

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-80736-CIV-MARRA/JOHNSON

JANE DOE 1 and JANE DOE 2, :
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 Plaintiffs, :
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 v. :
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 UNITED STATES OF AMERICA, :
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 Defendant. :
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**JEFFREY EPSTEIN’S RESPONSE TO THE MEDIA’S
OPPOSITION TO A TEMPORARY SEAL OF PLEA NEGOTIATIONS**

In high profile cases such as this one, there exists an inevitable tension between the media’s presumptive right of access to judicial filings and the parties and intervenor’s rights to the temporary sealing of a filing in order to provide the Court with a short period to determine whether the exhibit in question requires public access or instead whether a sealing of that exhibit, in whole or part, is justified by good cause. *See, e.g., United States v. McVeigh*, 119 F3d 806 (10th Cir. 1997). The media and public are not entitled to access to all exhibits to filings or even all portions of all filings; instead, the court must balance the interests of the media, the public, and the parties/intervenors, *Id.* at 813 (“Neither tradition nor logic supports public access to inadmissible evidence. Access to inadmissible evidence is not necessary to understand the suppression hearing so long as the public is able to understand the circumstances that gave rise to the decision to suppress”). While a sealing order must result only when the district court makes “specific, on the record findings” and while such an order must be “narrowly tailored,” *Id.* at 814 *quoting Press-Enterprise II*, 478 US 1, 13-14 (1978), the Court is entitled to establish a

protocol that allows for it to conduct the appropriate weighing before, not after, a pleading or exhibit are filed.

An order temporarily sealing the plea and settlement negotiation letters is the only way to protect these confidential communications until the Court can determine whether any part of the correspondence should be in the public record. Jeffrey Epstein and his lawyers have no control over which exhibits the plaintiffs chose to file with pleadings in this case. Mr. Epstein is not the filing party and has no ability to file a motion to seal *before* the materials are made part of the court record absent the Court ordering a procedure that temporarily seals any pleading quoting from or appending any portion of the plea negotiation letters pending a motion to seal based on good cause.

A temporary seal gives Mr. Epstein and his lawyers time to be heard before the plaintiffs make all the plea and settlement negotiations public. Mr. Epstein is not seeking to shift the burden of proof as the media claims. We are looking only for an opportunity to meet our burden before it is mooted by an unnecessary partial or wholesale public filing of the settlement communications.

I.
A TEMPORARY SEAL IS APPROPRIATE

A protective order temporarily sealing confidential or sensitive materials is distinct from a closed hearing or the sealing of an entire docket or even a permanent sealing of a judicial document absent good cause. A temporary seal of confidential communications is a completely appropriate procedural mechanism permitting the Court to determine whether good cause exists to seal a document without offending the public's presumptive right to access judicial proceedings or judicial filing. "The court may temporarily seal the documents while the motion

to seal is under consideration so that the issue is not mooted by the immediate availability of the documents.” *In re The Knight Publishing Co.*, 743 F.2d 231, 235 n.1 (4th Cir. 1984). The rationale for this seems obvious. For example, in considering whether a pleading disclosed 6(e) grand jury materials, the Third Circuit held that the district court “did not err in initially sealing the motions and proceedings,” because when a Court is “faced with a bona fide claim that 6(e) material was disclosed” in a public filing, the Court properly “prevent[s] further disclosure” by temporarily sealing the materials and “preserving the *status quo* while the parties briefed the question and the Court brought them in for a hearing.” *In re Newark Morning Ledger Co.*, 260 F.3d 217, 223 (3d Cir. 2001).

Similarly in *Reyes v. Freebery*, 192 Fed. Appx. 120(3d Cir. 2006), the Third Circuit ruled that temporarily “restricting disclosure of sensitive information until a district judge determines its confidential status can constitute an important overriding interest sufficient to outweigh the presumption in favor of access” to documents in the court file. *Id.* at 124-25. Because “there are circumstances where disclosure would effectively nullify” a claim of privilege or confidentiality before a hearing on the merits can be held, a court can temporarily seal materials to give the parties “the opportunity to resolve their disputes in court without automatically destroying the confidentiality of certain information.” *Id.* The *Reyes* Court emphasized that “[h]ere, the explicit purpose of the sealing order was to allow the District Judge time to make reasoned judgments regarding the material’s confidential nature and the privacy concerns of third parties.” *Id.* at 125. This purpose was “an important countervailing interest” that was “sufficient to outweigh the presumption in favor of access and to justify a temporary sealing order.” *Id.* The Court concluded: “Accordingly, we believe the temporary sealing order was justified at the time

it was issued.” *Id.*

The media’s objection to a temporary seal order is not well founded. Because we have no control over what the plaintiffs are filing, the only way to give Mr. Epstein a meaningful opportunity to be heard is to require that these materials be filed under temporary seal to maintain the *status quo*. The other alternative that permits an appropriate judicial consideration of whether there is good cause to seal a document would be a procedure requiring that the plaintiffs provide the Government and Mr. Epstein with copies of letters or emails they intend to file, along with any supporting pleading, at least 72 hours in advance of filing to give Mr. Epstein an opportunity to file a motion to seal first. Presumably this filing by Mr. Epstein would satisfy the media’s claim that Mr. Epstein should be the moving party bearing the initial burden on a motion to seal, but this procedure would still require that the plaintiffs make their filing temporarily under seal until the Court rules on Mr. Epstein’s motion.

A protective order temporarily sealing the plea and settlement negotiations does not violate the media’s right of access to court files. Such an order properly maintains the *status quo* and ensures that Mr. Epstein’s rights are not mooted pending an opportunity to be heard on the merits. Mr. Epstein has no other remedy to protect against the wrongful filing and disclosure of his confidential settlement negotiations.

II.

THERE IS NO OTHER REMEDY

Citing *Federal Trade Comm’n v. Abbvie*, 713 F.3d 54 (11th Cir. 2013), the media contends that Mr. Epstein’s concerns about abusive filings by the plaintiffs’ lawyers are not a basis to issue the temporary protective order. According to the media, “the Eleventh Circuit has previously rejected the argument that concerns about future abusive filings” can support a

temporary seal. [DE 305 at 8]. This is not a fair statement of the Court's decision.

What the Eleventh Circuit actually held was that *in that case*, the concerns about abusive filings were "purely speculative and not at all present in the circumstances of this case." *Id.* at 64. The Court found that there was only a "sole exhibit" that was publicly filed and that the exhibit "had a direct bearing" on the issues in the case. *Id.* The Court also found that "[t]here is not the slightest indication in this record that the document's inclusion [as an exhibit] was a tactic by the FTC, or that the document was included solely" for tactical purposes. *Id.* The Court held that Rule 11 sanctions and other professional sanctions could be an appropriate response to potential future abusive filings and emphasized that "Solvay does not explain why these protections would be insufficient in an appropriate case." *Id.*

These statements stand in stark contrast to the facts of this case. As we explained in our initial response to the Court's order seeking justification for the temporary seal, there is nothing speculative about Mr. Epstein's concerns that the plaintiffs will publicly file irrelevant confidential plea negotiation letters.

The most recent example is the plaintiffs' attempt to publicly file as an exhibit a 23-page single-spaced defense negotiation letter after quoting only five or six words from that letter in a pleading. According to the plaintiffs, they needed to file this entire letter in the public record to show that Mr. Epstein's lawyers "pushed prosecutors to agree to a confidentiality provision that illegally kept the non-prosecution agreement secret from the victims." [DE 298 at 6]. But the 23-page defense letter makes *no mention* of a confidentiality agreement or any agreement to keep the Non-Prosecution Agreement secret. Indeed, the letter was authored 2 ½ months before there was a Non-Prosecution Agreement and months before the Government decided to forego federal

prosecution of Mr. Epstein.

In response to Mr. Epstein's objections to this proposed public filing, the plaintiffs have admitted that they do not oppose filing a redacted copy of this defense letter in the public record: "The victims would have no objection to only a few pages of the letter being entered into the public court file if the court believes that other surrounding pages are not required for context." [DE 298 at p.6 n.5]. But this admission did not come until after Mr. Epstein filed his objection and showed the unnecessary nature of the plaintiffs' proposed filing. Without a temporary seal in place, a redacted filing of this letter never would have been an option. The plaintiffs' lawyers would have filed the entire letter in the public record, as they initially proposed to do and as they have done in the past with the government side of the correspondence.

As Mr. Epstein described previously and in contrast to the single exhibit at issue in *Federal Trade Comm'n v. Abbvie*, plaintiffs' counsel Mr. Edwards used state court civil litigation with Mr. Epstein to make a wholesale dump into the public record of *all* of the settlement communications sent by the government to Epstein's counsel during the federal investigation. The communications were filed as an exhibit to an exhibit to a motion for summary judgment, without regard for the relevance of the many government written communications to the issues raised in the motion.

Mr. Epstein has a principled basis to distrust the decision-making as to what documents the plaintiffs will append to pleadings in this case. The concern is not speculative and it is not limited to one document or a single exhibit. Good cause exists to issue the additional Protective Confidentiality Order proposed by Mr. Epstein.

III.
THE CVRA PROVIDES NO RIGHT OF
ACCESS TO ALL THE DEFENSE NEGOTIATIONS

The media contends that it would have the right to access all of Mr. Epstein's plea and settlement negotiations in this CVRA case because "the public is understandably interested in" three things:

(1) "the evidence that the government claimed to have in connection with its investigation of Epstein,"

(2) "how the government chose to negotiate a just resolution based on that evidence," and

(3) "what the government chose to communicate to the alleged victims."

[DE 305 at 8]. The media contends that these are "issues that go to the core of the fairness of our justice system" and that "they are matters of legitimate public concern." *Id.*

The CVRA claims raised by the plaintiffs provide no right of public access to all the confidential plea negotiations so that the public can question "the evidence that the government claimed to have in connection with its investigation of Epstein" or "how the government chose to negotiate a just resolution based on that evidence." The "Attorney General and United States Attorneys retain broad discretion to enforce the Nation's criminal laws," *United States v. Armstrong*, 517 U.S. 456, 464 (1996), and whether to negotiate a plea or dismiss charges are exclusively the prosecutor's executive function. *United States v. Smith*, 231 F.3d 800, 807 (11th Cir. 2000). The CVRA expressly provides that "*Nothing* in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction." 18 U.S.C. § 3771(d)(6) (emphasis added). Thus, what evidence the government may have had and how the government chose to negotiate a resolution based on that evidence do not overcome the

confidentiality historically conferred to plea negotiations such that all the settlement letters in this case should be made public in wholesale fashion. Indeed, the media recognizes that “of course . . . communications between defense attorneys and prosecutors are not routinely disclosed to the public in a typical criminal case,” but argues that such communication should be publicly disclosed when they “become relevant” to “the fairness of our justice system’s treatment of alleged sexual assault victims.” [DE 305 at 9]. Without a protocol authorizing the temporary sealing of a document containing such communications, the weighing that even the media implicitly concedes is appropriate cannot occur.

The media’s third stated interest – “what the government chose to communicate to the alleged victims” – also does not justify a wholesale public release of all the plea and settlement negotiations. As stated above, a good example of this is the 23-page defense letter that the plaintiffs propose to file in opposition to Professor Dershowitz’s intervention. This letter is completely irrelevant to “what the government chose to communicate to the alleged victims” under their CVRA claim that they were not consulted before the investigation was resolved.

To be sure, the Non-Prosecution Agreement is a public record. The media and the public have access to it and to the terms under which the government agreed to resolve this investigation. The confidential negotiations leading up to it, however, should not become a public record simply because the plaintiffs chose to attach them as an exhibit to a pleading filed in this case. The Court should issue the supplemental proposed protective order and temporarily seal the settlement negotiations for a short but fixed period to enable the parties and Mr. Epstein to file a particularized motion to seal and to enable the Court to then rule on whether any portion of the correspondence should be public.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was filed by my office via
CM/ECF on February 5, 2015.

By: s/Roy Black
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