UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOES #1 AND #2,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.
_____/

UNITED STATES' RESPONSE TO MOTION FOR LIMITED INTERVENTION OF JEFFREY EPSTEIN [DE93]

The United States of America, by and through the undersigned Assistant United States Attorney, hereby files this Response to the Motion for Limited Intervention of Jeffrey Epstein ("Movant") [DE93].

Movant seeks to intervene as of right, pursuant to Fed. R. Civ. P. 24(a)(2), and permissively, pursuant to Fed. R. Civ. P. 24(b)(1)(B).[1] Eleventh Circuit precedent favors intervention, especially to allow an intervenor to assert attorney-client and work product privileges.

> In this circuit, a movant must establish the following requirements to intervene as of right under Federal Rule of Civil Procedure 24(a)(2): (1) his application to intervene is timely; (2) he has an interest relating to the property or transaction which is the subject of the action; (3) he is so situated that disposition of the action, as a practical matter, may impede or impair his ability to protect that interest; and (4) his interest is represented inadequately by the existing parties to the suit.

[1]As will be explained, the main difficulty with Movant Epstein's motion to intervene as of right is its untimeliness. In order to intervene permissively, Movant Epstein must still establish the timeliness of his motion. Thus, if he is unable to satisfy the timeliness prong of his intervention under Rule 24(a)(2), he also is unable to satisfy the timeliness prong of his intervention under Rule 24(b)(1)(B). Conversely, if Movant Epstein succeeds in convincing the Court of the timeliness of his motion under Rule 24(a)(2), then he does not need to seek permissive intervention.

Purcell v. BankAtlantic Financial Corp., 85 F.3d 1508, 1512 (11th Cir. 1996) (quoting *Chiles v. Thornburgh*, 865 F.2d 1197, 1213(11th Cir. 1989)). "Once a party establishes all the prerequisites to intervention, the district court has no discretion to deny the motion." *Purcell*, 85 F.3d at 1512 (quoting *United States v. State of Ga.*, 19 F.3d 1388, 1393 (11th Cir.1994)).

The Eleventh Circuit reviews the denial of a motion to intervene as of right *de novo*, *Purcell*, 85 F.3d at 1512 (citing *Federal Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 214-15 (11th Cir.1993)), and the District Court's decision on the motion to intervene is a final decision that is immediately appealable. *Purcell* at 1511 n.2 (citing *Meek v. Metropolitan Dade County, Fla.*, 985 F.2d 1471, 1476 (11th Cir.1993)).

As mentioned above, the Eleventh Circuit favors intervention to allow a party to raise the attorney-client privilege:

> The law in this Circuit, and others, is clear, that this Court must allow intervention by a client "in the first instance . . . as soon as the [attorney-client] privilege issue is raised." *In re Grand Jury Matter (ABC Corp.)*, 735 F.2d 1330, 1331 (11th Cir. 1984), (quoting *In re Grand Jury Proceedings (Freeman)*, 708 F.2d 1571, 1575 (11th Cir. 1983)); *see also In re Grand Jury Subpoena (Newparent, Inc.)*, 274 F.3d 563, 570 (1st Cir. 2001) ("Colorable claims of attorney-client and work product privilege [are] . . . a textbook example of an entitlement to intervention as of right."); *United States v. AT&T Co.*, 642 F.2d 1285, 1292 (D.C. Cir. 1980); *Sackman v. Liggett Group, Inc.*, 167 F.R.D. 6, 20-21 (E.D.N.Y. 1996).

El-Ad Residences at Mirarmar Condo. Ass'n, Inc. v. Mt. Hawley Ins. Co., 716 F. Supp. 2d 1257, 1262 (S.D. Fla. 2010) (brackets and ellipses in original).

Under this case law, Movant Epstein clearly satisfies the second and third requirements for intervention as of right. The Court must, however, decide whether his motion is timely and whether his interests are adequately represented by the existing parties to the suit. Epstein's argument that his motion is timely because he just realized the impact of the Petitioners' claims on the Non-Prosecution Agreement is belied by the documents cited in the Petitioners' Response to the Motion

to Intervene. The timeliness of Movant Epstein's Motion to Intervene is also undercut by the fact that it was preceded by filings in this matter by his attorneys, Roy Black and Martin Weinberg, as early as March 28, 2011. On that date, Attorneys Black and Weinberg filed a "Notice of Objection" in this matter, alerting the Court to their impending Motion to Intervene to seek "a protective order on the grounds that the letters [between counsel and the U.S. Attorney's Office] fall under the protections of opinion work-product of the lawyers, as well as the broad protections of Federal Rules of Evidence 410 and 408, Federal Rule of Criminal Procedure 11, and the constitutional right to effective assistance of counsel." [DE54 at 2.] These are the same grounds that Movant Epstein is now asserting on his own behalf. Thus, Movant Epstein's motion is, at least, six months late and his claims are being protected by the intervention of his counsel.

On the other hand, the Court has yet to rule upon the motion to intervene by Attorneys Black, Weinberg, and Lefkowitz, and no discovery has yet been taken from those individuals. Thus, the Court may elect to allow intervention by Movant Epstein in lieu of, or in addition to, his counsel.

In his motion, however, Movant Epstein mentions that he is seeking only "limited" intervention. As is discussed in the *El-Ad Residences* case, when a proposed intervenor asserts that the attorney-client privilege or work-product privilege may be lost without intervention, the Court may allow intervention without first (1) deciding whether someone has or will disclose any privileged communications; (2) identifying which disclosures the intervenor claims are privileged; (3) determining whether any of the disclosures fall within the crime-fraud or any other exceptions to the privilege; or (4) deciding any other issues related to the merits of the claim of privilege. Instead, the Court should accept the party's well-pleaded allegations as valid. *El-Ad Residences*, 716 F. Supp. 2d at 1262-63 (citing *United States v. AT&T Co.*, 642 F.2d at 1291). 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." *El-Ad Residences*, 716 F. Supp. 2d at 1263 n.9 (citation omitted). Thus, if the Court grants the motion to intervene, Movant Epstein and his counsel must expect to be subject to discovery at least as to his claims of privilege, on which he bears the burden of proof.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 25, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. According to the Court's website, counsel for all parties are able to receive notice via the CM/ECF system.

s/*A. Marie Villafaña*
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SERVICE LIST

Jane Does 1 and 2 v. United States,
Case No. 08-80736-CIV-MARRA/JOHNSON
United States District Court, Southern District of Florida

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