DRAFT

EPSTEIN – CVRA – REPLY TO PETITONER'S SUMMARY JUDGMENT MOTION:

1. Any failure to notify or consult were not the result of any "conspiracy" with JE, nor any bad faith by the Government: they were the result of the USAO following the nationwide DOJ policy that was reinforced by a Memorandum Opinion for the Acting Deputy Attorney General from the Office of Legal Counsel on December 17, 2010 which determined that "*The rights provided by the Crime Victims' Rights Act are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment)* and cease to be available if all charges are dismissed…(or if the Government declines to bring formal charges after the filing of a complaint". It was not until May 29, 2015 that Congress amended the CVRA, 18 USC 3771(a)(9) to clarify that victims have the "right to be informed in a timely manner of any plea bargain or deferred prosecution agreement" a re-codification that still does not clearly require CVRA rights to apply in the absence of a federal plea agreement or in circumstances where there is a federal Non-Prosecution Agreement, Summary Judgment Motion (hereinafter "Motion") at 48 fn 175.
2. In addition to following nationwide DOJ policy, the USAO had its own independent and good faith interests for any decision not to fully confer with each identified victim during the Sept 24 2007-June 30 2008 period, that being the USAO's credible and principled interest in protecting the credibility of their witnesses in the event that the NPA was never implemented. Although signed, the Government was aware that further negotiations regarding how to fairly implement the unique monetary reward provisions of 18 USC 2255 as well as appeals to the Department of Justice by Epstein's counsel contesting whether there was a sufficient jurisdictional basis for the underlying federal investigation were ongoing, see eg Motion, Exhibit 39 (May 15, 2008 letter by the head of CEOS to Epstein's counsel overruling their objections). The Government properly determined that to disclose the NPA to its victim-witnesses given its containing explicit

financial incentives would risk impairing the credibility of their victim witnesses in the event the NPA not be finalized and should a federal trial ensue, see Villafana Declaration, Dkt 14 at pgs 4-5 ("*the agents and I concluded that informing additional victims could compromise the witnesses' credibility at trial if Epstein reneged on the agreement*")(emphasis added), see also Motion at 29 where FAUSA Sloman emphasized to Epstein's counsel that "none of the victims was informed of any right to receive damages of any amount prior to the investigation of her claim". Until the appeals to DOJ were concluded on June 23, 2008, see Motion at 34-35, par 105, and until Epstein entered his state court plea seven days later, there existed uncertainty as to whether the NPA would be implemented. The Government apprehension that Epstein would plead guilty resulted in their determination that it would compromise their ability to prosecute Epstein if they disclosed the NPAs monetary incentives to the potential victim-witnesses. Such a disclosure was reasonably believed to create a financial bias in favor of a potential witness falsely claiming that she was a victim thus rendering her eligible for a mandatory financial reward that, by statute, was set at a minimum of either $50,000 or $150,000 (the statute was amended mid-way through the implementation of the NPA period) without any individualized proof of injury or damages, 18 USC 2255. Such a disclosure was also reasonably believed to provide a basis for Epstein, had he elected to go to trial, to impeach the credibility of the Government victim witnesses. That the Government was uncertain during the September 2007-June 30, 2008 period that the NPA would be finalized was beyond dispute: the FBI continued to investigate Epstein during this period and the Grand Jury continued to receive evidence relating to the alleged federal offenses during this period. Rather than proof that the "Government and Epstein conspired to conceal the NPA from the victims to prevent them from voicing any objection…", Motion at 7, the Government made its decisions to protect its ability to successfully prosecute Epstein in the event that Epstein failed to finalize his obligations under the NPA as the Government reasonably apprehended he might, given his repeated expressions of dissatisfaction with the NPAs provisions and his repeated appeals to various decision-makers in the Department of Justice unsuccessfully seeking amendments to the NPA.

3. Jane Doe 2, TM, was hostile to the efforts of the USAO and FBI to cooperate against Epstein, Villafana Declaration, Dkt 14 at pg 4, 6.

She was not listed as a federal "victim" in the list provided to Epstein's counsel shortly after the June 30, 2008 state plea. She ultimately consented, through counsel, to a significant multi-year delay in litigating the current petition (which under the statute contains very strict time limits to protect both the petitioners and any defendant who was serving a sentence) in order to prioritize and profit from litigating a separate monetary damage lawsuit against Epstein during which time she never contested the NPA.

4. Jane Doe 1, CW, was one of four victims that in fact were provided with notice of the NPA as early as October of 2008, and who were also provided pro bono counsel with the assistance of the Government at a time prior to her retaining Mr. Edwards, Villafana Declaration, Dkt 14 at pg 4, Motion at 25 ("the Special Agents have said that they explained that Epstein would plead guilty to state charges involving another victim, he would be required to register as a sex offender for life, and he had made certain concessions related to the payment of damages"). Jane Doe 1 also consented through counsel to a significant multi-year delay in litigating the current petition during which Epstein completed the service of his state criminal sentence in order to prioritize and profit from litigating a separate monetary damage lawsuit against Epstein, during which she never contested the NPA.
5. There was no impropriety during the plea negotiations with Epstein. The negotiations at all time were arms-length negotiations between two parties with differing interests. The suggestions that Epstein's counsel had undue influence over the negotiations are baseless: it was Epstein who appealed from what his counsel contended were overly Draconian conditions within the NPA that required his incarceration, that required a plea to and conviction of a state sex offense that mandated lifetime sex offender registration, and that required him to consent to pay damages to each identified federal witness pursuant to 18 USC 2255 despite the absence of a federal plea or conviction and despite his not receiving the victim list until after his state plea was entered and his state sentence commenced. The eventual plea agreement was not "indulgent", Motion at 4, and the USAO was always pursuing its self-interest in reaching such an agreement rather than doing "Epstein's bidding", Id. Despite the Motion's claim that Epstein launched an "assault" on the prosecution after the execution of the NPA in September of 2007, no ameliorative change was made by the USAO to the NPA to benefit Epstein, see Motion at 20.

6. The evidence received by the FBI and Grand Jury that investigated federal child sexual offenses did *not* overwhelmingly prove each element of the two pivotal statutes under consideration. Although Epstein was shown to have traveled interstate and thereafter to have engaged in illegal sexual conduct, he was traveling to his home, a factor that could reasonably be relied upon by Epstein to contest the mens rea for violating 18 USC 2423(b) that required proof that his dominant purpose in traveling was to engage in underage sex. Likewise, although Epstein scheduled sexual massages with underage females, there was no internet inducement and the telephone communications lacked the required indicia of persuasion, inducement, enticement that would indisputably prove a violation of 18 USC 2422(b). At the time, 18 USC 1591 had only been used to prosecute pimps or traffickers who derived a financial benefit from sexual offenses. That Epstein's counsel and the USAO considered various alternatives to a state court resolution, Motion at 12-15, is consistent with the give and take of plea negotiations as parties advance their respective positions in an effort to reach a compromise resolution of an outstanding investigation. What is unique about this case is not that various options were considered; instead, it is that the petitioners received hundreds of pages of letters and emails disclosing what is ordinarily a negotiation and settlement process that remains confidential. Ultimately, the USAO gained the benefit of avoiding the inherent risks of litigation, while vindicating their prosecutorial interest in assuring that Epstein plead guilty to serious state criminal offenses, serve an 18 month jail sentence and community control probation, register as a sex offender, and pay millions of dollars to those victims who asserted their rights pursuant to the NPA and were the beneficiaries of Epstein's agreement to make payments pursuant to 18 USC 2255 which was fully applied, uniquely, in the absence of a federal conviction.
7. That any failure to notify its victim-witnesses regarding the imminence of a state plea was the result not of Epstein's "urgings" or any fear that notification would lead to a public outcry but instead was a good faith response to the legal uncertainty of whether a state court plea involving allegations relating to just 3 women permitted or required notification to those whose allegations were not the subject of the state plea **ADDLAW.** The USAO did not just agree with the good faith legal positions of Epstein's counsel, they deferred "to the discretion of the State Attorney regarding whether he wishes to

provide victims with notices of the state proceedings", Motion at 30-31.

8. That the NPA contained confidentiality provisions was not illegal and not atypical: it is commonplace that subjects and targets of federal Grand Jury investigations who are not federally prosecuted are protected by the secrecy provisions of F.R.Crim.P. 6(e). An agreement not to prosecute (combined with a public state court plea and the disclosure of such provisions of the NPA that conferred restitution-related rights to the victims) was all that would be typically required under these circumstances. The insertion of a confidentiality provision in the NPA resulted not from any "urgings" or "insistence" by Epstein's counsel but instead from a question as to the intention of the USAO to disclose the eventual agreement with the "Office respond{ing} 'A non-prosecution agreement would not be made public or filed with the Court…it is not something that we would distribute without compulsory process", Motion at 15, Exhibit 10, 18, and from the USAO's decision to "reevaluate" its notification obligations in response to objections from Epstein's counsel, see Exhibit 31 at pgs 2-3.
9. **CAN GO THROUGH SJ MOTION** - In particular, the SJ motion raises material factual disputes not resolvable as a matter of law:
    1. Pg 3 – Federal prosecutors had not {dispositively} disproven {all} defense arguments regarding the applicability of the federal sex offenses under investigation
    2. Pg 3 – Neither Jane Doe 1 or 2 alleged interstate travel or inducement through interstate communications as required by 18 USC 2423(b) and 2422(b)
    3. Pg 4 – All of the offense conduct being investigated as well as the state offenses of conviction did involve the payment of money for sex (OMIT?)