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.
_____/

REPLY IN SUPPORT OF MOTION TO INTERVENE OF ROY BLACK, MARTIN WEINBERG, AND JAY LEFKOWITZ

Jane Doe 1 and Jane Doe 2 oppose intervention because according to them, proposed intervenors Black, Weinberg and Lefkowitz do not have a claim of privilege or confidentiality. Jane Doe 1 and Jane Doe 2 contend that all the correspondence at issue was already turned over to them. They are mistaken.

Undersigned counsel spoke with Paul Cassell, one of the lawyers representing Jane Doe 1 and Jane Doe 2, and he confirmed that he and his clients do not have any of the negotiation and settlement letters prepared by the defense attorneys. Additionally, while the settlement and negotiation letters prepared by the government have been turned over to Mr. Cassell and his clients pursuant to the Magistrate Judge's Order in the related case, that Order specifically maintains the confidentiality of those letters and prohibits Jane Doe 1 and Jane Doe 2 from filing them in the public record of any proceeding, disclosing them to the media, or otherwise disclosing them to the public. Finally, the Magistrate Judge's Order specifically does not rule on whether these settlement negotiations are admissible as evidence in any case, holding instead that the ultimate question of their admissibility must be put before the judge in each proceeding. [*Doe v. Epstein*, Case No. 9:08-

CV-80893, DE 226 at 4].

Jane Doe 1 and Jane Doe 2 now request discovery of the settlement letters that have not yet been turned over during discovery [DE 50]; they seek to overturn the Court's previous ruling maintaining the confidentiality of the letters that have been turned over to them [DE 51]; and they ask the Court to rule on the admissibility of those letters to be used in open court. [DE 51]. Accordingly, attorneys Black, Weinberg and Lefkowitz properly move to intervene for the limited purpose of seeking a protective order, and to respond to the motions of Jane Doe 1 and Jane Doe 2.

1. COLORABLE CLAIMS OF PRIVILEGE ARE A TEXTBOOK EXAMPLE OF AN ENTITLEMENT TO INTERVENTION AS OF RIGHT

Jane Doe 1 and Jane Doe 2's attacks on the merits of the privilege and confidentiality claims are premature. In ruling on a motion to intervene to protect privileged or confidential information, the Court's role is limited to determining whether the proposed intervenor has raised a colorable claim of privilege. "Colorable claims of attorney-client and work product privilege [are] . . . a textbook example of an entitlement to intervention as of right." *El-Ad Residences at Miramar Condo. Ass'n, Inc. v. Mt. Hawley Ins. Co.*, 716 F. Supp. 2d 1257, 1262 (S.D. Fla. 2010), *quoting In re Grand Jury Subpoena (Newparent Inc.)*, 274 F.3d 563, 570 (1st Cir. 2001). As Magistrate Judge McAliley held in the context of the attorney-client privilege, "[t]he law in this Circuit, and others, is clear, that this Court must allow intervention . . . 'in the first instance . . . as soon as the [attorney-client] privilege issue is raised.'" *El-Ad Residences*, 716 F. Supp. 2d at 1262. Determination of the merits of the claim, including the extent of the privilege and its applicability in the underlying action, are not appropriately addressed until after intervention. *Id.* "In this and other circuits," the proposed intervenors "need not set forth th[eir] proof before they intervene." *Id.* Because the motion to intervene raises colorable claims of privilege and confidentiality, intervention is appropriate under

Rule 24(a)(2).

2. INTERVENTION IS APPROPRIATE TO PROTECT GRAND JURY MATTERS THAT ARE NEITHER DISCOVERABLE NOR ADMISSIBLE

For these same reasons, Jane Doe 1 and Jane Doe 2's attack on the merits of a claim of confidentiality under Federal Rule of Criminal Procedure 6(e), and their complaint that a privilege log has not been provided, are premature. If intervention is granted, proposed intervenors will then prepare a privilege log. The claim of Jane Doe 1 and Jane Doe 2 that Rule 6(e) extends only to matters that occurred inside the grand jury room is off the mark. *See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 656 F.2d 856, 869 (D.C. Cir. 1981) (identity of witnesses, substance of testimony, strategy, and direction of the investigation properly protected by Rule 6(e)).

Jane Doe 1 and Jane Doe 2 contend that attorneys Black, Weinberg, and Lefkowitz could not possess any protected grand jury information because that would mean that the U.S. Attorney's Office violated Federal Rule of Criminal Procedure 6(e). To the contrary, both the U.S. Attorney's Office and defense counsel relied on the ordinary practice of receiving and responding to information derived from the grand jury investigation to attempt to resolve a potential future prosecution or threat of prosecution, and further relied upon the ordinary protection conferred on such exchange of information by Federal Rule of Evidence 410.

This case is the anomaly. Defense lawyers have a constitutional obligation to explore the option of a non-criminal disposition of criminal (or potential criminal) charges. "The plea bargaining process is so important in our criminal justice system that a defense lawyer who refuses to negotiate with the government will often fail to provide the effective assistance required by the Sixth Amendment." *United States v. Wells*, 394 F.3d 725, 737-38 (9th Cir. 2005). The U.S. Attorney's Office regularly discusses with defense counsel information obtained by an investigating grand jury

in order to incentivize plea agreements and other non-criminal dispositions, including deferred prosecution agreements and non-prosecution agreements.

Jane Doe 1 and Jane Doe 2 misunderstand the reach of Rule 6(e). It is not limited to transcripts; its ambit includes information derived from grand jury subpoenas and testimony and related information. "Courts have interpreted the secrecy requirement imposed by Rule 6(e) to apply not only to information drawn from transcripts of grand jury proceedings, but also to anything which 'may tend to reveal what transpired before the grand jury.'" *In re Grand Jury Investigation (Lance)*, 610 F.2d 202, 216 (5th Cir. 1980). To put in the hands of an adversary who was not involved in the settlement negotiations correspondence that by its nature includes a frank discussion of the nature of the grand jury's investigation is to upset the expectations of confidentiality possessed by prosecutors and defense counsel who regularly engage in frank, open discussions of such matters without apprehension that their discussions will end up in the hands of litigants seeking to exploit them for purposes extrinsic to Federal Rule of Evidence 410.

3. AN INTEREST IN THE DISPUTE OVER THE CRIME VICTIMS RIGHTS ACT IS NOT REQUIRED TO INTERVENE TO PROTECT PRIVILEGED AND CONFIDENTIAL INFORMATION

Jane Doe 1 and Jane Doe 2 also oppose intervention because they claim that attorneys Black, Weinberg, and Lefkowitz do not have an interest "in" the underlying action against the U.S. Attorney's Office. They claim that to intervene to assert a claim of privilege or confidentiality, the lawyers must show that they have "a direct, substantial, and legally protected interest *in the enforcement of the Crime Victims Rights Act.*" [DE 78 at 3] (emphasis added). This is incorrect and a strained reading of Rule 24(a) that would defeat the purpose of intervention in almost every case and would leave third parties with a claim of privilege or confidentiality with no remedy or redress.

Rule 24(a) does not require an interest "***in***" the underlying action; it only requires an interest

"***relating to***" the underlying action such that disposition of the action may impair or impede the movant's ability to protect his interest (a classic case when a claim of privilege is involved):

> **RULE 24. INTERVENTION**
>
> (a) Intervention of Right.
>
> On timely motion, the court must permit anyone to intervene who:
>
> * * *
>
> (2) claims an interest ***relating to*** the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

FED. R. CIV. P. 24(a) (emphasis added).

Proposed intervenors seek a limited intervention to protect against the dissemination of clearly protected correspondence exchanged with the government during plea negotiations. Proposed intervenors have an interest in protecting their work product and the privileged and confidential settlement negotiations with the U.S. Attorney's Office. This interest will be forever impaired if intervention is denied and the correspondence and plea negotiations are subject to discovery, evidentiary use, and dissemination to the media and the public. Without the right to intervene in the underlying action to assert the privilege, third parties like proposed intervenors would suffer the injustice of having their privilege and confidentiality claims erased without ever having been heard.

For these reasons, numerous courts have held that non-parties, including attorneys, must be allowed to intervene in litigation to protect claims of privilege and confidentiality. *See In re Grand Jury Matter (ABC Corp.)*, 735 F.2d 1330, 1331 (11th Cir. 1984); *Appeal of Hughes*, 633 F.2d 282, 286 (3d Cir. 1980) ("The governing rule in these circumstances is that the possessor of the claimed privilege or right may intervene to assert it"); *Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 20-21

(E.D.N.Y. 1996).

4. CONCLUSION

The Court should grant the motion to intervene because proposed intervenors have made colorable claims of privilege and confidentiality concerning correspondence exchanged with the government during plea negotiations.

We certify that on May 12, 2011, the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system.

Respectfully submitted,

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