

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

Case No. 9:08-cv-80736-KAM

JANE DOE 1 AND JANE DOE 2,

Petitioners,

v.

UNITED STATES,

Respondent.

**JANE DOE 1 AND JANE DOE 2'S MOTION FOR FINDING OF WAIVER OF WORK
PRODUCT AND SIMILAR PROTECTIONS BY GOVERNMENT AND FOR
PRODUCTION OF DOCUMENTS**

Jane Doe 1 and Jane Doe 2 (also referred to as “the victims”), by and through undersigned counsel, file this motion for a finding that the Government has waived work production protections, as well as attorney-client and similar privileges, regarding documents that the Government has previously withheld based on these protections, and an order directing the Government to produce all such documents.

As the Court will recall, it previously reviewed emails and other internal materials submitted to it in camera by the Government about its internal deliberations. *See* DE 330 at 12. The Court ultimately concluded that many of these documents were protected by work-product protection. DE 330 at 12-17. And yet, in recently-filed pleadings, the Government has now made many representations about these same internal deliberations – representations that it now argues should lead the Court to grant summary judgment in this case. *See, e.g.*, DE 403-19 (Villafaña affidavit – filed June 2, 2017). The Government cannot simultaneously assert work product protection over relevant documents concerning its internal deliberations while making representations regarding those deliberations to obtain summary judgment. Because the

Government has now waived any work product protection (and attorney client and similar privileges) concerning its deliberations in this case, the Court should direct the Government to produce to the victims all documents that it previously withheld based on work-product and similar protections.

I. Work-Product Protection, as Well as Attorney-Client Privilege, Can Be Explicitly or Impliedly Waived.

Case law from this Court, the Eleventh Circuit, and the Supreme Court all make clear that work product protection can be waived – indeed, such protection can be waived “impliedly.” A very thorough review of the relevant caselaw is found in this Court’s decision in *Stern v. O’Quinn*, 253 F.R.D. 663, 676–77 (S.D. Fla. 2008). As this Court explained, under the doctrine of implied waiver of work product protection, “a party waives work-product or privilege protection when (1) assertion of the protection results from some affirmative act by the party invoking the protection; (2) through this affirmative act, the asserting party puts the protected information at issue by making it relevant to the case; and (3) application of the protection would deny the opposing party access to information vital to its defense. *Stern v. O’Quinn*, 253 F.R.D. 663, 676 (S.D. Fla. 2008) (citing *Granite Partners, L.P. v. Bear, Stearns & Co., Inc.*, 184 F.R.D. 49, 55 (S.D.N.Y.1999) (citing *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D.Wash.1975); *U.S. v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.1991); *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 468–69 (S.D.N.Y.1996); *Tribune Co. v. Purcigliotti*, 1997 WL 10924, *6 (S.D.N.Y. Jan. 10, 1997)).

As an illustration of how the doctrine operates, this Court cited *Volpe v. U.S. Airways, Inc.*, 184 F.R.D. 672 (M.D.Fla.1998). As this Court explained, in *Volpe*, the plaintiff sued the defendant, alleging employment discrimination based on sexual harassment. As a defense to the plaintiff’s claims, the defendant asserted an affirmative defense that demonstrated that the

defendant intended to rely upon an internal investigation it had conducted into the plaintiff's complaints, as well as subsequent remedial action, to avoid liability. Although the defendant had produced the final report of its internal investigation to the plaintiff, the court held that by relying upon the investigation as a defense, the defendant had put the investigation at issue and had waived any privilege or protection of the documents comprising the complete investigation file, including the investigator's notes and other materials. 184 F.R.D. at 673. Explaining the reasoning behind this conclusion, the *Volpe* court noted, “[I]f defendant intends to rely on the investigation as a defense, plaintiff is entitled to test the *bona fides* of the investigation.” *Id.* (discussed in *Stern v. O’Quinn*, 253 F.R.D. 663, 676–77 (S.D. Fla. 2008)).

After reviewing these cases, this Court distilled the fundamental principle that “it is simply not fair to allow a party to wield the work-product protection as a sword to cut out the heart of an opposing party’s case while simultaneously brandishing it as a shield from disclosure of any Achilles heels.” *Stern v. O’Quinn*, 253 F.R.D. 663, 677 (S.D. Fla. 2008) (citing *Kallas v. Carnival Corp.*, 2008 WL 2222152, *5 n. 1 (S.D.Fla. May 27, 2008) (citing *Pitney–Bowes, Inc. v. Mestre*, 86 F.R.D. 444 (S.D.Fla.1980); *Hollinger Int’l, Inc. v. Hollinger, Inc.*, 230 F.R.D. 508, 516 (N.D.Ill.2005); *Granite Partners L.P. v. Bear Stearns & Co.*, 184 F.R.D. 49, 55 (S.D.N.Y.1999)). The Eleventh Circuit, citing Supreme Court precedent has likewise concluded that work product protection can be waived by actions during litigation. *See Jones v. GDCP Warden*, 753 F.3d 1171, 1191 (11th Cir. 2014). The Eleventh Circuit relied upon an earlier Supreme Court decision which held that a litigant “can no more advance the work-product doctrine to sustain a unilateral testimonial use of work-product materials than he could elect to testify in his own behalf and thereafter assert his Fifth Amendment privilege to resist cross-

examination on matters reasonably related to those brought out in direct examination.” *United States v. Nobles*, 422 U.S. 225, 239–40 (1975) (footnote omitted).

The same considerations apply when considering any assertion of attorney-client privilege, which can likewise be explicitly or implicitly waived. See *GAB Business Servs., Inc. v. Syndicate* 627, 809 F.2d 755, 762 (11th Cir.1987) (discussing the concept in the context of the attorney-client privilege); *Baratta v. Homeland Housewares, LLC*, 242 F.R.D. 641, 643 (S.D.Fla.2007) (same); *Peterson v. Wallace Computer Servs., Inc.*, 984 F.Supp. 821 (D.Vt.1997) (same). And all other privileges and protections can similarly be waived.

II. The Government’s Recently-Filed Affidavit Both Explicitly and Impliedly Waives Work Product Protections (and Attorney Client Privilege) Over Its Internal Deliberations in this Case.

Recent filings by the Government in this case waive work-product protections, as well as other privileges and protections, over its internal deliberations in connection with the non-prosecution agreement it reached with Epstein and related discussions about victim notifications. As the Court is aware, the victims have previously-filed a substantial motion for summary judgment in this case, relying on emails and other evidence supporting their position that through (at least) June and July 2008 the Government deliberately and improperly concealed from the victims the existence of the non-prosecution agreement it had previously reached with Epstein. DE 361. The Government recently responded to this motion for summary judgment, simultaneously contesting the victims’ motion while raising its own motion for summary judgment. DE 401-2. This pleading made numerous representations about the internal deliberations of the Government during the critical time frame. See, e.g., DE 401-2 at 10-3; DE 403-19 at 2-23. For example, consider the following arguments made in the Government’s memorandum in support of its cross-motion for summary judgment:

- The January 2008 letters from the FBI regarding the continuing investigation of Epstein were not deceptions, as suggested by petitioners. They reflected the investigative team's view that there might well be a federal prosecution and that at least some of the victims would become prosecution witnesses at trial. Ex. S, ¶¶ 35-36; see also Ex. R, ¶ 10.
- Given the extraordinary efforts that Epstein's attorneys expended to obtain higher-level review of the criminal prosecution, and the possibility that DOJ officials might relieve Epstein of his obligations under the NPA, it was only reasonable and prudent for the U.S. Attorney's Office to assume that a federal criminal prosecution of Epstein might still proceed.
- The Government cannot be faulted for properly recognizing that the NPA might be set aside by the efforts of Epstein's attorneys at the DOJ, or that Epstein would fail to satisfy the terms of the NPA. The Government had continued its investigation because prudence dictated that the Government continue its investigation and preparations to be ready to move forward with a criminal prosecution of Epstein. See Section IV, *supra*, at 9-12; Ex. R, ¶ 10; Ex. S, ¶¶ 34-36.
- When Epstein's attorneys learned of this [victim notification], they complained that the Government was incentivizing the victims to overstate their involvement with Epstein in order to increase their damage claims. *Id.* AUSA Villafaña and the FBI agents concluded that informing additional victims could compromise both the witnesses' credibility and the agents' credibility at a later trial if Epstein reneged on the agreement. *Id.*; Ex. R, ¶ 9; Ex. S, ¶ 34.
- This strategic decision to limit a potential attack on the Government witnesses' credibility was a permissible exercise of prosecutorial discretion, which should not be second-guessed by means of a CVRA lawsuit.
- During the course of its investigation, the Government learned that many of Epstein's victims were troubled by the existence of the Government's criminal investigation and a majority expressed concern that their identities and their involvement with Epstein might be made public. Ex. R, ¶ 12. . . . Informed by these circumstances and the strengths and weaknesses of the case against Epstein, the U.S. Attorney's Office sought to resolve the matter in its prosecutorial discretion in a manner that obtained a guaranteed sentence of incarceration for Epstein, that did not subject victims to the scrutiny and travails associated with a trial, that provided victims with the equivalent of uncontested restitution from Epstein, and that guaranteed the sexual offender registration of Epstein, which would help protect other minors throughout the country in the future. Ex. S, ¶ 18.
- While the U.S. Attorney's Office did not provide victims with advance notice of the negotiated resolution, it did so to ensure that additional impeachment evidence would not be created to which the victims, prosecutor, and agents would be

subjected to the detriment of a future prosecution of Epstein in the event the negotiated resolution of the investigation were not perfected. Ex. R, ¶ 9; Ex. S, ¶ 21. Given these circumstances, even if the resolution of the Epstein investigation under the NPA's terms may not have been optimal and may be subject to criticism, the discretionary actions of the U.S. Attorney's Office in resolving the federal investigation as it did through the NPA simply do not constitute unfair treatment of the victims and did not fail to respect the dignity and privacy of the victims.

- The mere fact that subordinates within the DOJ had questions about the applicability of § 3771(a)(5) to the young women abused by Epstein does not undermine the Government's position that there was no obligation to notify them of the NPA . . . Given the resolution that the U.S. Attorney's Office was seeking to achieve, balancing the competing interests and concerns in this matter in an exercise of prosecutorial discretion . . . and given the fact that the Government was trying to minimize damaging impeachment evidence in the event that the negotiated resolution embodied in the NPA failed . . . it cannot be disputed that the U.S. Attorney's Office used its best efforts [to protect victims' rights] . . .

See DE 408 at 10, 11, 16, 17, 18, 19, 22.

As is apparent from the quotations above from the Government's summary judgment motion, it intends to rely on the internal views and impressions of the prosecution team to cause this Court to grant summary judgment and terminate this lawsuit without a full airing of the facts.

A further illustration of this point comes from Exhibit R in support of the Government's summary judgment motion. This frequently-cited exhibit is an affidavit from AUSA Marie Villafaña, the line prosecutor on the Epstein case. Her affidavit is replete with representations about her mental impressions and motivations for the Government's actions. For example:

- During the course of the suit filed by Jane Doe 1 and Jane Doe 2, the Petitioners have alleged that the case agents, the U.S. Attorney's Office, and I personally committed acts that violated their rights under the CVRA. They have pointed to various pieces of correspondence with counsel for Epstein to suggest that the negotiations were not at arms' length or that certain things were done inappropriately in order to keep the victims from finding out about the NPA. Their interpretations and assertions are incorrect.
- Prior to the Office making its decision to direct me to engage in negotiations with Epstein's counsel, I discussed the strengths and weaknesses of the case with members of

the Office's management and informed them that most of the victims had expressed significant concerns about having their identities disclosed. While I was not part of the final decision-making at the Office that arrived at the two-year sentence requirement, I was part of the discussions regarding sex offender registration and the restitution provision. It is my understanding from these and other discussions that these factors, that is, the various strengths and weaknesses of the case and the various competing interests of the many different victims (including the privacy concerns expressed by many), together with the Office's desire to obtain a guaranteed sentence of incarceration for Epstein, the equivalent of uncontested restitution for the victims, and guaranteed sexual offender registration by Epstein to help protect other minors throughout the country in the future, were among the factors that informed the Office's discretionary decision to negotiate a resolution of the matter and to ultimately enter into the NPA.

- Regardless of the perceived strength of the corroborating evidence, it was and remains my professional opinion as an experienced prosecutor that a successful prosecution would have required convincing all of the identified victims to come forward and speak publicly at a trial, knowing that they would face public scrutiny and withering cross-examination. Using my best efforts to accord all of the victims their right to be treated with fairness and with respect for the exercise of my prosecutorial discretion, I believed and still believe that a negotiated resolution of the matter was in the best interests of the Office and the victims as a whole. The Office had also reached that same conclusion.
- The investigative team and I worked tirelessly to put together the evidence necessary to prove beyond a reasonable doubt that Epstein committed federal offenses. We recognized how difficult a trial would be and that a successful case could be made only if a jury heard from a long series of credible victims, who did not know each other (to avoid an allegation of collusion) and who had all been subjected to the same treatment at Epstein's hands. A case involving just two victims who knew each other, including one who had previously stated - on videotape - that she never engaged in sexual contact with Epstein, would never have been charged as a federal case, must less resulted in a conviction.
- If Epstein did not enter an agreement with the Office, then the Office needed to be in the best position it could be to charge and convict him. Accordingly, I did not want to share with victims that the Office was attempting to secure for them the ability to obtain monetary compensation for the harm they had suffered. I was aware that, if I disclosed that and the negotiations fell through, Epstein's counsel would impeach the victims and my credibility by asserting that I had told victims they could receive money for implicating Epstein.
- The Office and I concluded that opening up the possibility for such impeachment would be detrimental to the prosecution of Epstein if a negotiated resolution failed and Epstein were thereafter to be criminally charged
- I was instructed to construct a plea to federal or state offenses that resulted in a sentence of two years (later reduced to 18 months). This required me to find a relevant charge with the agreed-upon statutory maximum and then determine whether the facts developed in the investigation fit that charge. I was unable to find a relevant federal charge that had

a statutory maximum of two years, and that required me to research the possibility of stacking two federal misdemeanor charges.

- My reason for recommending filing charges in Miami was to protect the privacy interests of the victims in the case by allowing them the opportunity to attend court proceedings - by definition, proceedings open to the public - with a reduced chance that their identities would be compromised.
- The investigative team, the FBI's victim-witness coordinator, and I all proceeded with a "victims first" approach, and we all used our best efforts to protect the victims and accord them their rights.
- Once the NPA was signed on September 24, 2007, I asked the agents to meet with the victims to provide them with information regarding the terms of the agreement and the conclusion of the federal investigation. I also anticipated that they would be able to inform the victims of the date of the state court change of plea, but that date had not yet been set by state authorities at the time the first victims were notified.
- These and other attacks and efforts to avoid the NPA's terms led the FBI investigative team, the Office, and me to conclude that prosecution and trial remained a possibility and we should prepare as such. This meant that the victim notifications had to cease because: (1) we no longer knew whether Epstein would perform under the NPA and, hence, we did not know whether providing information about the NPA would be accurate; and (2) we believed that Epstein, through his counsel, would attempt to use victim notifications concerning the NPA to suggest that the victims had been encouraged by the FBI or the Office to overstate their victimization for monetary compensation.
- On July 3, 2008, attorney Edwards contacted me to discuss how the Epstein matter had been resolved and to raise concerns regarding that resolution. I shared the concerns that attorney Edwards raised with my superiors at the U.S. Attorney's Office.

DE 403-19 at 7, 8, 9, 10, 10, 10, 11, 13, 14, 17-18, 18, 22.

Here again, this affidavit makes clear that the Government intends to defeat the victims' pending summary judgment motion – as well as prevail on its own summary judgment motion – by relying on representations about the internal motivations of its prosecutors and its good faith motivations in declining to make victim notifications.

Under the legal principles set forth in Part I above, the Government's intentional actions plainly explicitly – and, at the very least, implicitly – waive work-product protection and other similar protections over its emails and other related documents on the same subjects. These filings by the Government are obviously "affirmative acts" by a party seeking to simultaneously

invoke protection from discovery. *Stern v. O'Quinn*, 253 F.R.D. 663, 676 (S.D. Fla. 2008). And through these affirmative acts, the Government has put “protected information at issue by making it relevant to the case.” *Id.* And finally, continued application of work production (and similar) protection would deny the victims “access to information vital to [their case].” *Id.* As in the other cases cited above, the Government is trying to have its cake and eat it too – i.e., the Government is trying to deprive the victims of discovery about the Government’s internal motivations and deliberations, while simultaneously asserting that that its motivations were benign and its deliberations devoted to nothing but justice for the victims. The cases cited above, at all levels of the federal courts, do not permit the Government to have it both ways.

Accordingly, the Court should direct the production to the victims of all documents that the Government has previously withheld based on work-product and similar protections. For example, the Court should order the Government to produce the documents that the Court previously reviewed in camera and concluded were protected by the work-product doctrine. DE 330 at 12-17. Any other result would violate the basic principle that “it is simply not fair to allow a party to wield the work-product protection as a sword to cut out the heart of an opposing party’s case while simultaneously brandishing it as a shield from disclosure of any Achilles heels.” *Stern v. O'Quinn*, 253 F.R.D. 663, 677 (S.D. Fla. 2008).

CONCLUSION

The Court should direct the Government to produce to the victims all documents that it previously withheld based on work-product and similar protections, including all documents concerning its internal deliberations in connection with the non-prosecution agreement it reached with Epstein and related discussions about victim notifications.

DATED: August 11, 2017

Respectfully Submitted,

/s/ Bradley J. Edwards

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CERTIFICATE OF SERVICE

I certify that the foregoing document was served on August 11, 2017, on the following
using the Court's CM/ECF system:

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