IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

SCOTT ROTHSTEIN, individually, and BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiff.
_____/

COUNTER-DEFENDANT JEFFREY EPSTEIN'S NOTICE OF SUPPLEMENTAL AUTHORITY IN SUPPORT OF HIS SUPPLEMENT TO MOTION FOR COURT TO DECLARE RELEVANCE AND NON-PRIVILEGED NATURE OF DOCUMENTS, ETC.

As supplemental authority in support of his Motion for Court to Declare Relevance and Non-Privileged Nature of Documents and with Specific Request for *In Camera* Review to Determine Relevance, Inapplicability and/or Waiver of Attorney-Client Privilege and Attorney Work Product With Regard to Sealed Documents, Plaintiff/Counter-Defendant, Jeffrey Epstein ("Epstein"), respectfully submits the Opinion in the case of *Jane Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014), attached to this Notice as **Exhibit A**, and Edwards' clients' Appellee Brief filed in that case, attached to this Notice as **Exhibit B**. In *Jane Doe No. 1*, the United States Court of Appeals for the Eleventh Circuit held that Epstein's former counsel had waived the work-product privilege with respect to documents sought by Edwards' clients, after having voluntarily sent allegedly privileged correspondence to the United States during plea negotiations.

There, Edwards' clients claimed that the United States failed to confer with them before entering into a non-prosecution agreement with Epstein. As part of that lawsuit, Edwards' clients

sought to discover correspondence between Epstein's former counsel and the United States regarding the non-prosecution agreement. *Id.* at 1001. The federal district court overruled Epstein's former counsel's privilege objections. On appeal, the Eleventh Circuit held that Epstein's former counsel had waived the work-product privilege as to all persons, as a consequence of having sent the allegedly privileged correspondence to the United States:

> The intervenors [Epstein's former counsel] next contend that the correspondence falls under the work-product privilege, but the finding of the district court that the intervenors waived any privilege when they voluntarily sent the correspondence to the United States during the plea negotiations is not clearly erroneous. Disclosure of work-product materials to an adversary waives the work-product privilege. *See, e.g.*, *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988); *In re Doe*, 662 F.2d 1073, 1081-82 (4th Cir. 1981). **Even if it shared the common goal of reaching a quick settlement, the United States was undoubtedly adverse to Epstein during its investigation of him for federal offenses, and the intervenors' disclosure of their work product waived any claim of privilege**.

Id. at 1008 (emphasis added). **Exhibit A**.

In reaching its conclusion, the Eleventh Circuit agreed with the position of Edwards' clients, espoused by Edwards, as set forth in their Appellee Brief. In their Appellee Brief, Edwards' clients, through Edwards, made the following argument:

> Case law is clear that "[d]isclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement." *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 860 (8th Cir. 1988). In summarily rejecting Epstein's claim, the District Court found that Epstein had waived any work product protection in the materials by turning them over to the federal prosecutors:
>
> > 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 exposes 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. 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's 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.
>
> DE 188 at 6 (*citing, inter alia, United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997). Numerous cases have reached the same conclusion as the District Court in similar circumstances.[*]

Exhibit B, at 35-36.

Edwards supported this last statement with the following authorities:

> *See, e.g.*, *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991) (Westinghouse's disclosure of work product materials to the Justice Department during an investigation "waived the work-product doctrine as against all other adversaries."); *In re Qwest Communications, Inc.*, 450 F.3d 1179, 1192-1201 (10th Cir. 2006) (company's disclosure of documents to the SEC during criminal investigation waived work product protections); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2005) ("any work product protection was waived by [party] via production" of the documents in question); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 302 (6th Cir. 2002) (attorney client/work product privilege was "never designed to protect conversations between a client and the Government—i.e., an adverse party—rather, it pertains only to conversations between the client and *his or her* attorney. . . . purpose of [attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Nowhere amongst these reasons [for protection] is the ability to 'talk candidly with the Government.'"); *In re Chrysler Motors Overnight Evaluation Litigation*, 860 F.2d 844, 846-47 (8th Cir. 1988) (defendant company's disclosure of computer tape to class counsel during settlement negotiated waived work product when tape sought by government as part of criminal

case); *In re Sealed Case*, 676 F.2d 793, 824-25 (D.C. Cir. 1982) (production of documents during settlement discussions with the SEC waived work product protection as to grand jury materials).

Exhibit B, at 36 n.13.

Epstein also files as **Exhibit C** the August 4, 2010, hearing transcript in *In re Rothstein Rosenfeldt Adler, P.A.*, United States Bankruptcy Court, Southern District of Florida, Case No. 09-34791-BKC-RBR. The following are statements made by William Scherer, Razorback's counsel:

- "[I]n November we filed a lawsuit in State Court and we alleged that as part of Mr. Rothstein and the firm, and the firm's employees, and maybe some of the firm's attorneys, conspired to use the Epstein/LM litigation in order to lure $13.5 million worth of my victims, my clients, into making investments in these phoney [sic] settlements." (17:7-14.)

- "In addition, as we have alleged, that Mr. Edwards and the firm put sensational allegations in the LM case that they knew were not true, in order to entice my clients into believing that Bill Clinton was on the airplane with Mr. Epstein and these young woman ..." (18:24-19:7.)

- "I can't conceive that Mr. Edwards and the predecessor law firm would have any standing to prepare privilege logs or anything else, given what I just told the Court. That would be like having the fox guard the hen house." (20:5-9.)

- "[The Complaint] names Rothstein. It does not name Mr. Edwards. It just names Rothstein, not the firm, and lays out the facts and says other people in the firm. We did not name them because we want to see the documents and see whether they had involvement." (22:3-8.)

- I support the same position that [Epstein] has asked the Court, and that is to have the trustee deal with this, get these documents and deal with it with you, rather than allow the successor law firm to have them. (22:16-24.)

8/4/10 Hearing Transcript, **Exhibit C.**

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the attorneys listed on the Service List below on August 14, 2018, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1).

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EXHIBIT A

749 F.3d 999
United States Court of Appeals,
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.

No. 13–12923.
|
April 18, 2014.

Synopsis

Background: Alleged minor victims of federal sex crimes brought action against the United States alleging violations of the Crime Victims' Rights Act (CVRA) related to the United States Attorney Office's execution of non-prosecution agreement with alleged perpetrator. After the victims moved for disclosure of correspondence concerning the non-prosecution agreement, the alleged perpetrator and his criminal defense attorneys intervened to assert privilege to prevent the disclosure of their plea negotiations. The United States District Court for the Southern District of Florida Court, No. 9:08 CV 80736 KAM, ordered disclosure. The intervenors filed interlocutory appeal.

Holdings: The Court of Appeals, Pryor, Circuit Judge, held that:

[1] Court of Appeals had jurisdiction over interlocutory appeal;

[2] plea negotiations were not protected from disclosure by federal rule of evidence barring admission of plea negotiations;

[3] intervenors waived work-product privilege; and

[4] plea negotiations were not protected from disclosure by any common-law privilege.

Affirmed.

West Headnotes (15)

[1] Federal Courts
Jurisdiction

The court of appeals reviews de novo whether it has jurisdiction to decide an interlocutory appeal.

3 Cases that cite this headnote

[2] Federal Courts
Evidence

The court of appeals reviews de novo the interpretation of the Federal Rules of Evidence.

3 Cases that cite this headnote

[3] Federal Courts
Witnesses

The issue of whether to recognize a privilege is a mixed question of law and fact that is reviewed de novo. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

2 Cases that cite this headnote

[4] Federal Courts
"Clearly erroneous" standard of review in general

The court of appeals reviews for clear error factual findings made by a district court.

Cases that cite this headnote

[5] Federal Courts
Preliminary proceedings;depositions and discovery

Court of Appeals had jurisdiction over interlocutory appeal from District Court's discovery order requiring disclosure of plea negotiations between United States Attorney

Office (USAO) and criminal defense attorneys who represented alleged perpetrator of federal sex crimes against alleged minor victims, in alleged victims' Crime Victims' Rights Act (CVRA) action against United States, in connection with USAO's execution of non-prosecution agreement with alleged perpetrator; appeal was filed by alleged perpetrator and defense attorneys, who were intervenors for limited purpose and could not challenge final judgment in victims' action against United States, the victims' action was ancillary to criminal investigation, and absent an interlocutory appeal, alleged perpetrator and attorneys would be left with no recourse to appeal the disclosure order. 18 U.S.C.A. § 3771.

1 Cases that cite this headnote

[6] Federal Courts

What constitutes final judgment

A final decision, for purpose of appellate jurisdiction, is one by which a district court disassociates itself from the case, and ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment. 28 U.S.C.A. § 1291.

1 Cases that cite this headnote

[7] Federal Courts

Preliminary proceedings;depositions and discovery

Discovery orders are ordinarily not final orders that are immediately appealable.

1 Cases that cite this headnote

[8] Federal Courts

Preliminary proceedings;depositions and discovery

The *Perlman* doctrine allows an intervenor to file an interlocutory appeal of an order denying a motion to quash a grand jury subpoena.

Cases that cite this headnote

[9] Federal Courts

Preliminary proceedings;depositions and discovery

Under *Perlman,* a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance.

1 Cases that cite this headnote

[10] Federal Courts

Interlocutory and Collateral Orders

The "collateral order doctrine" provides an exception to the general bar of interlocutory appeals if an order (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.

Cases that cite this headnote

[11] Criminal Law

Civil liabilities to persons injured; reparation

Correspondence documenting plea negotiations between the United States Attorney Office (USAO) and criminal defense attorneys for alleged perpetrator of federal sex crimes against minor victims were not protected from disclosure, in alleged victims' Crime Victims' Rights Act (CVRA) action challenging the USAO's execution of non-prosecution agreement with alleged perpetrator, by federal rule of evidence barring admission of plea negotiations; the alleged victims intended to admit the evidence of the plea negotiations to prove violations of the CVRA by the United States, not to be used against the alleged perpetrator. Fed.Rules Evid.Rule 410, 28 U.S.C.A.

1 Cases that cite this headnote

[12] Federal Civil Procedure

Waiver

Alleged perpetrator of federal sex crimes against minor children and his criminal defense attorneys waived any work-product privilege in correspondence documenting plea negotiations with the United States Attorney Office (USAO), in alleged victims' Crime Victims' Rights Act (CVRA) action challenging the USAO's execution of non-prosecution agreement with alleged perpetrator, where the attorneys voluntarily sent the correspondence to the United States during plea negotiations. 18 U.S.C.A. § 3771.

2 Cases that cite this headnote

[13] Federal Civil Procedure

Waiver

Disclosure of work-product materials to an adversary waives the work-product privilege.

1 Cases that cite this headnote

[14] Privileged Communications and Confidentiality

Criminal records

Correspondence documenting plea negotiations between the United States Attorney Office (USAO) and criminal defense attorneys for alleged perpetrator of federal sex crimes against minor victims were not protected from disclosure by any common-law privilege, in alleged victims' Crime Victims' Rights Act (CVRA) action challenging the USAO's execution of non-prosecution agreement with alleged perpetrator. 18 U.S.C.A. § 3771; Fed.Rules Evid.Rule 501, 28 U.S.C.A.

1 Cases that cite this headnote

[15] Privileged Communications and Confidentiality

Privileged Communications and Confidentiality

There is a presumption against common-law privileges which may only be overcome when it would achieve a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth. Fed.Rules Evid.Rule 501, 28 U.S.C.A.

1 Cases that cite this headnote

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Wifredo A. Ferrer, Dexter Lee, Kathleen Mary Salyer, U.S. Attorney's Office, Miami, FL, Ann Marie C. Villafana, U.S. Attorney's Office, West Palm Beach, FL, for Defendant.

Appeals from the United States District Court for the Southern District of Florida. D.C. Docket No. 9:08 cv 80736 KAM.

Before PRYOR and MARTIN, Circuit Judges, and HONEYWELL,* District Judge.

Opinion

PRYOR, Circuit Judge:

This appeal requires us to decide two issues: whether we have jurisdiction over an interlocutory appeal by criminal defense attorneys and their client who intervened in a proceeding ancillary to a criminal investigation to claim a privilege that would prevent the disclosure of their plea negotiations; and, if so, whether a privilege bars crime victims from discovering plea negotiations. The United States investigated Jeffrey Epstein's sexual abuse of minors, but failed to confer with the victims before entering a non-prosecution agreement with Epstein. Two

victims filed suit against the United States to enforce their rights under the Crime Victims' Rights Act, 18 U.S.C. § 3771, and sought to discover the correspondence between Epstein's attorneys and the United States regarding the non-prosecution agreement. Epstein and his attorneys then intervened to object to that discovery as privileged. The district court overruled their objection and ordered the United States to disclose the correspondence to the victims. After the intervenors filed this appeal, the victims ***1002** moved to dismiss it for lack of jurisdiction. Because we conclude that we have jurisdiction to decide this appeal and that the plea negotiations are not privileged from discovery, we affirm.

I. BACKGROUND

In 2006, the Federal Bureau of Investigation began investigating allegations that Jeffrey Epstein had sexually abused several minor girls. The United States Attorney's Office for the Southern District of Florida accepted Epstein's case for prosecution, and the Federal Bureau of Investigation issued victim notification letters to two minors, Jane Doe No. 1 and Jane Doe No. 2, in June and August 2007. Extensive plea negotiations ensued between the United States and Epstein. On September 24, 2007, the United States entered into a non-prosecution agreement with Epstein in which the United States agreed not to file any federal charges against Epstein in exchange for his offer to plead guilty to the Florida offenses of solicitation of prostitution and procurement of minors to engage in prostitution. Fla. Stat. §§ 796.07, 796.03.

Not only did the United States neglect to confer with the victims before it entered into the agreement with Epstein, it also failed to notify them of its existence for at least nine months. The United States sent post-agreement letters to the victims reporting that the "case is currently under investigation" and explaining that "[t]his can be a lengthy process and we request your continued patience while we conduct a thorough investigation." And in June 2008, the United States asked the victims to explain why federal charges should be brought against Epstein without mentioning the agreement to them.

On June 27, 2008, the United States informed the victims that Epstein planned to plead guilty to the Florida charges three days later, on June 30, 2008. But the United States failed to disclose that Epstein's pleas to those state charges arose from his federal non-prosecution agreement and that the pleas would bar a federal prosecution. The victims did not attend the state court proceedings.

On July 7, 2008, Jane Doe No. 1 filed a petition alleging that she was a victim of federal crimes committed by Esptein involving sex trafficking of children by fraud and enticing a minor to commit prostitution and that the United States had wrongfully excluded her from plea negotiations and violated the Crime Victims' Rights Act. 18 U.S.C. § 3771. She alleged that the United States violated her right to confer with federal prosecutors, her right to be treated with fairness, her right to receive timely notice of relevant court proceedings, and her right to receive information about restitution. The United States answered that it used its "best efforts" to comply with the rights afforded to victims under the Act, but that the Act did not apply to pre-indictment negotiations with potential federal defendants. After Jane Doe No. 2 joined the initial petition, the district court found that both women qualified as "crime victims" under the Act. 18 U.S.C. § 3771(e). Among other relief, the victims sought rescission of the non-prosecution agreement.

The victims' petition remained dormant for years while they pursued a federal civil suit against Epstein and reached a settlement agreement with him. As a basis for relief against Epstein in the civil suit, the victims relied on Epstein's waiver of his right to contest liability in the non-prosecution agreement. Over Epstein's objection, the district court in that civil suit ordered the United States to produce the documents given to Epstein's attorneys during his plea negotiations. The victims received correspondence written by the ***1003** United States, but they never received any correspondence written by Epstein's attorneys during the plea negotiations with the United States.

In 2011, the victims renewed the prosecution of their petition against the United States. The victims moved to use correspondence between the United States and Esptein's attorneys during the plea negotiations to prove violations of their rights under the Act. And the victims later moved the district court to compel the United States to produce all requested discovery about the plea negotiations.

Epstein and his criminal defense attorneys, Roy Black and Martin Weinberg, moved to intervene for the limited

purpose of challenging the disclosure and use of the correspondence they wrote during plea negotiations. After the district court granted their permissive intervention, Fed.R.Civ.P. 24(b), the intervenors moved for protective orders. The intervenors argued that the work-product privilege protects their correspondence; that Federal Rule of Evidence 410 and Federal Rule of Criminal Procedure 11 create a privilege for plea negotiations; and that their correspondence contained confidential grand jury material. They also urged the district court to recognize a common-law privilege for plea negotiations. The United States responded that the court should consider the correspondence privileged, but that it would disclose the correspondence if the court ordered it to do so.

Epstein later filed two other motions to intervene in a limited capacity one to challenge the disclosure of grand jury materials and another to challenge any remedy that would violate constitutional and contractual rights under the non-prosecution agreement. The attorney-intervenors did not join either of these motions. The district court has not yet ruled on Epstein's motion to intervene to prevent disclosure of grand jury materials, but the district court has "allowed [him] to intervene with regard to any remedy issue concerning the non-prosecution agreement."

The district court then issued two discovery orders, both of which the intervenors challenge in this appeal. In the first, the district court denied the intervenors' motions for protective orders and granted the victims the right to proffer the correspondence between the United States and Epstein's attorneys, but the district court reserved "ruling on the relevance or admissibility" of any of the correspondence to prove violations of the Act. In the second, the district court required the United States to file answers to all outstanding requests for admissions and to produce documents in response to the requests for production by the victims, including "any documentary material exchanged by or between the federal government and persons or entities outside the federal government (including without limitation all correspondence generated by or between the federal government and Epstein's attorneys)." After the intervenors filed this interlocutory appeal, the victims moved to dismiss the appeal for lack of jurisdiction. This Court later entered a stay of the second order, which required the United States to disclose the correspondence to the victims.

II. STANDARDS OF REVIEW

[1] **[2]** **[3]** **[4]** Two standards of review govern the issues in this appeal. We review *de novo* whether we have jurisdiction to decide this interlocutory appeal before addressing the merits. *United States v. Cartwright,* 413 F.3d 1295, 1299 (11th Cir.2005). We also review *de novo* the interpretation of the Federal Rules of Evidence. *See United States v. Campa,* 459 F.3d 1121, 1174 (11th Cir.2006); *Pickett v. Iowa Beef Processors,* 209 F.3d 1276, 1279 (11th Cir.2000). And the issue of whether ***1004** to recognize a privilege under Federal Rule of Evidence 501 is a mixed question of law and fact that we review *de novo. Adkins v. Christie,* 488 F.3d 1324, 1327 (11th Cir.2007). But we review for clear error factual findings made by a district court. *Morrissette Brown v. Mobile Infirmary Med. Ctr.,* 506 F.3d 1317, 1319 (11th Cir.2007).

III. DISCUSSION

We divide our discussion in two parts. First, we explain that we have jurisdiction over this interlocutory appeal by limited intervenors who, as claimants of a privilege, challenge a disclosure order directed at the United States, a disinterested party. Second, we explain that the plea negotiations are not privileged from disclosure.

A. We Have Jurisdiction To Decide This Interlocutory Appeal.

[5] The victims argue that we should dismiss this appeal for lack of jurisdiction for two reasons. First, they argue that the *Perlman* doctrine, which permits a claimant of a privilege to appeal a non-final judgment, applies only to grand jury subpoenas. *Perlman v. United States,* 247 U.S. 7, 38 S.Ct. 417, 62 L.Ed. 950 (1918). Second, they argue that a decision of the Supreme Court, *Mohawk Industries, Inc. v. Carpenter,* 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009), forecloses an interlocutory appeal of a denial of a claim of privilege.

[6] **[7]** The courts of appeals "have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291. A "final decision" is one "by which a district court disassociates

itself from the case," *Mohawk,* 558 U.S. at 106, 130 S.Ct. at 604 05 (alteration omitted) (quoting *Swint v. Chambers Cnty. Comm'n,* 514 U.S. 35, 42, 115 S.Ct. 1203, 1208, 131 L.Ed.2d 60 (1995)), and "ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment," *Carpenter v. Mohawk Indus., Inc.,* 541 F.3d 1048, 1052 (11th Cir.2008) (quoting *McMahon v. Presidential Airways, Inc.,* 502 F.3d 1331, 1338 (11th Cir.2007)), *aff'd*, 558 U.S. 100, 130 S.Ct. 599, 175 L.Ed.2d 458 (2009). Discovery orders are ordinarily not final orders that are immediately appealable. *Id.* Five notable exceptions to this rule exist: the *Perlman* doctrine; the collateral-order doctrine, *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949); a certification provided by statute, 28 U.S.C. § 1292(b); a petition for a writ of mandamus; or an appeal of a contempt citation.

[8] **[9]** The *Perlman* doctrine allows an intervenor to file an interlocutory appeal of an order denying a motion to quash a grand jury subpoena. *See, e.g.*, *In re Grand Jury Proceedings,* 832 F.2d 554, 556 58 (11th Cir.1987). "This exception, derived from *Perlman v. United States*, ... permits an order denying a motion to quash to be 'considered final as to the injured third party who is otherwise powerless to prevent the revelation.' " *Id.* at 558 (quoting *In re Grand Jury Proceedings (Fine),* 641 F.2d 199, 202 (5th Cir. Unit A 1981)). Under *Perlman,* "a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology of Cal. v. United States,* 506 U.S. 9, 18 n.11, 113 S.Ct. 447, 452 n. 11, 121 L.Ed.2d 313 (1992); *see also In re Air Crash at Belle Harbor, N.Y. on Nov. 12, 2001,* 490 F.3d 99, 106 (2d Cir.2007) ("[T]he *Perlman* exception is relevant only to appeals brought ***1005** by the holder of a privilege where the disputed subpoena is directed at *someone else.*"). We have exercised jurisdiction under the *Perlman* doctrine when the party ordered to disclose the information "has no direct and personal interest in the suppression of the information" and would be reluctant to risk a contempt citation, such that "the order is definitely final as to the [claimant of the privilege]." *Fine,* 641 F.2d at 201 02. We have not invoked the *Perlman* doctrine to exercise jurisdiction over an interlocutory appeal outside the context of a grand jury proceeding. *See, e.g.*, *In re Fed. Grand Jury Proceedings (Cohen),* 975 F.2d 1488, 1491 92 (11th Cir.1992); *In re Grand Jury Proceedings,* 832 F.2d at 558; *Fine,* 641 F.2d at 201 02. But we have exercised jurisdiction over interlocutory appeals by claimants of a privilege in some civil proceedings. *See Castle v. Sangamo Weston, Inc.,* 744 F.2d 1464, 1465 66 (11th Cir.1984) (exercising jurisdiction because the appellant "claims a privilege of non-disclosure relating to materials that *another party* has been directed to produce"); *Int'l Horizons, Inc. v. Comm. of Unsecured Creditors (In re Int'l Horizons, Inc.),* 689 F.2d 996, 1001 02 (11th Cir.1982) (holding that an order compelling production of allegedly privileged material is immediately appealable because "the privilege-holder has no power to compel the custodian of the material to risk a contempt citation for his refusal to comply" (internal quotation marks omitted)); *Overby v. U.S. Fid. & Guar. Co.,* 224 F.2d 158, 162 & n. 5 (5th Cir.1955) (exercising interlocutory jurisdiction and citing *Perlman* in a civil action to recover damages for breach of a bond against a surety company where "denial of the privilege could [not] be reviewed on appeal either from the final judgment or from a contempt order").

The victims argue that we should not extend *Perlman* beyond an intervenor's appeal of a grand jury subpoena, but we decline to draw an arbitrary line. The victims' argument has an ipse dixit quality that is, because our Court has never before applied the *Perlman* doctrine outside of the grand jury context, we should not do so now. But we must ask instead whether applying the doctrine here makes sense.

The logic of the *Perlman* doctrine applies with equal force in this appeal. Like a claimant objecting to a grand jury subpoena cannot challenge an indictment to remedy the disclosure of his privileged information, the intervenors cannot challenge a final judgment in this proceeding to remedy the disclosure of their plea negotiations. And the victims' petition, like a grand jury proceeding, is ancillary to a criminal investigation. The rights and remedies provided by the Act arise in a criminal prosecution and affect how the United States prosecutes that action. *See* 18 U.S.C. § 3771(a), (d).

The victims argue that Epstein has made himself an ordinary litigant through his intervention, but we disagree. The district court has allowed Epstein's attorneys to intervene only to contest the disclosure of their correspondence, and the district court has granted Epstein limited intervention to challenge only the disclosure

of his attorneys' correspondence and any remedy that involves the non-prosecution agreement. Epstein's only opportunity to challenge the disclosure order is *now* because there will not be an adverse judgment against him or his attorneys. The district court instead will enter any judgment against either the victims or the United States. And, even if the victims succeed in their petition to rescind the non-prosecution agreement, Epstein can challenge only that remedy, not the judgment against the United States. The victims intend to use the correspondence ***1006** from Epstein's attorneys to prove that the United States violated the Act, which is an issue separate from the kind of relief necessary to remedy that violation. And it is all the more likely that the district court would fashion a remedy that does not involve the non-prosecution agreement, if the district court were to conclude that rescission is unavailable, which might then bar an appeal by Epstein of that remedy.

The intervenors claim a privilege, and only claimants of a privilege may appeal under the *Perlman* doctrine. *In re Grand Jury Proceedings,* 832 F.2d at 558 59. Contrary to the victims' argument, jurisdiction under the *Perlman* doctrine does not rise or fall with the merits of an appellant's underlying claim for relief. *See, e.g.*, *id.* at 558 60 (permitting an interlocutory appeal based on *Perlman,* but holding that "we find that the privilege asserted by appellants is without a basis in Florida law" and that appellants "have no privilege of nondisclosure under state law"); *Ross v. City of Memphis,* 423 F.3d 596, 599 (6th Cir.2005) ("[*Perlman*] jurisdiction does not depend on the validity of the appellant's underlying claims for relief."); *see also, e.g.*, *Perlman,* 247 U.S. at 13 15, 38 S.Ct. at 420 (reviewing Perlman's claim on interlocutory appeal, but finding no violation of the Fifth Amendment in later use by the United States of exhibits made public in previous litigation). The intervenors claim a privilege based on Rule 410, the work-product privilege, and the Sixth Amendment right to effective assistance of counsel as well as a new common-law privilege for plea negotiations. These claims of privilege, however tenuous, are sufficient to establish jurisdiction under *Perlman.*

Absent an interlocutory appeal, the intervenors would be left with no recourse to appeal the disclosure order. The intervenors cannot defy the disclosure order and risk a contempt citation because the order is directed at the United States, which has expressed an intent to comply with the order. The United States is a disinterested party because it does not purport to hold the privilege claimed by the intervenors. Even if the United States earlier shared the common goal of resolving the criminal investigation quickly and without a federal indictment, any interest of the United States in asserting a privilege for plea negotiations dissipated when Epstein disclosed the correspondence written by the United States to the victims in the civil suit.

The intervenors are also likely unable to pursue their claims through the remaining "established mechanisms for [immediate] appellate review." *See Mohawk,* 558 U.S. at 112, 130 S.Ct. at 608. Because a crime victim's petition under the Act arises in a criminal action, the text of section 1292(b), which applies to a "civil action," renders a certification of this appeal unavailable. *See also In re Grand Jury Proceedings,* 832 F.2d at 557 (holding that grand jury proceedings are not civil actions for purposes of section 1292(b)). And if the intervenors were to seek a writ of mandamus, it is unlikely that the disclosure order would amount to a "judicial usurpation of power or a clear abuse of discretion" or "otherwise work[ ] a manifest injustice." *Mohawk,* 558 U.S. at 111, 130 S.Ct. at 607 (internal quotation marks omitted).

[10] The victims argue that, even if the logic of the *Perlman* doctrine applies here, the decision of the Supreme Court in *Mohawk* forecloses this interlocutory appeal, but they misconstrue both the decision in *Mohawk* and the *Perlman* doctrine. *Mohawk* considered whether the Court had jurisdiction under the collateral-order doctrine, which provides an exception to the general bar of interlocutory appeals if an order "(1) conclusively determines the disputed question; (2) resolves an important ***1007** issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." *Id.* at 105, 130 S.Ct. at 604. In *Mohawk,* the Supreme Court foreclosed an interlocutory appeal of an order requiring the disclosure of materials protected by the attorney-client privilege because the claimant was a party who could appeal a final judgment. *Id.* at 114, 130 S.Ct. at 609. The Supreme Court explained that an appeal from a final judgment suffices "to protect the rights of litigants and ensure the vitality of the attorney-client privilege" because "[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 material and its fruits

are excluded from evidence." *Id.* at 109, 130 S.Ct. at 606 07. The Court found unpersuasive that these disclosures may "have implications beyond the case at hand" and ruled that, although imperfect, postjudgment review is sufficient. *Id.* at 108 12, 130 S.Ct. at 606 09. The Court also explained that three traditional routes of immediate review could still afford the claimant of the privilege adequate relief in a civil action: the claimant could ask the district court to certify the appeal of "a controlling question of law," the resolution of which "may materially advance the ultimate termination of the litigation"; the claimant could petition the court of appeals for a writ of mandamus; or the claimant could defy a disclosure order and appeal a sanction for contempt. *Id.* at 110 11, 130 S.Ct. at 607 08 (internal quotation marks omitted). The Supreme Court in *Mohawk* never cited *Perlman* nor discussed appeals by claimants of a privilege who are limited intervenors in a proceeding ancillary to a criminal investigation and seek to prevent the disclosure of information held by a disinterested party. *See In re Grand Jury,* 705 F.3d 133, 146 (3d Cir.2012) ("[T]he *Mohawk* Court ... did not discuss, mention, or even cite *Perlman*...."). Understandably so claimants of a privilege under the *Perlman* doctrine remain "powerless to avert the mischief of [a discovery] order," *Perlman,* 247 U.S. at 12 13, 38 S.Ct. at 419, because the materials in question are held by a disinterested party who is likely "to forgo suffering a contempt citation and appealing in favor of disclosure," *United States v. Krane,* 625 F.3d 568, 573 (9th Cir.2010). As the Seventh Circuit explained about the scope of the *Perlman* doctrine after *Mohawk,* "[o]nly when the person who asserts a privilege is a nonlitigant will an appeal from a final decision be inadequate." *Wilson v. O'Brien,* 621 F.3d 641, 643 (7th Cir.2010); *see also In re Grand Jury,* 705 F.3d at 145 46 & n.11 (rejecting that *Mohawk* narrowed *Perlman* "at least in the grand jury context"); *Holt Orsted v. City of Dickson,* 641 F.3d 230, 239 (6th Cir.2011) (recognizing that *Perlman* jurisdiction remains when a nonparty asserts a privilege); *Krane,* 625 F.3d at 572 (ruling that "*Perlman* and *Mohawk* are not in tension" when the claimant of a privilege is not a party). *But see United States v. Copar Pumice Co., Inc.,* 714 F.3d 1197, 1207 09 (10th Cir.2013) (holding that jurisdiction under the *Perlman* doctrine is limited to only the grand jury context, but declining jurisdiction because the privilege holder was also a party to the litigation). And, as we explained above, the intervenors cannot appeal a final judgment against the United States, which leaves them without an avenue to appeal the denial of their claims of privilege.

B. The Intervenors' Correspondence Is Not Privileged.

[11] The intervenors argue that the district court erred when it ordered the ***1008** disclosure of the plea negotiations because three privileges protect the correspondence: a privilege under Federal Rule of Evidence 410, the work-product privilege of attorneys, and a common-law privilege for plea negotiations in criminal proceedings. We disagree. No privilege prevents the disclosure of the plea negotiations.

1. Federal Rule of Evidence 410 Provides No Privilege for Plea Negotiations.

Federal Rule of Evidence 410 does not protect against the discoverability of plea negotiations and, even if it did, Epstein clearly falls outside its protection because he entered a guilty plea and the victims intend to use the correspondence against the United States, not against Epstein. Rule 410 "create[s], in effect, a privilege of the defendant," *United States v. Mezzanatto,* 513 U.S. 196, 205, 115 S.Ct. 797, 803, 130 L.Ed.2d 697 (1995) (internal quotation marks and alteration omitted), but not a privilege of non-disclosure as the intervenors assert. The text of Rule 410 unambiguously states that the evidence "is not admissible against the defendant who made the plea or participated in the plea discussions" if the "guilty plea ... was later withdrawn" or "did not result in a guilty plea." Fed.R.Evid. 410(a). Rule 410 governs the admissibility of plea negotiations, not the discoverability of them. Moreover, Epstein cannot invoke Rule 410 because he pleaded guilty to state charges based on the same conduct and has not withdrawn those pleas. *See, e.g., United States v. Holmes,* 794 F.2d 345, 349 (8th Cir.1986) (admitting guilty plea from state court in federal proceeding). The victims intend to admit the correspondence to prove violations of the Act allegedly committed by the United States, not "against" Epstein. And even if rescission of the non-prosecution agreement abuts Epstein's interests, the purpose of the admission does not change. Rule 410 does not bar disclosure of the correspondence written by the attorney-intervenors.

2. The Intervenors Waived Any Work-Product Privilege.

[12] **[13]** The intervenors next contend that the correspondence falls under the work-product privilege, but the finding of the district court that the intervenors waived any privilege when they voluntarily sent the correspondence to the United States during the plea negotiations is not clearly erroneous. Disclosure of work-product materials to an adversary waives the work-product privilege. *See, e.g.*, *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.,* 860 F.2d 844, 846 (8th Cir.1988); *In re Doe,* 662 F.2d 1073, 1081 82 (4th Cir.1981). Even if it shared the common goal of reaching a quick settlement, the United States was undoubtedly adverse to Epstein during its investigation of him for federal offenses, and the intervenors' disclosure of their work product waived any claim of privilege.

As a last-ditch effort, the intervenors contend that "[i]f more is needed in addition to the plain language of Rule 410 to preclude disclosure of the correspondence to plaintiffs, it can be found in the conjunction of Rule 410, the work-product privilege, and the Sixth Amendment right to the effective assistance of counsel in the plea bargaining process," but this novel argument fails too. As explained above, Rule 410 does not create a privilege and the intervenors waived any work-product privilege. The intervenors concede too that the right to counsel under the Sixth Amendment had not yet attached when the correspondence was exchanged. *See Lumley v. City of Dade City, Fla.,* 327 F.3d 1186, 1195 (11th Cir.2003) ("[T]he Sixth Amendment right to counsel ordinarily does not arise until there is a formal ***1009** commitment by the government to prosecute," such as a "formal charge, preliminary hearing, indictment, information, or arraignment."). The "conjunctive" power of three false claims of privilege does not rescue the correspondence from disclosure.

3. We Decline To Recognize a Common-Law Privilege for Plea Negotiations.

[14] **[15]** The intervenors also invite us to recognize a common-law privilege for plea negotiations, Fed.R.Evid. 501, but we decline to do so. The intervenors have not established a "compelling justification" to prevent the discovery of plea negotiations in criminal proceedings. *In re Int'l Horizons,* 689 F.2d at 1004. Although Congress empowered the federal courts through Rule 501 to "continue the evolutionary development of testimonial privileges," *Trammel v. United States,* 445 U.S. 40, 47, 100 S.Ct. 906, 910, 63 L.Ed.2d 186 (1980), we disfavor newly minted privileges, which "contravene the fundamental principle that the public has a right to every man's evidence," *Adkins v. Christie,* 488 F.3d 1324, 1328 (11th Cir.2007) (quoting *Univ. of Pa. v. EEOC,* 493 U.S. 182, 189, 110 S.Ct. 577, 582, 107 L.Ed.2d 571 (1990)). "Accordingly, there is a presumption against privileges which may only be overcome when it would achieve a 'public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.' " *Id.* (quoting *Trammel,* 445 U.S. at 50, 100 S.Ct. at 912).

The Supreme Court has identified several considerations relevant to whether a court should recognize an evidentiary privilege the needs of the public, whether the privilege is rooted in the imperative for confidence and trust, the evidentiary benefit of the denial of the privilege, and any consensus among the states, *Jaffee v. Redmond,* 518 U.S. 1, 10 15, 116 S.Ct. 1923, 1928 31, 135 L.Ed.2d 337 (1996) but none of these considerations weighs in favor of recognizing a new privilege to prevent discovery of the plea negotiations. Although plea negotiations are vital to the functioning of the criminal justice system, a prosecutor and target of a criminal investigation do not enjoy a relationship of confidence and trust when they negotiate. Their adversarial relationship, unlike the confidential relationship of a doctor and patient or attorney and client, warrants no privilege beyond the terms of Rule 410. *See Jaffee,* 518 U.S. at 10, 116 S.Ct. at 1928. But the victims would enjoy an evidentiary benefit from the disclosure of plea negotiations to prove whether the United States violated their rights under the Act. As for any consensus among the states, the majority of the state statutes the intervenors cite adopted Rule 410 verbatim. *Compare, e.g.*, Fla. Stat. § 90.410 ("Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding."), *with* Fed.R.Evid. 410.

Even if we were to accept the intervenors' argument that plea negotiations are de facto confidential in criminal practice, that custom alone would not protect them from discovery because Rule 410 militates against the

establishment of a new privilege. The Supreme Court has cautioned federal courts to be "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." *Univ. of Pa.,* 493 U.S. at 189, 110 S.Ct. at 582. Congress weighed the evidentiary concerns related to criminal plea negotiations when it enacted Rule 410, which enables a defendant to negotiate without fear that the prosecutor will use his statements against him. Rule 410 contemplates that ***1010** plea negotiations should ordinarily be inadmissible against a defendant, but not always. The rule does not bar the admission of plea negotiations, for example, when the defendant pleads guilty, in a proceeding for perjury, or when the defendant introduces the statements so long as they are not self-serving hearsay. If we were to recognize a privilege for plea negotiations, we would upset the balance that Congress struck when it adopted Rule 410. *See In re MSTG, Inc.,* 675 F.3d 1337, 1344 (Fed.Cir.2012) (rejecting a privilege for settlement negotiations because Congress, by enacting Rule 408, "did not take the additional step of protecting settlement negotiations from discovery."). We will not go further than Congress stated was necessary to promote the public good in criminal plea negotiations.

IV. CONCLUSION

We **AFFIRM** the disclosure order and **LIFT** the stay of the order compelling the United States to disclose the correspondence.

All Citations

749 F.3d 999, 24 Fla. L. Weekly Fed. C 1270

Footnotes

* Honorable Charlene Edwards Honeywell, United States District Judge for the Middle District of Florida, sitting by designation.

End of Document

EXHIBIT B

No. 13-12923

In the

United States Court of Appeals

for the

District of Eleventh Circuit

Jane Doe No. 1 and Jane Doe No. 2,

Plaintiffs-Appellees,

v.

United States of America,

Defendant,

Roy Black et al.,

Intervenors/Appellants.

JANE DOE NO. 1 AND JANE DOE NO.2'S APPELLEE BRIEF

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

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to 11th Cir. R. 26.1, Jane Doe No. 1 and Jane Doe No. 2, through undersigned counsel, hereby certifies 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. Villafaña, A. Marie
16. Weinberg, Martin

17. Doe No. 1, Jane

18. Doe No. 2, Jane

Note: As they have in the court below, as well as in parallel civil court proceedings, Jane Doe #1 and Jane Doe #2 proceed by way of pseudonym as victims of child sexual assault.

STATEMENT REGARDING ORAL ARGUMENT

Appellees Jane Doe No. 1 and Jane Doe No. 2 request oral argument in this case to clarify the factual record.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Appellees Jane Doe No. 1 and Jane Doe No. 2 (hereinafter "the victims") have a pending motion to dismiss for lack of subject matter jurisdiction. For the reasons articulated in that motion, the Court lacks jurisdiction over this appeal.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

In the district court, the victims have alleged the following facts, which the district court properly assumed to be true in ruling on the pre-trial discovery motion of appellants Roy Black, Martin Weinberg, and Jeffrey Epstein (hereinafter collectively referred to as "Epstein") to prevent disclosure of certain correspondence.[1]

The Epstein Investigation and the Non-Prosecution Agreement

In 2006, the Federal Bureau of Investigation opened an investigation into allegations that Epstein had been sexually abusing underage girls over the proceeding five years. The United States Attorney's Office for the Southern District of Florida accepted the case for prosecution, and in June, 2007 and August, 2007, the FBI issued victim notification letters to the appellees, Jane Doe No. 1 and Jane Doe No.2.

Extensive plea discussions then ensued between the U.S. Attorney's Office

[1] All of the following facts are taken from the District Court's recent decision, denying the Government's Motion to Dismiss, District Court Docket Entry (DE) 189, the Victims' Motion for Summary Judgment (DE 48), an affidavit supporting discovery (DE 225-1), and related orders.

and Epstein, a politically-connected billionaire represented by a battery of high-powered attorneys. On September 24, 2007, the U.S. Attorney's Office entered into a non-prosecution agreement ("NPA") with Epstein, in which it agreed not to file any federal charges against Epstein in exchange for Epstein pleading guilty to two minor state offenses.[2] The Office entered into the NPA without first conferring with victims, and without alerting them to the existence of the agreement, either before or promptly after the fact – facts that the Government apparently concedes.

The U.S. Attorney's Office then kept the victims in the dark about the agreement for roughly nine months, making no mention of the NPA in intervening correspondence and verbal communications between the victims, the FBI, and the local United States Attorney's Office. *See* DE 48 at 7-20. The post-agreement deception includes January 10, 2008, letters from the U.S. Attorney's Office to both Jane Doe No. 1 and Jane Doe No. 2 advising that the case "is currently under investigation" and that "it can be a lengthy process and we request your continued patience while we conduct a thorough investigation." *Id.* at 16. This letter (other letters like it up through at least May 2008) did not inform the victims that Epstein had months earlier already entered into a non-prosecution agreement regarding the crimes committed against them, a fact that Epstein

[2] The charges were solicitation of prostitution and procurement of minors to engage in prostitution, in violation of Fla. Stat. §§796.07 and 796.03.

concedes. *See* Appellant's (Appt's) Br. at 2 ("In September, 2007, . . . Jeffrey Epstein entered into a non-prosecution agreement with the Government."). In addition, the U.S. Attorney's Office sent a letter to the victims' counsel in June, 2008, asking them to submit a letter expressing on why federal charges should be filed against Epstein – without disclosing that the U.S. Attorney's Office had already entered into the NPA blocking the filing of such charges.

This post-agreement deception was done specifically at the behest of Epstein. The victims have specifically alleged that the U.S. Attorney's Office – pushed by Epstein – wanted the non-prosecution agreement kept from public view because of the intense public criticism that would have resulted from allowing a politically-connected billionaire who had sexually abused more than 30 minor girls to escape from federal prosecution with only a county court jail sentence. DE 48 at 11. The victims have also alleged that the Office wanted the agreement concealed at this time because of the possibility that the victims could have objected to the agreement in court and perhaps convinced the judge reviewing the agreement not to accept it. *Id.* It is undisputed that extensive negotiations took place between Epstein and prosecutors regarding crime victim notifications – negotiations that lead to the Government not providing notifications to Jane Doe No. 1 and Jane Doe No. 2. *Id.* at 13-14; *see also* DE 225-1 at 50. The Government has further admitted that its negotiations with

defense counsel regarding victim notifications was not standard practice. DE 225-1 at 50.

Ultimately, on June 27, 2008, the Assistant United States Attorney assigned to the Epstein case contacted victims' counsel to advise that Epstein was scheduled to plead guilty to certain state court charges on June 30, 2008, again without mentioning that the anticipated plea in the state court was the result of the pre-existing agreement with the federal authorities. DE 48 at 19-20.

On June 30, 2008, Epstein pled guilty to the state law charges. Jane Doe No. 1 and Jane Doe No. 2 did not attend that proceeding because they did not know about the existence of the NPA; nor did they know that this guilty plea would block the filing of federal charges for Epstein's crimes against them. *Id.* at 19.

On July 3, 2008, victims' counsel sent a letter to the U.S. Attorney's Office advising that Jane Doe No. 1 wished to see federal charges brought against Epstein. Of course, when counsel drafted that letter, he did not know that Epstein had entered into a non-prosecution agreement barring such charges ten months earlier. *Id.* at 20.

Procedural History Surrounding the Victims' CVRA Petition

The victims' counsel began to hear rumors that Epstein was working out some sort of an arrangement with the U.S. Attorney's Office, an arrangement that

was not be disclosed to the victims. Accordingly, on July 7, 2008, Jane Doe No. 1 filed an "emergency" petition under the Crime Victims' Rights Act, 18 U.S.C. § 3771, contending that Epstein was currently involved in plea negotiations with the U.S. Attorney's Office which "may likely result in a disposition of the charges in the next several days." CVRA Petition, DE 1at 3. Arguing that they had been wrongfully excluded from those discussions, Jane Doe No. 1 asserted a violation of her CVRA rights to confer with federal prosecutors; to be treated with fairness; to receive timely notice of relevant court proceedings and to receive information about her right to restitution. *Id.* (*citing* 18 U.S.C. § 3771(a)).

On July 9, 2008, the government filed its response, disclaiming application of the CVRA to pre-indictment negotiations with prospective defendants. Alternatively, the government contended it did use its "best efforts" to comply with the CVRA's requirements in its dealings with Jane Doe No. 1. DE 13.

On July 11, 2008, the District Court held a hearing on the initial petition. DE 15. During the course of that hearing, the Court allowed Jane Doe No. 2 to be added as an additional victim. The Government acknowledged that both Jane Doe No. 1 and Jane Doe No. 2 met the CVRA's definition of "crime victims."

During that hearing, for the first time victims' counsel began to learn that

the Government and Epstein had concluded a NPA months earlier. *See* DE 15 at 24. The District Court then inquired, in view of the fact that the agreement was at least nine months old, whether the proceedings could still be regarded as an emergency. Having just learned that the NPA was executed months earlier, victim's counsel agreed that he could see no reason why the matter needed to be handled on an emergency basis. DE 15 at 25.

The District Court indicated that the case would require some factual development, and the Government and victims' counsel agreed to reach a stipulated set of facts. Later, on August 21, 2008, the District Court provided a copy of the NPA to the victims. DE 26.

Over the following months, the victims attempted (unsuccessfully) to negotiate an agreed statement of facts with the Government about how the NPA was negotiated without providing them an opportunity to confer regarding it. They also pursued collateral civil claims against Epstein, during which they also learned facts relevant to their CVRA suit. For example, Epstein produced to the victims' counsel significant parts of the correspondence concerning the NPA. The victims ultimately successfully settled their civil cases with Epstein.

The victims, however, were unsuccessful in reaching any agreement with the Government regarding the CVRA case. Because the Government refused to reach any stipulated set of facts, on March 21, 2011, the victims filed a Motion for

Finding of Violations of the CVRA and a supporting statement of facts. DE 48. They also filed a motion to use the correspondence that they had previously received from Epstein in the civil case in their CVRA case. DE 51.

Procedural History Regarding Releasing the Correspondence

On April 7, 2011, two of Epstein's numerous criminal defense attorneys – appellants Roy Black and Martin Weinberg – filed a motion for limited intervention in the case, arguing that their right to confidentiality in the correspondence would be violated if the victims' were allowed to use the correspondence. DE 56. Jeffrey Epstein also later filed his own motion to intervene to object to release of the correspondence. DE 93. Later, Epstein and his attorneys filed a motion for protective order, asking the Court to bar release of the correspondence. DE 160. At no point, however, did Epstein or his attorneys provide any affidavits or other factual information establishing that the correspondence was confidential. Nor did they provide a privilege log or other description of the materials in question.

While these intervention motions were pending, on September 26, 2011, the District Court entered its order partially granting the victims' motion for a finding of violations of the CVRA, recognizing that the CVRA can apply before formal charges are filed against an accused. DE 99. The Court, however, denied the victims' motion to have their facts accepted, instead deferring ruling on the

merits of the victims' claims pending development of a full factual record. The Court also authorized the victims to conduct limited discovery. DE 99 at 11. The victims quickly requested discovery from the Government, including correspondence between the Government and Epstein's attorneys regarding the non-prosecution agreement.

On November 8, 2011, the day on which the Government was due to produce discovery, it instead moved to dismiss the entire CVRA proceeding for alleged lack of subject matter jurisdiction (DE 119), and successfully sought a stay of discovery (DE 121, 123). The victims filed a response. DE 127.

On March 29, 2012, the district court turned to the motions to intervene, granting both Epstein's motion to intervene (DE 159) and his attorneys' motion to intervene (DE 158). The Court emphasized, however, that the question of the merits of the intervenors' objections remained to be determined.

After additional proceedings, on June 18, 2013, the district court denied Epstein's efforts to bar release of the plea bargain correspondence. DE 188. The District Court began by noting that the same arguments that Epstein was raising had previously been rejected in one of the victims' parallel federal civil lawsuits, and it saw "no reason to revisit that ruling here." *Id.* at 3-4. The District Court then rejected Epstein's argument that the correspondence was protected under Fed. R. Evid. 410, because that Rule by its own terms does not apply in situations where a

defendant later pleads guilty. The District Court next rejected Epstein's argument that it should invent a new "plea negotiations" privilege that would apply to the correspondence, explaining that "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 7-8.

The next day, the District Court entered a detailed written opinion denying the Government's motion to dismiss. DE 189. After carefully reviewing the CVRA's remedial provisions, the Court explained 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 the prosecutor's conferral obligations under the statute." DE 189 at 7. In light of this conclusion, the District Court explained that it was then "obligated to decide whether, as crime victims, petitioners have asserted valid reasons why the court should vacate or re-open the non-prosecution agreement reached between Epstein and the [U.S.

Attorney's Office]. Whether the evidentiary proofs will entitle them to that relief is a question properly reserved for determination upon a fully developed evidentiary record." DE 189 at 11-12. The Court then ordered the Government to begin to produce the requested discovery. DE 190.

On June 27, 2013, Epstein and his attorneys filed a notice of appeal from the District Court's denial of efforts of block release of the plea bargain correspondence. DE's 194-96. Epstein also filed for a stay pending appeal (DE 193), and the victims filed a response in opposition (DE 198). The district court denied the motion to stay, explaining:

> In this case, intervenors have neither demonstrated a probable likelihood of success on the merits on appeal, *see e.g. In re MSTG, Inc.*, 675 F.3d 1337 (7th Cir. 2012) (rejecting request for recognition of new privilege for settlement discussions; finding need for confidence and trust alone insufficient reason to create a new privilege, and noting that Congress, in enacting Fed. R. Civ. Evid. 408, governing admissibility of statements made during "compromise negotiations, " did not take additional step of protecting settlement negotiations from discovery); *In re Qwest Communications International, Inc.*, 450 F.3d 1179 (10th Cir. 2006) (noting circuit courts' near unanimous rejection of selective waiver concept as applied to attorney-client and work-product privileges), nor that the balance of equities weighs heavily in favor of granting a stay.

DE 206 at 2-3. E

STANDARD OF REVIEW

1. The victims first present the issue that Epstein has failed to develop a factual record to support his claim that the correspondence in question is

confidential. This issue is a purely factual one, which this Court would review by giving due deference issue to the District Court in managing discovery matters. *World Holdings, LLC v. Federal Republic of Germany*, 701 F.3d 641, 649 (11th Cir. 2012).

2. The District Court rejected Epstein's claim that correspondence by his attorneys was protected from discovery by Rule 410 for two reasons: first, because it was not general discussions of leniency and statements made in the hope of avoiding a federal indictment rather than plea negotiations; and, second, that it involved negotiations for charges to which Epstein ultimately plead guilty. These are both factual findings, for which review is limited to determining whether the district court "had an adequate factual basis for the decision it rendered" and whether the decision was "clearly erroneous." *Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1244 (11th Cir. 2008).

3. Epstein asks this Court to overturn the District Court's decision not to recognize a new privilege for plea bargaining. This Court has held that "a new privilege should only be recognized where there is a 'compelling justification." *International Horizons, Inc. v. The Committee of Unsecured Creditors,* 689 F.2d 996, 1004 (11th Cir.1982) (internal quotation omitted). The issue is thus whether the District Court erred in finding no such compelling justification.

SUMMARY OF THE ARGUMENT

Appellants Jeffrey Epstein and his attorneys argue that they have some sort of interest in the confidentiality of correspondence that they sent to government prosecutors – prosecutors who were attempting convict their client of sex offenses. The district court properly rejected their argument and this Court should affirm the decision below for three reasons.

1. Epstein never developed any evidentiary record in the district court that the correspondence in question was confidential. Accordingly, he has simply failed to establish the required factual record to permit him to challenge the District Court's conclusions. *Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (noting privilege holder not "excused from meeting [his] burden of proving the communication confidential and within the [applicable] privilege").

2. Rule 410 of the Federal Rules of Evidence does not apply to bar discovery of the correspondence, because (a) the Rule does not apply where a criminal defendant pleads guilty; (b) the District Court's factual finding that the correspondence was not primarily plea negotiations was not clearly erroneous; (c) entirely apart from whether they can use the correspondence against Epstein, the victims can discover the correspondence to use against the Government; (d) Rule 410 does not, in any event, even apply to the early discovery phase of litigation; (e)

no work product privilege exists over correspondence that was exchanged by Epstein with his adversaries.

3. This Court should not create a new privilege for plea bargaining in this case, because Rule 410 provides sufficient protection for such negotiations and the Court should not undermine the Crime Victims' Rights Act.

This Court should also dismiss Epstein's appeal because it lacks jurisdiction over an interlocutory appeal of a discovery dispute.

ARGUMENT

In the District Court, the victims have advanced detailed allegations that Epstein and the Government agreed to a non-prosecution agreement and then further agreed to conceal it from the victims for many months. The District Court has ordered the Government to provide to the victims correspondence between Epstein and the Government that will shed light on these allegations.

In his brief to this Court, Epstein does not contest the merits of the victims' allegations. Instead, he argues that the District Court's action was improper because of alleged confidentiality of the correspondence, either under Fed. R. Evid. 410 or a "common law" privilege. Indeed, Epstein goes so far as to argue that the District Court's decision somehow "dramatically reshapes the landscape of criminal settlement negotiations" (Appt's Br. at 10). Epstein thus stakes out the sweeping position that prosecutors and defense attorneys are free to bargain away

criminal charges in secrecy without any consideration of the interests of crime victims, or the public for that matter.

If such a landscape ever existed, it exists no more. In the Crime Victims' Rights Act, Pub. L. 108-405, Title I, § 102(a), 118 Stat. 2261 (2004), Congress made clear that victims are entitled to information about the handling of the prosecution of crimes committed against them. As one circuit has observed, "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The CVRA sought to change this by making victims independent participants in the criminal justice process." *Kenna*, 435 F.3d 1011, 1013 (9th Cir. 2006).

To that end, the CVRA guarantees crime victims a series of rights, including the right "to confer with the attorney for the Government in the case." 18 U.S.C. § 3771(a)(5). Congress was concerned that crime victims "were kept in the dark by . . . a court system that simply did not have a place for them." 150 CONG. REC. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein). Congress gave victims "the simple right to know what is going on . . . ." *Id.*

The District Court below properly recognized that the victims have advanced serious allegations about deliberate violations of the CVRA. To develop a record about exactly what happened during the federal investigation of Epstein's crimes against them, the District Court has ordered the Government to provide to

the victims certain correspondence related to the Epstein prosecution. In doing so, the District Court properly rejected Epstein's claim that information he willingly provided to prosecutors is somehow blocked from discovery by Fed. R. Evid. 410. Not only has Epstein failed to provide factual support for his claims, but the Rule is obviously inapplicable. As the District Court properly found, the Rule only applies to defendants who have not pled guilty, not those (like Epstein) who have pled. Moreover, Epstein cannot invoke the Rule to block the victims efforts to discovery materials *from the Government*; the Rule has no application to discovery proceedings and no application to efforts to obtain materials for use against someone other than the defendant.

I. EPSTEIN HAS FAILED TO DEVELOP AN EVIDENTIARY RECORD IN THE DISTRICT COURT THAT HE HAS ANY INTEREST IN THE CONFIDENTIALITY OF THE CORRESPONDENCE.

In the District Court, Epstein made generalized allegations that he would be harmed if the plea bargain correspondence were to be provided to the victims. But he never offered any facts surrounding the alleged confidentiality of the correspondence, much less facts showing how he would be injured if the victims reviewed that correspondence. Accordingly, this Court should reject his appeal for the simple reason that the factual predicate for all of his arguments is lacking.

The ordinary procedure for establishing privilege is to provide not only a privilege log, but more important, an affidavit regarding the confidential nature of

the allegedly privileged materials. *See, e.g., Miccosukee Tribe of Indians of Florida v. United States*, 516 F.3d 1235, 1265 (11th Cir. 2008) (noting affidavits gave the distict court "an adequate basis to determine the privileges asserted . . . ."). Here Epstein has failed to provide the required privilege log under the Local Rules of the District Court. *See* Local Rule 26.1(g), S.D. Florida. But more broadly, he has not provided any factual support (i.e., affidavits or similar evidence) from which this Court could conclude that he will be injured by the release of the correspondence.

Epstein's failure to provide such evidentiary materials is not merely a procedural defect, but apparently a deliberate ploy. The victims have alleged (with evidentiary support) that Epstein was well aware that the CVRA required prosecutors to confer with victims and that he pressured the prosecutors into violating their CVRA obligations. *See, e.g.*, DE 48 at 12-15. For Epstein to contest this allegation, he would have to provide affidavits (from both his attorneys and him) that he believed that the prosecutors would keep everything that they discussed during plea bargaining secret from the victims without any urging from Epstein. Such affidavits would be in contradiction with the limited factual record that exists in this case at this point, which is presumably why Epstein has not provided *any* factual record about the confidentiality of the materials at issue. But regardless of the reasons for Epstein's failure to build a factual record, the simple

fact at this point is that he has failed to create the necessary factual support to carry *his* burden of proof on privilege issues. *See Bogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003) (noting privilege holder not "excused from meeting [his] burden of proving the communication confidential and within the [applicable] privilege").[3]

Epstein may argue that he contended below that the documents were privileged. But simply because he made an argument below does not mean that he has provided an appropriate evidentiary basis for that argument. The District Court record does not contain even the rudimentary elements that would allow this Court to make an informed assessment of Epstein's claim: How many documents are at issue? Who created the documents? Who looked at the allegedly "confidential" documents? Do these documents actually involve plea negotiations? Did anyone expect that the documents would be maintained as "confidential"? These are all facts that the Court would need to have before it to allow Epstein to get to first base with his arguments – and these are all facts that are entirely absent from the record.

In the District Court, the Government specifically warned Epstein that he would need to build a record to support his arguments:

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[3] Epstein's brief to this Court does now contain several quotations from the oral arguments of his attorney's below. *See, e.g.,* Appt's Br. at 19. The arguments do not provide proof of the factual propositions that would be required to sustain his privilege claims. And, more fundamentally, arguments are not evidence.

> However, upon intervention, Movant Epstein will have to meet his burden of establishing that he was in fact represented by specific attorneys, and that they had privileged communications in the course of that attorney-client relationship that have been or are at the risk of, unauthorized disclosure. Movant Epstein bears the burden of establishing that the communications he seeks to withhold from disclosure fall within the attorney-client or other privilege. "In meeting this burden, each element of the privilege must be affirmatively demonstrated, and the party claiming privilege must provide the court with *evidence that demonstrates the existence of the privilege*, which often is accomplished by affidavit."

DE 98 at 3-4 (emphasis added) (*quoting El-Ad Residences at Mirarmar Condo. Ass'n, Inc. v. Mt. Hawley Ins. Co.*, 716 F. Supp. 2d 1257, 1262 (S.D. Fla. 2010)). Rather than heed that specific warning from the Government that he needed to provide "evidence that demonstrates the existence of the privilege," Epstein decided to provide nothing at all.[4]

The victims, too, specifically argued to the District Court that, for example, "Epstein must *present evidence* that he will be injured if the victims read the correspondence." DE 98 at 11 (emphasis added). As with the Government's warning, Epstein elected not to heed the warning given by the victims.

In sum, *nothing* exists in the record that would allow Epstein to carry *his* burden of proof that the correspondence was confidential. That failure is fatal to

[4] At various points in his brief, Epstein claims that the Government supports his appeal. But the Government has not chosen to join this appeal and, to the contrary, has indicated to the District Court that is has collected all of the materials at issue and stands ready to deliver them to victims as soon as this Court permits it. *See, e.g.,* DE 216-1 at 9 (noting correspondence with Epstein's defense counsel that will be produced to opposing counsel upon lifting of stay).

appeal. *See, e.g., In re Subpoena Duces Tecum Issued to Commodity Futures Trading Com'n*, 439 F.3d 740, 754 (D.C. Cir. 2006) (rejecting privilege claim where appellant "failed to meet its burden of demonstrating that the disputed subpoenaed documents were created for the purpose of settlement discussions and therefore would merit protection under any federal settlement privilege. . . .").

II. THE CORRESPONDENCE BETWEEN THE GOVERNMENT AND EPSTEIN IS NOT PROTECTED FROM DISCOVERY BY FEDERAL RULE OF EVIDENCE 410 OR BY THE WORK PRODUCT DOCTRINE.

Epstein's lead argument is that the correspondence is protected from discovery by Federal Rule of Evidence 410 and/or the work product doctrine. Appt's Br. at 14-24. He is simply incorrect, as no protection exists for correspondence he voluntarily sent to federal prosecutors.

A. RULE 410 DOES NOT APPLY IN THIS CASE BECAUSE THE PLEA DISCUSSIONS LEAD TO A GUILTY PLEA.

Rule 410 is fundamentally inapplicable here because it is designed to protect defendants who are cloaked with a presumption of innocence, not those (like convicted sex offender Epstein) who have plead guilty to a crime. Because "Rule 410 is an exception to the general principle that all relevant evidence is admissible at trial, *see* Fed.R.Evid. 402, its limitations are not to be read broadly." *United States v. Barrow*, 400 F.3d 109, 116 (2d Cir. 2005). Here Epstein pled guilty to

state sex offenses as part of his far-ranging plea discussions with federal prosecutors, so the rule does not apply.

While Epstein repeatedly argues that the correspondence falls within the "heartland" of Rule 410 (Appt's Br. at 7), he never argues that it falls within the *text* of the Rule. Rule 410 provides in its entirety:

> Rule 410. Pleas, Plea Discussions, and Related Statements
> (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:
> (1) a guilty plea that was later withdrawn;
> (2) a nolo contendere plea;
> (3) a statement made during a proceeding on either of those pleas under Federal Rule of Criminal Procedure 11or a comparable state procedure; or
> (4) *a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.*
> (b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4);
> (1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
> (2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

Although Epstein has not made a factual record about what the correspondence involves (*see* Part I, *supra*), he appears to argue that the correspondence falls within Rule 410(4), italicized above. But the plain language of that provision is narrowly written to cover *only* a "statement made in the course of plea discussions with an attorney for the prosecuting authority which do *not* result in a plea of

guilty." Fed. R. Evid. 410(4) (emphasis added). Obviously, a prerequisite to applying the rule is a case where no plea of guilty "resulted" from the discussions. *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 (1991); *United States v. Ruhkowsi*, 814 F.2d 594, 596 (11th Cir. 1987) (discussing application of the rule in situations where "plea negotiations . . . broke down" and case went to trial).[5]

Here, although Epstein evades this central point in his brief, his plea discussions undeniably did result in a plea of guilty. On this point, the District Court made a specific finding of fact: "[T]he communications between Epstein's counsel and federal prosecutors at issue here ultimately *did* result in entry of a plea

[5] Cases such as these also make clear that Epstein's protestations that the District Court's decision to release plea discussion is somehow unprecedented, *see, e.g.,* Appt's Br. at 10, are simply untrue. Courts sometimes find Rule 410 applies and sometimes that it does not. In fact, in earlier civil litigation against Epstein, the district court ordered this correspondence produced to one of Epstein's sexual assault victims, rejecting his Rule 410 argument. DE 226, *Jane Doe #2 v. Jeffrey* Epstein, No. 08-cv-80893-MARRA (S.D. Fla. Jan.5, 2011). Like that decision, the decision on appeal in this case is simply a routine discovery determination that the correspondence at issue falls outside the protections of Rule 410. Moreover, courts routinely override even opinion work product claims in situations where the attorney's conduct is at issue in the case. *See, e.g., In re John Doe,* 662 F.2d 1073, 1080 (4th Cir. 1981); *Charlotte Motor Speedway, Inc. v. International Ins. Co.*, 125 F.R.D. 127, 130 (M.D.N.C. 1989). Of course, in this case the conduct prosecutors and Epstein in reaching the secret non-prosecution agreement is the central element of the case. Indeed, the only thing that is unprecedented about this case is the fact that Epstein and prosecutors choose to negotiate about how to keep crime victims from learning what was happening rather than to comply with the Crime Victims' Rights Act.

of guilty by Epstein – to specific state 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 4-5 (emphasis in original). That finding of fact can be overturned only if it is clearly erroneous. It is not.

Again, while Epstein bears the burden of proof on *his* privilege claim, he has failed to develop any factual record in support of his claim. *See* Part I, supra. More specifically, he cannot deny that the non-prosecution agreement that is at the heart of this case specifically includes a provision for Epstein to plead guilty to two state offenses. The NPA recites that "Epstein seeks to resolve *globally* his state and federal criminal liability and Epstein understands and acknowledges that, in exchange for the benefits provided by this agreement, he agrees to comply with its terms, including undertaking certain actions with the State Attorney's Office." NPA at 2 (emphasis added).[6] The NPA goes on to specifically provide that, in exchange for avoiding federal prosecution, Epstein will plead guilty to two state offenses:

> Epstein shall *plead guilty* . . . to the Indictment as currently pending against him in the 15th Judicial Circuit in and for Palm Beach County (Case No. 2006-cf-009495AXXXMB) charging one (1) count of solicitation of prostitution, in violation of Fl. Stat. § 796.07. In

[6] For the convenience of the Court, a copy of the NPA is attached to this brief.

> addition, Epstein shall *plead guilty* to an Information filed by the States Attorney's Office charging Epstein with an offense that requires him to register as a sex offender, that is, the solicitation of minors to engage in prostitution, in violation of Florida Statutes Section 796.03.

Id. at 3 (emphases added). And, as the District Court specifically found, Epstein ultimately did plead guilty to those two Florida offenses – and did so pursuant to the "global" agreement as a result of his plea discussions. DE 188 at 4.

While Epstein does not discuss the specific linkage in the NPA between the his non-prosecution for federal offenses in exchange for pleading guilty to two state charges, he does contend that Rule 410 is limited to guilty pleas to federal offenses. The plain language of Rule 410(4) does not contain any such limitation, narrowly extending protection only to negotiations that "did not result in a guilty plea" without requiring that that plea be to a federal charge.[7] And such a limitation of the rule to guilty pleas to federal charges only would be extremely unwieldy, since many criminal cases now involve discussions that span multiple jurisdictions

[7] Epstein perversely flips around this absence of a limitation, contending that if Congress had intended to cover situations where defendants pled guilty to state charges, it needed to say so. Appt's Br. at 26. But Congress simply used the plain term "guilty plea" rather than the more cumbersome formulation "guilty plea to a federal, state, or local offense." In the same sentence, Congress also used the broad formulation "prosecuting authority" rather than a narrower, federal formulation such "United States Attorney." Fed. R. Evid. 410(4). Finally, in another part of Rule 410, Congress did see fit to itemize both state and federal proceedings. Fed. R. Evid. 410(3). The fact that it chose a broader formulation here makes clear its intention to cover both state and federal pleas in Rule 410(4), as the caselaw holds.

– which is why defendants, such as Epstein, frequently seek a "global" resolution of their criminal liability. In any event, case law makes quite clear that Rule 410 draws no distinction between federal pleas and state pleas. *See, e.g., United States v. Chapman*, 954 F.2d 1352, 1360 (7th Cir. 1992) (applying rule to discussions over "withdrawn state plea"); *United States v. Kerik*, 531 F.Supp.2d 610 (S.D.N.Y. 2008) ("Rule 410 applies in federal proceedings to statements made in connection with prior state pleas"); *see also United States v. Holmes*, 794 F.2d 345, 349 (8th Cir.1986) (permitting the admission of a guilty plea from state court in a federal proceeding).

The only substantial argument that Epstein makes is that the "substantive settlement discussions thus revolved around [federal] offenses to which Epstein did not ultimately plead guilty . . . ." Appt's Br. at 27. Of course, this is a factual argument about the nature of the discussions – a factual argument that lacks any record support. Epstein has not shown that the District Court was clearly erroneous in concluding that correspondence involved global plea discussions that "revolved around" not merely Epstein's non-prosecution for federal charges but also, in exchange, his guilty plea to state charges.

B. THE DISTRICT COURT'S FACTUAL FINDING THAT SIGNIFICANT PARTS OF THE CORRESPONDENCE CONCERNED SUBJECTS OTHER THAN PLEA NEGOTIATIONS IS NOT CLEARLY ERRONEOUS.

As a second reason for denying Epstein's motion to bar release of the correspondence, the District Court made a specific factual finding that significant parts of the correspondence did not involve "plea discussions" protected under Rule 410 but rather general discussions of leniency. Epstein has not shown – and cannot show – that this factual finding is clearly erroneous.

As one reason for finding the correspondence not covered by Rule 410, the District Court noted that "[a]s 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." DE 188 at 4. For support, the District Court cited the relevant case law from this Court (as well as from other Courts of Appeals). *See* DE 188 at 4 (*citing 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 discussion of leniency did not transform meeting into plea negotiations)); *see also* DE 188 at 4 (*citing United States v. Edelmann*, 458 F.3d 791, 804-06 (8th Cir. 2006); *United States v. Hare*, 49 F.3d 447, 450 (8th Cir. 1995). This is a factual finding by the

District Court, based on its familiarity with the correspondence. The Court reviews such a finding only to determine whether it is clearly erroneous. *See In re Grand Jury Proceedings, No. 4-10*, 707 F.3d 1262, 1266 (11th Cir. 2013) (factual determination underlying privilege rulings reviewed only for clear error).

Epstein does not contend that the District Court misunderstood the applicable legal standards. Instead, Epstein launches a fact-based challenge, contending that "the best proof that the communications at issue were not merely 'general discussion of leniency' is that they unquestionably resulted in an agreement which settled the federal criminal investigation of Epstein." Appt's Br. at 24-25. The Court will notice that this factual argument comes unadorned of any citations to the record below. No doubt this is because Epstein has simply failed to create any record below. Thus, when Epstein says it is "unquestionably" true that the communications were not general discussions of leniency, the victims would simply respond that this is indeed in question – because the District Court has specifically made a factual finding to the contrary.

The victims, moreover, have very specific reasons for raising doubt about whether all of the correspondence focused as narrowly on the "plea discussions," that the rule protects. *See* Fed. R. Evid. 410(4) (extending protection only to "plea discussions"). The victims have made detailed allegations that significant parts of the correspondence deal with Epstein's defense attorneys attempting to improperly

interfere with the Government's required notifications to them under the Crime Victims' Rights Act. For example, the victims have alleged that on November 29, 2007, the U.S. Attorney's Office sent to Jay Lefkowitz, one of Epstein's many defense lawyers, a draft crime victim notification letter which would have explained the NPA to Epstein's multiple victims. DE 48 at 13. The victims have further alleged that because of concerns from Epstein's defense attorneys (presumably communicated in writing as part of the correspondence at issue here), the U.S. Attorney's Office did not send that proposed victim notification letter to victims, but instead sent a misleading letter that the case was "still under investigation." *Id.* Whatever may be the reach of Rule 410 protections for "plea discussions," it certainly would not extend to defense attorney's negotiations with prosecutors regarding the scope of their congressionally-mandated CVRA notifications to crime victims. Certainly a defendant would not be "exhibit[ing] an actual subjective expectation to negotiate a plea," *United States v. Merrill*, 685 F.3d at 1012, when attempting to prevent the Government from informing crime victims about a previously-consummated non-prosecution agreement that prevented prosecution of crimes against those very victims. And Epstein's argument that the correspondence was based on "established practice . . . regarding the confidentiality of such communications" (Appt's Br. at 17) rings hollow. It is hardly "established practice" for defense attorneys to convince federal prosecutors

not to notify victims about the outcome of their cases. Indeed, the Government has specifically admitted to the contrary that "[i]t is *not* standard practice for the U.S. Attorney's Office to negotiate with defense attorneys about the extent of notifications provided to crime victims." DE 225-1 at 50 (emphasis added).

Of course, the normal way for this Court to review a District Court's determination about the nature of alleged privilege material would be to review an affidavit and accompanying privilege log provided to the District Court by the party asserting privilege. *See, e.g., Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1314 (11th Cir. 2001) (noting presence of affidavit and privilege log in the record). Here, Epstein has failed not only to provide an affidavit and privilege but *any* materials that would allow this Court to overturn the District Court's finding about the nature of the materials. Accordingly, this Court should simply affirm the District Court's factual determination that the correspondence at issue does not involve "plea discussions" by rather "general discussions of leniency and statements made in the hope of avoiding a federal indictment."[8]

[8] Epstein has not argued – either in his brief to this Court or in the court below – that the correspondence at issue can be separated into documents that involve plea discussions and those that do not. And, of course, he has not provided a privilege log or other basis for making any such a discriminating, document-by-document judgment. Accordingly, the District Court's ruling about the general nature of *all* the documents must be affirmed.

C. RULE 410 DOES NOT APPLY HERE BECAUSE THE VICTIMS CAN USE THE CORRESPONDENCE AGAINST THE GOVERNMENT.

Although the District Court did not need to reach them, several other grounds apparent in the record support the ruling below. This Court should affirm on these grounds as well. *Thomas v. Cooper Lighting, Inc.,* 506 F.3d 1361, 1364 (11th Cir.2007) (judgment below can be affirmed on any ground apparent from the record).[9]

Rule 410 is inapplicable here because it would, at most, bar admissibility of the correspondence into evidence "against the *defendant* who made the plea," Fed. R. Evid. 410 – i.e., against Jeffrey Epstein. But the victims intend initially to obtain and use the correspondence to pursue further discovery and to seek relief *from the Government*. Indeed, the district court's order requiring production of the correspondence is not directed to Epstein at all – it is directed solely to the Government. DE 190 at 2.

By its plain terms, Rule 410 only bars the admission of evidence "*against the defendant* who made the plea." Fed. R. Evid. 410. The purpose underlying this rule is to "promote negotiations by permitting *defendants* to talk to prosecutors without sacrificing *their* ability to defend themselves if no disposition is reached." *United States v. Barrow,* 400 F.3d 109, 116 (2d Cir.2005) (emphases added).

[9] The victims raised these arguments below, DE 106 at 5-13, but the District Court did not need to consider them.

Thus, the Rule has no application where the discussions are being used not against a defendant but rather against the Government. *See, e.g., United States v. Biaggi*, 909 F.2d 662, 691 (2d Cir. 1990) (holding that under Rule 410 "plea negotiations are inadmissible 'against the defendant' . . . and it does not necessarily follow that the Government is entitled to a similar shield").

Here, the victims intend to use the correspondence to prove initially that the Government violated their CVRA rights.[10] Having proven a violation of their rights, they will then seek various remedies against the Government.[11] As they have made clear throughout this litigation, they also ultimately intend to ask for the Court to impose (among other things) the one remedy that will most directly respond to the Government's violation of their rights: invalidation of the non-prosecution agreement so that they can confer with the Government about the possibility of actually prosecuting Epstein for the sex offenses he committed against them. Epstein's lawyers claim that any such use would be a use "against" the defendant and therefore covered by this language in Rule 410. This claim, however, assumes that the Rule 410 bars every court action that might ultimately have some collateral, harmful effect on a defendant. But Rule 410 is much more

[10] The victims do not believe they stand in an adversarial posture with the Government, as Congress has obligated the Government to use its "best efforts" to protect the CVRA rights of crime victims. 18 U.S.C. § 3771(c)(1).

[11] A list of the remedies that the victims intend to seek from the Government is found in DE 127 at 13-15.

narrowly drafted – forbidding not uses that may eventually *harm* the defendant, but instead more narrowly admissibility of plea negotiations into evidence directly *"against the defendant"* in a "civil or criminal proceeding." Fed. R. Evid. 410.[12]

In any event, regardless of how that issue ultimately plays out, at this early point in the District Court proceedings, the victims are still conducting discovery in an attempt to prove to the District Court that the Government failed in its obligations to properly confer with the victims about the NPA. Obtaining discovery is obviously not a use against Epstein. Rule 410 is accordingly inapplicable.

D. RULE 410 DOES NOT BAR DISCOVERY OF THE CORRESPONDENCE.

Epstein's reliance on Rule 410 is also plainly premature. By its plain terms, the rule does not apply to discovery. Instead, it bars only the admissibility of "evidence" against the defendant in a "proceeding." *See* Fed. R. Evid. 410 (barring use of certain "evidence" in a "civil or criminal proceeding"). The Rule thus does not apply to the discovery phase at all. *See In re MSTG, Inc.*, 675 F.3d 1337 (7th

[12] Epstein also argues that it would be improper for the District Court to invalidate the non-prosecution agreement, even if the victims prove a deliberate agreement between the Government and him that lead to an agreement reached in violation of the Crime Victims' Rights Act. Appt's Br. at 16 n.4. This issue is not currently before this Court. As Epstein concedes, however, the District Court has already ruled against his legal position in a detailed opinion. DE 189. And, as the victims have argued at length below, there is ample basis for a District Court to set aside an illegal plea agreement. *See* DE 127 at 8-13.

Cir. 2012) (noting that Congress, in enacting Fed. R. Civ. Evid. 408, governing admissibility of statements made during "compromise negotiations," did not take additional step of protecting settlement negotiations from discovery).

Confirming the discoverability of plea discussions are the Advisory Committee Notes to Rule 410. Advisory Committee explains that the Rule was originally drafted to forbid use of plea discussions "for any purpose." Fed. R. Evid. 410, Advisory Committee Note to 1974 Enactment. However, the Rule was specifically amended by the Senate to allow use of plea statements where other statements have been introduced (a "completeness" provision) and for perjury purposes. *Id.*

Of particular relevance here, the completeness provision provides that even a protected plea bargaining statement is admissible "in any proceeding wherein another statement made in the course of the same plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." Fed. R. Evid. 410(b)(2). Here, the Government has already made it quite clear in its pleadings that it will introduce certain statements about the course of the plea negotiations. *See, e.g.,* DE 225-1 at 45-56 (Government response to request for admission); DE 58 at 10-14 (Government version of contested facts). From these pleadings, it is clear the Government intends to introduce many statements about the timing and course of plea discussions. For example, in its

response to the victims' summary judgment motion, the Government makes clear that it intends to argue that it properly conferred with the victims over eighteen months. *See* DE 62 at 37. Similarly, the Government intends to dispute that after it entered into the NPA with Epstein it sent misleading notices to the victims about the case still being "under investigation"). *Id.* at 41. It is simply unfair for the Government to be able to pick and choose from all the events surrounding the plea negotiations only those that support its case, while depriving the victims of the opportunity to even discover information that might bolster their case. *See Frontier Ref., Inc. v. Gorman-Rupp Co., Inc.,* 136 F.3d 695, 704 (10th Cir. 1998) (a litigant cannot use privilege "as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion."). And Rule 410 in particular blocks such a one-sided approach. Instead, under the Rule, the victims are entitled to show the full course of plea discussions at any ultimate hearing in this case about whether the Government violated their CVRA rights.

The District Court has already ruled that important factual questions exist about what happened in this case: "Whether the evidentiary proofs will entitle [the victims] to that relief [of setting aside the non-prosecution agreement] is a question properly reserved for determination upon a fully developed evidentiary record." DE 189 at 11-12. The Court has further indicated that it will be considering an

"estoppel" argument raised by the Government as a defense in this case. DE 189 at 12 n.6. The Court has noted that this argument "implicates a fact-sensitive equitable defense which must be considered in the historical factual context of *the entire interface* between Epstein, the relevant prosecutorial authorities and the federal offense victims – including an assessment of the allegation of a deliberate conspiracy between Epstein and federal prosecutors to keep the victims in the dark on the pendency of negotiations between Epstein and federal authorities until well after the fact and presentation of the non-prosecution agreement to them as *a* fait accompli." DE 189 at 12 n.6 (emphasis added). The victims thus have a compelling need for information about the Government's actions to show what the "entire interface" was and to respond to the Government's estoppel arguments, as well as other defenses that it appears to be preparing to raise.

Finally, this Court has also noted that even if plea discussions are excluded from use at trial, "derivative evidence" obtained from plea discussion is never excluded. *See United States v. Ruhkowsi*, 814 F.2d 594, 599 (11th Cir. 1987). Accordingly, even if Rule 410 were somehow applicable to later proceedings here, the victims are free to obtain the correspondence now and follow whatever discovery leads it may provide. In light of all these points, it is obvious that Epstein's efforts to contort Rule 410 into a barrier barring discovery by the victims against the Government is meritless.

E. THE WORK PRODUCT DOCTRINE DOES NOT APPLY TO CORRESPONDENCE WITH AN ADVERSARY.

At various points in his briefing to this Court, Epstein seems to allude to the work product doctrine as having some bearing on the correspondence at issue. Appt's Br. at 12 (argument heading mentioning work product doctrine). But Epstein never develops this argument at any length in his brief. Any implicit argument that the work product doctrine bars release of the correspondence should be rejected.

Perhaps the reason Epstein has not pressed a work-product argument at any length is because it would be nonsensical to argue that the work product doctrine applies to correspondence between adversaries; prosecutors and defense attorneys do not operate in a confidential relationship.

Case law is clear that "[d]isclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement." *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846 (8th Cir. 1988). In summarily rejecting Epstein's claim, the District Court found that Epstein had waived any work product protection in the materials by turning them over to the federal prosecutors:

> 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. 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 deliberating disclosing this material to federal prosecutorial authorities investigating allegations against Epstein at that time, any work product protection was necessarily lost.

DE 188 at 6 (*citing, inter alia, United States v. Massachusetts Institute of Technology*, 129 F.3d 681 (1st Cir. 1997). Numerous cases have reached the same conclusion as the District Court in similar circumstances. [13]

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[13] *See, e.g., Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991) (Westinghouse's disclosure of work product materials to the Justice Department during an investigation "waived the work-product doctrine as against all other adversaries."); *In re Qwest Communications, Inc.*, 450 F.3d 1179, 1192-1201 (10th Cir. 2006) (company's disclosure of documents to the SEC during criminal investigation waived work product protections); *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 668 (10th Cir. 2005) ("any work product objection was waived by [party] via production" of the documents in question); *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 302 (6th Cir. 2002) (attorney client/work product privilege was "never designed to protect conversations between a client and the Government — i.e., an adverse party — rather, it pertains only to conversations between the client and *his or her* attorney. . . purpose [of attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. Nowhere amongst these reasons [for protection] is the ability to 'talk candidly with

Moreover, as the District Court made clear, it was simply "assuming" without deciding that the correspondence could properly be described as work product. To obtain a reversal from this Court of the District Court's decision, Epstein would need to prove that the materials actually are work product materials. Again, he has failed to build any record to that effect in the District Court.

In any event, any such attempt would be doomed to failure. Significant parts of the correspondence obviously could not even arguably qualify as work-product, such as Epstein's lawyer's efforts to get the Government to stop making notifications to crime victims. Moreover, Epstein would have to prove that the correspondence was prepared in anticipation of litigation. Many such documents were presumably not so prepared, and certainly not prepared in anticipation of litigation about the Crime Victims' Rights Act. *See, e.g., Southern Union Co. v. Southwest Gas Corp.*, 205 F.R.D. 542, 549 (D. Ariz. 2002) (documents not protected by work product because not prepared in connection with case at hand); *Hendrick v. Avis Rent A Car System, Inc.*, 916 F.Supp. 256, 259 (W.D.N.Y.,1996) (no work product existed because "the documents sought were not prepared in

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the Government.'"); *In re Chrysler Motors Overnight Evaluation Litigation*, 860 F.2d 844, 846-47 (8th 1988) (defendant company's disclosure of computer tape to class counsel during settlement negotiated waived work product when tape sought by government as part of criminal case); *In re Sealed Case*, 676 F.2d 793, 824-25 (D.C. Cir. 1982) (production of documents during settlement discussions with the SEC waived work product protection as to grand jury materials).

anticipation of *this particular litigation*") (internal quotation omitted and emphasis added)).

It is also important to emphasize that the work-product is a qualified privilege, subject to a host of exceptions and ultimately a balancing of interests to determine whether the doctrine should be applied. One of the most important is the fact that one of the parties to the correspondence – the Government – has a statutory obligation to uses its "best efforts" to protect crime victims' rights. 18 U.S.C. § 3771(c)(1). In light of that clear statutory command, the Government has its own independent obligation to use the correspondence to help protect the victims' rights, including providing the correspondence to the victims. *See* DE 106 at 17-18; *see also* DE 226 at 12-14. No such work product confidentiality can operate in such circumstances, which further underscores the fact that any purported "reliance" by the defense attorneys on the idea that the correspondence would not be provided to the victims was unreasonable.

Work product is also subject to a crime-fraud-misconduct exception. *See Cox v. Administrator U.S. Steel & Carnie*, 17 F.3d 1386, 1422 (11th Cir. 1994). The victims have alleged in detail that such an exception applies in connection with the Government's attempt to assert work product protection to internal Justice Department documents. *See* DE 225-1 at 23. The same exceptions would prevent Epstein from prevailing on any (as of yet undeveloped) work production assertion.

For all these reasons, the Court should reject Epstein's claim that its correspondence with prosecutors during plea negotiations somehow is confidential work product immune from discovery.

III. THE DISTRICT COURT PROPERLY CONCLUDED THAT CORRESPONDENCE BETWEEN THE GOVERNMENT AND EPSTEIN IS NOT PROTECTED FROM DISCOVERY BY SOME KIND OF "COMMON LAW" PLEA BARGAINING PRIVILEGE.

For all the reasons just given, Rule 410 (and the work product doctrine) do not bar the victims from discovering correspondence about how the non-prosecution agreement was reached. Perhaps recognizing the weakness of this argument, Epstein raises as a final, fallback claim that the District Court erred in declining to recognize a new "common law" privilege for "settlement/plea negotiation communications in criminal cases." Appt's Br at 28. This argument, too, lacks any merit.

A. THE COURTS CANNOT CREATE A "COMMON LAW" PRIVILEGE THAT OVERULES THE LIMITATIONS OF RULE 410 AND THE STATUTORY COMMANDS OF THE CRIME VICTIMS' RIGHTS ACT.

Epstein asks this Court to invent some sort of new "common law" privilege under Federal Rule of Evidence 501. But the Supreme Court has been clear, however, that courts must "not create and apply an evidentiary privilege unless it promotes sufficiently important interests to outweigh the need for probative evidence. Inasmuch as testimonial exclusionary rules and privileges contravene

the fundamental principle that the public has a right to every man's evidence, any such privilege must be strictly construed." *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990) (internal quotations omitted).

While Epstein does not cite the controlling legal standard for creating a privilege in this Circuit, this Court has strongly cautioned that "the rule in this circuit is that a new privilege should only be recognized where there is a 'compelling justification.'" *International Horizons, Inc. v. The Committee of Unsecured Creditors,* 689 F.2d 996, 1004 (11th Cir.1982) (*quoting In re Dinnan,* 661 F.2d 426 (5th Cir.1981)). This Court has explained that this stringent rule arises from the federal courts' disfavor of privileges and from the policy of construing privileges narrowly, so as to protect the "search for truth." 689 F.2d at 1003 (*quoting United States v. Nixon,* 418 U.S. 683 (1974)).

Here, this Court has strong reason to be skeptical of a new plea bargaining privilege. The transparent purpose behind Epstein's "common law" effort is to avoid the specific limitations contained in Rule 410 – limitations that prevent him from availing himself of Rule 410. *See* Part II, *supra*. But the Supreme Court has made clear that courts must be "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 (1990) (internal quotation omitted). This Court

should not use the general provisions of Rule 501 to effectively supersede the detailed limitations contained in Rule 410.

In addition, Epstein's argument would require this Court to supersede the Crime Victims' Rights Act. The CVRA promises crime victims a series of rights, including rights specifically at issue in this case: the right to confer with prosecutors, to be notified of court hearings, and to be treated with fairness. 18 U.S.C. § 3771(a)(2) & (5) & (8). The CVRA further commands that the courts have specific obligations to "ensure" that crime victims' rights are protected. 18 U.S.C. § 3771(b)(1) ("the court shall ensure that the crime victim is afforded the rights described [in the CVRA] . . . ."). Of course, it is to "ensure" that such rights are protected for Jane Doe No. 1and Jane Doe No. 2, two acknowledged victims of Epstein's sex offenses, that the District Court has ordered the Government to make the correspondence available to them. The District Court properly gave precedence to the protection of statutorily-created rights over Epstein's alleged "common law" privilege.

B. NO "COMMON LAW" PRIVILEGE FOR PLEA BARGAINING EXISTS.

Even if this Court were willing to entertain the idea that it should embark on an exercise of "common law" privilege making, no common law privilege exists for plea bargaining. While Epstein frequently alludes to "constitutional considerations" that supposedly undergird plea bargaining, the simple fact remains

that "there is no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). To be sure, the courts tolerate widespread plea bargaining because it helps reduce the workload of congested criminal dockets. But common law rulemaking should not be used to exalt administrative convenience over the far more important value of the search for truth.[14]

Moreover, were the Court to consider creating such a privilege, this would be a poor case in which to do so. Epstein is forced to admit that, at least in federal court, his Sixth Amendment rights have not yet attached in this case, because no indictment has yet been filed. *See* Appt's Br. at 33; *see Lampley v. City of Dade City*, 327 F.3d 1186, 1195 (11th Cir. 2003). Therefore, this case does not present any occasion for considering the scope of a privilege to protect Sixth Amendment right to counsel interests.

In addition, as is apparent from the District Court's rulings, this case involves a highly unusual situation where crime victims have raised credible allegations of an arrangement between prosecutors and defense attorneys to violate statutorily-mandated crime victims' rights. Indeed, the Government has recently admitted that "[i]t is not standard practice for the U.S. Attorney's Office to

[14] Of course, if their client wishes, defense counsel should always explore plea bargaining opportunities. *See Padilla v. Kentucky*, 130 S.C.t 1473, 1485 (2010). But this is a far cry from proving there is a "right" to plea bargaining or that protecting plea bargaining opportunities is more important than, for example, protecting congressionally-mandated crime victims' rights conferred in the CVRA.

negotiate with defense attorneys about the extent of notifications provided to crime victims," DE 225-1 at 50, negotiations that it nonetheless undertook in this case. *Id.* Accordingly, were the Court to even consider creating a new privilege, it would be doing so in circumstances that do not reflect ordinary plea bargaining practices.

Make no mistake about the sweeping position that Epstein is advancing: He is not arguing that this Court should recognize a narrow privilege that would prevent the victims from using any admissions of guilt he may have made. Instead, Epstein is broadly claiming that his defense attorneys and the Government can agree between themselves to undertake secret plea discussions — even in violation of congressionally-mandated crime victims' rights in the CVRA — and then later block the crime victims from obtaining the information that would prove the violation that has happened. Such a privilege would, among other things, directly conflict with the statutory command of Congress that crime victims must be "treated with fairness," 18 U.S.C. § 3771(a)(8),.

Epstein claims that defense attorneys must have assurances that communications with prosecutors will never be turned over to crime victims. Appt's Br. at 10. But it is now settled that if defense attorneys want to engage in plea discussions with federal prosecutors, they must now be aware that the prosecutors will, in turn, confer with victims about the 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 correspond with the government about how to avoid the requirements of the CVRA and then expect to be able to hide behind some nebulous "common law privilege" to escape accountability for any resulting violation of law.

Perhaps recognizing that tenuousness of raising plea bargaining over truth-seeking values, Epstein attempts to repackage his proposed privilege as a "mediation" privilege. Appt's Br. at 47. But Epstein implicitly concedes that there is no well-established "common law" support for a mediation privilege, as he is able to cite only a smattering of cases (three in total over the last 32 years) recognizing such a privilege. *See* Appt's Br. at 40.[15] None of these cases are from the Eleventh Circuit, which (unlike other jurisdictions) requires a strong showing

[15] Epstein also remarkably alleges that there is a "consensus among the states" in favor of protecting plea discussions. Appt's Br.a t 42 & n.10. But his citations simply show that many states have adopted Fed. R. Evid. 410 essentially verbatim, including the limitations that prevent Epstein from taking advantage of its protections here. If anything, his citations show that there is a consensus among the states *not* to protect the correspondence at issue here.

of "compelling" justification before a new privilege can be created. *International Horizons, Inc. v. The Committee of Unsecured Creditors,* 689 F.2d 996, 1004 (11th Cir.1982) ("compelling" justification required to interfere with the search for truth in federal cases). Moreover, none of the three cases cited involve plea bargaining in criminal cases – presumably because that subject is already directly covered in detail in Rule 410. Finally, these cases involve situations where a court thought it important to create "confidentiality and trust *between participants* in a mediation proceeding." *See, e.g., Folb v. Motion Picture Ind. Pension & Health Plans*, 16 F.Supp.2d 1164, 1175 (C.D. Cal. 1998) (emphasis added)). Here, of course, Epstein is not trying to create trust with the Government, but rather to block third parties to illegal negotiations learn what happened. No other Court of Appeals has extended a new privilege in such a situation. *See, e.g., In re MSTG, Inc.*, 675 F.3d 1337 (7th Cir. 2012) (rejecting request for recognition of new privilege for settlement discussions; finding need for confidence and trust alone insufficient reason to create a new privilege, and noting that Congress, in enacting Fed. R. Civ. Evid. 408, governing admissibility of statements made during "compromise negotiations," did not take additional step of protecting settlement negotiations from discovery). Epstein has not established the "compelling" reason that would be required for such an unprecedented step. The District Court's decision not to do so should be affirmed.

IV. THIS COURT DOES NOT POSSESS JURISDICTION OVER AN INTERLOCUTORY DISCOVERY DISPUTED.

Not only is Epstein's appeal meritless, but it is also not properly before the Court at this time. Epstein is asking this Court to jump into the middle of a District Court discovery dispute. The Supreme Court in *Mohawk Industries, Inc. v. Carpenter,* 130 S. Ct. 599 (2009), cautioned that "the district judge can better exercise [his or her] responsibility to [to police prejudgment tactics of litigants] if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Id.* at 605. For all of the reasons explained in the victims' pending Motion to Dismiss Non-Party Interlocutory Appeal and Reply in Support of Motion to Dismiss Non-Party Interlocutory Appeal, this Court should dismiss Epstein's appeal for lack of jurisdiction.

Because the victims have fully briefed the jurisdictional arguments in connection with their pending motion, they will not repeat their arguments here. The victims will, however, point out that there is serious discussion among the federal courts of appeals questioning the continued viability of the *Perlman* doctrine in the wake of *Mohawk*. The relevant opinions are summarized in *United States v. Copar Pumice Co., Inc.*, 714 F.3d 1197, 1209 n. 5 (10th Cir. 2013) ("A few circuit courts of appeals have discussed the impact of the *Mohawk* decision on the *Perlman* doctrine, with varying results.").

Epstein relies heavily on one of those opinions, *United States v. Krane*, 625 F.3d 568 (9th Cir. 2010). *See* Appt's Br. at 50. But the circumstances there hardly match the circumstances here. In that case, a recognized privilege holder sought interlocutory review to bar release of documents protected by the attorney client privilege in connection with a criminal case. The Ninth Circuit in *Krane* allowed the appeal, noting that "for all practical purposes, this appeal [was] [the privilege holders] *only opportunity* to seek review of the district court's order adverse to its claims of attorney-client privilege . . . ." *Id.* at 573 (emphasis added). Here, however, Epstein will have other opportunities to present a challenge to the use of the correspondence, because he has moved to intervene in other proceedings below.

Indeed, the victims need to alert the Court that Epstein, a billionaire with a battery of well-paid attorneys, appears to be embarking on a steady stream of motions to intervene below, with a possible steady stream of interlocutory appeals to this Court. After strategically delaying any entrance for several years, Epstein has now filed three separate motions to intervene in the District Court. Epstein first sought limited intervention not when the case was first filed in 2008, but rather more than three years later; on September 2, 2011, he moved to intervene with regard to correspondence between his attorneys and federal prosecutors (DE 93) – the intervention that has prompted this appeal. In response, the victims

objected that his efforts were untimely. DE 96. The victims also warned against "subjecting the [District] Court (and the victims) to an endless stream of 'limited' intervention motions from Epstein and his attorneys whenever a hearing does not unfold to his liking." DE 96 at 17. Ultimately, the District Court sided with Epstein on this particular motion, allowing his limited intervention (and that of his attorneys) on issues related to the correspondence. DE 158,159. Later, of course, the District Court rejected Epstein's arguments against releasing the correspondence to this Court, prompting Epstein's current interlocutory appeal.

In June of this year, another hearing unfolded in a way not to Epstein's liking. On June 18, 2013, the court denied the Government's motion to dismiss (DE 189) and a few days later, Epstein filed another motion for limited" intervention – this one a "prospective" motion anticipating that the District Court will need to determine whether the non-prosecution agreement in this case can be set aside as a remedy for the Government's violation of the CVRA. DE 207. The victims responded, DE 209, noting that on this particular issue, they had no objection to intervention because the issue had not yet been subject to any litigation. DE 212. That motion by Epstein to intervene remains pending before the District Court and is unopposed.

Most recently, on July 26, 2013, Epstein filed a *third* motion for "limited" intervention regarding grand jury materials that the District Court had ordered the

Government to produce to the victims. Epstein claimed that his motion was timely because the issue regarding the grand jury materials on recently became ripe. DE 215 at 3. Yet the issue was actually several years old, as the victims have argued in their opposition to the motion (which is pending before the District Court). DE 221.

Given that Epstein has filed three separate motions to intervene – the District Court has granted one of them, one of them is unopposed, and one remains under consideration – it can hardly be said that this appeal is somehow Epstein's "only opportunity" for further review of the relevant issues. Indeed, unless this Court makes clear that this interlocutory appeal is improper, it can perhaps look forward to (and subject the District Court to) a series of future interlocutory appeals that could disrupt the proceedings below. This kind of delaying tactic was precisely the sort of danger that *Mohawk* warned against. Accordingly, this Court should find that it lacks jurisdiction at this time to consider Epstein's interlocutory appeal of the District Court's discovery order regarding the correspondence.

CONCLUSION

For all these reasons, this Court should find that it lack jurisdiction over this appeal. If this Court reaches the merits of the appeal, it should affirm the decision of the District Court.

DATED: August 30, 2013

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(A)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements.

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,267 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 pt Time New Roman type.

Respectfully submitted,

Paul G. Cassell

CERTIFICATE OF SERVICE

The foregoing document was served on August 30, 2013, on the following using the Court's CM/ECF system:

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EXHIBIT C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 09-34791-BKC-RBR

In Re:
ROTHSTEIN ROSENFELDT ADLER, P.A.,
Debtor.
_____/

MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM TRUSTEE PURSUANT TO DOCUMENT PRODUCTION PROTOCOL ESTABLISHED BY DE#672 (807); AMENDED MOTION FOR PROTECTIVE ORDER (819)

August 4, 2010

The above-entitled cause came on for hearing before the HONORABLE RAYMOND B. RAY, one of the Judges of the UNITED STATES BANKRUPTCY COURT, in and for the SOUTHERN DISTRICT OF FLORIDA, at 299 East Broward Blvd., Fort Lauderdale, Broward County, Florida, on Tuesday, August 4, 2010, commencing at or about 9:30 a.m., and the following proceedings were had:

Reported By: Margaret Franzen

APPEARANCES:

BERGER SINGERMAN, by
CHARLES H. LICHTMAN, ESQUIRE
on behalf of the Trustee

CONRAD & SCHERER, by
WILLIAM R. SCHERER, ESQUIRE
on behalf of victims

FOWLER WHITE BURNETT, by
RONALD G. NEIWIRTH, ESQUIRE
LILLY ANN SANCHEZ, ATTORNEY-AT-LAW
CHRISTOPHER E. KNIGHT, ESQUIRE
JOSEPH L. ACKERMAN, ESQUIRE
on behalf of Jeffrey Epstein

FARMER JAFFE WEISSING EDWARDS FISTOS & LEHRMAN, by
GARY FARMER, ESQUIRE
BRAD EDWARDS, ESQUIRE
on behalf of LM, Brad Edwards and
Farmer Jaffe Weissing Edwards Fistos & Lehrman

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THE COURT: Rothstein Rosenfeldt & Adler. All right. May I have appearances, please?

MR. LICHTMAN: Good morning, Judge. Chuck Lichtman, Berger Singerman, for the trustee.

MR. NEIWIRTH: Good morning, your Honor. Ronald Neiwirth, Fowler White Burnett, on behalf of the movant, Epstein, and with me today are two of my partners, Chris Knight and Lilly Ann Sanchez --

MS. SANCHEZ: Good morning, your Honor.

MR. KNIGHT: Good morning, your Honor.

MR. NEIWIRTH: -- both of whom are more familiar with the State Court angle on this than I am, so they came along to be able to elucidate that end of it.

MR. FARMER: Good morning, your Honor. Gary Farmer on behalf of LM, Brad Edwards, and the Farmer Jaffe Weissing law firm. We are an interested party and have filed a motion for protective order as to the subpoena that is at issue here today.

THE COURT: All right. Insofar as the TD Bank motion, Docket Entry 780, that has been the subject matter of an agreed order that was submitted to me.

MR. LICHTMAN: Correct, Judge.

THE COURT: Mr. Scherer.

MR. SCHERER: Yes, sir, your Honor. I'm William Scherer and I'm here on behalf of a number of victims in the State Court action, as well as the chairman of the creditors' committee in the bankruptcy.

THE COURT: All right. That leaves us with Docket Entry 807 and 819. 807 is Jeffrey Epstein's motion.

MR. NEIWIRTH: Thank you, your Honor, and again, good morning. We represent Jeffrey Epstein. He has a civil claim pending in State Court in Palm Beach County. He had served a subpoena on Mr. Stettin requesting documents from the RRA estate. That was back in April.

While this was still in process, in May, under Docket Entry 672, your Honor entered an order standardizing procedures for obtaining discovery from Mr. Stettin and the RRA estate, and at least on the face of it, it takes jurisdiction over all discovery efforts against the trustee. That left us in a quandary.

We had a subpoena pending in State Court. We had correspondence from Berger Singerman on behalf of the trustee that they had

identified information and they were processing it, including vetting for attorney/client privilege issues, but then in the meantime came your Honor's order on May 18th, so we had to go back and reinvent the wheel and go through the necessary hoops in order to comply with that.

In the meantime, as we sit here now, we still have no production. We have a trial date coming up in October, and we have a motion for protective order coming from a party who's already settled out, the LM party. They no longer have anything directly to do with this.

Further, we are advised by the creditors' committee that in addition to what was proffered to us, that at some point in time there had been something like ten boxes of records pertaining to these particular issues and someone on behalf of the victims had been given, or several someones, had been given access to those ten boxes and had viewed them, which would vitiate any attorney/client privilege in any event.

So what we are trying to do is fashion a mechanism so we can comply with your order, Docket 672, about standardized means of getting

production from the trustee, allow for the appropriate vetting of the materials for attorney/client privilege, and we must bear in mind that this is one objector, there's a lot more documents than that.

To the best of our knowledge, the documents that pertain to the LM party, who is settled anyway, may be 15 percent of those which are responsive to the inquiry that we made of the trustee, but in any event, someone has to vet them for attorney/client privilege and do a privilege log.

Now, Mr. Farmer's office on behalf of LM wants to do that. We don't think that's appropriate. We think the privilege at this point, since the case is settled, lies with RRA and, therefore, the trustee, rather than Mr. Farmer and his client, because as to them the case is over.

Furthermore, we don't think there is any privilege because the boxes have been vetted before and we'll hear more about that from Mr. Scherer, I assume, because he was the one that was aware of that.

And last, but not least, your Honor has

taken jurisdiction over these discovery matters and attempted to standardize discovery efforts for the trustee. There's a lot of people that want things from the trustee.

The trustee is overseeing an estate which involved somewhere in excess of 70 lawyers and lots of cases and lots of problems, and literally millions of documents, and we have absolutely no problem with the standardized order, but that means that somehow or other we have to be able to deal with it in a standardized manner, instead of Mr. Farmer's suggestion, which is go back to State Court and deal with it over there.

THE COURT: What is the status of the State Court proceeding?

MR. NEIWIRTH: May I defer to my partner, who is more familiar with that?

MR. KNIGHT: Your Honor, Christopher Knight, if I may? While we were waiting for the documents from the Stettin office, we obviously wanted to go down two tracks because we had an October trial date. The status of it is we could not come to an agreement with the other side. Mr. Ackerman was at the last hearing, in which the

judge said, one, I need a representative of the trustee here and two, shouldn't this be back before you, Judge Ray.

THE COURT: You can't proceed against Rothstein in the State Court, they're here.

MR. KNIGHT: And that is the same thing I think Judge Crow recognized, and that's why we're back here, and that's why we had to file the motion.

MR. ACKERMAN: The claim against Rothstein is against him individually, and it's against Brad Edwards individually, and it was against one of the claimants, LM individually.

THE COURT: So it's not against the debtor estate.

MR. ACKERMAN: That's correct.

MR. KNIGHT: Just to go a little further on what Mr. Neiwirth was saying. Out of these documents we've been asking for for a long time, very few of them would even have privilege on their face because they have nothing to do with the clients that were represented, what's been called as LM.

If there's going to be a log, if there's any need, which I don't think there is because I think privilege has been waived, it needs to be a log put together by the trustee,

not anybody else that has some sort of interest in it.

If there's a problem with payment for those, et cetera, our client has already offered to the trustee, to Mr. Lichtman, we will pay for it, whether it's a special master or whether it's a contract attorney, if they need to do that, but I don't think we even need to reach that.

I think these documents are long overdue. They have been produced to others, they have been used in depositions for others, they are out there, and I think the privilege issue is just being used as a smoke screen to keep our client from being able to get the documents he needs to be able to prove his case.

Thank you.

MR. ACKERMAN: Your Honor, one other matter. Judge Crow expressed a concern about entering any order against the trustee or his counsel without them being present.

Initially we had filed a motion to compel in the State Court, but we didn't realize at the time or it was unclear, because we had just taken over the case from another law firm, that the Court had entered its order.

There was some discussion prior to the hearing and when we went to the hearing, it was clear that there was no agreement that had existed and Judge Crow said, I'm not entering an order, I'm not doing anything on this motion until the bankruptcy trustee is represented.

He was concerned because this Court's order had set up the standardized procedure for dealing with these arguments and had reserved jurisdiction relating to any subpoena or request for documents from the trustee, so that's why we're here now.

THE COURT: All right.

MR. KNIGHT: Your Honor, just one other point. We tried to work, and we've been working with Mr. Lichtman, tried to work out a protective order between the trustee and Epstein regarding the subpoena. Mr. Lichtman and Ms. Sanchez agreed to language on it. I have a copy of it.

Mr. Farmer, with his motion for protective order, would not agree to that, but if the Court would like to have a copy of what the draft was, I will approach your clerk, but if you do not want that, I also ---

THE COURT: Well, let me hear from

everybody first.

MR. KNIGHT: Okay.

MR. FARMER: Thank you, your Honor, may it please the Court. Again, Gary Farmer on behalf of the interested party, LM, also on behalf of Brad Edwards and I'm sorry, your Honor, Mr. Edwards is here with me. I neglected to introduce him to the Court earlier.

MR. EDWARDS: Good morning, your Honor.

MR. FARMER: There has been a lot of discussion here about your Honor's standardized production order and I think that you need to understand that this particular matter, which is before you today, is anything but standard or common to the matters before this Court.

You need to understand the nature of the case. Jeffrey Epstein is an admitted convicted pedophile. He sexually assaulted dozens and dozens of young girls under the age of 15. He pled guilty to this and he has settled every civil lawsuit filed against him on this issue.

Despite all of this, Mr. Epstein has seen fit to file a lawsuit against LM, who is one of the plaintiffs against him; against

Brad Edwards, LM's attorney; and against Mr. Rothstein.

Now, Edwards, myself, and all the members of our firm were RRA attorneys when Mr. Rothstein took his ill-fated trip to Morocco and did the things which are now so well known, but the fact of the matter is that this discovery request is a blatant attempt to obtain clearly privileged documents related to the representation of LM and many other victims, by the way.

And if I can show your Honor a copy of the subpoena itself, I don't think that the breadth of the subpoena has been adequately represented to the Court. If you peruse this, you will see they are asking for communications with private investigators, they're asking for contingency fee contracts, they're asking for every communication between any member of the firm, and they throw Rothstein in just to make it sexy, about these cases.

Now, your Honor, clearly communication about the representation of a client falls under not only the work product, but if the client is involved in the communication, also the

attorney/client privilege.

Now, most of this stuff we've already responded and said none, none, none, but for many of these items, we have asserted the privilege and we continue to assert the privilege.

Now, the only reason the trustee is here ---

THE COURT: Wait, there's been a privilege asserted in the State Court proceeding?

MR. FARMER: Yes, sir.

THE COURT: And there is a privilege log and the judge has made a ruling?

MR. FARMER: No. The dispute now really is over who's going to file the privilege log and respectfully, Judge, what we suggest is that the trustee has been thrust into this matter simply because the trustee stands in the shoes of all the former attorneys at RRA, and the trustee is likewise bound by the privileges that attach to the cases and to the lawyers that were at the firm.

The trustee has repeatedly acknowledged the fact that it is bound by those privileges and, of course, as your Honor knows, the privilege belongs to the client, not to any lawyer or any law firm.

So the trustee is really kind of stuck in the middle here. You've got the pedophile who wants documents related to the cases he's already settled and pled guilty for. Those documents, the electronic documents, at least, the e-mails, electronically stored information is how it's referred to in the discovery request, your Honor, are not in our possession, they are in the possession of the trustee because the trustee took the computer system.

So the trustee doesn't want to incur the cost and expense of filing a privilege log and, frankly, I don't know that the trustee has a full appreciation of the nature and specific facts of the cases that would enable it to conduct a complete privilege log.

So my suggestion, your Honor, and it's been rejected -- I believe it's acceptable to the trustee, but it's been rejected by Mr. Epstein's counsel, is the trustee be removed from this equation. There's no need that we come back before you.

This case, this Epstein case, is not a matter which would involve bankruptcy estate assets going to Mr. Epstein. Unlike

Mr. Scherer's clients, who have claims before this Court, and hopefully they will get some form of relief from the Bankruptcy Court, Epstein is not seeking any bankruptcy assets. He's suing Brad Edwards and LM personally, and Scott Rothstein, and it's not an estate claim, it's against Scott Rothstein personally.

So my suggestion, your Honor, is that you instruct the trustee to turn this electronic documentation information over to us. We will file the appropriate privilege log with the Circuit Court judge who is presiding over the case, who is most familiar with the case, who will be considering the upcoming motion for summary judgment, and possibly trying the case, and that way your Honor is not burdened with this matter, the trustee does not incur fees and expenses of having to go through all of these documents, prepare a privilege log and our clients and Mr. Edwards -- Mr. Edwards is also a party of that lawsuit. He enjoys his own privilege, your Honor, over and above, or in addition to, I should say, the privilege possessed by our former clients and, of course, I know counsel knows that the privilege extends

beyond the litigation.

So although Mr. Epstein paid a ton of money for this claim that is supposedly frivolous, it has been settled, but the privilege still extends and it remains in place. So we simply want to make sure that our investigative materials, our reports, other documentation relating to the claims we have and have had against Jeffrey Epstein are not put into the hands of Jeffrey Epstein's attorneys.

Now, we just want the chance to review these documents and prepare the privilege log and the trustee is kind of stuck in the middle here, Judge. Remove the trustee from the equation, let us get the documents, we'll file the privilege log, and then Mr. Epstein and us can go before Judge Crow. He can review the privilege log, review the documents in camera.

All that is going to be pretty time consuming, but he's much more suited, a better suited judge because he's more familiar with the facts to engage in that inquiry.

THE COURT: Thank you.

MR. FARMER: Thank you, your Honor.

THE COURT: Mr. Lichtman, Mr. Scherer, your

input, please.

MR. LICHTMAN: I'm going to let Mr. Scherer go first.

MR. SCHERER: I think he wants me to go first.

THE COURT: All right.

MR. SCHERER: Your Honor, in November we filed a lawsuit in State Court and we alleged that as a part of Mr. Rothstein and the firm, and the firm's employees, and maybe some of the firm's attorneys, conspired to use the Epstein/LM litigation in order to lure $13.5 million worth of my victims, my clients, into making investments in these phoney settlements.

And as we alleged in that State Court proceeding, and we've sharpened the allegations as we've amended a few times, we allege that sometime in late October, that my clients were invited into the Rothstein firm with Mr. Rothstein, and he explained that he had a litigation going in State Court with Mr. Edwards representing LM, a victim of Mr. Epstein, and these are kind of sensational allegations and it's been printed widely.

And my clients, a number of them and

their lawyer, went into the Rothstein conference room and Mr. Rothstein brought down -- summoned the investigators, two of them, two or three of them, to bring down the Epstein file. And the lawyer that my clients brought from a national firm, went through the LM boxes, ten of them that the investigators brought down, and concluded that the Epstein case was a real case.

And what Mr. Rothstein did with that real case, of course, is he told everybody that not only did he have the LM client of Mr. Edwards, that there were a number of other young ladies, that was widely published in the newspaper, that the firm was representing and that wanted to settle with Mr. Epstein on a confidential basis.

So he used the real case in order to defraud my clients into investing into these phoney settlements and paid 13 and a half million dollars. I believe that Mr. Rothstein and others in the firm also told that story to a lot of other people, and let a lot of other people examine those ten boxes of the real case.

In addition, as we have alleged, that Mr. Edwards and the firm put sensational

allegations in the LM case that they knew were not true, in order to entice my clients into believing that Bill Clinton was on the airplane with Mr. Epstein and these young woman and other personages, I can't remember who they are, and all sorts of other allegations that really were not even related to the LM case.

And to the extent that any lawyers from the RRA firm, former lawyers, made a ton of money or however Mr. Farmer talked about it, we're interested in that ton of money because if they were involved in this scheme, this fraud, there's a crime fraud exception, and in addition, I want to see the ten boxes that they brought down.

The trustee does not have those ten boxes. Those ten boxes were taken by Mr. Edwards when he left the law firm, I presume. So we want the ten boxes, we want all the communications and we want to look through everything on behalf of my State Court case, but also on behalf of the creditors' committee because the creditors' committee is looking to see if anybody else in the firm, other than Rothstein, was involved in this massive fraud that used the Epstein case.

The model of using an existing case and

then spinning off a fraud from it is the same that was perpetrated on the Morse -- in the Morse situation, as has been alleged and widely produced.

I can't conceive that Mr. Edwards and the predecessor law firm would have any standing to prepare privilege logs or anything else, given what I just told the Court. That would be like having the fox guard the hen house. That Epstein case is settled, and to the extent it's the ten boxes of stuff that we looked through, and I'll have to get the boxes to see if the attorney who looked through them, and how much time he spent looking through them ---

THE COURT: Where are the ten boxes?

MR. SCHERER: That's a good question. The trustee does not have the ten boxes. I presume the ten boxes are residing with the lawyers who took the case, Mr. Edwards and the successor law firm. The trustee does not have them. And then in addition, there's about 6,000 e-mails that the trustee has, and I bet you when we look at Qtask, there's going to be a boatload more.

My clients were also advised during

their due diligence, short due diligence to settle these cases with these young ladies -- these putative young ladies who had to get the money and leave town because of whatever the stories were, that there were other members of the firm that told my clients that they, indeed, had even identified more of these victims that Mr. Rothstein didn't even know about at that time. So we know it wasn't just Mr. Rothstein spinning the tale, there were a lot of people in the firm.

We've alleged almost all of this in our State Court action that we filed in November, up to where we are right now, but, your Honor, I think your Honor is going to have to deal with these issues in this court and I would urge you to have the trustee get involved and let the trustee do its job with respect to whether there are privileges that need to be protected, work product or attorney/client privileges, given what's going on, and I believe the trustee will be investigating whether the trustee wants to bring any claims on behalf of the estate by virtue of what I've just laid out for you.

Thank you.

THE COURT: So your lawsuit in State Court names these people as defendants?

MR. SCHERER: It names Rothstein. It does not name Mr. Edwards. It just names Rothstein, not the firm, and lays out the facts and says other people in the firm. We did not name them because we want to see the documents and see whether they had involvement.

But the facts that I have alleged for you, your Honor, is pretty much what I've alleged in my first through third amended complaint in State Court.

THE COURT: So, in essence, your position in this matter would be to support the motion to compel and deny the motion for protective order?

MR. SCHERER: Yes, sir, notwithstanding that Mr. Epstein is a convicted pedophile. I want to put that on the record. You know, he's served his time and whatever, but I support the same position that he -- that he has asked the Court, and that is to have the trustee deal with this, get these documents and deal with it with you, rather than allow the successor law firm to have them.

I don't know where they had the right

to take those ten boxes to start with.

THE COURT: All right. Mr. Lichtman.

MR. LICHTMAN: Good morning, Judge. I'm going to try to walk you through sort of chronologically the trustee's perspective of what has happened here. I think that what I've heard from all the parties are comments that are correct, and not necessarily correct, and I'm not suggesting falsehoods. We just have kind of a different perspective of some things and there are some points that ought to be corrected.

Mr. Stettin received a subpoena in a Palm Beach State Court action for production of documents, and as we had done in virtually every subpoena, we went to our forensic accountants, the Berkowitz Dick Pollack & Brant firm, and said, okay, we need to produce e-mails and we need to also then, with the staff that we have at Berger Singerman and elsewhere, and look to see if there are any hard documents that we can find, notwithstanding what we'll call the issues as to the RRA hard drive that contain client files.

We quickly realized that this is a claim different than all of the other subpoenas. The subpoenas that we had been receiving from

virtually every other party in the case were requests for production of documents related to claims that those moving parties or requesting parties would have as it pertains to them trying to recover some aspect of money as pertained to the Ponzi scheme.

Okay. Like Mr. Scherer, who said I need a bunch of documents, can you help us? So we would enter into, on a one by one basis, a protective order that was very, very tightly negotiated. There is no standard form protective order in this case, contrary to what everybody has told you. We have a form that we use, and everybody that has come to us, we said, we need to have a protective order in place ---

THE COURT: We have Docket Entry 672, which apparently is the document production protocol.

MR. LICHTMAN: We have that, yes, but then we also, as an example, Document 685, have a protective order that was entered with Mr. Scherer's clients. We have, as an example, Document 715 that pertains to MS Capital, and on and on.

So, in any event, what we realized is the case with respect to the Epstein vs. Scott Rothstein, Bradley Edwards case, is this is

different. This is not an asset either to the RRA estate, nor is it really an asset to any potential creditor of the RRA estate that is investigating claims that can bring a recovery that can help in terms of the overall dollars into either RRA or to a particular creditor on their individual lawsuits.

The Epstein case, rather, is a lawsuit between a third party that was being sued by the Rothstein firm against Rothstein lawyers, and we had a different privilege issue than we had focused on with all these other document productions.

So we get the 6,000 e-mails, and on the eve of one of my colleagues getting ready to enter into -- either enter into one of these protective orders or say, here, take them, like we've done with everybody else, we looked up and Mr. Stettin and I said, time out. We have a legitimate privilege issue here.

And I want to be clear, we don't want to come anywhere close to stepping in the mess of waiving attorney/client privilege, unless and until the Court tells us to, and I want to also be clear, we wish we weren't here. We would

prefer not to have a fight on any of this stuff and on one hand, we don't care who does the privilege log and who gets the documents, and on the other hand, because of some things that Mr. Scherer just commented on, that I learned literally today, and because of the common interest agreement that everybody knows we have with Mr. Scherer and the committee, in some respects, I don't think it prudent for me to discuss why I would want to look at some of those documents.

But be that as it may, we found that there were 6,000 e-mails and this was the one time that rather than go through the usual protocol of preparing the stipulated protective order that is effectively a mirror image of that which is provided by Federal Rule of Evidence 502, we said there is a need for a real privilege log here.

There are 6,000 e-mails, give or take, and we quickly assessed that the time to review 6,000 e-mails, this could not be done by a paralegal, it would have to be done by a lawyer.

THE COURT: Does this include Qtask or is this in addition to?

MR. LICHTMAN: Qtask is not part of this equation as of right now. Now, it may be, and we're still trying to get that. I'm just talking about internal e-mails where we would put in a name search, give it to the Berkowitz firm and say, run an e-mail search on the following names.

And when we realized the volume of work, and you can imagine, you know, like from a ream of paper, 500 sheets of paper, and you multiply that out and you get to 12 reams of that paper, it takes up a lot of paper, it takes up a tremendous amount of time. This is not an asset of the estate that we can, if we have to, warrant doing the work, the hard work, as we've done on many of the other claims, some of which already are before you for settlement purposes. This is a liability to the estate and an expensive one.

So we really didn't want to go through the undertaking of having to protect the privilege, though we would, and candidly, Epstein's counsel has said we'll pay you to do it, but then there's also the manpower issue because we are pressed very hard to get certain adversaries moving as quickly as we can and we're fighting a lot of battles on a lot of different

grounds, we still really don't want to do that, and also because we don't know the Epstein case well enough to be able to assess what is privileged, what is not, and preparing a privilege log the proper way is really a time consuming mess.

So I teed it up for both sides and said, here's what I'm willing to do. Putting aside the issue as to really whether or not the Court does have jurisdiction on a State Court subpoena, which ultimately I leave to you, we said, we're still willing to enter into a modified version of the protective order that we gave to you, which effectively provides the additional language of no claims can be brought against Mr. Stettin or the estate if we produce these documents.

We don't really have a bone to pick in this mess, we just want to make sure that we follow all of the ethical boundaries required by Florida law, by rules of professional conduct. We don't wish to necessarily waive somebody else's privilege. We don't think that's necessarily prudent, but we really don't want to have a fight in this battle, and we wanted the

Court to approve -- whatever it is you want us to do, to tell you the truth, we're happy to do. We just want to make sure that Mr. Stettin is personally insulated and that the estate is insulated in whatever it is --

THE COURT: All I see is --

MR. LICHTMAN: -- you direct.

THE COURT: -- the potential of a claim against Stettin and the estate for breach of the attorney/client privilege.

MR. LICHTMAN: correct.

THE COURT: So the basis --

MR. LICHTMAN: And hence the dilemma.

THE COURT: -- for the claim is there.

MR. LICHTMAN: Yeah, right, hence the dilemma.

Now we come to the issue of hard documents because the e-mails are one thing, and I had a number of conversations candidly with Ms. Sanchez, where I think that we had told her originally we had heard there were, as an example, some loan files or transaction files related to Ponzi deals related to Mr. Epstein, because I remember myself even hearing that going back many, many, many months ago.

Suffice it to say, that I have conducted a very thorough discussion, without waiving our internal privileges or work product, and we can't find those, and it appears as if they really did not exist, that what had occurred is that somehow Epstein was listed on a sheet for a potential deal that never closed.

In terms of the ten boxes of documents, one of the functions the trustee served early on in the case was to facilitate transfers of files --

THE COURT: I remember that.

MR. LICHTMAN: -- from two attorneys that were handling cases. All right. I had a general understanding that most of the files were picked up by the Farmer firm because they were continuing on with that litigation, and that would have made some sense, but then we had also heard that there were some boxes that were left behind.

I believe there are two boxes, I'm not positive of that, two boxes I think that we may still have, and I'm pretty sure we've sent e-mails a couple of times to the Farmer firm saying, come get your documents.

Now, why would we do that? A, because

they had been counsel for LM and others in litigation respecting Epstein, and that we assumed that they would have been files they would want; and B, because at the time that this matter on the subpoena came before the State Court judge, we stood outside the courtroom and here's what happened. I was effectively going to tell the State Court judge basically the same story I've told you in complete detail and say, we don't really care. We just want to make sure Mr. Stettin is protected and the estate is protected.

And we had reached an agreement that day, which was we were going to turn over the boxes to Mr. Farmer's firm and we were going to give e-mails to them, and they were going to do the privilege log because that would save us a ton of time, important time, and as important, a lot of money to the estate, and we did not wish to burden the creditors of the estate with legal fees for putting together the privilege log, so it was agreed that we would do that.

I, personally, reiterated the terms to all the lawyers that were standing outside the courtroom, as to what was to be reflected in a

written order because I didn't want to leave it to chance as to what was agreed on.

Suffice it to say, when the lawyers for Mr. Epstein and the lawyers for Mr. Edwards went back to try to reduce to writing that which was in part agreed upon outside the courtroom, they were unable to do so, and that teed up the filing of the motion before you to compel us to produce the e-mails and the documents.

I wish to reiterate, I think that Mr. Scherer has shared something with me that we need to investigate and will, and I was unaware of that literally until I rode up the elevator with him this morning. And I don't wish to spend more time on it than that right now, but I take him at his word because an awful lot of what I've seen him work on so far has borne fruit.

I don't care what you want us to do. All I want to know is that at the end I can walk out of court with an order that protects the estate and protects Mr. Stettin. So I have told you the story and leave it to you to fashion what remedy you think appropriate.

If I can answer any questions, I'm happy to.

THE COURT: Well, the trustee knows what the trustee has, obviously.

MR. LICHTMAN: Yes.

THE COURT: So the trustee is capable of preparing a log of what he has.

MR. LICHTMAN: Meaning we have the following data.

THE COURT: Yes.

MR. LICHTMAN: Yes, we can do that.

THE COURT: Then the parties can then argue whether or not that is subject to privilege. The plaintiff can still get from Mr. Farmer and his clients in the State Court discovery. The discovery being sought here is from the trustee --

MR. LICHTMAN: Correct.

THE COURT: -- and would be subject to the trustee's responsibility for the privilege log because of his potential liability.

MR. LICHTMAN: Yes, and I think you understand, though, why if we can somehow deflect that responsibility, because of the extreme amount of cost and time to do that, we would be happy to do that because, you know, otherwise, we submit fee petitions that show a tremendous amount of time on something that doesn't produce an asset to the

estate, just a liability.

THE COURT: Right. This is not an asset of the estate.

MR. LICHTMAN: No, it's just a liability.

THE COURT: But could be a substantial liability.

MR. LICHTMAN: Hence the dilemma.

THE COURT: Well, I can appoint a special master to do it at the expense of the movant and not release the information until the special master reports back to me and I authorize the release.

What I propose to do by my authorizing the release -- I'm sorry, Stettin, as trustee, to release the information, I would, therefore, be protecting the estate from any claims for the release of that information.

MR. LICHTMAN: We would be happy to do that, your Honor, and I note, I don't wish to speak for the Epstein lawyers, they actually offered to pay time for us doing that, and I said, well, you know, that's part of the equation, the other part is ---

THE COURT: No, no, no, I can appoint a special master.

MR. LICHTMAN: Yes.

THE COURT: All right. Mr. Farmer.

MR. FARMER: Yes, your Honor. Just very briefly. I thank you for the opportunity to address the Court again. I just wanted to clear something up, your Honor. Understand that when this all happened, there were six of us now who are partners, who had dozens and dozens of on-going cases.

THE COURT: I remember we held hearings and I authorized the trustee --

MR. FARMER: And you authorized, yes.

THE COURT: -- to deliver the information so the lawyers could continue to represent the clients.

MR. FARMER: It just seemed to be maybe suggested here today that something untoward occurred as far as the removal of these boxes. These were litigation files, pleadings, investigative reports, all of these things.

So we needed to get on with those cases, but I think you've heard now from the trustee that this is not an asset and it is an expense. I still think that we are the party who should prepare this privilege log. We are most familiar ---

THE COURT: Well, no, if I appoint a special master, you will have an input into that

special master and you'll have an opportunity to be heard before me before I authorize the release of the information, because ultimately the order that's going to authorize the release of the information is going to provide protection to the trustee and the estate.

MR. FARMER: And, thank you, Judge, I just wanted to make sure, and I was going to request, that we have an opportunity to review whatever the master does and if we think they've missed a privilege or are wrong in an assertion, that we have an opportunity to address that.

THE COURT: There is going to be a hearing before the information gets released.

MR. FARMER: Understood. Thank you, your Honor.

THE COURT: All right. Mr. Lichtman --

MR. LICHTMAN: Yes.

THE COURT: -- I want you to prepare the order. I'm going to continue the hearing on the two motions, Docket Entry 807 and 819, and I'm going to have you draft an order appointing a special master, the expense of which will be borne by the Epstein movants. The special master will meet with both sides, Epstein and Edwards, and then with the

trustee, and will prepare a privilege log, the release of which will be noticed for hearing in front of me.

MR. LICHTMAN: Do I pick the special master or do you?

THE COURT: You can -- if you all can -- I hate to use the word agree, but if you all can agree, that's fine. If you can't agree, give me three names to choose from.

MR. LICHTMAN: Okay.

THE COURT: You're going to have to check with this, quote, "special master" to make sure they have the time to review the privilege log.

MR. LICHTMAN: The documents.

THE COURT: And it has to be somebody that doesn't have a conflict of interest.

MR. LICHTMAN: Right. Okay.

THE COURT: All right. Run the order by Mr. Neiwirth and Mr. Farmer.

MR. LICHTMAN: Thank you.

MR. FARMER: Thank you, your Honor.

MR. NEIWIRTH: Your Honor, may it please the Court?

THE COURT: Yes.

MR. NEIWIRTH: Can we say something about

the time frame because as we sit here right now we still have a trial coming in October.

THE COURT: Well, I understand that, but I probably have between five and 6,000 active cases right now and within the Rothstein case, I don't even know how many adversaries and contested matters are pending. I'll get to it as soon as I can.

But you can proceed to obtain the information from Edwards and LM in the State Court proceeding. All I'm governing is what the trustee is going to release from the debtor estate.

All right. Mr. Lichtman, see to the order.

MR. EDWARDS: Thank you, your Honor.

MR. FARMER: Thank you for your time, your Honor.

MR. NEIWIRTH: Thank you, Judge.

(Thereupon, the hearing was concluded.)

CERTIFICATION

STATE OF FLORIDA:
COUNTY OF DADE:

I, Margaret Franzen, Shorthand Reporter and Notary Public in and for the State of Florida at Large, do hereby certify that the foregoing proceedings were taken before me at the date and place as stated in the caption hereto on Page 1; that the foregoing computer-aided transcription is a true record of my stenographic notes taken at said proceedings.

WITNESS my hand this 5th day of August, 2010.

_____

Margaret Franzen
Court Reporter and Notary Public
in and for the State of Florida at Large
My Commission Expires: April 14, 2014