

24

Suite 300
West Palm Beach, Florida 33401

25

(561) 835-0220

1 APPEARANCES:

2 FOR THE PLAINTIFF/COUNTER-DEFENDANT:

3 LAW OFFICES OF TONJA HADDAD COLEMAN,

█.

4 315 Southeast 7th Street

Suite 301

5 Fort Lauderdale, Florida 33301

954-467-1223

6 BY: TONJA HADDAD COLEMAN, ESQ.

7

8 FOR THE DEFENDANT/COUNTER-PLAINTIFF:

9 SEARCY, DENNEY, SCAROLA, BARNHART

& SHIPLEY, █.

10 2139 Palm Beach Lakes Boulevard

West Palm Beach, Florida 33409

11 561-686-6300

BY: JACK SCAROLA, ESQ.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 The above-styled cause came on for
2 hearing before the Honorable David Crow,
3 Circuit County Court Judge, at the Palm Beach
4 County Courthouse, 205 North Dixie Highway,
5 West Palm Beach, Florida, on June 5, 2013,
6 commencing at 8:55 o'clock, [REDACTED], as follows:

7 THE COURT: Good morning. This is
8 Epstein versus Rothstein. Actually, this is a
9 status conference, as well as I think the
10 plaintiff filed a motion for clarification. I
11 read the motion. Do you want to add anything
12 else to the written motion?

13 MS. COLEMAN: No, Judge. I brought all
14 the case law with me, but I attached your
15 previous March 11th order, as well as the
16 subsequent May 17th order, which was the
17 portion with which we took issue for the
18 clarification.

19 THE COURT: I am not sure what the
20 clarification is. Let me just say I thought
21 the order was clear. Here's what it said.

22 It said very simply that I initially
23 ordered you to produce a privilege log for
24 anything that was an non-constitutional
25 privilege and you do not have to provide a

1 privilege log which in and of itself may be
2 incriminating. I understood that that was
3 your position.

4 I expected there would be a list of
5 documents, which only was an objection based
6 on some non-constitutional privilege. What I
7 got, what was provided, was essentially,
8 although you did produce some documents,
9 substantially all the documents were objected
10 to not only on the Fifth Amendment privilege
11 but also on the basis of work product,
12 attorney/client privilege and various other
13 non-constitutional privileges.

14 We had a hearing on that, and I think I
15 asked counsel what do I do under these
16 circumstances, and I don't recall the direct
17 response, but it was not a lot of information
18 I got from you.

19 So what I did is I went back and I had
20 some of our cracker-jack legal staff here do
21 some independent research for me, and after
22 reviewing that information I understand the
23 law to be, as I set forth in my order, that a
24 blanket objection on Fifth Amendment
25 constitutional grounds is generally

1 unacceptable, and the Courts have outlined a
2 methodology by which the Court can test the
3 legitimacy of a Fifth Amendment claim when
4 it's basically a broad brush.

5 And that methodology, as outlined in the
6 cases I cited, is that you ask for and obtain
7 an in camera privilege log, one that is not
8 provided to the other side, an in camera
9 privilege log directed to the Court alone that
10 outlines; one, the document, and provides me a
11 copy of the document; two, the privilege that
12 you are asserting, whether it be
13 constitutional or non-constitutional; and the
14 third, the basis that you feel, at least on
15 constitutional grounds, that the production,
16 for example, is, in fact, testimonial and that
17 you have a reasonable basis to believe that
18 producing the document, if it's an individual
19 or a corporation, would, in fact, incriminate
20 the client.

21 As I understand the case law, the Court
22 is then to look at that in camera production,
23 nobody gets a copy of it, I take a look at it,
24 I make a decision whether or not there is, in
25 fact, a good faith basis for a constitutional

1 objection on Fifth Amendment grounds.

2 Also I look at the documents to determine
3 whether or not the other privileges apply, the
4 attorney/client privilege, work product
5 privilege, accountant privilege, and, if I
6 can, I make rulings based upon that internal
7 privilege log or in camera privilege log.

8 In fact, the case law goes forward from
9 there and actually says, if I can't determine
10 it from that, I can actually have an in camera
11 hearing where I can have you and your client
12 appear and produce additional information to
13 me to allow me to make that decision as to
14 whether or not the documents in good faith are
15 constitutional.

16 No one is trying to abrogate your
17 client's Fifth Amendment privilege, but there
18 has to be a method to test whether there's a
19 good-faith basis for it and to rule on the
20 other privileges, and if I need a further
21 hearing, I can have a further hearing. Mr.
22 Scarola is not a part of that. Then I make a
23 ruling.

24 And the pragmatic and practical reason
25 for that is not only to determine whether or

1 not there is a Fifth Amendment privilege,
2 like, for example, as I understand, the
3 production of documents, the actual production
4 itself must be testimonial, not the document
5 necessarily, and there are various different
6 things I have to look at, and I recognize that
7 your client deserves, you know, the utmost
8 protection of his constitutional rights.

9 But the pragmatic reason I thought out
10 loud in my order was that, what happens then,
11 I would be able to rule on your
12 non-constitutional privileges, because at
13 trial, very simply, what can happen is, you
14 can't ask somebody at trial an attorney/client
15 privilege question, you can't ask them a work
16 product privilege question, so if the only
17 privilege remaining is, in fact, subject to
18 self-incrimination under the Fifth Amendment,
19 that can be asked of the witness on the stand,
20 and he must assert his right at the time of
21 trial, and the jury can take whatever they
22 want to from that.

23 That's the reason I set forth this
24 procedure. ■ sorry it wasn't clear. That's
25 the procedure I set up. But do you want me to

1 reconsider that theory or you just didn't
2 understand what I was doing? [REDACTED] not sure I
3 understand what you're asking.

4 MS. COLEMAN: I understood your order,
5 but it was in direct contravention with your
6 first order, and it --

7 THE COURT: Well, the initial order
8 contemplated that there would be a subset of
9 documents which were privileged based upon
10 non-constitutional grounds that I could look
11 at and make determinations on, but the reality
12 is that they apply to all of them, so there's
13 no way I can look at the documents and make
14 determinations on work product, attorney/
15 client, accountant privilege, I am not sure of
16 all the other privileges, without looking at
17 the document, and that's what I asked and did
18 research on, to determine how I look at a
19 document that is claimed to be Fifth Amendment
20 privileges.

21 And the Federal Courts have set up a way
22 to do that because, otherwise, people would
23 just have a blanket assertion. In fact, there
24 are two Supreme Court cases I think I cited,
25 one where they said, yeah, the other one said,

1 no, and then there's a lower court setting
2 forth a procedure to do it.

3 MS. COLEMAN: The problem with which we
4 are faced with, Judge, is this:

5 We did not assert a blanket Fifth
6 Amendment privilege. It was very specific as
7 to certain requests to which we argued. And
8 the interrogatories was the other portion of
9 which we were requesting clarification of, but
10 I will address that momentarily.

11 If the documents are provided to you,
12 even for an in camera review, the Fifth
13 Amendment privilege is waived. Respectfully,
14 Judge, hypothetically speaking, if you saw
15 something --

16 THE COURT: You mean I got it totally
17 wrong?

18 MS. COLEMAN: Judge, I am not trying to
19 say you got it totally wrong, but the case law
20 research, my case law research and the
21 research that the criminal defense attorneys
22 with whom [REDACTED] working, states that --

23 THE COURT: What case are you relying
24 upon? Actually, I ran this by somebody who
25 teaches this that's a colleague of mine,

1 teaches federal prosecutors the issue. Which
2 case are you relying upon?

3 MS. COLEMAN: I am looking at Piscioti
4 versus Stephens; 940 So.2d, 1217; Maged versus
5 Winter, 664 So.2d --

6 THE COURT: Where in your motion is it?

7 MS. COLEMAN: [REDACTED] on page 3 of my motion
8 for clarification.

9 THE COURT: Okay. And it's Maged versus
10 Winter?

11 MS. COLEMAN: If you turn to page 3,
12 Judge, that entire page, it discusses --

13 THE COURT: It says the production in
14 camera to the Court to determine the validity
15 of the Fifth Amendment privilege waives the
16 privilege?

17 MS. COLEMAN: It does, Judge. If you
18 would allow me to finish, I will explain to
19 you the issue.

20 THE COURT: Okay, [REDACTED] sorry.

21 MS. COLEMAN: Hypothetically speaking,
22 let's say the documents are given to you and
23 you see something that in and of itself would
24 constitute a reason to assert the Fifth
25 Amendment, it could possibly be deemed

1 criminal, respectfully, this Court cannot
2 confer immunity upon my client from
3 prosecution of that.

4 In fact, I believe under the Judicial
5 Canons, you would be obligated to turn it
6 over. And we proffered this, and I did cite
7 case law in our motion for clarification in
8 which we asserted that a proffer from the
9 attorney is specific enough, and we have laid
10 it out many times.

11 THE COURT: Which case is that?

12 MS. COLEMAN: The proffer from the
13 attorney would be sufficient, ironically, it's
14 in regards to Rothstein versus Albert, which
15 is cited on page 6 of our motion. And, in
16 addition, Judge, there are cases where, if you
17 look at all the other cases to which we refer,
18 it's a realistic fear of future prosecution.

19 We have delineated in here, this is a
20 unique situation, Mr. Edwards is actively
21 seeking to overturn a non-prosecution
22 agreement between Mr. Epstein and the United
23 States government. Part of the allegations by
24 the United States government, and again of
25 course I am not saying they are true, part of

1 the allegations to which the government was
2 referring included financial crimes.

3 As such, if any of this financial
4 information is provided to this Court and/or
5 if Mr. Edwards is successful in his quest to
6 do this, the docket is 427 entries long, it's
7 an active case, Mr. Epstein runs the risk of
8 being prosecuted for these things should there
9 be anything incriminating therein.

10 The biggest issue with which we are
11 faced, Judge, is if the mere act of producing
12 these documents or identifying these documents
13 would waive his Fifth Amendment privilege,
14 then he has lost that Fifth Amendment
15 privilege.

16 I do appreciate the concern with respect
17 to the other privileges, and I don't have an
18 answer, if I had been able to find one I would
19 have given it to you, but the risk we're faced
20 with today is that if he must lose all those
21 other privileges, accountant/client,
22 attorney/client, work product, and only be
23 permitted to assert the Fifth, then that's
24 what he is going to have to do, because I
25 don't see any way in which the client can

1 produce the documents.

2 Again, I don't read any of these cases to
3 state that an in camera review of a privilege
4 log would not waive the Fifth Amendment
5 privilege, I don't see that in any of these
6 cases, which is why we were asking for the
7 clarification.

8 THE COURT: Okay. [REDACTED] going to have to
9 look at it again. This is complex stuff.

10 MS. COLEMAN: It is very complex, I don't
11 disagree.

12 THE COURT: Okay, Mr. Scarola.

13 MR. SCAROLA: I thought that I just heard
14 counsel offer to agree that the only
15 applicable privilege for purposes of this
16 proceeding would be the Fifth Amendment
17 privilege, and if that is what counsel is
18 prepared to agree to, that is an acceptable
19 stipulation.

20 That's what we have been asserting from
21 the beginning of this controversy, that it is
22 necessary for the Court to implement a
23 procedure, which the Court has very clearly
24 outlined in Your Honor's order, which would
25 allow you to make a determination with regard

1 to the validity of other privileges, even
2 assuming that the Fifth Amendment privileges
3 were to apply.

4 If opposing counsel is agreeing that they
5 will waive privileges other than the Fifth
6 Amendment privilege, in order to avoid the
7 procedure that Your Honor has outlined, that
8 is acceptable, we accept that stipulation.

9 THE COURT: I don't think you are going
10 to get it, but...

11 MS. COLEMAN: Honestly, I don't know that
12 my client can be forced into that position.
13 The bigger issue is, respectfully, again this
14 Court can't confirm immunity upon Mr. Epstein,
15 and if there's anything in those documents to
16 which a crime or a link to a crime could be
17 possibly furnished, the Court would have an
18 ethical obligation to turn it over.

19 If we could get the United States
20 government, who is a party to this lawsuit
21 with Mr. Edwards, to come in here and confirm
22 immunity upon Mr. Epstein, I am sure there
23 would be no issue with making a privilege log
24 and providing all these documents. But Mr.
25 Edwards, respectfully, has created this

1 situation under which my client can't turn
2 over any of these documents.

3 So by actively seeking to overturn this
4 non-prosecution agreement he places my client
5 in a legitimate fear that he could be
6 prosecuted for anything that could arise out
7 of this transactional event, including any
8 alleged financial crimes, because that is what
9 the government was initially alleging.

10 THE COURT: So your position, very
11 simply, is in a civil case where there are
12 multiple privileges asserted to almost all the
13 documents there is no methodology or method by
14 which the Court can determine the validity of
15 those assertions and, therefore, Mr. Scarola
16 can't ask your client any questions?

17 MS. COLEMAN: Judge, again, I have not
18 seen a case -- I don't have an answer for
19 you. We can try to give you an answer on
20 Monday. We have a one hour special set
21 hearing.

22 THE COURT: I asked for that before I
23 thought. I didn't get a lot of help. I tried
24 to do it on my own.

25 MS. COLEMAN: Because there's not a

1 simple answer out there, Judge, and I can't
2 just blanketly waive my client's rights to all
3 his privileges without conferring with him,
4 but the situation with which we are faced is
5 my client is now being put in a position where
6 he has to potentially waive any other
7 privilege he may be able to assert or waive
8 his constitutional privilege.

9 THE COURT: Okay, here's what I am going
10 to do. I am going to stay production of the
11 documents until I have a chance to look at
12 this. Unfortunately, [REDACTED] in the middle of a
13 rather lengthy trial right now, and I will get
14 to it as soon as I can, but it won't be
15 tomorrow, it will be some time next week at
16 the earliest. But I will get you something
17 out as to what we're going to do here.

18 MS. COLEMAN: Judge, the last part of the
19 clarification is, your order does speak to the
20 interrogatories, but you never actually said
21 whether or not you expected further responses
22 to the interrogatories, and I cited some case
23 law in our motion for clarification in which
24 the law is clear that interrogatories, because
25 they must be verified and sworn to, are

1 testimonial in nature. So that might be a
2 little easier to answer, but please note that
3 that was something with which we were also
4 seeking clarification.

5 THE COURT: Okay. Well, there are two
6 categories of documents here, as I understand
7 it. One is documents in the possession or
8 alleged to be in the possession of your
9 client, the other is documents which are in
10 the possession of or are corporate documents
11 or something like that.

12 MS. COLEMAN: No, Judge, that was another
13 portion of it. There are no corporate
14 documents. All of the requests are to Mr.
15 Epstein.

16 THE COURT: I don't mean corporate
17 documents, but documents that are not personal
18 to him necessarily.

19 MS. COLEMAN: I think the easiest way to
20 go through this might be to look at each
21 request individually, rather than trying to
22 make these blanket or combination assertions,
23 because --

24 THE COURT: The problem is you make
25 blanket objections.

1 MS. COLEMAN: We didn't, Judge. We
2 objected to each one individually.

3 THE COURT: In the same objection, like
4 you just mimeographed it. Well, y'all are too
5 young to remember mimeographs.

6 MR. SCAROLA: Not all of us.

7 MS. COLEMAN: No, Judge, not to all of
8 them. Some of them, for example, may have a
9 work product type privilege or a third party
10 privacy right privilege. I'll just give you
11 an example: Any account on which Mr. Epstein
12 would have signatory authority.

13 THE COURT: Okay, I have to move on. I
14 will take a closer look at it. I have already
15 taken a close look at it. I will take a
16 magnifying glass to it, I guess, and get you
17 something out.

18 MS. COLEMAN: Thank you, Judge.

19 MR. SCAROLA: Thank you, Your Honor.
20
21
22
23
24
25

CERTIFICATE OF REPORTER

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Roger Watford, Florida Professional Reporter, certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

I further certify that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorneys or counsel connected with the action, nor am I financially interested in the action.

Dated this 21st day of June, 2013.

Roger Watford, FPR/RPR

