

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN RE APPLICATION TO QUASH :
SUBPOENAS TO DAILY NEWS, L.P., :
AND GEORGE RUSH :
-----X

No. 10 M8-85 (LLM)

REPLY MEMORANDUM OF LAW OF DAILY NEWS, L.P., AND
DAILY NEWS JOURNALIST GEORGE RUSH IN SUPPORT OF THEIR
MOTION TO QUASH SUBPOENAS SERVED ON THEM IN A FLORIDA
LITIGATION OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER

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Daily News, L.P. (“Daily News”), and Daily News journalist George Rush respectfully submit this reply memorandum of law and accompanying Reply Declaration of Anne B. Carroll and Supplementary Affidavit of George Rush in support of their motion for an order pursuant to Fed. R. Civ. Proc. 45(c)(3)(A)(iii) quashing subpoenas or in the alternative for a Protective Order pursuant to Fed. R. Civ. Proc. 26(c)(1).

PRELIMINARY STATEMENT

Plaintiff Jane Doe has failed to carry her burden of showing that anything on the Epstein interview tape sought through the subpoenas challenged here may be compelled from movants under either the reporter’s privilege recognized in this Circuit or the governing federal rules, F.R.C.P. 26 and 45. Her assertion that, absent the tape, she has no evidence to support her claims collides head-on with her positions, taken in the underlying litigation, that, for example, she has “ample evidence” that “can easily prove her case,” that F.R.E. 415 permits her to introduce evidence of Epstein’s alleged assaults on more than 30 other victims, and that his invocations of the Fifth Amendment entitle her to adverse inferences at trial “on all the factual issues” concerning liability. Her assertion that the recording is “the only direct evidence in existence or available . . . to prove what Epstein thinks about what he did to her” cannot be squared with the fact that she does not even allege to this Court that Epstein said so much as a single word about her or her specific case – nor could she so allege, for he did not. Her argument that statements purportedly made by Epstein on the tape about another plaintiff in another litigation are somehow material to her case affords no support for a subpoena in this case. Yet these are exactly the kinds of claims on which she bases this effort to obtain disclosure of Rush’s journalistic work product.

The Court need not even reach the question of whether the reporter’s privilege has been waived since plaintiff cannot meet the standards under F.R.C.P. 26 and 45: the burden on the non-party journalist to produce his newsgathering materials is not outweighed by Doe’s need for this evidence, evidence which is at best cumulative and tangential. (Point I.) In any event, plaintiff has failed to show that the reporter’s privilege has been waived as to the recording at issue since Doe does not allege – and cannot allege – that any part of the interview was published in the Daily News.

(Point II.) Since there are no material facts in dispute, there is no need for an evidentiary hearing that would only further intrude into Mr. Rush's journalistic endeavors. (Point III.) The subpoenas should therefore be quashed in their entirety or a Protective Order issued to prevent their enforcement.

ARGUMENT

POINT I: WHETHER ANALYZED UNDER THE REPORTER'S PRIVILEGE OR THE FEDERAL RULES, DOE HAS NOT SHOWN THE REQUIRED RELEVANCE, MATERIALITY OR ABSENCE OF ALTERNATIVE SOURCES

Movants have already articulated the stringent standard that Doe must meet in order to obtain the disclosure sought under the most protective level of the qualified reporter's privilege accorded to confidential materials.¹ Main Br. at 8-13. That standard applies whether the source is confidential or, as here, the information was obtained on a confidential basis from an identified

¹ Contrary to Doe's claims, this Circuit has not repudiated the 1st Amendment roots of the privilege. See, e.g., Gonzales v. National Broad. Co., 194 F.3d 29, 36 n.6 (2d Cir. 1999) (does not decide if privilege is "constitutionally required, or rooted in federal common law"); Persky v. Yeshiva Univ., No. 01 Civ. 4278 (LMM), 2002 WL 31769704, at *2 (S.D.N.Y. Dec. 10, 2002) (McKenna, J.) ("This circuit has long recognized the existence of a qualified privilege for journalistic information. This privilege is based, at least in part, on the importance of the First Amendment protections of freedom of speech and the press.") (internal quotation marks and citation omitted); Schiller v. City of New York, 245 F.R.D. 112, 118 (S.D.N.Y. 2007) ("There is some dispute whether [the reporter's] privilege is a creature of federal common law or is required by the First Amendment. . . . In either event, it arises from a concern for the potential harm to the paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.") (internal quotation marks and citation omitted). In any event, New York Times v. Gonzales, 459 F.3d 160, 173-74 (2d Cir. 2006), and other grand jury subpoena cases on which Doe relies (Opp. Br. at 14-15) are not controlling with respect to non-party subpoenas in private civil disputes. Lee v. Department of Justice, 413 F.3d 53, 58 (D.C. Cir. 2005) (limiting "the applicability of the *Branzburg* precedent to the circumstances considered by the court in *Branzburg*-that is, the context of a criminal proceeding, or even more specifically, a grand jury subpoena").

Also contrary to plaintiff's contention, Opp. Br. at 15-16, courts in this Circuit continue to apply the highest level of the qualified privilege's protection to confidential newsgathering materials, like the recording here, as well as to the identity of confidential sources. See, e.g., In re Natural Gas Commodities Litigation, 235 F.R.D. 241, 242, 246 (S.D.N.Y. 2006) (applying Petroleum Products standard to confidential materials); E & J Gallo Winery v. Encana Energy Servs., Inc., 33 Media L. Rep. 1413, 1414 (S.D.N.Y. 2005) (Preska, J.) (applying Petroleum Products standard to both confidential sources and confidential materials) (copy annexed as Ex. A to Carroll Reply Decl.); see Gonzales v. National Broad. Co., 194 F.3d at 32, 33 (reaffirming that "*Baker* and *Petroleum Products* established the existence of a journalists' privilege for confidential materials").

source.² Rush's sworn statement that the interview was off the record stands uncontradicted.³

Even if the Court were to find that confidentiality may have been waived as to certain portions of the interview – which we believe it was not, see Point II, infra, and Main Br. at 13-15 – the lower level of showing required to defeat the protection for non-confidential material articulated in Gonzales v. NBC has also not been made.

In fact, if defendant prevails on his pending motion for summary judgment on the federal claims, the state law claims would be the only claims remaining and the New York Shield Law would then apply. See In re Application to Quash Subpoena to National Broadcasting Co., 79 F.3d 346, 351, 352 (2d Cir. 1996) (“Graco”) (applying New York Shield Law to state claims pending in Massachusetts federal court, noting the relevant standards of that law and the federal privilege were “identical,” and freely cited both state and federal authorities throughout its opinion). See Main Br. at 10. The New York Shield Law provides absolute protection of confidential sources and newsgathering materials and qualified protection for non-confidential newsgathering, requiring a showing that the information is “highly material and relevant,” “critical or necessary to the maintenance of a party’s claim” and “not obtainable from any alternative source.” N.Y. Civil Rights Law § 79-h(b), (c).⁴

But the Court need not even consider the scope of the reporter’s privilege or if it has been waived. Without relying on an explicit First Amendment, common law or statutory privilege, under Rules 26 and 45, federal courts have nonetheless factored in the burden on First Amendment rights when analyzing private litigants’ attempts to unearth the unpublished confidential and

² If the Court should entertain any doubt about whether the conversation was indeed, by mutual agreement, off the record, the matter can be easily resolved by an *in camera* review of the recording.

³ Under Gonzales v. NBC, “Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists’ privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.” 194 F. 3d at 36 (requiring production of outtakes of highway stops in case alleging racial profiling).

⁴ While plaintiff is correct that it is the burden of the party asserting the privilege to show it applies, it is the burden of the party seeking the information to show she has overcome the privilege. United States v. Burke, 700 F.2d 70, 77 (2d Cir. 1983).

nonconfidential work product and sources of non-party journalists and publishers. In Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 596-98 (1st Cir. 1980), for example, a libel plaintiff sought the identities of confidential sources from the defendant newspaper. After reviewing Supreme Court precedents, the court concluded that “[t]he important point for purposes of the present appeal is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights. In determining what, if any, limits should accordingly be placed upon the granting of such requests, courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information.” Id. at 595-96 (footnotes omitted). The court remanded with instructions to examine the provisions of Rule 26, including the factors set out in subsection (c), with “a heightened sensitivity to any First Amendment implication that might result from the compelled disclosure of sources,” and to “assess[] . . . the importance to the defendant’s continued newsgathering effectiveness of preserving the source’s confidentiality.” Id. at 596-98.⁵

Even in Circuits that, unlike the Second Circuit, have not recognized a federal reporter’s privilege, the standards applicable under Rules 26 and 45 have resulted in rejection of private litigants’ efforts to obtain reporters’ non-confidential newsgathering materials. For example, in Patterson v. Burge, No. 03 C 4433, 2005 WL 43240 (N.D. Ill. Jan. 6, 2005), the court analyzed under Rule 45(c) subpoenas issued by defendants in a civil rights suit for media outlets’ nonconfidential outtakes and audiotapes of interviews with plaintiff. Finding that the materials were relevant to the underlying litigation in the “broadest and weakest sense,” the court nonetheless

⁵ See, e.g., Apicella v. McNeil Labs., Inc., 66 F.R.D. 78, 82, 85 (E.D.N.Y. 1975) (Weinstein, J.) (“In exercising this authority,” under Federal Rules 26 and 37, “the court must consider the possible necessity for the information and the costs of providing it”; after weighing the interests of the plaintiff against the adverse effects on the publisher’s First Amendment rights if the information were revealed – and observing that the parties had not shown that they were unable to obtain the information from another source – the court struck the balance under Rule 26 in favor of quashing the subpoena); Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163, 175, 179 (E.D.N.Y. 1988) (Rule 26 balancing of interests in view of defendant’s attenuated showing of relevance and need and the publication’s First Amendment interest in preventing intrusion into its editorial and news gathering activities, as well as its status as a non-party, weighed in favor of quashing subpoena), aff’d, 870 F.2d 642 (Fed. Cir. 1989).

held that plaintiffs had not established that the information sought was not already in their possession or unavailable from other sources. *Id.* at *2. The court said, the subpoena posed a significant burden on the third parties: “[I]f there is no standard higher than mere relevance which civil lawyers must satisfy to help themselves to reporters’ records, news organizations will be very busy responding to civil subpoenas. Similarly, the news organizations’ efforts to maintain their independence and gain the trust of sources is an interest that will be severely impaired if mere relevance, meaning as it does here a mere relationship to the subject matter of a civil suit, makes their non-public records available on request.” *Id.* at *3. In view of the weakness of defendants’ “showing of materiality” and the absence of a compelling public interest in the disclosure, as well as the “important private and public interests compelled production in this case would involve,” the balancing of interests required by Rule 45(c) weighed in favor of quashing the subpoenas. *Id.* at *5.⁶

These cases make plain that considerations such as materiality, need, and the availability of alternative sources, on the one hand, and non-party status, very real burdens,⁷ and harm to important public (as well as private) interests, involving the ability of the press to do its job of informing the public – whether or not that is labeled a “First Amendment” value – on the other hand, can be sifted and weighed within the broad discretion of the Court in ways independent of, or in addition to, the currently shifting and sometimes uncertain parameters of privilege law in this area.

⁶ See, e.g., *L.W. ex rel. Whitson v. Knox County Bd. of Educ.*, 36 Media L. Rep. 1721, 1723 (E.D. Tenn. 2008) (copy annexed as Ex. B to Carroll Reply Decl.) (granting non-party reporter’s motion to quash even though reporter’s privilege was not recognized by the 6th Circuit, reasoning that, under Fed. R. Civ. P. 26(b)(2)(C), the discovery sought was unreasonably cumulative or duplicative, and obtainable from other sources more convenient, less burdensome, or less expensive; plaintiffs failed to show that reporter possessed any unique evidence that could not be obtained elsewhere, and burden and expense of proposed discovery outweighed its likely benefit); *Apel v. Murphy*, 70 F.R.D. 651, 653 (D.R.I. 1976) (avoiding the constitutional question of whether a reporter’s privilege exists under federal law and applying Rules 45(c) and Rule 26(b); finding that party’s weak claim of relevance did not outweigh burdensomeness and oppression that would be imposed on journalists if they were compelled to disclose nonconfidential work product; subpoenas quashed).

⁷ See, e.g., Supplementary Affidavit of George Rush (“Supp. Rush Aff’t”), annexed as Ex. C to Carroll Reply Decl., ¶ 5.

A. The Testimony and Tape Recording Would Be, At Best, Cumulative

Doe sets the table for her case against movants by asserting that her counsel have diligently tried – and failed – to find any evidence or means to support her claims. Opp. Br. at 4-5. The claim is disingenuous at best. At the outset, in the response to Epstein’s motion for summary judgment dismissing Doe’s federal sex abuse claims which she filed on April 13, 2010 (“SJ Opp.”),⁸ she repeatedly argues that in fact she has more than enough evidence against him to survive the motion. See, e.g., SJ Opp. at 12 (“far from supporting summary judgment for the defendant, the evidence overwhelmingly inclines in Jane Doe’s favor”) (see other examples Carroll Reply Decl. ¶ 6).

Further bolstering Doe’s claims in the underlying case is the fact that evidence of sexual abuse of the 30 other underage Jane Does whom plaintiff says investigators identified as having been Epstein’s victims, Opp. Br. at 3, would be admissible against him pursuant to F.R.E. 415; see Medina v. United Christian Evangelistic Ass’n, No. 08-22111-CIV, 2009 WL 5066675, at *1-2 (S.D. Fla. Dec. 15, 2009) (Rule 415 “supercedes the general rule . . . which excludes evidence of prior bad acts when admitted to prove that a party acts in conformity on a particular occasion”; admitting testimony of a witness who had filed a verified complaint alleging sexual abuse against the same defendant, then settled his case; finding that “the probative value of this testimony is extremely high because of its similarity with the allegations in this case”); SJ Opp. at 10-11 (Doe’s Statement of Material Fact (“SOMF”) ¶ 19), citing F.R.E. 415 and passages of Epstein’s and her own depositions in support of statement that from 2001 to 2006, Epstein “had sexual contact with over 30 girls under the age of 18.”

Moreover, Doe’s response to the summary judgment motion declares that she has a great deal of evidence to show that Epstein’s sexual abuse was part of “a common scheme or plan whereby he sexually abused many other underage young girls.” See, e.g., SJ Opp. at 10 (SOMF ¶ 18), citing “FRE 404(b) (evidence of a common scheme or plan admissible),” F.R.E. 415, and passages from the depositions of Epstein, Jane Doe No. 2, Jane Doe No. 4, Jane Doe No. 5 and

⁸ This brief may be found on PACER, S.D. Fla. Civil Docket for Jane Doe v. Jeffrey Epstein, Case # 9:08-cv-80893-KAM (“Docket”), DE 140.

herself; at 35-36 (Epstein's extensive travel for the purpose of trafficking minors across borders for purposes of sex or prostitution coincided with sexual abuse of Doe and was part of a common scheme or plan).

Still, Doe tries to further her contention in this proceeding that she is bereft of evidence by reference to Epstein's invocations of the Fifth Amendment during discovery and a "promise" that he will do so at trial, giving rise to her claim that "the tape recording is Jane Doe's *only* opportunity to place Epstein's own words before the jury." Opp. Br. at 2-3; *id.* at 20 (through assertion of his Fifth Amendment privilege, "Epstein has denied Jane Doe's allegation [of sexual molestation], by operation of law . . . as to all claims against him"). But as her counsel avers repeatedly in Doe's opposition to Epstein's summary judgment motion, *see, e.g.*, SJ Opp. at 4 n.5, 10 n.6, 38, it is virtually certain that she will be entitled to adverse inferences against Epstein as to the factual issues in her case based on his silence. *See Baxter v. Palmigiano*, 425 U.S. 308, 318, 319 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"; "'(f)ailure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question' ") (citation omitted); *Eagle Hosp. Physicians, LLC v. SRG Consulting, Inc.*, 561 F.3d 1298, 1303-05 (11th Cir. 2009); *Brink's Inc. v. City of New York*, 717 F.2d 700, 709-10 (2d Cir. 1983); *Cablevision Systems Corp. v. DePalma*, No. CV-87-3528 (JLC), 1989 WL 8165, at *4-5 (E.D.N.Y. Jan. 17, 1989); *see also* Carroll Reply Decl. ¶ 7. Doe tries to underscore her lack of evidence by maintaining that "Epstein has refused to provide any substantive discovery to Jane Doe." Opp. Br. at 20. As to that, her remedy plainly lies in motion practice against Epstein in her home court, not in a subpoena to a non-party journalist.

Finally, Doe states that she "of course, has no other witnesses she can call to tell what Epstein did to her behind closed doors in his mansion." *Id.*; *see* Edwards Aff't ¶ 10 ("Epstein's abuse of Jane Doe took place in private, with only Epstein and Jane Doe present during the abuse"). However, an exchange between Doe and Epstein's attorney refers to a prior deposition in which Doe testified that the first time she was at Epstein's house, she was brought there by [REDACTED] and she took off

her clothes “in conjunction . . . with [REDACTED].”⁹ In any event, whether in fact the claim of no eyewitnesses is true, several things are clear: [REDACTED] will be a witness at Jane Doe’s trial, Opp. Br. at 11 n.10, there is likely to be circumstantial evidence such as a web of telephone calls and specially-arranged taxicabs cited in the Florida filings and there is an alleged pattern of behavior of underage sexual contact, as well as a guilty plea and a non-prosecution agreement.

B. The Alleged Statements in the Interview Are Not Even Relevant to a Significant Issue in Doe’s Case, Much Less Critical or Necessary

Despite this embarrassment of evidentiary riches, Doe identifies four statements or groups of statements which she believes are contained on the tape and argues that each is highly material and critical to the maintenance of her cause – indeed, her claim “will likely rise and fall with this Court’s decisions.”¹⁰ Opp. Br. at 19, 23 n.19.

1. A purportedly “damning admission” by Epstein either that “the only thing he might have done wrong was to maybe cross the line a little too closely,” Fisten Aff’t ¶ 7,¹¹ or that “he may have come ‘too close to the line,’” Edwards Aff’t ¶ 13. Either way, according to plaintiff, the gist of the “admission” is that “Epstein may have crossed ‘the line’ between having consensual sexual relations with adult women and having non-consensual sexual relations with minor girls – girls like Jane Doe.” Opp. Br. at 20-21 (emphasis added).

⁹ A copy of the page is annexed as Ex. E to the Carroll Reply Decl. (First page of composite Exhibit A to Doe’s opposition to summary judgment (Docket, DE 140); neither the immediately following pages of this transcript nor pages reflecting the earlier testimony, are included in the exhibit.) [REDACTED] is another anonymous plaintiff who is suing Epstein and is apparently Edwards’ client. Edwards Aff’t ¶¶ 11, 24. She is also a co-defendant with Edwards in Epstein’s racketeering and fraud suit against both Edwards and [REDACTED], as well as Scott Rothstein, Edwards’ former law partner. See *infra*.

¹⁰ Doe incorrectly states that “[m]ore recent cases” in this Circuit and District have demoted the showing required under *Petroleum’s* “critical and necessary” prong to an inquiry into “whether the information was important to the case” – indeed, one of the two cases cited by Doe as authority (Opp. at 23 n.19) states that the relevant part in the test “is satisfied where the party’s claim or defense virtually rises or falls with the admission or exclusion of the proffered evidence.” *In re Natural Gas Commodities Litigation*, 235 F.R.D. 241, 244 (S.D.N.Y. 2006) (internal quotation marks omitted). In applying the reporter’s privilege in a federal question case, this Court cited *Graco* for the proposition that the “necessary and critical” prong of the *Petroleum Products* test requires a showing that the party’s claim “virtually rises or falls with the admission or exclusion of the proffered evidence,” and dropped a footnote to explain that “[a]lthough [*Graco*] was decided based on the New York Shield Law, ‘the contours of the privilege under federal law are “identical” to those under the applicable New York statute.’” See *Persky*, *supra*, 2002 WL 31769704, at *3 (McKenna, J.).

¹¹ Notably, Mr. Fisten claims he “wrote up a report memorializing what Rush had told me” shortly after his conversation with Mr. Rush (Fisten Aff. ¶ 11) but chooses not to attach the memo to his affidavit.

As to the supposed “damning admission,” Rush attests that neither formulation of the “line” phraseology posited by plaintiff’s counsel and investigator was spoken by Epstein. Supp. Rush Aff’t ¶ 4. Of course, Doe simply does not know what Epstein said; an in camera review will establish what was or was not said and whether it was said specifically in reference to Doe. But neither formulation, much less what was in fact said, meets the threshold of relevance, let alone materiality, necessity or criticality. If this is the “damning admission” on which Doe’s case depends, all her claims of “ample evidence” in response to plaintiff’s summary judgment motion – which Doe filed just over two weeks ago – are surely suspect.

2. An alleged statement by Epstein that one of his accusers, known in the litigations as [REDACTED] (see note 9, supra), “came to him as a prostitute and a drug addict,” which Doe characterizes as “a highly useful admission, as it will help to establish that Epstein has a sexual interest in minor girls – minor girls like Jane Doe. Perhaps more important, it is direct proof that Epstein knows LM, a fact that he has denied in the past.” Opp. Br. at 21.

Assuming, for the sake of argument, that Epstein did say what plaintiff asserts, she provides no rational basis for a finding that the statement, which concerns exclusively another individual, is about her or could be relevant, much less critical, to her litigation. The notion that it could pertain to Doe because it contradicts an alleged prior statement by Epstein that he did not know [REDACTED], is patently illogical – and all the more so in light of Epstein’s admission in his lawsuit against [REDACTED] and others that he that he was “one of [REDACTED]’s many ‘Johns.’” See Complaint, Epstein v. Rothstein, Edwards & [REDACTED], No. 50 2009 CAO 40800 (Cir. Ct., 15th Jud. Cir., Palm Beach Co., Dec. 7, 2009) at ¶ 46(a), pertinent pages annexed as Ex. E to the Carroll Reply Decl.¹² As for alleged “derogatory remarks” about [REDACTED], they would surely be cumulative of those Epstein already alleges in his complaint against [REDACTED].¹³

¹² The document is available online at <http://www.scribd.com/doc/23947743/121009-epstein>.

¹³ Complaint, Epstein v. Rothstein et al., ¶¶ 42(h)(i) (“[REDACTED] testified that she . . . worked at various strip clubs; is an admitted prostitute and call girl; has a history of illegal drug use (pot, painkillers, Xanax, Ecstasy); and continually asserted the 5th Amendment during her depositions in order to avoid answering relevant but problem questions for her”); 42(j) (“[REDACTED] claimed in her civil complaint that Epstein “forced [her] into ‘oral sex’” after testifying that “she had never engaged in oral, anal, or vaginal intercourse with Epstein and she had never touched his genitalia”); 46 (has admitted under oath she was a prostitute since the age of 15, making \$1,000 a day on more than 20

To the degree that Doe's counsel is seeking the recording, in whole or in part, for use in other cases – i.e., for purposes other than those set out on the face of the subpoenas and argued in this proceeding – such use for other cases cannot be grounds for enforcing a subpoena in this case.¹⁴ As the Supreme Court held in Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352-53 (1978), “[W]hen the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied.” This principle is enforced in this District. Thus, the court in Night Hawk Ltd. v. Briarpatch Ltd., L.P., No. 03 Civ. 1382 RWS, 2003 WL 23018833 (S.D.N.Y. Dec. 23, 2003) quashed a subpoena served on a third party after it determined that the party-defendant was attempting to use it to not to obtain information in the underlying action, which had been dismissed, but to gather evidence for use in state court proceedings. Id. at *8. The court analyzed the matter under the undue burden standard of Rule 45(c)(3):

Whether a subpoena imposes an “undue burden” “depends upon ‘such factors as relevance, the need of the party for the documents, the breadth of the document, the time period covered by it, the particularity with which the documents are described and the burden imposed.’” The party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings. . . . “Rule 26(b)(1) of the Federal Rules of Civil Procedure restricts discovery to matters relevant to the claims and defenses of the parties. Here, the burden is on [the party . . . who issued the subpoena] to demonstrate relevance.” Additionally, “the status of a witness as a non-party to the underlying litigation ‘entitles [the witness] to consideration regarding expense and inconvenience.’”

occasions from many Johns, of whom Epstein was one); 47(a) (in sworn statement to FBI, ██████. “spoke so highly of Epstein and her interactions with him that the US Attorney’s office informed a federal court in July 2008 that the US Attorney could not consider ██████. a victim” but in the deposition in her civil case testified that Epstein should be in jail and that she has “lived a shitty life because of [him]”); 47(b) (██████. told the FBI under oath that Epstein never kissed, touched or treated her “in a sexual way” but in her second amended complaint alleged that Epstein “coerced [her] . . . to commit various acts of sexual misconduct [including] oral sex”); 47(c)-(e) (alleging other direct contradictions between ██████’s FBI testimony and her deposition testimony).

¹⁴ Edwards Aff’t ¶ 11 (“While the present subpoena before the Court has been filed by Jane Doe, the Court should be aware that attorneys representing ██████. [presumably Edwards himself] may also file a subpoena for the George Rush tape shortly.”); id. ¶ 20 (“The tape is also crucial for ██████. to dismiss the frivolous complaint filed by Jeffrey Epstein against her, as he clearly acknowledges knowing ██████., contrary to claims he makes in his complaint against her and also contradictory to other statements he has made in depositions related to knowing ██████.); id. ¶ 25 (“I explained [to Anne Carroll] that we needed this tape for several reasons, including those cited by her in her pleading. The tape is detrimental to Epstein’s personal complaint against ██████. and me.”).

Id. (citations omitted) (finding that the witness was entitled to attorney's fees under Rule 45(c)(1)). See Salvatorie Studios, Int'l v. Mako's, Inc., No. 01 CIV. 4430BSJDF, 2001 WL 913945, at *1 (S.D.N.Y. Aug. 14, 1991) ("Mako's . . . has failed to establish that the [material] it seeks [from third-party law firm] is in any way relevant to the claims or defenses raised in *this* action.") (emphasis original); Nicholas v. Poughkeepsie Sav. Bank/FSB, No. 90 Civ. 1607 (RWS), 1991 WL 113279, at *2 (S.D.N.Y. June 14, 1991) (subpoena modified where "the reasonable inference is that the purpose of this portion . . . is to obtain facts in order to make a claim against [the subpoenaed non-party]"; "[i]n deciding whether a request comes within the discovery rules, a court is not required to blind itself to the purpose for which a party seeks information").¹⁵

3. Five statements allegedly made by Epstein in the interview that Doe insists are "compelling evidence in her case for punitive damages": that in commenting on his guilty plea and jail sentence, "Epstein states that he did nothing wrong and went to jail for no reason"; that "he further reveals in the recorded interview that his time in jail was too harsh . . . and if the same circumstances would have happened in New York, he would have only received a \$200 fine"; and that "[h]e also stated that 'all the girls suing him' – including, of course, Jane Doe – are only trying to get a meal ticket." (Opp. Br. at 21-22.)

Even if all those statements appear on the recording, which is not the case, they show little more than a defendant, charged in multiple actions with committing heinous sexual abuse on a massive scale, defending himself to a reporter in an off-the-record interview. The comment about New York law, assuming arguendo something like is on the tape, appears to be less an expression of lack of remorse than a statement of law and objective fact. Plaintiff offers no legal support for the proposition that evidence of this kind would be probative of punitive damages. In one of the two punitive damages cases cited by plaintiff, the Supreme Court set out the factors that reviewing courts must use in determining whether a punitive damage award accords with due process. They are: "(1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the

¹⁵ See also 9 James Wm. Moore et al., Moore's Federal Practice ¶ 45-38 (3d ed. 2010) (when a nonparty is subpoenaed in an action, "Rule 45(a)(1) . . . requires that the action be identified to the subpoenaed witness including the title, civil action number and court in which the action is pending"; "[t]he failure to include, or the affirmative misstatement of, any of this identifying information makes the subpoena facially invalid and unenforceable").

difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.” Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 440 (2001). None of these considerations support plaintiff’s theory that a “lack of remorse” or “lack of empathy” can be the basis for punitive damages.

But even if Epstein’s pre-trial state of mind about the women who are suing him were relevant, the claimed statements would be merely cumulative of far more vehement language to be found in his complaint against Rothstein, Edwards and ■■■■■, where he directly attacks the credibility and reputations of three of the women suing him – including Jane Doe.¹⁶ They would also be cumulative of Epstein’s ruthless affirmative defenses in the underlying case. See Main Br. at 3-4, 11.

Plaintiff contends that Epstein’s affirmative defenses cannot be evidence of his lack of remorse because these are only “legal defenses raised by legal counsel,” rather than Epstein’s own views. Opp. Br. at 22. But the affirmative defenses state facts – for example that “Plaintiff consented to and was a willing participant in the acts alleged” and that she “actually consented to and participated in conduct similar and/or identical to the acts alleged with other persons.” The law is well-settled that facts stated in a pleading are judicial admissions that bind a party throughout a litigation. See, e.g., Best Canvas Products & Supplies, Inc. v. Ploof Truck Lines, Inc., 713 F.2d 618, 621 (11th Cir. 1983) (noting “the general rule that a party is bound by the admissions in his pleadings”; “judicial admissions are proof possessing the highest possible probative value. Indeed, facts judicially admitted are facts established not only beyond the need of evidence to prove them, but beyond the power of evidence to controvert them.”) (citation omitted); accord Chick-Fil-A, Inc. v. CFT Development, LLC, 652 F. Supp. 2d 1252, 1260 (M.D. Fla. 2009), aff’d, No. 09-15066, 2010 WL 1006661 (11th Cir. Mar. 19, 2010); Bellefonte Re Ins. Co. v. Argonaut Ins. Co., 757 F.2d 523, 528-29 (2d Cir. 1985).

¹⁶ See Complaint, Epstein v. Rothstein et al. ¶ 42(b) (Jane Doe participated in a media interview “without any legitimate legal purpose other than to ‘pump’ the federal case for potential investors [in the Ponzi scheme] or to prejudice Epstein’s right to a fair trial in Palm Beach County”); ¶ 42(h)(iii) (Jane Doe has admitted to lying in sworn testimony and “worked at two different strip clubs”). See note 13, supra.

4. An assertion that the recording is “clear proof that Epstein committed the crime of perjury” because, when he was asked at deposition “whether he knew George Rush[,] Epstein lied and impressed the point [*sic*] that he did not recognize any reporter from the Daily News.” Opp. Br. at 23.

Doe has not tried to explain how or why it would be important, or even relevant, to her case to obtain the recording as evidence that Epstein “committed the crime of perjury.” As set forth in the Edwards Aff’t at ¶ 19, the recording “is . . . unique and not otherwise obtainable from other witnesses because it can be used to prove perjury (a federal crime) on the part of Epstein.” Edwards then cites a deposition transcript, without providing the relevant pages, “wherein Jeffrey Epstein clearly impresses that he does not recognize George Rush from the New York Daily News.” Offering this as a “criminal event,” Edwards states that, “[i]f we receive the tape, we intend to alert the appropriate law enforcement authorities, both federal and state, so that they can pursue any appropriate criminal investigation perjury [*sic*] charges.”

Given the garbled renditions of the deposition exchange and absence of record support, it is impossible to know what question(s) Epstein was asked and how he answered. And even if instigating a criminal investigation of a litigation opponent were a proper purpose for serving subpoenas on non-party journalists – which it clearly is not¹⁷ – the allegation that Epstein committed a crime is meritless. See, e.g., United States v. Monteleone, 257 F.3d 210, 219 (2d Cir. 2001) (“A witness commits perjury if he gives false testimony concerning a material matter with the willful intent to provide false testimony, as distinguished from incorrect testimony resulting from confusion, mistake, or faulty memory.”) (emphasis added). More to the point, this evidence is at most for impeachment purposes – an insufficient reason for intruding on movants’ journalistic work product. United States v. Burke, 700 F.2d at 78.

Doe’s assertions that there are no alternative sources for the recording she seeks from the Daily News and Rush is principally based on the mistaken premise it is the only known recording of Epstein in connection with the controversy, and therefore represents her “only opportunity to prevent [*sic*] Epstein’s own words to the jury that hears her case.” Opp. Br. at 25. This argument

¹⁷ Indeed, counsel offered to provide an affidavit from Rush confirming that he conducted a phone interview of Epstein, but that offer was flatly rejected. (Carroll Reply Decl. ¶ 9.)

completely misconstrues the third prong of the test. There is nothing relevant, material or necessary to her case in Epstein's voice on a recording as such. The question is not whether it is the only tape, but rather, whether she can show that it contains the kind of evidence that would justify a burdensome incursion on the Daily News' and Rush's newsgathering. See In re Application to Quash Subpoena to Nat'l Broad. Co., 79 F.3d at 353 (rejecting lower court's conclusion that "because the material contained in the out-takes sought by Graco is solely in the hands of NBC, it is 'therefore, unavailable from any other source' "; "it cannot be said that pertinent material is not obtainable elsewhere just because it is included in some out-take.")

Doe asserts that she should be given the tape because she has been unable to adduce substantive evidence supporting her allegations in the case but offers no cogent reason why, if the depositions she has taken in her case to date have been of "co-conspirators" who have taken the Fifth, id. at 5, she will not be able to draw adverse inferences from that testimony or why she has apparently not taken a single deposition of Epstein's friends and acquaintances. See Main Br. at 12-13. Edwards' explanation that "we have no information that any of those people . . . have spoken to Mr. Epstein about Jane Doe or any of the other specific victims," Edwards Aff't ¶ 18, does not suffice as a showing of no alternative sources – especially in light of Doe's inability to demonstrate that the recording is even likely relevant to any significant issue in her case. See Persky, supra at *4 ("Persky cannot think that the Court should be impressed by the fact that a mere three people were deposed and that three other individuals were 'informally questioned'"; noting that the Petroleum Products court "suggested that the taking of 60 or 65 depositions may be a reasonable prerequisite to disclosure").

The Court should, therefore, quash the subpoenas to the Daily News and Rush in their entirety or enter a protective order barring their enforcement.

POINT II: JANE DOE HAS FAILED TO DEMONSTRATE THAT THE QUALIFIED REPORTER'S PRIVILEGE WAS WAIVED

For her position that the reporter's privilege for confidential materials attaching to Rush's interview of Epstein was waived by Rush's disclosures, plaintiff relies on a misplaced analogy of

the reporter's privilege to the attorney-client privilege and work product doctrine to conclude that disclosure of any portion of the interview constitutes waiver of the privilege as to the whole. The analogy does not hold. Since no portion of Epstein's interview was actually published in the Daily News, the qualified protection of the reporter's privilege is not waived as to any part of the interview and certainly not to the interview in its entirety.

For her argument that the reporters privilege has been waived, Doe relies almost entirely on cases analyzing the attorney client privilege and the work product doctrine. As a result, she fundamentally misconstrues the nature of the reporter's privilege. As explained in Pugh v. Avis Rent A Car System, Inc., No. M8-85, 1997 WL 669876 (S.D.N.Y. Oct. 28, 1997), the court rejected a party-litigant's argument that CBS' privilege was waived because a *60 Minutes* journalist interviewed two or more people together, finding that the argument "rest[ed] on the assumption that confidentiality is the exclusive rationale behind the reporter's qualified privilege" – an assumption mistakenly adopted by Doe here.

The mere presence of third parties during an interview does not undermine the interests served by the qualified privilege, which allow a journalist to review privately his or her notes, tapes or videotapes of an interview, and then decide what information to publish and how to incorporate it as part of a news story without fear that what he or she publishes can result in easy obtainment of those notes, tapes and videotapes by litigants in search of any nonpublished material relevant to a lawsuit. This goes to the privacy of editorial processes, the independence of the press and the need to allow the press to publish freely on topics of public interest without harassment and scrutiny by litigants seeking to conduct "fishing expeditions" into nonbroadcast materials in the hope that some relevant information may turn up.

Id. at *5 (finding no waiver of privilege by virtue of group interviews).

Thus courts have taken pains to distinguish this unique privilege from the more traditional ones. In Ulrich v. Coast Dental Servs., Inc., 739 So. 2d 142, 143-44 (Fla. Dist. Ct. App. 1999) the Florida court held the reporter's privilege was not waived by the reporter's pre-publication disclosure to third party of identities of confidential sources, explaining:

A distinction is drawn between the need for confidentiality in the initial relationship which forms the basis for traditional privilege law and the protection of confidential and non-confidential information obtained during news gathering. The protection of the relationship of a husband-wife, physician-patient, attorney-

client or clergy-penitent, is justified on a privacy theory. On the other hand, the journalist's privilege is justified by its constitutional origin or its public purpose to allow journalists to collect the news from sources who would not otherwise disclose information if they were identified. In other words, while most privileges protect only those communications that are confidential, a reporter's statutory privilege is generally not conditioned upon a prior agreement of confidentiality. It follows then, that disclosure of information to a third party should not constitute a waiver.

Id. at 143-44 (citation omitted).¹⁸

Moreover, plaintiff's mere recitation (Opp. Br. at 9) of the waiver provision of New York State's Shield Law, unaccompanied and uninformed by a review of authorities interpreting it, led her to misconstrue it entirely to reach a conclusion that disclosure to any third party destroys the privilege. On the contrary, as the court found in Brown & Williamson Tobacco Corp. v. Wigand, No. 101678/96, 1996 WL 350827 (N.Y. Sup. Ct. Feb. 28, 1996), a leak of confidential interview transcripts from CBS to the New York Daily News during the epic face-off between *60 Minutes* and whistleblower Jeffrey Wigand on one side and the Brown & Williamson Tobacco Company on the other, did not waive CBS's privilege in the documents under the Shield Law except as to the portions that were actually published in the Daily News. The court firmly rejected B&W's effort to analogize the reporter's privilege to courtroom evidentiary rules under which expanded testimony is permitted as to privileged matters once the door has been opened – the formulation Doe has proposed here. Under that interpretation of the Shield Law's waiver provision, the court said, a specific but limited disclosure “would become a launching pad for a massive, unlimited and unspecified foray” into CBS's news files containing related information. Such a result, the court

¹⁸ See Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark, 993 P.2d 50, 57 (Nev. 2000) (“Privileges relating to confidential communications, such as those between attorney and client, between doctor and patient, and between spouses, shield the confidentiality of communications within special relationships and are not designed or intended to assist the fact-finding process or to uphold its integrity. . . . In contrast, the reporter's privilege does not arise strictly as a result of confidence or a special relationship. This privilege arises when a journalist gathers information within his or her professional capacity for the purpose of dissemination. The policy rationale behind this privilege is to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution.”) (citations omitted).

reasoned, would be antithetical to the entire purpose of the privilege. Id. at *5-6.¹⁹ Doe's waiver theories, built on an inapt analogy to other privileges, would have just that result.

Maximizing the number of the bullet points representing supposedly waived portions of the interview, Opp. Br. at 10-12, Doe argues that "the gist of the *entire* tape" was communicated to both Edwards and Fisten, and "any privilege is plainly waived for the entire recording." Id. at 12. Nowhere does she allege, however, that a copy of a tape of the interview was ever given to anyone – indeed, Fisten admits that Rush refused his request. (Fisten Aff. ¶ 10). Nor does she allege that the interview was published in the Daily News. Even as to published quotes, a privilege still applies, although the level of protection may be diminished. See United States v. Treacy, 603 F. Supp. 2d 670, 672 (S.D.N.Y. 2009) (appeal pending) (requiring testimony of reporter to confirm published quotes but limited inquiry by the defense into unpublished material). Here where the off-the-record interview was not published, the reporter's privilege for confidential newsgathering still holds. At a minimum, the privilege for nonconfidential newsgathering would apply and preclude compelled disclosure of the interview since Doe has been unable to show that the information is anything more than cumulative of the "ample evidence" she has already amassed or is about other parties, other litigation or side issues.

POINT III: THERE IS NO NEED FOR AN EVIDENTIARY HEARING WHERE THERE ARE NO MATERIAL FACTS IN DISPUTE

For no apparent reason other than to further burden the reporter and invade the protection for newsgathering materials, Doe persists in insisting on an evidentiary hearing in regard to her claims of waiver. First, the court need not even reach the waiver issue because the standards under F.R.C.P. 26 and 45 applicable to non-party subpoenas, even without regard to privilege, have not been met. (See Point I, supra.) Second, as a matter of law, absent publication of the

¹⁹ See also Altemose Constr. Co. v. Building & Constr. Trades Council, 443 F. Supp. 489 (E.D. Pa. 1977) (concluded that affidavits in the possession of television news staff retained their status as confidential materials protected by the qualified privilege notwithstanding that they had been the subject of a broadcast discussion and shown in their entirety to two law enforcement officials) (incorrectly described in Opp. Br. at 9-10 as inapplicable because standing for the proposition "that broadcasting a small part if a document does not waive the protection of all parts.").

interview in the Daily News, there is no waiver of the reporter's privilege. (See Point II.) Third, even if the extent of disclosure of the interview mattered here, the factual dispute between the parties is hardly "stark" as Doe suggests. (Opp. Br. at 26.) Rush's sworn statement that the interview was off the record is uncontradicted. Supp. Rush Aff't ¶ 6. The broad strokes of the disclosure – playing a few minutes of the tape on a confidential basis to an author and an activist and discussion of some of the topics covered in the interview with Doe's attorney – were already fleshed out in Rush's initial affidavit. Id. ¶¶ 3, 6, 7. The additional topics that Rush agrees may have been discussed with an investigator working with Doe's counsel which Rush has now recalled in his Supplementary Affidavit ¶¶ 2, 3, do not materially alter the contours of the issues before the Court with regard to waiver. But, in any event, with his recollection refreshed, Mr. Rush has now recalled the conversation with Fisten and allowed as possible that he mentioned the additional topics Fisten says Rush told him were discussed in the Epstein interview.

Despite the fact that there are now no material differences, when provided in advance a copy of Rush's Supplementary Affidavit, Doe's counsel refused to withdraw the subpoena for an evidentiary hearing, unless Rush would stipulate to the accuracy of each and every allegation contained in the Affidavits of Messrs. Edwards and Fisten. Carroll Reply Decl. ¶ 11. Because their sworn statements contain factual and legal conclusions the accuracy of which Rush could not and would not stipulate to, as explained in more detail in Point I, Doe's gun-to-the-head demand was declined, requiring Rush to take still more time away from his reporting.

We respectfully request that the Court not give Doe an opportunity to further burden Rush for a hearing that would not assist the Court in resolving the issues before it. Accordingly, we ask that the subpoena for an evidentiary hearing be quashed.

CONCLUSION

For the foregoing reasons, the motion to quash the subpoenas to the Daily News, L.P. and George Rush should be granted or a Protective Order be issued.

Dated: New York, New York
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Respectfully submitted,

DAILY NEWS, L.P.



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