UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE #1 and JANE DOE #2

v.

UNITED STATES
_____/

JANE DOE #1 AND JANE DOE #2'S RESPONSE TO SUPPLEMENTAL BRIEFING IN SUPPORT OF MOTION TO INTERVENE OF ROY BLACK, MARTIN WEINBERG, AND JAY LEFKOWITZ

COME NOW Jane Doe #1 and Jane Doe #2 (also referred to as "the victims"), by and through undersigned counsel, to respond in opposition to the motion for protective orders filed by defense attorneys Roy Black, Martin Weinberg, and Jay Lefkowitz and intervenor Jeffrey Epstein (DE 160, DE 161, and DE 162) (also called "supplemental briefing").

The victims point out that these motions are really just re-entered motions that had been filed earlier (DE 94). Out of an abundance of caution and to expedite this case, the victims now repeat their earlier filed response (DE 106) to the defense attorneys' and Epsteins' claims on the merits. The victims will refer to these claims as the "defense attorneys'" claims, even though they are raised by both the attorneys and Epstein.

The defense attorneys contend that the victims cannot use at trial (or even discover preliminarily) correspondence between them and the U.S. Attorney's Office arranging a highly unusual and secretive non-prosecution agreement. The victims have already explained at length why the correspondence between Epstein's lawyers and government prosecutors is simply not

confidential material to which any kind of privilege or other protection could attach. *See* Jane Doe #1 and Jane Doe #2's Response to Motion to Intervene (DE 78) at 4-6. Perhaps recognizing the strength of the victims' response, the defense attorneys now raise a new "supplemental" argument that a privilege somehow follows from either (1) Federal Rule of Evidence 410 or (2) a purported "common law privilege" for "plea negotiations" that the attorneys ask the Court to create under Federal Rule of Evidence 501. The defense arguments are meritless for multiple, independent reasons.

With regard to Rule 410, the defense attorneys' efforts to invoke Rule 410 is simply premature. The rule bars only admissibility of information at trial, not collection of information through discovery. Accordingly, discovery is proper now and admissibility issues can be sorted out later.

Second, this Court previously ruled in the civil case against Epstein that Rule 410 does not bar discovery of the correspondence. Epstein is collaterally estopped from re-litigating this same issue.

Third, in any event, Rule 410 is simply inapplicable. The plain language of the rule covers admissibility into evidence of "any 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). Epstein's plea discussions *did result in a plea of guilty*, and accordingly the rule does not apply.

Fourth, the victims intend to use the correspondence to prove that *the Government* violated the CVRA violations and that various remedies are accordingly appropriate. Because Rule 410 only bars evidence from being admitted into evidence "against *the defendant*" who

participated in plea discussions, the victims are (at the very minimum) entitled to obtain and use the correspondence in litigation with the Government.

Fifth, Rule 410 makes plea bargaining statements 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. The Government has made clear that it intends to introduce considerable evidence about the course of plea discussions in this case in support of its position. As a matter of fairness, the victims are therefore entitled to discover evidence from the Government that might support their position.

In addition to their Rule 410 argument, the defense attorneys quickly advance a fallback argument – that the Court should create a heretofore unrecognized "common law privilege" under Rule 501 of the Federal Rules of Evidence. This claim also lacks merit.

First, the Court cannot create a "common law" plea bargaining privilege that would overturn limits that Congress crafted in Rule 410. Congress extended protection only to plea discussions "*which do **not** result in a plea of guilty*." Fed. R. Evid. 410(4) (emphasis added). Whatever the Court's "common law" rulemaking authority maybe, it certainly does not extend to trumping specific language in the Federal Rules of Evidence.

Second, no such "common law" privilege exists. While the defense attorneys frequently allude to "constitutional considerations" that supposedly undergird plea bargain, the simple fact remains that "there is no constitutional right to plea bargain." *Weatherford v. Bursey,* 429 U.S. 545, 561 (1977). The Court should not exalt to privileged status negotiations that merely serve the administrative convenience of the parties over the important value of truth seeking.

The Government has also filed a response to the supplemental briefing of the defense attorneys (DE 100), in which it claims that its plea bargaining correspondence with Epstein's lawyers is confidential work product material. The Government's arguments are without merit for three reasons. First, as the victims have previously explained, all the correspondence is discoverable because the CVRA requires the Government to makes its "best efforts" to support the victims. 18 U.S.C. § 3771(c)(1). Second, the CVRA bars the Government from erecting an adversarial work product privilege against the victims when they are attempting to secure information to protect their CVRA rights. Third, entirely apart from the CVRA, work product protections only extend to confidential materials. If the Government wishes to litigate this issue, it must prepare a privilege log. But the correspondence with defense attorneys is simply not confidential and therefore not protected by the work product doctrine.

I. THE CORRESPONDENCE BETWEEN THE GOVERNMENT AND EPSTEIN IS NOT PROTECTED FROM DISCOVERY BY FEDERAL RULE OF EVIDENCE 410.

The defense attorneys claim that, under Fed. R. Evid. 410, the victims cannot seek discovery of plea bargaining correspondence between them and the Government. Their arguments are unavailing.

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

The defense attorneys' reliance on Rule 410 is simply premature. By its plain terms, the rule bars only admissibility of information at trial against the defendant who made the plea - the Rule does not apply to the discovery phase at all. *See* Fed. R. Evid. 410 (barring use of certain "evidence" in a "civil or criminal proceeding"). Accordingly, the victims can discover the correspondence now and the court can sort out trial admissibility issues later.

B. EPSTEIN IS COLLATERALLY ESTOPPED FROM RELITIGATING THE APPLICABILITY OF RULE 410.

As the Court is well aware, the issue of whether the correspondence was somehow protected by Rule 410 was thoroughly litigated by the defense attorneys' client (Jeffrey Epstein) more than a year ago, and Epstein's arguments were more appropriate in the previous case (where he was actually a party to the litigation and the information discovered would likely be admitted against him). This Court rejected Epstein's arguments against disclosure in that case as well, including his argument that Rule 410 blocked disclosure. *See, e.g., Jane Doe v. Epstein*, doc. #462 at 10, Case No. 9:08-CV-80119-KAM (Feb. 4, 2010).

The defense attorneys now propose to relitigate the very same issue of Rule 410's applicability in this case. Their effort to revisit the issue is barred by the doctrine of collateral estoppel because: "(1) the issue at stake is identical to the one involved in the prior proceeding; (2) the issue was actually litigated in the prior proceeding; (3) the determination of the issue was critical and necessary to the earlier judgment; and (4) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding." *In re MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1202 (11th Cir. 2011).

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

In any event, at any ultimate proceeding in this case, Rule 410 will simply be inapplicable. 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). The plain language of the rule 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. *See, e.g., 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); *United States v. Gonzalez*, 608 F.3d 1001 (7th Cir. 2010) *cert. denied*, 131 S. Ct. 952 (2011) (allowing use of plea discussions against a defendant who pleaded guilty because Rule 410(4) "makes admissions in plea bargaining inadmissible only if the plea bargaining either does 'not result in a plea of guilty'"); *United States v. Kerik*, 531 F.Supp.2d 610, 618 (S.D.N.Y. 2008) (Rule 410 "only excludes statements made in plea discussions that do not result in a plea of guilty. As such, the rule does not apply here because Mr. Kerik eventually pleaded guilty."). Here, of course, Epstein's plea discussions *did result in a plea of guilty*. As the Court is well aware, Epstein engaged in extensive discussions with the U.S. Attorney's Office in an effort to obtain a non-prosecution agreement. And ultimately he did obtain such an agreement – in exchange for pleading guilty to two state offenses.

The terms of the non-prosecution agreement the victims are challenging make it quite clear that Epstein's plea discussions "result[ed] in a guilty plea." The agreement 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." Non-Prosecution Agreement at 2. The agreement goes on to specifically provide Epstein shall plead guilty to two 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 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 Court knows, Epstein did ultimately plead guilty to those two Florida offenses pursuant to the agreement.[1] Accordingly, Rule 410 gives Epstein no ability to block the victims from discovery and use of his attorneys' plea discussions because those discussions "result[ed] in a guilty plea."[2]

Rather than address this obvious point, Epstein's lawyers engage in subterfuge. In their supplemental pleading, the lawyers claim that the correspondence with the U.S. Attorney's Office is protected by "the express language of Rule 410." DE 94 at 3. Yet, they cleverly paraphrase the "express language" of the rule in a way that avoids quoting the critical limiting language that restricts Rule 410 to discussions "which do not result in a plea of guilty." Fed. R. Evid. 410(4). *See* DE 94 at 4-5 (discussion of Rule 410 that fails to discuss the limitation of the rule to negotiations "result[ing] in a plea of guilty"). The express language of the Rule does not

[1] Rule 410 draw no distinction between pleas in federal court and pleas in state court. *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).

[2] Because Epstein's lawyers are claiming that the correspondence is protected by Rule 410, they bear the burden of establishing all necessary facts for the application of the rule. If Epstein's lawyers claim that the plea discussions somehow did not result in a plea of guilty, the victims request a hearing under Fed. R. Evid. 104(a) to dispute this preliminary question of fact.

prevent the victims from introducing the correspondence in support of their claims about plea discussions concerning Epstein because he pled guilty.[3]

D. RULE 410 DOES NOT APPLY HERE BECAUSE THE VICTIMS WILL USE THE CORRESPONDENCE AGAINST (IF ANYONE) THE GOVERNMENT.

Rule 410 is also inapplicable here because it would, at most, bar admissibility of the correspondence into evidence "against the *defendant* who made the plea" – i.e., against Jeffrey Epstein. But the victims intend to obtain and use the correspondence to seek relief from the Government. Accordingly, the Rule cannot be used to bar the victims from obtaining discovery of this information.

By its plain terms, Rule 410 only bars the admission of evidence "*against the defendant* who made the plea." The purpose underlying this rule 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). Thus, the Rule has no application where the discussions are being used not against a defendant but rather against the Government. *See United States v. Biaggi*, 909 F.2d 662, 691 (2d Cir. 1990).

Here, the victims intend to use the correspondence against any argument the Government may make in this civil action seeking to enforce their CVRA rights.[4] They intend to use the correspondence to prove initially that the Government violated their rights. Having proven a

[3] The express language of Rule 410 also makes clear that "derivative evidence" is never excluded from a proceeding. *See United States v. Ruhkowsi*, 814 F.2d 594, 599 (11th Cir. 1987).

[4] As explained in Section III.B below, 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).

violation of their rights, they will then seek various remedies concerning the Government. To provide a straightforward example, one (quite modest) remedy that they will ask the Court to impose on the Government is an order directing the U.S. Attorney's Office write a letter of apology to the victims for deliberately violating their rights. Clearly the victims' use of the correspondence to prove that the Government did not afford them their rights and that such a remedy is appropriate lies outside Rule 410's ambit.

Of course, the victims in this case seek far more than a letter of apology from the Government. As they have made clear throughout this litigation, they also 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.[5] 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 narrowly drafted – forbidding not uses that may eventually *harm* the defendant, but instead more narrowly admissibility of plea negotiations into evidence *"against" the defendant in a "civil or criminal proceeding."* At this point, Epstein is not a party to the CVRA proceeding, and therefore it is not possible for any use of this correspondence to equate to forbidden admissibility of evidence "against" him. For this reason as well, the rule is inapplicable.

[5] Notably, the Government does *not* argue in its pleading that any use of the information against it would somehow violate Rule 410. *See* U.S. Response to Supplemental Briefing at 3.

E. RULE 410 DOES NOT APPLY HERE BECAUSE OTHER STATEMENTS WILL BE INTRODUCED AND, IN FAIRNESS, THE CORRESPONDENCE SHOULD BE CONSIDERED AS WELL.

Rule 410 will also ultimately be inapplicable at trial because it contains a "completeness" exception. Even for plea bargain discussions protected by Rule 410, a plea bargain 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. The Government has already made it quite clear in its pleadings that it will introduce certain statements about the course of the plea negotiations. Rule 410 thus entitles the victims to respond by introducing other aspects of the plea negotiations.

Rule 410's completeness rule requires the court to determine whether, when one statement about plea discussions is introduced, other statements ought to in fairness be introduced as well. While it is too early to say for certain what arguments the Government will make at any ultimate proceeding to determine whether it violated the victims CVRA rights, from all indications 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 an 18 month period of time. *See* U.S. Response to Jane Doe #1 and #2's Motion for Finding Violations of the CVRA at 37 (DE 62) (arguing that between August 2006 and January 2008 government prosecutors and agents "went above and beyond the minimum statutory requirements" in conferring with victims about plea negotiations). Similarly, the Government intends to dispute that it sent false notices to the victims about the case being "under

investigation" because plea discussions had not reached a final conclusion at that time. *Id.* at 41 (arguing that "[d]uring the time that Epstein was challenging the NPA, the investigation continued and agents were able to conduct" witness interviews). The Government also intends to take the position that it reasonably stopped making notifications to the victims, because if Epstein did not plead guilty and there was a trial, Epstein would cross-examine the victims about payments they would have received pursuant to the non-prosecution agreement. *Id.* at 42.

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. And the victims are certainly entitled, at this earlier juncture in the case, to obtain all relevant information that they might ultimately be able to use to disprove the Government's defenses.[6]

[6] Additionally, the correspondence may become important if the Court allows Epstein to make a belated entry into the case and raise various defenses. Epstein's legions of lawyers can be expected to advance all manner of legal and factual arguments – even claims that are simply untrue. For example, in a desperate attempt to avoid registering as a convicted sex offender in New York, Epstein recently had his attorneys represent to the New York County Supreme Court that "the prosecutor in Florida conducted a full investigation . . . and determined that the only case that she could present to the grand jury was this [single] indictment for a non registrable offense . . . ." *People of New York v. Epstein*, No. 30129/2010 (N.Y. Cnty. Sup. Ct. Jan. 18,

II. THE 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 does not bar the victims from discovering correspondence about how the non-prosecution agreement was reached. Perhaps recognizing the weakness of this argument, Epstein's lawyers present the fallback claim that some sort of "common law" privilege for "plea bargaining" bars discovery into the correspondence. This argument, too, lacks any merit.

A. The Courts Cannot Create a "Common Law" Privilege That Overrules the Specific Contours of Rule 410.

Epstein's lawyers ask the Court to invent some sort of new "common law" privilege under Federal Rule of Evidence 501. Rule 501 does allow federal courts some opportunity to create new privileges. 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).

2011), hearing transcript at 9 (transcript attached to his pleading as Exhibit A). Epstein's attorneys also – quite astonishingly – stated "there are no real victims" in Florida. *Id.* And in what can only be described as a false statement to the New York court, Epstein's lawyers stated: "there has been through the course of the last few years some civil ligation . . . involving these matters and we now have sworn testimony in evidence from the complainants themselves disclaiming much of what appears in the [Florida] police report." *Id.* at 14. Given Epstein's penchant for bending the truth, the victims are entitled to all the correspondence as a safeguard against him advancing similar inaccurate arguments in this case.

While Epstein's lawyers do not cite the controlling legal standard for creating a privilege in this Circuit. The Eleventh Circuit 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)). The Eleventh Circuit 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 the Court has strong reason to be skeptical of a new plea bargaining privilege. The transparent purpose behind Epstein's lawyers' "common law" effort is to avoid the specific limitations contained in Rule 410. *See* Sections I.C through I.E, *supra* (discussing language in Rule 410 requiring that the negotiations not have "result[ed] in a plea of guilty," that the negotiations be introduced "against" the defendant in a "proceeding," and that fairness not require "contemporaneous" introduction of all aspects of the negotiations). 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. The balancing of conflicting interests of this type is particularly a legislative function." *University of Pennsylvania v. E.E.O.C.*, 493 U.S. 182, 189 (1990) (internal quotation omitted). The Court should not use the general provisions of Rule 501 to effectively supersede the detailed limitations in Rule 410.

B. No "Common Law" Privilege for Plea Bargaining Exists.

Even if the 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 the defense attorneys frequently allude 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); *accord United States v. Barrentine*, 591 F.2d 1069, 1078 (5th Cir. 1979). To be sure, the courts tolerate plea bargaining because it helps reduce the workload of congested criminal dockets. But common law rulemaking should not be used as an excuse to exalt negotiations that merely serve administrative convenience over the far more important search for truth.[7]

Perhaps recognizing that tenuousness of raising plea bargaining over truth-seeking values, Epstein's lawyers attempt to repackage their proposed privilege as a "common law mediation" privilege. Supplemental Briefing at 16. There is no need for such a privilege in the Southern District of Florida to protect true mediation. A local rule already protects confidentiality in court-annexed mediation. *See* Local Rule 16.2(G)(2). Epstein's lawyers, however, do not cite this rule, because they know their plea bargaining discussions with government attorneys fall outside its protections.

Epstein's lawyers also implicitly concede that there is no well-established "common law" support for a mediation privilege, as they are able to cite only a smattering of cases (three in total over the last 32 years) recognizing such a privilege. None of these cases are from the Eleventh

[7] To be sure, as the Government points out, effective defense counsel should always explore plea bargaining opportunities. *See* Gov't Resp. at 7 (*citing 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.

Circuit, which (unlike other jurisdictions) requires a strong showing 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." Epstein's Supplemental Briefing at 17 (*citing Folb v. Motion Picture Ind. Pension & Health Plans*, 16 F.Supp.2d 1164, 1175 (C.D. Cal. 1998) (emphasis added)). Here, of course, the parties to the plea discussion (Epstein and the Government) are attempting not to create a privilege between themselves, but rather to block third parties harmed by their actions from discovering what they have done.

Make no mistake about the sweeping position that Epstein's attorneys are advancing: They claim that the defense attorneys and the Government can conspire between themselves to arrange for secret plea discussions in violation of congressionally-mandated crime victims' rights in the CVRA and then 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), a statute which obviously trumps any claim by a convicted sex offender that his efforts to work out a secret plea deal with the Government is somehow entitled to greater protection. For all these reasons, the Court should reject the defense attorney's suggestion that it

should invent a new "mediation privilege" to apply to the plea bargaining discussions in this case.

III. THE WORK PRODUCT DOCTRINE DOES NOT COVER CORRESPONDENCE BETWEEN PROSECUTORS AND DEFENSE ATTORNEYS.

The Government's response to the defense attorney's supplemental briefing (DE 100) itself raises new issues about whether the victims will be able to obtain the correspondence (or, indeed, *any* information from the Government). After the Court ruled that the victims were entitled to discover relevant information (DE 99 at 10), the victims asked the Government to voluntarily provide them with at least some documents. In response, however, the Government told the victims that *all* of the relevant information — including presumably the correspondence — is privileged from production and that the Court will need to determine, "on a document-by-document basis" (Gov't Resp. at 1) whether any of the materials in the Government's possession falls outside the work product doctrine. The Court should reject the Government's sweeping claim that all correspondence (and other information) is protected by the work product doctrine.

A. The Court Should Now Grant the Victim's Still-Pending Motion for an Order Directing the U.S. Attorney's Office Not to Suppress Relevant Evidence.

In its order allowing discovery, the Court "reserve[d] ruling" (DE 99 at11) on the victims' Motion for an Order Directing the U.S. Attorney's Office Not to Withhold Relevant Evidence. The victims respectfully renew their motion (DE 50). Of course, if the Court decided to grant this motion, it would obviate the need for any kind of "document-by-document" review of the relevant information that the Government continues to withhold.

B. The CVRA Requires the Government to Work Cooperatively to Protect the Victims' Rights and Thus Bars the Government from Interposing an Adversarial Work Product Defense.

The Government argues that the work-product doctrine it is asserting prevents the victims from obtaining any information relevant to their CVRA claim. In doing so, the Government fundamentally misunderstands its role under the CVRA. The Government seems to believe that it stands in an adversarial posture to the victims and therefore it can simply interpose the same sorts of litigation barriers it would deploy against a criminal defendant seeking discovery of Government documents. But the CVRA does not place victims and the Government on opposite sides of CVRA enforcement. Instead, the Act obligates the Government to work together with victims to enforce CVRA rights. In such a cooperative world, the Government cannot erect a "work product" barrier to CVRA enforcement.

The CVRA specifically directs Justice Department prosecutors to make their "best efforts" to protect victims' rights. Title 18 U.S.C. § 3771(c)(1) commands that "*[o]fficers and employees of the Department of Justice* and other departments and agencies of the United States engaged in the . . . *prosecution* of crime shall make their *best efforts* to see that crime victims notified of, and accorded, the rights described in [the CVRA]" (emphases added). Underscoring this "best efforts" obligation, the CVRA even allows prosecutors to bring their own actions to enforce victims' CVRA rights. Title 18 U.S.C. § 3771(d)(1) provides: "The crime victims . . . *and the attorney for the Government* may assert the rights described in [the CVRA]" (emphasis added). Of course, the attorney for the Government can never bring an action on behalf of a criminal defendant. Thus, unlike when they prosecute criminal defendants, Justice Department prosecutors are statutorily obligated to work with crime victims.

In light of the fact that Congress requires prosecutors and victims to cooperate to protect CVRA rights, in cases (such as this one) seeking to enforce CVRA rights the Government cannot raise adversarial work-product objections under the Federal Rules of Criminal Procedure. Those rules govern the antagonistic relationship inherent in a criminal prosecution. With regard to discovery, the rules only cover discovery "upon a *defendant's* request." Fed. R. Crim. P. 16(a)(1) (emphasis added). The discovery rules allow a criminal defendant to obtain limited information from the Government, including specifically his confession, his prior criminal record, tangible objects (i.e., contraband or other evidence), and reports of scientific tests. Fed. R. Crim. P. 16(a)(1)(A)-(F). Against that backdrop, the rule cited by the Government – Fed. R. Crim. P. 16(a)(2) – prevents a criminal defendant from forcing disclosure of "internal government documents made by an attorney for the government or other government agent in connection with investigating or prosecuting the case." In this case, though, it is not a criminal "*defendant"* trying to obtain information in an effort to obtain an acquittal, but rather plaintiff *crime victims* seeking information to enforce their CVRA rights. Accordingly, by its plain terms, Rule 16 simply doesn't apply. And even if it somehow did apply, it only covers documents made "in connection with investigating or prosecuting *the case*" – i.e., documents about the "case" in which the discovery request is made (here *Jane Doe #1 and #2 v. United States*). Here, the victims are seeking (among other things) correspondence about an *earlier* case – i.e., documents related to the Jeffrey Epstein investigation and non-prosecution in which the Government violated their CVRA rights. For this reason as well, the criminal rule simply doesn't apply.

Perhaps recognizing that it will not be able to avoid producing documents under the Federal Rules of *Criminal* Procedure, the Government immediately cites the Federal Rules of *Civil* Procedural as well. Gov't Resp. at 5 (*citing* Fed. R. Civ. P. 26(b)(3)(B)). But if the Government is going to seek the civil rules' protections, it also needs to satisfy those rules' burdens. For example, despite repeated requests from the victims spanning several years, the Government has yet to even make any initial disclosures under the civil rules. *See* Fed. R. Civ. P. 26(a)(1)(A) ("a party must, without await awaiting a discovery request, provided to the other parties" various things relevant to the case). The victims long ago made their initial disclosures to the Government under the civil rules, but the Government continues to refuse to reciprocate. If the Government is going to maintain that the civil rules operate to give it certain discovery protections, it must satisfy all of its discovery obligations as well.

In any event, as with the criminal rules, the civil rules are designed to create protections in an adversarial setting. The rule cited by the Government – Fed. R. Civ. P. 26(b)(3)(A) – provides that "ordinarily . . . *a party* may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for *another party* or its representative . . . ." This privilege "does not exist to protect a confidential relationship, but rather to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of *the opponent*." *U.S. v. American Tel. and Tel. Co.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980) (emphasis added). While the victims have listed the government in the caption of this enforcement action, they certainly do not regard the Government as their "opponent" – and under the regime created by the CVRA, prosecutors and victims are not "opponents" that would create the proper circumstances for a work product privilege. As explained above, the CVRA requires

the Government to use its "best efforts" not to oppose crime victims but rather to "accord" them their rights under the CVRA. 18 U.S.C. § 3771(c)(1).

Underscoring the conclusion that work product does not apply is the nature of the correspondence at issue in these pleadings. The correspondence is between prosecutors and defense attorneys negotiating a plea arrangement. It was, at most, prepared in anticipation of a criminal prosecution being filed by the Government against Epstein – in other words, a contemplated criminal prosecution that would have been styled *United States v. Epstein*. Whatever work product claim would exist in that case, it does not extend to this – entirely separate – civil case. *See 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 anticipation of *this particular litigation*'" (*citing Bartley v. Isuzu Motors,* 158 F.R.D. 165, 167 (D.Colo.1994) (emphasis added)). For all these reasons, the Court should give effect to the cooperative structure created in the CVRA and flatly reject the Government's suggestion that it can interpose an adversarial work product claim to block the victims from discovering correspondence with Epstein's defense attorneys.

C. If the Court Allows the Government to Raise Work Product Claims, then the Government Must Prepare a Detailed Privilege Log and Bear the Burden of Establishing Its Position on a Document-by-Document Basis – a Burden It Cannot Meet With Regard to the Correspondence.

If the Government is allowed to raise a work product claim, the procedures associated with such claims are familiar. As the Government concedes, it would be required to prove protection on a "document-by-document" basis. Gov't Resp. at 1. The way such document-specific issues are litigated is through a privilege log. *See* Fed. R. Crim. P. 26(b)(5)(A)(ii). The

Court's Local Rules spell out requirements for a privilege log. The Government should describe (among other things) the type of document, the general subject matter of the document, the date of the document, and the author and addressee of the document or correspondence. Local Rule 26(g)(3). The privilege log must be detailed enough to allow the victims to respond to the Government's assertion of privilege. *See, e.g., Avgoustis v. Shinseki*, 639 F.3d 1340, 1345-46 (Fed. Cir. 2011) ("privilege logs were insufficiently detailed when they merely stated "Fax: Whistleblower article" or "Summary of Enclosures" and justified the privilege by characterizing the documents as "attorney-client communication[s]" without explanation.") (*citing United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir.1996)).[8]

Once the Government has cataloged the documents in its privilege log, it then bears the burden of proving the applicability of the privilege. *See In re Professionals Direct Ins. Co.*, 578 F.3d 432 (6th Cir. 2009); *Boogle v. McClure*, 332 F.3d 1347, 1358 (11th Cir. 2003). The victims will, of course, later respond in detail to any specific assertions the Government makes.[9] But it is obvious that the Government cannot assert a valid work product privilege for *any* of the correspondence it carried on with defense attorneys for Epstein.

For starters, the issue of whether the correspondence was somehow protected against discovery was thoroughly litigated by Epstein more than a year ago. This Court rejected

[8] Similarly, if the defense attorneys are allowed to intervene in this case to assert privilege, they must then provide a privilege log on a document-by-document basis.

[9] In briefly responding here to arguments raised by the Government, the victims are not waiving any responses they might later make to specifically-asserted work product claims. In particular, on a document-by-document basis, the victims reserve their right to argue that the documents are not work product materials and, in any event, that they have a "substantial need for the materials to prepare [their] case and cannot, without undue hardship, obtain the[] substantial equivalent by other means." Fed. R. Civ. P. 26(b)(3)(A)(ii).

Epstein's arguments against disclosure. *Jane Doe v. Epstein*, doc. #462, Case No. 9:08-CV-80119-KAM (Feb. 4, 2010).[10] That ruling by the Court then is, to say the least, persuasive authority on the Government's identical argument here.

Moreover, correspondence with an adversary in a criminal prosecution is not the kind of confidential information that is even arguably covered by work product. Work product covers only "reports, memoranda, and other *internal* government documents made by an attorney for the government . . . in connection with . . . prosecuting the case." Fed. R. Crim. P. 16(a)(2) (emphasis added); *see also* Fed. R. Civ. 26(b)(3)(A). Correspondence between prosecutors and defense attorneys is simply not an "internal" matter that is subject to a work product protection.

Correspondence with an adversary also waives any work-product coverage. "The privilege derived from the work-product doctrine is not absolute. Like other qualified privileges, it may be waived." *United States v. Nobles*, 422 U.S. 225, 239 (1975). "Disclosure 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). Thus, "[c]ourts will imply waiver when a party claiming the protection has voluntarily disclosed work product to a party not covered by the work-product doctrine." *United States v. Ary*, 518 F.3d 775, 783 (10th Cir. 2008).

[10] In *Jane Doe v. Epstein*, doc. #462, Case No. 9:08-CV-80119-KAM (Feb. 4, 2010) (denying defense objection to Request for Production #10), the Court ordered Epstein to produce "*all* correspondence between you and your attorneys and state or federal law enforcement or prosecutors." It now appears to the victims that, in clear contravention of this Court's discovery orders, Epstein's attorneys secretly withheld significant correspondence involving plea discussions by several of Epstein's attorneys, including Lillian Sanchez, Jay Lefkowitz, and Ken Starr. If this is true, as part of any privilege log they file, the defense attorneys should explain why they secretly and improperly withheld this information.

Perhaps recognizing the difficulty inherent in its position under these well-recognized general principles, the Government claims that the court cases have been "inconsistent" on whether communications during plea bargaining waive work product privilege. Gov't Resp. at 8. This is simply untrue, as a review of the relevant cases quickly demonstrates.

The Government concedes that there is circuit court authority that defendants' disclosure of work product materials to the government during plea bargaining waives all work product protection. The Government acknowledges, for example, that *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), explicitly adopts this position. That case concluded that Westinghouse's disclosure of work product materials to the Justice Department during an investigation "waived the work-product doctrine as against all other adversaries." *Id.* at 1429. This holding makes sense, because it is hard to understand how a litigant can claim confidentiality in materials it has otherwise disclosed.

The Government claims, however, that this common sense conclusion has been rejected by the First Circuit, which (according to the Government) has "held that a company may maintain even its . . . work-product privilege in materials that it discloses to the U.S. Attorney's Office during pre-indictment presentations and ongoing plea negotiations." Gov't Resp. at 8 (*citing In re Keeper of the Records (Grand Jury Subpoena Addressed to XYZ Corp.*), 348 F.3d 16, 27-28 (1st Cir. 2003)). But the case the Government cites stands for no such broad proposition. Rather, that case involved a situation where for two years the Government had been demanding that XYZ Corporation should waive its privileges and produce various documents relevant to a government investigation; the company "steadfastly had refused." *Id.* at 26. The company ultimately proffered some of the documents that the Government had been seeking.

But the company's counsel voluntarily produced those documents under a "clear and explicit" reservation of all privileges. *Id.* at 27. And the reservation was "accepted by the government's consistent course of conduct," *id.* at 28, which included treating the documents as protected. Thus, in that case, there was simply no conduct from which a waiver could be inferred, as the Government had agreed through its course of conduct that the protection existed. Here, of course, there is not such course of conduct and, in any event, the victims have never "accepted" that the correspondence is protected.

Moreover, in an effort to show the Courts of Appeals are inconsistent, the Government pretends to have universally surveyed caselaw with its citations to just these two allegedly "inconsistent" cases. In fact, the clear bulk of circuit authority has clearly and straightforwardly rejected arguments that the U.S. Attorney's Office advances here (and has frequently done so at the request of the Government). *See, e.g., 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 the Government.'"); *United States v. M.I.T.*, 129 F.3d 681, 687 (1st Cir. 1997) ("the prevailing rule that disclosure to an adversary, real or potential, forfeits work product protection"); *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2nd Cir. 1993) ("voluntary disclosure of work product to an adversary waives the privilege as to other parties"); *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).

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

CONCLUSION

For all the foregoing reasons, if the Court allows the defense attorneys to intervene in this case, the Court should rule (1) that Rule 410 does not prevent discovery of plea negotiation correspondence; (2) there is no basis for inventing a new "common law" privilege preventing discovery of the correspondence; and (3) the correspondence is not confidential "work product" of the Government and is discoverable by the victims in this case.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

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