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
_____/

MOTION OF JEFFREY EPSTEIN FOR PROSPECTIVE LIMITED INTERVENTION AT THE REMEDY STAGE OF THESE PROCEEDINGS

Jeffrey Epstein hereby moves, pursuant to Fed. R. Crim. P. 24(a)(2) and 24(b)(1)(B), that he be permitted to intervene in these proceedings when and if they reach the stage at which the Court will consider what remedy to order if it finds that the government violated the plaintiffs' rights under the CVRA. Mr. Epstein does not seek to intervene generally in the case, as the duties and obligations imposed by the CVRA apply solely to the government; the statutory requirements do not run to Mr. Epstein; he had no obligations to the plaintiff under the CVRA. The dispute regarding whether the government violated the plaintiffs' rights under the CVRA is one between the plaintiffs and the government.

However, if the case reaches the remedy issue, which this Court has said is contingent upon whether the plaintiffs' "evidentiary proofs will entitle them to [rescission] relief," "a question properly reserved for determination upon a fully developed evidentiary record," Order Denying Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 189) at 11-12, Mr. Epstein has a clear and compelling interest in opposing any remedy that would entail

rescission of his non-prosecution agreement with the government and has interests which are personal to him and would not be adequately represented by the government should the Court determine that a CVRA violation occurred and that rescission or re-opening of the non-prosecution agreement was one of the remedial options under consideration. *See, e.g., Harris v. Pernsley*, 820 F.2d 592, 599 (3d Cir. 1987) ("Given the nature of an applicant's interest, he or she may have a sufficient interest to intervene as to certain issues in an action without having an interest in the litigation as a whole").

Because Mr. Epstein does not seek to intervene generally in the action but instead only as to the issue of remedy, if it arises, the Court has the option of holding this motion in abeyance and not deciding it unless and until such time as it decides that it must fashion a remedy for violation of the CVRA. Mr. Epstein is filing this motion at the present time to ensure that plaintiffs have continuing notice of his intention to intervene to oppose the rescission of his non-prosecution agreement with the government, a matter that fundamentally impacts his constitutional and contractual rights.

In its Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 205-2) at 4-5, the government correctly argues that, as a matter of contract law and due process, courts cannot order rescission of a contract – of which the non-prosecution agreement is one – unless all parties to the contract are before the court. Mr. Epstein has no access to the courts to assert this right without intervening in this action as to remedy, which creates an unconstitutional dilemma – a veritable Catch-22 – in which he would be forced to forego one right – not to have the non-prosecution agreement rescinded in his absence as a party – in order to assert his other contractual and due process rights in the matter. *See, e.g., Simmons v. United States*, 390 U.S.

377, 394 (1968) ("[W]e find it intolerable that one constitutional right should have to be surrendered to assert another"); *Tomai-Minogue v. State Farm Mut. Auto Ins. Co.*, 770 F.2d 1228, 1232 (4th Cir. 1985) (finding it a "questionable line of argument . . . [that] to assert her rights as a matter of procedural due process, Tomai-Minogue would be compelled to forego other due process rights"). Thus, in seeking to intervene with respect to remedy, Mr. Epstein does not waive the issue regarding whether the Court can rescind the non-prosecution agreement if he is not before the Court as a party.

I. INTERVENTION AS OF RIGHT.

A party may intervene as of right under Rule 24(a) if "(1) the application to intervene is timely; (2) the party has an interest relating to the property or transaction which is the subject matter of the action; (3) the party is situated so that disposition of the action, as a practical matter, ma impede or impair its ability to protect that interest; and (4) the party's interest is represented inadequately by the existing parties to the suit." *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989). The circumstances here easily satisfy all four elements of the standard.

A. Timeliness.

In assessing the timeliness of motions to intervene, courts are to consider "(1) the length of time during which the would-be intervenor knew or reasonably should have known of his interest in the case before he petitioned for leave to intervene; (2) the extent of prejudice to the existing parties as a result of the would-be intervenor's failure to apply as soon as he knew or reasonably should have known of his interest; (3) the extent of prejudice to the would-be intervenor if his petition is denied; and (4) the existence of unusual circumstances militating

either for or against a determination that the application is timely." *United States v. Jefferson County*, 720 F.2d 1511, 1516 (11th Cir. 1983). "'Timeliness' is not precisely measurable," *Brown ex rel. O'Neil v. Bush*, 194 Fed. Appx. 879, 882 (11th Cir. 2006), and is "not limited to chronological considerations but is to be determined from all the circumstances." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 263-64 (5th Cir. 1977). Among the circumstances which must be considered is "the purpose for which intervention is sought." *National Resources Defense Council v. Costle*, 561 F.2d 904, 907 (D.C.Cir. 1977).

Here, the government moved to dismiss plaintiffs' complaint for lack of subject matter jurisdiction in November, 2011. In that motion, the government contended, *inter alia*, that the remedy of rescission of the non-prosecution agreement was prohibited on due process grounds. *See* Order Denying Government's Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 189) at 6-7. It was not until June 19, 2013, that the Court denied the motion and indicated that it believed rescission to be a potentially available remedy. *Id.* at 11. Thus, it is only now that Mr. Epstein's future interest in preserving inviolate his non-prosecution agreement has become sufficiently concretized for seeking intervention to contest the rescission remedy sought by plaintiffs.[1] A motion to intervene before the Court ruled on the Government's Motion to Dismiss which focused, in part, on the question whether rescission was an available remedy at all, would have been premature.

Since Mr. Epstein has moved to intervene promptly upon learning that the Court would consider rescission in fashioning the remedy in this case (assuming, of course, that plaintiffs

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

prove their entitlement to any relief at all), there is no need to evaluate prejudice to the plaintiffs. In any event, there will be no prejudice to plaintiffs in terms of timeliness in allowing Mr. Epstein to intervene on the issue of remedy, particularly as this motion provides them with further notice that he intends to do so, many months before the issue of remedy is even potentially before the Court in a context that would result in the Court addressing the remedial options available to respond to a violation of the CVRA rights of the plaintiffs, should any such violations be found.[2]

In sharp contrast, denying intervention to Mr. Epstein to litigate remedy will cause him severe prejudice, as the plaintiffs are asking the Court to invalidate a binding contract to which he is a signatory and which implicates his constitutional rights. Mr. Epstein entered into a non-prosecution agreement with the government and has fully performed, to his detriment, his obligations under that agreement, including pleading guilty to state court charges, serving a prison term, serving a year of community control, paying the attorney representing claimants who brought actions solely under 18 U.S.C. §2255, as he was required to do by the non-prosecution agreement, and making civil settlements with all such §2255 claimants due in significant part to the requirements of the non-prosecution agreement that prohibited Mr. Epstein

[2] In any case, this filing is not the first notice to plaintiffs of Epstein's intention, if necessary, to seek a prospective intervention if the remedy issue is reached and if rescission of the non-prosecution agreement, which implicates his of his contractual and constitutional rights. As plaintiffs themselves recognize, "Epstein has announced that he will seek to intervene further in this case should any effort be made by the victims to seek a remedy that would harm him," Motion to Dismiss Non-Party Interlocutory Appeal (filed by plaintiffs in *Jane Doe #1 and Jane Doe #2 v. United States, Roy Black, et al., Intervenors*, Eleventh Circuit No. 13-12923, citing Doc.108 at 13 n.3 (Mr. Epstein's assertion that he has an interest in the non-prosecution agreement which would later become ripe if the Court were to consider invalidating that agreement).

from contesting liability.[3] *See also* United States' Reply in Support of Its Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 205-6), Exhibit F at 11-12 (detailing reliance of plaintiffs themselves as well as other claimants on the non-prosecution agreement in seeking and then negotiating civil settlements with Mr. Epstein). He has an intense interest in opposing plaintiffs' effort to set that agreement aside and in presenting to the Court reasons why the agreement should not be rescinded which are personal to him, as opposed to the institutional considerations which the government has and may advance.

Even though the action has been pending since 2008, plaintiffs knowingly sat on their CVRA claims for years as Mr. Epstein served a prison sentence 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 told the Court that they saw no reason to proceed on an emergency basis. [Trans. July 11, 2008 at 24-25]. Moreover, in a hearing one month later, the plaintiffs specifically asked that the Court *not* invalidate the non-prosecution agreement "because of the legal consequences of invalidating the current agreement, it is likely not in [the plaintiffs'] interest to ask for the [rescission] relief that we initially asked for." [Trans. August 14, 2008 at 4]. Thus, plaintiffs waived their right to have the Court "take up and decide any motion asserting a victim's right forthwith," 18 U.S.C. §3771(d)(3), in favor of their pursuing over at least the next eighteen months civil settlement actions against Mr. Epstein prior to, rather than concurrently with, litigating their CVRA rights. As the direct result, Mr. Epstein has, to his detriment, served a prison sentence (2008-09), served a year of community control probation (2009-10), and made monetary payments that are directly related to his obligations under the non-prosecution

[3] *See* Non-Prosecution Agreement, ¶¶7-8, executed on September 24, 2007.

agreement to pay legal fees for attorney representation[4] and not to contest liability for underlying offenses to those suing under §2255 alone. So inactive were plaintiffs in this case that the Court dismissed the case for lack of prosecution in September, 2010. (Doc. 38). Despite the long pendency of the action, the case remains, for many reasons, in its relatively early stages. If more is needed to warrant intervention, the unusual procedural posture of the case presents "unusual circumstances militating . . . for . . . a determination that the application is timely." The motion to intervene, having been filed little more than two short weeks of the Court's ruling on the government's motion to dismiss, satisfies the timeliness requirement for intervention, both as of right and permissive.

B. Mr. Epstein Has an Interest Relating to the Property or Transaction Which Is the Subject Matter of the Action.

Mr. Epstein unquestionably has an interest in opposing rescission of the non-prosecution agreement into which he entered with the government. "[A]n applicant has a sufficient interest to intervene . . . where contractual rights of the applicant may be affected by a proposed remedy." *Forest Conservation Counsel v. United States Forest Service*, 66 F.3d 1489, 1495 (9th Cir. 1995), *abrogated on other grounds*, *Wilderness Society v. United States Forest Service*, 630 F.3d 1173 (9th Cir. 2011), *quoting Harris*, 820 F.2d at 601. "Nonprosecution agreements, like plea bargains, are contractual in nature, and are therefore interpreted in accordance with general principles of contract law. Under these principles, if a defendant lives up to his end of the bargain, the government is bound to perform its promises." *United States v. Castaneda*, 162 F.3d 832, 835-36 (5th Cir. 1998). The potential rescission remedy also has serious implications for Mr. Epstein's constitutional rights, as "[d]ue process requires the government to adhere to the

[4] *See* Addendum to the Non-Prosecution Agreement, executed in October, 2007.

terms of any plea bargain or immunity agreement it makes." *United States v. Hill*, 643 F.3d 807, 874 (11th Cir. 2011), *quoting United States v. Harvey*, 869 F.2d 1439, 1443 (11th Cir.1989) (en banc). *See, e.g., Santobello v. New York*, 404 U.S. 257, 262 (1971) ("when a plea rests in any significant degree on a promise ... of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled"); *United States v. Al-Arian*, 514 F.3d 1184, 1190 (11th Cir. 2008) ("Due process requires the government to adhere to the promises it has made in a plea agreement").

C. Mr. Epstein Is Situated So That Disposition of the Action, as a Practical Matter, May Impede or Impair His Ability to Protect That Interest.

Mr. Epstein, as previously discussed, is a party to a binding contract – a contract with respect to which his constitutionally-guaranteed right to due process is at stake – which the plaintiffs are seeking to have this Court invalidate. If he cannot intervene to oppose such a remedy, he will be forced to stand on the sidelines while others litigate rights which are personal and fundamentally important to him. His ability to protect his interest in the validity of the non-prosecution agreement would be severely impaired. Also, unless he is allowed to intervene, he would not be able to appeal from any possible future order of the Court rescinding the non-prosecution agreement and would lose another level of ability to protect his interests in the non-prosecution agreement. The Supreme Court has made it clear that "[t]he rule that only parties to a lawsuit or those that properly become parties may appeal an adverse judgment is well settled." *Marino v. Ortiz*, 484 U.S. 301, 304 (1988). Even were he allowed to intervene later for purposes of appeal, he would likely be limited to the issues raised by the parties and unable to assert his own individual interests on appeal. *See, e.g., Georgia Power Co. v. Teleport Communications*,

Atlanta, Inc., 346 F.3d 1047, 1049 (11th Cir. 2003) ("[e]xcept for extraordinary cases, an intervenor is precluded from raising issues not raised by the principal parties").

D. Mr. Epstein's Interest in the Non-Rescission of the Non-Prosecution Agreement Would Not Be Adequately Represented by the Existing Parties to the Suit.

While the government may adequately represent whatever interests Mr. Epstein may have, if any, with respect to the question whether the government violated the plaintiffs' rights under the CVRA, the same is not true as to the question of whether, if the Court finds that it did so, rescission of the non-prosecution is an available or appropriate remedy. Although the Eleventh Circuit has said that "[t]here is a presumption of adequate representation where an existing party seeks the same objectives as the interveners," *Stone v. First Union Corp.*, 371 F.3d 1305, 1311 (11th Cir. 2004), that presumption is a "weak" one, *id.*;"[i]nterveners need only show that the current [party's] representation '*may* be inadequate,' and the burden for making such a showing is 'minimal.'" *Id.* (emphasis added), *quoting Clark v. Putnam County*, 168 F.3d 458, 461 (11th Cir. 1999). *See, e.g., Georgia v. United States Army Corps of Engineers*, 302 F.3d 1242, 1255 (11th Cir. 2002) ("The proposed intervenor has the burden of showing that the existing parties cannot adequately represent its interests, but this burden is treated as minimal"); *Federal Sav. and Loan Ins. Corp. v. Falls Chase Special Taxing District*, 983 F.3d 211, 216 (11th Cir. 1993) ("The proposed intervenor's burden to show that their interests *may* be inadequately represented is minimal") (emphasis in original).

Mr. Epstein and the government may share a common goal of opposing a rescission remedy, at least at the present juncture, but their interests, as well as what they would bring to the Court on the issue, vary substantially. The government will (most likely) present general

institutional reasons why non-prosecution agreements into which it has entered are binding on it and cannot, or should not, be rescinded. In contrast, in addition to the constitutionally-based arguments which the government may advance, Mr. Epstein has, specific, personal, and private interests in the non-rescission of this particular agreement, including his constitutional right to due process of law, *see* pages 7-8, *supra*, his detrimental reliance on the agreement and his full performance of his many obligations under the agreement on the basis of that reliance, including, as discussed above, pleading guilty to state court charges, serving a prison term, serving a year of community control, and paying the attorney representing persons who had brought or were threatening to bring actions against him for money damages. Mr. Epstein's personal constitutional and contractual rights in the matter should be before the Court in making its determination as to remedy, if the proceedings reach that stage, and the government will not adequately represent those rights that are personal to Mr. Epstein. Indeed, plaintiffs have contended that the government does not have standing to argue that rescission of the non-prosecution agreement would violate Mr. Epstein's constitutional rights. Jane Doe #1 and Jane Doe #2's Response to Government's Sealed Motion to Dismiss for Lack of Subject Matter Jurisdiction (Doc. 127) at 11.

II. PERMISSIVE INTERVENTION.

The Court need not reach the issue of permissive intervention, as Mr. Epstein so plainly satisfies the criteria for intervention as of right. For the same reasons addressed in the preceding section, Mr. Epstein "has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). That common question of law or fact is whether rescission of a non-prosecution agreement is a permissible remedy for a violation of the

plaintiffs' rights under the CVRA, if such a violation is found to have occurred, and, if so, whether that remedy should be ordered in this case.

CONCLUSION

For all the foregoing reasons, Mr. Epstein's motion to intervene as to the remedy issue in this case is timely and should be granted as of right under Rule 24(a)(2). Alternatively, permissive intervention should be granted under Rule 24(b)(1)(B).

We certify that on July 8, 2013, this motion was filed using the CM/ECF system.

Respectfully submitted,

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