UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 and JANE DOE 2,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.
_____/

REPLY IN SUPPORT OF SUPPLEMENTAL BRIEFING BY LIMITED INTERVENORS BLACK, WEINBERG, LEFKOWITZ, AND EPSTEIN

The limited intervenors Black, Weinberg, Lefkowtiz, and Epstein re-file this reply, which is identical to the reply that was previously filed during the litigation on intervention. We only add that, in *Lafler v. Cooper*, 132 S. Ct. 1376 (2012) and *Missouri v. Frye*, 132 S. Ct. 1399 (2012), the United States Supreme Court flatly rejected the arguments by Jane Doe 1 and Jane Doe 2 that there are no "constitutional considerations that undergird plea bargaining" and that plea negotiations are "merely" a process that "serve[s] the administrative convenience of the parties." [DE 167 at 3]. As we set out in our Notice of Supplemental Authority filed last week [DE 163], the Supreme Court in *Lafler* and *Frye* constitutionalized the right to effective assistance of competent counsel in plea negotiations and specifically recognized that "plea bargains are . . . ***central*** to the administration of the criminal justice system" because ours is "a system of pleas, not a system of trials." *Lafler*, 132 S. Ct. at 1388; *Frye*, 132 S. Ct. at 1407.

The rest of our reply, as previously filed, provided as follows:

The plaintiffs contend that they need the plea negotiation letters for two reasons: First, to get an apology from the government, but of course they do not need the defense plea negotiations to get an apology from the government. And second, to seek "invalidation of the non-prosecution agreement so that they can confer with the government about the possibility of actually prosecuting Epstein." [DE 106 at 9].

The plaintiffs are not entitled to the plea negotiation letters to seek invalidation of the non-prosecution agreement. This is a remedy that the plaintiffs cannot obtain as a matter of constitutional law. Mr. Epstein has performed his side of the bargain with the government, and when a bargain is based "on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello v. New York*, 404 U.S. 257 (1971). Failure to enforce the government's side of a plea bargain violates Due Process. *United States v. Yesil*, 991 F.2d 1527, 1532-33 (11th Cir. 1992).

The plaintiffs knowingly sat on their CVRA claims for years as Mr. Epstein served a prison sentence in solitary confinement and as he satisfied all the requirements of his non-prosecution agreement. Rather than seek emergency relief from the Court, the plaintiffs appeared at a status conference on July 11, 2008, *knowing that Mr. Epstein was in prison*, and they told the Court that they saw no reason to proceed on an emergency basis. [Trans. July 11, 2008 at 24-25]. In a hearing one month later, the plaintiffs specifically asked that the Court *not* invalidate the non-prosecution agreement because they wanted to make sure not to undo any benefits they could gain from it. [Trans. August 14, 2008 at 4].

Mr. Epstein has a constitutional right to enforce the non-prosecution agreement. The time he served in prison cannot be given back to him. The Court may not undo the non-prosecution

agreement now that Mr. Epstein has adhered to his side of the bargain and suffered all of its burdens. Rather than invalidate the agreement, Mr. Epstein has a Due Process right to its continued specific performance and enforcement. *United States v. Haber*, 299 Fed. Appx. 865, 867 (11th Cir. 2008).

The remedy the plaintiffs seek cannot be obtained and their request for disclosure and use of the plea negotiation letters and emails to pursue that unprecedented objective should be denied. The negotiations are properly protected in this case by the attorneys' work-product privilege, by a common-law privilege under Rule 501 that the Court can recognize on a case-by-case basis, and by Rule 410. Finally, because there is no identity of parties and no identity of issues, collateral estoppel does not apply.

I.
COLLATERAL ESTOPPEL DOES NOT APPLY

Citing page 10 of the Magistrate Judge's Order of February 4, 2010 in the damages case of *Doe v. Epstein*, Case No. 9:08-CV-80119-KAM, the plaintiffs contend that collateral estoppel precludes the lawyers and Mr. Epstein from litigating the inadmissibility and privileged nature of the defense plea negotiation letters and emails. The plaintiffs are mistaken.

First, collateral estoppel requires identity of parties and no such identity exists. Jane Doe 1 and Jane Doe 2 in this CVRA case were not parties to the federal damages case from which the Magistrate Judge's order originated, and neither were the lawyers who seek to intervene. Thus, because there is a failure of identity of parties, collateral estoppel does not apply.

Second, collateral estoppel does not apply because there is no identity of issues. Collateral estoppel requires that "the issue at stake be identical to the one involved in the prior proceeding." *In re MDL*, 644 F.3d 1160, 1202 (11th Cir. 2011). The Magistrate Judge's order upon which the

plaintiffs rely does not address the letters and emails that the defense wrote to the government; the Order only addresses the letters and emails that *the government* wrote to Mr. Epstein's lawyers. With italicized emphasis in the original, the Order provides:

> The documents at issue here were given *by the Government* to Epstein, and as such are clearly not confidential communications protected by the attorney client privilege. The work product doctrine . . . is also not implicated as the subject documents were not created by Epstein's attorneys.

[Case No. 9:08-CV-80119-KAM, DE 462 at 10] (emphasis in original). Thus, while the plaintiffs contend in footnote 10 of their response that "the Court ordered Epstein to produce '*all* correspondence between you and your attorneys and state or federal law enforcement or prosecutors,'" the Court ordered nothing of the sort.

Identity of issues fails for another reason. In their discovery motions in the damages case, where the issue of the plea negotiation letters and emails arose, the parties were Jane Doe 1 and Jane Doe 2 seeking damages against Mr. Epstein for alleged sexual misconduct. The issue for the Magistrate Judge, based on representations by the plaintiffs, was whether those documents would lead to relevant evidence that could help Jane Doe 1 and Jane Doe 2 obtain a damage award against Mr. Epstein. That was how the issue was presented by the plaintiffs and based on that representation that the letters from the government could lead to discoverable evidence, the Magistrate Judge ordered their disclosure. In this CVRA case, the plaintiffs argue that the issues are whether the plea negotiation letters and emails from the defense to the government are relevant to show that the CVRA was not honored and whether they are relevant to the remedy the plaintiffs seek. These issues are not identical to the issues in the prior case, and therefore estoppel does not apply.

Finally, the unclean hands of plaintiffs' counsel should bar the plaintiffs from making estoppel arguments here. The plaintiffs' lawyers misrepresented their true intentions to the

Magistrate Judge when they sought discovery of the plea negotiation letters and emails. In their motion to compel discovery, they represented that the letters and emails were relevant and were sought for the purpose of leading to discovery of other admissible evidence in that lawsuit. [DE 210 at 10-12, n. 1-3, Case No. 08-CIV- 80119-Marra/Johnson]. Their reply of October 16, 2009, makes the same representation, specifically claiming that the plaintiffs sought the plea negotiations because "correspondence with the government agencies may well point Jane Doe in the direction of admissible evidence, and therefore Epstein should be compelled to provide the correspondence sought . . . ." [DE 354 at 9-10]. The Magistrate Judge ordered production of the letters from the government to the defense based on the plaintiffs' representations that the letters would lead to other discoverable evidence in that case. [DE 462, 513].

We now know that these representations by the plaintiffs' attorneys were not true, as they have admitted that they sought the plea negotiation letters in the damages case so that they could use them in this CVRA case. [DE 96 at 2]. They claim in their papers in this case that they "*ran into roadblocks in obtaining information about how their CVRA rights came to be violated – roadblocks erected by both the Government and Epstein. Accordingly, Jane Doe 1 and Jane Doe 2 sought disclosure of relevant information in the sexual abuse civil litigation from Epstein*." [DE 96 at 2] (emphasis added).

The Court should not tolerate litigants abusing the discovery process and making misrepresentations to the Court to get discovery. The Federal Rules of Civil Procedure were never intended to provide discovery on other unrelated matters without first using the procedures available in those proceedings. *See Foltz v. State Farm*, 331 F.3d 1122 (9th Cir. 2003); *Cordis Corp. v. O'Shea*, 988 So. 2d 1163 (Fla. 4th DCA 2008). The plaintiffs' arguments that the Magistrate

Judge's order has a preclusive effect should be denied not only because collateral estoppel does not apply, but also because the Magistrate Judge's discovery order was obtained by subterfuge and by an abuse of the discovery process.

II.
THE PLEA NEGOTIATIONS IN THIS CASE ARE PROPERLY SUBJECT TO A COMMON-LAW PRIVILEGE UNDER RULE 501 AND *JAFFEE*

The plaintiffs argue that plea negotiations are "merely" an "administrative convenience" that this Court "tolerates" to reduce its "workload." [DE 106 at 12, 14]. The plaintiffs accuse us of asking that the Court "invent" "some sort" of privilege, and of conceding – *conceding* – that the mediation privilege is "not well founded" because we cite but "a smattering" of case, only "three in total," in support. *Id.*

It was actually four cases that we cited in support of the mediation privilege, but if those were not enough, here are five more, for a total of nine:

> *In re RDM Sports Group, Inc.*, 277 B.R. 415, 430 & n.6 (N.D. Ga. 2002) – "This Court agrees with the reasoning and analysis put forth by these district courts . . .The encouragement of settlement negotiations and alternative dispute resolution is a compelling interest sufficient to justify recognition of a mediation privilege."
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> *Sampson v. School District of Lancaster*, 262 F.R.D. 469 (E.D.Pa 2008) – "We decide this case on grounds other than the federal mediation privilege. Nevertheless, we find persuasive the reasoning set forth by the court in *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F. Supp. 2d 511 (W.D. Pa. 2000), and by other courts that have adopted the federal mediation privilege."
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> *Software Tree LLC v. RedHat Inc.*, 2010 WL 2788202 at *4 (E.D.Tex. June 24, 2010) – "Continuing to exclude underlying negotiations is consistent with this Court's past decisions . . . and is most appropriate given the chilling effect such discovery would have on settlements. . . [T]he possibility of some negotiation materials being discovered could hamper negotiation efforts and interfere with settlement discussions. Accordingly, continuing to recognize the common law settlement privilege is the most prudent course."
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> *Chester Co. Hospital v. Independence Blue Cross*, 2003 WL 25905471 at * (E.D.Pa.

> 2003) – "The primary question before the Court queries whether, under the facts of this case, the mediation privilege should apply . . . As a general rule, the mediation privilege operates to protect the confidentiality of communications, either written or oral, made during the course of a mediation. Our decision whether to apply this mediation privilege . . . is governed by Federal Rule of Evidence 501 [and] *Jaffee v. Redmond*, 518 U.S. 1 (1996) . . . Recognizing that only those documents prepared for purposes of the confidential mediation are protected by the mediation privilege, this Court will grant defendants' motion [to recognize the privilege]."
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> *U.S. Fidelity & Guar. Co. v. Dick Corp.*, 215 F.R.D. 503, 506-07 (W.D. Pa. 2003) – Applying Pennsylvania privilege law, but "because there are no Pennsylvania cases directly on point, we look to federal case law construing the federal mediation privilege for guidance, [including] *Folb v. Motion Picture Indus. Pension & Health Plans*, 16 F.Supp.2d 1164 (C.D.Cal.1998) [which recognized a mediation privilege under Rule 501]."

Substantial constitutional and policy considerations, viewed under "the light of reason and experience" as Rule 501 and *Jaffee* command, support a common-law privilege over Mr. Epstein's plea negotiation letters and emails.

A. The Attorneys Relied Upon The Correct Legal Standard

We address at the outset the plaintiffs' claim that we intentionally did not disclose in our supplemental filing that the standard for recognizing a privilege under Rule 501 in the Eleventh Circuit requires a showing of "compelling justification." [DE 106 at 13]. Citing an Eleventh Circuit case from 1982, the plaintiffs claim that we plotted to hide this standard because it is more stringent than in other circuits. [DE 106 at 15].

The 1982 standard the plaintiffs accuse us of hiding was effectively overruled by the Supreme Court in *Jaffee*, a 1996 case we cited throughout our supplemental filing. Indeed, we referred to *Jaffee* as "perhaps the leading case addressing Rule 501 and the common-law principles underlying the recognition of testimonial privileges." [DE 94 at 10]. Pursuant to *Jaffee*, the

standard for accepting a privilege under Rule 501 is as follows:

> Exceptions from the general rule disfavoring testimonial privileges may be justified . . . by a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth . . .
>
> [The Court asks] whether a privilege protecting confidential communications . . . promotes sufficiently important interests to outweigh the need for probative evidence.

Jaffee, 518 U.S. at 8.

At the very least, the plaintiffs should have read *Jaffee* before casting such nasty and frivolous accusations at counsel.

B. The Common-Law Privilege Promotes "Sufficiently Important Interests"

The plaintiffs argue that the Court should not recognize a privilege over Mr. Epstein's plea negotiations because plea negotiations are not important. They claim that there is no constitutional right to plea bargain, and they trivialize negotiated pleas as nothing but a process that judges "tolerate." [DE 109 at 12-14]. This is foolish. Just today, two separate cases were heard on oral argument at the United States Supreme Court directly addressing the duties of counsel to communicate plea offers to their clients as an imperative of the Sixth Amendment's right to effective assistance of counsel. (*Lafler v. Cooper*, No. 10-209 & *Missouri v. Frye*, No. 10-444). The discovery of plea negotiations in collateral or parallel civil litigation will burden rather than facilitate the obligations of counsel to fully meet the commands of the Sixth Amendment.

Our criminal justice system does not simply tolerate pleas; pleas are its lifeline. Congress enacts minimum mandatory and other draconian sentences to intimidate people into pleading guilty and cooperating. We have reached a point where criminal defense attorneys are constitutionally ineffective under the Sixth Amendment if they fail to explore plea negotiations. It is no accident that

prosecutors, rather than judges, hold the real sentencing power. As plaintiffs' counsel Paul Cassell told the New York Times last month, "Judges have lost discretion, and that discretion has accumulated in the hands of prosecutors, who now have the ultimate ability to shape the outcome . . . With mandatory minimums and other sentencing enhancements out there, prosecutors can often dictate the sentence that will be imposed."[1]

Plea negotiations implicate significant constitutional and policy considerations. The plaintiffs argue that under *Weatherford v. Bursey*, "there is no constitutional right to plea bargain," but that is not what the case held. What the Supreme Court actually said is that there is no constitutional right to get a plea offer from the prosecutor:

> But there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty.

429 U.S. 545, 561 (1977). This is important, because while a prosecutor may not have a constitutional obligation to offer a plea, Mr. Epstein's lawyers certainly had a constitutional and ethical obligation to seek one. *See Hawkman v. Parratt*, 661 F.2d 1161, 1171 (8th Cir. 1981) (counsel's "failure to initiate plea negotiations concerning the duplicitous felony counts constituted ineffective assistance of counsel which prejudiced Hawkman"); *United States v. Fernandez*, 2000 WL 534449 *1 (S.D.N.Y. May 3, 2000) ("[I]t is malpractice for a lawyer to fail to give his client timely advice concerning" pleas).

C. The Common-Law Privilege Does Not "Effectively Supersede" Rule 410

The plaintiffs argue that the Court may not recognize a common-law privilege for plea

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[1] http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html

negotiations under Rule 501 because this would "effectively supersede the detailed limitations of Rule 410." [DE 106 at 14]. The plaintiffs conflate what is discoverable with what is admissible by reading the relevant Federal Rules in isolation without appreciating the interplay between them. Of course, the first step in determining whether the letters are discoverable is to consult Federal Rule of Civil Procedure 26, which protects "privileged" communications from discovery, but does not define the term "privilege." It is thus necessary to consult Federal Rule of Evidence 501, which tells us that, in federal cases like this one, courts recognize privileges that exist at common law, unless the Constitution, a federal statute, or a rule prescribed by Supreme Court provides otherwise.

In this case, the common law – and thus Rule 501 – recognizes the privileged nature of the defense plea negotiation letters and emails. Contrary to the plaintiffs' assertions otherwise, honoring this common law privilege does not supersede Federal Rule of Evidence 410. Rule 410 is a rule of admissibility, not discoverability. Although questions concerning admissibility can be taken into account when determining whether a particular item is discoverable – for example, a document that will be inadmissible at trial is less likely to be discoverable for obvious reasons – the two concepts are very different. It is simply not accurate to say that recognizing a common-law privilege over the defense plea negotiation letters and emails in this case under Rule 501 (governing discoverability) expands Rule 410 (governing admissibility), or that Rule 410 abrogates the common-law privilege for negotiations that is protected by Rule 501. They are two separate things.

Rule 410 begins with the assumption that a litigant is in possession of plea negotiation materials and thus the Rule describes the circumstances in which those materials may either be admitted or excluded from consideration at trial. It says nothing, however, about whether a non-participant in the plea negotiations is entitled to obtain those materials in discovery in the first

instance. That question must be answered by reference to Federal Rule of Civil Procedure 26, which refers to Federal Rule of Evidence 501, which in turn refers to the common law. And the common law considers the plea negotiation letters and emails privileged. This interpretation is the only way to give effect to all of the relevant Federal Rules without raising the constitutional concerns that plaintiffs' competing view presents.

Thus, the Court may properly recognize a privilege over Mr. Epstein's plea negotiations in conjunction with Rule 410 protections, without invading the domain of Rule 410. Additionally, the Court may properly recognize a privilege over the plea negotiations to rule that there was no waiver of the attorney work-product privilege as we argued during the August 12, 2011 hearing.

III.
THE DEFENSE PLEA NEGOTIATION LETTERS AND EMAILS ARE INADMISSIBLE AND NOT SUBJECT TO DISCOVERY UNDER RULE 410

A. Rule 410 Protects The Disclosure Of Defense Plea Negotiation Letters And Emails

Mr. Epstein's plea negotiations with the government did not result in a federal plea concerning the matters under federal investigation, and therefore the letters and emails are inadmissible under Rule 410. That Mr. Epstein entered into a plea in state court to state offenses does not affect this analysis. The plain meaning of Rule 410(4) is that the defendant must enter a plea in federal court relating to the federal offenses under investigation. If Congress had intended to include state court pleas in subsection (4), it would have expressly done so as it did in subsection (3). There, Congress expressly provided for change-of-plea proceedings in federal court and "comparable state procedures." FED. R. EVID. 410(3). Congress did not provide for state court pleas in subsection (4) of the rule, and "where Congress includes particular language in one section of a statute but omits it in another . . . it is generally presumed that Congress acts intentionally and

purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

Even when plea negotiations result in a guilty plea, not all statements made during those negotiations are thereby subject to disclosure. The plain meaning of Rule 410 is that any disclosure of plea negotiations must relate to the plea that was actually entered. The broad reading suggested by the plaintiffs, that all the letters and emails shared during plea negotiations are discoverable and admissible regardless of what they address, would frustrate the purpose and policy of Rule 410. In this case, there was no plea to the offenses that the government was investigating or to the matters discussed in the plea negotiation letters and emails. There was never a federal plea that closed out all the federal issues that were the subject of the continuing exchanges of letters and memos where Mr. Epstein's counsel addressed the reasons why Mr. Epstein should not be federally prosecuted. Under the plaintiffs' interpretation of Rule 410, the government or a state could use all the statements made during those negotiations to start a new investigation of Mr. Epstein and use the statements made by Mr. Epstein and his lawyers as his agent during negotiations to prosecute him even if all the statements related to allegations and potential charges that never resulted in a plea of guilty. And this is precisely why the plaintiffs' interpretation of Rule 410 is flawed.

There is another fundamental flaw in the plaintiffs' reasoning: The plaintiffs want to use the statements of Mr. Epstein and his lawyers to invalidate the non-prosecution agreement and then urge Mr. Epstein's federal prosecution as if he never plea guilty to any of the federal offenses. Were the plaintiffs to achieve their objective, Mr. Epstein would be within the express literal protections of Rule 410(4) but he would only be in this status *after* the protected documents were disclosed. Facially, subsection (4) applies only if a defendant pleads guilty to the offense being negotiated, and

if there is any perceived ambiguity in the meaning of the words in the statutory scheme, the policies and protections of Rule 410 would be so compromised by the construction urged by the plaintiffs that it should be rejected. For example, assume parties to negotiations over sex offenses eventually agree to a plea involving a non-sex related misdemeanor. Under the plaintiffs' interpretation of Rule 410, all the negotiations would be discoverable and admissible without any protection whatsoever. Congress could not have intended to bring about this absurd result. *See Rowland v. California Men's Colony*, 506 U.S. 194, 200 (1993) ("the common mandate of statutory construction to avoid absurd results").

The "central feature" of Rule 410 "is that the accused is encouraged candidly to discuss his or her situation in order to explore the possibility of disposing of the case through a consensual arrangement." *United States v. Herman*, 544 F.2d 791, 797 (5th Cir. 1977). The Rule is derived from "the inescapable truth that for plea bargaining to work effectively and fairly, a defendant must be free to negotiate **without fear that his statements will later be used against him**." *Id.* at 796 (emphasis added). Thus, the most reasonable construction of Rule 410 is that all plea discussions in this case were about offenses for which there was no plea of guilty and therefore Rule 410 facially and fully applies. Any other reading would render Rule 410 ambiguous and would violate Mr. Epstein's Fifth Amendment rights. After all, Mr. Epstein cannot be goaded into candid and open plea negotiations with the government under a statutory scheme that offers him protection from self-incrimination, yet later be ordered to disclose those statements so that they can be used against him in another proceeding:

> The rule's central feature is that the accused is encouraged candidly to discuss his or her situation in order to explore the possibility of disposing of the case through a consensual arrangement. Such candid discussion will often include incriminating admissions . . . To allow the government to introduce statements uttered in reliance

> on the rule would be to use the rule as a sword rather than a shield. This we cannot allow; the rule was designed only as a shield.

Id. at 797. The Court should reject the plaintiffs' interpretation of Rule 410(4) because it would lead to unconstitutional results. "Where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress . . . The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *DeBartolo Corp. v. Florida Gulf Coast Trades Council*, 485 U.S. 568, 575 (1988).

One final matter must be addressed concerning Mr. Epstein's state court plea: During a hearing in this case, the Court asked how it could properly invalidate the non-prosecution agreement after Mr. Epstein had performed under its terms. The plaintiffs responded that this would not pose a problem because Mr. Epstein could withdraw his state court plea:

> THE COURT: So you want me then to set aside the government's agreement with him because there was no conferring, yet he has already accepted a plea agreement and is sitting in custody, in part, in reliance on that agreement . . . I can undo that agreement in your theory but . . . Mr. Epstein, in a sense, would then be adversely affected by my actions when he acted in reliance upon the agreement. How does that work?
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> MR. EDWARDS: Certainly, we are only asking you to vacate the agreement. I understand and your point is well taken. And I believe that at that point in time his rights may kick in and say wait, I was relying on this other deal so I wouldn't be prosecuted . . . So maybe I can get to withdraw my plea . . . .

[Trans. July 11, 2008 at 21]. If Mr. Epstein's remedy is to withdraw his guilty plea, then the plaintiffs definitely are not entitled to the defense plea negotiation letters and emails because those negotiations would have resulted "in a plea of guilty later withdrawn." FED. R. EVID. 410(4).

B. The Plaintiffs Intend To Use The Plea Negotiations "Against" Mr. Epstein

Finally, the plaintiffs argue that Rule 410 does not apply because they do not intend to use

the plea negotiation letters and emails "against" Mr. Epstein. This is nonsense, given the plaintiffs' threat that they will "seek far more than a letter of apology" and that they will ask for "invalidation of the non-prosecution agreement so that they can confer with the government about the possibility of actually prosecuting Epstein . . . ." [DE 106 at 9].

Using the plea negotiations to seek Mr. Epstein's prosecution certainly qualifies as using the evidence "against" him. The words "not . . . admissible against the defendant" refer to "**the purpose** for which [the evidence] is offered." *Committee on Rules of Practice And Procedure of The Judicial Conference of The United States*, 77 F.R.D. 507, 538 (February 1978) (emphasis added). The plaintiffs' technical argument that it is "not possible" to use the plea negotiations "against" Mr. Epstein because Mr. Epstein is not a party to the CVRA proceedings is foreclosed by the advisory committee notes. Rule 410 is concerned not with the technicalities upon which the plaintiffs rely, but with the purpose for which the evidence is being used.

The plaintiffs seek Mr. Epstein's incarceration. As their lawyer told this Court, "they want him in prison now more than ever." [Trans. July 11, 2008 at 23]. That the plaintiffs intend to use the plea negotiation letters and emails "against" Mr. Epstein is plain and obvious.

IV.
THE PLAINTIFFS ADMITTED THAT THE DEFENSE PLEA NEGOTIATION LETTERS AND EMAILS ARE NOT RELEVANT TO PROVE THEIR CLAIMED CVRA VIOLATION

The plaintiffs contend that if the Court protects the defense plea negotiations, the Court will be blocking the plaintiffs from obtaining evidence to prove their claimed CVRA violations. Far from it. The plaintiffs already have the government letters and emails. They have admitted that they do not need the defense plea negotiations to prove their claimed CVRA violations. [Trans. August 12, 2011 at 33-34]. Their argument to the Court during the hearing on August 12, 2011, was that

they needed the defense letters and emails only to support the *remedy* they seek of invalidating the non-prosecution agreement:

> THE COURT: Well, again, this is getting more to the merits. But it's the government's either actions or inactions that are at issue here and not what Mr. Epstein or any of his lawyers may have done either to induce or encourage or suggest that the – again, hypothetically, that they violated the victims' rights under the Act. So aren't you really focusing on what the government did or didn't do regardless of what Mr. Epstein may have done, or his lawyers? Is that really relevant?
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> MR. EDWARDS: To prove violation, yes. But the scope of the remedy or relief that we are able to seek, if it is ultimately to invalidate this contract between the government and Mr. Epstein, and it is untimely going to be detrimental at all to Mr. Epstein, then his deliberateness in the insistence that the rights of these victims were violated is going to be very important when we brief the issue on remedy and relief.

[Trans. August 12, 2011 at 33].

The plaintiffs' about-face now, that they are entitled to the defense plea negotiations as "discovery" to establish that the government violated the CVRA, is frivolous and should be denied. The Court is correct that the issue is whether the government failed to honor the CVRA, and the defense letters and emails are irrelevant to establish that claim.

The plaintiffs also argue that they can "discover the correspondence now and the court can sort out trial admissibility issues later." [DE 106 at 5]. But as we stated in our initial pleading, when a discovery request seeks information that is subject to exclusion, "many courts shift the burden to the requesting party, requiring them to make a particularized showing that the inadmissible evidence is likely to lead to admissible evidence." *Reist v. Source Interlink Co.*, 2010 WL 4940096 at *2 (M.D. Fla. Nov. 29, 2010). This is important because once privileged or confidential information is disclosed, there is no way to protect it again when the plaintiffs' "sort-it-out-later" procedure establishes that the information should not have been disclosed. And so for good reason, the plaintiffs are required *now* to make a particularized showing, which they have failed to do.

V.
CONCLUSION

During the August 12, 2011 hearing, the Court asked undersigned counsel whether the attorney work-product privilege that we claim over the defense letters and emails was waived when we shared those letters and emails with the government. We responded that the privilege was not waived because the letters and emails were written pursuant to our constitutional and ethical obligations to attempt to negotiate a plea. We argued that because we are obligated by the Sixth Amendment to engage in these plea communications, we cannot thereby suffer a waiver by doing that which we are constitutionally required to do. We also argued that because of these obligations, plea negotiations are cloaked with privilege, and thus sending the letters and emails to their intended recipient – the government – could not constitute a waiver. The Court asked that we provide supplemental briefing on the issue of privilege, which prompted the filing of the lawyers' supplemental filing in support of their motion to intervene to assert the work-product privilege over the plea negotiation letters and emails and to object to their use under Rule 410.

There is no question that the facts of this case are unique, and that they satisfy the *Jaffee* analysis, which is undertaken on a case-by-case basis. The Court is not being called upon to make a universal ruling concerning privilege for plea negotiations in all cases under all circumstances. Instead, the lawyers and Mr. Epstein believe that based on the particular facts of this case, the Court should deny production and use of the defense plea negotiation letters and emails.

The lawyers who represented Mr. Epstein during the criminal investigation engaged in plea negotiations pursuant to their constitutional and ethical obligations to seek the best possible result for the benefit of their client. The settlement communications originated in confidence, with the reasonable expectation and understanding from both sides, based on experience, the Rules, and the

Constitution, that the negotiations would not be disclosed. This element of confidentiality was essential to the relationship between the government and Mr. Epstein during the negotiations. As adversaries in a criminal setting, with the full weight of the government's badge bearing over Mr. Epstein, the *only way* to engage in candid negotiations was under the protection of confidentiality afforded to plea negotiations. The lawyers' best efforts resulted in the non-prosecution agreement.

Now the plaintiffs, who are third parties in a civil action, seek disclosure of the plea negotiations that counsel undertook for the client's benefit, and their intended purpose is to use those negotiations to hurt the client, to ask that the Court undo the bargain that counsel negotiated, and to have the client prosecuted and incarcerated. What's more, these plaintiffs lingered for years before seeking such grave relief from the Court, knowing that Mr. Epstein was serving a prison sentence and that he would be suffering all the detriments of the non-prosecution agreement to which he adhered and has fully performed.

These are the unique facts that underlie the claims of work-product and common-law privilege of attorneys Black, Weinberg & Lefkowitz as it pertains to the plea discussions in this case. For good reason, the Rules require that the Court consider each claim of privilege on a case-by-case basis. Rule 501 reflects Congress' "affirmative intention not to freeze the law of privilege," and to provide the court "with the flexibility to develop rules of privilege on a case-by-case basis, and leave the door open to change." *Trammel,* 445 U.S. at 47. Whatever the circumstances may be in other cases in the future, the facts of this case, when "interpreted in the light of reason and experience," compel the conclusion that the lawyers may properly invoke work-product and common-law privileges over plea communications that they were constitutionally and ethically obligated to have with the government for the benefit of their client, and that the plaintiffs may not obtain those

communications to hurt the client or seek invalidation of the non-prosecution agreement.

We certify that on April 23, 2012, the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system.

Respectfully submitted,

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