

EXHIBIT K

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE APPLICATION TO QUASH
SUBPOENA TO DAILY NEWS AND
GEORGE RUSH

CASE NO. 10 M8-85 (LAK)

REAL PARTY IN INTEREST JANE DOE'S RESPONSE IN OPPOSITION TO
MOTION OF DAILY NEWS, L.P., TO QUASH SUBPOENA

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**PLAINTIFF JANE DOE'S RESPONSE IN OPPOSITION TO MOTION OF DAILY
NEWS, L.P., TO QUASH SUBPOENA**

The real party in interest in this matter, Jane Doe,¹ was repeatedly sexually abused by billionaire Jeffery Epstein when she was a minor. She ultimately filed a civil suit to recover her actual damages and punitive damages in the U.S. District Court for the Southern District of Florida, raising both federal and state claims. Thus far in the litigation, however, her effort to obtain any substantive discovery from Epstein about his sexual abuse has been blocked. In particular, Epstein has invoked his Fifth Amendment right to silence – thereby functionally denying the allegations that Jane Doe has made. Epstein intends to invoke his Fifth Amendment right at trial.

As result of these barriers, Jane Doe has been unable to obtain any admission from Epstein that he sexually abused her as a minor. She has also been unable to obtain any evidence of his lack of remorse for this abuse, a critical issue in her effort to secure substantial punitive damages.

In the fall of 2009, Michael Fisten, an investigator working for Jane Doe, heard from an author that *Daily News* reporter George Rush had made a tape recording of Epstein discussing the sexual abuse of minor girls. The author told Fisten that Rush had played the tape for her and two other persons. The author concluded: "You've got to get that tape." Fisten then called Rush. Rush described the tape at great length to Fisten, including damning admissions made by Epstein. Rush also later called Brad Edwards (the attorney for Jane Doe) and again described the salient parts of the tape – including statements by Epstein about "coming close to crossing a line" concerning sex with underage girls and blaming them for the abuse.

¹ Because the underlying litigation involves the sexual abuse of Jane Doe was she was a minor, she has proceeded by way of the pseudonym "Jane Doe."

Jane Doe filed a proper subpoena for the tape. Rush and the *Daily News*, however, have now filed a motion to quash, claiming that the tape recording is somehow protected by a journalist's privilege. The *Daily News* cannot carry its burden of refusing to respond to the proper subpoena for two simple reasons.

First, Rush has waived whatever privilege might attach to the recording, because he has played a significant part of the recording to three people and described the recording in detail to two other persons – Jane's Doe's attorney Brad Edwards and private investigator Michael Fisten. Accordingly, any privilege has now been obviously waived.

Second, even if the material could somehow be viewed as being protected by a journalist's privilege, the privilege would be only a qualified one. As the *Daily News* admits in its pleading (and as repeated disclosures to third parties make clear), the tape recording does not involve a discussion between Rush and a confidential source, but rather a discussion between Rush and a named source: defendant Jeffrey Epstein. The applicable test for obtaining nonconfidential materials not involving a confidential source has been set forth by the Second Circuit as follows: "Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists' privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29, 36 (2nd Cir. 1999). Jane Doe easily meets this test, because she can show the materials are not simply "likely" relevant – but are in fact highly relevant and critical to the maintenance of her claims. Indeed, in view of

Epstein's invocations of the Fifth Amendment – both during past discovery and the promised invocation during the upcoming trial – the tape recording is Jane Doe's *only* opportunity to place Epstein's own words before the jury. Moreover, the record is a uniquely important piece of evidence, because no other recording of Epstein discussing the sexual abuse exists. Jane Doe can thus easily overcome any claim of privilege by the *Daily News*.

The *Daily News* asks for an in camera review of the recording. Jane Doe concurs in that request, as the Court can then easily confirm both that the contents of the recording have already been disclosed and that the contents are highly material and relevant to Jane Doe's case.

Jane Doe also asks for a brief evidentiary hearing to the extent that the *Daily News* is relying on disputed assertions by George Rush about the limited nature of his disclosures.

FACTUAL AND PROCEDURAL BACKGROUND

From February 2003 through June 2005, Jane Doe (then a minor girl) was repeatedly sexually abused by Jeffrey Epstein behind the walls of his gated mansion in Palm Beach, Florida. The acts of abuse include digital vaginal penetration and Epstein's use of a vibrator on then minor Jane Doe. Epstein is a billionaire, and used his power and wealth to intimidate Jane Doe into not reporting what happened. See *Jane Doe v. Epstein*, No. 9:08-cv-80893-Marra (S.D. Fla. 2008).

After state and federal investigators learned of Epstein's sexual abuse of Jane Doe and approximately thirty other under-age girls, Epstein hired a battery of attorneys who negotiated a plea bargain for his criminal charges. Under the plea agreement,

Epstein pled guilty to two state criminal charges related to procuring a minor for prostitution and soliciting prostitution. These two charges to which he pled pertained to girls other than Jane Doe. Epstein also entered into a "non-prosecution agreement" (NPA), under which the federal government agreed not to prosecute him for any other sex offenses. As part of the NPA, Epstein agreed to make restitution to any of the victims who agreed to proceed solely under the federal statute creating a cause of action for child sexual abuse, 18 U.S.C. § 2255. Edwards Aff't at 1.

On August 13, 2008, Jane Doe filed a civil suit against Epstein in the U.S. District Court for the Southern District of Florida. Her suit alleged both federal and state law claims for sexual abuse, including claims seeking punitive damages. Because she is not proceeding solely under § 2255 (which limits damages to \$150,000 per act of abuse), the terms of the NPA state that Epstein does not admit any liability:

Except as to those individuals who elect to proceed exclusively under 18 U.S.C. § 2255 . . . neither Epstein's signature on this agreement, nor its terms, nor any resulting waivers or settlements by Epstein are to be construed as admissions or evidence of civil or criminal liability or a waiver of any jurisdictional or other defense as to any person

NPA, & 8, Exhibit C to Carroll Declaration.

Epstein filed an answer to Jane Doe's complaint, invoking his Fifth Amendment privilege and arguing that this invocation serves as the equivalent of a denial of the claims. Jane Doe has also been deposed by Epstein's battery of attorneys, who have propounded numerous questions suggesting that she is fabricating her allegations that Epstein repeatedly sexually abused her.² Jane Doe's attorneys have diligently

² Based on what he claims are inadequacies in Jane Doe's answers, Epstein's has filed a motion for summary judgment on Jane Doe's federal claims that is now fully briefed and currently pending before the district court. See Epstein's Reply to Jane Doe's Response in

attempted to find evidence supporting her allegations, including taking the depositions of the co-conspirators (household staff and others) who helped Epstein secure minor girls to abuse. All of these individuals have invoked their Fifth Amendment right and thus have elected not to provide answers. Epstein has also been repeatedly deposed, not only by an attorney for Jane Doe but by many other attorneys for other victims as well. Epstein, however, has taken the Fifth regarding all substantive questions propounded to him, including in particular questions regarding whether he abused Jane Doe. Edwards Aff't at 1-2.³ Epstein has also taken the Fifth (and had his invocations sustained) regarding all substantive interrogatories, requests for admission, and requests for production regarding the sexual abuse of Jane Doe. *Id.*

While discovery efforts to get information from Epstein have been unavailing, in the fall of 2009, Epstein did speak to *Daily News* reporter George Rush "off-the-record" about the civil suits brought against him. Rush made a 22-minute recording of their conversation. Rush Aff't at 1-2.

Several days after Rush talked to Epstein, Rush played the beginning of the tape recording for three persons not involved in any *Daily News* reporting effort: a filmmaker, a social activist, and an attorney who had been following the case. *Id.* Shortly after that meeting, one of the participants went to an investigator for Jane Doe -- Michael Fisten -- and said, "My god, you've [got to] get this tape. [Epstein] talks about the girls." Fisten Aff't at 3.⁴

Opposition to Epstein's Motion for Summary Judgment, No 9:08-cv-80893 (S.D. Fla. Apr. 22, 2010) (dkt. #148).

³ The affidavit of Bradley James Edwards is attached to this memorandum as Exhibit A.

⁴ The affidavit of Michael Fisten is attached to this memorandum as Exhibit B.

On October 22, 2009, Fisten called Rush to get the tape. Rush had no hesitancy in telling him in detail about the contents of the recorded call. Rush told Fisten that Epstein had said a number of interesting things. Epstein claimed he was being targeted for the civil suits because he had made good and become wealthy. Epstein stated had he had done nothing wrong and had gone to jail for no reason. If the same thing had happened in New York that had happened in Florida, Epstein protested, he would have received only a \$200 fine. He further said that Jane Doe's attorney, Brad Edwards, was causing all his problems and that one of Edwards clients, L.M., came to him as a prostitute and drug addict. Epstein also said that all the girls suing him were only trying to get a meal ticket and that the only thing he might have done wrong was maybe cross a line a little too closely. Fisten was not told that his discussion was confidential in any way. Fisten asked for a copy of the tape, and Rush said he had no problem but had to run it by "legal." He called back later that day to say that "legal" would not let him turn over the tape. Fisten Aff't at 2.

Jane Doe's attorney, Brad Edwards, was also contacted by Rush. Rush again disclosed the contents of the tape, describing the general tenor of the entire Epstein interview for Edwards. Rush also stated that Epstein had admitted that he may have come "too close to the line" but that he should not have been punished as severely as he was. Epstein said on tape that his conduct was at most worthy of a \$100 fine. Epstein also flippantly suggested that the allegations filed against him in another case in federal court in Florida (involving repeated sexual abuse of a 15-year-old girl by Epstein and his friends) had been dismissed as meritless. Edwards Aff't at 2-3.

Ultimately Jane Doe filed an appropriate subpoena to obtain a copy of the tape. Counsel for the *Daily News* then contacted counsel for Jane Doe an attempt to resolve the matter.⁵ While the attempt was unsuccessful, counsel for the *Daily News* conceded that Rush's disclosures were viewed with disfavor by his employer. Edwards Aff't at 4.

On April 7, 2010, the *Daily News* filed a motion to quash Jane Doe's subpoena. Among the supporting exhibits was an affidavit from Rush, in which he admitted playing part of the tape recording of Epstein to three people. He further admitted speaking to Brad Edwards about the tape, but characterized the discussion as merely disclosing "Epstein's overall stance and repeat[ing] to [Edwards] one sentence from the interview" Rush Aff't at 3. Rush swore in his affidavit that "I have not revealed any part of the contents of the Epstein interview to anyone other than the individuals I have described here, except for [legal counsel]" *Id.*

Counsel for Jane Doe then contacted counsel for the *Daily News* and asked whether Rush was taking the position that he had not spoken to any investigators about the Epstein interview. Counsel for the *Daily News* later responded that Rush now remembered speaking to Mike Fisten and that he "shared a very limited amount of information about the Epstein interview, including on a subject that came up during it that had no relation whatever to the Jane Doe civil cases against Mr. Epstein." E-Mail

⁵ It is not standard practice for undersigned counsel to discuss communications between counsel in legal pleadings. However, because the *Daily News* has first done so in its pleadings, see *Daily News* Memo at 6 (citing Declaration of Anne Carroll at 2 (recounting discussions between *Daily News*' attorney Carroll and Jane Doe's attorney Edwards)), Jane Doe reluctantly believes she must respond by including all of the communications pertinent to understanding counsel's communications. See Fed. R. Evid. 106 (rule of completeness). The communications between counsel are relevant in their own right, as they provide the motivation for Rush to submit the incomplete and inaccurate affidavit he has submitted in this case given the pressure that is apparently being placed on him by his employer to minimize the extent of his previous disclosures.

from Anne Carroll to Paul Cassell (4/22/2010).⁶ Counsel for the *Daily News*, however, indicated that it would not be possible for Rush to correct his inaccurate affidavit until several days later – i.e., until after Jane Doe had filed her pleading and affidavits disclosing what knowledge she had about Rush’s disclosures. *Id.* Counsel for the *Daily News* indicated that Rush would be filing a new affidavit correcting the false information in his earlier affidavit.⁷

ARGUMENT

I. THE *DAILY NEWS* HAS WAIVED ANY PRIVILEGE THAT MIGHT OTHERWISE ATTACH TO THE TAPE RECORDING OF JEFFREY EPSTEIN BY PLAYING THE TAPE TO THREE PEOPLE AND DESCRIBING ITS CONTENTS IN DETAIL TO (AT LEAST) TWO MORE.

A. Like Other Privileges, a Journalist’s Privilege Can Be Waived.

The *Daily News* attempts to frame the issue as one regarding privileged communications protected against compelled disclosure. Of course, as with other privileges, any journalist’s privilege can disappear if the journalist himself chooses to disclose the communication. As the Second Circuit has explained in the context of the more robust attorney-client privilege, “We deem it clear that subsequent disclosure to a third party by the party of a communication with his attorney eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.” *In re Horowitz*, 482 F.2d 72, 81 (2nd Cir. 1973) (*citing*

⁶ This e-mail is attached as Exhibit C to this memorandum. Counsel for the *Daily News* had no objection to its use as part of Jane Doe’s pleading. The e-mail also admits that Rush’s date for the interview is inaccurate and that Rush may have disclosed additional information to Brad Edwards.

⁷ Counsel for Jane Doe has requested that this new affidavit fully reveal all disclosures of the Epstein recording made by Rush, including any disclosures that he made of any part of the contents of the tape recording to the three people for whom he played a portion of the tape.

MCCORMACK, EVIDENCE § 93, at 197 (Cleary ed. 1972) and cases cited therein and 8 WIGMORE, EVIDENCE § 2311, at 599 (McNaughton rev. 1961)); see also *United States v. Premises Known as 281 Syosset Woodbury Road*, 71 F.3d 1067, 1072 (2d Cir. 1995) (“[l]ike other testimonial privileges protecting confidences, the confidential marital communications privilege may be waived” (internal citations omitted)). Thus, a person cannot invoke a “privilege as to communications whose confidentiality he has already compromised for his own benefit.” *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (internal quotation omitted).

A clear illustration of this general principle of waiver in the context of a journalist’s privilege comes from New York’s shield law, which the Second Circuit has described as “more journalist-protective” than the common law privilege recognized in federal court. *In re Fitch, Inc.*, 330 F.3d 104, 109 (2d Cir. 2003).⁸ While the shield law provides certain protections for journalists, it also provides directly that the protection can be waived if information is disclosed to third parties:

(g) Notwithstanding the provisions of this section, a person entitled to claim the exemption provided under subdivision (b) or (c) of this section *waives such exemption* if such person voluntarily discloses or consents to disclosure of the specific information sought to be disclosed to *any person* not otherwise entitled to claim the exemptions provided by this section.

N.Y. Civil Rights Law § 79-h(g) (McKinney 2010) (emphases added).

Rather than cite Second Circuit law or the illustrative New York statute, the *Daily News* relies upon out-of-jurisdiction cases that it describes as standing for some sort of narrow construction of waiver law. *Daily News Memo.* at 13. In fact, these cases stand for no such thing, but rather different propositions -- such as the fact that broadcasting a

⁸ The *Daily News* apparently takes the position that the New York shield law and the federal common law journalist privilege are “identical.” *Daily News Memo.* at 10.

small part of a document does not waive protection of all parts (*Altemose Constr. Col. v. Buidling & Constr. Trades Council*, 443 F. Supp. 489 (E.D. Pa. 1977), or that identifying a source as a “whistle blower” does not waive the right to refuse to disclose the source’s name (*Flores v. Cooper Tire and Rubber Co.*, 178 P.3d 1176, 1183 (Ariz. App. 2008), or that state law can create a demanding rule against a finding a waiver for journalists (*Ulrich v. Coast Dental Services, Inc.*, 739 So.2d 142, 144 (Fla. App. 1999) (creating such a rule under Florida law)).⁹ These off-point authorities do not constitute any reason for deviating from the clear law in this Circuit that a person cannot claim a “privilege as to communications whose confidentiality he has already compromised for his own benefit.” *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993) (internal quotation omitted).

B. The *Daily News* Has Waived Any Privilege in the Tape Recording by Playing It for Three People and Describing It in Detail to Others.

The *Daily News* has plainly waived any privilege that might attach to the recording by revealing what the recording says to a number of persons. In particular, George Rush has waived any privilege by:

- Playing “approximately three to four minutes” of the beginning of the tape to three people who are not professional journalists (Rush Aff’t at 2);
- Agreeing to paraphrase the Epstein interview to investigator Michael Fisten (Fisten Aff’t at 2);
- Telling Fisten that Epstein began the recorded interview by describing how he came from Brooklyn and became wealthy (*id.*);

⁹ Florida law is thus different than the law in the Second Circuit in general and in New York in particular. See N.Y. Civil Rights Law § 79-h(g) (McKinney 2010) (journalist’s privilege waived by “disclosure of the specific information sought to be disclosed to any person” not a journalist); *In re Fitch, Inc.*, 330 F.3d 104, 109 (2d Cir. 2003) (New York law “more protective” of journalists than federal privilege).

- Telling Fisten that Epstein said the people do not like it when people make good and that was one reason he (Epstein) was being targeted by civil suits filed by young girls in Florida (i.e., Jane Doe) (*id.*);
- Telling Fisten that Epstein said that he (Epstein) had done nothing wrong (*id.*);
- Telling Fisten that Epstein said that he (Epstein) had gone to jail in Florida for soliciting prostitution for no reason (*id.*);
- Telling Fisten that Epstein said that if the same thing (i.e., sexual abuse of minor girls) had happened in New York, he (Epstein) would have received only a \$200 fine (*id.*);
- Telling Fisten that Epstein had made very negative comments about Jane Doe's attorney Brad Edwards and that Edwards was the one causing all of Epstein's problems (i.e., the civil suits brought by Jane Doe and other girls) (*id.*);
- Telling Fisten that Epstein said that L.M., one of Edwards' clients who has sued Epstein for sexual abuse as a minor, came to him as a prostitute and a drug user (i.e., came to Epstein for sex, rather than Epstein pursuing her) (*id.*);¹⁰
- Telling Fisten that Epstein said that all the girls suing him (e.g., Jane Doe) are only trying to get a meal ticket (*id.*);
- Telling Fisten that Epstein said that the only thing he might have done wrong was to maybe cross the line a little too closely (*id.*);
- Telling Fisten that Epstein said he was very upset that Edwards had subpoenaed Ghislaine Maxwell, referring to her as a good person that did nothing wrong (i.e., had done nothing wrong even though she helped procure young girls to satisfy Epstein's sexual desires) (*id.*);¹¹
- Calling Brad Edwards, Jane Doe's attorney, to tell him about the recorded Epstein interview (Edwards Aff't at 2);
- Telling Brad Edwards more than description of the tape and in fact describing the general tenor of the entire interview (*id.* at 3);

¹⁰ L.M. is expected to testify at the Jane Doe trial as a witness. Because she was a minor when sexually abused, she is referred to by initials here, as she has been in the Florida state case she filed against Epstein that parallels Jane Doe's. See *L.M. v. Epstein*, No. 50 2008 CA 028051 (Cir. Ct. 15th Jud. Cir. Palm Beach Cty., Fla 2008).

¹¹ Maxwell is an anticipated witness in the Jane Doe trial.

- Telling Brad Edwards that Epstein said in the interview that he (Epstein) may have come “too close to the line” but that he should not have been punished as severely as he was (*id.* at 2);
- Telling Brad Edwards that Epstein spoke about L.M. and made derogatory remarks about her (*id.*); and
- Telling Brad Edwards that Epstein spoke directly about another civil case that was filed against him, *Jane Doe 102 v. Epstein*,¹² which involved an allegation that Epstein had repeatedly sexually abused a 15-year-old girl, forced her to have sex with his friends, and flew her on his private plane nationally and internationally for the purposes of sexually molesting and abusing her, and that Epstein had flippantly said that the case was dismissed, indicating that the allegations were ridiculous and untrue (*id.*).

As the foregoing bullet points make clear, the *Daily News* (through its reporter) has not only played a significant portion of the tape recording to third parties, it has described the sum and substance of the entire recording to two persons who are in no sense *Daily News* employees (or even journalists). This is an obvious waiver of any privilege.

Nor should the *Daily News* be heard to quibble that it has somehow “only” waived confidentiality with respect to the 17 bullet points above. As should be clear from the sheer number of bullet points, Rush has described to Fisten and Edwards (and perhaps others) the gist of the *entire* tape. Because Rush has purported to describe the entire tape, any privilege is plainly waived for the entire recording. See *United States v. Jacobs*, 117 F.3d 82, 90 (2d Cir. 1997) (finding that waiver of attorney-client privilege extended to the entirety of two letters written by Jacobs’ attorney, “the gist of which Jacobs purported to convey while” speaking to third parties). Moreover, given that the tape is apparently about 22 minutes long, the numerous points related above must

¹² See *Doe No. 102 v. Epstein*, No. 9:09-CV-80656-KAM (S. D. Fla. 2009).

constitute the bulk of the recording.¹³ And, presumably, later portions of the conversation must link back to earlier portions of the conversation – making it difficult to segregate any particular sentence in the interview. Cf. Fed. R. Evid. 106 (rule completeness requires introducing one of a statement when other parts of the statement ought to in fairness be considered contemporaneously).

Accordingly, the Court need not consider the details of how a journalist privilege might operate on these facts. Any privilege that might exist has simply evaporated and been waived.

II. ANY QUALIFIED JOURNALIST'S PRIVILEGE OF THE *DAILY NEWS* IS OVERCOME BY JANE DOE'S CLEAR AND COMPELLING NEED TO OBTAIN JEFFREY EPSTEIN'S OWN WORDS ABOUT HIS SEXUAL ABUSE AND LACK OF REMORSE.

If the Court is inclined for any reason to consider the application of the privilege in this case, it would quickly find that the *Daily News* cannot sustain its burden of showing a good reason for defeating Jane Doe's search for the truth. This case does not involve an issue relating to a confidential source. Accordingly, the *Daily News* possesses (at most) a qualified privilege, which can be overcome if Jane Doe "can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29, 36 (2nd Cir. 1999). She can easily make such a showing here, as the tape recording is unique evidence of highly probative statements from Epstein that she cannot obtain from any other source.

A. To Defeat Jane Doe's Search for Truth, The *Daily News* Must Bear the Burden of Proving It Is Entitled to Invoke Privilege.

¹³ Of course, if the Court wanted to make this determination more precisely, it could review the recording in camera – as Jane Doe urges in Part III, *infra*.

The *Daily News* has filed the pending motion to quash a valid subpoena served by Jane Doe. The Second Circuit has held that it is "well established that the party invoking a privilege bears the burden of establishing its applicability to the case at hand." *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003). The party asserting the privilege bears the burden of proving each essential element. See, e.g., *United States v. International Bhd. of Teamsters*, 119 F.3d 210, 214 (2d Cir.1997) (holding that party invoking attorney-client privilege bears the burden of establishing "all of its elements"); *United States v. Construction Prods. Research, Inc.*, 73 F.3d 464, 473-74 (2d Cir.1996) (rejecting attorney-client and work product privilege claims where party failed to establish the essential elements). The burden that the *Daily News* faces "is a heavy one, because privileges are neither 'lightly created nor expansively construed.'" *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003) (citing *United States v. Nixon*, 418 U.S. 683, 710 (1974)).

Perhaps given the "heavy" burden it faces, the *Daily News* at various points in its brief seems to be arguing that it has some sort of First Amendment interest in not honoring the subpoena. To the extent that it is making such a claim, it has been rejected by the United States Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) ("We are asked to create another [testimonial privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do."). See also *New York Times Co. v. Gonzales*, 459 F.3d 160, 173-74 (2d Cir. 2006) (discussing *Branzburg* and First Amendment claims); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 970 (D.C. Cir. 2005) (same).

The only privilege that the *Daily News* can plausibly assert is a common law privilege that would be recognized in federal court under Federal Rule of Evidence 501. Such "privileges are recognized 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth.'" *In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002*, 318 F.3d 379, 384 (2d Cir. 2003) (quoting *Trammel v. United States*, 445 U.S. 40, 50 (1980)); accord *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996). As the Supreme Court has explained, "When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule." *Jaffee*, 518 U.S. at 9.

B. Because the Interview with Jeffrey Epstein Does Not Involve a Confidential Source, The *Daily News* Has (At Most) a Qualified Privilege in the Recording that Jane Doe Can Overcome By Showing that the Tape is "of Likely Relevance to a Significant Issue in the Case, and Is Not Reasonably Obtainable from Other Available Sources."

The *Daily News* begins by citing the 28-year-old *Petroleum Products* case which (the *Daily News* contends) shows that the law in the Second Circuit is "clear" that a privilege exists requiring anyone subpoenaing a media entity to make a specific showing of relevance of the materials at issue and their unavailable from other sources. *Daily News Memo.* at 8 (citing *In re Petroleum Products Antitrust Litig.*, 680 F.2d 5 (2d Cir. 1982) (per curiam)). But the *Daily News* does not discuss more recent precedent from the Second Circuit, which demonstrate the unique circumstances surrounding that

particular case. As the Circuit explained in *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29 (2d Cir. 1999): “The stringent test we enunciated in *Petroleum Products* for overcoming the qualified privilege was designed ‘to protect . . . the confidentiality of journalists’ sources.’” [quoting *Petroleum Products*] 680 F.2d at 7. We believe that when protection of confidentiality is not at stake, the privilege should be more easily overcome.” *Gonzales*, 194 F.3d at 36. The Circuit went on to enunciate a less demanding standard that applied to cases like that one, where a civil plaintiff was seeking unbroadcast video footage of a traffic stop in a civil rights action: “Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists’ privilege if he can show that the materials at issue are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources.” *Id.* at 36. This is the test that has been used by this Court in recent cases. See, e.g., *United States v. Treacy*, 603 F.Supp.2d 670, 672 (S.D.N.Y. 2009); *Schiller v. City of New York*, 245 F.R.D. 112, 119-20 (S.D.N.Y. 2007).

The *Daily News* makes no serious effort to show that the *Petroleum Products* test applies to its motion to quash. Obviously, this case does not involve “the confidentiality of journalists’ sources,” as the *Daily News* admits that the 22-minute tape recording was a discussion between its reporter George Rush and defendant Jeffrey Epstein. *Daily News Memo.* at 4. Accordingly, the *Petroleum Products* test is inapplicable and the Court must apply the “more easily overcome” qualified privilege discussed in *Gonzales*.

The *Daily News* attempts to obtain some kind of confidentiality through the affidavit of George Rush that “Epstein said at the beginning of the conversation that it

was off-the-record and [I] agreed. I understood that to mean that the contents of the call, though not the fact of it, were to be treated as confidential *and not to be published.*" Rush Aff't at 2 (emphasis added). Of course, if the understanding with Epstein was simply that the material was not to be published, that understanding will not be violated by if the Daily News complies with a lawful subpoena to produce the tape to Jane Doe; that involves no publication, but simply honoring the duties that all citizens have to produce evidence when under court order.

To the extent Rush is now claiming some sort of broader confidentiality of the materials, this Court should not give any weight to Rush's conclusory claim that he "understood" that Epstein's call was somehow "confidential." The 'burden is on a party claiming the protection of a privilege to establish those facts that are essential elements of the privileged relationship, a burden not discharged by mere conclusory or ipse dixit assertions." *In re Grand Jury Subpoena Dated Jan. 4, 1984*, 750 F.2d 223, 225 (2d Cir. 1984). Rush's own actions plainly belie any such understanding. Several days after the Epstein interview, Rush felt entirely free to share the significant parts of the recording for his own purposes. He even played the first three or four minutes of the tape to three individuals not involved with any *Daily News* reporting effort, and presumably described the rest of the recording to the participants at the meeting.¹⁴ And he further shared "the general tenor of the entire interview" with Jane Doe's attorney Brad Edwards (Edwards Aff't at 2) and told Jane Doe's investigator Mike Fisten "in detail about the contents of the tape recorded call" (Fisten Aff't at 2).

¹⁴ Rush's (inaccurate) affidavit does not reveal whether he disclosed any other parts of the tape to the three persons at his meeting beyond the three or four minutes he played. Presumably he will address this subject in his revised affidavit that he will apparently be filing shortly.

Even if the Court concludes that all these disclosures do not constitute a waiver of the privilege (as Jane Doe argued above), it clearly places the tape recording outside the realm of confidential material to which some sort of heightened protection might be given. Indeed, this Court has specifically ruled that, to invoke a journalist's privilege for confidential materials, a "mutuality" of any agreement of confidentiality must be shown. *PPM America, Inc. v. Marriott Corp.*, 152 F.R.D. 32, 36 (S.D.N.Y. 1993). As this Court explained in the context of confidential sources, "the genesis of the [journalist's] privilege lies only in the anonymity claimed *and the confidence given.*" *Id.* (quoting *Andrews v. Andreoli*, 400 N.Y.S.2d 442, 448 (Sup. Ct. 1977)) (emphasis added). Here, there is simply no "mutuality" of confidentiality – no "confidence given" by Rush. Therefore, even crediting the disputed and inaccurate Rush affidavit, the *Daily News* cannot carry its "burden of proffering at least preponderant evidence of the mutuality of the understanding . . . of confidentiality." *PPM America*, 152 F.R.D. at 36.¹⁵ Therefore, any protection that might be given to confidential materials is not involved in this case.

C. The Recording of the Defendant is Uniquely Valuable Evidence of His Sexual Abuse of Jane Doe and other Victims and of his Lack of Remorse.

The Second Circuit has been clear that "where the protection of confidential sources is not involved, the nature of the press interest protected by the [journalist's] privilege is narrower." *Gonzalez*, 194 F.3d at 36. To obtain such information, Jane Doe need only show that the materials sought "are of likely relevance to a significant issue in the case, and are not reasonably obtainable from other available sources." *Id.*

¹⁵ Epstein has been served with the pleadings in this case. He has not asserted any claim of confidentiality in the recording.

The *Daily News*, however, argues that the more demanding *Petroleum Products* standard applies, under which Jane Doe would need to show “that the information is: (1) highly material and relevant, (2) necessary or critical to the maintenance of the claim, and (3) not obtainable from other available sources.” *Petroleum Products*, 680 F.2d at 7. Perhaps the simplest way for Jane Doe to proceed, then, is show that she can easily satisfy this more demanding standard. She easily can meet each of these prongs – and thus, *a fortiori*, meets the applicable standard from *Gonzalez*.

1. The Epstein Interview is Highly Material and Relevant to Jane Doe’s Civil Suit for Sexual Abuse Seeking Compensatory and Punitive Damages and Necessary and Critical to the Maintenance of Her Claim.

The *Daily News* suggests that Jane Doe is seeking the Epstein recording because she has “a hope and a hunch that there might be something in the recording . . . that will be useful in her case.” *Daily News Memo.* at 10. Nothing could be further from the truth. Jane Doe wants the recording for very specific reasons to support her claim that Epstein repeatedly sexually abused her (and other girls) and that she is entitled to compensatory and punitive damages of at least \$50 million.

A bit of context may be useful. As explained at greater length in the affidavit of Brad Edwards (Jane Doe’s lead attorney in the civil case against Epstein), Jane Doe’s lawsuit against Epstein (along with those of other girls) has become highly contentious. *See generally* Edwards Aff’t at 1-2; *Jane Doe v. Jeffrey Epstein*, Case No. 9:08-cv-80893-MARRA (S.D. Fla.) (case consolidated with *Doe v. Epstein*, 9:08-cv-80119-MARRA for discovery purposes) (more than 500 docket entries). Because Jane Doe

alleges that Epstein repeatedly sexually abused her behind the walls of his private mansion in Palm Beach, Florida, the case at some level is one of "he said, she said." With regard to the "he said" half of this equation, Epstein has (thus far) been able to essentially contest the substance of Jane's Does claims of sexual molestation. Epstein has denied Jane Doe's allegation, by operation of law, through his assertion of Fifth Amendment privileges as to all claims against him. Edwards Aff't at 1. Moreover, Epstein has refused to provide any substantive discovery to Jane Doe. With regard to the "she said" half of the equation, Epstein's battery of attorneys have taken Jane Doe's deposition, in which they have asked numerous questions suggesting that she has fabricated her claims against him. *Id.* Indeed, the *Daily News* concedes that the questioning of Jane Doe has been (in its words) "savage." *Daily News Memo.* at 11 (referring to questioning of Jane Doe "by [Epstein's] defense team . . . so savage it made local headlines"). And Jane Doe, of course, has no other witnesses she can call to tell what Epstein did to her behind closed doors in his mansion – no direct eyewitnesses to prove that what she is saying is the truth. *Id.*

Fortunately, through the recording of Epstein, Jane Doe now has a way to provide to the jury a damning admission from Epstein. As George Rush explained to Jane Doe's investigator Michael Fisten, Epstein says on the tape that "the only thing he might have done wrong was to maybe . . . cross the line a little too closely." Fisten Aff't at 2; see *also* Edward Aff't at 2 (Epstein says he may have come "too close to the line"). Understood in context, this is a highly damning admission that Epstein may have

crossed "the line" between having consensual sexual relations with adult women and having non-consensual sexual relations with minor girls – girls like Jane Doe.¹⁶

Epstein also said that L.M., a minor girl, came to him as a prostitute and a drug addict. This is also a highly useful admission, as it will help to establish that Epstein has a sexual interest in minor girls – minor girls like Jane Doe. Perhaps more important, it is direct proof that Epstein knows LM, a fact that he has denied in the past.

Not only is the tape recording unparalleled evidence for Jane Doe on liability, but it is also compelling evidence in her case for punitive damages. One of the key issues in the punitive damages case will be the extent to which Epstein has shown remorse for his sexual abuse of Jane Doe – or whether he continues to believe that he did nothing wrong. Of course, punitive damages are "quasi-criminal,' [and] operate as 'private fines' intended to punish the defendant and to deter future wrongdoing." *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). If Epstein is not remorseful for having abused Jane Doe, the jury will need to impose a substantial punitive damage award to deter future abuse of other young girls that he might prey upon.

Lack of remorse "will be a central issue in the punitive damages case against Epstein at trial." Edwards Aff't at 2.¹⁷ And, in Florida, any punitive damages award that

¹⁶ In reply, the Daily News may attempt to quibble that Epstein only admitted that he "may" have crossed the line between having consensual sex with an adult and raping a child. Of course, the jury would be entitled to draw the only logical conclusion that Epstein's qualification is as close an admission as one is likely to get in a sex offense case of this nature.

¹⁷ In assessing the importance of evidence, courts have been reluctant to substitute their judgment for that of the trial lawyer most closely involved in presenting a case to a jury, particularly where the subject relates to a tactical judgment about the usefulness of the evidence. See, e.g., *United States v. Sanusi*, 813 F.Supp. 149, 160 (E.D.N.Y. 1992) (finding journalist privilege overcome and expressing reluctance of the court "to substitute its judgment" for that of defense counsel).

Jane Doe will be closely scrutinized under both the United States Constitution and Florida law. See, e.g., *Engle v. Liggett Group, Inc.*, 945 So.2d 1246, 1264 (Fla. 2006) (discussing different layers of review for punitive damages awards under Florida law; vacating punitive damages award). The Epstein recording provides words from Epstein's own mouth to show his lack of remorse for abusing Jane Doe. Commenting on his criminal plea for soliciting minors for prostitution that lead to an 18-month jail sentence, Epstein states he did nothing wrong and went to jail for no reason. Fisten Aff't at 2. He further reveals in the recorded interview that his time in jail was too harsh of a sentence and if the same circumstances would have happened in New York, he would have only received a \$200 fine. *Id.* He also stated that "all the girls suing him" – including, of course, Jane Doe -- are only trying to get a meal ticket. *Id.* Indeed, the entire substance and tone of the tape reeks of evidence of a sex offender who lacks any empathy for the numerous girls he victimized. This is unique evidence that is not cumulative of anything else Jane Doe can present.

In a desperate attempt to find some other comparable evidence of lack of remorse, the *Daily News* points to "the pitiless affirmative defenses" in Epstein's answer to Jane Doe's complaint. *Daily News Memo.* at 11. Of course, these are legal defenses raised by legal counsel – not Epstein's own views on his own actions.¹⁸ The *Daily News* also claims that "savage" questioning of Jane Doe by Epstein's legal team would be evidence of lack remorse. *Id.* Again, tactical decisions by attorneys are little help to Jane Doe in trying to prove *Epstein's* lack of remorse. The tape is the only direct

¹⁸ Epstein's attorneys are also presumably free to move to dismiss any affirmative defenses at any time if they believe doing so would aid their client.

evidence in existence or available to Jane Doe to prove what *Epstein* thinks about what he did to her.

Finally, it bears mention that the tape recording is clear proof that Epstein has committed the crime of perjury. During his recent deposition, one of the few questions Epstein did not take the Fifth on was whether he knew George Rush. Epstein lied and impressed the point that he did not recognize any reporter from the Daily News – despite the fact that a 22-minute recording of such an interview exists. Edwards Aff't at 3. The tape recording is therefore direct evidence of a crime.

As a result of all this, the recording is highly probative on both the liability and damages case Jane Doe intends to present at trial. Presumably it is for this reason that the first person to hear the tape (the author with whom George Rush shared the tape) quickly told Jane Doe's investigator, "My god, you've [got to] get this tape. He talks about the girls." Fisten Aff't at 1. The information is thus critical to her claim, because it is not "cumulative of other evidence." *Application of Behar*, 779 F.Supp. 273, 275 (S.D.N.Y. 1991).¹⁹

¹⁹ The *Daily News* asserts that information is "critical or necessary" to a claim only if there is a finding the claim for which the information is to be used "virtually rises or falls with the admission or exclusion of the proffered evidence." Daily News Memo. at 10, citing *In re Application to Quash Subpoena to Nat'l Broad. Co. (Graco)*, 79 F.3d 346, 351 (2d Cir. 1996)). But *Graco* involved application of the New York shield law, which applies a "more journalist-protective" standard than the common law privilege recognized in federal court. *In re Fitch, Inc.*, 330 F.3d 104, 109 (2d Cir. 2003); see also *Gonzales v. Nat'l Broadcasting Co., Inc.*, 155 F.3d 618, 623 (2d Cir. 1998) (discussing difficulties with recognizing *Graco's* interpretation of New York law as consistent with federal privilege law), *opinion vacated and superseded by* 194 F.3d 29 (2d Cir. 1999). More recent cases in the Second Circuit and this Court applying the common law privilege have not required a showing that a claim rises or falls with the admission of the evidence, but instead have asked whether the information was important to the case. See, e.g., *New York Times v. Gonzales*, 459 F.3d 160, 169-70 (2d Cir. 2006); *In re Natural Gas Commodities Litigation*, 235 F.R.D. 241, 245 (S.D.N.Y. 2006). In any event, Jane Doe's claim for \$50 million in compensatory and punitive damages will likely rise and fall with this Court's decision on production of the recording.

This Court has recently explained that, to overcome a journalist's privilege asserted at the discovery stage of litigation, the claimant need not prove that the information will lead to success on the merits at trial. In rejecting a claim of journalist's privilege, this Court explained: "The ultimate validity of Plaintiffs' case . . . need not be proved at this stage of the litigation. To obtain information during pretrial discovery proceedings that is sufficient relevant and necessary to maintain a claim, a litigant should not be compelled to establish that the requested material will enable it to prevail on the merits." *In re Natural Gas Commodities Litigation*, 235 F.R.D. 241, 245 (S.D.N.Y. 2006).

Here it is clear that a substantial portion of the merits of Jane Doe's damages case could hinge on her obtaining the tape recording. Jane Doe seeks at least \$50 million in compensatory and punitive damages. The tape recording will be the jury's only opportunity to assess Epstein's lack of remorse – indeed, his arrogance – about repeatedly sexually abusing Jane Doe and other young girls. It will, in short, provide a unique window into the pitiless mind of a serial child molester. It is therefore no exaggeration that millions of dollars in damages are at stake in the court's decision, as the extent of the substantial damages that she seeks could well rise or fall based on the extent to which she can demonstrate to the jury that Epstein needs to be punished and deterred. Jane Doe respectfully asks that she be given access to this vital evidence in support of her claim.

2. The Words Out of Epstein's Own Mouth Are Unique and Not Obtainable from Other Sources.

Jane Doe can also easily establish that the Epstein interview is unique. Despite diligent efforts on her part, Jane Doe has been unable to identify any witnesses (other

than Epstein's attorneys) with whom Epstein has spoken about the abuse (except of course his co-conspirators who have all also invoked a 5th amendment privilege). Edwards Aff't at 2. More important, despite diligent efforts, Jane Doe has not been able to locate any recorded statements by Epstein. *Id.* Indeed, given the fact that Epstein has taken the Fifth with regard to all discovery propounded to him, the interview will be Jane Doe's only opportunity to prevent Epstein's own words to the jury that hears her case. *Id.* The interview is thus truly one-of-a-kind and Jane Doe has exhausted all reasonable alternatives to finding another recording.

In sum, even if a journalist's privilege exists, on the facts of her particular case the privilege is overcome and Jane Doe is entitled to the tape recording to support her claims.

III. THE COURT SHOULD EXAMINE THE RECORDING IN CAMERA.

The *Daily News* asks the Court to examine the tape in camera to determine whether privilege applies in this case. Jane Doe joins in that request. Jane Doe submits that a quick in camera review will confirm both the extent to which any privilege has been waived by disclosure of the contents and the significance of the admissions to Jane Doe's case. Jane Doe also submits that the in camera review should include actually listening to the tape rather than simply reviewing the transcript that the *Daily News* has prepared. Listen to the tape will reveal, Jane Doe submits, a clear tone of arrogance and lack of remorse by Epstein that make the evidence highly probative for Jane Doe.²⁰

²⁰ The *Daily News* represents that the end of the tape includes information not related to the Epstein interview. This information is not covered by Jane Doe's subpoenas, and she has not wish to have this materials examined by the Court.

IV. THE COURT SHOULD HOLD A BRIEF EVIDENTIARY HEARING RATHER THAN RELY ON DISPUTED CLAIMS OF GEORGE RUSH.

For all the reasons given above, Jane Doe believes that Court can rule in her favor by simply accepting as accurate all of the claims made by George Rush in his affidavit. However, if the Court concludes otherwise, it is clear that the accuracy of the Rush affidavit has been called into doubt by the counter-affidavits filed by Jane Doe. For example, while Rush maintains that he told Brad Edwards only about "a development" in "one of the cases" and "gave Edwards a one or two word characterization of what I perceived to Epstein's overall stance and repeated to him one sentence from the interview." Rush Aff't at 3. Edwards, however, reports that Rush "provided me more than a description of the tape, and in fact described the general tenor of the entire interview, so that nothing in the interview can be fairly regarded as confidential at this point." Edwards Aff't at 2.

The differences of recollection between Rush and Mike Fisten are even more stark. Initially, Rush filed an affidavit in which he stated, under oath, he had not revealed the contents of the tape to anyone other than Edwards and three other persons who met him in New York. After counsel for Jane Doe called counsel for the Daily News and reminded counsel of an investigator, Rush "is able now to recall that during a conversation with Mike Fisten, . . . he shared *very limited amount of information about the Epstein interview*" Anne Carroll E-Mail to Paul Cassell (4/22/2010) (emphasis added). Fisten's recollection (aided by a report that he wrote four days after he talked with Rush) is that Rush told him "in detail about the contents of the tape recorded call." Fisten Aff't at 1-2 (recounting details revealed). Apparently Rush is planning to file shortly a new affidavit correcting the inaccurate information in his earlier

affidavit – after he has reviewed all of the information that Jane Doe has thus far discovered about his disclosures.

As noted above, the *Daily News* bears the burden of establish the privilege. At the very least, the extent of Rush's disclosures of the tape are now clearly disputed – indeed, he himself is modifying his position to a degree that is unknown to Jane Doe at this time. Accordingly, if the Court believes that the factual issues surrounding the extent of the disclosure are determinative of the case, it should hold – and Jane Doe requests – a brief evidentiary hearing on these subjects at the May 4, 2010 hearing, during which Rush and Fisten could testify to their respective positions about the extent of disclosures.²¹

CONCLUSION

For the foregoing reasons, real party in interest Jane Doe respectfully requests that this Court deny the motion of George Rush and the *Daily News* to quash subpoenas properly served on them by Jane Doe.

DATED: April 23, 2010

Respectfully submitted,



Paul G. Cassell
Motion for Admission Pro Hac Vice Pending
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Counsel for Real Party in Interest Jane Doe

²¹ Attorneys for the *Daily News* have indicated that they will accept service for George Rush of any subpoena Jane Doe might serve for the hearing. Jane Doe intends to question Rush only about narrow subjects at issue in this motion – i.e., the making of the recording and the extent of his subsequent disclosure of the contents of the recording, rather than Rush's general investigation of the Epstein situation.

CERTIFICATE OF SERVICE

As agreed in advance with counsel for the Daily News, I HEREBY CERTIFY that
on April 23, 2010, I e-mailed a copy of the foregoing memorandum and attachments to:

DAILY NEWS, L.P.
Anne B. Carroll (AC-5322)
Deputy General Counsel
450 West 33rd Street, 3rd Floor
New York, NY 10001


acarroll@nydailynews.com

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Attorneys for Defendant Jeffrey Epstein



Paul G. Cassell

EXHIBIT A

AFFIDAVIT OF BRADLEY JAMES EDWARDS

1. I am an attorney in good standing with the Florida Bar and admitted to practice in the Southern District of Florida. I am a partner in the law firm of Farmer Jaffe Weissing Edwards Fistos and Lehrman.

2. I am the lead attorney currently representing "Jane Doe" in the case of Jane Doe v. Jeffrey Epstein, case number 08-80893 in federal Court in the Southern District of Florida. I am the lead attorney representing Jane Doe, whose civil complaint alleges that Epstein sexually molested her numerous occasions when she was a minor.

3. Defendant Epstein has entered into a "non-prosecution agreement" (NPA) with the federal government for sex crimes against minors. Under that agreement, the federal government has agreed not to file criminal charges against Epstein for sex crimes committed against approximately thirty girls, including Jane Doe. In exchange, Epstein agreed to plead guilty to state law criminal charges involving solicitation of prostitution and procuring a minor for prostitution. The victim of the criminal charges to which he has pled was not Jane Doe.

4. Under the NPA, Epstein has agreed not to contest civil liability of any of his approximately thirty victims – provided that the victim agrees to limit themselves to the damages provided by 18 U.S.C. § 2255 (currently set at \$150,000). Jane Doe has not agreed to limit herself to pursuing only \$150,000 in damages. Therefore, the terms of the NPA purport to prevent Jane Doe from using the NPA to prove liability.

5. Epstein has filed an answer to Jane Doe's complaint, in which he has invoked his Fifth Amendment right to silence with respect to the allegations that he molested her as a child. Epstein has further argued that this Fifth Amendment invocation is the functional equivalent of, and must be treated as, a specific denial of the allegations.

6. Defendant Epstein's deposition has been taken on several occasions, in this and other related cases, and he has not provided any substantive discovery whatsoever. Instead, he invoked his 5th amendment privilege against self-incrimination when asked questions about his abuse of Jane Doe or other girls.

7. Defendant Epstein has also been served with Interrogatories and requests for production; all requests have been met with 5th amendment assertions and Epstein has not given Jane Doe any substantive testimony related her allegations.

8. Jane Doe's complaint contains a punitive damages claim, and Mr. Epstein has also elected to invoke the 5th Amendment on all questions that would relate to punitive damages issues, such as his intent when committing the crimes, his lack of remorse and his intent to recidivate.

9. Epstein has taken Jane Doe's deposition. During that deposition he has asked numerous questions of Jane Doe that suggest that she is fabricating her allegation of abuse by Epstein.

10. In addition to deposing Mr. Epstein, other attorneys and I have taken the depositions of his various co-conspirators (as labeled by the federal government in the NPA), including [REDACTED]. Each of those individuals was employed by Epstein to bring him underage girls for him to molest and to ensure that he was protected from detection by law enforcement, and thus those individuals could likely provide general testimony that would assist Plaintiff in proving liability and damages, including punitive damages. However, none of these individuals were

present during acts of sexual abuse by Epstein. In any event, ALL of those individuals have also invoked their 5th amendment rights against self-incrimination, and thus have left Plaintiff with no information about what Epstein or other conspirators inside his house were doing during the sexual abuse of Jane Doe and other minors girls. This creates a serious issue for Jane Doe in proving her sexual molestation claim against Epstein. By its nature, sexual molestation takes place in private, with only the abuser and the victim typically available to testify. In this case, Epstein's abuse of Jane Doe took place in private, with only Epstein and Jane Doe present during the abuse. Jane Doe has no other reasonable avenues of discovery to provide direct proof of claim of sexual abuse by Epstein.

11. Additionally, Mr. Epstein has recently filed a lawsuit against me personally that has no merit whatsoever, a fact known to Mr. Epstein and his attorneys. He filed the lawsuit against Brad Edwards, Scott Rothstein, and L.M. (another Epstein victim of his molestation). That lawsuit implies that L.M.'s civil case against him (currently pending in Florida state court) is fabricated and that L.M. and I have conspired to commit fraud against him (presumably that she made up the case against him, implying that he does not know L.M.). While the present subpoena before the Court has been filed by Jane Doe, the Court should be aware that attorneys representing L.M. may also file a subpoena for the George Rush tape shortly.

12. Despite Mr. Epstein and all of his co-conspirators, asserting a 5th amendment privilege against self-incrimination, George Rush of the New York Daily news did contact me to inform me that Mr. Epstein spoke personally with him about issues related to the various charges of sex abuse against him.

13. Paraphrasing from memory of my conversation with Mr. Rush, Mr. Epstein told him that he may have come "too close to the line" but that he should not have been punished as severely as he was and that his conduct was at most worthy of a \$100 fine. This is a statement that shows two things of great importance to Jane Doe's pending civil action. First, it is in effect an admission by Epstein of his liability to Jane Doe for sexually abusing her. Jane Doe does not have any other admission of Epstein of his sexual abuse of her and Epstein has filed an answer to Jane Doe's complaint that has the functional effect of denying abuse of her. Jane Doe has diligently pursued all possible ways of obtaining an admission from Epstein of his molestation of Jane Doe without success. Second, the statement to Mr. Rush is a clear demonstration that Epstein lacks remorse for committing felony child molestation against Jane Doe. This will be a central issue in the punitive damages case against Epstein at trial. Here again, Jane Doe has diligently pursued all possible ways of obtaining a statement from Epstein about his lack of remorse for abusing Jane Doe without success. There are no other reasonable means of obtaining a statement from Epstein on these subjects.

14. Mr. Rush also told me that Mr. Epstein spoke specifically about one of my clients, L.M., and he made derogatory remarks about her.

15. Additionally, Mr. Rush said that Epstein spoke directly about another civil case that was filed against him (Jane Doe 102 v. Epstein); that case alleges that Epstein repeatedly sexually abused a 15 year old girl, forced her to have sex with his friends and flew her on his private plane nationally and internationally for the purposes of sexually molesting and abusing her. Epstein flippantly told George Rush that that case was dismissed, in a way to indicate that the allegations are ridiculous and untrue.

16. Mr. Rush indicated that he taped the conversation between him and Mr. Epstein.

17. Mr. Rush also spoke at length to Michael Fisten, an investigator with my firm that was assisting with the investigation of the case. Mr. Fisten reported to me shortly after the conversation with Mr. Rush that he had such a conversation.

18. While research by other plaintiffs' attorneys and myself has uncovered other persons that were acquaintances of Mr. Epstein, specifically Donald Trump, Alan Dershowitz, Bill Clinton, Tommy Mottola, and David Copperfield, we have no information that any of those people (other than Mr. Dershowitz) have spoken to Mr. Epstein about Jane Doe or any of the other specific victims of Mr. Epstein's molestation. Mr. Dershowitz is acting as an attorney for Mr. Epstein, and therefore it is presumably unlikely to question him about any admissions that Epstein may have made regarding Jane Doe or other minors girls. Additionally, we have no information that any of those individuals or any other individuals have any taped statements of Epstein's own voice relating to these matters. George Rush's taped conversation with Mr. Epstein is the only known one in existence, making it very unique and it contains information not otherwise obtainable through other means or sources. Indeed, without the Rush tape conversation, the jury that handles the case will not hear any words from Epstein himself about his abuse of Jane Doe and other young girls. I have been informed by Epstein's attorney that Epstein intends to invoke his Fifth Amendment rights rather than answer any substantive questions about the abuse of Jane Doe and other girls at trial.

19. The Rush interview is, in any event, unique and not otherwise obtainable from other witnesses because it can be used to prove perjury (a federal crime) on the part of Epstein. Epstein lied about not knowing George Rush. See deposition of Jeffrey Epstein, taken in L.M. v. Jeffrey Epstein, case 50-2008-CA-028051, page 154, line 4 through 155 line 9, wherein Jeffrey Epstein clearly impresses that he does not recognize George Rush from the New York Daily News, despite the fact that he gave a personal interview that we all now know to have been tape recorded. It is therefore evidence of a criminal event. If we receive the tape, we intend to alert the appropriate law enforcement authorities, both federal and state, so that they can pursue any appropriate criminal investigation perjury charges.

20. The tape is also crucial for L.M. to dismiss the frivolous complaint filed by Jeffrey Epstein against her, as he clearly acknowledges knowing L.M., contrary to claims he makes in his complaint against her and also contradictory to other statements he has made in depositions related to knowing L.M. In that regard, this tape provides evidence of other false statements Epstein has made under oath.

21. During a telephone call with George Rush, he provided me more than a description of the tape, and in fact described the general tenor of the entire interview, so that nothing in the interview can be fairly regarded as confidential at this point.

22. As George Rush admitted in his affidavit, he played the tape for *at least* two other persons who also confirmed Epstein's arrogance as he speaks about his actions with minors.

23. The people for whom George Rush played the tape or told in detail of the information on the tape were not "sources" in the tradition sense of the word – all individuals were simply chatting with Mr. Rush about Mr. Epstein and his propensity to molest children. For example, when I discussed the tape with Mr. Rush, I was not a "source" in the traditional sense of that term. At no point did Mr. Rush tell me that I was a "source" for his reporting.

24. Because Epstein and all other co-conspirators have invoked the 5th amendment as to all relevant questions, this tape is the *only* way that Jane Doe can put Epstein's own perceptions of what he has done before the jury and the *only* way that Jane Doe can put Epstein's admissions and statements before the jury. As even a quick perusal of the more than 500 entries on the docket sheet for Jane Doe's (consolidated) case will confirm (see Case no. 9:08-80119 (S.D. Fla.) (case number for consolidated cases on discovery), Jane Doe and other plaintiffs have made exhaustive attempts to obtain information from Epstein about his abuse. These attempts have included repeated requests for admission, requests for production, interrogatories, and depositions – all the means that are listed in the Federal Rules of Civil Procedure for obtaining discovery. These means have all been exhausted without success. Neither

Jane Doe nor any of the other plaintiffs have been able to obtain even a single word of information from Epstein about his abuse of minor girls.

25. I made a good faith, albeit unsuccessful, effort to resolve this matter with Anne B. Carroll, representing the Daily News in order to avoid any court intervention. I explained that we needed this tape for several reasons, including those cited by her in her pleading. The tape is detrimental to Epstein's personal complaint against L.M. and me; the tape is evidence of perjury committed by Epstein; the tape is the Best Evidence of his lack of remorse for his actions and will be presented in the punitive damages phase of the civil trials against him; and, perhaps most important, the tape is the only way that the jury considering Jane Doe's case will be able to hear Epstein's voice and own statements about his abuse of Jane Doe and other minor girls. Without the tape, the jury will not have the opportunity to hear Epstein give any substantive information about Jane Doe's complaint. Indeed, they will not have the opportunity to even hear Epstein's voice utter any substantive words other than (in essence) "I take the Fifth." Ms. Carroll has made it clear that Rush's disclosures were viewed unfavorably by his employer.

I declare under penalty of perjury that the foregoing is true and correct.

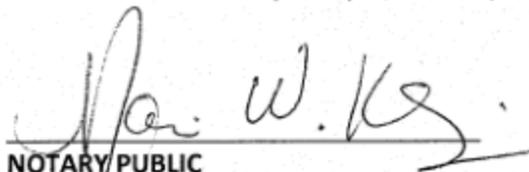
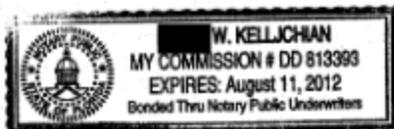
FURTHER AFFIANT SAYETH NAUGHT.

Dated this 23rd day of April, 2010.



Brad Edwards, Esq.

The foregoing instrument was acknowledged before me this 23rd day of April, 2010 by BRAD EDWARDS, who is personally known to me.



NOTARY PUBLIC

Print Name: _____

My Commission Expires:

EXHIBIT B

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE APPLICATION TO QUASH
SUBPOENA TO DAILY NEWS AND
GEORGE RUSH

CASE NO. 10 M8-85 (LAK)

AFFIDAVIT OF MICHAEL FISTEN

1. I am an investigator employed by the law firm of Farmer Jaffe Weissing Edwards Fistos and Lehrman who has been assigned to work on the case brought by Jane Doe, seeking compensation for damages inflicted on her by Jeffrey Epstein. The case is Jane Doe v. Jeffrey Epstein, No. 08-80893, and is currently pending in the U.S. District Court for the Southern District of Florida. Before being a private investigator, I spend thirty years in south Florida as a law enforcement officer.

2. In pursuit of information related to the litigation against Jeffrey Epstein I had a conversation with George Rush, a reporter with the New York *Daily News*, on October 22, 2009.

3. I called Rush after I had become aware of him because he was giving information to an author about Jeffrey Epstein. The author told me that this was extremely valuable information for the civil case I was working one. The author said that Rush played a tape for the author and another person that was a recording of Epstein. I had the impression that Rush had played the entire tape for this author. The author said words to the effect, "My god, you've get this tape. He talks about the girls." The author told me that the admissions made by Epstein in the tape would be very helpful to the girls pursuing civil suits against Epstein.

4. At this point, I called Rush in New York to try to get the tape. Rush had no hesitancy in telling me that he had tape recorded a recent conversation between Jeffrey Epstein and himself.

5. Rush then began telling me in detail about the contents of the tape recorded call.

6. Rush has previously spoken to attorney Brad Edwards (the attorney representing Jane Doe) and me concerning a story he (Rush) was writing on Jeffrey Epstein. Rush stated that he compiled very negative information on Epstein concerning his exploits with

underage girls and how he eluded the justice system. Rush stated that he presented the story to his publisher, who killed the story. He stated that his publisher, who knows Jeffrey Epstein, received a call from Epstein which resulted in him killing the story.

7. Rush agreed to paraphrase his recorded interview of Jeffrey Epstein, providing me with the following highlights. He stated that Epstein spoke in a New York accent advising how he came from Brooklyn and became wealthy. He stated that people do not like it when people make good and that was one reason he was being targeted. He stated that he did nothing wrong and went to jail for no reason. He stated that the time he spent in jail was too harsh of a sentence and if the same circumstances would have happened in New York he would have only received a \$200 fine. He continued by making very negative comments concerning Attorney Brad Edwards (the lead attorney representing Jane Doe), that he (Brad) was causing all his problems. He referred to Edwards as an ambulance chaser and his clients such as L.M. as a person that came to him as a prostitute and drug addict. He stated that all the girls suing him are only trying to get a meal ticket and the only thing he might have done wrong was to maybe to cross the line a little too closely. Rush advised that Epstein was very upset that Edwards subpoenaed Ghislaine Maxwell, referring to her as a good person that did nothing wrong.

8. Rush advised that he was going to listen to the tape again and provide me with additional information. Rush had no other information to offer.

9. At no point during this phone call was I told that the discussion was "off the record" or otherwise confidential. I was never told that there was any agreement for secrecy. I had the clear impression that Rush knew I would be relay all of the information that he had provided to me to Brad Edwards and other attorneys and investigators working on Jane Doe's case and other similar cases.

10. After I interviewed Rush, I asked for a copy of the tape of Epstein. He said he had no problem with doing that. He just had to run by his legal people. But later that day, he called me back and said "legal" would not let him give me the tape.

11. On October 26, 2009, when my discussion with Rush was fresh in my mind, I wrote up a report memorializing what Rush had told me.

12. Rush later sent me e-mails about the Epstein case, including forwarding to me an e-mail that Epstein had apparently written about the case.

13. I have reviewed the affidavit of George Rush, dated April 6, 2010, filed in this matter. That affidavit contains this statement: "I have not revealed any part of the contents of the Epstein interview to anyone other than the individuals I have described here [i.e., Brad Edwards and three other individuals who met with Rush in New York], except for Anne Carroll, the attorney representing me in this proceeding." This statement

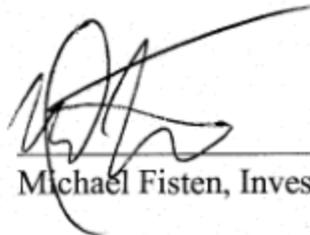
is not accurate, as Rush gave me a detailed description of the Epstein tape recorded interview.

14. I have been extensively involved in the investigation attempting to support Jane Doe's claims against Epstein. As part of my duties in investigating the case, I have attempted to locate all recorded statements made by Epstein regarding his sexual abuse of Jane Doe and other minor girls. I have not been able to locate any such recordings. Nor do I currently possess any investigative leads for tracking down such recordings.

I declare under penalty of perjury that the foregoing is true and correct.

FURTHER AFFIANT SAYETH NAUGHT.

Dated this 23rd day of April, 2010.



Michael Fisten, Investigator

The foregoing instrument was acknowledged before me this 23rd day of April, 2010 by MICHAEL FISTEN, who is personally known to me. _____



NOTARY PUBLIC

Print Name: _____

My Commission Expires:

EXHIBIT C

Paul Cassell

From: Carroll, Anne [REDACTED]
Sent: Thursday, April 22, 2010 5:45 PM
To: Paul Cassell
Cc: Handman, Laura
Subject: MOTION TO QUASH SUBPOENA IN DOE v. EPSTEIN

Paul:

I have spoken to George Rush and can confirm that you are correct that his interview of Jeffrey Epstein took place in October 2009, prior to October 22. (We have not yet been able to establish the exact date.) Mr. Rush's earlier statement concerning the November 18 date was due to a mistaken entry on his Outlook calendar. He conducted only one interview of Mr. Epstein. In addition, after his recollection was refreshed by the information you gave us, Mr. Rush is able now to recall that during a conversation with Mike Fisten, Bradley Edwards' private investigator, he shared a very limited amount of information about the Epstein-interview, including on a subject that came up during it that had no relation whatever to the Jane Doe civil cases against Mr. Epstein. (Mr. Rush now believes that it is possible that he also discussed that unrelated subject with Mr. Edwards, although he is unsure, since his memories of his conversations with Edwards and Fisten have converged to some extent – certainly enough so that initially he did not remember discussing the interview with Fisten at all.) Therefore, we will be providing a supplemental affidavit of Mr. Rush, although I think it unlikely that we will be able to do so before next week.

I reiterate that, as Laura Handman and I said to you on the phone yesterday, we do not believe that this additional information alters in any material way our position, or the arguments we have already made, in this proceeding.

You stated that you will be requesting that the Court conduct an evidentiary hearing on May 4th and that you anticipate serving a subpoena on Mr. Rush to that end. You asked if I am willing to accept service of such a subpoena on Mr. Rush's behalf. I am – though with the proviso that my agreement does not waive any rights of either the Daily News or Mr. Rush to challenge the subpoena.

Best regards,

Anne

Anne B. Carroll
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Deputy General Counsel
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