No. 13-12923

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JANE DOE NO. 1 AND JANE DOES NO. 2,
Plaintiffs-Appellees

[redacted].

UNITED STATES OF AMERICA,
Defendant-Appellee

ROY BLACK *ET AL.*,
Intervenor/Appellants

INTERVENORS' RESPONSE TO MOTION TO DISMISS NON-PARTY INTERLOCUTORY APPEAL

Roy Black
Jackie Perczek
Black, Srebnick, Kornspan & Stumpf
[redacted]

Martin G. Weinberg
[redacted]

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes and Rules

INTRODUCTION AND FACTUAL BACKGROUND

Intervenor Jeffrey Epstein entered into a Non-Prosecution Agreement ("NPA") with the government in September, 2007. Under that agreement, contrary to the impression which the plaintiffs seek to create, Mr. Epstein did far more than plead guilty to "two minor state offenses." Motion at 4. Instead, he 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. Many plaintiffs sued under §2255 and received settlements as the direct result of Mr. Epstein's agreement not to contest liability in those cases. Other plaintiffs, including 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. Now having reaped the benefits of the NPA, plaintiffs seek, among other remedies, a rescission of that agreement.

Jane Doe No. 1 commenced the underlying action in 2008, contending that the government had violated her rights under the CVRA, 18 U.S.C. §3771. Epstein is not a party to that litigation. He had no obligations to either Jane Doe No. 1 or Jane Doe No. 2 under the CVRA; the obligations imposed by the statute are those of the government alone. Because neither Mr. Epstein nor intervenor-attorneys are parties to the action, this Court, for the reasons addressed herein, has jurisdiction to hear their appeal under *Perlman* [redacted]. *United States*, 247 U.S. 7 (1918); contrary to plaintiffs' arguments, nothing in *Mohawk Industries, Inc.* [redacted]. *Carpenter*, 558 U.S. 100 (2009), undercuts the Court's exercise of *Perlman* jurisdiction in this case.

While the underlying CVRA action was commenced as an "emergency" petition, Motion at 5, what the plaintiffs neglect to inform the Court is that shortly thereafter, plaintiffs appeared at a status conference, knowing that Mr. Epstein was in prison, and told the district court that they saw no reason to proceed on an emergency basis. Trans. July 11, 2008 (Doc. 15) at 24-25. Then, a month later, plaintiffs withdrew their request that the Court rescind the NPA, telling the court that "because of the legal consequences of invalidating the current agreement, it is likely not in [the plaintiffs'] interest to ask for the relief that we initially asked for." Trans. August 14, 2008 (Doc. 27) at 4. Plaintiffs spent the next eighteen months pursuing civil remedies against Mr. Epstein, and ultimately obtaining settlements, while their CVRA action remained dormant. Indeed, so inactive were plaintiffs that the district court dismissed the case for lack of prosecution *sua sponte* in September, 2010. Doc. 38. *See* Order Denying Government's Motion to Dismiss (Doc. 189) at 5 ("Over the course of the next eighteen months, the CVRA case stalled as petitioners pursued collateral civil claims against Epstein").

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* [redacted]. *Epstein*, No. 08-80119-MARRA, Doc. 462. Thus, the plaintiffs' statement that during that civil litigation, "Epstein's counsel produced to the victims' counsel significant parts of the correspondence by his attorneys concerning the NPA," Motion at 6, is misleading, as only correspondence *from* the government *to* Mr. Epstein's attorneys was produced to plaintiffs, not correspondence authored by Mr. Epstein's counsel during the course of the negotiations. *See* United States' Response to Supplemental Briefing in Support of Motion to Intervene (Doc. 100) at 2 ("To the knowledge of the government, the Jane Does have only received the portions of the correspondence written by government attorneys – all of the writings of Mr. Epstein's attorneys, except for a few short portions . . . – have been redacted").

Once the CVRA action was re-activated – 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 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 – appellants 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 for a protective order, contending that the correspondence was privileged and confidential under Fed. R. Crim. P 11(f) and Fed. R. Evid. 410 and the work product privilege and that the correspondence fell within the bounds of privilege under Fed. R. Evid. 501. (Doc. 94, 160,161, 162).The government also filed a response, in which it agreed with intervenors that the correspondence was protected by the work product privilege. Doc. 100.

The district court granted the motions to intervene (Doc. 158, 159), but ultimately ruled that the correspondence was subject to disclosure, although reserving judgment on its admissibility. Doc. 188. The district court rejected intervenors' argument based on Rule 410, erroneously concluding, relying on cases wholly unlike this one, that the correspondence fell outside the protections of Rule 410 because Rule 410 does not encompass "general discussions of leniency and statements made in the hope of avoiding a federal indictment, arguably the content of the correspondence at issue here." *Id.* at 4.[1] As will be demonstrated below, the correspondence at issue specifically addressed various potential federal charges that had been the subject of two separate grand jury presentations, Epstein was an

[1] *See* Motion for Stay Pending Appeal, filed on July 12, 2013, at 7-10.

identified target of these grand juries, and the communications by his attorneys with the government were paradigmatic efforts, consistent with the Sixth Amendment right to effective assistance of counsel during plea bargaining, *see, e.g., Lafler* [redacted]. *Cooper*, 132 S.Ct. 1376 (2012), to engage in settlement discussions falling within the core protections of Rule 410. The district court also rejected – again erroneously – the application of Rule 410 to Mr. Epstein's counsel's communications with the government on the ground that Mr. Epstein had in fact pleaded guilty, albeit in state court. *Id.* at 4-5.[2] Finally, the district 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 did not see fit to recognize a privilege for plea negotiation communications. *Id.* at 8-9. That too was error.[3]

Intervenors sought a stay of the district court's disclosure order pending appeal to this Court in the district court (Doc. 193), which was denied, although the district court stayed its order until July 15, 2013, to permit intervenors to seek a stay pending appeal from this Court (Doc. 206), which they have done.

---

[2] *See* Motion for Stay Pending Appeal, filed on July 12, 2013, at 11.

[3] *See* Motion for Stay Pending Appeal, filed on July 12, 2013, at 11-14.

II. THIS COURT HAS JURISDICTION OVER THE INTERVENORS' APPEAL UNDER THE *PERLMAN* DOCTRINE.[4]

A. *Mohawk* Does Not Affect the Operation of the *Perlman* Doctrine in this Case.

Plaintiffs first accuse intervenors of ignoring recent Supreme Court precedent which, in their view, precludes an appeal by intervenors from the district court's order that correspondence which they contend is privileged and confidential must be disclosed to plaintiffs. Motion at 10-11. Intervenors did not, however, ignore controlling Supreme Court precedent, for the simple reason that *Mohawk Industries, Inc.* [redacted]. *Carpenter*, 558 U.S. 100 (2009), does not affect the right of non-parties such as intervenors to take an appeal from the district court's disclosure order. There are two interrelated reasons why it does not. First, and most important, *Mohawk* involved an attempted interlocutory appeal by a party to the litigation, which this case does not. Second, *Mohawk* was concerned with an interlocutory appeal under the collateral order doctrine of *Cohen* [redacted]. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949), not with the *Perlman* exception to the final judgment rule; indeed, it did not so much as mention *Perlman.* Those two distinctions are critical.

In analyzing the issue of whether a party was entitled under the *Cohen*

---

[4] Plaintiffs demand that intervenors inform them whether they believe the rules of civil procedure apply to this case. Motion at 11 n.3. That question is entirely irrelevant for the Court's consideration of the jurisdictional issue.

collateral order doctrine to appeal from an order compelling it to produce documents which it contended were protected by the attorney-client privilege, the *Mohawk* Court emphasized that the Court had "stressed that [the *Cohen* collateral order doctrine] must never be allowed to swallow the general rule that *a party* is entitled to a single appeal, to be deferred until final judgment has entered." *Mohawk*, 558 U.S. at 106 (emphasis added; internal quotation marks omitted). *See id.* at 112 ("Permitting *parties* to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals" (emphasis added)). In holding that an interlocutory appeal would not lie, the *Mohawk* Court concluded that

> postjudgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege. *Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.*

Id. at 606-07 (emphasis added). This conclusion underscores the inapplicability of *Mohawk* in the present circumstances.

Quite unlike the *Mohawk* appellant, Mr. Epstein and the attorney intervenors are not parties to the litigation, having intervened solely for the limited purpose of seeking to prevent the disclosure of confidential communications; accordingly, they have no right of appeal from the final judgment in this case, and the injury done by disclosure cannot be remedied through the appellate remedy of granting of a new trial. While Mr. Epstein moved on July 8, 2013, for limited contingent future intervention with respect to the issue of remedy, should the district court reach that issue, to protect his constitutional and contractual rights with respect to the NPA, which plaintiffs seek to have rescinded as a remedy for the government's alleged violation of the CVRA (Doc. 207), the district court has not yet ruled on that motion and may never reach the remedy issue if the plaintiffs are unable to sustain their burden of proof. As Mr. Epstein explained in that motion, he is not seeking to intervene generally in the case, as the duties and obligations imposed by the CVRA apply solely to the government; the statutory requirements do not run to Mr. Epstein, and the CVRA imposed upon him no obligations to the plaintiffs. The dispute regarding whether the government violated the plaintiffs' rights under the CVRA is between the plaintiffs and the government.

Thus, should the district court grant the additional limited future remedy-stage intervention which Mr. Epstein seeks, Mr. Epstein still would not be a party to the litigation within the meaning of *Mohawk*, but instead a party for a limited purpose only. Indeed, he would not become a party at all unless the district court rules that the government violated the plaintiffs' CVRA rights and turns to the issue of remedy, which may never occur. If the district court did find that the government violated the plaintiffs' rights under the CVRA, Mr. Epstein would have no right of appeal, as he would not be a party *with respect to that issue*. He would likewise not have the right to appeal if the district court decided in plaintiffs' favor but did not order rescission. Even were the court to order rescission of the non-prosecution agreement, and Mr. Epstein had the right, as intervenor as to remedy, to appeal the Court's remedial order, it is unlikely that such an appeal from the Court's order would encompass the issue of the validity of any order regarding the disclosure of his attorneys' plea negotiation communications with the government. In the absence of the ability to take an appeal at this juncture, intervenors are "powerless to avert the mischief of the order." *Perlman*, 247 U.S. at 13.

In cases such as this one, contrary to plaintiffs' argument, *Perlman* does not directly conflict with *Mohawk*. *See* Motion at 13. In *United States* [redacted]. *Krane*, 625 F.3d 568 (9th Cir. 2010), a case not cited by the plaintiffs, the Ninth Circuit permitted an interlocutory appeal by intervenors under *Perlman*, noting that it had, "[w]hen assessing the jurisdictional basis for an interlocutory appeal, . . . considered the *Perlman* rule and the *Cohen* collateral order exception separately, as distinct doctrines," and concluding that "*Perlman* and *Mohawk* are not in tension." *Id.* at 572. In *In re Grand Jury*, 705 F.3d 133 (3d Cir. 2012), another case not cited by plaintiffs, the Court concluded, after analysis, that it "[could] not say that the Supreme Court has abandoned [the *Perlman* finality] determination on the basis of a later case, *Mohawk*, that never cites, let alone discusses, *Perlman*").

The two cases on which the plaintiffs rely do not support the proposition that appellate review under the *Perlman* doctrine is not available to intervenors in this case. In *Wilson* [redacted]. *O'Brien*, 621 F.3d 641 (7th Cir. 2010), *see* Motion at 13, plaintiff and the individual whose deposition defendants wished to use to support a summary judgment motion sought to appeal, under the *Cohen* collateral order doctrine, the district court's order compelling the individual to answer deposition questions over a claim of work product privilege. The Seventh Circuit did not in fact decide the question of *Mohawk*'s impact on *Perlman*, finding the appeal moot because the deposed individual had complied with the order and answered the objected-to deposition questions. *Id.* at 643. The Court noted that, if the district court did ultimately permit the defendants to use the deposition testimony, plaintiff, who was the privilege holder rather than the deponent, could appeal that decision after final judgment. Notably, the *Wilson* Court stated that "when the person who asserts a privilege is a non-litigant," "an appeal from a final judgment [will] be inadequate."

In *Holt-Orsted* [redacted]. *City of Dickson*, 641 F.3d 230 (6th Cir. 2011), the plaintiffs sought to take an interlocutory appeal from an order compelling the testimony of their former attorney over a claim of attorney-client privilege. The Court agreed with the Ninth Circuit's decision in *Krane*, concluding that the circumstances in *Krane* "support application of the *Perlman* doctrine because, without the ability to raise the issue in an interlocutory appeal, Quellos, as a non-party, would have lost its opportunity to do so in the future." *Id.* at 239. The same is true here. The Court found no appellate jurisdiction, following *Mohawk*, because plaintiffs – the privilege holders – were parties to the litigation and, as such, could avail themselves of a post-judgment appeal to "preserve the vitality of the attorney-client privilege." *Id.* at 240, *quoting Mohawk*, 558 U.S. at 606-07. That, however, is not the case here.

Since the attorney intervenors are not "litigants" or parties in this action, under both *Wilson* and *Holt-Orsted*, they would retain the right to appeal under *Perlman.* Plaintiffs seek to cast Mr. Epstein as a "litigant" in this action, but his limited intervention to challenge disclosure of confidential communications does not make him a litigant, *i.e.*, a party, to the action, nor, contrary to plaintiffs' argument, does Mr. Epstein's "current posture" in this litigation provide him with an avenue "to appeal any adverse privilege ruling that harms him at the conclusion of the case." Motion at 14. There will be no "adverse judgment *against him*," *id.* at 13 (emphasis added), from which he could take an appeal. Even if the district court grants Mr. Epstein's contingent motion for future intervention as to remedy, he would not be a party to the action as a whole but only as to that limited facet of the litigation; in fact, he may never actually become a party if the district court does not reach the remedy issue or denies his request for limited contingent intervention (although Mr. Epstein believes that his intervention as to remedy is warranted and mandatory). Plaintiffs cite no authority for the proposition that a non-party to the litigation can appeal from a final judgment, and the law is to the contrary. *See Marino* [redacted]. *Ortiz*, 484 U.S. 301 (1988)("The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled"). Plaintiffs' action was not brought against Mr. Epstein, nor has he sought by intervention to become a full party to the action. The *Perlman* doctrine is fully applicable in the circumstances of this case.

B. Intervenors are "Privilege Holders" for Purposes of *Perlman*.

The *Perlman* doctrine is not, as the plaintiffs contend, strictly limited to fully recognized privileges such as the attorney-client privilege. The privilege which intervenors assert falls squarely within *Perlman*. Indeed, the Supreme Court has recognized that "Rules 410 and 11(e)(6) 'creat[e], in effect, a privilege of the defendant . . . .'" *United States* [redacted]. *Mezzanatto*, 513 U.S. 196, 205 (1995). Contrary to the plaintiffs' characterization, what Mr. Epstein and the attorney intervenors seek to appeal is *not* an issue of admissibility of evidence, *see* Motion at 15, but one of *disclosure*: whether their confidential communications with the government in the course of settlement/plea negotiations may be ordered disclosed to third parties such as plaintiffs.

The privilege which intervenors assert has its basis in the implementation of Fed. R. Evid. 410 in the context of its overlap with the work product privilege and counsel's legitimate expectations of privacy in their communications with the government in seeking to resolve the investigation or prosecution of their clients; it is not a "new" privilege in the sense that plaintiffs argue. In any event, plaintiffs' arguments that Mr. Epstein is not a privilege holder and that *Perlman* does not extend to cases in which the appellant will be arguing for the recognition of a privilege, rather than asserting an existing one, are foreclosed by *In re Grand Jury Proceedings*, 832 F.2d 554 (11th Cir. 1987). In that case, appellants asserted that their state grand jury testimony was protected from disclosure to a federal grand jury by a nondisclosure privilege grounded in the state grand jury secrecy requirement. The Court held that it had jurisdiction to hear the appeal under *Perlman*, but concluded that the privilege for which appellants contended did not exist under state law. Thus, the fact that a privilege has not yet been formally recognized under Rule 501 is not a bar to *Perlman* jurisdiction. The controlling factor is whether the appellants assert a right or privilege, *see In re Sealed Case*, ___ F.3d ___, 2013 WL 2120157 at *4 (D.C.Cir. March 5, 2013)("The *Perlman* doctrine permits appeals from some decisions that are not final but allow the disclosure of property or evidence over which the appellant asserts a right or privilege"), as they do here – the right or privilege of confidentiality in their settlement/plea communications with the government and their concomitant protection from disclosure to the plaintiffs. *See, e.g., Ross* [redacted]. *City of Memphis*, 423 F.3d 596, 599 (6th Cir. 2007)(*Perlman* jurisdiction "does not depend on the validity of the appellant's underlying claims for relief"); *Gill* [redacted]. *Gulfstream Park Racing Ass'n, Inc.*, 399 F.3d 391, 398, 402 (1st Cir.

2005)(asserting jurisdiction under *Perlman*, but concluding that informant privilege was not available to private parties).

C. *Perlman* is not Limited to the Grand Jury Context.

This Court has never limited *Perlman* to the grand jury context, and there is no principled reason why the doctrine should be so limited, so long as its requirements are met. "[U]nder the . . . *Perlman* doctrine, a discovery order directed at a disinterested third party is treated as an immediately appealable final order because the third party presumably lacks a sufficient stake in the proceeding to risk contempt by refusing compliance." *Church of Scientology* [redacted]. *United States*, 506 U.S. 9, 18 n.11 (1992). The danger to the privilege holder – that privileged or confidential documents will be disclosed and his powerlessness to prevent the disclosure absent an immediate appeal remedy – is the same, regardless of whether the order is made in the context of grand jury proceedings or in another context. Only by referring solely to this Court's applications of *Perlman* "over the last fifty years," Motion at 16, are the plaintiffs able to ignore the fact that this Court cited *Perlman i*n support of its finding of jurisdiction in *Overby* [redacted]. *U.S. Fidelity & Guar. Co.*, 224 F.2d 158, 162 & n.5 (11th Cir. 1955), a civil case. In just the few years since *Mohawk*, the Fourth Circuit found jurisdiction based on *Perlman* in a civil case, *Mezu* [redacted]. *Morgan State University*, 495 Fed. Appx. 286, 289 (4th Cir. 2012); the Ninth Circuit has applied *Perlman* in a case arising under 28 U.S.C. §2255, *United States* [redacted]. *Gonzalez*, 669 F.3d 974, 977 n.2 (9th

Cir. 2012), and in a civil case, *S.E.C.* [redacted]. *CMKM Diamonds, Inc.*, 656 F.3d 829, 830-31 (9th Cir. 2011); the Sixth Circuit has indicated in a civil case that *Perlman* jurisdiction is still viable after *Mohawk* where the privilege holder is not a party to the action, *Holt-Orsted*, 641 F.3d at 239; and the Seventh Circuit has indicated in a civil case that *Perlman* jurisdiction still attaches where the person asserting the privilege is a non-litigant, *Wilson*, 621 F.3d at 643.[5] The grand jury limitation for which plaintiffs argue simply does not exist.

D. The United States is a Disinterested Third Party.

Under the circumstances of this case, the government, contrary to plaintiffs' argument, Motion at 17, should be considered a disinterested party for purposes of application of the *Perlman* doctrine. Even though the government has voiced its general agreement that correspondence exchanged between defense counsel and the government in pursuit of settlement/plea negotiations is protected by the work product privilege, it stopped short of advocating the recognition of a settlement/plea

[5] Plaintiffs rely on the Tenth Circuit's lack of awareness that *Perlman* had ever been applied outside the grand jury context, Motion at 16-17, but a quick Westlaw search demonstrates that *Perlman* has often been applied outside the grand jury context. *See, e.g., Gotham Holdings, LP* [redacted]. *Health Grades, Inc.*, 580 F.3d 664, 665 (7th Cir. 2009)(civil case); *United States* [redacted]. *Williams Cos., Inc.*, 562 F.3d 387, 392 (D.C.Cir. 2009)(criminal case; rejecting effort to distinguish *Perlman* on the ground that it arose in the grand jury context); *Ross* [redacted]. *City of Memphis*, 423 F.3d 596, 599-600 (6th Cir. 2007); *Gill* [redacted]. *Gulfstream Park Racing Ass'n, Inc.*, 399 F.3d 391, 398 (1st Cir. 2005)(civil case); *Sheet Metal Workers Intern.* [redacted]. *Sweeney*, 29 F.3d 120, [redacted] (4th Cir.1994)(civil case).

negotiation privilege under Rules 410 and 501. *See* United States' Response to Supplemental Briefing in Support of Motion to Intervene (Doc. 100). The government's institutional interests differ significantly from those of attorneys who represented a private individual under criminal investigation by the government and who sought, though full and frank exploration of the facts and legal issues involved, to convince the government not to prosecute their client. Only immediate appeal of the Court's order will ensure that intervenors are able to protect their distinct interests in preserving the confidentiality of their communications with the government in the settlement negotiation process. In the absence of the ability to take an appeal at this juncture, intervenors will be "powerless to avert the mischief of the order," *Perlman*, 247 U.S. at 13, as their particular interests in nondisclosure will not be adequately protected by the government.

Likewise, the government and Mr. Epstein have significantly different interests in the scope of Rule 410 in the context of a litigant's discovery attempts. The disclosure request here comes from plaintiffs who have previously sued Mr. Epstein, the target of a federal prosecution, seeking monetary damages for the very conduct that was at issue during the plea/settlement negotiations between his attorneys and the government. The prior civil discovery order relied upon by Judge Marra resulted from the efforts of the civil litigants to enhance their case through the mechanism of acquiring the target's attorney's communications with the government which, in the context of plea or settlement negotiations, are authored in an expectation of privacy, and which include admissions made in the effort to provide a predicate for any plea or agreement to defer prosecution rather than litigate. Although the government in this particular matter is contending that it did not violate the CVRA , its overall litigation position – including urging the Jane Does to advocate for Epstein's prosecution in other districts, *see* United States Motion to Dismiss for Lack of Subject Matter Jurisdiction, Doc. 205-2 at 8-9, eloquently demonstrates that there is only the most ephemeral and illusory commonality of interests between the government and Epstein – and certainly not one that makes the government Epstein's agent or advocate for purposes of this issue. Epstein's interest in opposing the disclosure of his attorneys' written communications relating to bona fide attempts to resolve concrete federal criminal allegations are substantially distinct from the government's institutional interests and distinct from the government's litigation-related strategies in terms of the underlying CVRA litigation and, accordingly, will not be adequately represented by the government.

III. INTERVENORS WILL SUFFER INJURY IF THE PRIVILEGED AND CONFIDENTIAL CORRESPONDENCE IS DISCLOSED TO PLAINTIFFS.

Intervenors have contended from the outset that the communications at issue were conducted with the government in the course of settlement/plea negotiations for the purpose of seeking resolution of a serious ongoing criminal investigation of Mr.

Epstein which had reached the grand jury stage. *See* Doc. 94, 160, 161, 162; *see also* Doc. 100. Plaintiffs have never denied that this is the case; indeed, it is the very reason why they seek discovery of the correspondence. Intervenors have also contended that the correspondence was privileged and confidential, a position with which the government agrees. All of their pleadings directed to the issue discussed in depth why the correspondence was privileged. Plaintiffs have never suggested in this case that intervenors needed to file a privilege log or affidavits, *see* Motion at 19,[6] and the issues were litigated in the district court as a question of law, based on the acceptance of all parties of the fact that the correspondence at issue was conducted as part of settlement/plea negotiations.[7]

Plaintiffs' argument that intervenors have not shown that they would be injured if the settlement/plea correspondence were disclosed to plaintiffs is, simply, specious. Because it is impossible for appellate courts to undo the damage caused by forced

[6] *Miccosukee Tribe of Indians of Florida*, 516 F.3d 1235 (11th Cir. 2008), on which plaintiffs rely, Motion at 19, was concerned with the particular requirements for a government entity to invoke the FOIA Section 5 exemption. As such, it has no relevance to the issues before the Court.

[7] The single case on which plaintiffs rely for the proposition that this appeal should be dismissed for lack of subject matter jurisdiction, *Florida Wildlife Federation, Inc.* [redacted]. *South Florida Water Management Dist.*, 647 F.3d 1296 (11th Cir. 2011), is wholly inapposite. The issue in that case was whether intervenors had standing to appeal a consent decree, and the Court concluded that there were no remaining justiciable issues.

disclosure of privileged or confidential communications or information, courts have consistently recognized that the harm caused by an erroneous order to disclose privileged or confidential information is irreparable. *See, e.g., In re Professionals Direct Ins. Co.*, 578 F.3d 432, 438 (6th Cir. 2009)(finding risk of irreparable harm because "a court cannot restore confidentiality to documents after they are disclosed"); *Gill* [redacted]. *Gulfstream Park Racing Ass'n, Inc*., 399 F.3d 391, 398 (1st Cir. 2005)("once the documents are turned over to Gill with no clear limitation on what he may do with them, the cat is out of the bag, and there will be no effective means by which TRPB can vindicate its asserted rights after final judgment"); *In re Perrigo Co.*, 128 F.3d 430, 437 (6th Cir.1997)("We find . . . that forced disclosure of privileged material may bring about irreparable harm"); *In re Grand Jury Proceedings*, 43 F.3d 966, 970 (5th Cir. 1994)(forced disclosure of privileged documents would cause irreparable harm). This remains true post-*Mohawk* in cases such as this one, where intervenors are not parties to the action. Intervenors have more than adequately shown that they will be injured by the disclosure of their privileged and confidential settlement/plea negotiation correspondence, as the injury inheres in the disclosure itself.

CONCLUSION

For all the foregoing reasons, the Court should deny plaintiffs' motion to dismiss.

Respectfully submitted,

/s/ Roy Black
Roy Black
Jackie Perczek
Black, Srebnick, Kornspan & Stumpf
201 South Biscayne Boulevard
[redacted]

/s/ Martin G. Weinberg
Martin G. Weinberg
20 Park Plaza, Suite 1000
[redacted]

Intervenor/Appellants and Attorneys for Intervenor/Appellants

CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that on this 12th day of July, 2013, the foregoing document was served, through this Court's CM/ECF system, on all parties of record.

/s/ Martin G. Weinberg
Martin G. Weinberg