Request No. 10 contravenes the critical public policy of encouraging the resolution of criminal prosecutions without trial and the concomitant understanding that defendants will be considerably more likely to engage in full and frank discussions with the government if they need not fear that statements they or their counsel make to government prosecutors will be used against them to their detriment. The critical importance of plea bargaining to the criminal justice system has long been recognized. "[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." *Bordenkircher v. Hayes*, 434 U.S. 357, 361-62 (1978), *quoting Blackledge v. Allison*, 431 U.S. 63, 71 (1977). To encourage defendants to participate in the plea negotiation process, rules have developed to prohibit admission into evidence against the defendant of any and all statements he or his counsel acting on his behalf makes to government prosecutors during the plea negotiation process. This confidentiality protection is embodied in both Fed. R. Evid. 410 and Fed. R. Crim. P. 11(f). While these rules by their express terms refer only to admissibility of evidence, the purposes and policies underlying these rules in instructive in this context, in which a civil plaintiff seeks discovery of documents falling within the scope of these two rules.

> Rule 410 was created to promote active plea negotiations and plea bargains, which our Supreme Court has acknowledged are "important components of this country's criminal justice system.". . . Our Court of Appeals has held that "in order for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that this statements will later be used against him.". . . Indeed, absent the protection of Rule 410, "the possibility of self-incrimination would discourage defendants from being completely candid and open during plea negotiations."

S.E.C. v. Johnson, 534 F.Supp.2d 63, 66-67 (D.D.C. 2008), *quoting United States v. Davis*, 617 F.2d 677, 683 (D.C.Cir. 1980). *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 205, 207 (1995)(purpose of the rules is to encourage plea bargaining, and rules "creat[e], in effect, a

privilege of the defendant," *quoting* 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶410[05] at 410-43 (1994)); *United States v. Barrow*, 400 F.3d 109, 116 (2d Cir. 2005)("The underlying purpose of Rule 410 is to promote plea negotiations by permitting defendants to talk to prosecutors without sacrificing their ability to defend themselves if no disposition agreement is reached"); Fed. R. Crim. P. 11, Advisory Committee Notes, 1979 Amendment ("the purpose of Fed. R. Ev. 410 and Fed. R. Crim. P. 11(e)(6) [now Rule 11(f)] is to promote the unrestrained candor which produces effective plea discussions").[1]

Additional illustration of the high degree of confidentially accorded settlement negotiations is found in Fed. R. Evid. 408, which precludes the introduction into evidence communications made during settlement negotiations. The purposes underlying Rule 408 are essentially the same as those underlying Rules 11(f) and 410: "to encourage non-litigious solutions to disputes." *Reichenbach v. Smith*, 528 F.2d 1072, 1074 (11th Cir. 1976). *See, e.g., Stockman v. Oakcrest Dental Center, P.C.*, 480 F.3d 791, 805 (6th Cir. 2007)("the purpose underlying Rule 408 . . . is the promotion of the public policy favoring the compromise and settlement of disputes that would otherwise be discouraged with the admission of such evidence"); *Bankcard America, Inc. v. Universal Bancard Systems, Inc.*, 203 F.3d 477, 483 (7th Cir. 2000)("Because settlement talks might be chilled if such discussions could later be used as admissions of liability at trial, the rule's purpose is to encourage settlements"); *In re A.H. Robins Co., Inc.*, 197 B.R. 568, 572 (E.D.Va. 1994)("Rule 408 aims to foster settlement discussions in an individual lawsuit, and therefore insulates the particular parties to a settlement discussion

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[1] FRE 410(4) is particularly directed to communications in matters which, like Epstein's, did not result in a plea of guilty to **any** federal charge. Fla. Stat. §90.410 provides parallel protections in state criminal matters.

Epstein pled guilty to Fla. Stat. 796.07(2)(f), *Unlawful to Solicit, Induce, Entice, or Procure Another to Commit Prostitution, Lewdness or Assignation*, and Fla. Stat. 796.03, *Procuring Person Under Age of 18 For Prostitution*. Therefore, in the event this court orders production of said correspondence, then it must first hold an in camera inspection to determine what, if any, documents are related to the foregoing pleas and what documents are not. Along those same lines, an in camera inspection must be had in an effort to redact any information that may violate third-party privacy rights or information that would implicate Epstein's Fifth Amendment rights. See *infra*.

from possible adverse consequences of their frank and open statements"). So crucial is this policy of confidentiality to the functioning of our federal court system that some courts have held that communications falling within the parameters of Rule 408 are covered by a settlement privilege which insulates them not just from admission into evidence but from discovery as well. *See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976, 979-983 (6th Cir. 2003).

Given the powerful and long-standing policy of according confidentiality to settlement negotiations in both the civil and criminal context, civil plaintiffs should, at a minimum, be required to demonstrate real and concrete need for the material. They should not be permitted to rummage through such sensitive documents based on nothing more than a vague and contentless statement that the materials are "likely to lead to the discovery of other admissible evidence." Motion to Compel at 12 n.3, which is all that plaintiff offers as to Request No. 10. This is particularly so given the reality that parties often take positions or offer potential compromise solutions during plea negotiations which are inconsistent with the litigation strategy they will pursue if the case goes to trial. As one court has explained in the civil context:

> There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. . . . The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. . . . Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts.

Goodyear Tire, 332 F.3d at 980. The same is no less true in the plea negotiation context. The free availability in discovery to civil plaintiffs of communications made during the plea negotiation process has profound potential to chill frank and open communications during that process so crucial to the functioning of the criminal justice system in any criminal case which has potential to become a civil or regulatory matter as well. Such defendants will be loath to be fully forthcoming during plea discussions or communications and indeed, if the potential civil or regulatory consequences are sufficiently severe, may decline to enter into plea negotiations at all, if they must fear that their communications will be made available to civil plaintiffs in discovery, thus entirely defeating both the purpose and spirit of Rules 410 and 11(f).

In addition, the communications made during the plea negotiation process contain fact and opinion attorney work product of both Mr. Epstein's attorneys and government attorneys. Particularly given the strong public policy in favor of confidentiality of plea/settlement negotiations, the disclosure of such information should be treated as falling within the selective waiver provisions of Fed. R. Evid. 502 and not be treated as an open-ended waiver of the attorney-client and work product privileges.

The correspondence in question contained what, absent limited disclosure for the specific and exclusive purpose of furthering plea and settlement discussion, would constitute paradigm opinion work product. It includes the views of Epstein's counsel in

the criminal case regarding why a federal prosecution was inappropriate, why the federal statutes did not fit the alleged offense conduct, why certain of the alleged victims were not credible. It also includes Epstein's counsel's views on the limits and inapplicability of certain elements of 18 U.S.C. §2255, one of the principal causes of action in the Jane Doe cases. This opinion work product should not be disclosed when it was incorporated into heartland plea negotiations that are accorded protection under the federal rules of evidence. It is the disclosure of such legal opinions – and not just their admissibility – that should be protected from a civil discovery request that lacked any statement as to why this information was even necessary to the fair litigation of the civil cases.

To The Extent that the Court is considering affirming any part of the Magistrate-Judge's opinion allowing request 10, the defendant requests that the Court first consider (a) receiving a privilege log that would identify specific portions of the correspondance that contains the opinion work product of counsel for Epstein and (b) provide notice to and receive from the United States Attorney their view on the risks of disclosing their correspondance to Epstein. Amongst the reasons the USAO should be advised of this plaintiffs' request is (a) letters from the USAO include opinions, *i.e.*, work product that was disclosed to Epstein's counsel only within the protected parameters of FRE 408 and 410 and would further risk disclosure of the identiites of alleged victims and information that would otherwise be subject to the protections of grand jury secrecy. See *infra*.

Epstein also continues to maintain that the requested correspondence is protected under the Fifth Amendment, as it could furnish a link in the chain of evidence needed to prosecute him for a crime or provide the federal government with information that

provides a lead or clue to evidence having a tendency to incriminate Epstein. See *infra*; Hoffman v. United States, 341 U.S. at 486; United States v. Neff, 315 F.2d at 1239; Blau v. United States, 340 U.S. at 159; and SEC v Leach, 156 F.Supp.2d at 494.