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,

ROY BLACK, *et al.*,

Intervenors.
_____/

INTERVENORS' MOTION FOR A PROTECTIVE CONFIDENTIALITY ORDER AND INCORPORATED MEMORANDUM OF LAW

Intervenors Roy Black, Martin Weinberg, and Jeffrey Epstein, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and Local Rule 26.1, respectfully move this Court for the entry a Protective Confidentially Order which (1) limits the dissemination of certain Confidential Discovery Material ("CDM") described below, to a designated list of the Plaintiffs' counsel and support staff, and (2) prohibits any party from filing pleadings, briefs, memorandums or exhibits purporting to reproduce, quote, paraphrase or summarize any CDM or portions thereof, absent leave of the Court to file the document or portion thereof under seal in accordance with Local Rules of the United States District Court for the Southern District of Florida. *See* **Exhibit 1**, Proposed Protective Confidentiality Order.

In support of this motion, the Intervenors submit the following Memorandum. Part I sets forth the background of this matter. Part II demonstrates why the Court can and should issue the requested protective order.

MEMORANDUM

I. BACKGROUND

Intervenor Jeffrey Epstein entered into a Non-Prosecution Agreement ("NPA") with the government in September, 2007. Under that agreement, Mr. Epstein pled guilty to two state felony offenses and served a prison sentence and a term of community control probation. The agreement, with which he has fully complied, also required that he pay the legal fees of the attorney-representative of identified victims and that he not contest liability in any cases brought against him solely under 18 U.S.C. § 2255. Plaintiffs sued under § 2255 and received settlements as the direct result of Mr. Epstein's agreement not to contest liability in those cases. Plaintiffs, such as the Jane Does in this case, "relied on the [NPA] when seeking civil relief against Epstein . . . and affirmatively advanced the terms of the [NPA] as a basis for relief from Epstein." United States' Reply in Support of its Motion to Dismiss for Lack of Subject Matter Jurisdiction, Doc. 205-6 at 12-13.

After reaping the benefits of the NPA, the plaintiffs seek herein, among other remedies, the rescission of that agreement. During the course of civil litigation against Mr. Epstein, Mr. Epstein was ordered, over his strenuous objection, to produce documents given to him by the government during the course of his settlement/plea negotiations with it. *See*

Jane Doe #2 v. Epstein, No. 08-80119-MARRA, Doc. 462. Once the CVRA action was reactivated – after plaintiffs had successfully pursued their civil monetary remedies against Mr. Epstein to completion – plaintiffs sought to use that correspondence in the CVRA case and thereafter also sought disclosure from the government of correspondence authored and sent to the government by Mr. Epstein's attorneys in the course of their efforts on behalf of their client to resolve the ongoing criminal investigation of him. Both Mr. Epstein and his criminal defense attorneys – Intervenors Roy Black and Martin Weinberg – filed motions to intervene for the limited purpose of challenging the use and disclosure of the settlement/plea negotiation correspondence (Doc. 56, 93), followed by supplemental briefing and motions contending, among other things, that the correspondence fell within the bounds of privilege under Fed. R. Evid. 501. Doc. 94, 160,161, 162.

This Court granted the motions to intervene (Doc. 158, 159), but ultimately ruled that the correspondence – the CDM at issue in the instant motion – was subject to disclosure. Doc. 188. Among other things, the Court rejected Intervenors' argument based on Rule 501 on the ground that Congress has already addressed the issue in Fed. R. Crim. P. 11(f) and Fed. R. Evid. 410 and likewise rejected the Intervenors' request that the Court recognize a privilege for plea negotiation communications. Id. at 8-9. The Intervenors appealed the Court's ruling to the Eleventh Circuit. However, on April 14, 2014, the Eleventh Circuit affirmed the Court's rulings using the same rationales.

II. ARGUMENT

Although the Court ruled that the Plaintiffs could *discover* the CDM, the Court reserved ruling on how the Plaintiffs could *use* the material thereafter, expressly cautioning that "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." Doc 188, p. 10. Unless and until the Court determines those reserved issues, the Court should bar the Plaintiffs from disseminating and/or publicly disclosing the substance of the CDM absent further order of the Court.

A. Discovery Should Not Be Routinely Made Available to the Public

"The Eleventh Circuit has repeatedly acknowledged the private nature of discovery" *Looney v. Moore*, No. 2:13-CV-00733-KOB (N.D. Ala. April 7, 2014), *2014 U.S. Dist. LEXIS 48349*, at *3, citing *Chicago Tribune Co. v. Bridgestone/Firestone, Inc*., 263 F.3d 1304, 1316 (11th Cir. 2001) ("Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the *sole purpose* of discovery is to assist trial preparation.") (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986; emphasis in original). *See also Anderson*, 799 F.2d at 1441 ("Historically, discovery materials were not available to the public or press.") (citation omitted); *In re: Denture Cream Products Liability Litigation*, No. 09-2051-MD-Altonaga/Simonton (S.D. Fla. Jan. 18, 2013), 2013 U.S. Dist. LEXIS 8114, at *37 ("the common law right of access to judicial proceedings does not apply to discovery materials, 'as these materials are neither public

documents nor judicial records'") (quoting *Chicago Tribune*, 263 F.3d at 1311; citation omitted). Thus, "[a] court may restrict distribution of discovery material even if there 'certainly is a public interest in knowing more' about its contents." *Tillman v. C.R. Bard, Inc.*, Case No. 3:13-cv-222-J-34JBT (M.D. Fla. March 13, 2014), *2014 U.S. Dist. LEXIS 41406*, at *6, quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1984)

Placing limitations on the dissemination and use of pretrial discovery is particularly important since "[t]he overwhelming majority of documents disclosed during discovery are likely irrelevant to the underlying issues...." *Federal Trade Commission v. Abbvie Products LLC*, 713 F.3d 54, 63 (11th Cir. 2013). Therefore, "[s]uch documents, prior to admission into the record in support of a motion or as evidence at trial, 'play no role in the performance of Article III functions' of a federal judge." *Travelers Indemnity Co. v. Excalibur Reinsurance Corp.*, No. 3:11-CV-1209 (CSH) (D. Conn. Aug. 5, 2013), *2013 U.S. Dist. LEXIS 110400*, at *37, quoting *United States v. Amodeo*, 71 F.3d 1044, 1050 (2d Cir. 1995).

These principles are vitally important here where counsels' private communications with prosecutors "if publicly released could be damaging to reputation and privacy" and would likely constitute an "abuse of [a court's] processes." *Seattle Times*, 467 U.S. at 35 While courts have recognized that settlement agreement materials may sometimes be *discoverable*, *see, e.g., In re MSTG, Inc.*, 675 F.3d 1337, 1348 (Fed. Cir. 2012),[1] they are

[1] *But see Wagner v. Wastiffs*, Case No. 2:08-cv-431 (S.D. Ohio May 14, 2013), *2013 U.S. Dist. LEXIS 68349* (denying motion to compel discovery of settlement agreement on relevancy grounds); *Duncan v. Phoenix Supported Living, Inc.*, No. 2:05cv1 (W.D. N.C. Sept. 12, 2006), *2006 U.S. Dist.* (continued...)

rarely admissible as evidence at trial, *see, e.g, LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 78 (Fed. Cir. 2012) (reversing district court for admitting settlement agreement at trial); *Apple, Inc. v. Samsung Electronics Co., Ltd.*, Case No. 11-CV-01846-LHK (N.D. Cal. Nov. 7, 2013), *2013 U.S. Dist. LEXIS 160337*, at **51-54 (barring parties from relying on settlement agreement at trial under Fed. R. Evid. 403).

For this reasons alone, it is appropriate to limit the dissemination and use of discovery concerning settlement discussions, even if not privileged. *See Charles E. Hill & Associates, Inc. v. ABT Electronics, Inc.*, 854 F. Supp. 2d 427, 430 (E.D. Tex. 2012) (designating discovery material including settlement communications as "Outside Counsel Eyes Only Confidential Information" and cautioning parties that while it is allowing the discovery it intends to later weigh relevance carefully and noting that settlement negotiations are "always suspect to some degree and are often littered with unreal assertions and unfounded expectations ... And are not always grounded in facts or reason."). Indeed, unless and until the Plaintiffs demonstrate a bona fide need to use the discovery at trial or in pleadings, the Intervenors need not even demonstrate "good cause" in order to obtain relief. As the Hon. Karon Owen Bowdre, Chief Judge of the U.S. District Court for the Northern District of Alabama recently held:

---

[1](...continued)
LEXIS 66742, at **9-11 (finding settlement communications non-discoverable as "not .. Likely to lead to the disclosure of admissible evidence" and would tend to chill settlement efforts) (citations omitted).

> Based on this standard of practice, the court finds that restricting the use of discovery materials to case-related purposes only, even over Plaintiffs' objection, is within this court's discretion and authority even without the application of the Rule 26(c) good cause standard. By its text, Rule 26(c) applies to situations where the court is either limiting what a party has to produce *at all* in the discovery process, or limiting public access to documents that are *actually filed* in the case. Fed. R. Civ. Pro. 26(c). The disputed limitation in this case does not fall into either of these categories....

Looney v. Moore, No. 2:13-CV-00733-KOB (N.D. Ala. April 7, 2014), *2014 U.S. Dist. LEXIS 48349*, at ** 4-5 (emphasis in original).

B. Good Cause Exists For the Protective Order In Any Event

Even if the Intervenors would be required to demonstrate "good cause" for the requested protective order at this point, that standard is met where restrictions are appropriate under Rule 26(c) to protect the Intervenors from "annoyance, embarrassment, oppression, or undue burden or expense." *See Looney*, *2014 U.S. Dist. LEXIS 48349*, at *5; *Irizarry-Santiago v. Essilor Industries*, 293 F.R.D. 100, 104 (D. P.R. 2013). The Intervenors include not only the third-party *client* whose non-prosecution agreement is the one Plaintiffs are trying to undo but also the client's *attorneys*, who are even further removed from the actual litigants. Counsels' lengthy arguments may or may not have had any influence on the government's decision-making and, therefore, their relevance is particularly remote. *Cf. United States v. Byrd*, Crim. No. 13-0266-WS (S.D. Ala. April 7, 2014), *2014 U.S. Dist. LEXIS 48035*, at **14-18 (denying newspaper's motion to obtain copies of unsolicited sentencing letters mailed to the judge prior to sentencing, despite "no formal promises of

secrecy or confidentiality," because "the privacy interests of the letter writers and the interests of the judicial system in obtaining hones, uncensored input" outweighed public's interest in disclosure, especially where the sentencing letters "neither drove no significantly impacted the sentencing decision" which was based on a plea agreement).

Like the situation at issue in *Looney*, the instant case is a "high profile" one and should not be "tried in the media, rather [than] in the courtroom." *Looney*, *2014 U.S. Dist. LEXIS 48349*, at *5. Moreover, there is a well documented history in this case of the media reporting inflammatory statements made by Plaintiffs' counsel, either directly to the press or in pleadings, and these statements have frequently been based on discovery materials. *See, e.g., Attorneys Say Miami Prosecutors Violated Crime Victims' Rights Act*, Main Justice, March 22, 2011 (quoting Plaintiffs' motion asserting that the U.S. Attorney's Office "deliberately misled' them and claiming that the "only reason" the U.S. Attorney's Office "concealed the existence of the non-prosecution agreement from them was "to avoid a firestorm of public controversy that would have erupted if the sweetheart plea dal with a politically connected billionaire had been revealed"); *Attorneys want Jeffrey Epstein agreement thrown out*, PalmBeachDailyNews.com, March 21, 2011 (repeating aforementioned accusations from Plaintiffs' motion attacking the U.S. Attorney's Office, adding that the Office had allegedly engaged in a "pattern of deception" and noting that Plaintiffs' motion had made references to "e-mails and letters from the federal office to Epstein's lawyers"); *News Reports about Billionaire Pedophile Jeffrey Epstein Highlight the*

Importance of Victims Rights, BriefingWire.com, March 8, 2011 (quoting Plaintiffs' counsel saying "we took on powerful people and sought to level the playing field to protect victims" and that he "hopes that the media attention" will "inspire victims" to "hold predators accountable"); *Judge Receives Epstein Tape Ruling Pending*, Palm Beach Daily News, May 5, 2010 (quoting plaintiffs' counsel as arguing that a 22-minute tape recording of Mr. Epstein was "'critical'" in showing his alleged "'lack of remorse'" and that he was a "pitiless" sexual abuser); *Lawyer: Epstein Made Admissions On Tape*, Palm Beach Daily News (FL), April 29, 2010 (quoting Plaintiffs' motion concerning the same tape recording); *Attorney For Epstein Victims: 'I have Never Seen A Stranger Case'*, Palm Beach Daily News, September 20, 2009, p. A.1 (quoting Plaintiffs' counsel as opining that Mr. Epstein "could have gone to prison for life," that he had "never seen a stranger case" and that the U.S. Attorney's Office was effectively "saying we'll do everything in our power to see he doesn't get punished"); *Palm Beach sex offender's secret plea deal: Possible co-conspirators not charged, presses victims to settle civil suits*, The Palm Beach Post, September 18, 2009 (quoting Plaintiffs' counsel as saying that non-prosecution agreement "taught [the victims] that someone with money can buy his way out of anything. It's outrageous and embarrassing...."); *Judge to Rule on Sealed Plea-Deal Papers Today*, Palm Beach Daily News, June 25, 2009, p. A.1 (reporting Plaintiffs' counsel saying that he wanted to use the settlement documents in depositions); *Hearing Set to Consider Secrecy of Plea Bargain*, Sun-Sentinel (Ft. Lauderdale, Florida), Palm Beach Edition, June 15, 2009, p. 3B (in

response to reporter's question about whether he thought Mr. Epstein had received special treatment, Plaintiffs' counsel quoted as saying: "Are you kidding? It's transparent. Certainly, no one else gets treated like that"). *See* **Composite Exhibit 2**.

The publicity-generating comments by Plaintiffs' counsel have continued since the Eleventh Circuit's ruling. The wave began on April 21, 2014. That day, the *Washington Post* published a lengthy letter written by one of Plaintiffs' lead counsel containing his editorialized history of the case criticizing the Intervenors' arguments and concluding with his opinion that "the federal prosecutors deliberately concealed the sweetheart plea deal." *See* **Composite Exhibit 3**. The same attorney was also quoted by the *Sun-Sentinel* as making the unsupported accusation that somehow Mr. Epstein "used his political connections and great wealth" to secure a plea bargain that, in counsel's opinion "was unheard of, frankly, if you look at these charges." *Id.* Also that same day, the Plaintiffs' other lead counsel was quoted by the *Palm Beach Daily News* as referring to Mr. Epstein as "[a] well-connected billionaire" who "got away with molesting many girls." *Appeals court rules against sex offender; Attorneys for underage victims seek to overturn 'sweetheart plea'*, PalmBeachDailyNews.com, April 21, 2014. *Id.*

On April 22, 2014, the same attorney issued a "press release" likewise trumpeting the appellate victory, identifying Mr. Epstein's counsel by name and containing a personal statement from counsel. *See* **Composite Exhibit 4**. In a parallel article published in the *Daily Business Review*, Plaintiffs' counsel was quoted as follows: "Edwards said the

documents ***at this point*** will be disclosed only to the plaintiffs and will not become part of the public record." *Id.* (emphasis added). The implication of the "at his point" qualifier suggests that Plaintiffs' counsel plan to inject the private discovery into "the public record" at a later date.

The next day, April 23, 2014, the Facebook page for the Farmer Jaffe Weissing law firm began posting multiple photographs of Mr. Epstein with links to numerous newspaper articles about the case, along with snippets of prejudicial quotations from Plaintiffs' counsel. *See* **Composite Exhibit 5**. The same comments were then posted on the law firm's blog "www.pathtojustice.com with yet another large photograph of Mr. Epstein, resembling a mug shot. *Id.* The blog includes such personalized opinions, such as: "We have a very strong case that, prodded by Epstein, the federal prosecutors deliberately concealed the sweetheart plea deal." *Id.*

In light of the prominence of this case in the media, the repeated use of the media by Plaintiffs counsel to drum up support for their case (and to prejudice the community against Mr. Epstein and his counsel), and the Plaintiffs' suggestion that they could make the CDM available to the public in the future (just not "at this point"), the requested protective order is more than justified. As Chief Judge Bowdre likewise concluded in a similar, but less egregious, situation:

> The court has already expressed to the parties its concern that this potentially high profile case will be tried in the media, rather in the courtroom. Significant media coverage of the case has already occurred. In the interest of justice, this court is

> committed to giving both parties a fair trial, which includes protecting the Defendants from the "annoyance, embarrassment, [and] oppression" that could occur from allowing their names to be dragged through the metaphorical mud before a jury has even made any determination of wrongdoing. At least one other court has cited the risk of excessive publicity preventing the selection of an impartial jury as legitimate support for a finding of good cause under Rule 26(c). *See Anderson v. Cryovac, Inc.,* 805 F.2d 1, 4 (1st Cir. 1986) (overturning the district court's decision on other grounds). As such, the court finds that good cause exists to support the Protective Order as written....

Looney v. Moore, *2014 U.S. Dist. LEXIS 48349*, at **5-6.

LOCAL RULE 7.1(a)(3) CERTIFICATION

Counsel hereby certify that they have conferred with all parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues raised in the motion and have been unable to do so. Plaintiffs oppose this motion.

CONCLUSION

For all of the foregoing reasons, the Court should GRANT this motion and enter the requested Protective Order.

Respectfully submitted,

/s/Roy Black
Roy Black
Jackie Perczek
BLACK, SREBNICK, KORNSPAN & STUMPF, P.A.
201 So. Biscayne Blvd., Suite 1300
Miami, Florida 33131
Tele: (305) 371-6421

Fax: (305) 358-2006
rblack@royblack.com
jperczek@royblack.com
Attorneys for Intervenors

/s/Martin G. Weinberg
Martin G. Weinberg
20 Park Plaza, Suite 1000
Boston, Massachusetts 02116
Tele: (617) 227-3700
Fax: (617) 338-9538
owlmgw@att.net
Attorney for Intervenors

CERTIFICATE OF SERVICE

I HERE CERTIFY that a true copy of the foregoing was filed via CM/ECF, this 2nd day of May, 2014.

/s/Roy Black
Roy Black