

No. 13-12923

In the United States Court of Appeals For the Eleventh Circuit

JANE DOE NO. 1 & JANE DOE NO. 2,

Plaintiffs-Appellees,

v.

UNITED STATES OF AMERICA,

Defendant,

ROY BLACK, MARTIN G. WEINBERG,
& JEFFREY EPSTEIN,

Intervenors-Appellants.

TIME SENSITIVE MOTION FOR A STAY PENDING A RULING ON INTERVENORS' PETITION FOR REHEARING

ROY BLACK
JACKIE PERCZEK
BLACK, SREBNICK, KORNSPAN
& STUMPF, P.A.
201 South Biscayne Blvd.
Suite 1300
Miami, FL 33131
Tel: (305) 371-6421
Fax: (305) 358-2006
rblack@royblack.com
jperczeck@royblack.com

G. RICHARD STRAFER
G. RICHARD STRAFER, P.A.
201 South Biscayne Blvd.
Suite 1380
Miami, FL 33131
Tel: (305) 374-9091
Fax: (305) 377-9937
richard@richardstrafer.com

MARTIN G. WEINBERG
20 Park Plaza
Boston, MA 02116
Tel: (617) 227-3700
Fax: (617) 338-9538
Owlmgw@att.net

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, Intervenor/Appellants hereby certify that the following persons have an interest in the outcome of this case:

1. Marra, The Honorable Kenneth
2. Acosta, R. Alexander
3. Black, Roy
4. Cassell, Paul G.
5. Edwards, Bradley J.
6. Epstein, Jeffrey
7. Ferrer, Wifredo A.
8. Howell, Jay
9. Lee, Dexter
10. Lefkowitz, Jay
11. Perczek, Jackie
12. Reinhart, Bruce
13. Sánchez, Eduardo I.
14. Sloman, Jeffrey
15. Strafer, G. Richard

16. Villafaña, A. Marie

17. Weinberg, Martin

18. Doe No. 1, Jane

19. Doe No. 2, Jane

/s/ Roy Black
Attorney for Intervenor/Appellants

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TIME SENSITIVE MOTION FOR A STAY PENDING A RULING ON INTERVENORS' PETITION FOR REHEARING

Pursuant to Fed. R. App. P. 8 and 27 and 11th Cir. R. 27-1(b), Intervenor Roy Black, Martin Weinberg, and Jeffrey Epstein move this Court on a time sensitive basis for the continuation of the stay pending appeal issued by this Court on September 13, 2013, *see* **Exhibit 1**, of the district court's order of June 18, 2013 (Doc. 188), *see* **Exhibit 2**, ordering disclosure to plaintiffs of the Intervenor attorneys' written communications with federal prosecutors in the Southern District of Florida made with the specific purpose of obtaining a favorable resolution of the criminal investigation of Jeffrey Epstein through attorney-to-attorney settlement negotiations. On April 18, 2014, a Panel of this Court affirmed the district court's ruling in a to-be-published Opinion, *see* **Exhibit 3**, and simultaneously lifted the stay. However, the Intervenor intend to file a timely motion for rehearing or rehearing en banc. Since production of the documents to the plaintiffs will effectively moot any relief obtained through that motion, the Intervenor seek a continuation of the stay until a petition for rehearing or rehearing en banc can be timely filed and decided by this Court.

The government has informed counsel that, absent the continuation of the stay, it will turn over the documents to plaintiffs' counsel by **Friday, May 2, 2014**, making this motion time sensitive. Accordingly, pursuant to 11th Cir. R. 27-1(b), the Intervenor request a ruling on this motion from the Court by **no later than Friday**,

May 2, 2014. Pursuant to 11th Cir. R. 27-1(b), the Intervenors have contacted both the Clerk's Office of this Court and opposing counsel telephonically and advised them of this time sensitive Motion.

In support of this time sensitive motion, the Intervenors submit the following Memorandum.

MEMORANDUM

I. INTRODUCTION

The Panel opinion in this case decided an issue of first impression in this Court, ordering disclosure *to third party litigants* of private and confidential communications from attorneys seeking to resolve a criminal matter favorably to their clients to government prosecutors. In so ruling, the Panel declined to recognize “a common law privilege for plea negotiations” under Fed. R. Evid. 501. Panel Op., p. 20. Unless rehearing is granted, the Panel’ opinion will drastically reshape the landscape of criminal settlement negotiations and overturn expectations of privacy, confidentiality, and privilege on which criminal defense attorneys have reasonably relied for decades in negotiating with government attorneys on behalf of their clients. Moreover, although the Court cast its ruling only in terms of “plea negotiations” in criminal cases, the Panel’s ruling necessarily implicates – and, we submit undermines – the broader, umbrella *litigation* privilege that is well-established in Florida and that this Court has recognized as encompassing settlement negotiations generally. *See in*

Jackson v. BellSouth Telecoms., 372 F.3d 1250, 1274-75 (11th Cir. 2004) (finding the litigation privilege applied to actions taken in the course of settlement negotiations because they were “inextricably linked” to the ongoing litigation, and stating, “Florida’s litigation privilege affords absolute immunity for acts occurring during the course of judicial proceedings”).¹ And, although the Panel found support for its opinion in the Federal Circuit’s rejection of a privilege for settlement negotiations, *see* Panel Op., p. 23, citing *In re MSTG, Inc.* 675 F.3d 1337 (Fed. Cir. 2012), the Panel failed to note that its opinion directly conflicted with the Sixth Circuit’s ruling in *Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc.*, 332 F.3d 976 (6th Cir. 2003), which not only recognized a settlement privilege but held that that privilege protects settlement negotiations from discovery. *Accord Duncan v. Phoenix Supported Living, Inc.*, 2006 U.S. Dist. LEXIS 66742 (W.D. N.C. Sept. 12, 2006). In light of the potentially far-reaching impact of the Panel’s opinion, the stay should be continued until the full Court has an opportunity to weigh-in.

¹ Florida’s litigation privilege is absolute once litigation has commenced and can be invoked prior to the initiation of a judicial proceeding under certain circumstances. *See Kelly v. Palmer, Reifler & Associates, P.A.*, 681 F. Supp. 2d 1356 (S.D. Fla. 2009), citing *Pledger v. Burnup & Sims, Inc.*, 432 So.2d 1323 (Fla. 4th DCA 1983).

II. BACKGROUND

Intervenor Jeffrey Epstein entered into a Non-Prosecution Agreement (“NPA”) with the government in September, 2007. Under that agreement, Mr. Epstein pled guilty to two state felony offenses and served a prison sentence and a term of community control probation. The agreement, with which he has fully complied, also required that he pay the legal fees of the attorney-representative of identified victims and that he not contest liability in any cases brought against him solely under 18 U.S.C. § 2255. Many plaintiffs sued under § 2255 and received settlements as the direct result of Mr. Epstein’s agreement not to contest liability in those cases. Other plaintiffs, including the Jane Does in this case, “relied on the [NPA] when seeking civil relief against Epstein . . . and affirmatively advanced the terms of the [NPA] as a basis for relief from Epstein.” United States’ Reply in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction, Doc. 205-6 at 12-13.

After reaping the benefits of the NPA, the plaintiffs seek herein, among other remedies, the rescission of that agreement. While the underlying CVRA action was commenced as an emergency petition, plaintiffs shortly thereafter appeared at a status conference, knowing that Mr. Epstein was in prison, and told the district court that they saw no reason to proceed on an emergency basis. Trans. July 11, 2008 (Doc. 15) at 24-25. Then, a month later, plaintiffs withdrew their request that the district court rescind the NPA, telling the court that because of the legal consequences of

invalidating the NPA, it was probably not in their interests to ask for rescission. See Trans. August 14, 2008 (Doc. 27) at 4. Plaintiffs spent the next 18 months pursuing civil remedies against Mr. Epstein, and ultimately obtaining settlements, while their CVRA action remained dormant. Indeed, so inactive were plaintiffs that the district court dismissed the case for lack of prosecution in September, 2010. Doc. 38. *See also* Order Denying Government's Motion to Dismiss (Doc. 189) at 5 (“Over the course of the next eighteen months, the CVRA case stalled as petitioners pursued collateral civil claims against Epstein”).

During the course of civil litigation against Mr. Epstein, Mr. Epstein was ordered, over his strenuous objection, to produce documents given to him by the government during the course of his settlement/plea negotiations with it. *See Jane Doe #2 v. Epstein*, No. 08-80119-MARRA, Doc. 462. Once the CVRA action was reactivated – after plaintiffs had successfully pursued their civil monetary remedies against Mr. Epstein to completion – plaintiffs sought to use that correspondence in the CVRA case and thereafter also sought disclosure from the government of correspondence authored and sent to the government by Epstein's attorneys in the course of their efforts on behalf of their client to resolve the ongoing criminal investigation of him. Both Mr. Epstein and his criminal defense attorneys – Intervenor/appellants Roy Black and Martin Weinberg – filed motions to intervene for the limited purpose of challenging the use and disclosure of the settlement/plea

negotiation correspondence (Doc. 56, 93), followed by supplemental briefing and motions for a protective order, contending, among other things, that the correspondence fell within the bounds of privilege under Fed. R. Evid. 501. Doc. 94, 160,161, 162.

The district court granted the motions to intervene (Doc. 158, 159), but ultimately ruled that the correspondence was subject to disclosure. Doc. 188. Among other things, the district court rejected Intervenors' argument based on Rule 501 on the ground that Congress has already addressed the issue in Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 and did not see fit to recognize a privilege for plea negotiation communications. *Id.* at 8-9.

Although the district court denied Intervenors' request for a stay pending appeal, this Court granted a stay. On April 14, 2014, however, the Panel affirmed the district court's rulings using the same rationales.

III. ARGUMENT

A. The Standard Governing The Issuance of Time Sensitive Stays

The standards governing stays generally and stays needed on an emergency or time sensitive basis are similar. For emergency relief under 11th Cir. R. 27-1(b)(2), a party must both state the reasons for granting that relief and specifically address four factors: (1) The likelihood that the party will prevail on the merits; (2) The prospect of irreparable injury if the stay is denied; (3) The possibility of harm to other parties

if a stay is granted; and (4) The public interest in continuing the stay until the Court can rule upon a timely filed motion for rehearing or rehearing en banc. The rule codifies the holdings of numerous cases in this Circuit governing the issuance of appellate stays generally. *See In re Federal Grand Jury Proceedings*, 975 F.2d 1488, 1492 (11th Cir. 1992). *Florida Businessmen for Free Enterprise v. City of Hollywood*, 648 F.2d 956, 957 (11th Cir. 1981). An analysis of these factors justifies continuing the stay to afford the Intervenors a meaningful opportunity to seek and obtain rehearing. Unless the stay is temporarily continued for that limited purpose, they will be immediately and irreparably harmed by the disclosure of the communications at issue; the plaintiffs will suffer no harm from the granting of a stay until these critically important issues can be resolved by the full Court; and to the extent that the public has an interest in the matter, it would favor considered appellate resolution of the issues presented prior to the release of the communications at issue.

B. The Likelihood of Success On the Merits

Prior to the Panel's ruling, only three other circuits had addressed whether to recognize a settlement negotiation privilege. The Sixth Circuit in *Goodyear Tire* both recognized the privilege and extended it to bar discovery. The Sixth Circuit's ruling is consistent with this Court's decision one year later in *Jackson v. BellSouth Telecoms.*, 372 F.3d 1250, 1274-75 (11th Cir. 2004), which recognized that Florida's

long-standing litigation privilege applied to settlement negotiations generally.² The Federal Circuit in *MSTG, Inc.* disagreed, citing the Seventh Circuit's 35-year old precedent in *In re General Motors Corp. Engine Interchange Litigation*, 594 F.2d 1106, 1124 n. 20 (7th Cir. 1979), but also expressly recognized that the "District courts are divided on whether a settlement privilege exists." *MSTG, Inc.* 675 F.3d at 1342 n. 2 (citations omitted).

The Panel's decision to side with *MSTG* instead of *Goodyear* was based on an incorrect application of the Supreme Court's seminal decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996). In "authoriz[ing] federal courts to define new privileges by interpreting 'common law principles . . . in the light of reason and experience,'" Rule 501 of the Federal Rules of Evidence "did not freeze the law governing the privileges of witnesses in federal trials at a particular point in our history, but rather directed federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 8 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). "[T]estimonial privileges may be justified . . . by a 'public good transcending the

² In the years since *Jackson* was decided, Florida courts have continued to extend the reach of the litigation privilege. See *Echevarria, Mccalla, Raymer, Barrett & Frappier v. Cole*, 950 So.2d 380 (Fla. 2007) (holding that the privilege extends to all causes of action in Florida); *Wolfe v. Foreman*, 128 So.3d 67 (Fla. 3d DCA 2013) (applying privilege even to malicious prosecution). See also *Acosta v. James A. Gustino, P.A.*, 2013 U.S. Dist. LEXIS 163697 (M.D. Fla. Nov. 18, 2013) (extending privilege to bar claims under debt collection statutes).

normally predominant principle of utilizing all rational means for ascertaining truth.” *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 50). Here, as in *Jaffee*, such a “public good” exists, as is made clear by a correct application of the four-step privilege methodology prescribed by the Supreme Court in *Jaffee*.

First, “[l]ike the spousal and attorney-client privileges” a settlement/plea negotiation privilege “is ‘rooted in the imperative need for confidence and trust.’” *Id.* at 10 (quoting *Trammel*, 445 U.S. at 51). As Judge Suhrheinrich observed for the unanimous panel of the Sixth Circuit:

In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of “impeachment evidence,” by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts.

Goodyear, 332 F.3d at 980. In the course of negotiating settlements, parties to threatened or ongoing litigation need to be able to bargain creatively, acknowledge past wrongdoing, and propose monetary and other compromises of their respective claims and defenses in a way that they simply would not if those communications were subject to discovery by third parties. Reason and experience counsel that our system of sentencing laws, ethical rules, federal court dockets, and constitutional considerations will not function if plea negotiation communications are not privileged.

After all, “it is immediately apparent that no defendant or his counsel [would] pursue [plea negotiations] if the remarks uttered during the course of it are to be admitted in evidence as proof of guilt.” *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977).

Given the essentiality of promoting these kinds of candid settlement discussions, a number of statutory provisions preserve the confidentiality of these discussions. *See, e.g.*, Fed. R. Evid. 408 (offers to compromise civil claims); Fed R. Evid. 410 (offers to compromise criminal claims); 5 U.S.C. § 574(b) (mandating that “[a] party to a dispute resolution proceeding shall not voluntarily disclose or through discovery or compulsory process be required to disclose any dispute resolution communication” occurring as part of “the administrative process”). The Panel, however, rejected Intervenors’ request to recognize a common law privilege for communications made in the course of settlement/plea negotiations on the ground that Congress has already addressed the issue in Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 and did not see fit to recognize a privilege for plea negotiation communications. However, neither the Rules of Evidence nor the Rules of Criminal Procedure have ever dealt with specifying the privileges which will and will not be recognized; instead, they leave that function to the courts under Rule 501. Nothing in Rules 11(f) or Fed. R. Evid. 408 and 410 suggest that Congress rejected (or even thought about) a litigation privilege for settlement/plea negotiation communications when framing

those provisions. Rules 11(f), 408 and 410 deal only with what is admissible; they do not purport to extend to what is discoverable. Rules 408 and 410 begin with the assumption that the litigants themselves are *already* in possession of settlement/plea negotiation materials, and thus the Rules describe the circumstances in which those materials may either be admitted or excluded from consideration at trial. It says nothing, however, about whether a *nonparticipant* in the negotiations is entitled to obtain those materials in discovery in the first instance to advance interests distinct from those at issue during the settlement/plea negotiations. That question must be answered by reference to Fed. R. Evid. 501, which “empower[s] the federal courts to ‘continue the evolutionary development of [evidentiary] privileges.’” *Adkins v. Christie*, 488 F.3d 1324, 1328 (11th Cir. 2007), quoting *Trammel*, 445 U.S. at 47/

While the literal terms of Rules 408 and 410 speak to the inadmissibility of such evidence at trial, it seems clear that *the policy* animating these rules would be seriously undermined if the settlement/plea discussions are routinely discoverable. For example, if pre-indictment settlement communications with the U.S. Attorney’s Office are not privileged from third-party discovery, then the chilling effect on internal investigations of corporate wrongdoing would be dramatic and unacceptably deleterious. As one commentator has explained:

A strong argument in favor of viewing rule 408 [of the Federal Rules of Evidence] as creating a privilege can be built from the principal purpose of this rule. Because its principal purpose is to encourage settlement by

encouraging “freedom of communication with respect to compromise, even among lawyers,” rule 408 has something very important in common with traditionally recognized privileges. The principal reason the law cloaks communications between attorney and client with confidentiality, for example, is to encourage clients to “tell all” to their lawyers. The traditional privileges, in short, have been designed to open up lines of communication in certain settings in which full communication will serve important societal interests. The fact that rule 408 is designed to serve a closely analogous function is a major argument in favor of viewing it as creating a privilege.

Wayne D. Brazil, *Protecting the Confidentiality of Settlement Negotiations*, 39 HASTINGS L.J. 955, 990 (1988) (quoting Fed. R. Evid. 408 Advisory Committee’s Note).³ Given this “imperative need for confidence and trust” between parties attempting to settle their respective claims, *Jaffee*, 518 U.S. at 10, it seems clear that, absent a settlement privilege, “the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.” *Goodyear*, 332 F.3d at 980.

Second, *Jaffee* “make[s] clear that an asserted privilege must also ‘serve public ends.’” 518 U.S. at 11 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981)). Fostering such “judicial efficiency” undoubtedly “serv[es] public ends,”

³ See also Brazil, *supra*, at 999 (“I have hosted many settlement conferences during which parties have expressed concerns about related cases or parallel situations involving nonparties, or in which one party has been unwilling to settle unless it is assured that the terms will not be disclosed to others who might be encouraged to file new claims or hold out for more money in cases already docketed. It is naive not to recognize that lawyers and litigants are constantly concerned about how their statements or actions in one setting might come back to haunt them in other settings.”).

given the burden on the federal judiciary and the delays in the prompt delivery of justice to litigants – both civil and criminal – caused by the ever-mounting docket of the federal courts. “The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system.” *Goodyear*, 332 F.3d at 980; *see also, e.g., University of Tenn. v. Elliott*, 478 U.S. 788, 798 (1986) (noting “the public’s interest in conserving judicial resources”); *United States v. Contra Costa County Water Dist.*, 678 F.2d 90, 92 (9th Cir. 1982) (noting “the public policy favoring the compromise and settlement of disputes”) (footnote omitted). As the Second Circuit has explained:

It is essential to the proper functioning of the Civil Appeals Management Plan that all matters discussed at these conferences remain confidential If participants cannot rely on the confidential treatment of everything that transpires during these sessions then counsel of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal manner more suitable to poker players in a high-stakes game than to adversaries attempting to arrive at a just resolution of a civil dispute. This atmosphere if allowed to exist would surely destroy the effectiveness of a program which has led to settlements. . . , thereby expediting cases at a time when the judicial resources of this Court are sorely taxed.

In the Matter of Lake Utopia Paper Ltd., 608 F.2d 928, 930 (2d Cir. 1979). These general principles are at their zenith in criminal cases since the overwhelming majority of criminal cases are resolved through plea bargaining. Such bargaining should be “encouraged” because “[i]f every criminal charge were subjected to a full-scale trial, the states and the federal government would need to multiply by many times the

number of judges and court facilities.” *Santobello v. New York*, 404 U.S. 257, 260 (1971).

Third, as in *Jaffee*, “the likely evidentiary benefit that would result from the denial of the privilege is modest.” 518 U.S. at 11. “If the privilege were rejected,” many of the candid and comparatively uninhibited communications that are essential to effective settlement negotiations “would surely be chilled.” *Id.* at 1-12. “Without a privilege, much of the desirable evidence to which litigants such as [Jane Does] seek access . . . is unlikely to come into being. This unspoken ‘evidence’ will therefore serve no greater truth-seeking function than if it had been spoken and privileged.” *Id.* at 12. *See also Hickman v. Taylor*, 329 U.S. 495, 510-511 (1947) (recognizing that if an attorney’s work product was “open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten” and “[i]nefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advance and in the preparation of cases for trial”).

Even if this chilling effect were only partial, it is doubtful whether much legitimate probative evidence could be gained from permitting settlement communications to be discoverable, given “the inherent questionability of the truthfulness of” many statements made in at least the early phases of settlement negotiations which, in civil cases in particular, “are typically punctuated with numerous instances of puffing and posturing since they are ‘motivated by a desire for

peace rather than from a concession of the merits of the claim.” *Goodyear*, 332 F.3d at 981 (citations omitted). And, in criminal cases, defense counsel negotiating a favorable plea may offer concessions on facts or compromises on charges that, absent a bargain, would be vigorously contested.⁴

Fourth, Jaffee urges courts to examine whether a broad consensus of support exists amongst the States for recognizing the asserted privilege. The Panel claimed that this factor did not support the Intervenors but ignored the fact that “all 50 States and the District of Columbia have enacted into law some form of” settlement privilege

⁴ Cases declining to recognize various asserted privileges are distinguishable because the cost-measured in terms of the loss of probative evidence-of recognizing the asserted privilege was disproportionately high. *See, e.g., University of Penn. v. EEOC*, 493 U.S. 182 (1990) (academic peer-review privilege, where the privilege would have blocked disclosure of the most direct evidence of whatever racial or sexual discrimination may have tainted the defendant’s refusal to grant tenure to the complainant); *In re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005) (reporter’s privilege, where the very act of leaking the identity of a covert CIA operative to a reporter was the criminal act being investigated); *see also id.* (only one of the three members of the panel, Judge Sentelle, rejected a common-law reporter’s privilege on the merits); *In re Sealed Case*, 148 F.3d 1073 (D.C. Cir. 1998) (rejecting a “protective function privilege” that would have prevented Secret Service agents from testifying about criminal conduct they witnessed first-hand while protecting the President). In contrast, a plea negotiation/settlement privilege is much closer to traditional privileges such as the attorney-client, priest-penitent, and psychotherapist-patient privileges, which entail the loss of evidence of *secondary* and often litigation-related conduct, rather than *primary* conduct giving rise to the underlying lawsuit. *In re Grand Jury Proceedings*, 103 F.3d 1140 (3d Cir. 1997), is distinguishable because the privilege asserted there – a “parent-child privilege” – had been “rejected” by “[t]he overwhelming majority of all courts,” including eight federal Courts of Appeals. *Id.* at 1146.

protecting the confidentiality of settlement communications that take place in the context of mediation. *Jaffee*, 518 U.S. at 12.⁵

Indeed, 11 of the 13 federal Courts of Appeals (including this Circuit) and the vast majority of federal district courts have adopted comparable rules protecting the confidentiality of mediation. *See, e.g.*, 1st Cir. R. 33(c); 2d Cir. R. App. Part D(4); 3d Cir. R. 33.5(c); 4th Cir. R. 33; 5th Cir. R. App. VI, Parts 8-9; 6th Cir. R. 33(c)(4); 8th Cir. R. 33A(c); 9th Cir. R. 33-1; 10th Cir. R. 33.1(D), 33.2(D); 11th Cir. R. 33-1(c)(3); D.C. Cir. R. App. III; 28 U.S.C. § 652(d) (directing “each district court” to adopt “local rule[s]” “provid[ing] for the confidentiality of the alternative dispute resolution processes and . . . prohibit[ing] disclosure of confidential dispute resolution communications.”).

The Panel discounted this nationwide consensus regarding the importance of protecting the confidentiality of settlement communications taking place in other contexts, such as mediation, and focused narrowly upon a plea negotiation privilege

⁵ *See, e.g., Folb v. Motion Picture Industry Pension & Health Plans*, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) (“every state in the Union, with the exception of Delaware, has adopted a mediation privilege of one type or another”) (citing Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. REV. 715, Appendix A (collecting statutes)); *see also* Del. Super. Ct. Civ. R. 16.1 (2004) (mandating that communications made in or in connection with court-affiliated mediation “are not subject to disclosure”).

between criminal defense attorneys and prosecutors. However, in *Jaffee*, the Supreme Court rejected such an approach and relied heavily upon the nationwide consensus for a *psychiatrist/psychologist-patient* privilege in recognizing a *psychotherapist-patient* privilege broad enough to encompass the social worker at issue in *Jaffee*. See 518 U.S. at 12-18 and n.11; see also *id.* at 19-22 (Scalia, J., dissenting) (explaining that nearly all of the Court’s analysis pertains to the question whether there should be a privilege for communications with “‘a person authorized to practice medicine’ or ‘a person licensed or certified as a psychologist,’” rather than with the social worker at issue in *Jaffee*) (citations omitted). After all, the considerations favoring the recognition of a privilege under the first three prongs of *Jaffee* are similar, if not identical, for settlement communications that take place outside of formal mediation. As the Sixth Circuit succinctly observed: “There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. *This is true whether settlement negotiations are done under the auspices of the court or informally between the parties.*” *Goodyear*, 332 F.3d at 980 (emphasis added); see also Michael D. Moberly, *The Discoverability of Severance Agreements in Wrongful Discharge Litigation*, 20 HOFSTRA LAB. & EMP. L.J. 1, 15 (2002) (“mediation is merely a specialized form of settlement negotiation”) (footnote and citations omitted). Consequently, “[d]iscovery generally should not be allowed as to settlement

negotiations between the parties.” Jay E. Grenig & Jeffrey S. Kinsler, HANDBOOK OF FEDERAL CIVIL DISCOVERY AND DISCLOSURE, § 1.62 (2d ed. 2005).

C. The Intervenees Will Suffer Irreparable Injury If A Stay Is Denied

Absent a stay from this Court, the Intervenees will suffer irreparable injury from the imminent destruction of the privilege that they properly have claimed over their sensitive attorney work-product and other materials that Intervenees confided in government lawyers in furtherance of their settlement efforts. The government has informed counsel that it will produce the materials to the private third parties absent a continuation of the stay this Court had previously ordered pending the outcome of the appeal. If this Court denies the prayed-for stay, then “the issue of privilege” would become “effectively moot.” *United States v. Philip Morris*, 314 F.3d 612, 619 (D.C. Cir. 2003) (citations omitted). “As our prior cases have repeatedly noted, ‘appeal after final judgment is obviously not adequate in [privilege] cases-the cat is out of the bag.’” *In re. Sealed Case (Medical Records)*, 381 F.3d 1205, 1208, 1210 (D.C. Cir. 2004) (citation omitted). Whatever relief this Court might be able to fashion after the fact would be practically ineffective, given the nature of the documents at issue, because “[i]t would be impossible for a court to sort out and redress the harm caused by the incorrect disclosure.” *Philip Morris*. 314 F.3d at 619.⁶

⁶ See also *In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. (continued...))

D. Continuing the Stay Will Not Substantially Harm the Plaintiffs

Given the procedural history of this case, any claim of “substantial harm” by the plaintiffs would ring hollow. Whatever effects that a stay of short duration may have on other parties would be insubstantial and, at most, a mere inconvenience. *See Philip Morris*, 314 F.3d at 622 (“A mere assertion of delay does not constitute substantial harm. Some delay would be occasioned by almost all interlocutory appeals.”).

E. The Public Interest Will Be Served By Issuance Of The Stay

As recited above, the public-interest factor militates more strongly in favor of a stay here than in *Philip Morris*. Because this Circuit had not yet squarely held whether a settlement privilege exists, continuing the stay pending rehearing would give the entire Court the opportunity to resolve this important question of federal common law in the context of a concrete case or controversy presenting the kind of adversity called for by Article III and by well-established precepts of common-law

⁶(...continued)

2009)(finding risk of irreparable harm because “a court cannot restore confidentiality to documents after they are disclosed”); *Gill v. Gulfstream Park Racing Ass’n, Inc.*, 399 F.3d 391, 398 (1st Cir. 2005)(“once the documents are turned over to Gill with no clear limitation on what he may do with them, the cat is out of the bag, and there will be no effective means by which TRPB can vindicate its asserted rights after final judgment”); *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir.1997)(“We find . . . that forced disclosure of privileged material may bring about irreparable harm”); *In re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir. 1994)(forced disclosure of privileged documents would cause irreparable harm).

adjudication. *See, e.g., Diamond v. Charles*, 476 U.S. 54, 61-62 (1986) (the Article III case-or-controversy requirement “ensures the presence of the ‘concrete adverseness which sharpens the presentation of issues . . .’ *Baker v. Carr*, 369 U.S. 186, 204 (1962).”).

Counsel has been in contact with United States Attorney Paul Cassell, who stated that this motion is opposed.

CONCLUSION

The settlement/plea negotiation process, a critical component of the criminal justice system and one with serious Sixth Amendment implications once formal charges have been brought, cannot function properly unless counsel are assured that their communications with prosecutors will not later be subject to disclosure to third parties seeking to harm their clients. The settlement/plea negotiation process is of such profound public and constitutional importance that the entire Court should be given the opportunity to decide whether to recognize the privileged nature of the correspondence under Fed. R. Evid. 501. For these reasons, Intervenors respectfully submits that this Court should grant a stay, on a time sensitive basis, until the Intervenors have filed and the Court ruled upon their motion for rehearing.

Respectfully submitted,

/s/ Roy Black

Roy Black
Jackie Perczek
BLACK, SREBNICK, KORNSPAN
& STUMPF, P.A.
201 So. Biscayne Blvd., Suite 1300
Miami, Florida 33131
Tele: (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
Tele: (617) 227-3700
Fax: (617) 338-9538
owlmgw@att.net

/s/ G. Richard Strafer

G. Richard Strafer
G. RICHARD STRAFER, P.A.
201 So. Biscayne Blvd., Suite 1380
Miami, Florida 33131
Tele: (305) 374-9091
Fax: (305) 377-9937
richard@richardstrafer.com

Intervenor/Appellants and Attorneys for Intervenor/Appellants

CERTIFICATE OF SERVICE

I HERE CERTIFY that a true copy of the foregoing was filed via CM/ECF, this
24th day of April, 2014.

/s/ Roy Black
Roy Black

EXHIBIT 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 13-12923-CC

JANE DOE,

Plaintiff - Appellee,

versus

UNITED STATES OF AMERICA,

Defendant - Appellee,

ROY BLACK,
MARTIN G. WEINBERG,
JEFFREY EPSTEIN,

Intervenors - Appellants.

On Appeal from the United States District Court for the
Southern District of Florida

BEFORE: DUBINA, MARCUS, and PRYOR, Circuit Judges.

BY THE COURT:

Appellants' motion to stay the district court's June 18, 2013, order compelling the disclosure of communications between intervenors and federal prosecutors is GRANTED. See *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

The Clerk is directed to place this case on the next available oral argument calendar after briefing is completed.

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

John Ley
Clerk of Court

For rules and forms visit
www.ca11.uscourts.gov

September 23, 2013

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 13-12923-CC
Case Style: Jane Doe v. Roy Black
District Court Docket No: 9:08-cv-80736-KAM

This Court requires all counsel to file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause.

The enclosed order has been ENTERED.

Sincerely,

JOHN LEY, Clerk of Court

Reply to: Joe Caruso
Phone #: (404) 335-6177

MOT-2 Notice of Court Action

EXHIBIT 2

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 08-80736-CIV-MARRA

**JANE DOE #1 and JANE DOE #2,
petitioners,**

vs.

**UNITED STATES OF AMERICA,
respondent.**

**ORDER GRANTING PETITIONERS' MOTION TO PROFFER
GOVERNMENT CORRESPONDENCE IN SUPPORT OF CVRA CLAIMS
& GRANTING MOTION TO UNSEAL CORRESPONDENCE AND RELATED
UNREDACTED PLEADINGS OF PETITIONERS**

THIS CAUSE is before the court on the petitioners' motion to use correspondence generated between the United States Attorney's Office for the Southern District of Florida (USAO/SDFL) and counsel for Jeffrey Epstein to prove the Crime Victims' Rights Act (CVRA) violations alleged in this proceeding, joined with motion to unseal petitioners' unredacted pleadings which reference and incorporate the correspondence [DE 51]; the government's response to the motion [DE 60]; petitioners' reply to the government's response [DE 74]; intervenors Roy Black, Martin Weinberg, and Jay Lefkowitz's opposition to the motion, including motion for protective order [DE 160, 161]; intervenor Jeffrey Epstein's opposition to the motion, including motion for protective order [DE 162]; intervenors' notice of supplemental authority in support of asserted common law privilege [DE 163]; petitioners' response to supplemental briefing of intervenors [DE 167]; intervenors' reply in further support of motion for protective order [DE 169] and petitioners' supplemental authority in opposition [DE 172].

The government does not object to petitioners' request to use the correspondence as evidence in this proceeding, but does oppose, in part, the motion to unseal. More specifically, the government expresses a concern that certain labeled "facts" included in the "Statement of Undisputed Facts" filed in support of petitioners' "Motion for Finding of Violations of the Crime Victims' Rights Act" [DE 48] "relate[] to matters occurring before the grand jury" which it is unable to confirm or deny without doing violence to its obligation of grand jury secrecy under Fed. R. Crim P. 6(e).¹ It also expresses concern that these allegations describe crimes alleged against Jeffrey Epstein and others for which they were never charged or convicted, contending that the Due Process Clause requires the court to maintain this information under seal to protect the reputations of persons who may have been under federal investigation but not charged or convicted. *See e.g. In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981)(requiring redaction from records of guilty pleas of references to name of individual who was not charged or convicted).

Intervenors Jeffrey Epstein and his attorneys object to the petitioners' request for permission to use the evidence in this proceeding, and object to petitioners' request to unseal the correspondence and related pleadings on the following grounds: (1) the correspondence is the privileged opinion

¹Fed. R. Crim. P. Rule 6(e)(2)(B) provides:

Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

- (i) a grand juror;
- (ii) an interpreter;
- (iii) a court reporter;
- (iv) an operator of a recording device;
- (v) a person who transcribes the recorded testimony;
- (vi) an attorney for the government; or
- (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).

work-product of Epstein's legal counsel; (2) the correspondence is protected under grand jury secrecy principles codified at Fed. R. Crim. P. 6(e) because its subject matter overlaps with matters occurring before the grand jury; (3) the correspondence is shielded against disclosure under Fed. R. Crim. P. 11(f)² and Fed. R. Evid. 410³ because it consists of and relates to statements made during the course of plea discussions between Epstein, through counsel, and federal prosecutors; (4) the correspondence is irrelevant because rescission of Epstein's non-prosecution agreement with the United States Attorneys' Office for the Southern District of Florida is not an available remedy in this CVRA proceeding; (5) the court should craft a new common law privilege encompassing plea discussions under Fed. R. Evid. 501.

At the outset, the court observes that the intervenors' privilege objections to public release of the correspondence in question were previously rejected by Magistrate Judge Linnea Johnson in a discovery order entered in a parallel civil lawsuit, *Jane Doe # 2 v. Jeffrey Epstein*, Case No. 08-80893-CIV-MARRA. By order entered January 5, 2011 in that proceeding, Magistrate Judge Johnson expressly rejected Epstein's request for the "Court to find the subject correspondence privileged and on that basis prohibit plaintiffs' counsel from disclosing it in either of the two

²Fed. R. Crim. P. 11(f) provides, "The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410."

³Federal Rule of Evidence 410 (a) provides in pertinent part:

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

.....

(4) a statement during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a plea of guilty or they resulted in a later-withdrawn guilty plea.

proceedings [the pending state court or federal (CVRA) proceedings].” [Case No. 08-80893, DE 226].⁴ The court finds no reason to revisit that ruling here.

As a threshold matter, “statement[s] during plea discussions” protected under Fed. R. Evid. 410 do not include general discussions of leniency and statements made in the hope of avoiding a federal indictment - arguably the content of the correspondence at issue here. *See e.g. United States v. Merrill*, 685 F.3d 1002 (11th Cir. 2012)(statements made to AUSA during meetings were not statements made during plea negotiations under Rule 410, where there were no pending charges against defendant when discussions occurred; general discussions of leniency did not transform meeting into plea negotiations); *United States v. Edelmann*, 458 F.3d 791, 804-06 (8th Cir. 2006)(Rule 410 inapplicable to statements made during preindictment meetings by defendant seeking to avoid indictment and not reach plea agreement); *United States v. Hare*, 49 F.3d 447, 450 (8th Cir. 1995) (voluntary statements made in hope of improving situation before plea negotiation has begun or after plea agreement is reached are not statements made “in the course of plea discussions” protected by Rule 410).

In addition, the communications between Epstein’s counsel and federal prosecutors at issue here ultimately *did* result in entry of a plea of guilty by Epstein --to specific state court charges -- thereby removing the statements from the narrow orbit of “statement[s] made during plea discussions...if the discussions did not result in a guilty plea....” which are inadmissible in

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The Magistrate Judge contemporaneously directed that the documents remain under seal pending ruling by the relevant institutions on the admissibility of the evidence and conditions of disclosure. The material has accordingly remained under seal in the instant CVRA proceeding before this court, as one institution charged with adjudication of the parallel victim claims.

proceedings against the defendant making them under Rule 410. See e.g. *United States v. Paden*, 908 F.2d 1229, 1235 (5th Cir. 1990)(statements made during negotiations that resulted in a final plea of guilty not protected under Rule 410), *cert. denied*, 498 U.S. 1039, 111 S. Ct. 710 (1991).

The court also summarily rejects the government and intervenors' suggestion that the correspondence is appropriately preserved under seal under the grand jury secrecy rule codified at Fed. Crim. P. 6(e) because the subject matter of the correspondence happens to coincide with matters presented to the grand jury. Fed. R. Crim. P. 6(e)(2) prohibits particular persons from disclosing "a matter occurring before a grand jury," and Fed. R. Crim. 6(e)(6) provides that "[r]ecords, orders and subpoenas relating to grand jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury."

The phrase "matter occurring before the grand jury" encompasses what has occurred, what is occurring and what is likely to occur before the grand jury, *In re Motions of Dow Jones & Co* 142 F.3d 496 (D. C. Cir. 1998), but it does not cover prosecutors' strategies, recommendations, *In re Sealed Case No. 99-3091 (Office of Independent Counsel Contempt Proceeding)*, 192 F.3d 995 (D. C. Cir. 1999)(internal deliberations of prosecutors that do not directly reveal grand jury proceedings are not Rule 6(e) material), or opinions about an individual's potential criminal liability. See *In re Grand Jury Investigation (Lance)*, 610 F.2d 202 (5th Cir. 1980)(statements about potential criminal liability, even if based on knowledge of grand jury proceedings, not covered by Rule 6(e), provided statement does not reveal the grand jury information on which it is based). This follows because "it is not the information itself, but the fact that the grand jury was considering that information which is protected by Rule 6(e)." *Anaya v. United States*, 815 F.2d 1373, 1379 (10th Cir.

1987).

Thus, Rule 6(e)'s provisions do not extend to the disclosure of information obtained from a source independent of the grand jury proceeding, such as a parallel or prior government investigation. *In re Grand Jury Subpoena*, 920 F.2d 242 (4th Cir. 1990); *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982); *United States v. Smith*, 787 F.2d 111, 115 (3d Cir. 1986)(fact that witness received "target letter" not subject to grand jury secrecy under Rule 6(e) where it appeared to be expression of opinion of United States Attorney, based on his or her knowledge of status of criminal investigation).

Next, the court rejects the attorney intervenors' assertion of opinion-work product privilege as a shield against public release or use of the correspondence as evidence in this CVRA proceeding. Assuming without deciding that any part of the correspondence in question reflects "the mental impressions, conclusions, or legal theories" of Epstein's attorneys, Fed. R. Civ. P. 26(b)(3), any work product protection which might otherwise attach to this product was necessarily forfeited when Epstein voluntarily submitted the information to the United States Attorney's Office in the hopes of receiving the *quid pro quo* of lenient punishment for any wrongdoings exposed in the process.

Work product protection is provided only against "adversaries." Thus, disclosure of the material to an adversary, real or potential, works a forfeiture of work product protection. *United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997). In this case, Epstein's attorneys' disclosure to the United States Attorney's Office was plainly a disclosure to a potential adversary. The United States Attorneys' office, at that juncture, was reviewing evidence relating to Epstein' sexual crimes against minor females within the Southern District of Florida and

deliberating the filing of relevant federal charges; while Epstein's counsel clearly hoped to avoid any actual litigation between the United States and Epstein, the potential for such litigation was plainly there. By voluntarily and deliberately disclosing this material to federal prosecutorial authorities investigating allegations against Epstein at that time, any work product protection was necessarily lost. See e.g. *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), cert. dismissed, 539 U.S. 977 (2003); *In re Quest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006); *Westinghouse Electric Corp. v Republic of Philippines*, 951 F.2d 1414, 1428-31 (3d Cir. 1991); *In re Subpoena Duces Tecum*, 738 F.2d 1367, 1372 (D.C. Cir. 1984).

Finally, the court rejects the intervenors' invitation to craft a new federal common law privilege governing plea discussions with prosecutorial authorities under the authority conferred by Fed. R. Evid. 501.⁵ Federal Rule of Evidence 501 instructs federal courts to develop federal common law privilege according to principles of common law as they may be interpreted "in the light of reason and experience." The applicable test in assessing whether federal common law should recognize a new privilege "is whether such a privilege promotes sufficiently important

⁵Federal Rule of Evidence 501 provides:

The common law – as interpreted by United States courts in the light of reason and experience - governs a claim of privilege unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute; or
- rules prescribed by the Supreme Court.

But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

interests to outweigh the need for probative evidence.” *Jaffee v. Redmond*, 518 U.S. 1, 9-19, 116 S. Ct.1923, 135 L.Ed. 2d 337 (1996); *Trammel v. United States*, 445 U.S. 40, 47, 100 S. Ct. 906, 63 L.Ed.2d 186 (1980).

Recognizing that there is a presumption against privileges which may be overcome only when it would achieve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth, *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), citing *United States v. Nixon*, 418 U.S. 683, 710, 94 S. Ct. 3090, 3108, 41 L.Ed. 2d 1039 (1974)(privileges are in derogation of the search for truth and should not be lightly created nor expansively construed), and that the Supreme Court has been “especially reluctant to recognize a privilege in an area where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself,” *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189, 110 S. Ct. 577, 582, 107 L.Ed.2d 571 (1990)(declining to recognize common law privilege protecting academic peer review materials), this court declines to recognize a new federal common law privilege over plea discussions as here urged by the intervenors.

Congress has already addressed the competing policy interests raised by plea discussion evidence with the passage of the plea-statement rules found at Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410, which generally prohibits admission at trial of a defendant’s statements made during plea discussions, ⁶ without carving out any special privilege relating to plea discussion materials. Considering the Congressional forbearance on this issue -- and the presumptively public nature of

⁶The policy behind Rule 410 is to permit a defendant to freely negotiate without fear that statements will be used against him. *United States v. Knight* 867 F.2d 1285 (11th Cir. 1989).

plea agreements in this District --⁷, this court declines the intervenors' invitation to expand Rule 410 by crafting a federal common law privilege for plea discussions. *See e.g. Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007)(declining to recognize medical peer review privilege in federal discrimination cases); *Weiss ex rel. Estate of Weiss v. County of Chester*, 231 F.R.D. 202 (E. D. Pa. 2005)(declining to recognize medical peer review privilege in §1983 action); *Johnson v. United Parcel Service, Inc.*, 206 F.R.D. 686 (M.D. Fla. 2002)(declining to recognize "self-critical analysis" privilege in Title VII race discrimination case); *Aramburu v. Boeing Co.*, 885 F. Supp. 1434 (D. Kan. 1995)(same).

Conclusion

Accordingly, the court rejects the privileges asserted by intervenors as bases for maintaining the correspondence and related pleadings incorporating the correspondence under seal in this proceeding. Finding the asserted privileges inapplicable, the court finds no legitimate compelling interest which warrants the continued suppression of this evidentiary material under seal in this proceeding. *See generally United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005)(reversing order sealing document in drug trafficking conspiracy prosecution in order to protect cooperating defendants and confidential informants where unsupported by record finding to rebut presumption of openness of court proceedings),and shall therefore grant petitioners' motion to unseal the

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On January 22, 2009 Chief Judge Federico Mereno issued an administrative order requiring complete remote electronic access to all (unsealed) plea agreements extending to all members of the public and the bar, contrary to the expressed wishes of the U.S. Department of Justice. *See In Re: Remote Electronic Access to Plea Agreements*, Administrative Order 2009-2, United States District Court, Southern District of Florida (January 22, 2009); Marcia Coyle, *Federal Prosecutors Want to Shutter Public Access to Plea Agreements*, *The National Law Journal*, Sept. 17, 2007 (online)(DOJ asks Judicial Conference to rescind policy of making plea agreements available on line)

correspondence. While the court shall also grant the petitioners' motion to use the evidence as proof of alleged CVRA violations to the extent it shall allow petitioners to proffer the evidence in support of their CVRA claims, this order is not intended to operate as a ruling on the relevance or admissibility of any particular piece of correspondence, a matter expressly reserved for determination at the time of final disposition.

It is therefore **ORDERED AND ADJUDGED**:

1. The petitioners' motion to use correspondence between the United States Attorneys' Office and counsel for Jeffrey Epstein to prove the violations of the CVRA alleged in this proceeding [DE 51] is **GRANTED** to the extent that the petitioners are granted leave to proffer the evidence in support of their CVRA claims in this proceeding. The court shall reserve ruling on the ultimate relevance and admissibility of any particular piece of correspondence until the time of final disposition.

2. The petitioners' motion to unseal unredacted pleadings incorporating the subject correspondence [DE# 51] is **GRANTED**, with the following proviso: The petitioners are directed to file unredacted pleadings, including attached correspondence, in the open court file. *However, before placing the materials in the court file, petitioners are directed to carefully review each page of the correspondence in question and to REDACT: (1) all references to victims' names or initials; (2) all identifying information with regard to internal telephone numbers and/or emails of government attorneys or employees; (3) all identifying references or names of individuals other than Epstein relating to uncharged crimes; (4) all correspondence describing and/or attaching grand jury subpoenas (see US Atty Correspondence Bates 329-356).*

3. The petitioners shall file unredacted pleadings in the court file in conformity with the above prescriptions within **TWENTY (20) DAYS** from the date of entry of this order.

4. The motion for protective order submitted by Intervenor Black, Weinberg and Lefkowitz [160, 161] and motion for protective order submitted by limited Intervenor Jeffrey Epstein [162], seeking the continued suppression under seal of correspondence relating to plea discussions between Epstein's counsel and federal government prosecutorial authorities, are **DENIED**.

DONE AND ORDERED in Chambers at West Palm Beach, Florida this 18th day of June, 2013.



Kenneth Marra
United States District Judge

cc.
All counsel