

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION AG
CASE NO. 502009CA040800XXXXMB
Judge David F. Crow

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

SCOTT ROTHSTEIN, individually, and
BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiffs.

**PLAINTIFF JEFFREY EPSTEIN'S MOTION TO COMPEL
PRODUCTION OF DOCUMENTS BY DEFENDANT BRADLEY EDWARDS
AND FOR SANCTIONS**

Plaintiff, Jeffrey Epstein, by and through his undersigned counsel, hereby respectfully seeks the entry of an Order compelling Defendant Bradley Edwards to produce the documents listed in Edwards' privilege log, or, in the alternative, the entry of an Order compelling Edwards to serve a privilege log that fully complies with Fla. R. Civ. P. 280(b)(5), and an in camera review of the documents specified below, together with an award of attorney's fees and costs, and in support thereof would show as follows:

SUMMARY OF ARGUMENT

On or about February 23, 2011, Edwards, in response to several orders entered by Judge Raymond Ray in the Bankruptcy Court, filed a one hundred and fifty-nine (159) page privilege

log, claiming that over two thousand (2000) documents are privileged.¹ This is Edwards' second privilege log that fails to meet the requirements for a legally sufficient privilege log under Fla. R. Civ. P. 1.280 (b)(5), as interpreted by the Fourth District Court of Appeal in *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001). Edwards' privilege log is insufficient on its face in many respects. In addition, although the Special Master required a master list of names contained in the privilege log, a description of the recipients of the documents, and identification of the individuals who received blind copies, Edwards failed to provide the names of the individuals who were copied directly or who received blind copies.² Edwards' material failure to comply with Fla. R. Civ. P. 1.280(b)(5) prevents the Plaintiff and the Court from determining whether Edwards has made any valid privilege assertions and results in a waiver of the privileges claimed.

ARGUMENT

I. REQUIREMENTS FOR A PRIVILEGE LOG

The requirements for a privilege log in Florida are set forth in Fla. R. Civ. P. 1.280(b)(5), which provides as follows (emphasis added):

Claims of Privilege or Trial Protection Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and

¹ Edwards' privilege log is being filed contemporaneous with the filing of the subject motion. For ease of reference, excerpts from the log are attached hereto as exhibits.

² After Epstein's Motion to Compel was heard on August 4, 2010, the Bankruptcy Court entered at least four (4) orders directing Edwards to prepare a privilege log, the last of which required the privilege log to be completed by January 31, 2011. The first log, served on January 26, 2011, was in woeful noncompliance with the *TIG* requirements. On February 23, 2011, another log was served by Edwards which again patently failed to comply with *TIG* requirements. The February 23, 2011 log is the subject of the instant motion.

shall describe the nature of the documents, communications, or things not produced or disposed in a manner that, without revealing information itself privileged, or protected, *will enable other parties to assess the applicability of the privilege or protection.*

The key case in this District construing Fla. R. Civ. P. 1.280(b)(5) is *TIG Ins. Corp.*, 799 So. 2d 339, in which the Fourth District Court of Appeal denied a petition for a writ of certiorari seeking review of an order requiring *TIG*, the homeowner's insurer, to produce documents. After filing a third-party complaint against *TIG*, and requesting that *TIG* produce its claim files, *TIG* served objections on the basis of attorney-client and work-product privileges, but did not identify the documents that were assertedly privileged and did not serve a privilege log. *Id.* at 340.

The Fourth District noted in *TIG* that Rule 1.280(b)(5) is identical to its federal counterpart, Fed. R. Civ. P. 26(b)(5), whose Advisory Committee Notes state that "to withhold materials without such notice is contrary to the rule, subjects the party to sanctions under rule 37(b)(2) and may be viewed as a waiver of the privilege or protection." 799 So. 2d at 340. The *TIG* court further observed that Local Rule 26.1(G)(3)(b), of the Southern District of Florida, spelled out the requirements for a valid privilege log, *id.* at 341:

Where a claim of privilege is asserted in objecting to any interrogatory or document demand, or sub-part thereof, and an answer is not provided on the basis of such assertion:

(i) The attorney asserting the privilege shall in the objection to the interrogatory or document demand, or sub-part thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) For documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other.

...

The Fourth District also quoted with approval from *Abbott Laboratories v. Alpha Therapeutic Corp.*, 2000 U.S. Dist. LEXIS 20834, at *13 (N.D. Ill. Dec. 14, 2000), in which the court stated that a privilege log should:

describe the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from discovery. These categories, especially this last category, must be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing the requirements expounded upon in the foregoing discussion. Accordingly, descriptions such as 'letter re claim,' 'analysis of claim,' or 'report in anticipation of litigation'--with which we have grown all too familiar--will be insufficient. This may be burdensome, but it will provide a more accurate evaluation of a discovery opponent's claims and takes into consideration the fact that there are no presumptions operating in the discovery opponent's favor. Any failure to comply with these directions will result in a finding that the plaintiff-discovery opponents have failed to meet their burden of establish the applicability of the privilege. (Citations omitted)

Thus, a party invoking a privilege "must...provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection." *Hoot Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC*, 2009 U.S. Dist.

LEXIS 103045, at *9 (S.D. Cal. Nov. 4, 2009) (quoting Advisory Committee Notes to Rule 26(b)(5)).³

TIG, 799 So. 2d at 341.

II. EDWARDS' PRIVILEGE LOG VIOLATES FLA. R. CIV. P. 1.280(b)(5) AND THE *TIG* REQUIREMENTS

Edwards' privilege log clearly violates the requirements of Florida law, and is insufficient on its face. First, many of the entries for "senders" and "recipients" use the generic terms "attorney and staff," "litigation," "RRA personnel," and "unknown staff attorneys at RRA" which generic terms do not meet the *TIG* requirements. *See, e.g.*, Comp. Ex. A., Bates 00150 ("Litigation Team"), 003760-3828 ("RRA Personnel"), 05807-05810 ("attorneys at RRA"). Second, the privilege log fails to indicate whether the documents were copied or distributed to third parties, or whether blind copies were sent to third parties. *See* Privilege Log generally. Third, it is readily apparent that the privilege log fails to adequately describe the documents that are assertedly privileged. Descriptions of document as "in re Epstein," "litigation strategy," "Meeting" and "FYI" do not sufficiently describe the type of document for which the privilege is claimed. *See, e.g.*, Ex. B, Bates 01514, 16777-16786, 07619, 00017, 06409-06415,

³ *See also Evans v. United Fire & Cas. Ins. Co.*, 2007 U.S. Dist. LEXIS 58578, at *9 (E.D. La. Aug. 9, 2007) ("United has provided a privilege log, but it is insufficient on its face. Rule 26(b)(5) requires such a log to 'describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.'"); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 162 F.R.D. 490, 492 (E.D. Pa. 1995) (party's failure to explain nature of the assertedly privileged communication precluded court from determining whether privilege applied); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 664 (S.D. Ind. 1991) (requiring the log to list, for each separate document, the authors and their capacities, the recipients (including copy recipients) and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery).

06428-06447, 06453-06454. Such shorthand labels, with no description of the content of the materials, do not permit Epstein or the Court to begin to evaluate the applicability of the privileges claimed by Epstein. *TIG*, 799 So. 2d at 341 (quoting *Abbott Labs*, 2000 U.S. Dist. LEXIS 20834, at *13)("[D]escriptions such as 'letter re claim', 'analysis of claim' or 'report in anticipation of litigation'. . . will be insufficient."). Fourth, Edwards' privilege log does not even disclose the *type* of documents that are assertedly privileged – e.g., email, letter, memo. *See* Ex. C. Finally, the privilege log fails to indicate whether the materials contain attachments. "Where a privileged document has attachments, each attachment must individually satisfy the criteria for falling within the privilege. Merely attaching something to a privileged document will not, by itself, make the attachment privileged." *Leonen v. Johns-Manville*, 135 F.R.D. 94, 98 (D.N.J. 1990). Edwards is not entitled to invoke a privilege with respect to attachments which themselves have not been described at all, let alone with the specificity required to determine whether any privileges apply.

In sum, Edwards' privilege log is grossly inadequate and in blatant violation of Rule 1.280(b)(5), precluding Epstein and the Court from evaluating the applicability of the numerous privileges claimed.

III. EDWARDS HAS NO VALID PRIVILEGE BASED ON "PRIVACY RIGHTS"

Edwards objects to the production of the vast majority of the documents on the ground that they are "protected by privacy rights." (*See* Privilege Log generally; Ex. D. Remarkably, Edwards claims that over 75% of the documents listed are shielded from discovery by *unspecified* "privacy rights." His objections do not identify the specific "privacy" privilege or describe the person whose privacy interests are assertedly at stake or the nature of the privacy

interest at stake. Such amorphous "privacy rights" are non-existent under Florida law. No valid privilege can be raised in an attempt to protect purely generic "privacy rights."

Section 90.501, Fla. Stat., expressly states in relevant part that "[e]xcept as provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to . . . (3) [r]efuse to produce . . . any writing." Neither the Florida Evidence Code, other Florida statutes, or the Constitution, recognizes a privilege for generic "privacy rights" or precludes the production of documents in a legal proceeding" based upon a general right of privacy. *See La Roche v. Wainwright*, 599 F.2d 722, 726 (5th Cir. Fla. 1979) (rejecting "fourteenth amendment rights to privacy" to protect marital relationship: "[W]e see no persuasive reason to extend the right of privacy, based as it is on "penumbras and emanations" of other more explicit constitutional rights, to evidentiary matters protecting marital relationships, long thought to be uniquely within the regulatory province of the individual states.").

In sum, Edwards cannot hide behind a sham privilege based on "privacy rights."

IV. EDWARDS HAS NO "CONFIDENTIAL SOURCE" PRIVILEGE

Edwards objects to producing hundreds of pages of documents from or to a purportedly "confidential source." *See* Ex. E. There is no Florida law, however, that gives Edwards the right to assert a privilege based upon "a confidential source. Indeed, a "confidential source" privilege applies only with respect to reporters protecting their sources. *See, e.g., CBS v. Jackson*, 578 So.2d 698, 700 (Fla. 1991) (journalists have a qualified privilege against revealing confidential sources of information). Edwards is not a reporter. Therefore, as a matter of settled law, Edwards has no valid objection based upon a "confidential source" privilege.

**V. ATTORNEY-CLIENT PRIVILEGE DOES NOT APPLY
TO NON -ATTORNEY-CLIENT COMMUNICATIONS**

Edwards invokes the attorney-client privilege with respect to thousands of pages of documents listed in 120 pages of his 159-page privilege log. *See* Privilege Log generally. Significantly, the log *describes only three* of these documents as attorney-client communications. *See* F.Bates 02546-02547, 02809-02810, 02807-02808. There is no description or information provided by Edwards to suggest that any of the other documents *claimed* to be subject to the attorney-client privilege, actually are. For example, document Bates 19856, from Mike Fisten to Mike Fisten, described as "Investigation into Epstein's planes" (*see* Comp. Ex. A) is assertedly subject to the attorney-client privilege, but is *not described as an attorney-client communication*, and on its face does not appear to be an attorney-client communication. The attorney-client privilege applies only to communications between counsel and client and cannot be asserted to block the discovery of communications that are not identified as attorney-client communications. *See, e.g.,* §90.502, Fla. Stat., *Skorman v. Hovnanian of Florida, Inc.*, 382 So. 2d 1376, 1378 (Fla. 4th DCA 1980). Accordingly, no attorney-client privilege attaches to communications that have not been specifically identified by Edwards as attorney - client communications.

In addition, with respect to the tens of thousands of communications or documents to which Edwards has asserted the attorney-client privilege, Edwards must establish all of the following elements: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of a bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without

the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. See § 90.502, Fla. Stat.; *State v. Rabin*, 495 So. 2d 257, 60 (Fla. 3d DCA 1986). The attorney-client privilege does not apply to communications between an attorney and a third party, or a person who is not a client. See *State v. Rabin*, 495 So. 2d at 260 (attorney-client privilege did not attach to attorney's communication with client's ex-wife). The attorney-client privilege is waived if the client voluntarily discloses the substance of the communication. See § 90.507, Fla. Stat.; *Delap v. State*, 440 So. 2d 1242, 1247 (Fla. 1983) ("[W]hen a party himself ceases to treat the matter as confidential, it loses its confidential character.").

Edwards' woefully inadequate privilege log does not provide sufficient information to enable Epstein and the Court to determine the applicability of the attorney-client privilege to the thousands of communications listed in the privilege log. The alleged client involved is not disclosed with respect to each communication. The purpose of the document is not described. The names of all recipients are not disclosed, preventing a determination as to whether the attorney-client privilege was waived. No information is provided which would enable the Court and Epstein to determine whether the communications were intended to be disclosed to third parties or did not involve the giving of legal advice, in which case there is no privilege. See, e.g., *Watkins v. State*, 516 So. 2d 1043, 1046 (Fla. 1st DCA 1987).

VI. THE WORK-PRODUCT PRIVILEGE CANNOT BE DETERMINED FROM EDWARDS' PRIVILEGE LOG

Fla. R. Civ. P. 1.280(b)(3) contains a limited privilege for "fact" work product or factual information pertaining to the client's case and obtained or gathered in connection therewith if the party or his attorney prepares or directs the preparation of the materials for litigation or trial. Thus, the work-product privilege extends only to "materials in question [which] were prepared in anticipation of litigation with respondents." *Nationwide Mut. Fire Ins. Co. v. Harmon*, 580 So. 2d 192, (Fla. 4th DCA 1991).

Forty years ago, the Florida Supreme Court, in *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 112 (Fla. 1970), explained what is covered by the work product privilege:

[T]hose documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery. Personal views of the attorney as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his own convenience, but not to be used as evidence, come within the general category of work product.

The work product doctrine protects documents and papers of an attorney or a party prepared in anticipation of litigation, regardless of whether they pertain to confidential communications between attorney and client. Fla. R. Civ. P. 1.280(b)(2). See *Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994). Work product is a qualified immunity from discovery. See *DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988 (Fla. 3d DCA 1994). The work product privilege does not extend to materials intended for use as evidence at trial. *Northup v. Acken*, 865 So. 2d 1267 (Fla. 2004).

Work product falls into two categories: 1) "fact" work product consisting of factual information pertaining to a client's case that is prepared in anticipation of litigation or for trial by

another party; and 2) "opinion" work product, which includes all attorney's mental impressions, opinions or conclusions about a client's case. The former is discoverable upon a showing of (a) need for the materials to prepare the party's case, and (b) inability to obtain the substantial equivalent of such materials without undue hardship. *See, e.g., Metric Engineering, Inc. v. Small*, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003). The latter is subject to nearly absolute immunity. *See, e.g., Smith v. Fla. Power & Light Co.*, 632 So. 2d 696 (Fla. 3d DCA 1994).

A trial court is instructed "to make particularized findings in support of its determination of which of the documents are, or are not, subject to the work product privilege." *Dismas Charities, Inc. v. Dabbs*, 795 So. 2d 1038, 1039 (Fla. 4th DCA 2001). The party asserting the privilege must *prove* that the materials constitute work product. *See, e.g., Prudential Ins. Co. of Am. v. Fla. Dep't of Ins.*, 694 So. 2d 771, 773-74 (Fla. 2d DCA 1997) (objecting party provided affidavits stating that the documents were prepared in anticipation of litigation); *See, e.g., Lloyds Underwriters of London v. El-Ad Villagio Condo. Ass'n*, 976 So. 2d 28 (Fla. 4th DCA 2008) (discovery order quashed where no in camera inspection was made). Thus, a trial court is not required to protect materials from discovery if a party makes no affirmative showing, and only makes "a blanket statement that these items were prepared in anticipation of litigation and are protected from disclosure without presenting evidence to support the claim." *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855, 856-57 (Fla. 2d DCA 1997).

Once the party seeking the documents challenges non-production, the burden shifts to the opposing party to establish that the materials were prepared in anticipation of litigation in which case they are discoverable upon a showing that the former has need of the materials and cannot

obtain the equivalent without undue hardship. *See, e.g., Tampa Med. Assoc., Inc. v. Estate of Torres*, 903 So. 2d 259, 263-64 (Fla. 2d DCA 2005).

Given the numerous deficiencies on the face of Edwards' privilege log, Epstein has no way to determine whether the work product privileges claimed are fact or opinion work product. (See Bates _____. (Ex. F). It is essential that sufficient information be provided by Edwards to distinguish between fact and opinion work product because Epstein is entitled to discover fact work product upon a showing of need.

VII. POOLED, JOINT DEFENSE OR COMMON LITIGATION INTEREST CANNOT BE DETERMINED FROM THE PRIVILEGE LOG

Litigants who share "unified interests" may exchange privileged information to prepare their case without losing the benefit of the attorney-client interest pursuant to the "joint defense," "common interest" or "pooled information" exception. *Visual Scene, Inc., v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987). The exception has been recognized in the case of co-defendants, co-parties to potential litigation, members of a class of plaintiffs pursuing separate suits, and defendants in separate actions. *Id.* (citations omitted).

However, "[t]he joint defense privilege, more properly identified as the 'common interest rule,' *see generally* Capra, The Attorney-Client Privilege In Common Representations, 20 Trial Lawyers Quarterly, Summer 1989, at 20, has been described as 'an extension of the attorney client privilege, *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987). It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. *See United States v. Bay State Ambulance and Hosp.*

Rental Serv., 874 F.2d 20, 28 (1st Cir. 1989). *Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected.* *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.), *cert. denied*, 474 U.S. 946, 106 S. Ct. 342, 88 L. Ed. 2d 290 (1985); *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986)." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. N.Y. 1989) (emphasis added). Thus, "parties seeking to invoke the exception must establish that they agreed to engage in a joint effort and to keep the shared information confidential from outsiders." *Ken's Foods, Inc. v. Ken's Steak House, Inc.*, 213 F.R.D. 89, 93 (D. Mass. 2002). *See also United States v. Sawyer*, 878 F. Supp. 295, 297 (D. Mass. 1995) (despite similar interests between employer and employee, there was insufficient evidence that communications were made during the course of a joint defense effort; proponent could not establish the time frame of the purported agreement or the acts creating and/or terminating the agreement).

Edwards' privilege log does not establish that the communications listed were made during the course of an "ongoing common enterprise," does not establish relevant time frames, and does not establish that the communications were made in furtherance of that enterprise. For example, Edwards objects to Bates 05171-05172, from Mercedes Estrada to Bradley Edwards, re "Transcripts" on the basis of the joint work-product privilege (*see* Ex. G), but has provided no information that "a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *North River Ins. Co. v. Columbia Casualty Co.*, 1995 U.S. Dist. LEXIS 53, at *7 (S.D.N.Y. Jan. 5, 1995) (citation and quotation omitted).

Given the critical gaps in Edwards' privilege log, it is impossible to determine whether Edwards can properly invoke the "common interest" doctrine to preclude discovery.

**VIII EDWARDS' FAILURE TO SUPPLY AN ADEQUATE
LOG-WAIVES THE PRIVILEGES CLAIMED AND
SUPPORTS SANCTIONS AGAINST EDWARDS**

It is settled that the failure to supply an adequate privilege log results in the waiver of a privilege under Florida law. *TIG*, 799 So. 2d at 341 ("Any failure to comply with these directions will result in a finding that the plaintiff-discovery opponents have failed to meet their burden of establish[ing] the applicability of the privilege."). The *TIG* court noted that Rule 1.280(B)(5) "uses mandatory language, and federal courts have found waiver where the federal rule was violated." *Id.* (citing cases). The *TIG* court concluded that there was no departure from the essential requirements of the law in compelling production based upon a privilege waiver: "Because the trial court did not have the benefit of specific descriptions of the documents, we assume that the court found a waiver." *Id.* at 342. See also *Century Bus. Credit Corp. v. Fitness Innovations & Techs., Inc.*, 906 So. 2d 1156, 1157 (Fla. 4th DCA 2005) (the court denied a petition for certiorari directed to an order finding a waiver of privilege in regard to the production of documents because the petitioner filed a privilege log which was "completely inadequate"); *Kaye Scholer LLP v. Zalis*, 878 So. 2d 447, 449 (Fla. 3d DCA 2004) (the purpose of the privilege log requirement is "to identify materials which might be subject to a privilege or work product protection so that a court can rule on the 'applicability of the privilege or protection' prior to trial...Failure to comply with the requirements of Rule 1.280(b)(5) results in the waiver of any attorney-client and work-product privileges."); *Omega Consulting Group v. Templeton*, 805 So. 2d 1058, 1060 (Fla. 4th DCA 2002) (noting that where a privilege log "filed by the corporations did not contain sufficient detail to comply with the requirements of Florida Rule of Civil Procedure 1.280(b)(5)," the attorney-client privilege may be waived).

Edwards has had ample opportunities to file a proper privilege log, and has declined to do so. Given his blatant violation of Rule 1.280(b)(5), the magnitude of the deficiencies in his privilege log, and his cavalier invocation of numerous clearly inapplicable and/or non-existent privileges, this Court should enter an order finding a waiver and requiring production of the documents requested. *See TIG*.

In the alternative, the Court should compel Edwards to produce a privilege log that strictly complies with *TIG* and the requirements of Rule 1.280 in order that Epstein and the Court can reasonably determine whether any valid privileges have been asserted and were not waived.

At a minimum, and as soon as convenient, the Court should conduct an in camera inspection of the documents referenced in ¶¶ 20, 22-4 of the Corrected Second Amended Complaint and determine whether any of the privileges asserted by Edwards to block the production of these highly relevant materials are valid or have been waived. These materials – approximately thirty (30) emails -- were sent to or from Edwards during the critical period of May- October, 2009, when the Ponzi scheme was imploding. The critical nature of these documents is vividly demonstrated by Rothstein's testimony during his recent deposition that he had asked Edwards or Adler to specifically set aside a flight manifest for an Epstein private jet. (Tr. Rothstein Depo 12/21/11 at 2278). Rothstein further testified that he showed boxes with Epstein files to the Discala investors in his office, disclosing the actual names of the parties "as a way of me attempting to induce them to invest further." (Tr. Rothstein Depo 12/20/11 at 1917; *see also* Tr. 12/21/11 at 2278). Rothstein explained with regard to Edwards' lawsuits that "this was a big ticket because there was the defendant and he's a wealthy guy" and was associated with public figures who did not want their names dragged through the mud. (Tr. Rothstein Depo

12/21/11 at 2283). Thus, because the documents specifically referenced in the Corrected Second Amended Complaint are critical to the continued deposition of Rothstein in June, 2012, an in camera inspection should be conducted of those documents prior to that time, although Epstein does not hereby waive the right to an in camera review with respect to any of the other materials referenced in the Privilege Log.

Finally, the actual prejudice to and impact on Epstein by Edwards' willful and continued non-compliance is palpable. Epstein has been prejudiced because he has not been able to conduct critical discovery necessary for the prosecution of his claims, and necessary for opposition to Edwards' summary judgment motion. Epstein has spent over tens of thousands of dollars in attorney's fees trying to obtain the requested documents from Edwards and address privilege log issues. Sanctions should be imposed on Edwards to prevent unfair prejudice to Epstein and insure the integrity of the discovery process. *See Aztec Steel Company v. Florida Steel Corp.*, 691 F. 2d 480, 482 (11th Cir.1982).

In sum, pursuant to Fla. R. Civ. P. 1.280, this Court should enter an Order finding that Edwards' privilege claims are waived, requiring Edwards to produce the documents requested by Epstein, and requiring Edwards to pay the reasonable expenses incurred by Epstein, including attorney's fees and costs, caused by Edwards' failure to provide a timely and legally sufficient privilege log, and granting such other and further relief as the Court deems necessary and proper.

Respectfully submitted,

Joseph L. Ackerman, Jr.
Florida Bar No. 235954
FOWLER WHITE BURNETT, P.A.
901 Phillips Point West
777 South Flagler Drive

West Palm Beach, Florida 33401
Telephone: (561) 802-9044
Facsimile: (561) 802-9976
Attorneys for Plaintiff Jeffrey Epstein
and
Christopher E. Knight
Florida Bar. No. 607363
FOWLER WHITE BURNETT, P.A.
Espirito Santo Plaza, 14th Floor
1395 Brickell Avenue
Miami, Florida 33131
Telephone: (305) 789-9200
Facsimile: (305) 789-9201
Attorneys for Plaintiff Jeffrey Epstein

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via electronic mail and U.S. Mail on this 1st day of January, 2012 to: Jack Scarola, Esq., Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409; Jack Alan Goldberger, Esq., Atterbury, Goldberger & Weiss, P.A., 250 Australian Ave. South, Suite 1400, West Palm Beach, FL 33401-5012; and Marc S. Nurik, Esq., Law Offices of Marc S. Nurik, One East Broward Blvd., Suite 700, Fort Lauderdale, FL 33301.

Joseph L. Ackerman, Jr.

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