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.
_____/

JEFFREY EPSTEIN,

Intervenor.
_____/

INTERVENOR EPSTEIN'S PROPOSAL REGARDING
THE PROCEDURE TO DETERMINE REMEDY

INTERVENOR JEFFREY EPSTEIN, through undersigned counsel, respectfully submits this proposal in response to the Court's Order of February 21, 2019 (DE 435), as clarified by the Court's Order entered the following day (DE 437).

To summarize, Mr. Epstein proposes: **a)** legal briefing from the Petitioners, on a date to be set by the Court, identifying the remedy they will be seeking, and responses from the government and Mr. Epstein within thirty-five (35) days thereafter; and **b)** a settlement conference among the Petitioners, the government, and Mr. Epstein, on or before April 30, 2019.

In support of this proposal, Mr. Epstein states as follows:

1. On February 13, 2014, this Court entered an Order permitting Mr. Epstein "to intervene with regard to any remedy issue concerning the non-prosecution agreement in this case." (DE 246).

2. At the time, the Petitioners and the government were litigating whether the government had violated the Crime Victims' Rights Act, 18 U.S.C. §3771 ("CVRA"), by purportedly failing to confer with the Petitioners prior to entering into a Non-Prosecution Agreement ("NPA") with Epstein in 2007.

3. On February 21, 2019, this Court entered an Order granting Petitioners' partial motion for summary judgment "to the extent that Petitioners' right to conferral under the CVRA was violated." (DE 435:33).

4. The Court ordered the parties to "confer and inform the Court **within 15 days of the date of the entry of this Order** how they wish to proceed on determining the issue of what remedy, if any, should be applied in view of the violation." (DE 435:33) (emphasis in original).

5. On February 22, 2019, the Court clarified that it "only directs the parties to confer on what submissions or proceedings they believe are necessary in order for the Court to make a determination on a remedy, if any. If the parties are unable to agree on the submissions or proceedings necessary, they may submit separate filings." (DE 437:1).

6. Thereafter, the United States Attorney's Office for the Southern District of Florida ("USAO-SDFL") recused itself from this matter and was replaced by the United States Attorney's Office for the Northern District of Georgia ("USAO-NDGA"). It is

unclear how much time the USAO-NDGA needs to review the 437 docket entries in this case and research the law to be prepared to litigate the remedy stage.

7. In the meantime, Mr. Epstein's undersigned counsel, Roy Black, is currently at the end of week 4 of an expected 8-week trial before the Honorable Robert N. Scola in the case of *United States v. Esformes*, Case No. 16-20549-Cr-RNS. Mr. Black has not had sufficient time to focus on the Court's recent rulings or even to confer with co-counsel in an effort to achieve consensus about a course of action to determine remedy. Undersigned counsel for Mr. Epstein, Martin G. Weinberg, conferred with Bradley Edwards, Esq., counsel for the Petitioners, who has not yet indicated the specific remedy or remedies the Petitioners will be seeking.

8. In the event the Petitioners intend to seek rescission of the NPA, the Court should first set a briefing schedule for the parties to submit memoranda of law regarding whether rescission is even appropriate as a matter of law under the undisputed facts of the case.[1]

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[1] Mr. Epstein did not participate at the "violation" stage of the proceedings and thus cannot be bound by any factual findings in the Court's Order, which he disputes to the extent they effect the determination of remedy. However, there are many facts that are not in dispute, including that Mr. Epstein fully performed his obligations under the NPA, requiring him to plead guilty to a felony in state court, serve thirteen months in prison followed by a year of community control, and register as a sex offender. Moreover, in reliance upon the NPA, Mr. Epstein waived his rights to contest liability and damages as to certain individuals identified by the government as victims, settled civil claims for damages with all claimants including those who brought actions against him under 18 U.S.C. §2255 and those who brought federal or state monetary tort actions (amounting to millions of dollars), paid the attorney representing claimants who brought such §2255 actions, and forewent a speedy resolution of any federal criminal charges. Finally, Petitioners fully availed themselves, and willingly benefitted from, the NPA by invoking it in their state court civil complaints to preclude Mr. Epstein from "denying the acts alleged" and to force him to "effectively admit liability to the Plaintiff." (DE 408, Ex. P, ¶20; DE 408, Ex. Q, ¶20).

9. Although this Court has already held that "the CVRA authorizes the rescission or 'reopening' of a prosecutorial agreement, including a non-prosecution agreement, reached in violation of a prosecutor's conferral obligations under the statute," (DE 435:26, *Doe v. United States*, 950 F. Supp. 2d 1262, 1267 (S.D.Fla. 2013), this Court has not yet considered, from the perspective of the Intervenor, the multitude of constitutional, contractual, statutory and equitable issues that make rescission a wholly inappropriate remedy, including but not limited to the following.

a. The Due Process Clause requires the government to adhere to the terms of any plea bargain or immunity agreement, *United States v. Harvey*, 869 F.3d 1439, 1443-44 (11th Cir. 1989) (*en banc*), especially where, as here, the defendant or immunized party has fully performed. The government has already acknowledged this unremarkable proposition. (DE 205-2:3-4) ("Indeed, even if the Court were somehow to set aside the Non-Prosecution Agreement on the authority of the CVRA, and even if after consultation with Petitioners the United States determined that it would be proper and desirable to institute a criminal prosecution in the Southern District of Florida against Epstein on the charges contemplated in the Non-Prosecution Agreement, the United States would still be constitutionally required to adhere to the negotiated terms of the Non-Prosecution Agreement.").

b. The doctrine of separation of powers counsels against judicial interference with the government's extra-judicial exercise of prosecutorial discretion regarding how best to resolve alleged criminal conduct.

c. Petitioners have waived their right to seek rescission of an agreement they invoked and from which they sought to benefit. *Mazzoni Farm, Inc. v. E.I. DuPont de Nemours & Co., Inc.*, 761 So.2d 306, 313 (Fla. 2000) ("[A] party's right to rescind is subject to waiver if he retains the benefits of a contract after discovering the grounds for rescission.").

d. A "contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his pre-agreement status." *Id.* (quoting *Bass v. Farish*, 616 So. 2d 1146, 1147 (Fla. 4th DCA 1993)).

e. Mr. Epstein has fully performed his end of the agreement. Thus, any claim that the government failed to comply with a federal statute in connection with that agreement does not render the contract void *ab initio*. *See, e.g., Amer. Tel. and Tel. Co. v. United States*, 177 F.3d 1368, 1377 (Fed. Cir. 1999) (*en banc*).

10. An additional reason for first requiring legal briefing before allowing any discovery is that, in addition to the novel question of whether discovery is even permitted under the CVRA, certain potential evidentiary issues, if determined to be within the scope of any future hearing, would raise complex and time-consuming issues. These issues would potentially implicate Sixth Amendment concerns and the attorney-client, work-product, and Fifth Amendment privileges, invade prosecutorial discretion and

decision-making, and subject the parties and others to needless discovery. Thus, the Court should determine the availability of any proposed remedy as a matter of law before permitting additional discovery.

11. Accordingly, Mr. Epstein proposes that the Court set the following briefing schedule regarding remedy:

a. 30 days after both the Petitioners and the government file their response to the Court's order (DE 435:33): Petitioners may file a memorandum of law in support of whatever remedy they will be seeking.

b. 35 days later: Respondent and Intervenor may file a responsive memorandum of law; and

c. 10 days later: Petitioners may file a reply memorandum.

12. In view of the Court's most recent rulings and given that neither Mr. Epstein nor the USAO-NDGA participated in any prior mediation before the Magistrate Judge, Mr. Epstein proposes that the Court direct the parties to mediate this dispute on or before April 30, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of March, 2019, 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/Scott A. Srebnick
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