UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 08-80736-Civ-Marra/Johnson

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____/

JANE DOE #1 AND JANE DOE #2'S RESPONSE IN OPPOSITION TO INTERVENORS' MOTION TO STAY

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to respond in opposition to Intervenors' Motion for Stay Pending Appeal (DE 193). The intervenors – Jeffrey Epstein and his team of defense lawyers (hereinafter referred to collectively as "Epstein") -- have requested a stay of the Court's order requiring disclosure of correspondence connected with plea negotiations on behalf of Epstein relating to crimes he committed against the victims (DE 188, DE 190) pending an interlocutory appeal to the Eleventh Circuit. The motion should be denied for two straightforward reasons: First, Epstein cannot take such an interlocutory appeal; second, on the merits, any such appeal would be baseless and thus Epstein cannot demonstrate a likelihood of success on the merits and the other requirements for obtaining a stay pending appeal.

I. EPSTEIN CANNOT TAKE AN INTERLOCUTORY APPEAL OF THIS COURT'S DISCOVERY ORDER.

Epstein has asked the Court for a stay "pending appeal." (DE 193 at 1). This raises the immediate question of how the Eleventh Circuit would have jurisdiction over such an appeal.

Epstein apparently does not rely on 28 U.S.C. § 1292(b), which gives district courts discretion to authorize interlocutory appeals in civil cases where "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[1] Instead, Epstein claims that he is entitled to an interlocutory appeal under *Perlman v. United States*, 247 U.S. 7 (1918). Epstein claims that "questions of privilege and confidentiality asserted by non-parties to the litigation are paradigmatic examples of circumstances in which interlocutory appeals are allowed." (DE 193 at 2). Epstein (and his battery of lawyers), however, have conspicuously chosen to ignore recent controlling caselaw from the Supreme Court, which makes clear that an interlocutory appeal is not permitted.

A. The Supreme Court's Recent Decision in *Mohawk* That Attorney-Client Privilege Rulings are Not Immediately Appealable Limits the *Perlman* Doctrine to Non-Litigants in a Case.

Contrary to Epstein's claim that privilege litigation is a paradigmatic example of when interlocutory appeals are proper, the Supreme Court has recently and flatly concluded otherwise. In *Mohawk Industries, Inc. v. Carpenter*, 130 S.Ct. 599 (2009), an opinion that immediately appears when performing basic research on this issue, the Supreme Court affirmed the Eleventh Circuit and rejected an effort by a defendant to take an interlocutory appeal of a district court decision denying an attorney-client privilege claim. *Mohawk* explained that "[p]ermitting piecemeal, prejudgment appeals . . . undermines efficient judicial administration and encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing

[1] Presumably the reasons that Epstein does not rely on this provision is that he does not want the expansive discovery that would follow from characterizing this cases as a "civil" case, as well as the insurmountable problem of demonstrating that his time-wasting, interlocutory appeal would somehow advance the ultimate termination of the litigation.

litigation." *Id.* at 605 (internal quotations omitted). *Mohawk* noted that "most discovery rulings are not final" and thus not appealable. *Id.* at 606. *Mohawk* specifically held attorney-client privilege issues to be no different than other discovery rulings: "In our estimation, post-judgment appeals generally suffice to protect the rights of litigants and assure the vitality of the attorney-client privilege." *Id.*

Rather than cite this recent, controlling decision, Epstein's relies on *Perlman v. United States*, 247 U.S. 7 (1918), as grounds for an interlocutory appeal. Of course, appellate court jurisdiction is typically confined to "final" judgments of the district court. 28 U.S.C. § 1291. *Perlman* recognized a narrow exception to the final judgment rule in situations where a district court has denied a motion to quash a grand jury subpoena directed at a disinterested third party, non-litigant, leaving the privilege holder powerless to remedy harm from disclosure. *Perlman*'s reasoning, however, directly conflicts with *Mohawk*.[2] As the Seventh Circuit has recently explained, "*Mohawk* . . . calls *Perlman* and its successors into question, because, whether the order is directed against a litigant or a third party, an appeal from the final decision will allow review of the district court's ruling." *Wilson v. O'Brien*, 621 F.3d 641, 643 (7th Cir. 2010); *accord Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236-40 (6th Cir. 2011) ("[T]he *Mohawk* decision has altered the legal landscape related to collateral appeals of discovery orders adverse to the attorney-client privilege and narrowed the category of cases that qualify for interlocutory review."). Under these recent court of appeals authorities from other circuits (the Eleventh

[2] *Perlman* has also been described as "Delphic" by no less an authority than Judge Friendly. *See In re Sealed Case*, ---F.3d---, 2013 WL 2120157, at *5 (D.C. Cir. 2013) (refusing to read *Perlman* expansively, *citing Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 178 (2d Cir.1979) (Friendly, J.)).

Circuit has not discussed *Perlman* recently), "Only when the person who asserts a privilege is a non-litigant will an appeal from the final decision be inadequate." *Wilson*, 621 F.3d at 643; *Holt-Orstead*, 641 F.3d at 240.

In light of these latest decisions, Epstein cannot avail himself of an interlocutory appeal if he is a litigant in this case. If he is a litigant, then he can simply wait (like every other litigant) to challenge an erroneous privilege order (or any other order for that matter) on appeal from any adverse judgment against him. By previously filing a motion for limited intervention in this case (which the Court granted, *see* DE 159, granting DE 93), Epstein is a litigant in this case and therefore he cannot take an interlocutory appeal now. Indeed, Epstein has announced that he will seek to intervene further in this case should any effort be made by the victims to seek a remedy that would harm him. *See, e.g.*, DE 108 at 13 n.3 (claiming that Epstein has an "interest" in the non-prosecution agreement and that his interests would later become "ripe" if the Court were to consider invalidating that agreement).[3] As a result of his current posture in this case, Epstein can appeal any adverse privilege ruling that harms him at the conclusion of this case. The Eleventh Circuit accordingly lacks jurisdiction to hear any interlocutory appeal from Epstein under *Mohawk*.

B. The Court's Discovery Order Requiring the United States to Produce Certain Plea Agreement Correspondence is Not Immediately Appealable Under *Perlman*.

Even assuming that for some reason Epstein could not take an appeal at the conclusion of the case, the *Perlman* doctrine would still not allow Epstein to take an immediate, interlocutory appeal for multiple reasons.

[3] The victims reserve their right to challenge any such belated intervention.

1. Epstein is Not a Privilege Holder.

The first hurdle that Epstein cannot clear is the fact that the *Perlman* doctrine applies to claims of privilege, not other ancillary discovery or evidentiary issues. *See, e.g., In re Grand Jury Proceedings*, 142 F.3d 1416, 1419 (11th Cir. 1998) (applying *Perlman* in context of attorney-client privilege claim). Epstein is not seeking to take an interlocutory appeal of what is truly a *privilege* issue. Instead, he first purports to appeal an issue regarding the applicability of Rule 410 of the Federal Rules of Evidence, which makes some plea discussions "not admissible" in certain limited situations. *See* Fed. R. Evid. 410 ("In a civil or criminal case, evidence of the following is not *admissible* . . . "). Thus, Rule 410 does not purport to protect plea discussions from *disclosure*; it only protects against their introduction into *evidence* in limited situations. In taking appeal of an issue regarding the rules governing the admissibility of evidence before the trier of fact, Epstein obviously falls outside the parameters of the *Perlman* doctrine. *See, e.g., United States v. Copar Pumice Co., Inc.*, 714 F.3d 1197, 1207 (10th Cir. 2013) (discussing how *Perlman* doctrine applies only to situations "where a third party has a justiciable interest in preventing a third party's *disclosure* of documents").

Epstein also purports to appeal an issue of whether this Court erred in failing to invent a brand new privilege for communications in the course of plea negotiations. But here again, such a speculative claim falls outside the reach of the *Perlman* doctrine. *Perlman* applies to someone who *holds* a privilege, not someone who is arguing for a new privilege. *See In re Sealed Case*, ---F.3d---, 2013 WL 2120157 at *5 (D.C. Cir. 2013) ("Typically, *Perlman* permits a *privilege-holder* to appeal a disclosure order directed at a disinterested third party . . . .") (emphasis added). We are aware of no case (and Epstein cites none) in which an interlocutory appeal was

allowed under *Perlman* by a party who wants to *create* a new privilege, rather than defend an existing one.

In sum, Epstein seeks to take an interlocutory appeal of an evidentiary issue and a privilege-creation issue, neither of which fall within the narrow *Perlman* doctrine.

2. Epstein Is Not Challenging a Grand Jury Subpoena.

As the Court is aware, this is a case brought by crime victims to enforce crime victims' rights under the Crime Victims' Rights Act. This kind of case is not subject to the *Perlman* doctrine. *Perlman* applies in situations involving grand jury subpoenas. For example, the five Eleventh Circuit cases discussing *Perlman* appeals over the last fifty years have all involved grand jury subpoenas. *In re Grand Jury Subpoenas*, 142 F.3d 1416 (11th Cir. 1998); *In re Federal Grand Jury Proceedings (FGJ 91-9), Cohen*, 975 F.2d 1488 (11th Cir. 1992); *In re Grand Jury Proceedings*, 832 F.2d 554 (11th Cir. 1987); *In re Grand Jury Proceedings in the Matter of Fine*, 641 F.2d 199 (11th Cir. 1981); *In re Grand Jury Proceedings*, 528 F.2d 983 (11th Cir. 1976). The Eleventh Circuit is not unusual in this regard. As the Tenth Circuit explained just last month: "We are aware of no case ... that extends *Perlman* beyond criminal grand jury proceedings. *We decline to do so here.*" *United States v. Copar Pumice Co., Inc.*, 714 F.3d 1197, 1207 (10th Cir. May 2013) (internal quotation omitted) (emphasis in original). Epstein offers no argument for extending the *Perlman* doctrine into the new context of crime victims' rights cases, much less a persuasive one.

3. The Documents Are Not Held By a Disinterested Third Party Litigant, But By a Party in the Case.

Yet another reason Epstein cannot take an interlocutory appeal is that this is not a situation where a disinterested third party has the correspondence in question. Instead, the correspondence is held by a party to this action: the Government.

It is generally agreed that the *Perlman* rule "applies only when the privilege holder is powerless to avert the mischief of a district court's discovery order because the materials in question are held by a disinterested third party." *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 239 (6th Cir. 2011) (internal quotations omitted). That is not the case here. The Government is not a disinterested "third party" to this lawsuit: It is a party which is actively litigating in opposition to the victims' argument. Accordingly, should any improper use be made of correspondence between it and Epstein, then the Government will no doubt point that out to the district court or seek further appellate review at the end of this case.

Indeed, under Epstein's theory, the Government is apparently a co-holder of the privilege in question. Epstein has asked this Court to invent a new privilege for "plea negotiations" (DE 193 at 10), which presumably would extend not just to defense counsel but also to prosecutors. As a result, the Government is not "disinterested" in the asserted privilege, but in fact would possess the privilege if Epstein's theory were to be recognized. [4] *Perlman* is inapplicable for this reason as well.

[4] It is instructive to note that, even though the correspondence was between Epstein and the Government, the Government cannot now take an interlocutory appeal from the Court's order releasing the correspondence. *See* 18 U.S.C 3731 (limiting interlocutory appeals by the Government in criminal cases to orders suppressing evidence). It would be anomalous to allow an interlocutory appeal by Epstein regarding his correspondence with the Government while the Government is barred from taking an appeal regarding its correspondence with Epstein.

For all these reasons, the *Perlman* doctrine is not applicable to the Court's order on correspondence and the Eleventh Circuit would lack jurisdiction to hear any appeal. The Court should deny Epstein's requested stay on this ground.

II. EPSTEIN CANNOT SHOW HE MEETS ANY OF THE FACTORS REQUIRED TO OBTAIN A STAY PENDING APPEAL.

Epstein also should not receive a stay pending appeal because he cannot satisfy *any* of the four requirements for obtaining such a stay. As Epstein concedes in his motion, to obtain a stay he "*must* show: (1) a likelihood that [he] will prevail on the merits of the appeal; (2) irreparable injury to [him] unless the stay is granted; (3) no substantial harm to other interested persons; *and* (4) no harm to the public interest." *In re Federal Grand Jury Proceedings (FGJ 91-9), Cohen*, 975 F.2d 1488, 1492 (11th Cir. 1992) (emphasis added). If he is unable to meet any one of these strict requirements, then his motion fails. In this case, he fails to meet his burden on each and every one of these points, and therefore his motion for a stay is completely meritless.

A. Epstein Does Not Have a Likelihood Of Prevailing on the Merits.

As just explained, Epstein will not even be able to take an appeal to the Eleventh Circuit, much less convince it of the merits of his claims. For this reason alone, this stay should be denied.

In addition, Epstein's claims that correspondence with an adversary is somehow "confidential" and "protected" is far-fetched. Epstein begins his pleading with the dramatic claim that "[t]he Court's order is the first decision anywhere, insofar as the undersigned counsel are aware, that orders disclosure to third-party litigants of private and confidential communications between attorneys who were seeking to resolve a criminal matter . . . ." (DE

193 at 2). Epstein seems to have forgotten that just two years ago, he lost the same battle in the civil case filed by victims against him. As this Court explained: "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." (DE 188 at 3). This Court's decision to turn over the correspondence does not break new ground. Indeed, if anything, it would be new ground to hold that correspondence sent by a criminal defendant to prosecutors trying to convict him of a crime was somehow "confidential."

Epstein then contends that "[t]he Court's decision drastically reshapes the landscape of criminal settlement negotiations sets at naught expectations of privacy, confidentiality, and privilege on which criminal defense attorneys have reasonably relied for many decades . . . ." (DE 193). Again, not so. This Court's decision has not reshaped the landscape of plea discussions; the Crime Victims' Rights Act has done so. Crime victims are now entitled to "confer" with prosecutors about important stages of criminal proceedings, including plea proceedings. 18 U.S.C. § 3771(a)(5). If Epstein and other defense attorneys want to engage in plea discussions with federal prosecutors, they must now be aware that prosecutors will confer with victims about these plea arrangements. Indeed, the Attorney General has promulgated guidelines requiring such conferences. *See* U.S. Dept. of Justice, Attorney General Guidelines for Victim-Witness Assistance 41 (2012) ("Federal prosecutors should be available to confer with victims about major case decisions, such as . . . plea negotiations . . . ."). And when a criminal defendant works with a prosecutor to violate that congressionally-created right to confer, the defendant can hardly complain about efforts to reveal what he has done. In short,

Epstein cannot share information with the government about how to avoid the requirements of the CVRA and then expect to be able to hide behind some nebulous "privilege" to escape accountability for that violation of law.

Epstein seems to think that on appeal he will be able to demonstrate that his correspondence with prosecutors somehow falls within the "heartland" of Rule 410 of the Federal Rules of Evidence (DE 193 at 6). But he fails to demonstrate that the correspondence falls within the *text* of the Rule. As this Court carefully explained: "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 proceedings against the defendant making them under Rule 410." (DE 188 at 5) (*citing 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 (1991)).

Perhaps recognizing the weakness of his argument based on Rule 410, Epstein asks this Court for a stay to appeal for the creation of a brand new privilege for "communications in the course of settlement/plea negotiations." (DE 193 at 10). As with his other arguments, Epstein does nothing more than rehash arguments that this Court has already carefully considered – and persuasively rejected. As this Court carefully explained: "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, without carving out

any special privilege relating to plea discussion materials. Considering the Congressional forbearance on this issue -- and the presumptively public nature of plea agreements in this District -- , this court declines the intervenors' invitation to expand Rule 410 by crafting a federal common law privilege for plea discussions." (DE 188 at 9) (collecting supporting authorities).

Epstein's odds of prevailing on the merits of his claims are slim to none.

B. Epstein Does Not Suffer Irremediable Harm from Disclosure of the Correspondence to the Victims.

Epstein's motion for a stay also founders on the fact that he will not suffer "irreparable injury" from having the victims review the materials. Epstein's pleading huffs and puffs about the importance of confidentiality in the plea bargaining process generally. (*See* DE 193 at 15-17). But he never specifically explains how turning over the correspondence to counsel for the victims will specifically harm *him*. It is not enough for Epstein to show that he does not want the victims to read the correspondence. Epstein must present evidence that he will be injured if the victims read the correspondence. *See, e.g., Northeastern Florida Chapter of Ass'n of General Contractors of America v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1286 (11th Cir. 1990) ("Because plaintiff presented no evidence on the issue, we cannot agree that irreparable injury is "apparent".). Epstein's claims become weak to the vanishing point in light of the fact that victims' counsel has already seen significant parts of the correspondence in July 2011, when Magistrate Judge Johnson ordered it produced in a parallel civil lawsuit.

In an effort to prove irreparable injury, Epstein cites various authorities about "confidential" documents. But none of these cases involved anything remotely like what Epstein

is attempting to assert is "confidential" here: discussions not with his allies but with adversaries – i.e., criminal prosecutors seeking to force him to plead guilty to criminal charge.

Moreover, the Court will recognize that all of these cases were older cases, decided before the Supreme Court's decision in *Mohawk*. The *Mohawk* decision makes clear that even as to highly sensitive attorney-client materials, "[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected materials and its fruits are excluded from evidence." 130 S.Ct. at 606-07.

Epstein has not shown that he will suffer injury from the Court's order, much less irreparable injury.

C. The Victims Will Be Prejudiced By a Stay.

Epstein next contends that the victims will not be a prejudiced by a stay. In the course of making his arguments, Epstein makes a series of inaccurate representations about the course of these proceedings over the last several years. In the interests of keeping this response brief, the victims will only respond to a few of the most obvious distortions.

Epstein claims that the fact that the victims have moved for summary judgment somehow proves that they do not need the correspondence. (DE 193 at 17). But as Epstein must know, the Court has found that the existing record is insufficient to grant that summary judgment motion (DE 99 at 11), which is one of several reasons why the victims need the correspondence to move forward with their case. Epstein also contends that the victims "knowingly sat on their CVRA claims for years . . . ." (DE 193 at 17). But as the Court is aware, much of the delay in this case has come from intransigence of the Government, which despite repeated efforts by the victims

has been unwilling to reach any agreement on what the facts are in this case. And the Court is also aware of delay caused by repeated motions filed by Epstein himself in the parallel civil case, which also impeded the ability of the victims to resolve all their litigation with him.

Epstein also contends that the "timing of that relief [that the victims seek] matters little, if at all." (DE 193 at 18). Again, not true. As Epstein is no doubt aware, the applicable statute of limitations for prosecuting him for federal sex abuse claims appears to be ten years. 18 U.S.C. § 3283. Epstein abused the victims (and other similarly situated young girls) from roughly 2002 to 2005. As a result, if Epstein can succeed in stalling this case for another two years or so, then he will have successfully "run out the clock" on his criminal liability. At this point, the victims are irreparably harmed in their ability to seek prosecution of Epstein by every day that goes without resolution of the case.

Epstein also attempts to pre-litigate whether the non-prosecution agreement could be rescinded. Interestingly, Epstein does not discuss this Court's ruling on this issue, in which it carefully explained: "As a threshold matter, the court finds that the CVRA is properly interpreted to authorize the rescission or 're-opening' of a prosecutorial agreement – including a non-prosecution agreement – reached in violation of a prosecutor's conferral obligations under the statute." (DE 189 at 7). This ruling is now the law of the case that Epstein must abide by. Given this ruling, the victims are clearly harmed by delay in any opportunity to seek that remedy.

And finally, Epstein also fails to recognize that under the CVRA, the victims have a right to have this Court "take up and decide any motion asserting a victim's right forthwith." 18 U.S.C. § 3771(d)(3). An interlocutory appeal by Epstein would clearly interfere with bringing

this case to a resolution "forthwith." The victims obviously will be harmed by an interlocutory appeal.

D. The Public Interest Will Not Be Served By Allowing Epstein to Appeal.

Epstein finally claims that a delaying this case through a stay is somehow in the public interest. But nothing could be further from the truth. A stay will only serve to delay the victims effort to vindicate their rights under the CVRA, a clear indication that the public interest is not being served. *See* U*nited States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest . . . .").

In a transparent effort to trivialize what is at stake in this important case, Epstein remarkably claims that the "public may have little interest at all in a dispute between private civil litigants regarding access to documents." (DE 193 at 20). To the contrary, as the Court well knows, there is considerable public interest in just how it was possible for a well-connected billionaire who had sexually abused dozens of young girls to obtain a plea deal with the federal government in which he served little prison time. Denying a stay will not begin to answer all of the public's questions about this case. But it will at least move this case one step closer to resolution, which is what the public interest demands.

CONCLUSION

For all the foregoing reasons, the Court should deny Epstein's motion for a stay of production of correspondence pending an interlocutory appeal to the Eleventh Circuit.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

The foregoing document was served on June 28, 2013, on the following using the Court's CM/ECF system:

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