epstein filed his Motion for Prospective Limited Intervention at the Remedy Stage of These Proceedings (Doc. 207), which plaintiffs did not oppose. In that motion, he contended that he "has a clear and compelling interest in opposing any remedy that would

entail rescission of his non-prosecution agreement with the government and has interests which are personal to him and would not be adequately represented by the government should the Court determine that a CVRA violation occurred and that rescission or reopening of the non-prosecution agreement was one of the remedial options under consideration." *Id.* at 1-2.1 That motion continued:

> [D]enying intervention to Mr. Epstein to litigate remedy will cause him severe prejudice, as the plaintiffs are asking the Court to invalidate a binding contract to which he is a signatory and which implicates his constitutional rights. Mr. Epstein entered into a non-prosecution agreement with the government and has fully performed, to his detriment, his obligations under that agreement . . . . He has an intense interest in opposing plaintiffs' effort to set that agreement aside and in presenting to the Court reasons why the agreement should not be rescinded which are personal to him, as opposed to the institutional considerations which the government has and may advance.

Id. at 5. *See id.* at 8 "If [Mr. Epstein] cannot intervene to oppose [a rescission] remedy, he will be forced to stand on the sidelines while others litigate rights that are fundamentally important to him"). Mr. Epstein also explained why the government would not adequately represent his interests with respect to remedy:

> Mr. Epstein and the government may share a common goal of opposing a rescission remedy, at least at the present juncture, but their interests, as well as what they would bring to the Court on the issue, vary substantially. The government will (most likely) present general institutional reasons why non-prosecution agreements into which it has entered are binding on it and cannot, or should not, be rescinded. In contrast, in addition to the constitutionally-based arguments which the government may advance, Mr. Epstein has, specific, personal, and private interests in the non-rescission of this particular agreement, including his constitutional right to due process of law, . . . his detrimental reliance on the agreement and his full performance of his many obligations under the agreement on the basis of that reliance, including . . . pleading guilty to state court charges, serving a prison term, serving a year of community control, and paying the

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[1] Courts, including the Eleventh Circuit, have recognized the propriety of intervention to litigate remedy. *See, e.g., Benjamin ex rel. Yock v. Department of Public Welfare*, 701 F.3d 938 (3d Cir. 2012); *Howard v. McLucas*, 782 F.2d 956, 959-61 (11th Cir. 1986); *National Resources Defense Council v. Costle*, 561 F.2d 904, 907-08 (D.C.Cir. 1977); *see also Caterino v. Berry*, 922 F.2d 37 (1st Cir. 1990)(district court denied intervention at liability stage but indicated that it would consider a motion to intervene at the remedy stage).

> attorney representing persons who had brought or were threatening to bring actions against him for money damages. Mr. Epstein's personal constitutional and contractual rights in the matter should be before the Court in making its determination as to remedy, if the proceedings reach that stage, and the government will not adequately represent those rights that are personal to Mr. Epstein.

Id. at 9-10. The order granting Mr. Epstein's motion allowed intervention "with regard to any remedy issue concerning the non-prosecution agreement in this case." Order Granting Jeffrey Epstein's Prospective Limited Intervention at the Remedy State of These Proceedings (Doc. 246).

On July 26, 2013, Mr. Epstein filed a motion to intervene for the purpose of protecting his interests in the secrecy of matters which occurred before the federal grand juries of which he was a target. Doc. 215. In that motion, he contended:

> The materials to which the government has asserted the Rule 6(e) bar to disclosure include materials which would disclose substantial portions of the evidence presented to the grand jury, both documentary and testimonial, and draft indictments of Mr. Epstein, all of which relate to allegations now more than five years old, of a highly sensitive nature which Mr. Epstein never had the opportunity to refute . . . . He has a profound interest in opposing the release to plaintiffs of this grand jury material, which can only redound to his severe prejudice and injury.

Id. at 4. That motion also explained at length why Mr. Epstein's individual interests would not be adequately represented by the government. *Id.* at 6-9. Judge Marra granted the motion as a matter of permissive intervention, over the plaintiffs' objection, finding that Mr. Epstein "has a legitimate interest in asserting a claim that the grand jury material may be protected from disclosure by the Federal Rule of Criminal Procedure 6(e)." Order on Motion for Intervention by Jeffrey Epstein (Doc. 256) at 1.

II. THERE ARE COMPELLING REASONS WHY THE NONPROSECUTION AGREEMENT CANNOT AND SHOULD NOT BE INVALIDATED.

A. Constitutional Considerations.

Both Mr. Epstein and the government concur that the CVRA cannot be construed to invalidate a pure exercise of executive discretion such as the decision to enter into a nonprosecution agreement. "Few subjects are less adapted to judicial review that the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . ." *United States v. Fokker Services B.V.*, ___ F.3d ___, 2016 WL 1319266 at *5 (D.C.Cir. April 5, 2016), *quoting Newman v United States*, 382 F.2d 479, 480 (D.C.Cir. 1967). *Fokker Services* addressed the intersection of judicial and executive powers with respect to a deferred prosecution agreement and held, based on constitutional considerations regarding the powers conferred on the Executive, that the district court could not reject the deferred prosecution agreement in that case based on its disagreement with the Executive's charging decisions. Unlike a deferred prosecution agreement, which results in the filing of criminal charges and thus in at least some role for the judicial system to play, nonprosecution agreements are contracts between the government and the defendant that are never filed with the court and do not result in the institution of criminal charges. *See* Memorandum from Craig S. Morford, Acting Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components, U.S. Att'ys re: Selection and Use of Monitors in Deferred Prosecution Agreements and Non–Prosecution Agreements with Corporations (Mar. 7, 2008) at note 2, *available at* http://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors (last visited February 26, 2016) ("In the

nonprosecution agreement context, formal charges are not filed and the agreement is maintained by the parties rather than being filed with a court.").

> The government has absolute discretion to decide not to prosecute. *ICC v. Brotherhood of Locomotive Engineers*, 482 U.S. 270, 283 . . . (1987) ("[I]t is entirely clear that the refusal to prosecute cannot be the subject of judicial review."). *Even a formal, written agreement to that effect, which is often referred to as a "non-prosecution agreement," is not the business of the courts.*

United States v. HSBC Bank USA, N.A., 2013 WL 3306161 at *5 (E.D.N.Y. July 1, 2013)(emphasis added). If courts are not free to invalidate deferred prosecution agreements, then nonprosecution agreements are even less the business of the courts, given the complete absence of judicial involvement in their negotiation and execution. The distinction between deferred prosecution agreements and nonprosecution is embodied in the May, 2015, amendments to the CVRA, which added the right "to be informed in a timely manner of any plea bargain or deferred prosecution agreement," 18 U.S.C.A. §3771(a)(9), but made no mention of nonprosecution agreements, even though Congress was surely aware of their existence. **[still looking for legislative history]** The omission of nonprosecution agreements from §3771(a)(9) plainly evidences a congressional determination that crime victims do not have the right to be informed regarding nonprosecution agreements. The Executive exercised its plenary discretion, given to it and it alone by the Constitution, over decisions regarding what, if any, federal criminal charges should be brought, and that decision should not be subject to judicial review.

The potential rescission remedy also has serious implications for Mr. Epstein's constitutional rights, as "[d]ue 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"). Thus, the government is constitutionally required to abide by the terms of the nonprosecution agreement that it entered into with Mr. Epstein. 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).

B. Mr. Epstein's Personal Considerations.

A party may intervene as of right under Rule 24(a) if "(1) the application to intervene is timely; (2) the party has an interest relating to the property or transaction which is the subject matter of the action; (3) the party is situated so that disposition of the action, as a practical matter, may impede or impair its ability to protect that interest; and (4) the party's interest is represented inadequately by the existing parties to the suit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). In granting Mr. Epstein's motion to intervene to protect the validity of his nonprosecution agreement, Judge Marra necessarily found that these prerequisites to intervention were satisfied, *i.e.*, that Mr. Epstein has an interest in the subject matter of the litigation—the preservation of his nonprosecution agreement—that is not adequately represented by the government.

Not permitting Mr. Epstein to attend and participate if necessary in the settlement conference would be fundamentally inconsistent with the reasons why intervention was granted in the first instance, as it would substantially compromise his ability to protect his critically important interests in preserving his nonprosecution agreement and preventing the release of personally damaging grand jury materials. Mr. Epstein has fully performed each and every one of his obligations under the nonprosecution agreement, including pleading guilty to state court charges, serving a prison term, serving a year of community control, paying the attorney representing claimants who brought actions solely under 18 U.S.C. §2255, and making civil settlements with all such §2255 claimants, amounting to millions of dollars (all of which should be returned if the agreement were ever to be rescinded, but it probably unlikely to be). Mr. Epstein can never be returned to the status quo ante – the time he spent in jail and on probation cannot be restored to him, the prejudice he has suffered from being required to register as a sex offender cannot be undone, and it is extremely doubtful that he would ever be able to recoup the millions of dollars he paid in legal fees and settlements because required to do so by the nonprosecution agreement. Mr. Epstein had no obligation to ensure that the government conferred with or notified the plaintiffs before entering into the nonprosecution agreement (even assuming *arguendo* that the government was required to do so), and he should not be prejudiced by a remedy based on the government's failure (if any there was) to perform the duties which the CVRA imposes on it. Based on these paramount equitable considerations, Mr. Epstein has an intense interest in opposing plaintiffs' effort to set his nonprosecution agreement aside and in presenting to the Court reasons why the agreement should not be rescinded which are personal to

him, as opposed to the institutional considerations which the government will likely advance, which he should be permitted to advance at any settlement conference.

Additional, and related, considerations which Mr. Epstein would invoke in opposition to any remedy that threatened to invalidate his nonprosecution agreement—considerations personal to him which are unlikely to be raised by the government, as it was Mr. Epstein, not the government, who suffered the manifest prejudice—arise from the plaintiffs' dilatoriness in pursuing this action. Even though the action has been pending since 2008, plaintiffs knowingly sat on their CVRA claims for years as Mr. Epstein served a prison sentence 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 told the Court that they saw no reason to proceed on an emergency basis. Doc. ___ **[Trans. July 11, 2008**] at 24-25. Moreover, in a hearing one month later, the plaintiffs specifically asked that the Court *not* invalidate the non-prosecution agreement "because of the legal consequences of invalidating the current agreement, it is likely not in [the plaintiffs'] interest to ask for the [rescission] relief that we initially asked for." Doc. ___ **[Trans. August 14, 2008]** at 4. Plaintiffs thus eschewed moving this case forward in favor of their pursuing, over at least the next eighteen months, civil settlement actions against Mr. Epstein *prior to, rather than concurrently with*, litigating their CVRA rights. As the direct result, Mr. Epstein has, to his detriment, served a prison sentence (2008-09), served a year of community control probation (2009-10), and made monetary payments that are directly related to his obligations under the non-prosecution agreement to pay legal fees for attorney representation and not to contest

liability for underlying offenses to those suing under §2255 alone. So inactive were plaintiffs in this case that the Court dismissed the case for lack of prosecution in September, 2010. (Doc. 38).

C. The Court Has the Discretion to Permit Mr. Epstein to Participate in the Settlement Conference.

With the advent of settlement negotiations, these proceedings have reached the remedy stage, as it is unlikely that any meaningful settlement discussions can take place between the plaintiffs and the government without touching on remedy. The Court certainly has the discretion to permit Mr. Epstein to attend the settlement conference and to participate as outlined above. It is not uncommon for intervenors to participate in settlement negotiations. *See, e.g., Professional Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 647 (8th Cir. 2012)(noting that intervenors participated in settlement negotiations); *City Partnership Co. v. Atlantic Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir. 1996)(noting that intervenors participated in settlement negotiations); *Su v. Siemens Indus., Inc*, 2013 WL 3477202 at *3 (N.D.Cal. July 10, 2013)(intervention allowed so that intervenor could participate in settlement negotiations); *United States v. Grand Rapids*, 166 F.Supp.2d 1213, 1220 (W.D. Mich. 2000)(noting that intervenors participated in settlement negotiations); *In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582, 601 (N.D. Ill. 1998)(intervention allowed so that intervenor could participate in settlement negotiations); *United States v. Maine Dep't of Transp.*, 980 F.Supp. 546, 549 (D.Me. 1997)(noting that intervenors participated in settlement discussions); *Buchet v. ITT Consumer Fin/Corp.*, 845 F.Supp. 684, 690-91 (D.Minn.), *amended* 858 F.Supp. 944 (D.Minn. 1994)(intervention allowed so that intervenor could participate in settlement negotiations). Indeed, at least one court has said that it has the power to *force* intervenors to participate in settlement negotiations "when those negotiations take place before the Court in a court-ordered

settlement conference." *United States v. Lexington-Fayette Urban Cty. Gov't,* 2007 WL 2020246, at *3 (E.D. Ky. July 6, 2007).

CONCLUSION

Declining to permit Mr. Epstein to participate in the settlement conference would be inconsistent with the intervention which was granted as to his interests in the preservation of his nonprosecution agreement and in the continued preservation of grand jury secrecy. This Court plainly has the discretion to permit him to participate on the settlement conference and should exercise that discretion.