No. 13-12923

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE NO. 1 AND JANE DOES NO. 2,
Plaintiffs-Appellees

v.

UNITED STATES OF AMERICA,
Defendant-Appellee

ROY BLACK *ET AL.*,
Intervenor/Appellants

REPLY TO OPPOSITION TO MOTION FOR STAY PENDING APPEAL

Roy Black
Jackie Perczek
Black, Srebnick, Kornspan & Stumpf
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
Tel: (305) 371-6421
Fax: (305)358-2006
rblack@royblack.com
jperczek@royblack.com

Martin G. Weinberg
20 Park Plaza, Suite 1000
Boston, Massachusetts 02116
Tel: (617) 227-3700
Fax: (617) 338-9538
owlmgw@att.net

Contrary to plaintiffs' arguments, the standards governing the issuance of a stay pending appeal are amply satisfied in this case. Absent a stay there will be irreparable injury to the intervenor/appellants, as the correspondence which they seek to have remain confidential will have been disclosed. Given the common understanding of both criminal defense counsel and the government that their written settlement and plea discussions will remain confidential and will not be available upon demand to third-party litigants, the important issues raised in this appeal require resolution which can only be fairly accomplished by the granting of the requested stay so the Court can address those issues. Further, given the absolute absence of any identified prior precedent that would give notice to criminal defense counsel as to when, if ever, their written communications would be disclosed to anyone other than the prosecutors, and then subject to Fed. R. Evid. 410 and a universal practice of safeguarding the confidentiality of plea discussions under circumstances such as those herein, a decision on the merits and the provision of meaningful judicial guidance on the issues raised is of critical import, not outweighed by any palpable prejudice to the plaintiffs.

BACKGROUND

First, at various points in their Opposition, plaintiffs complain of how long this action has been pending. Opposition at 1, 2, 16, 19. The delay of which plaintiffs complain, however, is not attributable to Mr. Epstein or the attorney-intervenors.

Instead, plaintiffs, in status conferences in July and August, 2008, knowingly waived or failed to insist upon their right to have the district court "take up and decide any motion asserting a victim's right forthwith," 18 U.S.C. §3771(d)(3). Eighteen months then elapsed while plaintiffs ignored their CVRA action in favor of successfully pursuing civil monetary remedies against Mr. Epstein prior to, rather than concurrently with, litigating their CVRA rights. *See* Motion for Stay Pending Appeal ("Motion") at 5. Another nineteen months elapsed between the filing of the government's motion to dismiss in November, 2011, and the concomitant stay of discovery, and the district court's ruling on the motion in June, 2013. Mr. Epstein's right to pursue his appellate remedies before the confidential communications of his attorneys are disclosed should not turn on the litigation conduct of others.

Second, plaintiffs' statement that they have already seen "significant parts of the correspondence," Opposition at 15 n.7, is misleading, as only correspondence *from* the government *to* Mr. Epstein's attorneys was produced to plaintiffs pursuant to the court's order in *Jane Doe #2 v. Epstein*, No. 08-80119-MARRA, Doc. 462; correspondence authored by Mr. Epstein's counsel during the course of the negotiations has *not* been disclosed. *See* Tr. 8/12/11 (Doc.208) at 17, 64-66 (intervenor-attorney Black states, without contradiction from plaintiff's counsel, that plaintiffs have only the government's side of the correspondence); Doc. 100 at 2 ("To the knowledge of the government, the Jane Does have only received the portions of

the correspondence written by government attorneys – all of the writings of Mr. Epstein's attorneys, except for a few short portions . . . – have been redacted"). Indeed, the very reason why plaintiffs are opposing the requested stay is an effort to speed the disclosure to them of correspondence they do not yet have.

I. INTERVENORS HAVE DEMONSTRATED THEIR LIKELIHOOD OF SUCCESS ON THE MERITS.

Plaintiffs' ridicule of intervenors' confidentiality/privilege claim, Opposition at 10, is predicated on an erroneous characterization of the arguments actually advanced by intervenors. Intervenors do not contend that they had a confidential *relationship* with the government prosecutors to whom the correspondence was addressed. Instead, they rely on their opinion work product privilege and the confidentiality of plea/settlement negotiations which has its roots in Rule 410 and the long-standing reliance of both prosecutors and criminal defense attorneys on the understanding – never before challenged until the litigation brought by the plaintiffs – that communications to prosecuting authorities made in the effort to resolve a criminal investigation of, or criminal charges against, their client will remain confidential and will not be disclosed to third parties trying to acquire and then use defense counsel's written communications. The need for such confidentiality in the criminal negotiation process is no more "far-fetched" than the civil mediation privilege which has been recognized by a number of courts, and which involves

communications to adversaries, *see* Motion at 14-15, and which, like the privilege asserted by intervenors, is essential to the functioning of an important process, here, the plea negotiation process which is so centrally critical to the ability of our criminal justice system to function, *a position with which the government agrees*. *See* Doc. 100. Plaintiffs profess to find it "unclear" why criminal defense attorneys would believe such communications would remain confidential, Opposition at 10-11, but intervenors have explained at length in their Motion just why this is and must be so, *see* Motion at 7-12. Plaintiffs have failed to identify a *single* applicable precedent where communications such as those at issue here – lawyer to lawyer communications involving concrete proposed federal criminal allegations – have been disclosed to third parties. That the CVRA entitles victims to confer with the government regarding plea proceedings, *see* Opposition at 11, does not alter the existence of the confidentiality privilege or the justifiability of defense attorneys' reliance on it when negotiating on behalf of their clients.

The right to confer has never been interpreted as a right to read, receive, or use plea/settlement correspondence falling within Rule 410. The fact that defense attorneys know that the prosecutor may at some point be required to confer with an alleged victim has not changed the practices of defense counsel in communicating with the prosecution, but, as addressed in intervenors' Motion at 8-9, knowledge that henceforth, under the rationale of the district court's order, such correspondence may

be fair game for discovery in civil or other actions against their clients surely will, and not for the better in terms of their abilities to provide their clients with effective representation. In short, however the right to consult under the CVRA is ultimately defined in the underlying case, not even the plaintiffs have contended – or provided any support for the proposition – that the disclosure of written plea and settlement negotiations between defense counsel and the government is part of or inherent in the statutory rights afforded victims by the CVRA.

That Mr. Epstein pled guilty to state charges does not foreclose the applicability of Rule 410, which applies only to guilty pleas in federal court to the offenses which were the subject of the plea negotiations. *See* Motion at 11-12. The negotiation correspondence at issue, which concerned a *federal criminal* investigation of specific *federal* offenses that were the subject of two *federal* grand jury investigations, fall well within the core of defense counsel to prosecutor plea and settlement letters, *see* Tr. 8/12/11 (Doc. 208) at 18, and the state court plea was ancillary to those negotiations. In any event, plaintiffs have not narrowly tailored their demand for production of the correspondence to those portions relating to Mr. Epstein's position with respect to the CVRA or to those concerning the state court plea but have instead sought disclosure of the *entirety* of the correspondence authored by Mr. Epstein's counsel. It is clear that plaintiffs seek more than just access to the correspondence: they plan to use it to prove their case, Tr. 8/12/11 (Doc. 208) at 64-65, despite the fact

that, as the district court recognized, the central issue is whether the government, which alone had statutorily imposed duties, not Epstein, violated the CVRA, *Id.* at 33.

Plaintiffs' argument regarding the immediate appealability of the district court's order, *see* Opposition at 13, has been fully answered in interveors' Response to Motion to Dismiss, filed on July 12, 2013.[1]

II. INTERVENORS WILL SUFFER IRREMEDIABLE HARM IF PRIVILEGED AND CONFIDENTIAL COMMUNICATIONS ARE DISCLOSED TO THE PLAINTIFFS.

Where privileged or confidential communications are concerned, the irreparable injury inheres in their very disclosure. *See* Motion at 15-17, and cases cited therein; Tr. 8/12/11 (Doc. 208) at 18 (intervenor-attorney Black describes correspondence at issue as classic plea negotiation opinion work product). The single case cited by plaintiff, *Northeastern Florida Chapter of Ass'n of Gen. Contractors of America v. City of Jacksonville*, 896 F.2d 1283 (11th Cir. 1990), Opposition at 14, did not involve privileged or confidential communications but instead the question whether the plaintiff had demonstrated the irreparable prejudice essential for the entry of a preliminary injunction. It is, accordingly, quite irrelevant to the present case. Nor, for irreparable injury purposes, does it matter that the cases cited by intervenors were

[1] Plaintiffs' contentions with respect to Rule 501, *see* Opposition at 12-13, have already been answered in intervenors' Motion at 12-15.

decided pre-*Mohawk*. *See* Opposition at 15. *Mohawk* was concerned with interlocutory appealability, not with whether the standard for a stay pending appeal has been satisfied.[2] Nor does it detract in any way from intervenors' irreparable injury argument, as they have no remedy through appeal from a final judgment, as would a party in the action. *See* Response to Motion to Dismiss at 6-12. For non-parties such as intervenors, the injury remains irreparable.

As addressed at page 3, *supra*, plea negotiation communications do not lose their privilege by being communicated to an adversary, *see* Opposition at 15; indeed, Rule 410 presupposes that the information has been communicated to the government. The Rule 410/work product privilege is not waived by communications to the government in the context of plea negotiations, but is defined by it.

The victims may believe that they need the correspondence at issue to move forward with their case, *see* Opposition at 16; *but see* pages 8-9, *infra*, but that does not mean that they are entitled to have it. That is the issue which will be decided by this appeal, and because intervenors have shown that they have a substantial likelihood of success on the merits, plaintiffs may not be entitled to it to pursue their claims against the government. That issue should be resolved before the

[2] While it is true that the district court did deny intervenors' request for a stay, Opposition at 7-8, the court did so without awaiting intervenors' reply to plaintiffs' opposition, which was due to be filed on the same day as the court entered its order denying the stay.

correspondence is disclosed, given the attendant irreparable injury that would befall intervenors from disclosure of their confidential communications.

III. PLAINTIFFS WILL NOT BE PREJUDICED BY THE REQUESTED STAY.

Plaintiffs contend that they will be injured by the requested stay because their efforts to have Mr. Epstein prosecuted will be stymied. *See* Opposition at 17. The fact of the matter, however, is that plaintiffs cannot force the government to prosecute Mr. Epstein. The CVRA only affords victims "[t]he reasonable right to confer with the attorney for the Government in the case," 18 U.S.C. §3771(a), and specifically provides that "[n]othing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." §3771(d)(6). "What the government chooses to do after a conferral with the victims is a matter outside the reach of the CVRA, which reserves absolute prosecutorial discretion to the government." *Doe v. United States*, ___ F.Supp.2d ___, 2013 WL 3089046 at *5 (S.D.Fla. June 19, 2013). *See, e.g., United States v. Thetford*, ___ F.Supp.2d ___, 2013 WL 1309851 at * 1 (N.D.Ala. March 29, 2013)(CVRA rights "do not extend to giving crime victims veto power over the prosecutor's discretion"); *id.* at *4 (CVRA does not confer on victims "the right to dictate Government strategy or demand who to prosecute"); *United States v. Rubin*, 558 F.Supp.2d 411, 418 (E.D.N.Y. 2008)(CVRA "gives victims a voice, not a veto"). *Even if the CVRA affords crime*

victims a "reasonable" right to confer with government attorneys before charges are brought, it does not provide them with any power to insist that an individual be prosecuted, nor does it confer on them the right to be privy to communications between the government and the individual's counsel.[3] Nor do plaintiffs' subjective beliefs that Mr. Epstein somehow obtained a sweetheart deal from federal prosecutors exempt the correspondence from the operation of Rule 410. The question is one of law, not "Law and Order." *See* Opposition at 18 n.9.

IV. GRANTING THE REQUESTED STAY WILL NOT HARM THE PUBLIC INTEREST.

The issue in this appeal is not whether plaintiffs will be able to vindicate their CVRA rights, *see* Opposition at 17, but whether they are entitled to access and use confidential plea negotiation communications in their effort to do so. Even if the public is interested in how the government arrived at its non-prosecution agreement with Mr. Epstein, Opposition at 17-18 & n.9, that is not the question which is at stake with respect to intervenors' motion for a stay pending appeal: whether the public has an interest which will be harmed by granting the requested stay. Plaintiffs already have received, albeit redacted, a fulsome disclosure of the government's plea negotiation communications, communications which they have detailed at pages 7-18

[3] In any event, the government consulted with plaintiffs on multiple occasions; whether that consultation sufficed to satisfy the CVRA will be decided by the district court.

of Attachment "B" to their Opposition. *It is the government which has duties under the CVRA, and the opinions of defense counsel are neither directly related to the government's fulfillment of its consultation obligations under the CVRA nor essential to any public monitoring of how the government exercises its discretion.* There is no public interest which will be harmed by granting the requested stay, but there is a significant one if the stay is denied insofar as the effect on the confidentiality of future plea bargaining when the negotiations are in the context of possible civil litigation. Moreover, plaintiffs' argument begs the question whether the public has a right to knowledge of the contents of intervenors' communications with the government in the course of settlement/plea negotiations. For the reasons addressed in Section II of intervenors' Motion and Section I, *supra*, it does not.

CONCLUSION

The Court should not, as plaintiffs have requested, rush its consideration of intervenors' Motion. This Court should, at a minimum, stay the district court's order until it has ruled on the plaintiffs' motion to dismiss, to which intervenors filed a response in opposition on July 12, 12013. If that motion is denied, and the appeal is allowed to proceed, then the Court should stay the district court's order until the important issues which will be raised in this appeal are decided.

Respectfully submitted,

/s/ Roy Black
Roy Black
Jackie Perczek
Black, Srebnick, Kornspan & Stumpf
201 South Biscayne Boulevard
Suite 1300
Miami, Florida 33131
Tel: (305) 371-6421
Fax: (305)358-2006
rblack@royblack.com
jperczek@royblack.com

/s/ Martin G. Weinberg
Martin G. Weinberg
20 Park Plaza, Suite 1000
Boston, Massachusetts 02116
Tel: (617) 227-3700
Fax: (617) 338-9538
owlmgw@att.net

Intervenor/Appellants and Attorneys for Intervenor/Appellants

CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that on this 15th day of July, 2013, the foregoing document was served, through this Court's CM/ECF system, on all parties of record.

/s/ Martin G. Weinberg
Martin G. Weinberg