

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

**INTERVENORS' REPLY TO JANE DOES' RESPONSE
OPPOSING A PROTECTIVE CONFIDENTIALITY ORDER**

INTRODUCTION

Given that the parties are first focused on litigating the circumstances regarding whether there was a sanctionable violation of the CVRA, the portion of the correspondence authored by Epstein's counsel to the government, foreseeably, is irrelevant to the resolution of this issue for it was only the government, not Epstein, who had obligations under the statute. The theory that Epstein was responsible for the government's construction and implementation of the CVRA is addressed herein. In short, it is neither rational nor true to suggest that the U.S. Attorney and then the Department of Justice – which extensively reviewed the non-prosecution agreement (“NPA”) during the months between its September 2007 execution and its June 30, 2008 finalization with Epstein's state plea – were acting, during this time period or during any other, *improperly or corruptly or were engaged in a “deliberate conspiracy”* in any way by advocating, in this case and on a nationwide basis, the *same* construction of the CVRA that Epstein's counsel were also advocating. The Plaintiffs' repeated accusation that the Department

of Justice and Epstein's counsel were "engaged in a deliberate conspiracy" to violate the law (*cf.* DE 189, at p. 12, n. 6), simply because they were each advocating the same legal position – a position other courts (albeit not this one) have also adopted – is a fundamental myth that has not and will not be proven.

The position of Epstein's counsel on the proper construction of the CVRA in the unusual context of a matter where there is to be no federal charge was ethical and proper advocacy that in no way can be construed as conspiratorial. Epstein and the Government were adversaries, not "co-conspirators." There is simply no threshold evidence that there was a "deliberate" conspiracy that would begin to make relevant the correspondence at issue. For these reasons, and because the correspondence of Epstein's counsel is not relevant to the Court's determination of whether the Government violated the CVRA, Epstein seeks a protective order.

ARGUMENT

On June 18, 2013, this Court entered two orders pertinent to the Intervenors' pending motion for a limited protective order: (1) the order denying the Intervenors' privilege objections to production of documents to the Plaintiffs (DE 188) and (2) the order denying the government's motion to dismiss for lack of subject matter jurisdiction (DE 189). These orders included the following rulings that should inform the rights of the parties and intervenors concerning the *public* dissemination *at this point in time* of the correspondence between Epstein's various counsel and the government that memorializes the negotiations relating to the signing and implementation of the NPA on September 24, 2007.

First, while the Court rejected the Intervenors' arguments against the *production* of that correspondence to *Plaintiffs' counsel*, the Court expressly withheld any ruling on the *relevance*

and admissibility of the correspondence¹ to the Plaintiffs' argument that Epstein somehow used his wealth and purported political influence to *improperly, unethically or illegally* "conspire" with the government to violate the Plaintiffs' rights under the Crime Victims' Rights Act of 2004, 18 U.S.C. § 3771 (the "CVRA"), or to any other material issue between the government and the Plaintiffs.

Second, the Court² ordered the Plaintiffs to "file unredacted pleadings, *including the attached correspondence*, in the open court file" without considering the legal distinction between the public's right of access to *pleadings*, as opposed to access to *discovery* whose relevance, as previously noted, has not been determined. *See* DE 188:10 (emphasis added).³

Third, in overruling the government's objections to allowing the Plaintiffs to challenge the NPA, the Court deferred ruling on the existence of a potentially insurmountable hurdle for the requested remedy of rescission: That a fully developed evidentiary record might well show that the Plaintiffs may have forfeited the remedy of rescission (through the doctrines of ratification and estoppel) by affirmatively using the NPA to secure huge civil settlements from

¹ *See* DE 188: 9-10 ("...this order is not intended to operate as a ruling on the relevance or admissibility of any particular piece of correspondence, a matter expressly reserved for determination at the time of final disposition").

² The principal issue Intervenor litigated in the motions leading up to DE 188 was their right to prevent discovery in the first place based on evidentiary privileges. The Intervenor never litigated how the discovery, once ordered to be produced, could be publicly used by the Plaintiffs.

³ That this Court did not apparently distinguish between pleadings and discovery was underscored by its reliance on *United States v. Ochoa-Vasquez*, 428 F.3d 1015 (11th Cir. 2005), for the proposition that there is "no legitimate compelling interest which warrants the continued suppression of this evidentiary material under seal in this proceeding." DE 188:9. The sealed material at issue in *Ochoa-Vasquez* was not "evidentiary material" (i.e., discovery) but *an entire secret docketing system* in which the government had been allowed to file entire pleadings in case numbers that could not be found on PACER or in the Clerk's Office. As discussed in the Intervenor's motion, the public has no common law or First Amendment right of access to *discovery* material.

Epstein⁴ – settlements that the Plaintiffs would be required to refund as a condition of the rescission remedy they seek (*see infra*) – while sitting back and allowing Epstein to “perform[] his part of the bargain” by serving jail time and accepting a lifetime of sex offender registration under Florida law. *See* DE 189, at p. 12 & n. 6. The Court allowed the Plaintiffs to proceed nonetheless, rather than being estopped in part, to see if they could prove their “*allegation of a deliberate conspiracy between Epstein and federal prosecutors...*” *Id.* (emphasis added).

In their motion for a protective order, the Intervenor has requested that *before* the Court allows the Plaintiffs to publicly use the details of the correspondence, the Court rule on the reserved issues of evidentiary relevancy and admissibility. The Plaintiffs object to that condition and in doing so continue to perpetuate fundamentally faulty arguments about what type of “conspiracy” they must prove to justify even arguing for the nullification of the NPA – along with Epstein’s due process right to enforcement of the NPA – despite the Plaintiffs’ inability and no doubt unwillingness to return him to the *status quo ante* – a traditional requirement of rescission, *see United States v. Texarkana Trawlers*, 846 F.2d 297, 304 (5th Cir.) (citation omitted), *cert. denied*, 488 U.S. 943 (1988),⁵ even when a contract is secured by fraud, which was not the case with the NPA.

⁴ As part of the NPA, the government insisted on including – over Epstein’s objections all the way to the Department of Justice – the unprecedented conditions that he waive all objections to liability and pay the legal fees of certain of the victims’ counsel in the lawsuits filed against him. The United States’ Sealed Reply In Support of Its Motion To Dismiss (DE 205-6), pp. 11-12, documents in detail how Plaintiffs and other “victims” used the NPA to their advantage in the civil litigation.

⁵ *See Mazzoni Farms, Inc. v. E.I. DuPont De Nemours and Co.*, 761 So.2d 306, 313 (Fla. 2000) (“Generally, a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his pre-agreement status.”); *Royal v. Parado*, 462 So. 2d 849, 856 (Fla. 1st DCA 1985) (“generally, a contract will not be rescinded even for fraud when it is not possible for the opposing party to be put back into his preagreement status quo condition”); *Smith v. Chopman*, 135 So. 2d 438, 440 (Fla. 2d DCA 1961) (“It is a general rule that a contract cannot be rescinded for fraud or misrepresentations where it is not possible to put the parties back in their original positions and with their original rights.”) (citation omitted). *See generally* Richard A. Lord, *Williston on*

***Hiring Lawyers To Advocate a Non-Frivolous Legal Position
Is Not Wrongful As a Matter of Law***

The first myth fueling this case is the central premise of the Plaintiffs’ rescission theory – that Epstein should be denied the due process protections normally attendant to plea bargains because the “billionaire” *improperly, unethically or illegally* used his financial resources and purported “political” influence to corruptly entice AUSA Villafana, U.S. Attorney Alex Acosta, and high level officials at the Department of Justice (including even the Deputy Attorney General) into defrauding the Plaintiffs of their CVRA rights. Implicit in this grandiose “conspiracy” theory is the legally and indeed constitutionally flawed contention that it is somehow wrongful for a non-indigent citizen to hire the best attorneys he can afford and pay them well to use their *advocacy skills* in an attempt to convince prosecutors to adopt *non-frivolous legal positions* favorable to their client. *See, e.g.,* Plaintiffs’ Response, at p. 10 (claiming that “[t]here has long been suspicion that Jeffrey Epstein was receiving favorable treatment in the criminal investigation because of his wealth and power”).⁶

That the Plaintiffs’ legal theory rests on lawyer advocacy rather than wrongful or illegal conduct is underscored by their Response in this case. Having received over 500 pages of correspondence, the only “examples” of what Plaintiffs consider relevant to their conspiracy

Contracts, § 69: 50 (4th ed.) (“Ordinarily, one cannot in equity seek to rescind a contract on the ground of fraud and, at the same time, retain the benefits derived from the contract....”). *See also* *Jackson v. Bellsouth Telecommunications*, 372 F.3d 1250, 1278 (11th Cir. 2004); *Treasure Salvors v. Unidentified Wrecked & Abandoned Sailing Vessel*, 459 F. Supp. 507, 523 (S.D. Fla. 1978), *aff’d sub nom. Florida v. Treasure Salvors*, 621 F.2d 1340 (5th Cir. 1980), *rev’d on other grounds*, 458 U.S. 670 (1982); *Webb v. Kirkland*, 899 So. 2d 344, 347 (Fla. 2d DCA 2005); *Fellman v. Southfield Farms Corp.*, 747 So.2d 1035, 1036 (Fla. 4th DCA 1999).

⁶ As documented in part in the Intervenor’s motion, if there is such a public “suspicion,” it is one that was deliberately generated by Plaintiffs’ counsel through their reckless and wholly unsupported “conspiracy” theories and the constant stream of inflammatory rhetoric used in speeches and “press releases” to the media that – contrary to what the Plaintiffs contend – were not remotely the type of *fact* statements permitted by the Florida Bar and ABA rules of professional conduct.

theory are excerpts where Epstein's attorneys were "urg[ing]" and "lobby[ing]" prosecutors to take the legal position that the CVRA did not apply pre-indictment. *See* Plaintiffs' Response, pp. 13-14. However, there is nothing remotely improper, unethical or illegal about *anything* cited by the Plaintiffs as "proof" of their theory. For instance, during the nine-month period between the execution of the NPA in September of 2007 and Epstein's state guilty plea in June 2008 while Epstein was seeking review at the Department of Justice of the NPA, including its unique obligations to fund an attorney representative and waive defenses and challenges to jurisdiction if sued under 18 U.S.C. § 2255, Epstein's lawyers advocated for the Government to take a particular view of the CVRA. That the FBI and United States Attorney then came to the conclusion that they should defer any victim notification in order to not burden the future credibility of their witnesses by providing them with notice of monetary incentives contained in the NPA was not part of a "deliberate conspiracy" but instead was a decision made by an adversary protecting their own interest in the possibility of a future trial. *See* Declaration of A. Marie Villafana in Support of United States' Response to Victims' Emergency Petition for Enforcement of Crime Victims Act, 18 U.S.C. § 3771, DE 14 at par 8 ("the agents and I concluded that informing additional victims could compromise the witnesses' credibility at trial if Epstein reneged on the agreement").

It simply is not a "misuse" of resources to retain extremely experienced and highly credentialed counsel to advocate non-frivolous legal positions with the Department of Justice. *Cf. United States v. Hylton*, 710 F.2d 1106, 1111-12 (5th Cir. 1983) (affirming dismissal of obstruction charges levied by IRS against tax protestor for filing complaint against the IRS, holding that the filing of "a factually accurate, non-fraudulent criminal complaint against federal

agents” was protected by the First Amendment’s right to petition for redress of grievances).⁷ To the contrary, Epstein’s counsel had a constitutional obligation to do so. *See generally Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012); *Missouri v. Frye*, 132 S. Ct. 1399, 1407-08 (2012).

If, as it appears, the only point Plaintiffs seek to prove using the attorney correspondence is that counsel were persistent in writing letters to prosecutors and the Department of Justice advocating or “lobbying” for the legal position that the CVRA did not apply to pre-indictment non-prosecution agreements, then the protective order should be granted because the point the Plaintiffs wish to prove through the letters is not only irrelevant but also constitutionally protected conduct.

***Epstein’s Lawyers Were Advocating a Non-Frivolous Legal Position
That the Government Has Consistently Taken In All Cases***

The second myth that the Plaintiffs have tried to perpetuate is that there was something improper, unethical or illegal about Epstein’s lawyers advocating the legal position that the CVRA did not apply to pre-indictment negotiations over the terms of an NPA. The absurdity of the Plaintiffs’ argument is best exposed by the undisputable fact that both the U.S. Department of Justice and federal prosecutors in numerous cases entirely unrelated to Epstein’s have consistently taken that very same position. For example, on February 8, 2008, in *United States v. BP Products, N.A.*, No. 4:07-cr-434 (S.D. Tex.), the government explicitly argued to the district

⁷ As one court explained in the different context of filing a motion to disqualify a judge:

We do not endorse the notion that an attorney can do or say anything imaginable within the course of client representation under the guise of vigorous representation of his client. However, the fair administration of justice provides a valuable right to challenge in good faith the neutrality of a judge who appears to be biased against a party. Lawyers using professional care, circumspection and discretion in exercising that right need not be apprehensive of chastisement or penalties for having the advocative courage to raise such a sensitive issue to assure the client’s right to a fair trial and the integrity of our system for administration of justice.

United States v. Cooper, 872 F.2d 1, 5 (1st Cir. 1989). *See generally Holt v. Virginia*, 381 U.S. 131, 136 (1965).

court that the CVRA did not apply to pre-indictment plea bargaining. *See* Government’s Response to Victims’ Motion Filed Pursuant to the Crime Victim Rights Act, *United States v. BP Products, N.A.*, No. 4:07-cr-434 (S.D. Tex. Feb. 8, 2008) (DE 63), attached hereto as **Exhibit 1**. While the district court in *BP Products* did not agree with all of the government’s positions, *see United States v. BP Products, N.A.*, No. 4:07-cr-434 (S.D. Tex. Feb. 21, 2008), 2008 U.S. Dist. LEXIS 12893, at **36-39, other district court judges have done so.⁸

Moreover, on December 17, 2010, Deputy Assistant Attorney General John E. Bies, (apparently yet another co-conspirator under the Plaintiffs’ theory) authored a 16-page, single-spaced Memorandum representing the official position of the entire Department of Justice that “[t]he rights provided by the Crime Victims’ Rights Act are guaranteed from the time that criminal proceedings are initiated (by complaint, information, or indictment) and cease to be available ... if the Government declines to bring formal charges after the filing of a complaint.” Memorandum Opinion of the Acting Deputy Attorney General, *The Availability of Crime Victims’ Rights Under the Crime Victims’ Rights Act of 2004*, Dec. 17, 2010, attached as **Exhibit 2** (previously filed with the Court at DE 90-1).

It is thus ludicrous for the Plaintiffs to continue asserting – without a shred of evidence – that the position taken by the government in the instant case was “caused” by some *improper, unethical or illegal* use of Epstein’s wealth and alleged political influence. For such a “conspiracy” theory to fly, the Plaintiffs would have to prove that Epstein not only conspired

⁸ *See, e.g., United States v. Merkosky*, No. 1:02-cr-0168–01 (S.D. Ohio April 11, 2008), 2008 WL 1744762, at *2 (denying relief under 18 U.S.C. § 3771 and 42 U.S.C. § 10607, finding that “the Crime Victims Restitution Act does not confer any rights up a victim until a prosecution is already begun”); *United States v. Turner*, 367 F. Supp. 2d 319, 326 (E.D.N.Y. 2005) (explaining why, despite a contrary statement in the legislative history, the actual language of the CVRA appeared to exclude victims of uncharged conduct from those covered by the CVRA); *Searcy v. NFN Paletz*, 2007 U.S. Dist. LEXIS 46682 (D. S.C. June 27, 2007) (noting cases that interpret the definition of “victim” to require the existence of a charging instrument). *Accord Harrison v. Hamilton Co.*, No. 1:12-cv-106 (S.D. Ohio March 13, 2012), 2012 U.S. Dist. LEXIS 33150, at *5 n. 2.

with or corruptly influenced AUSA Villafana but also the U.S. Attorney himself, numerous officials at the Department of Justice, including the Deputy Attorney General, and prosecutors in many other far-flung jurisdictions.

To the sure, this Court has disagreed with the Department's and Epstein's construction of the CVRA. However, as evidenced by the numerous courts that have *agreed* with the Department's views, Epstein's construction was plainly not so frivolous as to transform its advocacy by his counsel into the type of *improper, unethical or illegal* conduct that arguably might be enough to nullify Epstein's constitutional right to enforcement of the already-completed NPA. The fact that Plaintiffs' counsel cite to nothing in the 500-plus pages of communications now in their possession other than counsels' legitimate advocacy efforts underscores how bankrupt their "conspiracy" theory truly is.

There Was No "Sweetheart" Deal

The third myth that the Plaintiffs have sought to perpetuate through their *ipse dixit* rhetoric, both in their pleadings and speeches to the press, is that there "must" have been something improper going on because the NPA was a "sweetheart" deal that was just too good to be legitimate. Nothing could be further from the truth. The NPA contained, at the government's insistence – and over Epstein's objections – numerous and quite onerous conditions that had *not* been required by State authorities. The NPA thus obligated Epstein to: (1) plead guilty in state court to a charge the State would not have initiated absent the NPA, to be sentenced to 18 months in county jail, to be followed by 12 months of community control; (2) plead to an offense that required lifetime sex offender registration; (3) agree to fund an attorney representative whose function was to sue him; (4) waive his rights to contest both liability (*i.e.* guilt) and subject-matter jurisdiction with respect to an undisclosed list of "victims" which he could not

challenge and to pay each of them a lump sum monetary settlement; and (5) still face numerous additional civil cases brought under statutes other than 18 U.S.C. § 2255.

This was no “sweetheart deal” by any stretch of the imagination. Moreover, as previously noted, the government’s decision to enter this “sweetheart deal” was not left to the discretion of a “line” AUSA but was appealed to, and reviewed, and endorsed by, the U.S. Attorney and multiple levels of high-ranking officials at the Department of Justice.⁹ The exercise of prosecutorial discretion by the U.S. Attorney’s Office was also consistent with the fact that Epstein’s alleged offense conduct fell outside the precedential heartland of the federal statutes at issue and thus was more suitable to state rather than federal prosecution.

The Court Should Reject the Plaintiffs’ “Law of the Case” Argument

The Plaintiffs also erroneously contend that the “law of the case” doctrine binds Epstein to the Court’s prior ruling, which ordered the filing of “unredacted pleadings, including the attached correspondence, in the open court file.” As previously noted, the Court made that ruling without hearing fully from the parties and failed to distinguish the public’s right of access to already-filed pleadings from the public’s non-existent right of access to civil discovery.¹⁰

Contrary to the Plaintiffs’ extreme views, the “law of the case” doctrine “is not an inexorable command.” *White v. Murtha*, 377 F.2d 428, 431 (5th Cir. 1967). It is a restriction “self-imposed” on the courts, *Westbrook v. Zant*, 743 F.2d 764, 768 (11th Cir. 1984), and need not be followed since “justice is better than consistency.” *William G. Roe & Co.*, 414 F.2d 862, 867 (5th Cir. 1969). The doctrine thus does not bar a court from reviewing an earlier decision

⁹ These appeals took many months. Much of the correspondence cited by Plaintiffs was authored during this appellate review state when the issue of whether the NPA, executed but not implemented, would result in finality was still at issue.

¹⁰ The Plaintiffs also cite only to cases involving the public’s right of access to *criminal* proceedings. There is no federal criminal proceeding in this matter, as confirmed by the Plaintiffs’ use of the term “summary judgment,” a

when “the previous decision was clearly erroneous and would work a manifest injustice.” *Westbrook*, 743 F.2d at 769. *See also Beverly Beach Properties, Inc. v. Nelson*, 68 So.2d 604, 608 (Fla. 1953) (“We may change ‘the law of the case’ at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude.”)

At the time the Court included the public filing clause in its order, the issue of how the Plaintiffs could use the discovery once they obtained it was not even ripe, since the litigation up until that point was solely concerned with the Plaintiffs’ *access* to that discovery. “[R]ipeness is peculiarly a question of timing.” *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 140 (1974). “[I]ts basic rationale is to prevent the courts, through premature adjudication, from entangling themselves in abstract disagreements....” *Abbott Lab. v. Gardner*, 387 U.S. 136, 148 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977). The conditions that can and should be placed upon the Plaintiffs’ public use of the correspondence only became ripe now.

The Court Should Likewise Reject the Plaintiffs’ Straw Man Arguments

The Plaintiffs also greatly exaggerate the impact of the requested protective order, claiming that they could not even publicly file their “summary judgment” motion. Plaintiffs’ Response, p. 9. Of course they could file their motion. Indeed, their Response repeats what essentially they claim they wish to prove through the correspondence. The problem is that nothing in the correspondence proffered so far supports what they actually have to prove to support their theory.

civil rules term. There is no such thing as “summary judgment” under the Federal Rules of Criminal Procedure.

CONCLUSION

For all of the foregoing reasons, as well as those presented in the Intervenor's motion, the Court should enter the requested Protective Order.

Respectfully submitted,

/s/Roy Black

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CERTIFICATE OF SERVICE

I HERE CERTIFY that a true copy of the foregoing was filed via CM/ECF, this 23rd day of May, 2014.

/s/Roy Black

Roy Black