UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 AND JANE DOE 2,

Plaintiffs

v.

UNITED STATES OF AMERICA,

Defendant
_____/

INTERVENOR JEFFREY EPSTEIN'S MEMORANDUM IN SUPPORT OF HIS ATTENDANCE AT OR PARTICIPATION IN SETTLEMENT CONFERENCE

Intervenor Jeffrey Epstein has requested that he be permitted to attend, through counsel, the settlement conference to be convened in this matter. With the advent of settlement negotiations, these proceedings have reached the remedy stage, as it is unlikely that any meaningful settlement discussions can take place between the plaintiffs and the government without touching on remedy. Granting Mr. Epstein, through counsel, the right to participate in the settlement conference is necessary to effectuate Judge Marra's order granting Mr. Epstein's motion to intervene as of right at the remedy stage of these proceedings and Judge Marra's grant of permissive intervention regarding the release of information falling within

the grand jury secrecy protections of Rule 6(e). Mr. Epstein's participation within the parameters established for him as an intervenor will further the overall objective of the scheduled settlement conference: to reach an agreed remedy that will resolve all issues in the above-captioned matter.

To the extent that the settlement conference discussions are limited to the issue of the government's liability—whether the government violated the plaintiffs' rights under the CVRA—Mr. Epstein's counsel's role would remain that of a non-participating observer who would not seek to interject himself into the discussions. When, however, the settlement discussions touch on issues relating to remedy, as they inevitably must, Mr. Epstein's counsel would, consistent with his role as an intervenor, address such issues to the extent necessary to safeguard Mr. Epstein's pivotally important interests in avoiding invalidation of his nonprosecution agreement and the release of material protected by Rule 6(e), both of which are remedies which the plaintiffs have said they are seeking. *See* Jane Doe #1 and Jane Doe #2's Response to Government's Sealed Motion to Dismiss for Lack of Subject Matter Jurisdiction, Doc. 127 at 14.

If plaintiffs still intend to pursue the remedy of invalidating Mr. Epstein's nonprosecution agreement, there are strong constitutional and contractual arguments for maintaining the inviolability of that agreement that are common to

both the government and to Mr. Epstein. There are equally compelling reasons why the nonprosecution agreement should not be invalidated that are personal to Mr. Epstein and properly presented only by him, through counsel, at any settlement conference to be held in this matter. Unless and until the plaintiffs inform the Court, finally and irrevocably, that they will no longer seek rescission of Mr. Epstein's nonprosecution agreement or the release of information protected by the grand jury secrecy provisions of Rule 6(e), Mr. Epstein has a vital role to play in any settlement discussions to protect these important personal interests which are not adequately represented by the government.[1]

Case law, including the very recent decision of the United States Court of Appeals for the District of Columbia, *United States v. Fokker Services B.V.*, ___ F.3d ___, 2016 WL 1319266 (D.C.Cir. April 5, 2016), principles of both constitutional law and contract law, and doctrines of constitutional avoidance and fairness all provide powerful reasons why any settlement of this matter should leave Mr. Epstein's nonprosecution agreement intact. Moreover, although

[1] Contrary to the plaintiffs' assertion in a recent pleading, *see* Doc 381, the identity of each of the Jane Does has been known to Mr. Epstein for many years in part as a result of each Jane Doe's decision to delay the litigation of their CVRA claims in order to prioritize their parallel monetary damage lawsuits against Mr. Epstein during which time their identities were disclosed and their depositions taken, *see* pgs. 9-10 infra.

Congress recently broadened the CVRA rights to include protections for crime victims when the government is negotiating plea agreements or Deferred Prosecution Agreements ("DPAs"), which by their terms are predicated upon federal charges set forth in a formal charging instrument filed in federal court, Congress did not extend the CVRA to include nonprosecution agreements, such as Mr. Epstein's nonprosecution agreement in this matter, which by their terms necessarily contemplate that no federal charges have ever been filed in federal court.

I. BACKGROUND.

On July 8, 2013, Mr. Epstein filed his Motion for Prospective Limited Intervention at the Remedy Stage of These Proceedings (Doc. 207), which plaintiffs did not oppose. In that motion, he contended that he "has a clear and compelling interest in opposing any remedy that would entail rescission of his non-prosecution agreement." *Id.* at 1-2. That motion continued:

> [D]enying intervention to Mr. Epstein to litigate remedy will cause him severe prejudice, as the plaintiffs are asking the Court to invalidate a binding contract to which he is a signatory and which implicates his constitutional rights. Mr. Epstein entered into a non-prosecution agreement with the government and has fully performed, to his detriment, his obligations under that agreement . . . . He has an intense interest in opposing plaintiffs' effort to set that agreement aside and in presenting to the Court reasons why the agreement should not be rescinded which are personal to him, as opposed to the institutional considerations which the government has and may advance.

Id. at 5. *See id.* at 8 ("If [Mr. Epstein] cannot intervene to oppose [a rescission] remedy, he will be forced to stand on the sidelines while others litigate rights that are fundamentally important to him"). Mr. Epstein also explained why the government would not adequately represent his interests with respect to remedy:

> Mr. Epstein and the government may share a common goal of opposing a rescission remedy, at least at the present juncture, but their interests, as well as what they would bring to the Court on the issue, vary substantially. The government will (most likely) present general institutional reasons why non-prosecution agreements into which it has entered are binding on it and cannot, or should not, be rescinded. In contrast, in addition to the constitutionally-based arguments which the government may advance, Mr. Epstein has, specific, personal, and private interests in the non-rescission of this particular agreement, including his constitutional right to due process of law, . . . his detrimental reliance on the agreement and his full performance of his many obligations under the agreement on the basis of that reliance. . . . Mr. Epstein's personal constitutional and contractual rights in the matter should be before the Court in making its determination as to remedy, if the proceedings reach that stage, and the government will not adequately represent those rights that are personal to Mr. Epstein.

Id. at 9-10. The order granting Mr. Epstein's motion allowed intervention "with regard to any remedy issue concerning the non-prosecution agreement in this case." Order Granting Jeffrey Epstein's Prospective Limited Intervention at the Remedy State of These Proceedings (Doc. 246).

On July 26, 2013, Mr. Epstein filed a motion to intervene for the purpose of protecting his interests in the secrecy of matters which occurred before the federal grand juries of which he was a target. Doc. 215. In that motion, he contended:

> The materials to which the government has asserted the Rule 6(e) bar to disclosure include materials which would disclose substantial portions of the evidence presented to the grand jury, both documentary and testimonial, and draft indictments of Mr. Epstein, all of which relate to allegations now more than five years old, of a highly sensitive nature which Mr. Epstein never had the opportunity to refute . . . . He has a profound interest in opposing the release to plaintiffs of this grand jury material, which can only redound to his severe prejudice and injury.

Id. at 4. That motion also explained at length why Mr. Epstein's individual interests would not be adequately represented by the government. *Id.* at 6-9. Judge Marra granted the motion as a matter of permissive intervention, over the plaintiffs' objection, finding that Mr. Epstein "has a legitimate interest in asserting a claim that the grand jury material may be protected from disclosure by the Federal Rule of Criminal Procedure 6(e)." Order on Motion for Intervention by Jeffrey Epstein (Doc. 256) at 1.

II. THERE ARE COMPELLING REASONS WHY THE NONPROSECUTION AGREEMENT CANNOT AND SHOULD NOT BE INVALIDATED.

A. The Court Has the Discretion to Permit Mr. Epstein to Participate in the Settlement Conference.

A party may intervene as of right under Rule 24(a) if "(1) the application to intervene is timely; (2) the party has an interest relating to the property or transaction which is the subject matter of the action; (3) the party is situated so that disposition of the action, as a practical matter, may impede or impair its ability to

protect that interest; and (4) the party's interest is represented inadequately by the existing parties to the suit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). In granting Mr. Epstein's motion to intervene as of right to protect the validity of his nonprosecution agreement, Judge Marra necessarily found that these prerequisites to intervention were satisfied, *i.e.*, that Mr. Epstein has an interest in the subject matter of the litigation—the preservation of his nonprosecution agreement—that is not adequately represented by the government.

When, as is true in this case, settlement negotiations will inevitably lead to consideration of the very matters as to which intervention was granted of right, the Court certainly has the discretion to preserve and give effect to that right by permitting Mr. Epstein to attend and participate in such settlement negotiations as necessary. An intervenor's participation in settlement negotiations is not uncommon. *See, e.g., Professional Firefighters Ass'n of Omaha, Local 385 v. Zalewski*, 678 F.3d 640, 647 (8th Cir. 2012)(noting that intervenors participated in settlement negotiations); *City Partnership Co. v. Atlantic Ltd. Partnership*, 100 F.3d 1041, 1043 (1st Cir. 1996)(noting that intervenors participated in settlement negotiations); *Su v. Siemens Indus., Inc*, 2013 WL 3477202 at *3 (N.D.Cal. July 10, 2013)(intervention allowed so that intervenor could participate in settlement negotiations); *United States v. Grand Rapids*, 166 F.Supp.2d 1213, 1220 (W.D.

Mich. 2000)(noting that intervenors participated in settlement negotiations); *In re Discovery Zone Sec. Litig.*, 181 F.R.D. 582, 601 (N.D. Ill. 1998)(intervention allowed so that intervenor could participate in settlement negotiations); *United States v. Maine Dep't of Transp.*, 980 F.Supp. 546, 549 (D.Me. 1997)(noting that intervenors participated in settlement discussions); *Buchet v. ITT Consumer Fin. Corp.*, 845 F.Supp. 684, 690-91 (D.Minn.), *amended* 858 F.Supp. 944 (D.Minn.1994)(intervention allowed so that intervenor could participate in settlement negotiations). Indeed, at least one court has said that it has the power to *force* intervenors to participate in settlement negotiations "when those negotiations take place before the Court in a court-ordered settlement conference." *United States v. Lexington-Fayette Urban Cty. Gov't,* 2007 WL 2020246, at *3 (E.D. Ky. July 6, 2007).

B. Constitutional Considerations: Recent Court Decisions and Amendments to the Statute Under Consideration.

This filing is not the time to fully brief and address the complexity of constitutional and contractual reasons that, if the issue were being litigated, Mr. Epstein would contend mandate denial of any continued attempt to invalidate his 2007 Non-Prosecution Agreement. Mr. Epstein and the government concur to the extent that each party contends that the CVRA cannot be construed to invalidate a pure exercise of executive discretion such as the decision to enter into a

nonprosecution agreement. As stated in a new federal circuit court opinion, decided only two weeks ago, "few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings . . . ." *United States v. Fokker Services B.V.*, ___ F.3d ___, 2016 WL 1319266 at *5 (D.C.Cir. April 5, 2016), *quoting Newman v United States*, 382 F.2d 479, 480 (D.C.Cir. 1967). *Fokker Services* addressed the intersection of judicial and executive powers with respect to a deferred prosecution agreement and held, based on constitutional considerations regarding the powers conferred solely on the Executive, that the district court could not reject the deferred prosecution agreement in that case based on its disagreement with the Executive's charging decisions. Unlike a deferred prosecution agreement, which is predicated on federal criminal charges set forth in a formal charging instrument filed in federal court, and, thus, confers at least some role upon the Judiciary, nonprosecution agreements are contracts exclusively between the government and the defendant, are never filed with the federal court and by definition precede the institution of federal criminal charges. *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* http://www.justice.gov/usam/criminal-resource-manual-163-selection-and-use-monitors (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.").

> 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 courts.*

United States v. HSBC Bank USA, N.A., 2013 WL 3306161 at *5 (E.D.N.Y. July 1, 2013)(emphasis added). The distinction between deferred prosecution agreements and nonprosecution agreements is embodied in the recent May, 2015 amendments to the CVRA, which added the right "to be informed in a timely manner of any plea bargain or deferred prosecution agreement," 18 U.S.C.A. §3771(a)(9), but made no mention of nonprosecution agreements, even though the federal government then regularly entered into nonprosecution agreements and Congress was surely aware of their existence. Congress's omission of nonprosecution agreements from §3771(a)(9), when it had the ability to include them in an amendment whose purpose was to clarify the scope of the CVRA, is evidence of Congress's recognition that the deferred prosecution agreement ("DPA") and the nonprosecution agreement ("NPA") embody two very different scenarios. The

DPA, taking place after the filing in federal court of formal federal charges, is now undeniably subject to judicial supervision and the CVRA, and Congress amended §3771(a)(9) to make that point clear. An NPA, on the other hand, which precedes any filing of federal charges in federal court, represents the exercise of the Executive's exclusive prosecutorial discretion prior to any judicial involvement and was thus excluded from §3771(a)(9) and coverage under the CVRA. Congress recognized the plenary discretion given to the Executive, alone, by the Constitution over decisions regarding what, if any, federal criminal charges should be brought and that such decisions should not be subject to judicial review.[2]

C. Mr. Epstein's Personal Considerations.

Not permitting Mr. Epstein to attend and participate if necessary in the settlement conference would be fundamentally inconsistent with the reasons why intervention was granted in the first instance, as it would substantially compromise his ability to protect his critically important interests in preserving his nonprosecution agreement and preventing the release of personally damaging grand jury materials. "Nonprosecution agreements . . . are contractual in nature,

[2] Where such grave constitutional concerns are present, the doctrine of constitutional avoidance counsels strongly against construing the CVRA to permit rescission of a private individual's nonprosecution agreement as a remedy for violation of its terms by the government. *See, e.g., Clark v. Martinez*, 543 U.S. 371, 381-82 (2005); *Brown v. United States*, 748 F.3d 1045, 1068 (11th Cir. 2014).

and are therefore interpreted in accordance with general principles of contract law. Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform its promises." *United States v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir. 1998). Mr. Epstein has fully performed each and every one of his obligations under the nonprosecution agreement. To the extent that this remedy is addressed during the settlement conference, Mr. Epstein alone can fully illuminate the scope of his performance under his nonprosecution agreement and the extent of prejudice that would result from any rescission.

Moreover, Mr. Epstein alone can best explain the disregard for issues of fairness that would be sanctioned by permitting rescission in response to plaintiffs' dilatory prosecution of their claims in this matter. The action has been pending since 2008, but plaintiffs knowingly sat on their CVRA claims for years while Mr. Epstein fully performed all of the penal, civil, and extensive monetary obligations of his nonprosecution agreement. At the beginning of this case, plaintiffs declined to proceed on an emergency basis just as Mr. Epstein began performing the nonprosecution agreement, and a month later specifically asked that this Court not invalidate the agreement as they initially requested because "it is likely not in [the plaintiffs'] interest to ask for the [rescission] relief that we initially asked for." Tr. 8/14/08 at 4. So inactive were plaintiffs in this case that the Court dismissed the

case for lack of prosecution in September, 2010. (Doc. 38). Plaintiffs thus eschewed moving this case forward in favor of their pursuing, over at least the next eighteen months, civil actions against Mr. Epstein *prior to, rather than concurrently with*, litigating their CVRA rights. During this 18-month period that plaintiffs sought to keep the nonprosecution agreement intact in furtherance of their own interests, not only did Mr. Epstein fully perform the agreement's penal requirements, but he paid millions of dollars in total to and for the benefit of numerous civil claimants, including both plaintiffs, in satisfaction of his civil and monetary obligations under the nonprosecution agreement.

Because of the formidable equitable considerations implicated by plaintiffs' effort to set his nonprosecution agreement aside, Mr. Epstein has an intense interest in presenting to the Court reasons why the agreement should not be rescinded. These reasons are personal to him, as opposed to the more general institutional considerations which the government will likely advance. In order to preserve and give full effect to Mr. Epstein's intense personal interests, he must be permitted to advance his own contractual and equitable considerations at any settlement conference in the event that the plaintiffs do not withdraw their current proposal to seek the invalidation of this now 8 ½ year old nonprosecution agreement that he has fully performed.

CONCLUSION

Declining to permit Mr. Epstein to participate in the settlement conference would be inconsistent with the intervention which was granted to protect his interests in preserving his nonprosecution agreement and continued grand jury secrecy. This Court plainly has the discretion to permit him to participate in the settlement conference and should exercise that discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was filed by my office via CM/ECF on April 22, 2016.

By: __/s/_____
ROY BLACK, ESQ.