

MARTIN G. WEINBERG, [REDACTED]  
ATTORNEY AT LAW

20 PARK PLAZA, SUITE 1000  
BOSTON, MASSACHUSETTS 02116

(617) 227-3700

FAX (617) 338-9538

NIGHT EMERGENCY  
(617) 901-3472

EMAIL ADDRESSES:

[REDACTED]  
owlmcb@att.net

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Via First Class Mail

[REDACTED] Assistant U.S. Attorney  
United States Attorney's Office  
99 NE 4 Street  
Miami, FL 33132

Re: Rebutting the Summary Judgment Motion (hereinafter "Motion") filed by the Petitioners in the CVRA case, 08-cv-80736-KAM, Dkt. 361.

Dear Mr. [REDACTED]

Although Mr. Epstein is a limited intervenor rather than a party to the CVRA case between the Government and the Jane Does, please find several rebuttal arguments to the baseless accusations that Mr. Epstein improperly "conspired" with the Government to violate CVRA rights or that there was an improper relationship between the USAO and Mr. Epstein as the Jane Does have alleged.

1. Any failure to consult any potential crime victim before either the execution of the NPA on September 24, 2007, or the finalization of the NPA with the State Plea on June 30, 2008, was not the result of either a "conspiracy" with Epstein (*see* Motion at 7), nor any bad faith by the Government (*see* Motion at 4 where Petitioners allege that the Government was "following the guidance of Epstein's counsel in making decisions with respect to the timing and substance of any communication to the victims" and that the Office was "doing Epstein's bidding [when it] assiduously concealed the NPAs existence from the victims"). The USAO's decisions instead were consistent instead with the nationwide DOJ policy, regarding whether the CVRA rights were triggered in the absence of a federal criminal charge, a policy that was reinforced by a **Memorandum Opinion for the Acting Deputy Attorney General from the Office of Legal Counsel on December 17, 2010**, pg 1, which determined that "*The rights provided by the Crime Victims' Rights Act are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment...)*. Similarly, the Attorney General Guidelines for Victim and Witness Assistance 2011 ed. (rev. May 2012), at IIC1 defines a victim as a "person directly . . . harmed . . . if the offense is charged in federal district court. . . ." (emphasis added). Section IID1 of the 2015 Attorney General Guidelines reiterates the requirement that the

initiation of a federal charge is the condition precedent for CVRA rights. It was not until May 29, 2015, that Congress amended the CVRA, 18 U.S.C. 3771(a)(9) to clarify that victims have the “right to be informed in a timely manner of any plea bargain or deferred prosecution agreement” (an amendment that still does not clearly require that CVRA rights apply to a Non-Prosecution Agreement), Motion at 48, fn 175. Despite Judge Marra’s determinations that the CVRA rights are applicable in the absence of a formal federal charge, *see e.g.* Dkt 189 at 8, the USAO was acting consistent with DOJ policy in 2007-2008 when it did not consult with numerous victim-witnesses prior to entering the NPA with Epstein, and was also acting consistent with almost all of the prevailing case law;<sup>1</sup>

2. In addition to following nationwide DOJ policy, the USAO has asserted its own independent and good faith interest which resulted in its unilateral decision to not fully confer with or disclose the content of the NPA to each identified alleged witness-victim during the September 24, 2007, – June 30, 2008, period. During that time period, the Government has

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<sup>1</sup> Most courts construing the CVRA have declined to characterize alleged victims of uncharged conduct that did not lead to criminal proceedings as “crime victims” who are entitled to enforceable rights. *See, e.g., United States v. Daly*, 2012 WL 315409 \*4 (D. Conn. 2012) (“a more logical interpretation of the statute is that a person has the rights of a ‘crime victim’ for purposes of the CVRA no sooner than the point in time when an offense has been charged”); *United States v. Turner*, 367 F. Supp. 2d 319, 326-27 (██████████, 2005) (excluding victims of uncharged conduct from the class of those entitled to participatory rights under the CVRA because “the offense charged against a defendant can serve as a basis for identifying a ‘crime victim’ as defined in the CVRA”); *Searcy v. Paletz*, No. 6:07-1389-GRA-WMC, 2007 WL 1875802 \*6 (██████████, June 27, 2007) (inmate does not qualify as a “crime victim” under the CVRA where there has been a prosecutorial decision not to charge another inmate accused of attacking him); *Searcy v. Skinner*, No. 6:06-1418-GRA-WMC, 2006 WL 1677177 \*2 (██████████, June 16, 2006) (plaintiff inmate could not use CVRA as a basis to bring action against alleged attacker inmate where government had declined to initiate a prosecution against the alleged attacker); *In re Merkosky*, 2008 WL 177762 \*2 (██████████, Oh. 2008) (courts have found that the CVRA “does not confer any rights upon a victim until a prosecution is already begun”); *Stegman v. United States*, 2015 WL 728487 \*1-2 (D. Kan. 2015) (Sections 3771(a)(1) (right to protection from accused) and Section 3771(a)(5) (right to confer) do not apply in pre-charging context); *In re Petersen*, 2010 WL 5108692 \*2 (██████████, Ind. 2010) (“the U.S. Attorney didn’t have an obligation under the CVRA to confer with [victims] until after a charge was filed and a case opened”); *United States v. Rubin*, 558 F. Supp. 2d 411, 417 (██████████, 2008) (“the CVRA appears to simply accord [victims] standing to vindicate their rights as victims under the CVRA and to do so in the judicial context of the pending criminal prosecution of the conduct of the accused that allegedly victimized them”); *see also In re W.R. Huff Asset Management (United States v. Rigas)*, 409 F.3d 555 (2d Cir. 2005) (rejecting challenge to settlement agreement in forfeiture action in connection with Rigas/Adelphia fraud case and stating that “the CVRA does not grant victims any rights against individuals who have not been convicted of a crime”); *In re Antrobus*, 563 F.3d 1092, 1099 (10th Cir. 2009) (stating that “the purpose of the CVRA is to permit victim participation in ongoing criminal matters”); *In re Acker*, 596 F.3d 370, 373 (6th Cir. 2010) (characterizing as “uncertain” the question whether a victim has rights before formal charges are filed).

stated that it had a principled apprehension that Mr. Epstein would not fulfill his obligations under the NPA and enter a State Plea that would require his incarceration. As a result, the USAO decided based on its own self-interest that the widespread disclosure of the contents of the NPA, including terms that provided monetary benefits to those identified as its victim-witnesses would risk compromising the credibility of any such victim-witness who would be relied on in the event that the NPA was never finalized, Dkt. 361, Exhibit 80 at pgs. 12-13. Although signed, the Government was aware that further negotiations regarding how to fairly implement the unique monetary reward provisions of 18 U.S.C. 2255 continued after September 24, 2007. Also, appeals to the Department of Justice (to both the head of the Criminal Division and then to Deputy Attorney General Filip) by Epstein's counsel contesting whether there was a sufficient jurisdictional basis for the underlying federal investigation were ongoing, *see e.g.* Motion, Exhibit 39 (May 15, 2008 letter by the head of CEOS to Epstein's counsel overruling their objections), *see* Motion, Exhibit 96 (May 19, 2008 Letter from Kenneth Starr, Esq. to DAG Mark Filip seeking further review). The Government properly determined for their own interests in the event that there was a future prosecution and trial of Epstein that disclosing the NPA to persons it alleged were its victim-witnesses, given its containing explicit financial incentives for such victim-witnesses, would risk impairing the credibility of each such victim-witness who learned of the incentives in the event the NPA was not be finalized and a federal prosecution and trial ensued, *see* Villafana Declaration, Dkt. 14 at pgs. 4-5 ("*the agents and I concluded that informing additional victims could compromise the witnesses' credibility at trial if Epstein reneged on the agreement*")(emphasis added), *see also* Motion at 29 where FAUSA Sloman emphasized to Epstein's counsel that "none of the victims were informed of any right to receive damages of any amount prior to the investigation of her claim." Until the appeals to DOJ were concluded on June 23, 2008, *see* Motion at 34-35, ¶ 105, and until Epstein entered his state court plea seven days later, there existed uncertainty as to whether the NPA would be implemented. The Government apprehension that Mr. Epstein would not plead guilty resulted in the determination that it would compromise their ability to prosecute Mr. Epstein if they disclosed the NPA and its monetary incentives to potential victim-witnesses. It was reasonable for the USAO to conclude that the credibility of any victim-witness would be diminished if they knew that the Government was facilitating a minimum reward of either \$50,000 or \$150,000 pursuant to 18 U.S.C. 2255 for each identified victim-witness who brought suit under that provision while negotiating a settlement with Mr. Epstein. The USAO's belief that Mr. Epstein would not finalize the NPA is beyond dispute: the FBI continued to investigate Epstein during this period and the Government's privilege logs demonstrate that the federal Grand Jury was continuing to receive evidence relating to the alleged federal offenses of Mr. Epstein during this period. Rather than showing that the "Government and Epstein conspired to conceal the NPA from the victims to prevent them from voicing any objection . . .", Motion at 7, the Government's decisions were intended solely to protect its ability to successfully prosecute Epstein in the event that Epstein failed to finalize his obligations under the NPA, as the Government believed he might given Mr. Epstein's repeated expressions of dissatisfaction with the NPA's provisions and his repeated appeals to various decision-makers in the Department of Justice while unsuccessfully seeking amendments to the NPA.<sup>2</sup>

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<sup>2</sup> It should also be noted that the Government did not disclose its victim-witness list to Mr. Epstein on September 24, 2007 with the execution of the NPA but instead deferred any disclosure until after Mr. Epstein's plea of guilty in state court.

3. Jane Doe 2 was hostile to the efforts of the USAO and FBI to cooperate against Mr. Epstein, *see* Villafana Declaration, Dkt. 14 at pg. 4, 6, *see* Dkt. 361, Exhibit 80 at 10-11. She was not listed as a federal “victim” in the list provided to Epstein’s counsel shortly after the June 30, 2008, State Plea. She was certainly not prejudiced by any denial of her alleged right to confer prior to the USAO entering the NPA with Mr. Epstein. Additionally, she consented to a significant multi-year delay in the litigation of the current petition (which under the statute contains very strict time limits to protect both the petitioners and the target/defendant, particularly under circumstances where the target/defendant is serving a prison sentence) in order to prioritize and seek to profit from a parallel monetary damage lawsuit against Mr. Epstein, *see e.g.* Dkt. 189 at 5, ¶ 8.

4. Jane Doe 1 was one of four victim-witnesses that in fact were provided with notice as to the contents of the NPA as early as October of 2008. She was also provided pro bono counsel with the assistance of the Government prior to her retaining Mr. Edwards, *see* Villafana Declaration, Dkt. 14 at pg 4, Motion at 25 (“the Special Agents have said that they explained that Epstein would plead guilty to state charges involving another victim, he would be required to register as a sex offender for life, and he had made certain concessions related to the payment of damages”), *see* Dkt. 361, Exhibit 80 at 11-12 (Jane Doe 1 was told about the NPA before June 30, 2008). Jane Doe 1 also agreed to a significant multi-year delay in pursuing the current petition during which Epstein completed the service of his state criminal sentence in order to prioritize and seek to profit from litigating a monetary damage lawsuit against Epstein during which she never contested the NPA, *see e.g.* Dkt. 189 at 5, ¶ 8.

5. There was no impropriety during the plea negotiations with Epstein. The negotiations at all times were arms-length negotiations between two parties with differing interests. The suggestions that Epstein’s counsel had undue influence over the negotiations are baseless. In fact, it was Mr. Epstein who appealed from what his counsel argued were the overly Draconian provisions of the NPA that required his incarceration, that required a plea to and conviction of a state sex offense that mandated sex offender registration,<sup>3</sup> and that required him to consent to pay damages to each identified federal witness pursuant to 18 U.S.C. 2255 despite the absence of a federal plea or conviction and despite his not receiving the victim list until after his state plea was entered and his state sentence commenced. The eventual plea agreement was not “indulgent”, Motion at 4, and the Government had not conclusively “disproven” Epstein’s counsels’ arguments, Motion at 3. The USAO was always pursuing its self-interest in reaching such an agreement rather than doing “Epstein’s bidding.” *Id.* Despite the Motion’s claim that Epstein launched an “assault” on the prosecution after the execution of the NPA in September of 2007, no amendment to the NPA was made to favor Mr. Epstein or moot his “appeals” to the DOJ, *see* Motion at 20.

6. The evidence received by the FBI and Grand Jury that investigated federal child sexual offenses did *not* overwhelmingly prove each element of the two pivotal statutes under

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<sup>3</sup> Despite the petitioners’ protests, Motion at 4, the state offenses conformed to the irrebuttable evidence showing that the state witness-victims, like Jane Doe 1 and Jane Doe 2, were paid for their participation in the sexual offenses at issue in the state court case.

consideration, *contra* Motion at 3 (alleging that Federal Prosecutors had “disproven” the defense arguments). Although there was evidence available to the USAO that Mr. Epstein traveled interstate and thereafter had engaged in illegal sexual conduct, unlike each applicable precedent, Epstein was not traveling from his home to engage in illegal sexual conduct, he was traveling from his home for many purposes, a factor that could reasonably be relied upon by Epstein to contest the scienter element for violating 18 U.S.C. 2423(b) which required proof that his dominant purpose in travel was to engage in underage sex. Likewise, although there was evidence available to the USAO that Epstein scheduled sexual massages with underage females, there was no evidence of any substantive internet communications and the evidence of telephone communications lacked the required indicia of persuasion, inducement, or enticement that alone would satisfy the elements of 18 U.S.C. 2422(b), *see e.g. U.S. v Hite* 769 F.3d 1154 (■■■■, Cir.2014) where the Court examined the meaning of the statutory verbs “persuade, induce, entice, coerce” and ruled that the statute was limited to acts/communications intended to “transform or overcome the will of a minor” directly or “by way of an adult intermediary. The evidence of calls between Mr. Epstein or one of his assistants and any of the federal victim-witnesses showed at most an effort to schedule appointments rather than calls containing the elements of persuasion, inducement, enticement, or coercion.<sup>4</sup>

7. That Epstein’s counsel and the USAO considered various alternatives to a state court resolution, Motion at 12-15, is consistent with the ordinary give and take of plea negotiations between arms length adversaries, each pursuing their own positions in an effort to reach a compromise to resolve the issues implicated in the outstanding investigation. What is unique about this case is not that various federal charge options were considered by both parties; instead, it is that the petitioners received hundreds of pages of letters and emails disclosing the details of what, ordinarily, are negotiations and settlement discussions that remain confidential. Ultimately, the USAO gained the benefit of avoiding the inherent risks of litigation, while vindicating their prosecutorial interest in assuring that Epstein pled guilty to serious state criminal offenses, served an 18 month jail sentence followed by strict *i.e.* community control terms of probation, registered as a sex offender, and paid millions of dollars to those victims who asserted their rights and benefited from waivers compelled by the negotiations that resulted in the NPA.<sup>5</sup>

8. The Petitioners fault the USAO’s decision not to notify all its federal victim-witnesses of the date of a state plea. This decision was not the result of Epstein’s “urgings” nor caused by any fear that such notification would lead to a public outcry, *see* Motion at 7. Instead, the decisions regarding the breadth of notification were made in good faith given the legal uncertainty of whether a state court plea involving allegations relating to just three women permitted or required notification to those whose allegations were not the subject of the state plea. The USAO did not just agree with the good faith legal positions of Epstein’s counsel, they made a principled decision to defer “to the discretion of the State Attorney regarding whether he wishes to provide victims with notices of the state proceedings”, Motion at 30-31.

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<sup>4</sup> At the time, 18 U.S.C. 1591 had only been used to prosecute pimps or traffickers who derived a financial benefit from sexual offenses.

<sup>5</sup> Epstein’s counsel knows of no other example where a state criminal defendant was required to make payments pursuant to 18 USC 2255 in the absence of a federal conviction.

9. The NPA's confidentiality provisions were not illegal or even atypical. It is commonplace that subjects and targets of federal Grand Jury investigations who are not federally prosecuted are protected by the secrecy provisions of F. R. Crim. P. 6(e). Further, Non-Prosecution Agreements are regularly maintained in private, given that they are not "judicial documents" to which the First Amendment or common law right of public access applies. The insertion of a confidentiality provision in the NPA resulted not from any "urgings" or "insistence" by Epstein's counsel but instead from a question as to the intention of the USAO to disclose the eventual agreement with the "Office respond[ing] 'A non-prosecution agreement would not be made public or filed with the Court . . . it is not something that we would distribute without compulsory process'", Motion at 15, Exhibit 10, 18 (emphasis added), and not solely due to the USAO's decision to "reevaluate" its notification obligations in response to objections from Epstein's counsel, see Exhibit 31 at pgs 2-3. The position of the USAO was not an atypical concession to Epstein's counsel; instead it was the norm. 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 [REDACTED] (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.")(emphasis added).

The public right of access attaches only to "judicial documents." Because non-prosecution agreements are not judicial documents, there is no public right of access to them either under the First Amendment or the common law. To be considered a judicial document, "the item filed must be relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995). See, e.g., *In re Cedant Co.*, 260 F.3d 183, 192 (3d Cir. 2001)("The status of a document as a 'judicial record' . . . depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings"); *United States v. El-Sayegh*, 131 F.3d 158, 162 ([REDACTED] Cir. 1997)("with nothing to record, there are no judicial records"); see also *In re Boston Herald, Inc.*, 321 F.3d 174, 180 (1st Cir. 2003)(Both the constitutional and the common law rights of access have applied only to judicial documents"); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001) ("when applying the common law right of access federal courts traditionally distinguish between those items which may properly be considered public or judicial records and those that may not"). In general, "there is no First Amendment right of access to government processes," including those of the Executive branch. *United States v. Gonzales*, 50 F.3d 1246, 1260 (10th Cir. 1998). As the District of Columbia Circuit stated in evaluating whether a plea agreement which was submitted to the district court as an attachment to the government's motion for leave to file the plea agreement under seal was a judicial document where the plea agreement was not ultimately filed with the court because the plea deal broke down:

The details of the plea agreement may, of course, be relevant to evaluating the performance of the Department of Justice or other law enforcement agencies in their dealings with El-Sayegh. But that is not the judicial function, and proper

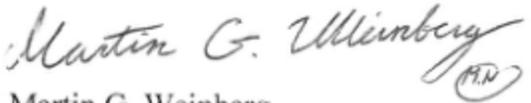
public oversight of the executive neither requires nor justifies claims of access to the records of the judiciary.

*El-Sayegh*, 131 F.3d at 163. The case is even clearer as to non-prosecution agreements:

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 court

*United States v. HSBC Bank USA*, [REDACTED], 2013 WL 3306161 at \*5 ([REDACTED] July 1, 2013).

Yours truly,

  
Martin G. Weinberg

cc: [REDACTED], Assistant U.S. Attorney  
United States Attorney's Office  
500 South Australian Ave  
Suite 400  
West Palm Beach, Florida 33401

Roy Black, Esq.  
Black, Srebnick, Kornspan & Stumpf, [REDACTED]  
201 South Biscayne Boulevard  
Suite 1300  
Miami, Florida 33131