

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. ~~If and~~ When, however, the settlement discussions touched 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 ██████████'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 ~~Although certain~~ constitutional and contractual arguments for maintaining the inviolability of that Mr. Epstein's nonprosecution agreement that; ~~if plaintiffs still intend to pursue this remedy,~~ are common to both the government and to Mr. Epstein. There are equally; ~~other~~ 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 ~~personal to him~~ which are not adequately represented by the government, ~~as the granting of intervention as of right confirms.~~

_____ 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), ~~and principles of both~~ constitutional law and contract law, ~~and principles, as well as doctrines theories~~ of constitutional avoidance and fairness ~~and the unfairness to Mr. Epstein of setting aside a contract which he has, to his great detriment, fully performed~~ all provide powerful reasons why any settlement of this matter should leave Mr. Epstein's nonprosecution agreement intact. Moreover, although 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 ordinarily subject to continued judicial supervision, Congress did not extend the CVRA to include ~~circumstances where the government enters a Non-Prosecution Agreements, such as Mr. Epstein's Non-Prosecution Agreement ("NPA")~~ as in this matter.

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, ~~with the government and has interests which are personal to him and would not be adequately represented by the government should the Court determine that a CVRA violation occurred and that rescission or reopening of the non-~~

~~prosecution agreement was one of the remedial options under consideration.”~~ *Id.* at 1-2.1 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, ~~including . . . pleading guilty to state court charges, serving a prison term, serving a year of community control, and paying the attorney representing persons who had brought or were threatening to bring actions against him for money damages. . . .~~ 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.

¹ Courts, including the Eleventh Circuit, have recognized the propriety of intervention to litigate remedy. *See, e.g., Benjamin ex rel. Yock v. Department of Public Welfare*, 701 F.3d 938 (3d Cir. 2012); *Howard v. McLucas*, 782 F.2d 956, 959-61 (11th Cir. 1986); *National Resources Defense Council v. Costle*, 561 F.2d 904, 907-08 (D.C.Cir. 1977); *see also Caterino v. Berry*, 922 F.2d 37 (1st Cir. 1990)(district court denied intervention at liability stage but indicated that it would consider a motion to intervene at the remedy stage).

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. 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.~~ 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~~the settlement conference and to participate as outlined above.~~ An intervenor’s participation in settlement negotiations is not uncommon. It is not uncommon for intervenors to participate in settlement negotiations. See, *e.g.*, *Professional Firefighters Ass’n of Omaha, Local 385 v. Zaleski*, 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, why—Mr. Epstein would contend mandate denial of, ~~were the issue being litigated, that~~ any continued attempt to invalidate his 2007 Non-Prosecution Agreement ~~must be rejected~~. 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 just—two weeks ago, ~~stated~~—“few

subjects are less adapted to judicial review than~~nt~~ 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 results in the filing of criminal charges, and, thus ~~in,~~ confers at least some role ~~for upon~~ the ~~judicial system~~ Judiciary, non-prosecution agreements are contracts exclusively between the government and the defendant ~~that,~~ are never filed with the court and do not result in the institution of 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 Congress was surely aware of their existence. The omission of nonprosecution agreements from §3771(a)(9) plainly evidences a congressional determination that crime victims do not have the right to be informed regarding nonprosecution agreements. The Executive exercised its plenary discretion, given to it and it alone by the Constitution, over decisions regarding what, if any, federal criminal charges should be brought, and that decision 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, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of

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).

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 and the extent of prejudice that would result from any rescission, ~~including pleading guilty to state court charges, serving a prison term, serving a consecutive term of community control, and making civil settlements with a myriad of civil monetary claimants including [REDACTED]~~. Based on these paramount equitable considerations, Mr. Epstein has an intense interest in opposing plaintiffs’ effort to set his nonprosecution agreement aside and in presenting to the Court reasons why the agreement should not be rescinded. These reasons are ~~which 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 ~~which he should 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 his fully performed, now 8 ½ year old nNonp-Prosecution aAgreement.

CONCLUSION

Declining to permit Mr. Epstein to participate in the settlement conference would be inconsistent with the intervention which was granted ~~as to~~ protect his interests in preserving the preservation of his nonprosecution agreement and ~~in the~~ continued preservation of grand jury

secrecy. This Court plainly has the discretion to permit him to participate ~~en~~in the settlement conference and should exercise that discretion.