

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.

**JEFFREY EPSTEIN’S OMNIBUS REPLY IN SUPPORT
OF HIS MOTION FOR LIMITED INTERVENTION**

We clarify at the outset the plaintiffs’ claim that they have the plea negotiation letters and therefore the letters cannot be privileged. [DE 96 at 13-14]. We have cleared this up before, with the plaintiffs’ lawyers acknowledging their mistake, [DE 80 at 1], but for some reason the plaintiffs insist on making the same misleading claims again. The plaintiffs *do not* have the letters or emails written by the defense attorneys to the government. The plaintiffs only have the letters from the government to the defense attorneys, pursuant to orders issued by Magistrate Judge Johnson that addressed the plaintiffs’ request “for documents the federal government gave to Epstein in the course of its plea discussions with him” and “documents . . . given *by the government* to Epstein . . .” [DE 462 at 7, 10] (emphasis in original); *see also* [Order, DE 513 at 2] (ruling on “documents the government itself gave Epstein”).

This pleading replies to the responses filed by the government [DE 98] and by the plaintiffs [DE 96] in response to Mr. Epstein’s motion for limited intervention. Mr. Epstein’s intervention is timely, as of right and as a matter of discretion, and properly limited to the legal issues concerning

the discovery and evidentiary use of letters and emails reflecting plea negotiations. The Court should grant his motion for limited intervention.

I. INTRODUCTION

For a number of years, Jeffrey Epstein endured intensive investigation and prosecution. His involvement with the legal system began in 2005, when search warrants were served at his Palm Beach home. Mr. Epstein endured a long state investigation, and then a subsequent federal investigation including extensive negotiations between his lawyers and the government. He ultimately pled guilty to a state offense, served a prison sentence in solitary confinement, and suffered all the penalties and consequences of his criminal state court plea. Mr. Epstein then went through many civil lawsuits and, in compliance with the terms of the Non-Prosecution Agreement, he paid millions in lawyers' fees to the attorney representative for certain of the plaintiffs. Also in compliance with the Non-Prosecution Agreement, Mr. Epstein then paid millions more to settle civil damages cases which paralleled the criminal prosecution.

The United States Attorney's Office and the State Attorney for West Palm Beach (and the attorney representative appointed to represent certain of the prosecution witnesses) all recognized that Mr. Epstein had fulfilled his obligations under the Non-Prosecution Agreement. But plaintiffs' attorney Bradley Edwards rejected the views of two sovereigns and initiated not only this action but also a media attack on Mr. Epstein and his business associates and friends.

The plaintiffs' attorneys have been reckless with the truth, and litigation with them has been toxic for years. They have used these proceedings to make false accusations against attorney Bruce Reinhart, a distinguished member of the Bar with a solid history of government and private practice,

simply because he represented someone who worked with Mr. Epstein. Indeed, the plaintiffs continue to insult and accuse Mr. Reinhart in their responsive pleading to Mr. Epstein's motion for limited intervention and in their recent discovery requests, despite the fact that Mr. Reinhart has put them on notice that their accusations are baseless and violate Rule 11.

Mr. Epstein now sees that his limited intervention is necessary because the plaintiffs have made the outrageous claim that they are entitled to Mr. Epstein's plea negotiations because Mr. Epstein allegedly conspired with the United States Attorney, his assistants, and the FBI to violate the law; they claim that Mr. Epstein "engineered" and "orchestrated" the claimed CVRA violations, and that he "insisted that the rights of these victims" be violated. [Trans. August 12, 2011 hearing at 33-34, 61]. The escalating rhetoric by these plaintiffs and their lawyers, culminating in the accusation at the August 12, 2011 hearing of a widespread conspiracy orchestrated by Mr. Epstein, has reached a point where Mr. Epstein cannot stand by without taking action to protect his plea negotiations.

Mr. Epstein seeks limited intervention to enforce his rights under the Constitution, the Federal Rules of Evidence, the case law, and common sense, that these plaintiffs and their lawyers cannot obtain defense letters and emails reflecting Mr. Epstein's plea negotiations nor use any of the plea negotiation documents as evidence against him.

II. THE MOTION FOR LIMITED INTERVENTION IS TIMELY

The plaintiffs argue that Mr. Epstein's motion to intervene is a year late because when the damages case settled in July 2010, the plaintiffs informed Mr. Epstein that sometime in the future, the plaintiffs "would be using" the plea negotiations letters in the CVRA case. [DE 96 at 3, 10].

They also contend that Mr. Epstein needed to intervene in July 2010 because the settlement agreement states that “Jane Doe 1 and Jane Doe 2 *may desire* to use” the plea negotiation letters in the CVRA case. *Id.* (emphasis added). These arguments misapprehend the law of intervention.

Intervention is not appropriate upon a lawyer’s warning of what he “may desire” to do in the future. Such contingencies do not satisfy the requirements of Rule 24. An intervenor must establish that he has a “direct and *immediate*” interest in an issue in the case, not merely a contingent one. *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Syst., Inc.*, 797 F.2d 85, 88 (2d Cir. 1986) (under Rule 24, interest must be “direct and *immediate*”).

“An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule.” *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990) (emphasis added). To intervene under Rule 24, “a nonparty must have a ‘direct,’ ‘substantial,’ and ‘legally protectable’ interest in the action rather than a merely speculative or contingent interest.” *AAL High Yield Bond Fund v. Deloitte & Touche LLP*, 361 F.3d 1305, 1310-11 (11th Cir. 2004), quoting *Brennan v. N.Y. City Bd. of Educ.*, 260 F.3d 123, 129 (2nd Cir. 2001); *Restor-A-Dent Dental Lab., Inc. v. Certified Alloy Prod., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984) (the interest must be “sufficiently direct and immediate . . . as opposed to remote or contingent”).

Thus, a motion to intervene in July 2010, contingent on what the plaintiffs’ lawyers may desire to do at some unidentified time in the future, would have been inappropriate, speculative, and a waste of judicial resources. And “courts should discourage premature intervention that wastes judicial resources.” *Sierra Club v. Espy*, 18 F.3d 1202 (5th Cir. 1994); *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) (speculative intervention may “later prove to have been

unnecessary, and the result will be needless prejudice to the existing parties and the would-be intervenor if his motion is granted, and purposeless appeals if his motion is denied. In either event, scarce judicial resources would be squandered, and the litigation costs of the parties would be increased”).

The government comments [DE 98] that Mr. Epstein’s motion is six months late because it was filed in September 2011, and the plaintiffs first filed their motions seeking to use the plea negotiations letters and seeking disclosure of the defense team’s letters on March 21, 2011. [DE 50, 51]. The government does not articulate any prejudice from this passage of time. The plaintiffs complain that they will be prejudiced in two ways: First, by having to respond to the merits of Mr. Epstein’s motion for a protective order; and second, by their Florida and Utah lawyers possibly having to attend another court hearing. [DE 96 at 12-13]. Once again, the plaintiffs misapprehend the law.

“For the purpose of determining whether an application for intervention is timely, the relevant issue is not how much prejudice would result from allowing intervention, but rather how much prejudice would result from the would-be intervenor's failure to request intervention as soon as he knew or should have known of his interest in the case.” *Stallworth*, 558 F.2d at 267. The rule is elementary – the plaintiffs would have to file a responsive pleading to Mr. Epstein’s motion for a protective order regardless of when Mr. Epstein applied for intervention. Because the burden placed on the plaintiffs of responding to that motion is not attributable to any delay in seeking intervention, it may not be considered as prejudice. *Id.* at 265.

The plaintiffs’ other argument – that they are prejudiced because their Florida and Utah lawyers may have to attend another court hearing – is also unavailing. First, the Court did not

consider the merits of the lawyers' motion for a protective order at the hearing on August 12, 2011. The Court only considered whether the lawyers had a right to intervene. The Court may choose to convene another hearing to consider the merits of the lawyers' claims, at which time the Court can also consider the merits of Mr. Epstein's claims. Any travel burdens that such a hearing may place on the plaintiffs' attorneys is not attributable to any delay by Mr. Epstein.

Second, plaintiffs' attorney Brad Edwards practices in Fort Lauderdale. That he may have to attend another hearing in West Palm Beach is hardly the type of prejudice that would justify denying a motion to intervene to protect privileged communications. And plaintiffs' attorney Paul Cassell, while he practices in Utah, has chosen, by his *pro hac vice* application to this court, to undertake the burdens of traveling to Florida for hearings. Alternatively, he can appear by telephone, as the Court has offered counsel to appear telephonically in the past. In any event, "mere inconvenience is not in itself a sufficient reason to reject as untimely a motion to intervene as of right." *McDonald v. E.J. Lavino Co.*, 430 F.2d 1065, 1072-73 (5th Cir. 1970)

These considerations of prejudice – or better, the lack of prejudice – are critical because "prejudice . . . is the essence of the timeliness inquiry . . ." *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1479 (11th Cir.1993), abrogated on other grounds by *Dillard v. Chilton County Comm'n*, 495 F.3d 1324, 1333 (11th Cir. 2007). Prejudice is the most important factor to consider – indeed, it may be the only significant consideration – when ruling on the timeliness of a motion to intervene. For in the absence of prejudice, even significant delay is insufficient to deny intervention. *See McDonald*, 430 F.2d at 1072-73 ("[t]he most important consideration in determining timeliness is whether any existing party to the litigation will be harmed or prejudiced by the proposed intervenor's delay in moving to intervene. In fact, this may well be the only significant consideration when the

proposed intervenor seeks intervention of right”); *Cook v. Bates*, 92 F.R.D. 119, 123 (S.D. N.Y. 1981) (“[i]n the absence of prejudice to the opposing party, even significant tardiness will not foreclose intervention”); *Smith Petroleum Serv., Inc. v. Monsanto Chem. Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970) (“it has been suggested that ‘the most important factor’ which should be considered by the trial court ‘is whether any delay in moving for intervention will prejudice the existing parties to the case.’”); *Diaz v. The Southern Drilling Corp.*, 427 F.2d 1118, 1126 (5th Cir. 1970) (“the more important question is not the mere length of time but the possibility of prejudice to existing parties that the delay may cause”).

Mr. Epstein’s motion for limited intervention is timely. It is certainly nowhere close to the facts in *Florida Key Deer v. Brown*, 232 F.R.D. 415 (S.D. Fla. 2005), which the plaintiffs cite in support of their untimeliness claim. The would-be intervenors in that case waited *fifteen years* to move to intervene, and then did so after judgment had entered and as the matter was gearing up for appeal. 232 F.R.D. at 417. The court denied intervention at this “extremely belated stage of the litigation.” *Id.*

Here, in contrast to *Florida Key Deer*, there has been no trial or adjudication on the merits of the claims and defenses. Indeed, it appears that no final adjudication will take place in the near future because the plaintiffs just served the government with outlandish discovery requests that will undoubtedly result in additional litigation. Thus, there is no final judgment that would be undone or affected by Mr. Epstein’s intervention. And the Court has not held evidentiary hearings to determine whether the CVRA was violated or what the remedy should be if a violation took place.

Even under the government’s argument that Mr. Epstein’s application to intervene is six months late, that is not a basis to deny the motion. As the Eleventh Circuit held in reversing the

district court's denial of a motion to intervene, "[w]e do not believe that a delay of six months in itself constitutes untimeliness." *Georgia v. United States Army Corps of Eng'r*, 302 F.3d 1242, 1259 (11th Cir. 2002). Such "absolute measures of timeliness . . . should be ignored," particularly when intervention is sought as of right under Rule 24(a), as Mr. Epstein has done. *Stallworth*, 558 F.2d at 265.

One final consideration in the timeliness analysis is whether any unusual circumstances militate in favor of intervention. The plaintiffs mock Mr. Epstein's argument that the Court's ultimate rulings concerning the plea negotiations will impact every criminal investigation and prosecution in this and other Districts. [DE 96 at 14]. But just last month, plaintiffs' counsel Paul Cassell was quoted by the New York Times in an article that discusses the importance of plea agreements. Cassell was talking about the monumental power prosecutors now have in federal cases and the shift of power from judges to prosecutors to determine sentences:

"Legal scholars like Paul Cassell, a conservative former federal judge and prosecutor who is now a law professor at the University of Utah, describe the power shift as a zero-sum game. 'Judges have lost discretion, and that discretion has accumulated in the hands of prosecutors, who now have the ultimate ability to shape the outcome,' Mr. Cassell said. 'With mandatory minimums and other sentencing enhancements out there, prosecutors can often dictate the sentence that will be imposed.'"¹ Other articles, including those published by the Bureau of Justice Statistics of the Department of Justice, report that only 4% of federal defendants go to trial and that 96% of them

¹ <http://www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html>

plead guilty, further emphasizing the importance of plea negotiations.²

Clearly, then, this Court’s ruling concerning plea negotiations will have a dramatic impact on the criminal justice system, and this impact is a proper consideration for the Court in ruling on the motion to intervene. “[A] substantial public interest at stake in the case is an unusual circumstance militating in favor of intervention.” *Meek*, 985 F.2d at 1479; *Howard v. McLucas*, 782 F.2d at 960 (finding denial of intervention to be an abuse of discretion in part because “intervenor-appellants raise an important question regarding the legality of the race-conscious promotional remedy”).

Finally, we emphasize again that the plaintiffs should not be heard to complain about Mr. Epstein’s timeliness when they allowed this case to linger inactive for a year and a half while they sought money from Mr. Epstein. Indeed, as this Court noted in its order of September 26, 2011, the Court held a hearing in this matter on July 11, 2008, at which time the “plaintiffs explained that their petition did not present an emergency and that therefore an immediate resolution was not necessary.” [DE 99 at 4].

According to the plaintiffs, they had good reason to take their time – a year and a half worth of time – to litigate this CVRA case because they were seeking discovery under false pretenses in the damages case. *See SECTION V below*. This is certainly not “good cause” for delaying this case. Had the plaintiffs believed time was of the essence, they would have applied to *this* Court immediately for assistance with discovery, rather than linger for a year and a half in the damages case, seeking discovery by subterfuge.

² www.ojp.usdoj.gov/bjs/pub/html/fjsst/2005/fjs05st.htm

For all these reasons, the Court should grant the motion to intervene as timely. “The requirement of timeliness is not a tool of retribution to punish the tardy would-be intervenor, but rather a guard against prejudicing the original parties by failure to apply sooner. Federal courts should allow intervention where no one would be hurt and greater justice could be attained.” *Sierra Club v. Espy*, 18 F.3d at 1205.

III.
MR. EPSTEIN CAN PROPERLY SEEK, AND THE COURT
CAN PROPERLY GRANT, LIMITED INTERVENTION

The plaintiffs contend that intervention should be denied because Mr. Epstein is somehow attempting to pull a fast one on the court by seeking only "limited" intervention. They contend that there is no basis in the law for limited intervention, and that this is “a ploy” and another “transparent scheme” by Mr. Epstein. [DE 2,15]. These arguments are nonsense.

The general rule in the Eleventh Circuit and elsewhere is that “[a] nonparty may have a sufficient interest for some issues in a case but not others, and the court may limit intervention accordingly.” *United States v. South Florida Water Mgmt. Dist.*, 922 F.2d 704, 707 (11th Cir. 1991); *see Harris v. Pernsley*, 820 F.2d 592, 599 (3rd Cir.), (holding that an applicant for intervention “may have a sufficient interest to intervene as to certain issues in an action without having an interest in the litigation as a whole”), *cert. den.* 484 U.S. 947 (1987); *United States v. AT&T Co.*, 642 F.2d 1285, 1291 (D.C. Cir. 1980) (“intervention for individual issues [may be] appropriate to protect particular interests, with the limited nature of the intervenor's interest determining the scope of the intervention that should be allowed”).

In fact, not only can the Court grant limited intervention, but it can also “order a separate trial of claims or issues subject to intervention when ‘conducive to expedition and economy.’” *South*

Florida Water Mgmt. Dist., 922 F.2d at 707.

Limited intervention is the appropriate vehicle by which a nonparty can protect privileged communications. Just last year, this District granted a motion for limited intervention seeking to protect privileged communications in *El-Ad Residences at Miramar Condo. Ass'n, Inc. v. Mt. Hawley Ins. Co.*, 716 F. Supp. 2d 1257 (S.D. Fla. 2010). The motion in that case invoked the attorney-client and attorney work-product privileges, and sought limited intervention as of right under Rule 24(a) “for the limited purpose of protecting the various privileges. . . .” *Id.* at 1262. The motion was granted.

Various other cases grant limited intervention to litigate privilege and other issues. In *Sackman v. Liggett Group, Inc.*, for example, the district court granted a motion for limited intervention, finding that “the intervenors have alleged a sufficient interest to warrant the limited intervention they seek” to raise claims “based on the joint defense privilege” and the “attorney-client and work-product privileges.” 167 F.R.D. 6, 20-21 (E.D.N.Y. 1996).

In *United States v. AT&T Co.*, 642 F.2d 1285, 1291 (D.C.Cir.1980), the Court granted limited intervention to assert the attorney work-product privilege in response to a discovery request.

In *United States v. Phillips Morris USA, Inc.*, 2003 WL 25572283 (D.D.C. Dec. 5, 2003), the court granted limited intervention “for the limited purpose of asserting and, if necessary, litigating privileges” in response to court-ordered discovery.

In *Fortunati v. Campagne*, 2009 WL 385433 (D.Vt. Feb. 12, 2009), the court granted limited intervention to the Attorney General, who sought to protect from discovery a memo his office prepared concerning a police shooting: “The A.G.'s Office is granted permissive intervention under Federal Rule of Civil Procedure 24(b) for the limited purpose of opposing Plaintiffs' Motion to

Compel.”

The Eleventh Circuit has also granted limited intervention in areas other than privilege. In *Howard v. McLucas*, for example, the court approved the limited intervention of minority employees who sought to challenge a consent decree in an employment discrimination case. 782 F.2d 956 (11th Cir. 1986). The Eleventh Circuit found that the employees had no standing to challenge the monetary award for back pay, but that they had standing to challenge the injunctive relief concerning promotions. *Id.* at 960. The Court therefore granted limited intervention, holding that the employees could intervene for the limited purpose of challenging the portions of the consent decree that addressed promotional opportunities. *Id.*

And in *South Florida Water Mgmt. Dist.*, 922 F.2d 704, the Eleventh Circuit again granted limited intervention as of right under Rule 24(a), this time in litigation where the United States claimed that the South Florida Water Management District was releasing pollutants into the Loxahatchee National Wildlife Refuge.

The case law is therefore clear that a nonparty may seek, and the court may properly grant, limited intervention. Indeed, Rule 24 itself contemplates that intervention may be limited, as the Advisory Committee Note to the 1966 Amendments specifically provides that "intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." This naturally implies that the Court has the power to limit intervention.

Jeffrey Epstein's motion for limited intervention is perfectly appropriate. He has no duties under the Crime Victims' Rights Act and owes no obligations to the plaintiffs under the Act. Mr. Epstein does not seek to litigate whether the Crime Victims' Rights Act applies in this case or

whether it was violated. Those are matters between the government and the plaintiffs.

Mr. Epstein simply seeks to intervene for the limited purpose of protecting the letters and emails reflecting plea negotiations. There is nothing nefarious about this; it is neither a scheme nor a ploy, but a right clearly afforded to him by the law. The plaintiffs' "all or nothing" standard for intervention is frivolous and certainly not one the court can confidently rely on. In at least one case, the district court's failure to limit intervention resulted in reversal by the Eleventh Circuit. *See Southern v. Plumb Tools*, 696 F.2d 1321, 1321-1323 (11th Cir.1983) (*per curiam*) (district court's failure to limit intervention and restrict the participation of intervenor to certain issues was reversible error due to the state evidentiary rules that applied).³

IV.
MR. EPSTEIN'S INTERVENTION IS NOT BARRED
BY THE LAW OF THE CASE DOCTRINE

The plaintiffs also contend that intervention should be denied because a ruling by Magistrate Judge Johnson *in a separate case* is "the law of the case" in this case. This argument is meritless because the law of the case doctrine does not apply to separate cases.

³ Naturally, Mr. Epstein has an interest in the Non-Prosecution Agreement. But his intervention at this time to protect the validity of that agreement would be inappropriate. So far, the Court has simply ruled that the CVRA applied pre-indictment. The Court will eventually hold hearings, perhaps evidentiary hearings as discussed during the August 12, 2011 hearing, to determine whether the CVRA was violated. The plaintiffs have requested that the Court then hold another hearing to determine what remedy is appropriate, and to consider invalidating the Non-Prosecution Agreement. Mr. Epstein's general intervention at the present time, essentially requiring Mr. Epstein to stand-by and see if the Court even reaches the point of holding such a remedies hearing, would be premature and would be the type of contingent intervention that the Courts have held is inappropriate. If the Court determines sometime in the future that a violation of the CVRA took place and then determines that a hearing is necessary to consider the validity of the Non-Prosecution Agreement, Mr. Epstein's interests with respect to the validity of the Agreement will become ripe and subject to intervention, rather than being simply speculative as they are now and contingent on how the Court rules between now and then.

"First and foremost, it is hornbook law that the law of the case doctrine operates as a form of issue preclusion *within the same case*." *Overseas Shipholding Group, Inc. v. Skinner*, 767 F. Supp. 287, 296 (D.C. Cir. 1991) (emphasis in original). The doctrine "is applicable only during the pendency of a *single proceeding*" and it is "inapplicable" in cases that are "altogether separate proceedings . . ." *Society of Separationists, Inc. v. Herman*, 939 F.2d 1207, 1214 (5th Cir. 1991) (emphasis also in original). The doctrine "provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages *in the same case*." *Harbor Ins. Co. v. Essman*, 918 F.2d 734, 738 (8th Cir. 1990) (emphasis again in original).

This CVRA case between the plaintiffs and the U.S. Attorney's Office is not the same case as the damages case between the plaintiffs and Mr. Epstein. Accordingly, any ruling by the Magistrate Judge in the damages case is not the law of the case in this CVRA case. *See Harbor Ins. Co.*, 918 F.2d at 738 ("because the instant case is not the same case as the 'Harbor Insurance Action,' the law of the case doctrine does not apply"); *Society of Separationists*, 939 F.2d at 1214 ("*Murray* and the case before us are altogether separate proceedings, so the law of the case is inapplicable").

Even if the doctrine applied here, it does not provide a basis to deny intervention. The doctrine goes to the substance of Mr. Epstein's underlying claims, and is therefore not properly addressed at this stage. In ruling on a motion to intervene to protect privileged or confidential information, the Court's role is limited to determining whether the proposed intervenor has raised a colorable claim of privilege. "Colorable claims of attorney-client and work product privilege [are] . . . a textbook example of an entitlement to intervention as of right." *El-Ad Residences*, 716 F. Supp. 2d at 1262, *quoting In re Grand Jury Subpoena (Newparent Inc.)*, 274 F.3d 563, 570 (1st Cir. 2001). Determination of the merits of the claim, including the extent of the privilege and its

applicability in the underlying action, are not appropriately addressed until after intervention. *Id.* at 1262.

Additionally, no determination has been made by any court concerning the inadmissibility of plea negotiations against Mr. Epstein under Rule 410, and the plaintiffs do not address this at all in their papers. The only comment they make is that the correspondence is relevant under Rule 402 and thus “obviously admissible in this CVRA action, since it goes to the very heart of the victims’ claim.” [DE 96 at 19].

This argument misses the mark entirely, and the plaintiffs’ attorneys well know it. Plaintiff’s counsel Paul Cassell was a United States District Court Judge in the District of Utah. He issued a ruling in *Goodwin v. Hole No. 4 LLC*, excluding and striking from evidence under Rule 408 *settlement letters* and also *statements made during mediation*. 2007 WL 2221066 at *4 (D. Utah July 31, 2007). Then-Judge Cassell held as follows:

1. “Hole No. 4 also challenges the admissibility of Geoffrey Munroe’s affidavit. Hole No. 4 contends the affidavit includes letters between counsel that are protected by Rule 408.” *Id.*
2. “Rule 408 provides that statements made in compromise negotiation are inadmissible to prove ‘liability for, invalidity of, or amount of claim.’” *Id.*
3. “This rule is meant to encourage and protect settlement discussions.” *Id.*
4. “The mediation statement and the letters attached to Mr. Munroe’s affidavit fall within the purview of Rule 408 because they were made in settlement negotiations – one even outlines the parties’ settlement history. Paragraphs 2 and 3 of the affidavit are similarly sensitive.” *Id.*
5. “The Goodwins argue that the letters and paragraphs are not offered to prove liability of Hole No. 4, but are simply offered in support of specific facts.” *Id.*

6. “This argument holds no weight – the facts are what make the case and, in their case, the Goodwins claim that Hole No. 4 is liable.” *Id.*

7. “The court, therefore, finds it necessary to strike paragraphs 2 and 3 of Mr. Munroe’s affidavit, as well as the accompanying letters.” *Id.*

Mr. Epstein’s settlement negotiation letters and emails are inadmissible under Rule 410, just as settlement letters and mediation statements were inadmissible under Rule 408 in *Goodwin v. Hole No. 4, LLC*. That the documents reflecting plea negotiations may contain arguably relevant information is besides the point, for all principled assertions of privilege or other evidentiary exclusions have the potential to remove arguably relevant information from consideration in litigation.

V.

MAGISTRATE JUDGE JOHNSON’S ORDER CAN HAVE NO PRECLUSIVE EFFECT BECAUSE THE PLAINTIFFS OBTAINED THAT ORDER BY SUBTERFUGE

Plaintiffs’ counsel misrepresented their true intentions to Magistrate Judge Johnson when they sought discovery of the government plea negotiation letters. They filed a motion in the consolidated damages case, *Case No. 08-CIV- 80119-Marra/Johnson*, to compel Mr. Epstein’s production of documents. [DE 210]. Part of the discovery requested by these attorneys was for the correspondence from the U.S. Attorney’s Office to the defense during plea negotiations. At pages 10 through 12 of the motion to compel, at footnotes 1, 2, and 3, the plaintiffs represent that these letters are relevant and sought for the purpose of leading to discovery of other admissible evidence in that lawsuit. [DE 210 at 10-12, n. 1-3]. Their reply of October 16, 2009, at DE 354, pages 9-10, makes the same representation, specifically claiming that they seek the government letters because “correspondence with the government agencies may well point Jane Doe in the direction of

admissible evidence, and therefore Epstein should be compelled to provide the correspondence sought” [DE 354 at 10]. The Magistrate Judge ordered production of the letters from the government to the defense based on the representations by these attorneys that the letters would lead to other discoverable evidence in that case. [DE 462, 513].⁴

We now know that these representations by the plaintiffs were not true, as they have admitted that they sought the plea negotiation letters in the damages case so that they could use them in this CVRA case. [DE 96 at 2]. They claim that they “*ran into roadblocks in obtaining information about how their CVRA rights came to be violated – roadblocks erected by both the Government and Epstein. Accordingly, Jane Doe 1 and Jane Doe 2 sought disclosure of relevant information in the sexual abuse civil litigation from Epstein.*” [DE 96 at 2] (emphasis added).

The court should not tolerate litigants abusing the discovery process and making misrepresentations to the Court in order to get discovery. The Federal Rules of Civil Procedure were never intended to provide discovery on other unrelated matters without first using the procedures available in those proceedings. *See Foltz v. State Farm*, 331 F.3d 1122 (9th Cir. 2003); *Cordis Corp. v. O’Shea*, 988 So. 2d 1163 (Fla. 4th DCA 2008).

The plaintiffs’ arguments that Magistrate Judge Johnson’s order in the damages case has a preclusive effect in this case should be dismissed because the Magistrate’s discovery order was obtained by subterfuge and by an abuse of the discovery process. If allowed to intervene, Mr.

⁴ Thus, in the order at DE 462, the Magistrate Judge ruled on the plaintiffs’ “request for documents the federal government gave to Epstein in the course of its plea discussions with him,” and held that those documents were not privileged because “the documents at issue here were given *by the government* to Epstein, and as such are clearly not confidential communications protected by the attorney client privilege.” [DE 462 at 7, 10]; *see also* [Order, DE 513 at 2] (ruling on “documents the government itself gave Epstein”).

Epstein reserves the right to supplement his “*Motion For a Protective Order And Opposition to Motions of Jane Doe 1 And Jane Doe 2 For Production, Use, And Disclosure Of Plea Negotiations*” to include an argument that the plaintiffs have forfeited any right to request disclosure and use of the plea negotiation letters by virtue of their subterfuge during the discovery phase of the damages case.

VI.

LIMITED INTERVENTION IS APPROPRIATE BECAUSE THE EXISTING PARTIES MAY NOT ADEQUATELY REPRESENT MR. EPSTEIN’S INTERESTS

The government urges the Court to find that Mr. Epstein’s plea negotiations are privileged and should not be disclosed. [DE 100]. But the government suggests that Mr. Epstein’s intervention should be denied if “Mr. Epstein’s claims are being protected by the intervention of his counsel.” [DE 98 at 3].

A motion to intervene must show that the applicant’s interests may not be adequately represented by the existing parties. As the Supreme Court has stated, this is a minimal showing: “The requirement of the Rule is satisfied if the applicant shows that representation of his interest ‘may be’ inadequate; and the burden of making that showing should be treated as minimal.” *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972).

During the August 12, 2011 hearing, the first words spoken by plaintiffs’ counsel in opposing the lawyers’ motion to intervene was that the motion should be denied because Jeffrey Epstein, and not the lawyers, has standing to make the privilege arguments. [Tran. at 28-29]. Later during the hearing, while undersigned counsel was arguing issues concerning Rule 410, the court questioned whether “[t]hat’s a Mr. Epstein argument, as opposed to a Roy Black attorney argument?” [Trans. at 37]. Thus, the plaintiffs and the Court both recognize that the lawyers and Mr. Epstein have differing interests. In fact, the plaintiffs admitted as much in their opposition to Mr. Epstein’s

motion to intervene, where they state that even though “the defense attorneys filed a similar pleading” to Mr. Epstein’s, “this does not change the fact that the victims will have different ‘standing’ arguments that they will need to advance against both pleadings – i.e., the defense attorneys’ interests are different than Epstein’s interests.” [DE 96 at 13].

An intervenor “need only show that representation may be inadequate, not that it is inadequate.” *Conservation Law Foundation of New England, Inc. v. Mosbacher*, 966 F.2d 39, 44 (1st Cir. 1992). In determining adequacy of representation, the court considers “whether the interest of a present party is such that it will *undoubtedly* make *all* the intervenor’s arguments . . . The applicant is required only to make a minimal showing that representation of his interests may be inadequate.” *California v. Tahoe Reg’l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986) (emphasis added). “We emphasize that a positive showing that such representation is inadequate is not necessary. The rule requires only that it ‘may be inadequate.’” *Kozak v. Wells*, 278 F.2d 104, 110 (8th Cir. 1960).

While the attorneys who propose to intervene and Mr. Epstein share some of their arguments, they each have a distinct legal basis for making them. The Court’s question to undersigned counsel during the hearing highlights this. The attorneys seek to intervene in their own right as lawyers, to protect as work product the letters they wrote to the government during plea negotiations. During the hearing on August 12, 2011, the Court questioned whether the attorneys had waived their work-product privilege when they sent their letters to the government. Counsel responded that the letters enjoyed a plea negotiations privilege, and that for this reason, sending them to their intended recipient – the government – does not constitute a waiver. The Court requested additional briefing on the issue of privilege, which we have filed.

Mr. Epstein, on the other hand, seeks to intervene to protect his plea negotiations as the party who was under investigation and on whose behalf the negotiations were had, and to ensure that his privileges under Rule 410 are protected. He asserts that his plea negotiations are privileged and also inadmissible under Rule 410, but his assertion of privilege is in addition to the lawyers' claim of work product. Part of the privilege argument made by the lawyers may be viewed by the Court as belonging to Mr. Epstein only, as reflected by the Court's question during the August 12 hearing. Thus, because Mr. Epstein and the lawyers may not adequately protect each others' interests, and because they may not *undoubtedly* make *all* of each others' arguments, they should be allowed to intervene for their respective limited purposes.⁵

VII. CONCLUSION

Rule 24 "implements the basic jurisprudential assumption that the interest of justice is best served when all parties with a real stake in a controversy are afforded an opportunity to be heard." *Hodgson v. United Mine Workers of America*, 473 F.2d 118, 130 (D.C. Cir. 1972). Timeliness is not determined by counting days, and it is not limited "to chronological considerations;" instead, timeliness is to be determined from all the circumstances in the case. *Stallworth*, 558 F.2d at 265. And those circumstances favor Mr. Epstein's intervention for the limited purpose of protecting his privileged plea negotiations.

⁵ Mr. Epstein's interests also are not fully protected by the government, as evidenced by the arguments the government makes in its response to Mr. Epstein's motion to intervene. The government obviously will not "undoubtedly" make "all" of Mr. Epstein's arguments.

We certify that on October 14, 2011, the foregoing document was filed electronically with the Clerk of the Court using the CM/ECF system.

Respectfully submitted,

**BLACK, SREBNICK, KORNSPAN
& STUMPF, P.A.**

201 South Biscayne Boulevard
Suite 1300

Miami, Florida 33131

Office: (305) 371-6421

Fax: (305) 358-2006

By _____/S/

ROY BLACK, ESQ.

Florida Bar No. 126088

JACKIE PERCZEK, ESQ.

Florida Bar No. 0042201

On Behalf of Jeffrey Epstein