PRE-EXISTING FACTS, DOCUMENTS, AND INFORMATION ARE NOT COVERED BY THE ATTORNEY-CLIENT PRIVILEGE OR THE WORK PRODUCT DOCTRINE.

In asserting that the contents of the computers are covered by the attorney-client privilege or the work product doctrine, Epstein attempts to stretch the privileges beyond its limits. There has been no assertion that the computers themselves were communications or that the computers contain attorney-client communications, nor were the computers or their contents produced in anticipation of litigation.

In *Upjohn* ▌ *United States* , 449 U.S. 383 (1981), the Supreme Court made clear that an attorney cannot create a "zone of silence" over factual matters. The Court wrote: the attorney-client "privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Id.* at 395.

> The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney. . . . [T]he courts have noted that a party cannot conceal a fact merely be revealing it to his lawyer.

Id. at 396 (internal citations and quotations omitted).

Likewise, despite a claim of attorney work product, "[w]here relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to that preparation of one's case, discovery may properly be had." *Hickman* ▌ *Taylor* , 329 U.S. 495, 511 (1947). Furthermore, the "work product rule protects work done by an attorney in anticipation of, or during, litigation," *In re Grand Jury Subpoena* , 274 F.3d at 574, not physical objects, like the computers, or the pre-existing records contained therein, which were created by Epstein or third parties, not attorneys. *Cf. In re Grand Jury Matter No. 91-01386* , 969 F.2d 995 (11th Cir. 1992) (holding that the attorney-client privilege did not bar the disclosure of the names of clients who paid their attorneys with counterfeit bills because "[d]isclosure of the clients' identities will link them with only the payment of a counterfeit one hundred dollar bill, *which is not a communication at all* . . . . To apply the privilege under these facts would be an affront to that very system, as it would effectively insulate discoverable *acts* merely because they were enacted in the presence of an attorney.") (emphasis added).

Just a month ago, the Second Circuit addressed this issue when a defendant tried to disqualify prosecutors who had seen four documents that the defense alleged were privileged. *United States* ▌ *Walker* , 2007 WL 1743273 (2d Cir. Jun. 18, 2007). The court wrote:

> Even assuming the documents (or the handful of corrections and clarifications handwritten thereon) were work product or were privileged, they contain solely factual information about [a] business, and shed no light on [defendant's] confidential communications with counsel or defense strategy. Moreover, we agree with the district court that these documents were neither work product nor attorney-client communications. The attorney-client privilege protects from disclosure the contents of confidential attorney-client communications, but does not prevent disclosure from the client's records the underlying factual information included in attorney-client

> communications. *See Upjohn Co.* ▌ *United States* , 449 U.S. 383, 395 (1981). For this reason, putting otherwise non-privileged business records . . . in the hands of an attorney–or printing out such records for an attorney to review–does not render the documents privileged or work product. *See Ratliff* ▌ *Davis Polk & Wardwell* , 354 F.3d 165, 170-71 (2d Cir. 2003) ("Documents obtain no special protection because they are housed in a law firm; any other rule would permit a person to prevent disclosure of any of his papers by the simple expedient of keeping them in the possession of his attorney.") *In re Grand Jury Subpoenas* , 318 F.3d 379, 384 (2d Cir. 2003) (stating that the work product doctrine generally does not shield from discovery materials in an attorney's possession that were prepared neither by the attorney nor his agents). Moreover, the "selection and compilation of . . . documents by counsel transforms that material into attorney work product" only if there is "a real, rather than speculative, concern that counsel's thought processes in relation to pending or anticipated litigation will be exposed through disclosure of the compiled documents." *In re Grand Jury Subpoenas* , 318 F.3d at 386.

Id. at *2 (some internal citations and quotations omitted).

Here, like in *Walker* , Epstein's counsel contends that the computers–which contain only pre-existing documents–are privileged and that counsel's decision to have his investigator remove those computers from Epstein's home is the "selection and compilation of documents" that would disclose his "thought processes." These arguments fail for the same reasons. First, the computers and their contents are not "communications," they are pre-existing documents and, as in *Ratliff* , putting them into the hands of an attorney (or his investigator) does not convert them into "privileged" communications. Second, the removal of the three computers from Epstein's home is not the "selection and compilation of documents by counsel." As Epstein himself argues, each computer can hold literally thousands of documents. Removing *all* of the file cabinets in an entire home is not the "selection" of documents, it is simply the wholesale removal of potentially incriminating evidence. Taking Epstein's argument to its logical conclusion, sending an investigator to a client's home to remove a murder weapon would make that physical item privileged or "work product" because its removal shows the attorney's "thought process" that the murder weapon would incriminate his client. [F1] *Cf. In re Grand Jury Subpoena* , 204 F.3d 516, 523 (4th Cir. 2000) ("The attorney-client privilege is not intended to permit an attorney to conduct his client's business affairs in secret. . . . A client may not 'buy' a privilege by retaining an attorney to do something that a non-lawyer could do just as well.") (internal quotations omitted)).

[F1] Although unpublished, the case of *United States* ▌ *Hunter* , 1995 WL 12513 (N.D. Ill. Jan. 6, 1995), contains facts similar to the ones at bar and gives a detailed analysis of the applicability of the attorney-client privilege to physical items. In *Hunter* , a defendant, subsequent to his arrest, informed his attorney of the existence of currency and ammunition in his home. The attorney went to his client's home; opened two boxes that contained $30,000 to $50,000; and removed them from the home. The boxes were thereafter kept in the attorney's custody or control. The attorney later revealed the existence of and whereabouts of the boxes and a search warrant was obtained and executed. The defendant moved to bar the introduction of the boxes of cash against him at trial asserted the attorney-client and work product privileges.

The district court began its analysis by noting that "the boxes themselves do not fall within the protection of the attorney-client privilege, since their existence is a fact and not a 'communication.'" *Id.* at *2 (citing *Upjohn* , 449 U.S. at 391). The District Court noted that if the boxes had never been removed from the home

and the government had learned of their existence only through the use of a protected communication, then the defendant *may* have had an argument against their admission. *Id.* However, "these are not the facts of this case. Here, defendants' attorneys removed the evidence from [the defendant's] house, thereby preventing police from recovering the boxes at a later date. At this point, [the attorneys] may have violated their ethical obligation not to 'unlawfully obstruct another party's access to evidence.' Indeed, it is this alteration of criminal evidence that forecloses [the defendant's] attorney-client privilege argument . . ." *Id.* The district court addressed the cases of *Clutchette* ▌ *Rushen* , 770 F.2d 1469 (9th Cir. 1985), and *People* ▌ *Meredith* , 631 P.2d 46 (Cal. 1981). In *Clutchette* , the defendant's attorney had sent an investigator to collect incriminating evidence from a shopkeeper, and the trial court had allowed that evidence to be admitted at trial over the defendant's assertion of the attorney-client privilege. The Ninth Circuit wrote that once the attorney made the strategic choice to take possession of the evidence–a step which was not necessary to evaluate the significance of the [evidence] for the defendant's case–he was legally and ethically obligated to turn it over to the prosecution. Therefore, introduction of the evidence did not implicate the privilege. *Hunter* at *2 (citing *Clutchette* at 1472).

In *Meredith* , a murder suspect informed his attorney that the murder victim's wallet was in the garbage can behind the suspect's house and the attorney sent a private investigator to retrieve it. After reviewing the wallet, the attorney gave it to law enforcement. The prosecution then introduced the wallet at trial, as well as testimony from the investigator that he recovered the wallet from behind the defendant's home over the defendant's assertion of the attorney-client privilege. The California Supreme Court held that the introduction of the wallet and the investigator's testimony was proper because "whenever defense counsel removes or alters evidence, the [attorney-client] privilege does not bar revelation of the original location or conduction of the evidence in question." *Hunter* at *3 (quoting *Meredith* at 54). While the investigator could not testify about the substance of any communications with the attorney, he had to tell the jury where the wallet was found. The California Supreme Court stated that, to hold otherwise, "permits the defense in effect to 'destroy' critical information; it is as if . . . the wallet in this case bore a tag bearing the words 'located in the trash can by [defendant's] residence,' and the defense, by taking the wallet, destroyed this tag." *Hunter* at n.5 (quoting *Meredith* at 53).

It should be noted that removal of the computers was not necessary to the ability of Epstein's counsel to evaluate their significance; copies of the hard drives could have been made. Of course, unlike counsel in *Clutchette* and *Meredith* , Epstein's counsel *never* provided the evidence to law enforcement and, instead, tries to aver that the items may not exist. If that is so, then not only did the investigator working for Epstein's counsel remove the evidence, he also destroyed it.

Lastly, the defendant asserted that defense counsel's search of the defendant's home "was part of the preparation of the defense case, and therefore 'the basis for conducting such an investigation is attorney-work product because it reflects the thought processes and strategies, if not actual privileged communications.'" *Hunter* at *4. The district court rejected this argument: "[t]aking possession of the boxes did not somehow transform them into 'materials prepared in anticipation of litigation,' which would subsequently be undiscoverable." *Id.* Epstein makes the identical arguments and those arguments should be rejected for the same reasons.