UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA

JANE DOE #1 and JANE DOE #2,
petitioners,

vs.

UNITED STATES OF AMERICA,
respondent.
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ORDER GRANTING PETITIONERS' MOTION TO PROFFER GOVERNMENT CORRESPONDENCE IN SUPPORT OF CVRA CLAIMS & GRANTING MOTION TO UNSEAL CORRESPONDENCE AND RELATED UNREDACTED PLEADINGS OF PETITIONERS

THIS CAUSE is before the court on the petitioners' motion to use correspondence generated between the United States Attorney's Office for the Southern District of Florida (USAO/SDFL) and counsel for Jeffrey Epstein to prove the Crime Victims' Rights Act (CVRA) violations alleged in this proceeding, joined with motion to unseal petitioners' unredacted pleadings which reference and incorporate the correspondence [DE 51]; the government's response to the motion [DE 60]; petitioners' reply to the government's response [DE 74]; intervenors Roy Black, Martin Weinberg, and Jay Lefkowitz's opposition to the motion, including motion for protective order [DE 160, 161]; intervenor Jeffrey Epstein's opposition to the motion, including motion for protective order [DE 162]; intervenors' notice of supplemental authority in support of asserted common law privilege [DE 163]; petitioners' response to supplemental briefing of intervenors [DE 167]; intervenors' reply in further support of motion for protective order [DE 169] and petitioners' supplemental authority in opposition [DE 172].

The government does not object to petitioners' request to use the correspondence as evidence in this proceeding, but does oppose, in part, the motion to unseal. More specifically, the government expresses a concern that certain labeled "facts" included in the "Statement of Undisputed Facts" filed in support of petitioners' "Motion for Finding of Violations of the Crime Victims' Rights Act" [DE 48] "relate[] to matters occurring before the grand jury" which it is unable to confirm or deny without doing violence to its obligation of grand jury secrecy under Fed. R. Crim P. 6(e). [1] It also expresses concern that these allegations describe crimes alleged against Jeffrey Epstein and others for which they were never charged or convicted, contending that the Due Process Clause requires the court to maintain this information under seal to protect the reputations of persons who may have been under federal investigation but not charged or convicted. *See e.g. In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981)(requiring redaction from records of guilty pleas of references to name of individual who was not charged or convicted).

Intervenors Jeffrey Epstein and his attorneys object to the petitioners' request for permission to use the evidence in this proceeding, and object to petitioners' request to unseal the correspondence and related pleadings on the following grounds: (1) the correspondence is the privileged opinion

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[1]Fed. R. Crim. P. Rule 6(e)(2)(B) provides:

Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
(i)a grand juror;
(ii) an interpreter;
(iii) a court reporter;
(iv)an operator of a recording device;
(v)a person who transcribes the recorded testimony;
(vi) an attorney for the government; or
(vii)a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

work-product of Epstein's legal counsel; (2) the correspondence is protected under grand jury secrecy principles codified at Fed. R. Crim. P. 6(e) because its subject matter overlaps with matters occurring before the grand jury; (3) the correspondence is shielded against disclosure under Fed. R. Crim. P. 11(f)[2] and Fed. R. Evid. 410 [3] because it consists of and relates to statements made during the course of plea discussions between Epstein, through counsel, and federal prosecutors; (4) the correspondence is irrelevant because rescission of Epstein's non-prosecution agreement with the United States Attorneys' Office for the Southern District of Florida is not an available remedy in this CVRA proceeding; (5) the court should craft a new common law privilege encompassing plea discussions under Fed. R. Evid. 501.

At the outset, the court observes that the intervenors' privilege objections to public release of the correspondence in question were previously rejected by Magistrate Judge Linnea Johnson in a discovery order entered in a parallel civil lawsuit, *Jane Doe # 2 v. Jeffrey Epstein*, Case No. 08-80893-CIV-MARRA. By order entered January 5, 2011 in that proceeding, Magistrate Judge Johnson expressly rejected Epstein's request for the "Court to find the subject correspondence privileged and on that basis prohibit plaintiffs' counsel from disclosing it in either of the two

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[2]Fed. R. Crim. P. 11(f) provides, "The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal. Rule of Evidence 410."

[3]Federal Rule of Evidence 410 (a) provides in pertinent part:

> (a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
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> .....
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> (4) a statement during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a plea of guilty or they resulted in a later-withdrawn guilty plea.

proceedings [the pending state court or federal (CVRA) proceedings]." [Case No. 08-80893, DE 226]. [4] The court finds no reason to revisit that ruling here.

As a threshold matter, "statement[s] during plea discussions" protected under Fed. R. Evid. 410 do not include general discussions of leniency and statements made in the hope of avoiding a federal indictment - arguably the content of the correspondence at issue here. *See e.g. United States v. Merrill*, 685 F.3d 1002 (11th Cir. 2012)(statements made to AUSA during meetings were not statements made during plea negotiations under Rule 410, where there were no pending charges against defendant when discussions occurred; general discussions of leniency did not transform meeting into plea negotiations); *United States v. Edelmann*, 458 F.3d 791, 804-06 (8th Cir. 2006)(Rule 410 inapplicable to statements made during preindictment meetings by defendant seeking to avoid indictment and not reach plea agreement); *United States v. Hare*, 49 F.3d 447, 450 (8th Cir. 1995) (voluntary statements made in hope of improving situation before plea negotiation has begun or after plea agreement is reached are not statements made "in the course of plea discussions" protected by Rule 410).

In addition, the communications between Epstein's counsel and federal prosecutors at issue here ultimately *did* result in entry of a plea of guilty by Epstein --to specific state court charges -- thereby removing the statements from the narrow orbit of "statement[s] made during plea discussions...if the discussions did not result in a guilty plea...." which are inadmissible in

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[4] The Magistrate Judge contemporaneously directed that the documents remain under seal pending ruling by the relevant institutions on the admissibility of the evidence and conditions of disclosure. The material has accordingly remained under seal in the instant CVRA proceeding before this court, as one institution charged with adjudication of the parallel victim claims.

proceedings against the defendant making them under Rule 410. *See e.g United States v. Paden*, 908 F.2d 1229, 1235 (5th Cir. 1990)(statements made during negotiations that resulted in a final plea of guilty not protected under Rule 410), *cert. denied*, 498 U.S. 1039, 111 S. Ct. 710 (1991).

The court also summarily rejects the government and intervenors' suggestion that the correspondence is appropriately preserved under seal under the grand jury secrecy rule codified at Fed. Crim. P. 6(e) because the subject matter of the correspondence happens to coincide with matters presented to the grand jury. Fed. R. Crim. P. 6(e)(2) prohibits particular persons from disclosing "a matter occurring before a grand jury," and Fed. R. Crim. 6(e)(6) provides that "[r]ecords, orders and subpoenas relating to grand jury proceedings must be kept under seal to the extent and as along as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."

The phrase "matter occurring before the grand jury" encompasses what has occurred, what is occurring and what is likely to occur before the grand jury, *In re Motions of Dow Jones & Co* 142 F.3d 496 (D. C. Cir. 1998), but it does not cover prosecutors' strategies, recommendations, *In re Sealed Case No. 99-3091 (Office of Independent Counsel Contempt Proceeding),* 192 F.3d 995 (D. C. Cir. 1999)(internal deliberations of prosecutors that do not directly reveal grand jury proceedings are not Rule 6(e) material), or opinions about an individual's potential criminal liability. *See In re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980)(statements about potential criminal liability, even if based on knowledge of grand jury proceedings, not covered by Rule 6(e), provided statement does not reveal the grand jury information on which it is based). This follows because "it is not the information itself, but the fact that the grand jury was considering that information which is protected by Rule 6(e)." *Anaya v. United States*, 815 F.2d 1373, 1379 (10th Cir.

1987).

Thus, Rule 6(e)'s provisions do not extend to the disclosure of information obtained from a source independent of the grand jury proceeding, such as a parallel or prior government investigation. *In re Grand Jury Subpoena*, 920 F.2d 242 (4th Cir. 1990); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982); *United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986)(fact that witness received "target letter" not subject to grand jury secrecy under Rule 6(e) where it appeared to be expression of opinion of United States Attorney, based on his or her knowledge of status of criminal investigation).

Next, the court rejects the attorney intervenors' assertion of opinion-work product privilege as a shield against public release or use of the correspondence as evidence in this CVRA proceeding. Assuming without deciding that any part of the correspondence in question reflects "the mental impressions, conclusions, or legal theories" of Epstein's attorneys, Fed. R. Civ. P. 26(b)(3), any work product protection which might otherwise attach to this product was necessarily forfeited when Epstein voluntarily submitted the information to the United States Attorney's Office in the hopes of receiving the *quid pro quo* of lenient punishment for any wrongdoings exposed in the process.

Work product protection is provided only against "adversaries." Thus, disclosure of the material to an adversary, real or potential, works a forfeiture of work product protection. *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997). In this case, Epstein's attorneys' disclosure to the United States Attorney's Office was plainly a disclosure to a potential adversary. The United States Attorneys' office, at that juncture, was reviewing evidence relating to Epstein' sexual crimes against minor females within the Southern District of Florida and

deliberating the filing of relevant federal charges; while Epstein's counsel clearly hoped to avoid any actual litigation between the United States and Epstein, the potential for such litigation was plainly there. By voluntarily and deliberating disclosing this material to federal prosecutorial authorities investigating allegations against Epstein at that time, any work product protection was necessarily lost. *See e.g. In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), *cert. dismissed*, 539 U.S. 977 (2003); *In re Quest Communications International, Inc.,* 450 F.3d 1179 (10th Cir. 2006); *Westinghouse Electric Corp. v Republic of Philippines*, 951 F.2d 1414, 1428-31 (3d Cir. 1991); *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984).

Finally, the court rejects the intervenors' invitation to craft a new federal common law privilege governing plea discussions with prosecutorial authorities under the authority conferred by Fed. R. Evid. 501. [5] Federal Rule of Evidence 501 instructs federal courts to develop federal common law privilege according to principles of common law as they may be interpreted "in the light of reason and experience." The applicable test in assessing whether federal common law should recognize a new privilege "is whether such a privilege promotes sufficiently important

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[5]Federal Rule of Evidence 501 provides:

> The common law – as interpreted by United States courts in the light of reason and experience - governs a claim of privilege unless any of the following provides otherwise:
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> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
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> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

interests to outweigh the need for probative evidence." *Jaffee v. Redmond,* 518 U.S. 1, 9-19, 116 S. Ct.1923, 135 L.Ed. 2d 337 (1996); *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980).

Recognizing that there is a presumption against privileges which may be overcome only when it would achieve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth, *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), citing *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L.Ed. 2d 1039 (1974)(privileges are in derogation of the search for truth and should not be lightly created nor expansively construed), and that the Supreme Court has been "especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself," *University of Pennsylvania v E.E.O.C.,* 493 U.S. 182, 189, 110 S. Ct. 577, 582, 107 L.Ed.2d 571 (1990)(declining to recognize common law privilege protecting academic peer review materials), this court declines to recognize a new federal common law privilege over plea discussions as here urged by the intervenors.

. Congress has already addressed the competing policy interests raised by plea discussion evidence with the passage of the plea-statement rules found at Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410, which generally prohibits admission at trial of a defendant's statements made during plea discussions, [6] without carving out any special privilege relating to plea discussion materials. Considering the Congressional forbearance on this issue -- and the presumptively public nature of

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[6]The policy behind Rule 410 is to permit a defendant to freely negotiate without fear that statements will be used against him. *United States v. Knight* 867 F.2d 1285 (11th Cir. 1989).

plea agreements in this District --[7], this court declines the intervenors' invitation to expand Rule 410 by crafting a federal common law privilege for plea discussions. *See e.g. Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007)(declining to recognize medical peer review privilege in federal discrimination cases); *Weiss ex rel. Estate of Weiss v. County of Chester*, 231 F.R.D. 202 (E. D. Pa. 2005)(declining to recognize medical peer review privilege in §1983 action); *Johnson v. United Parcel Service, Inc.*, 206 F.R.D. 686 (M.D. Fla. 2002)(declining to recognize "self-critical analysis" privilege in Title VII race discrimination case); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434 (D. Kan. 1995)(same).

Conclusion

Accordingly, the court rejects the privileges asserted by intervenors as bases for maintaining the correspondence and related pleadings incorporating the correspondence under seal in this proceeding. Finding the asserted privileges inapplicable, the court finds no legitimate compelling interest which warrants the continued suppression of this evidentiary material under seal in this proceeding. S*ee generally United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005)(reversing order sealing document in drug trafficking conspiracy prosecution in order to protect cooperating defendants and confidential informants where unsupported by record finding to rebut presumption of openness of court proceedings),and shall therefore grant petitioners' motion to unseal the

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[7] On January 22, 2009 Chief Judge Federico Mereno issued an administrative order requiring complete remote electronic access to all (unsealed) plea agreements extending to all members of the public and the bar, contrary to the expressed wishes of the U.S. Department of Justice. See *In Re: Remote Electronic Access to Plea Agreements*, Administrative Order 2009-2, United States District Court, Southern District of Florida (January 22, 2009); Marcia Coyle, *Federal Prosecutors Want to Shutter Public Access to Plea Agreements* , The National Law Journal, Sept. 17, 2007 (online)(DOJ asks Judicial Conference to rescind policy of making plea agreements available on line)

correspondence. While the court shall also grant the petitioners' motion to use the evidence as proof of alleged CVRA violations to the extent it shall allow petitioners to proffer the evidence in support of their CVRA claims, this order is not intended to operate as a ruling on the relevance or admissibility of any particular piece of correspondence, a matter expressly reserved for determination at the time of final disposition.

It is therefore **ORDERED AND ADJUDGED**:

1. The petitioners' motion to use correspondence between the United States Attorneys' Office and counsel for Jeffrey Epstein to prove the violations of the CVRA alleged in this proceeding [DE 51] is **GRANTED** to the extent that the petitioners are granted leave to proffer the evidence in support of their CVRA claims in this proceeding. The court shall reserve ruling on the ultimate relevance and admissibility of any particular piece of correspondence until the time of final disposition.

2. The petitioners' motion to unseal unredacted pleadings incorporating the subject correspondence [DE# 51] is **GRANTED**, with the following proviso: The petitioners are directed to file unredacted pleadings, including attached correspondence, in the open court file. *However, before placing the materials in the court file, petitioners are directed to carefully review each page of the correspondence in question and to* ***REDACT:*** *(1) all references to victims' names or initials; (2) all identifying information with regard to internal telephone numbers and/or emails of government attorneys or employees; (3) all identifying references or names of individuals other than Epstein relating to uncharged crimes; (4) all correspondence describing and/or attaching grand jury subpoenas (see US Atty Correspondence Bates 329-356).*

3. The petitioners shall file unredacted pleadings in the court file in conformity with the above prescriptions within **TWENTY (20) DAYS** from the date of entry of this order.

4. The motion for protective order submitted by Intervenors Black, Weinberg and Lefkowitz [160, 161] and motion for protective order submitted by limited Intervenor Jeffrey Epstein [162], seeking the continued suppression under seal of correspondence relating to plea discussions between Epstein's counsel and federal government prosecutorial authorities, are **DENIED.**

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 18th day of June, 2013.

Kenneth Marra
United States District Judge

cc.
All counsel