UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 08-80736-Civ-Marra/Matthewman

JANE DOE #1 AND JANE DOE #2,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

UNITED STATES' MEMORANDUM OF LAW REGARDING INTERVENORS' RIGHTS TO OBSERVE AND PARTICIPATE IN THE SETTLEMENT CONFERENCE

The Respondent, United States of America, by and through the undersigned Assistant United States Attorney, hereby files this Memorandum of Law regarding the rights of intervenors in this suit to observe and participate in the court-ordered settlement conference. For the reasons set forth below, the United States requests that the Court limit the observation and participation in the private settlement negotiations to the Petitioners, the Respondent, and their counsel. If the Court nonetheless allows any of the intervenors to participate or observe, the Respondent respectfully requests that the Court adhere to Local Rule 16.2(e) and its "Mandatory Attendance" rule and condition any such participation on the pertinent intervenor "personally appear[ing] at the conference" (DE378 at 1).

PROCEDURAL HISTORY REGARDING INTERVENTION

This action involves a petition filed on behalf of two individuals ("Jane Doe #1" and "Jane Doe #2") alleging that they were deprived of certain rights contained in the Crime Victims Rights Act ("CVRA"), 18 U.S.C. § 3771, by the U.S. government. Since the filing of the petition in

2008, a number of individuals and entities have sought to intervene pursuant to Fed. R. Civ. P. 24.[1] For purposes of this memorandum, those intervening parties will be separated into four "groups."

A. Group 1: Attorneys Black, Weinberg, and Lefkowitz

The first group contains attorneys Roy Black, Martin Weinberg, and Jay Lefkowitz, who all represented Jeffrey Epstein in connection with a federal criminal investigation. The three moved for "limited" intervention "for the purpose of seeking a protective order" and the opportunity to respond to the Petitioners' motion for disclosure of correspondence written by the three attorneys (DE56 at 1). The attorneys told the Court, "Attorneys Black, Weinberg, and Lefkowitz do not seek intervention to litigate whether the [CVRA] was violated and if so, against whom a remedy is appropriate" (DE56 at 5). District Judge Marra granted the attorneys' motion, allowing limited intervention to "assert[] a claim that the documents in question may be privileged" (DE158 at 1-2).

The document privilege issue was later resolved by the district court in favor of Petitioners (DE188), and the attorneys appealed (DE194, DE196). The Eleventh Circuit affirmed the district court's ruling on the merits. *See Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014).

The attorneys' issue has thus been completely resolved, and they have no issue or claim left to "settle." At the March 28, 2016 status conference, Attorney Weinberg agreed that this group had no need to participate in the settlement conference. Respondent agrees with Attorney Weinberg that this group should not participate.

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[1] As will be explained below, the Eleventh Circuit has determined that this is not a civil case, but rather is "ancillary to a criminal investigation" and "a criminal action." *Jane Doe No. 1 v. United States*, 749 F.3d 999, 1005, 1006 (11th Cir. 2014). Despite that designation, the petitioners filed their case as a civil action and the district court has applied the Federal Rules of Civil Procedure to a number of motions and rulings. Thus, all intervenors filed their motions to intervene pursuant to Fed. R. Civ. P. 24.

B. Group 2: The Palm Beach Newspapers

The second group consists of The Palm Beach Post and The Palm Beach Daily News. These entities moved for limited intervention in order to oppose Jeffrey Epstein's motion for protective order that sought to require sealing all pleadings that attached certain documents disclosed in discovery (DE305). The district court granted the motion to intervene, considered the newspapers' arguments, and denied the motion for protective order (DE326). Thus, there is no live dispute between the newspapers and the parties, and nothing to settle or mediate. The newspapers have had no further involvement in the litigation and counsel did not even appear at the March 28th status conference, despite having notice and specific call-in information. Respondent respectfully requests that this group also should not be allowed to participate in the settlement conference.

C. Group 3: Persons Not Granted Intervention

Two other attorneys also sought to intervene in this matter, both for the purpose of seeking sanctions (DE79; DE282). Although those attorneys appear on the case docket sheet as "Intervenors," both of their motions to intervene were denied by the district court (DE99; DE324). Thus, the attorneys in this group have never even been intervening parties and should not be allowed to participate in the settlement conference.

D. Group 4: Jeffrey Epstein

Lastly, Jeffrey Epstein has moved to intervene on multiple occasions. His first "Motion for Limited Intervention" was filed in 2011 and was based on the same grounds advanced by Attorneys Black, Weinberg, and Lefkowitz (*see* DE93). The district court granted the motion and allowed Epstein to seek a protective order (DE159). Epstein's motion for protective order (DE162) was denied (DE188), and Epstein appealed along with his attorneys (DE195). The

Eleventh Circuit affirmed the district court. *Doe No. 1, supra*, 749 F.3d 999. Thus, Epstein has no live dispute related to this limited intervention.

Epstein next moved to intervene in July 2013. He filed two motions for "limited intervention" (*see* DE207; DE215). Addressing these in reverse order, in DE215 Epstein sought limited intervention to assert a privilege pursuant to Fed. R. Crim. P. 6(e) as to items on the government's privilege log. The district court granted the motion to intervene (DE256); Epstein filed his motion (DE263); and the district court has already sustained the government's assertion of privilege as to those items (*see* DE330, DE336; DE339). Thus, there is no live dispute among the parties concerning the issues underlying this intervention, and it should not be a basis for Epstein to participate in the settlement conference.

Epstein also moved for "prospective limited intervention" at the remedy stage, that is, "when and if [the parties] reach the stage at which the Court will consider what remedy to order if it finds that the government violated the plaintiffs' rights under the CVRA" (DE207 at 1). When seeking this "prospective limited intervention," Epstein told the Court that he "does *not* seek to intervene generally in the case, as the duties and obligations imposed by the CVRA apply solely to the government" (*id.* (emphasis added)). Epstein further admitted that the dispute in the case was "one between the plaintiffs and the government" (*id.*). Because Epstein sought intervention "only as to the issue of remedy," he advised the Court that it "ha[d] the option of holding this motion in abeyance and not deciding it *unless and until* such time as it decides it [the Court] must fashion a remedy for violation of the CVRA" (DE207 at 2 (emphasis added)).

The district court granted the motion for "prospective limited intervention" and allowed Epstein "to intervene with regard to any *remedy* issue concerning the non-prosecution agreement in this case" (DE246 (emphasis added)). The Eleventh Circuit has characterized this order as

"grant[ing] Epstein limited intervention to challenge . . . any remedy that involves the non-prosecution agreement," and noted that Epstein would not be able to "challenge . . . the judgment against the United States."[2] *Jane Doe No. 1*, 749 F.3d at 1005. Thus, Epstein's rights as an intervenor only arise if (1) the *Court* determines that the government violated the CVRA; (2) the *Court* fashions a remedy; and (3) the remedy fashioned by the *Court* involves the non-prosecution agreement. Since the settlement conference, by definition, seeks to obviate the need for the Court to make a determination of fault or to fashion a remedy, Epstein should not be a participant in the settlement conference.

ARGUMENT

A. There Is No General Right of Access to Settlement Conferences

As explained above, none of the intervenors is a party to the central dispute between the petitioners and the respondent – that is, whether or not there was a violation of the CVRA. That disagreement is the one that the petitioners and respondent hope to resolve via the settlement conference. Since none of the groups above has intervened as to that dispute (nor could they), all of the intervenors are, in essence, third party spectators to the settlement conference and the negotiations. The Court has asked the parties to address whether such third party spectators should be allowed to participate in the settlement process. Courts addressing this question have repeatedly answered, "no."

"Settlement proceedings are historically closed procedures," *In re the Cincinnati Enquirer*, 94 F.3d 198, 199 (6th Cir. 1996), and "historically settlement techniques are closed procedures rather than open." *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900, 903-04 (6th

[2] The CVRA itself provides that a "person accused of the crime may not obtain any form of relief under this chapter." 18 U.S.C. § 3771(d)(1).

Cir. 1988). In both of those cases, the press sought access to pre-trial settlement procedures, asserting a First Amendment right of access, and the courts denied such access. In *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003), the Sixth Circuit similarly recognized that "confidential settlement communications are a tradition in this country." *Id.* at 980 (citing *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985)). The rationale for confidentiality is based on the "strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations . . . whether [they] are done under the auspices of the court or informally between the parties. . . . In order for settlement talks to be effective, parties must feel uninhibited in their communications." *Id.* at 980. More recently, the Second Circuit has held that the transcript of a settlement conference was properly sealed, despite the "common law presumptive right of access to judicial documents" because "[t]he 'presumption of access to settlement negotiations . . . is negligible to nonexistent.'" *Pullman v. Alpha Media Pub., Inc.*, 624 F. App'x 774, 779 (2d Cir. 2015) (quoting *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 858 (2d Cir. 1998)). The Second Circuit has further explained that public access to "settlement discussions and documents" does not assist in monitoring the exercise of Article III judicial power because those documents are not "presented to the court to invoke its powers or affect its decisions." *Glens Falls*, 160 F.3d at 857 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995)).

Pursuant to the Eleventh Circuit rules, "[c]ommunications made during [court-ordered appellate] mediation and any subsequent communications related thereto shall be confidential. Such communications shall not be disclosed by any party or participant in the mediation . . . nor shall such communications be disclosed to anyone not involved in the mediation or otherwise not entitled to be kept informed about the mediation by reason of a position or relationship with a party

unless the written consent of each mediation participant is obtained." 11th Cir. L.R. 33-1(c)(3). Mediation statements are confidential and not made part of the court file. 11th Cir. L.R. 33-1(d).

Similarly, in this District, "[a]ll proceedings of the mediation shall be confidential and are privileged in all respects as provided under federal law and Florida Statutes § 44.405." S.D. Fla. L.R. 16.2(g)(2). The proceedings cannot be reported, recorded, or made known to the Court of the jury. *Id.* As in the *Glens Falls* case, the Local Rule makes clear that the mediator does not "rule upon questions of fact or law, or render any final decision in the case," and, if no settlement is reached, reports only on whether the mediation will continue to another day or an impasse was declared. S.D. Fla. L.R. 16.2(a). Thus, like the *Glens Falls* case, the settlement conference will involve no exercise of Article III judicial power.

The procedures set forth in the Court's "Order Scheduling Settlement Conference" (DE378) are consistent with this Court's rules, the Eleventh Circuit's practice, and the cases cited above. That is, it provides for the submission of confidential settlement memoranda and "private caucusing" (*id.* at 2). The presence of third parties with no interest in the underlying dispute or its resolution would disrupt these procedures, which are meant to assist the parties in finding common ground and reaching an alternative, out-of court resolution of their dispute.

The case that prompted the Court's inquiry during the status conference, *State Farm Fire and Cas. Co. v. Hood*, 266 F.R.D. 135 (S.D. Miss. 2010) ("*State Farm I*"), is consistent with these Rules and cases. In *State Farm I*, members of the press sought to intervene "to challenge the confidentiality of the settlement agreement, not to litigate the merits of the underlying lawsuit." *Id.* at 140. The district judge determined that the members of the press had Article III standing to intervene "for the limited purpose of challenging the order sealing certain *court documents*." *Id.* at 143 (emphasis added). Having received permission to intervene, the press then filed their

motion to unseal the court-filed settlement agreement,[3] and the motion was granted. *See State Farm Fire and Cas. Co. v. Hood*, 2010 WL 3522445 (S.D. Miss. Sept. 2, 2010) ("*State Farm II*"). The district judge found that the settlement agreement was a "judicial record" because it had been placed in the court file, and, therefore, there was a presumption of a public right of access. *Id.* at *2. After considering the facts and weighing the concerns asserted by each party, the court then found that the presumption prevailed over the parties' interest in keeping the agreement confidential. *Id.* at *4.

State Farm I and *State Farm II* are inapposite because no "judicial records" are involved in the mediation of this matter. The only "judicial record" will be the Court's mediation report, which is a public document generated *after* the conclusion of the mediation conference in accordance with S.D. Fla. L.R. 16.2(f)(1). If any settlement agreement is reached that is ultimately filed with the Court, then any third party can seek to intervene if a motion or order to seal that agreement is also filed. At this point, any such discussion is premature, because it is not yet known whether a settlement will even be reached, much less whether any resulting settlement agreement will even be filed in the court record.

B. Special Confidentiality Concerns Raised by This Case

In addition to the general rule that settlement conferences are confidential, the involvement of Jeffrey Epstein or other third parties in the conference raises special concerns. First, this action is brought pursuant to the CVRA which provides that the Court "shall ensure" and the government "shall make their best efforts to see that crime victims" are treated "with respect for the victim's

[3] The settlement agreement was entered into the court record when, during the course of a hearing before the district judge, the "parties dictated their agreement into the record." *State Farm II* at *1.

. . . privacy." 18 U.S.C. § 3771(a)(8), (b)(1), (c)(1). Allowing third party access would not be consistent with that right to privacy. *See also* 18 U.S.C. § 3509(d)(1) (requiring court and government employees to keep confidential all documents identifying child victims).[4]

In addition to the general confidentiality provisions governing victim identities, the law also disfavors requiring a victim to have to engage with her alleged perpetrator in order to assert her rights. Thus, for example, a victim cannot be required to participate in a sentencing or restitution hearing in order to obtain an order of restitution. 18 U.S.C. § 3664(g)(1). *See United States v. Speakman*, 594 F.3d 1165 (10th Cir. 2010); *United States v. Aman*, 616 F. App'x 612 (4th Cir. 2015); *United States v. Schmidt*, 675 F.3d 1164 (8th Cir. 2012); *United States v. Hagerman*, 506 F. App'x 14 (2d Cir. 2012) (all discussing § 3664(g)(1)'s prohibition on requiring victim participation in the criminal proceedings).

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[4] While the two Jane Does are now adults, they were minors during the time relevant to the criminal investigation underlying their CVRA claims.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court exclude all third parties, including the intervenors, from observing and/or participating in the confidential settlement conference. If the Court nonetheless allows any of the intervenors to participate or observe, the Respondent respectfully requests that the Court adhere to its "Mandatory Attendance" rule and condition any such participation on the pertinent intervenor "personally appear[ing] at the conference" (DE378 at 1). Absent such personal appearance, the participation of an intervenor will do nothing to assist the resolution of the dispute between the Petitioners and the Respondent; rather, such participation, involving a dispute to which the intervenor is not a party, will only serve as an improper obstacle to a potential settlement to which the intervenor will not be legally bound..

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 22, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. According to the Court's website, counsel for all parties and intervenors are able to receive notice via the CM/ECF system.

s/A. Marie Villafaña
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