

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

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IN MATTER OF APPLICATION OF BRADLEY : Index No. 112345/2010  
JAMES EDWARDS SEEKING CPLR 3102(e) : (Justice Goodman)  
ORDER FOR DAILY NEWS, [REDACTED] TO PRODUCE :  
TAPE RECORDING : Motion Seq. No. 1  
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**DAILY NEWS, L.P.'S MEMORANDUM OF LAW IN OPPOSITION TO  
MOTION FOR CPLR 3102(e) ORDER TO PRODUCE TAPE RECORDING**

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Daily News, [REDACTED], publisher of the *New York Daily News*, respectfully submits this memorandum of law in opposition to Bradley J. Edwards' motion to compel the Daily News to produce a tape recording that news reporter George Rush made of a confidential unpublished interview of Jeffrey Epstein.

### **PRELIMINARY STATEMENT**

In this ancillary discovery proceeding, a civil litigant – Edwards – seeks to compel a non-party member of the New York press to turn over to him an off-the-record unpublished interview for use in his private litigation in Florida. As such, Edwards' motion strikes at the very heart of the reporter's privilege codified in [REDACTED] Civil Rights Law § 79-h (the "Shield Law") – a privilege that "call[s] for particular vigilance by the courts of this State in safeguarding the free press against undue interference." *O'Neill v. Oakgrove Const. Inc.*, 71 [REDACTED] 2d 521, 526, 529, 528 [REDACTED] 2d 1, 3, 5 (1988) ("The autonomy of the press would be jeopardized if resort to its resource materials, by litigants seeking to utilize the newsgathering efforts of journalists for their private purposes, were routinely permitted.") (internal citations omitted).

Edwards' motion to compel must be denied for several reasons. First, the Court need not even reach the Shield Law privilege since Edwards does not satisfy the minimum standards for non-party disclosure under CPLR 3101(a)(4) – which requires that even non-privileged evidence must have heightened relevance and be otherwise unobtainable from alternative sources before it may be subpoenaed from any non-party in New York. In fact, Edwards concedes in his own Florida court filings that the Epstein interview is, at best, cumulative of "overwhelming evidence" he has already obtained from several alternative sources. Second, even if Edwards were able to satisfy the heightened showing for non-party disclosure under CPLR 3101(a)(4), his motion to compel would not be able to overcome the still higher bar erected by the Shield Law. The content of the unpublished Epstein interview is confidential, and the Shield Law provides an absolute

privilege against compelled disclosure of “any news obtained or received in confidence.” [REDACTED] Civil Rights Law § 79-h(b). Even assuming *arguendo* that the unpublished Epstein interview constitutes non-confidential newsgathering material, Edwards – by his own admissions – does not remotely make the rigorous “clear and specific” showing that Section 79-h(c) of the Shield Law mandates before a litigant may compel the press to disclose non-confidential, unpublished material – namely, he does not meet his heavy burden under the Shield Law of demonstrating that the Epstein interview is not just “highly material and relevant,” but also “critical or necessary” to defending the claims at issue in his current lawsuit. *Id.* Third and finally, Edwards’ contention that Rush waived the reporter’s privilege is without merit and, indeed, Edwards fails to apprise this Court that he unsuccessfully tried to make this very waiver argument in a prior proceeding.

Illustrating the very disruption to news organizations caused by “unhampered ... repeated demands for [their] resource materials” (*O’Neill*, 71 [REDACTED] 2d at 526), which the Shield Law is designed to prohibit, this discovery motion marks the second time that movant and Florida attorney Bradley J. Edwards has demanded that the Daily News produce reporter Rush’s off-the-record unpublished interview of billionaire financier Jeffrey Epstein. The first attempt was in a federal District Court action on behalf of an unnamed “Jane Doe” client (the “Jane Doe Action”), one of three young women Edwards represented in suing Epstein for sexual abuse of minors. Edward’s argument that Rush had waived the reporter’s privilege by disclosing brief portions of the Epstein interview to other sources during the newsgathering process (the same failed waiver argument Edwards tries to recycle in this proceeding) was rejected; instead, the federal court applied the federal qualified reporter’s privilege that governs non-confidential newsgathering material in federal proceedings. Applying the qualified federal privilege (which provides significantly less protection to the press than does the rigorous [REDACTED] Shield Law standard at issue

here), the District Court concluded that Jane Doe had overcome the federal privilege because a small portion of the Epstein interview was “of likely relevance to a significant issue in Jane Doe[‘s]” sexual abuse case – *i.e.*, whether Epstein had had sex with her when she was a minor – and was not reasonably obtainable from other sources since Epstein had invoked the Fifth Amendment in refusing to testify. The net result of this federal action, however, was that the Daily News was not required to produce the Epstein interview tape in the Jane Doe Action because, on appeal, the decision below was vacated – rendering the District Court decision a total nullity with no res judicata or precedential effect whatsoever – when the sexual abuse lawsuits brought by Jane Doe and Edwards’ two other clients settled.

In this second round, Edwards now seeks production of the Epstein interview for use in an entirely different litigation in which he himself – not Jane Doe – is a party. Specifically, in January 2010 the managing partner of Edwards’ former law firm, Scott Rothstein, pled guilty and was sentenced to 50 years in prison for a massive “Ponzi” scheme in which he defrauded investors of \$1.2 billion by convincing them to purchase fictitious settlement agreements. Seeking to capitalize on this event, Epstein brought a civil lawsuit against Edwards in Florida state court in which he alleges that Edwards was involved in, or knew or should have known about, Rothstein’s Ponzi scheme, and pleads claims against Edwards for fraud and violation of Florida’s racketeering statute as well as an abuse of process claim alleging that Edwards engaged in abusive discovery practices during the course of the sex abuse litigation against Epstein. *Epstein v. Rothstein*, No. 50 2009 CA 040800XXXXMBAG (Fl. Cir. Ct., Palm Beach Co.) (the “Ponzi Scheme Action”). In response, Edwards filed an abuse of process counterclaim alleging that Epstein filed the Ponzi Scheme Action for the improper purpose of intimidating Edwards from pursuing his clients’ claims. In his present motion to compel, Edwards once again attempts to drag the Daily News into

the fray, now seeking Rush's unpublished interview of Epstein for use in the Ponzi Scheme Action.

Simply put, in his motion papers here, Edwards confuses and improperly conflates the fraud claims now at issue in the Ponzi Scheme Action against him with his former clients' settled sex abuse claims against Epstein – in a misguided attempt to ride the coat tails of the vacated District Court production order from the Jane Doe Action. This action (the Ponzi Scheme Action), however, involves different parties (Edwards, not plaintiff Jane Doe), entirely different causes of action (whether Edwards participated in Rothstein's fraudulent Ponzi scheme, not whether Epstein sexually abused Jane Doe) and entirely different law (New York's stringent Shield Law, not the less protective federal reporter's privilege). And the unpublished Epstein interview, which was conducted months before the Edwards-Epstein litigation even arose, has nothing to do with Edwards' and Epstein's claims against each other in the Ponzi Scheme Action, which are the only claims at issue here.<sup>1</sup>

Indeed, the summary judgment motion that Edwards has just filed in the Florida Ponzi Scheme Action compellingly demonstrates that the unpublished Epstein interview does not come close to being “critical or necessary” to maintenance of his defenses and claims in that action and that Edwards has a wealth of “alternative sources” of evidence. One, Edwards himself is the key witness – he unequivocally states in his summary judgment brief that “Edwards was simply not involved in any Ponzi scheme, he has provided sworn testimony and an affidavit in support of that assertion, and there is not (and never could be) any contrary evidence.”<sup>2</sup> Two, even with respect to the wholly peripheral issue of whether Epstein sexually abused Edwards' three clients,

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<sup>1</sup> At oral argument of this motion, the Daily News will submit the Epstein interview recording, and a written transcript thereof, to this Court for *in camera* review.

<sup>2</sup> See Edwards' Motion for Final Summary Judgment in the Ponzi Scheme Action (“SJ Motion”) at 6, annexed as Exhibit F to the accompanying Affirmation of Robert D. Balin, dated Nov. 1, 2010 (“Balin Aff.”).

Edwards (once again contrary to his assertions here) confirms in his summary judgment brief that there is “overwhelming evidence [from which] the Court can see for itself that all of the facts alleged by Edwards [in the three sexual abuse complaints against Epstein] were true” – including Epstein’s guilty plea to soliciting minors for prostitution. SJ Motion at 12 (emphasis added). Three, Edwards makes clear in his summary judgment motion that Epstein’s invocation of the Fifth Amendment in refusing to testify about his basis for bringing fraud/abuse of process claims against Edwards requires dismissal of his Ponzi Scheme Action (since, under settled law, Epstein cannot bring affirmative civil claims while at the same time refusing to testify as to those claims) and also entitles Edwards to conclusive adverse inferences against Epstein. SJ Motion at 20-23. In short, as Edwards himself acknowledges, Epstein’s invocation of the Fifth Amendment is a litigation bonanza for Edwards.

In sum, by his own admissions, Edwards clearly cannot satisfy the stringent showing required by the New York Shield Law for production of the unpublished Epstein interview or even the lesser showing required before discovery is permitted from any non-party under CPLR 3101(a)(4). His motion should be denied.

### **STATEMENT OF RELEVANT FACTS**

#### **A. The Jane Doe Action**

The Jane Doe Action arose from a widely-publicized scandal in which Palm Beach billionaire Jeffrey Epstein was investigated by the FBI and charged by Florida state authorities with having paid numerous underage girls for sexual acts in the early to mid-2000s. *See* Balin Aff. Ex. I (Non-Prosecution Agreement (“NPA”)). Under a non-prosecution agreement with federal authorities, in 2008 Epstein pled guilty to one state criminal charge of soliciting minors to engage in prostitution (requiring Epstein to register as a sex offender) and to a second state charge of soliciting prostitution, in exchange for which the federal authorities agreed not to

prosecute Epstein on federal charges. NPA at 3-5.

After Epstein's guilty plea in 2008, more than 20 sexual abuse suits were commenced against him by young women who had been his victims. *See* Balin Aff. Ex. G (Statement of Undisputed Facts ("SUF") in Ponzi Scheme Action) ¶¶ 48-49. Edwards, an attorney in Florida, filed three such suits on behalf of three of Epstein's victims – "Jane Doe", "██████." and "E.W."<sup>3</sup>

#### **B. The Unpublished Epstein Interview**

George Rush was a *Daily News* journalist who covered the unfolding sex abuse scandal surrounding Epstein. Balin Aff. Ex. J (Affidavit of George Rush, sworn to April 6, 2010 ("Rush Aff.")), ¶ 1. In pursuing the ongoing story, Rush developed contacts and sources among various lawyers and others close to the case – including attorney Edwards – who could provide tips and information to assist his reporting. Rush Aff. ¶¶ 3, 6-7.

In October 2009, Rush obtained a telephone interview with Epstein to talk about the status of the civil cases against him. *See* Rush Aff. ¶ 4; Balin Aff. Ex. L (Supplementary Affidavit of George Rush, sworn to April 30, 2010 ("Rush Supp. Aff.")), ¶ 2. Epstein and Rush agreed at the outset that the interview was "off-the-record" – in other words, that the contents of the interview (though not the fact of it) were "confidential and not to be published." Rush Aff. ¶ 5. The interview lasted approximately 22 minutes and was recorded by Rush on a digital recording device. *Id.* During the interview, Epstein made no material admissions regarding the young women suing him for sexual abuse. Rush Supp. Aff. ¶¶ 4-5. So too, because the interview took place months before Epstein filed the Ponzi Scheme Action (and before Rothstein was even publicly charged), the interview contains absolutely no statements about the Ponzi Scheme Action.

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<sup>3</sup> *See Jane Doe v. Epstein*, No. 9:08-cv-80893 (United States District Court █████, Fla.); █████ *v. Epstein*, Case No. 502008CA028051XXXXMBAB (Fl. Cir. Ct.); *E.W. v. Epstein*, Case No. 502008CA028XXXXMBAB (Fl. Cir. Ct.).

Several days later, Rush met with three individuals he regarded as valuable news sources – a filmmaker investigating child sex trafficking, an activist concerned with social policy issues arising from the Epstein sex scandal and an attorney following the case. Rush Aff. ¶ 6. “[U]nder an agreement of strict secrecy” (*id.* ¶ 6), Rush played two of them a three-to-four minute excerpt from the beginning of the Epstein interview in exchange for information to assist his reporting. *Id.* ¶ 6; Rush Supp. Aff. ¶¶ 6-7.

In covering the story, Rush also regularly spoke by telephone with Edwards, who was an important source to Rush for comment and newsgathering about the case. Rush Aff. ¶ 7. Rush used some of the information he had learned from the Epstein interview as the basis for questions to Edwards. *Id.* At a later point, Rush told Edwards that he (Rush) had conducted a recorded interview of Epstein and, as part of an exchange of information with Edwards, apprised Edwards of a procedural development in another victim’s case that had been related by Epstein. *Id.* In a later call, Edwards asked for a copy of the Epstein interview. Rush declined, informing Edwards that the interview had been off-the-record and, moreover, would be of no help to his clients. *Id.* ¶ 8. Thereafter, on October 22, 2009, Rush also had a call with Michael Fisten, an investigator employed by Edwards on the sexual abuse cases, during which Rush paraphrased aspects of the Epstein interview. Moving Affidavit of Michael Fisten, sworn to Sept. 14, 2010, ¶ 8. Fisten also requested a copy of the Epstein interview, which request was likewise refused. *Id.* ¶ 10.

The Daily News has not published any articles publicly quoting from the off-the-record Epstein interview. Rush Supp. Aff. ¶ 7.

### **C. The Vacated District Court Order in the Jane Doe Action**

In March 2010, in connection with the Jane Doe Action pending in the Southern District of Florida, Edwards, as attorney for plaintiff Jane Doe, served the Daily News and Rush with Southern District of New York subpoenas calling for production of the Epstein interview for use

at the then-upcoming trial of the Jane Doe Action. *See* Balin Aff. Ex. M (Memorandum & Order dated May 18, 2010 (“Dist. Ct. Op.”)), at 1. Thereafter, the Daily News and Rush instituted an ancillary proceeding in the Southern District of New York to quash the subpoenas on the ground (among others) that Jane Doe could not overcome the federal reporter’s privilege.

In opposition to the motion to quash, Edwards (on behalf of his client) argued that Rush had waived any applicable reporter’s privilege by disclosing brief portions of the Epstein interview to third parties (Balin Aff. Ex. K (Jane Doe’s Response in Opposition to Motion of Daily News, ██████ to Quash Subpoena), at 6-13) – the same exact waiver argument he makes here. The federal District Court (McKenna, J.) did not accept Edwards’ waiver argument; but, instead, ruled that, since Epstein was known to be the source for the interview, he was a non-confidential source and his unpublished interview therefore fell within the federal qualified privilege that governs non-confidential news material in the Second Circuit. Dist. Ct. Op. at 4 (quoting *Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1999)). Applying the federal qualified privilege standard (which is significantly less demanding than the more rigorous ██████. Shield Law privilege), the District Court concluded that, given Jane Doe’s need to prove the allegations of her sexual abuse claim, Jane Doe had overcome the federal qualified privilege in her case because “portions of the recording ‘are of likely relevance to a significant issue in [the Jane Doe Action],’ ... or, rather, depending on how used, two issues, liability and damages” and because Epstein refused to testify regarding whether he had had sex with Jane Doe. Dist. Ct. Op. at 4-5.

The Daily News and Rush thereafter appealed the District Court decision to the Second Circuit. While the appeal was pending, the Jane Doe Action (as well as the ██████. and E.W. suits) settled. *See* Moving Affirmation of Robert Y. Lewis, dated Sept. 15, 2010 (“Lewis Aff.”), ¶ 7. The Daily News and Rush then moved the Second Circuit to vacate the District Court decision.

On July 28, 2010, the Second Circuit granted their motion to vacate (*see* Balin Aff. Ex. N (Vacatur Order)) – with the result that the vacated District Court decision has no legal force.

**D. The Ponzi Scheme Action**

It is the claims in the Ponzi Scheme Action – and only those claims – that have any bearing on the pending discovery motion. The facts underlying that action are briefly as follows:

Scott Rothstein was the managing partner and CEO of Rothstein, Rosenfeldt and Adler (“RRA”), a 70-lawyer firm in Fort Lauderdale, Florida. Balin Aff. Ex. A, Ex. 1 (“Rothstein Information”) ¶¶ 1-2; *id.*, Ex. 2 (Amended Complaint for Dissolution) at 1 and ¶¶ 3-5. In early December 2009, the U.S. Attorney for the Southern District of Florida charged Rothstein with criminal racketeering, money laundering, wire fraud and mail fraud. *See* Rothstein Information. At the heart of the criminal case against Rothstein was a massive Ponzi scheme in which, from 2005 through November 2009, Rothstein and unindicted co-conspirators defrauded investors of \$1.2 billion by selling them (at a discount) fictitious settlement agreements from non-existent whistle-blower and sexual harassment cases. Rothstein Information ¶¶ 6, 11; SUF ¶ 86. In January 2010, Rothstein pled guilty and was sentenced to 50 years in jail. *See* Balin Aff. Ex. O. Neither Edwards (who worked at RRA for eight months in 2009) nor any other RRA attorney besides Rothstein was ever indicted or implicated in the Ponzi scheme. SUF ¶ 88.

Nonetheless, in December 2009, Epstein filed his civil Ponzi Scheme Action against Rothstein and Edwards in Florida state court. In his motion to compel, Edwards repeatedly asserts that Epstein supposedly claims in the Ponzi Scheme Action “that the three civil suits Edwards filed against him [for sexual abuse] were somehow fabricated[.]” Moving Brief (“Moving Br.”) at 14. That is a patently inaccurate misdescription. Nowhere in his complaint in the Ponzi Scheme Action does Epstein allege that the sex abuse suits brought by Jane Doe, ■■■, and E.W. were fabricated. Instead, what the complaint actually alleges is that Rothstein used

these three legitimate lawsuits and other real lawsuits “as bait. That’s the way [Rothstein] raised all the money. He would use [real] cases as bait for luring investors into fictional cases.” Balin Aff. Ex A (Complaint in Ponzi Scheme Action (“Ponzi Scheme Complaint”)), ¶ 20; *id.* at ¶ 25 (alleging that Rothstein told investors that “in addition to the [three real] Civil Actions another fifty (50) plus [fictitious] anonymous females were represented by RRA, with the potential for hundreds of millions of dollars in settlements”); *id.* at ¶¶ 28-30.

Alleging that Edwards “knew or should have known that Rothstein was utilizing RRA as a front for [his] massive Ponzi scheme,” Epstein’s complaint alleges claims against Rothstein and Edwards for fraud, violation of Florida’s civil racketeering statute and violation of Florida’s Civil Remedies for Criminal Practices Act. Ponzi Scheme Complaint ¶¶ 26, 54-68, 73-78.<sup>4</sup> The complaint also pleads an abuse of process claim alleging that, after the three sex abuse suits were filed, Edwards engaged in harassing press conferences and abusive discovery tactics (such as listing public figure friends of Epstein as potential witnesses) in order to embarrass Epstein and drive up the settlement value of the cases. *Id.* ¶¶ 38-42, 69-72. Edwards thereafter asserted a counterclaim against Epstein for abuse of process, alleging that the “sole purpose” of Epstein’s claims against him was to “intimidate” Edwards into not pursuing his clients’ suits. Balin Aff. Ex. B (Edwards’ Ponzi Scheme Counterclaim), ¶ 9.

On September 22, 2010, Edwards filed a motion for summary judgment to dismiss the Ponzi Scheme Action on several grounds – a motion which (as discussed below) repeatedly contradicts the assertions made by Edwards to this Court. That motion is pending.

#### **E. The Present Motion to Compel**

On July 19, 2010, Edwards filed a one-page motion with the Florida state court in the

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<sup>4</sup> Although ██████ was initially named as a defendant, she was dismissed from the Ponzi Scheme Action as part of the overall settlement of her claims. *See* Balin Aff. Ex. H, at pp. 19-20 (Dkt. Nos. 102-103 in Ponzi Scheme Action).

Ponzi Scheme Action asking for appointment of a commissioner to take “the deposition duces tecum of the Records Custodian of The New York Daily News.” Balin Aff. Ex. D (Edwards’ Motion to Appoint Commissioner) at 1. The Daily News was not made a party to the Florida motion nor given any opportunity to raise challenges in the Florida court. On August 3, 2010, the Florida court granted the motion and issued an order appointing a commissioner to take “the deposition duce [sic] tecum of the Records Custodian of The New York Daily News.” Balin Aff. Ex. E (Order on Defendant’s Motion to Appoint Commissioner) at 1. The Florida order makes no mention of the Epstein interview, and Edwards submits nothing indicating that the Florida court ever considered the propriety of its production.

Nonetheless, armed with this Florida order that does not even mention the Epstein interview, on September 20, 2010, Edwards filed this motion under CPLR 3102(e) requesting an order compelling the Daily News to produce “the audio tape recording of the conversation between Daily News reporter George Rush and Jeffrey Epstein.” Lewis Aff. Ex. 2.

### **ARGUMENT**

Where, as here, a party has secured a commission from an out-of-state court for discovery from a non-party who resides in New York, that out-of-state discovery commission is not, of course, self-executing. Instead, under CPLR 3102(e), the party must request that a New York Court issue an order directing the requested discovery in this state. And as recently noted by Justice York, it is well settled that Section 3102(e) does not permit a New York court to:

rubber stamp a foreign court’s Letters Rogatory. Instead, ... a court retains the power to quash subpoenas due to, *inter alia*, legislatively enacted privileges, an independent determination that the material at issue is neither critical nor necessary and a desire to prevent unnecessary harassment. Thus, this Court must make its own determination as to the validity of [the non-party’s] challenges [to discovery].... [T]his is especially true where, as here, the nonparties had no notice of the [out-of-state discovery] hearing and no opportunity to raise the [discovery] challenges before the [out-of-state] court.

*In re Zallie*, 2009 WL 2844429 (Sup. Ct. [REDACTED]. Co. Aug. 13, 2009) (emphasis added) (refusing to enforce out-of-state letters rogatory since information sought to be discovered from New York non-party was available from other sources); *Kirkland & Ellis v. Chadbourne & Parke LLP*, 176 Misc.2d 73, 77, 670 [REDACTED].2d 753, 756 (Sup. Ct. [REDACTED]. Co. 1998) (under CPLR 3102(e), “[t]his Court may not simply rubber stamp the decision of the Minnesota court”); *In re Pennzoil Co.*, 108 [REDACTED].2d 666, 667, 485 [REDACTED].2d 533, 535 (1st Dep’t 1985) (under Section 3102(e), quashing portion of subpoena seeking unpublished material from New York journalist for use in Texas proceeding since the unpublished material was privileged under New York Shield Law); *In re Sheehan*, 2008 WL 2148403 (Sup. Ct. [REDACTED]. Co. May 9, 2008) (denying Section 3102(e) motion for deposition of New York journalist for use in Florida action since requested testimony was privileged under New York Shield Law).<sup>5</sup>

Here, Edwards’ Section 3102(e) motion to compel must be denied since the unpublished Epstein interview is clearly privileged under the New York Shield Law; and, even without regard to the Shield Law privilege, Edwards cannot even make the showing required for general non-party discovery in New York.

## I.

### **EDWARDS MAY NOT RELY ON THE VACATED DISTRICT COURT ORDER FROM THE JANE DOE ACTION**

As a threshold matter, throughout his moving brief Edwards heavily relies on the vacated District Court production order from the Jane Doe Action as the basis for his argument that he too is similarly entitled to production of the Epstein interview for use in the Ponzi Scheme

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<sup>5</sup> As *Pennzoil* and *Sheehan* illustrate, where (as here) a party files a New York proceeding seeking discovery of newsgathering material from a New York news organization for use in an out-of-state-proceeding, the courts of this state apply the evidentiary privilege of New York’s Shield Law as the governing state law privilege. In this regard, Edwards concedes in his motion that New York’s Shield Law is the privilege standard that applies in this case. *See* Moving Br. at 14 (citing New York Shield Section 79-h as governing standard).

Action. Moving Br. at 2, 7-8, 18. This reliance is clearly misplaced for several reasons.

First and foremost, as a matter of settled law, having been vacated by the Second Circuit, the District Court decision in the Jane Doe Action is a nullity which has absolutely no res judicata or precedential effect. Because the settlement of the Jane Doe Action mooted the Daily News' pending appeal from the District Court's decision, the Second Circuit exercised its discretion to vacate the decision to ensure that the Daily News (stymied in its effort to appeal) would not be prejudiced and so that others (like Edwards) would not be able to rely on the decision. Indeed, the very purpose of vacatur is "to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *U.S. v. Munsingwear*, 340 U.S. 36, 41 (1950), cited in *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (vacatur "deprives [the lower] court's opinion of precedential effect"); see also *Associated Gen. Contractors of Conn., Inc. v. City of New Haven*, 41 F.3d 62, 67 (2d Cir. 1994) (vacatur ensures that a party will "not suffer ... adverse res judicata effects"). And, in this proceeding, Edwards tries to do precisely what is prohibited – "to pursue [new subpoenas] on the basis of a district court decision" that has been vacated. *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 48 (2d Cir. 2006).<sup>6</sup>

Second and equally important, besides being vacated, the District Court's analysis in the Jane Doe decision is completely irrelevant to the question here of whether Edwards is entitled to production of the Epstein interview for use in the current Ponzi Scheme Action. The decision in the Jane Doe Action involved different parties (plaintiff Jane Doe, not defendant/counterclaimant Edwards); it involved entirely different causes of action and issues (sexual abuse claims against Epstein, not Ponzi scheme fraud claims against Edwards); and it involved an entirely different

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<sup>6</sup> Edwards would have this Court believe that the settlement of the Jane Doe Action resulted in a routine, "automatic vacation of the district court ruling." Moving Br. at 2. In fact, far from being "automatic," the Daily News had to move the Second Circuit for vacatur; Edwards consented to the vacatur and the decision of whether or not to grant vacatur falls within the discretion of the Second Circuit. *Russman v. Bd. of Ed.*, 260 F.3d 114, 121 (2d Cir. 2001).

reporter's privilege (the less demanding federal qualified privilege, not the more stringent New York Shield law privilege that applies in this case). *Compare* Dist. Ct. Op. at 4 (to overcome federal qualified privilege for non-confidential materials, litigant need only 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" (quoting *Gonzales*, 194 F.3d at 36)) with [REDACTED]. Civil Rights Law § 79-h(c) (to overcome state Shield Law privilege for non-confidential material, party must make "a clear and specific showing" that the material at issue "(i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim [or] defense ...; and (iii) is not obtainable from any alternative source").

In short, it is legally meritless for Edwards to rely on the vacated result in the Jane Doe Action. Instead, he must independently establish that he (not Jane Doe) is entitled to the Epstein interview in connection with the claims now at issue in the Ponzi Scheme Action. And that is what he fails to do.

## II.

### **EDWARDS FAILS TO MEET THE REQUIREMENTS FOR DISCOVERY OF A NON-PARTY UNDER CPLR 3101(a)**

As discussed below, the unpublished Epstein interview was and remains clearly privileged under the New York Shield Law. (*See* Points III and IV, *infra*.) Yet, this Court does not even need to reach the Shield Law privilege. For, even without regard to the privilege, the Epstein interview is not discoverable under the general non-party disclosure requirements of CPLR 3101(a)(4).

First, under CPLR 3101(a)(4), "[m]ore than mere relevance and materiality is necessary to warrant disclosure from a nonparty." *Kooper v. Kooper*, 74 [REDACTED].3d 6, 17-18, 901 [REDACTED].2d 312, 323 (2d Dep't 2010); *Fraser v. Park Newspapers of St. Lawrence Inc.*, 257 [REDACTED].2d 961,

962, 684 [REDACTED] 3d 332, 334 (3d Dep't 1999) (same). This heightened relevancy requirement for non-party disclosure exists because "nonparties ordinarily should not be burdened with responding to subpoenas for lawsuits in which they have no stake or interest unless the particular circumstances of the case require their involvement." *Kooper*, 74 [REDACTED] 3d at 18 (emphasis added).

Second, even where evidence has heightened relevance, a party seeking disclosure from a non-party must also demonstrate that "the disclosure sought cannot be obtained from sources other than the nonparty." *Kooper*, 74 [REDACTED] 3d at 16-17 (quashing non-party subpoenas). Indeed, courts in the First Department routinely deny non-party disclosure on this ground. *See, e.g., Tannenbaum v. City of New York*, 30 [REDACTED] 3d 357, 359, 819 [REDACTED] 2d 4, 6 (1st Dep't 2006) (denying request to depose non-party witness where party seeking disclosure failed to demonstrate the information sought "could not be obtained from other sources"); *Zallie*, 2009 WL 2844429 ("the party seeking the [non-party] subpoena must show that the information sought is ... unobtainable from other sources") (quashing non-party subpoena); *Ash v. Bd. of Managers of the 155 Condominium*, 2006 WL 5376806 (Sup. Ct. [REDACTED] Co. Oct. 25, 2006) ("a party seeking disclosure from a non-party witness must first demonstrate ... that the information sought ... can not be obtained from other sources") (quashing non-party subpoenas), *rev'd in part on other grounds*, 44 [REDACTED] 3d 324, 843 [REDACTED] 2d 218 (1st Dep't 2007).

**A. The Epstein Interview Does Not Have Heightened Relevance to the Issues in the Ponzi Scheme Action**

Here, Edwards wholly fails to satisfy either of the strict requirements for non-party discovery. The Epstein interview simply has no relevance (let alone the required heightened relevance and materiality) to the fraud and abuse of process claims that are at issue in the Ponzi Scheme Action. Indeed, the October 2009 Epstein interview was conducted two months before Rothstein was even indicted by authorities for his Ponzi scheme fraud in December 2009 (and

two months before the Ponzi Scheme Action was filed). Accordingly, as this Court can readily see for itself from the interview transcript, nowhere in the interview does Epstein discuss Rothstein's Ponzi scheme – which had not yet even been made public.

In his summary judgment motion, Edwards acknowledges that “[t]he bulk of Epstein’s claims against Edwards hinge on the premise that Edwards was involved in a Ponzi scheme run by Scott Rothstein.” SJ Motion at 6; *see also* Ponzi Scheme Counterclaim ¶ 10 (acknowledging that the gist of Epstein’s claims is that Edwards was “a knowing participant in a civil theft and criminal enterprise”). Since nothing in the Epstein interview – nothing – discusses or refers to the Ponzi scheme, to any participation by Edwards in the Ponzi scheme or to Epstein’s motive for bringing the Ponzi Scheme Action against Edwards, the interview obviously does not have heightened relevance and materiality (or indeed any relevance) to the claims at issue in the Ponzi Scheme Action. Edwards is simply on a fishing expedition – which CPLR 3101(a)(4) prohibits. *Kooper*, 74 ██████.3d at 18 (where party cannot establish that sought after evidence has “more than mere relevance,” a non-party “should not be burdened with responding to subpoenas”).

Unable to credibly demonstrate that the Epstein interview has heightened relevance to the actual claims at issue in the Ponzi Scheme Action, in his motion to compel Edwards unfortunately resorts to distortion. Thus, he inaccurately (and repeatedly) asserts that, in the Ponzi Scheme Action, Epstein is supposedly making a “claim that the three [sex abuse] suits Edwards filed against him were somehow fabricated” and that Edwards therefore needs the interview tape to help establish that Epstein sexually abused his three clients. Moving Br. at 14, 16; *see also id.* at 1 (asserting that “Epstein’s molestation of [Jane Doe, ██████, and E.W.] is the central issue in the [Ponzi Scheme Action]”); *id.* at 2 (asserting that Epstein has supposedly alleged an “abuse of process [claim] for filing fabricated claims against him”); *id.* at 7.

That, of course, is not what Epstein alleges in the Ponzi Scheme Action (and Edwards again muddles the claims in this action with the claims in the settled Jane Doe Action). Nowhere does the complaint in the Ponzi Scheme Action allege that the sex abuse suits filed by Edwards' three clients were fabricated. Rather, the complaint alleges that Rothstein used these legitimate sex abuse claims against Epstein as "bait" to "lur[e]" and defraud investors into purchasing non-existent settlements in other "fictional cases." Ponzi Scheme Compl. ¶ 20; *see also id.* ¶¶ 25, 28-30. And Epstein's claim against Edwards is that he "knew or should have known" that Rothstein was defrauding investors into buying non-existent settlements in other cases. *Id.* ¶ 26. In short, the merits of the three sex abuse cases filed by Edwards are simply not at issue in the Ponzi Scheme Action.

In this regard, not only does Edwards seriously mischaracterize the factual allegations of the claims at issue in the Ponzi Scheme Action, but he also studiously avoids discussing the legal elements of those claims as well – and for good reason. In the Ponzi Scheme Action, Epstein alleges that, after filing the sex abuse suits, Edwards engaged in harassing discovery tactics that amounted to an "abuse of process"; and Edwards counterclaims that Epstein committed abuse of process by trying to "intimidate" Edwards into not pursuing his clients' suits. Ponzi Scheme Compl. ¶¶ 38-42, 69-72; Ponzi Scheme Counterclaim ¶ 9.<sup>7</sup> Under Florida law, however, the validity of the underlying sexual abuse claims is legally irrelevant to either party's abuse of process claim.

This is because the tort of abuse of process focuses exclusively on *post-filing* acts:

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<sup>7</sup> In his moving brief here, Edwards – in yet one more misstatement – describes his counterclaim as one for "malicious prosecution." Moving Br. at 2. In fact, Edwards stipulated in the Florida Ponzi Scheme Action that his counterclaim "is solely an abuse of process claim." *See* Balin Aff. Ex. C (Jan. 26, 2010 Order) (emphasis added). Nor could Edwards state a claim for malicious prosecution since there is no terminated litigation between himself and Epstein. *See Valdes v. GAB Robins North Am., Inc.*, 924 So.2d 862, 866 (Fla. Dist. Ct. App. 2006) ("bona fide termination" of prior litigation in current plaintiff's favor is essential element of malicious prosecution claim).

“[A]buse of process requires an act constituting the misuse of process *after* it issues. The maliciousness or lack of foundation of the asserted cause of action itself is actually irrelevant to the tort of abuse of process.” *Cazares v. Church of Scientology of Calif., Inc.*, 444 So.2d 442, 444 (Fla. Dist. Ct. App. 1983) (emphasis added), *quoted in Artubel v. Colonial Bank Group, Inc.*, 2008 WL 3411785, at \*16 (■■■■). Fla. Aug. 8, 2008). *See also Johnson Law Group v. Elimadebt USA, LLC*, 2010 WL 2035284, at \*4 (■■■■). Fla. May 24, 2010) (“The Court finds that Defendants’ alleged filing of a baseless suit ... is not an affirmative post-issuance misuse of process”); *S&I Investments v. Payless Flea Market, Inc.*, 36 So.3d 909, 917 (Fla. Dist. Ct. App. 2010); *Yoder v. Adriatico*, 459 So.2d 449, 450 (Fla. Dist. Ct. App. 1984) (“the tort of abuse of process is concerned with the improper use of process after it issues”). Thus, contrary to Edwards’ contention that he supposedly needs the Epstein interview tape “to disprove that he ... fabricated [the three sex abuse cases] against Epstein” (Moving Br. at 16), the merit (or lack thereof) of the three settled sex abuse cases is irrelevant to the parties’ abuse of process claims in the Ponzi Scheme Action as a matter of law.<sup>8</sup>

Last, unable to make the required showing, Edwards focuses on trivial peripheral issues. Thus, Edwards argues that the interview is “proof” that Epstein committed “perjury” at a deposition in one of the now-settled suits by implying that “he did not recognize” reporter Rush. Moving Br. at 17; *see also* Moving Affidavit of Bradley James Edwards, sworn to Sept. 14, 2010 (“Edwards Aff.”), ¶ 22. Besides being farfetched and factually unsupported, Edwards’ apparent desire to attack Epstein’s credibility on such a patently peripheral issue has absolutely no substantive relevance to the merits of the claims in the Ponzi Scheme Action and does not

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<sup>8</sup> Indeed, Epstein’s settlement of the three suits legally bars him from ever making such a claim for malicious prosecution. *See Della-Donna v. Nova University, Inc.*, 512 So.2d 1051, 1055 (Fla. Dist. Ct. App. 1987) (“a bona fide termination favorable to plaintiff does not encompass a termination resulting from negotiation, settlement, or consent”) (holding that where underlying suit had settled, party to settlement may not thereafter bring malicious prosecution suit based on settled claims).

remotely satisfy the CPLR 3101(a)(4) requirements for non-party discovery. *See, e.g., Fraser*, 257 █.2d at 962 (seeking to depose non-party for information “that may bear upon plaintiff’s credibility” does not meet the requirement of heightened relevance that “must be shown to obtain disclosure from a nonparty witness”); *Blittner v. Berg & Dorf*, 138 █.2d 439, 440-441, 525 █.2d 858, 859 (2d Dep’t 1988) (courts will not permit non-party discovery that is focused on a “collateral matter”).

**B. Edwards Admits That the Information He Seeks Is Available From An “Overwhelming” Number of Other Sources**

So too, Edwards admits in his Florida summary judgment motion that the information he seeks from the Epstein interview tape is available from numerous other sources. *Tannenbaum*, 30 █.3d at 359 (non-party discovery is not permitted where information sought can “be obtained from other sources”).

Indeed, the primary source of evidence relevant to the claims asserted in the Ponzi Scheme Action is Edwards himself. As he unequivocally states in his summary judgment motion, “Edwards was simply not involved in any Ponzi scheme, he has provided sworn testimony and an affidavit in support of that assertion, and there is not (and could never be) any contrary evidence.” SJ Motion at 6. Edwards has also submitted with his summary judgment motion a letter from the U.S. Attorney for the Southern District of Florida confirming that – like the other attorneys at RRA – he was a “victim” (not perpetrator) of Rothstein’s Ponzi scheme, as well as a decision from the Florida Bar dismissing an ethics complaint in which Epstein similarly charged that Edwards was involved in Rothstein’s wrongdoing. *See* SUF ¶¶ 91-92 .

So too, even if evidence of Epstein’s sexual abuse of Edwards’ clients and other minors was somehow relevant to the claims in the Ponzi Scheme Action (and, as noted above, it is truly not), Edwards admits in his summary judgment motion that he has a wealth of available sources

to establish these facts. SJ Motion at 12 (acknowledging the “overwhelming evidence” that Epstein sexually abused his clients and other minors); *id.* at 7 (“the evidence of Epstein’s crimes is now clear”). Among the many other evidentiary sources listed by Edwards:

- Jane Doe, [REDACTED], and E.W. have all provided graphic eyewitness testimony that they were sexually abused by Epstein when minors. *See* SUF ¶ 2 (“Deposition of Jane Doe, September 24, 2009 and continued March 11, 2010, at 527 (minor girl sexually abused at least 17 times by Epstein) ...; *id.* 564-67 (vaginal penetration by Epstein with his fingers), 568 (vaginal penetration by Epstein with massager); Deposition of [REDACTED], September 24, 2009, at 73 ... (describing the manner in which Epstein abused her beginning when [REDACTED] was 13 years old, touching her vagina with his fingers and vibrator) at 74, line 12-13 (she was personally molested by Epstein more than 50 times), at 164, line 19-23 and 141, line 12-13 and 605, 3-6 (describing that ... she brought him more than seventy (70) underage girls ...); Deposition of E.W., May 6, 2010 ... at 115-116, 131 and 255 (describing Epstein’s abuse of her beginning at age 14 when he paid her for touching her vagina, inserting his fingers and using a vibrator .... She brought him between 20 and 30 [other] underage females.)”)
- Jane Doe, [REDACTED], and E.W. were all recognized by the U.S. Attorney’s office as having been victims of Epstein’s sexual abuse of minors. *See* SUF ¶¶ 7, 29-30, 33.
- Several other young women have provided testimony, given police statements and filed complaints describing the details of their sexual abuse by Epstein when minors. SUF ¶¶ 2-4, 12-14.
- Epstein pled guilty to soliciting minors for prostitution and was required to register as a sex offender. *See* NPA at 3.
- Epstein kept a journal on his computer – called the “Holy Grail” – that contains the names of many underage females Epstein sexually abused in locations around the country and the world. SUF ¶¶ 16-18.

In short, Edwards does not – and obviously cannot – demonstrate that the information he seeks from the Epstein interview recording (supposed evidence that Epstein sexually abused his clients) is unobtainable from other sources.

Edwards makes much of the fact that Epstein has invoked the Fifth Amendment and refused to answer questions about the now-settled sexual abuse claims (which, as noted above, are simply not relevant to the Ponzi Scheme Action). According to Edwards, other than the Epstein interview recording, he cannot obtain other “recorded statements by Epstein.” Moving

Br. at 18. Yet, the question is not whether the Epstein interview is the only recording of Epstein, but rather, whether it is the only source of the information contained on the recording. *See Zallie*, 2009 WL 2844429 (“the party seeking the [non-party] subpoena must show that the information sought is ... unobtainable from other sources”) (emphasis added); *In re Application to Quash Subpoena to NBC (“Graco”)*, 79 F.3d 346, 353 (2d Cir. 1996) (rejecting lower court’s conclusion that “because the material contained in the out-takes sought by Graco is solely in the hands of [non-party] 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-takes”). Here, even accepting *arguendo* Edwards’ contention that the Epstein interview contains information relevant to his clients’ settled sex abuse claims, his own summary judgment motion makes it abundantly clear that he has numerous alternative sources for establishing that Epstein sexually abused his clients.

Epstein’s summary judgment brief also makes it clear that, far from hindering Edwards, Epstein’s invocation of the Fifth Amendment entitles Edwards to dismissal of Epstein’s claims in the Ponzi Scheme Action and to adverse inferences against Epstein. *See* SJ Motion at 19-23; *DePalma v. DePalma*, 538 So.2d 1290, 1290 (Fla. Dist. Ct. App. 1989) (“a person may not seek affirmative relief in a civil action and then invoke the Fifth Amendment to avoid giving discovery”) (citation omitted); *Rollins Burdick Hunter of N.Y., Inc. v. Euroclassics Ltd.*, 502 So.2d 959, 962 (Fla. Dist. Ct. App. 1983) (“a plaintiff seeking affirmative relief in a civil action may not invoke the fifth amendment”); *Baxter v. Palmigiano*, 425 U.S. 308, 318 (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”); *accord Vasquez v. State*, 777 So.2d 1200, 1203 (Fla. Dist. Ct. App. 2001).

In sum, Edwards has simply “failed to show that circumstances exist[] warranting discovery from nonparty [Daily News].” *Smith v. Moore*, 31 █.3d 628, 628-629, 818 █.2d 603, 604 (2d Dep’t 2006).

### III.

#### **THE UNPUBLISHED EPSTEIN INTERVIEW IS PRIVILEGED FROM DISCLOSURE UNDER THE NEW YORK SHIELD LAW**

The discovery sought by Edwards is not only from a non-party; it is also privileged and, as such, Edwards cannot surmount the much higher hurdles imposed by the New York Shield Law. While now codified in Section 79-h of the Civil Rights Law, the reporter’s privilege has its origins in the New York Constitution’s free press provision (Article I, § 8), which provides “the broadest possible protection to ‘the sensitive role of gathering and disseminating news of public events.’” *O’Neill*, 71 █.2d at 529 (quoting *Beach v. Shanley*, 62 █.2d 241, 256, 476 █.2d 765 (1984)). Under Section 79-h(b), unpublished “news obtained or received in confidence” by a news reporter is accorded an absolute privilege from compelled production; and, under Section 79-h(c), all non-confidential “unpublished news” is subject to a stringent qualified privilege that imposes a “very heavy burden” on any party seeking to overcome the qualified privilege. *In re ABC*, 189 Misc.2d 805, 808, 735 █.2d 919, 922 (Sup. Ct. █. Co. 2001).

Here, the content of Epstein’s unpublished interview was confidential and, as such, is subject to the Shield Law’s absolute privilege for “news obtained or received in confidence.” █. Civil Rights Law § 79-h(b). Indeed, as the interview recording confirms, Epstein and Rush expressly agreed at the outset that Epstein’s interview statements would be “off the record” (Interview Tr. at 1; Rush Aff. ¶ 5); and, under longstanding and well-known conventions of journalism, “off the record” means *precisely* that a source’s statements are confidential and not

for publication. See Merriam-Webster Online (2010), [REDACTED] /off-the-record (“‘off-the-record’: given or made in confidence and not for publication <off-the-record comments>”); *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart J., dissenting) (defining “confidentiality” as “the promise or understanding that names or certain aspects of communications will be kept off the record”).<sup>9</sup>

The Daily News strongly disagreed with (and appealed) the District Court’s conclusion in the now vacated Jane Doe decision that, because Epstein was known to be the source of the unpublished interview, the content of his interview should be subject to the privilege for non-confidential newsgathering material. Yet, even assuming *arguendo* that it is the Shield Law’s privilege for non-confidential unpublished material that should be applied to the Epstein interview, Edwards does not – and cannot – overcome that qualified privilege.

Under the Shield Law, non-confidential unpublished news is subject to compelled disclosure only in the exceedingly rare case where the requesting party makes “a *clear and specific showing* that the news: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party’s claim; *and* (iii) is not obtainable from any alternative source.” [REDACTED]. Civil Rights Law § 79-h(c) (emphases added). Edwards fails to satisfy any of these prongs.

**A. The Epstein Interview Is Not Highly Material And Relevant To The Claims In The Ponzi Scheme Action**

As discussed above, the Epstein interview is not even sufficiently relevant to the claims in the Ponzi Scheme Action to permit non-party discovery under CPLR 3101(a)(4). As such, Edwards certainly does not show, as he must under the heightened Shield Law requirement, that

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<sup>9</sup> In his moving brief, Edwards asserts that “[t]his case does not involve an issue relating to a confidential *source*.” Moving Br. at 14 (emphasis added). In so asserting, he fails to recognize that the absolute privilege of the Shield Law explicitly applies to both “news obtained or received in confidence” and to “the identity of the source of any such news.” [REDACTED]. Civil Rights Law § 79-h(b) (emphasis added). In other words, the absolute Shield Law privilege protects not just the names of confidential sources, but “news obtained ... in confidence” as well.

the interview is “highly” material and relevant to the claims in issue. *See People v. Griffin*, 1992 WL 474518, at \*12 (Sup. Ct. █████. Co. Nov. 12, 1992) (no clear and specific showing that unbroadcast video footage sought was highly material and relevant where footage was not of the actual incident at issue).

**B. The Epstein Interview Is Not Critical Or Necessary To Any Claim In The Ponzi Scheme Action**

The “critical or necessary” prong of the qualified reporter’s privilege imposes a “very heavy burden” that requires “clear and specific proof that the claim for which the information is to be used virtually rises or falls with the admission or exclusion of the proffered evidence. The test is not merely that the material be helpful or probative, but whether or not the defense of the action may be presented without it.” *In re ABC*, 189 Misc.2d at 808 (quoting *Graco*, 79 F.3d at 351); *see also O’Neill*, 71 █████.2d at 527 (the material sought must be “essential to the maintenance of the litigant’s claim”). The Shield Law “requir[es] disclosure of non-confidential material only as a last resort.” *In re ABC*, 189 Misc.2d at 808 (emphasis in original).

In *ABC*, for example, the defendant seeking non-confidential unpublished news failed to satisfy the “critical or necessary” prong since he failed to show that he would be unable to proceed to trial without the subpoenaed material. *Id.* at 809. So too, here, Edwards has also conceded as much, by moving for summary judgment in the Ponzi Scheme Action. SJ Motion at 1 (Edwards “is entitled to summary judgment for all claims brought against him in Plaintiff Jeffrey Epstein’s Complaint” because “the evidence uncontrovertibly demonstrates the propriety of every aspect of Edwards’ involvement in the prosecution of legitimate claims against Epstein.”).

Edwards’ summary judgment motion flatly belies his argument here that he needs the Epstein interview to “disprove[] Epstein’s claim that the three civil suits Edwards filed against

him were somehow fabricated and that it shows a complete lack of remorse for his activities.” Moving Br. at 14. Even without the summary judgment motion, Edwards still fails to explain how the “three [sexual abuse] civil suits” are even relevant to the claims in the Ponzi Scheme Action, much less offer “clear and specific proof” that those claims “rise or fall” with the information contained in the Epstein interview. And New York courts routinely hold that even far more compelling evidence fails to meet the Shield Law’s rigorous test of absolute need. *See, e.g., Graco*, 79 F.3d at 351 (unbroadcast portions of interview with plaintiff “likely to provide statements or admissions by [plaintiff] concerning pivotal elements of her case” insufficient to satisfy “critical or necessary” prong of Shield Law); *Flynn v. NYP Holdings, Inc.*, 235 █.2d 907, 909, 652 █.2d 833, 835 (3d Dep’t 1997); *Sheehan*, 2008 WL 2148403 (defendant doctor in Florida medical malpractice action seeking reporter’s interview with plaintiff failed critical or necessary prong where he “has not submitted any evidence that [the reporter’s] testimony goes to the heart of [plaintiff’s] claim”); *Brown & Williamson Tobacco Corp. v. Wigand*, 228 █.2d 187, 187 (1st Dep’t 1996) (B&W failed to establish materials sought were critical or necessary to underlying Kentucky action where “ample proof” existed as to alleged breach of confidentiality agreements, and B&W’s contention that it needed further documents from CBS to establish full measure of damages was “a vague assertion [that] cannot [satisfy] the ‘critical or necessary’” requirement).

Moreover, evidence that, as here, is duplicative and cumulative cannot be “critical or necessary” to a party’s claim or defense. *See Brown & Williamson Tobacco Corp. v. Wigand*, 1996 WL 350827, at \*5 (Sup. Ct. █. Co. Feb. 28, 1996) (unpublished newsgathering materials not critical or necessary where party seeking the materials “has, by its own admission sufficient evidence to prove [its claim]. Any further evidence would merely be duplicative and therefore

cumulative.”), *aff'd*, 228 █.2d 187, 643 █.2d 92 (1st Dep't 1996). In *Wigand*, the party seeking privileged information from the media failed the critical or necessary prong because it, "by its own admission, ha[d] ample proof" of the claim at issue. 1996 WL 350827, at \*8. Here, Edwards similarly has stated repeatedly that he already has "overwhelming evidence" of the information sought.<sup>10</sup>

**C. The Information Sought Is Available From Numerous Alternative Sources**

As fully discussed above, and detailed in Edwards' own summary judgment motion, the information sought here – supposed evidence that Epstein sexually abused Edwards' former clients – is available from eyewitness testimony of those women, from the many other victims of Epstein's abuse, from Edwards' guilty plea, and from the array of other documentary evidence (including the "Holy Grail") enumerated at length in the summary judgment papers. Thus, Edwards also patently fails to meet the third requirement of the Shield Law's qualified privilege for non-confidential materials. *See, e.g., In re CBS Inc.*, 232 █.2d 291, 648 █.2d 443 (1st Dep't 1996) (denying request for unpublished portions of video created during undercover investigation of pharmacist where pharmacist failed to show information sought was unobtainable from other sources).

In sum, Edwards cannot satisfy any one of the three prongs required to overcome the qualified privilege. Edwards' motion to compel production of the Epstein interview should therefore be denied. *See Griffin*, 1992 WL 474518, at \*2 ("While it may be interesting for [Edwards] to [listen to the Epstein interview], or to obtain the testimony of [Rush], [the Court]

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<sup>10</sup> *See also People v. Royster*, 43 █.3d 758, 760, 842 █.2d 12, 14 (1st Dep't 2007) (quashing subpoena seeking disclosure from newspaper that was cumulative of other witness testimony); *U.S. v Burke*, 700 F.2d 70, 78 (2d Cir. 1983) (quashing subpoena seeking "merely cumulative" evidence); *In re Behar*, 779 F. Supp. 273, 275 (█. 1991) ("cumulative [evidence] cannot be 'necessary or critical' to an action so as to override the [reporter's] privilege"); *U.S. v Marcos*, 1990 WL 74521, at \*4 (█. June 1, 1990) (It "cannot be credibly urged that the proffered [cumulative] evidence is necessary or critical.").

cannot conclude that the constitutionally based, statutorily mandated, qualified privilege has been overcome.”).

#### IV.

#### **RUSH DID NOT WAIVE THE REPORTER’S PRIVILEGE**

Last, having already failed to convince the District Court in the Jane Doe Action that Rush waived the reporter’s privilege, Edwards merely resurrects the same failed argument here. Simply put, Rush’s disclosure of brief portions of the Epstein interview to other sources during the newsgathering process did not, as a matter of law, constitute a waiver of the reporter’s privilege.<sup>11</sup>

Notably, Edwards’ waiver argument does not cite any Shield Law cases, relying instead on cases that involved waiver of the common law attorney-client privilege. See Moving Br. at 10-13. Yet, courts have repeatedly held that waiver principles developed for evidentiary privileges do not apply in the reporter’s privilege context.<sup>12</sup>

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<sup>11</sup> In another glaring misstatement, Edwards asserts in his moving papers that “Rush has purported to describe the entire tape” to third parties (Moving Br. at 13). In fact, Rush’s actual statement is that, as part of the newsgathering process, he played 3-4 minutes of the approximately 22-minute recording to two news sources of his, under an agreement of “strict secrecy”, and briefly described portions of the interview to Edwards and his investigator, who were also sources (see Rush Aff. ¶¶ 5-6; Rush Supp. Aff. ¶¶ 6-7) – facts which have never been contradicted.

<sup>12</sup> In *Wigand*, 1996 WL 350827, for example, the court held that a leak of confidential interview transcripts from CBS to the *New York Daily News* during the epic battle 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 New York 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 waiver rules under which expanded testimony is permitted as to privileged matters once the door has been opened. 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. Such a result, the court reasoned, would be antithetical to the entire purpose of the reporter’s privilege. *Id.* at \*5-6. See also *Damiano v. Sony Music Entm’t, Inc.*, 168 F.3d 485, 499 (2d Cir. 1999) (rejecting analogy to other privileges and holding that presence of third party did not waive confidential reporter’s privilege for “off the record” interview statements); *Pugh v. Avis Rent A Car Sys., Inc.*, 1997 WL 669876, at \*5 (D.C. Oct. 28, 1997) (rejecting party-litigant’s argument that CBS’s 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”). See generally, Carl C. Monk, *Evidentiary Privilege for Journalists’ Sources: Theory and Statutory Protection*, 51 Mo. L. Rev. 1, 60 (1986) (“[W]hile revelation of confidential information may appropriately be said to constitute a waiver of some privileges, it should not be treated as a waiver of the reporter’s privilege.”).

Moreover, while the appellate courts of this state have not directly addressed the issue, courts in other jurisdictions have repeatedly held that pre-publication disclosures as part of the newsgathering process do not, as a matter of law, constitute a waiver of the reporter's privilege for confidential materials. As exemplified by Rush's actions, it is common practice for news reporters to disclose portions of confidential interviews and materials to other sources in order to obtain comment and additional leads;<sup>13</sup> and Edwards' contention that this traditional newsgathering technique should disentitle a reporter from claiming the protection of the Shield Law, if accepted, would fundamentally impair the ability of journalists to conduct routine newsgathering. As the New Jersey Supreme Court recently stated in noting this common reportorial practice in a decision rejecting Edwards' waiver argument:

[W]e acknowledge the dynamic and complex nature of the newsgathering process and do not intend to strip disclosures that advance that process of their privileged status. We do not suggest that a journalist's disclosure of information to a source might not be covered by the [reporter's] privilege. For example, a disclosure to one source for an on-the-record comment or reaction about information obtained from another source would be privileged.

*In re Venezia*, 922 A.2d 1263, 1275 (█. 2007) (emphasis added).

To take but two of many other on-point examples, in *McGarry v. University of San Diego*, 64 Cal. Rptr. 3d 467 (Cal. Ct. App. 2007), the plaintiff – like Edwards here – argued that the journalist had waived his confidential reporter's privilege by disclosing the name of a confidential source and revealing his source's confidential statement to a second news source

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<sup>13</sup> As Rush has explained:

[T]he disclosures I made about the contents of the tape were solely in the context of seeking information from sources in the course of my reporting. Reporters doing investigative journalism customarily use information given to them by one side in a dispute as a basis for questions aimed at testing the veracity of that information and drawing out the positions of the other side, as I did in this case. I do not view my having used certain information gained during the Epstein interview in this way to be a waiver of the essential confidentiality of the interview because I did not intend to, and did not, publish the information imparted to me by Mr. Epstein during the interview.

Rush Supp. Aff. ¶ 7 (emphasis added).

during the course of a phone interview. In rejecting that legal argument, the California appeals court held that “we do not believe a limited disclosure can be deemed to waive the immunity for refusing to reveal unpublished information.” *Id.* at 485-86. Similarly, in *People ex rel. Scott v. Silverstein*, 89 Ill. App.3d 1039 (Ill. App. Ct. 1980), [REDACTED] on other grounds, 429 [REDACTED].2d 483 (Ill. 1981), the Illinois appeals court held that the statutory reporter’s privilege was not waived where the journalist revealed some of his sources to a special assistant attorney general who was handling a lawsuit that the journalist was covering. The *Silverstein* court ruled that the reporter’s “regular contacts” with the assistant attorney general – like Rush’s contacts with Edwards and other sources here – “were clearly within the scope of the [reporter’s] role as a newspaper reporter and any information [the reporter] may have given to [the assistant attorney general] concerning his news-gathering efforts ... did not cause [the reporter] to forfeit his privilege.” *Id.*<sup>14</sup> Decisions like these from other jurisdictions holding that no privilege waiver results from pre-publication disclosure of a confidential source’s name or information as part of the newsgathering process are legion.<sup>15</sup>

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<sup>14</sup> In his moving affidavit, Edwards asserts that “I was not a ‘source’ in the traditional sense of the word.” Edwards Aff. ¶ 24. This assertion is meritless. During the course of the sexual abuse litigation, Edwards regularly spoke with Rush about the litigation, and provided tips and leads (Rush Aff. ¶ 7) – the very definition of a news source. Indeed, Edwards’ protestation that he did not realize he was a news source is particularly incredible given that he was regularly interviewed and quoted by reporters in connection with the Epstein sex abuse litigation, as even a quick Google search reveals. See, e.g., *Heiress Quizzed in Sex Suits*, [REDACTED] POST, Oct. 12, 2009 (“Florida lawyer **Brad Edwards**, who represents three of the ‘Jane Does’ who are suing Epstein, told Page Six that [Ghislaine] Maxwell would be questioned over her knowledge of how Epstein procured many of the girls.”) (bold in original); Susan Spencer-Wendel, *Judge Agrees to Unseal Epstein’s Sex Scandal Deal*, PALM BEACH (Fla.) POST, June 26, 2009, at 1B (“‘Any chance to stall in any way and keep the agreement out of public disclosure, they will take it,’ said **Edwards** outside court.”) (emphasis added); Susan Spencer-Wendel, *Hearing Set to Consider Secrecy of Plea Bargain*, (Fla.) SUN-SENTINEL, June 15, 2009, at 3B (“A reporter asked **Edwards** whether he thought Epstein received special treatment by federal prosecutors. ‘Are you kidding? It’s transparent. Certainly, no one else gets treated like that,’ **Edwards** said.”) (emphases added).

<sup>15</sup> See, e.g., *In re Taylor*, 193 A.2d 181, 185-86 (Pa. 1963) (reporter’s privilege cannot be waived by any act short of publication of the confidential names or material in the newspaper or other dissemination to the public at large); *Saxton v. Arkansas Gazette Co.*, 264 Ark. 133, 136-37 (1978) (holding that reporter’s voluntary disclosure of identity of confidential source to her boss and to a deputy prosecuting attorney did not waive the privilege); *Flores v. Cooper Tire & Rubber Co.*, 178 P.3d 1176, 1183 (Ariz. Ct. App. 2008); *Waincott v. Dunn*, 1994 WL 732093, at \*1 (S.C. Ct. Common Pleas July 20, 1994) (holding that reporter’s description of document received from confidential source during his interview of another source did not constitute waiver of reporter’s privilege); *Venezia*,

