

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

x

**IN RE APPLICATION FOR CPLR 3102(E) ORDER
TO PRODUCE TAPE RECORDING**

Index No.

x

**MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR CPLR 3102(E)
ORDER TO PRODUCE TAPE RECORDING**

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PRELIMINARY STATEMENT

Bradley Edwards seeks an order pursuant to CPLR 3102(e) for production of a tape recording of a conversation between a *Daily News* reporter and billionaire Jeffrey Epstein concerning Epstein's molestation of minor girls, which is the central issue in a pending Florida lawsuit between Epstein and Edwards.

By way of background, in 2008, Edwards, a lawyer, filed lawsuits on behalf of three girls against Epstein to recover actual and punitive damages for Epstein's sexual assaults. As the cases proceeded, however, Epstein blocked all substantive discovery against him about his sexual abuse of young girls by invoking his Fifth Amendment right to silence – thereby functionally denying the allegations that the girls made. As a result of this barrier, the girls (represented by Edwards) were unable to obtain any admission from Epstein that he sexually abused them while they were minors. The girls were also unable to obtain any evidence to prove Epstein's lack of remorse for this abuse, a showing critical for securing substantial punitive damages.

In the fall of 2009, Michael Fisten, an investigator working for Edwards, heard from an author that *Daily News* reporter George Rush had made a recording of Epstein discussing the sexual abuse of minor girls. The author told Fisten that Rush had played the recording 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 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, while blaming them for the abuse.

Several months ago, one of the three girls -- Jane Doe -- filed a proper subpoena for the tape in the United States District Court for the South District of New York. In response, on April 7, 2010, Rush and the *Daily News* filed a motion to quash, claiming that the tape recording is somehow protected by a journalist's privilege. In June 2010, the District Court (McKenna, J.) rejected that argument, finding that, in view of its importance, the tape was properly discoverable despite the claim of journalist privilege.

The *Daily News* then took an appeal to the Second Circuit. While the appeal was pending, however, the underlying civil suit by Jane Does (as well as the other two girls) settled, leading to an automatic vacation of the district court ruling.

Meanwhile, litigation has proceeded on a parallel track on another lawsuit -- this one filed by Jeffrey Epstein against the girls' attorney, Brad Edwards, alleging abuse of process for filing fabricated claims against him. (Edwards has filed a malicious prosecution counter-claim against Epstein.) Edwards and Epstein continue to be in litigation on these issues. Accordingly, Edwards recently sought a copy of the recording and, on August 3, 2010, obtained an order from a Florida Commissioner for the appointment of a New York Commissioner to procure the Tape. The *Daily News*, however, has told counsel for Edwards that that it will refuse -- once again -- to produce the Tape. Accordingly, New York counsel moves this Court for a CPLR 3102(e) order requiring the *Daily News* to produce the tape.

All requisites for a CPLR 3102(e) order are satisfied. The content of the tape -- Epstein's statements about his molestation of young girls -- is highly relevant and clearly falls within the scope of the issues pending in the Florida action. Moreover, the *Daily News* cannot carry its burden of showing proper justification for refusing to produce these highly relevant tapes for two simple reasons.

First, the *Daily News*' reporter, George Rush, has waived whatever privilege might attach to the recording by playing a significant portion of the recording to three people and describing the recording in detail to two other persons – attorney Brad Edwards and private investigator Michael Fisten. Accordingly, any privilege has now been obviously waived. *See* N.Y. Civil Rights Law CRL § 79-h(g) (reporter privilege waived through voluntary disclosure of information).

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. The reporter's privilege in this state can be overcome by a showing that the materials at issue are highly relevant, critical or necessary to the maintenance of a party's claim, and not obtainable from any alternative source. Brad Edwards easily meets this test. He can show that the tape is in fact highly relevant and critical to the maintenance of his claims. Indeed, Judge McKenna, in ordering production, has already found that the evidence was relevant to one of the girl's (Jane Doe's) claims. In view of Epstein's invocations of the Fifth Amendment – both during past discovery and his promised invocation during the upcoming trial – the tape recording is Edwards' *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. Edwards can thus easily overcome any claim of privilege by the *Daily News*.

FACTUAL AND PROCEDURAL BACKGROUND

I. EPSTEIN'S SEXUAL ABUSE OF MINOR GIRLS AND HIS CRIMINAL PROSECUTION

From approximately 2003 through approximately 2005, Jane Doe, L.M., and E.W. (all then minor girls) were repeatedly sexually abused by Jeffrey Epstein behind the walls of his gated mansion in Palm Beach, Florida. The acts of abuse included, for example, digital vaginal

penetration and Epstein's use of a vibrator. 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 (United States District Court S.D. Fla. 2008); *L.M. v. Epstein*, Case No. 502008CA028051XXXXMBAB (Florida Circuit Court); *E.W. v. Epstein*, Case No. 502008CA028XXXXMBAB (Florida Circuit Court).

After state and federal investigators learned of Epstein's sexual abuse of Jane Doe and more than thirty other under-age girls, Epstein hired a battery of attorneys who negotiated a plea bargain. Affidavit of Bradley James Edwards dated September 14, 2010 ("Edwards Aff.") ¶ 6. Under the plea agreement, Epstein pled guilty to two state criminal charges related to procuring a minor for prostitution and soliciting prostitution. Edwards Aff. ¶ 6. These two charges to which he pled pertained to girls other than Jane Doe. Edwards Aff. ¶ 6. Epstein also entered into a "non-prosecution agreement" ("NPA"), under which the federal government agreed not to prosecute him for any other sex offenses. Edwards Aff. ¶¶ 6. 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. ¶ 7

II. THE CIVIL ACTIONS AGAINST EPSTEIN FOR SEXUAL MOLESTATION OF MINOR GIRLS AND ASSERTION OF THE FIFTH AMENDMENT BY EPSTEIN AND OTHERS

In 2008, Edwards filed civil lawsuits against Epstein on behalf of Jane Doe, L.M. and E.W. in state and federal court in Florida. Edwards Aff. ¶ 2. Epstein answered to these complaints by invoking his Fifth Amendment privilege and arguing that this invocation serves as the equivalent of a denial of the claims. Edwards Aff. ¶ 8. The three girls were vigorously deposed by Epstein's battery of attorneys, who propounded numerous questions suggesting that they were fabricating their allegations that Epstein repeatedly sexually abused them. Edwards Aff. ¶ 5. Edwards diligently attempted to find evidence to corroborate their allegations,

including taking the depositions of the co-conspirators (household staff and others) who helped Epstein secure minor girls to abuse. These individuals also invoked their Fifth Amendment right and elected not to provide answers. Edwards Aff. ¶ 11. Epstein was also deposed. Epstein, however, took the Fifth regarding all substantive questions propounded to him about sexual abuse, including in particular questions regarding whether he abused Jane Doe. Edwards Aff. ¶ 9. Epstein also took 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. Edwards Aff. ¶ 9. *Id.*

III. THE DAILY NEWS' RECORDED CONVERSATION WITH EPSTEIN ABOUT HIS SEXUAL MOLESTATION AND ITS DISCLOSURE OF THE CONTENTS OF RECORDED CONVERSATION TO THIRD PARTIES

While discovery efforts to get information from Epstein were unavailing, in the fall of 2009, Epstein spoke to *Daily News* reporter George Rush about his sexual molestation and the civil suits brought against him. Rush made a 22-minute recording of their conversation. Affidavit of George Rush dated April 6, 2010 ("Rush Aff.") ¶¶ 1-2.¹

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. Rush Aff. ¶ 6. Shortly after that meeting, one of the participants went to an investigator for Edwards' clients -- Michael Fisten -- and said, "My god, you've [got to] get this tape. [Epstein] talks about the girls." Affidavit of Michael Fisten dated September 14, 2010 ("Fisten Aff.") ¶ 3.

On October 22, 2009, Fisten called Rush to get the tape. Fisten Aff. ¶ 5. Rush had no hesitancy in telling him in detail about the contents of the recorded call. Fisten Aff. ¶ 6. Rush

¹ In the earlier litigation before Judge McKenna, George Rush provided an affidavit. That affidavit is attached as Exhibit 3 to the accompanying Affirmation of Robert Y. Lewis dated September 15, 2010 ("Lewis Aff.").

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. Fisten Aff. ¶ 8. Epstein stated had he had done nothing wrong and had gone to jail for no reason. *Id.* If the same thing had happened in New York that had happened in Florida, Epstein protested, he would have received only a \$200 fine. *Id.* 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. *Id.* 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. *Id.* Fisten was not told that his discussion was confidential in any way. Fisten Aff. ¶ 9. Fisten asked for a copy of the tape, and Rush said he had no problem but had to run it by "legal." Fisten Aff. ¶ 10. He called Fisten back later that day to say that "legal" would not let him turn over the tape. *Id.*

Jane Doe's attorney, Brad Edwards, was contacted by Rush. Edwards Aff. ¶ 14. In that conversation, Rush again disclosed the contents of the tape, describing the general tenor of the entire Epstein interview for Edwards. Edwards Aff. ¶¶ 14-16. 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. Edwards Aff. ¶ 15. Epstein said that his conduct was at most worthy of a monetary fine. Edwards Aff. ¶ 15. 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. ¶ 18

IV. EPSTEIN'S ACTION AGAINST EDWARDS AND EDWARDS' COUNTERCLAIM

In December 2009, Epstein filed a lawsuit against Edwards, alleging that Edwards, his client L.M., and Edwards' then-law partner (Scott Rothstein) had abused process in bringing the lawsuit. Edwards Aff. ¶ 3. Edwards answered the complaint and filed a counterclaim for essentially malicious prosecution against Epstein. *Id.*

V. FEDERAL COURT ORDER FOR PRODUCTION OF THE RECORDING

In the Spring of 2010, Jane Doe obtained a proper subpoena for the tape in her federal court case against Epstein. Rush and the *Daily News* filed a motion to quash, claiming that the recording was somehow protected by a journalist's privilege. Jane Doe responded, and the U.S. District Court for the Southern District of New York (McKenna, J.) held a hearing and listened to the tape in camera. The district court then ruled that the tape was not protected by the journalist's privilege. (Judge McKenna's Opinion is attached as Ex. 5 to Lewis Aff.).

Applying *Gonzales v. Nat'l Broad. Co., Inc.*, 194 F.3d 29 (2d Cir. 1999) (*Gonzales III*), the district court explained that a reporter's privilege extended even to non-confidential sources. The district court found the source of the recording was in no way confidential: "Mr. Rush disclosed his source to counsel for Jane Doe not long after the interview." *Id.* at 4. The district court then explained that it had both listened to the recording and reviewed the transcript. After that examination, the court found as a fact that "portions of the recording 'are of likely relevance to a significant issue in [*Jane Doe v. Epstein*],' *Gonzales III*, 194 F.3d at 35, or, rather, depending on how used, two issues, liability and damages." *Id.* at 4-5. The court then highlighted one sentence to prove the point: "The Court notes, in particular, a statement included in the first full paragraph attributed to Mr. Epstein at page 15 of the transcript." *Id.* at 5.

The district court further found that “the materials at issue ‘are not reasonably obtainable from other available sources,” citing *Gonzales*, since “the record is quite clear that Mr. Epstein has regularly been asserting, and will continue to assert, his Fifth Amendment privilege to relevant questions. *Id.* The fact that the recording is in Mr. Epstein’s own voice is also significant from a trial perspective.”

The court then concluded:

Not everything in the recording is relevant, but some non-relevant statements may (or may not) have context value. Ultimately, the amount of the recorded conversation that it would be appropriate to admit in a jury trial is one for the trial judge, with input from counsel on both sides. This Court [the Southern District of New York] defers to the trial court [the Southern District of Florida] in this regard.

Id.

The *Daily News* took an appeal to the Second Circuit. Shortly thereafter, the cases brought by L.M., E.W., and Jane Doe against Epstein all settled. Because of the settlement while the appeal was pending, the Second Circuit vacated the order of the district court. Lewis Aff. Ex. 4.

VI. EPSTEIN’S INVOCATION OF THE FIFTH IN THE EDWARDS ACTION AND FLORIDA COURT ORDER FOR PRODUCTION OF THE RECORDING

While the suit by the three girls has settled, the *Epstein vs. Edwards* lawsuit continues. As he did in the lawsuits brought by the girls, Epstein has taken the Fifth rather than provide any substantive discovery about his sexual abuse of minor girls, and all other leads to obtain this information in other ways have been exhausted. Edwards Aff. ¶ 25. On August 3, 2010, the court presiding over the case -- the Circuit Court of the 15th Judicial Circuit in and for Palm Beach County, Florida -- granted Edwards’ Motion to Appoint a Commissioner in New York to take the deposition duces tecum of the Records Custodian of the *Daily News*. Lewis Aff. Ex. 1. Counsel for the *Daily News* indicated, however, that it would not produce the tape at any such

deposition, prompting this motion for enforcement of the subpoena seeking the tape. Edwards Aff. ¶ 26. Accordingly, Edwards moves, through New York counsel, for a CPLR 3102(e) for production of the recording.

ARGUMENT

CPLR 3102(e) provides that “[w]hen under any . . . commission issued out of any court of record in any other state it is required to take the testimony of a witness in the state . . . [t]he supreme court . . . shall make any appropriate order in aid of taking” discovery for use in the other state’s action.

Under CPLR 3102(e) a court’s inquiry is limited to determining “(1) whether the witness’ fundamental rights are preserved; (2) whether the scope of inquiry falls with the issues of the pending out-of State action; and (3) whether the examination is fair.” *Application of Ayliff and Companies*, 166 A.D.2d 223, 224 (1st Dept. 1990). A court “will not prejudge the materiality or the competency of the evidence in a cause pending in another jurisdiction and will afford the widest possible latitude in the conduct of such examinations.” *Id.* at 224.

Here, the Florida court has issued an order for the appointment of a Commissioner in New York to take a custodian deposition duces tecum at which the tape should be produced. It is beyond peradventure that Epstein’s statements on the recording about his molestation of girls, about the civil actions brought against him, and about Brad Edwards, the girls’ lead lawyer, fall within the scope of the issues in the pending Florida action between Epstein and Edwards.

As to the witness’s fundamental rights, the *Daily News* bears the burden of proving that the reporter’s privilege entitles it to refuse to produce the recording. “The burden of proving each element of the privilege rests upon the party asserting it and even if the technical requirements of the privilege are satisfied, it may, nonetheless, yield in a proper case where

strong public policy requires disclosure.” *People v. Osorio*, 75 N.Y.2d 80, 84, 549 N.E.2d 1183, 1185 (N.Y. 1989) (discussing attorney-client privilege). The *Daily News* cannot carry its burden for two simple reasons: First, it has waived any privilege by disclosing the substance of the recording to several third parties. Second, Edwards has important reasons for obtaining the recording and has no reasonable alternative sources to obtain the information.

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.

As with other privileges, any journalist’s privilege can disappear if the journalist himself chooses to disclose the communication. As has been explained in the context of the more robust attorney-client privilege, “Disclosure of a privileged document generally operates as a waiver of the privilege” *New York Times Newspaper v. Lehrer McGovern Bovis, Inc.*, 300 A.D.2d 169, 172, 752 N.Y.S.2d 642, 645 (N.Y.A.D. 2002). The reason for this rule is the 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 MCCORMACK, EVIDENCE § 93, at 197 (Cleary ed. 1972) and cases cited therein and 8 WIGMORE, EVIDENCE § 2311, at 599 (McNaughton rev. 1961)). 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).

These general principles are operationalized in the New York’s shield law. 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). Under this shield law, therefore, the *Daily News* has waived any privilege if it “disclosed” the information that Edwards seeks to third parties.

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:

- Agreeing to paraphrase the Epstein interview to investigator Michael Fisten (Fisten Aff. ¶ 8);
- Telling Fisten that Epstein began the recorded interview by describing how he came from Brooklyn and became wealthy (Fisten Aff. ¶ 8);
- 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) (Fisten Aff. ¶ 8);
- Telling Fisten that Epstein said that he (Epstein) had done nothing wrong (Fisten Aff. ¶ 8);
- Telling Fisten that Epstein said that he (Epstein) had gone to jail in Florida for soliciting prostitution for no reason (Fisten Aff. ¶ 8);
- 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 (Fisten Aff. ¶ 8);
- 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) (Fisten Aff. ¶ 8);

- 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) (Fisten Aff. ¶ 8);
- Telling Fisten that Epstein said that all the girls suing him (e.g., Jane Doe) are only trying to get a meal ticket (Fisten Aff. ¶ 8);
- Telling Fisten that Epstein said that the only thing he might have done wrong was to maybe cross the line a little too closely (Fisten Aff. ¶ 8);
- 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) (Fisten Aff. ¶ 8);
- Calling Brad Edwards, Jane Doe's attorney, to tell him about the recorded Epstein interview (Edwards Aff ¶ 14);
- Telling Brad Edwards more than description of the tape and in fact describing the general tenor of the entire interview (Edwards Aff ¶¶ 14-19);
- 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 (Edwards Aff ¶ 15);
- Telling Brad Edwards that Epstein spoke about L.M. and made derogatory remarks about her (Edwards Aff ¶ 18); and
- Telling Brad Edwards that Epstein spoke directly about another civil case that was filed against him, Jane Doe 102 v. Epstein,² 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 (Edwards Aff ¶ 18);

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 at least two persons who are in no sense *Daily News* employees (or even journalists). This is an obvious waiver of any privilege.

² See *Doe No. 102 v. Epstein*, No. 9:09-CV-80656-KAM (S. D. Fla. 2009).

Nor should the *Daily News* be heard to quibble that it has somehow “only” waived confidentiality with respect to the 16 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. As Judge McKenna found after listening to the tape, “Mr. Rush paraphrased the interview relatively thoroughly.” McKenna Op. at 3, Lewis Aff. Ex. 1.

Because Rush has purported to describe the entire tape, any privilege is plainly waived for the entire recording. *See, e.g., People v. Fentress*, 103 Misc.2d 179, 193, 425 N.Y.S.2d 485, 494 (N.Y. Co. Sup. Ct. 1980) (finding waiver of “confidentiality of the corpus” of communications from a telephone call disclosing part of privilege communications); *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 constitute the bulk of the recording.³ 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. 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.

³ Of course, if the Court wanted to make this determination more precisely, it could review the recording in camera – as we urge in Part III, *infra*.

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.

In addition to the fact that it has waived any privilege, the *Daily News* likewise cannot sustain its burden of showing a good reason for defeating Brad Edwards' 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 by Edwards making "a clear and specific showing that the [information]: (i) is highly material and relevant; (ii) is critical or necessary to the maintenance of a party's claim, defense or proof of an issue material thereto; and (iii) is not obtainable from any alternative source." N.Y. Civil Rights Law § 79-h. Edwards can easily make such a showing here, as the tape recording is unique evidence of highly probative statements from Epstein that he cannot obtain from any other source.

A. The Epstein Interview is Highly Material and Relevant to Edwards' Defense of the Civil Suit Against him for Fabricating Sexual Abuse Claims and Critical to His Counterclaim Seeking Compensatory and Punitive Damages.

Edwards needs the recording for the pending civil litigation between him and Epstein for the very specific reason that it disproves Epstein's claim that the three civil suits Edwards filed against him were somehow fabricated and that it shows a complete lack of remorse for his activities – critical information for the punitive damages that Edwards seeks against Epstein with his counterclaim.

A bit of context may be useful. The lawsuits Edwards filed against Epstein by various girls became highly contentious. *See generally* Edwards Aff.; *see, e.g., 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). Edwards Aff. ¶

4. Because the cases involved allegations by girls that Epstein repeatedly sexually abused them behind the walls of his private mansion in Palm Beach, Florida, the case at some level became one of “he said, she said.” Edwards Aff. ¶ 4.

With regard to the “he said” half of this equation, Epstein was able to essentially contest the substance of the three girls claims of sexual molestation. Epstein denied the girls’ allegations, by operation of law, through his assertion of Fifth Amendment privileges as to all claims against him. Edwards Aff. ¶¶ 8-9. Moreover, Epstein refused to provide any substantive discovery to the girls – or to Edwards in the currently pending litigation. Edwards Aff. ¶ 9.

With regard to the “she said” half of the equation, Epstein’s battery of attorneys have taken the girls’ depositions, in which they have asked numerous questions suggesting that each has fabricated her claims against him. Edwards Aff. ¶ 5. Indeed, the *Daily News* conceded in earlier litigation that the questioning of the girls has been (in its words) “savage.” Edwards Aff. ¶ 5. And the girls, of course, have no other witnesses they can call to tell what Epstein did to them behind closed doors in his mansion – no direct eyewitnesses to prove that what they are saying is the truth. Edwards Aff. ¶ 5.

Fortunately, through the recording of Epstein, there is now a way to provide to the jury a damning admission from Epstein. As George Rush explained to Brad Edwards’ 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. ¶ 8; *see also* Edward Aff. ¶ 15 (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 the ones that Brad Edwards represented.

Epstein also told Rush that L.M., a minor girl, came to him as a prostitute and a drug addict. Fisten Aff. ¶ 8. 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 L.M., who was originally named by Epstein as a co-defendant in the lawsuit filed against Edwards. (Epstein has since dismissed his suit against L.M.). Perhaps more important, it is direct proof that Epstein knows L.M., a fact that he has denied in the past. Edwards Aff. ¶ 18.

Not only is the tape recording unparalleled evidence for Brad Edwards to disprove that he somehow fabricated cases against Epstein, but it is also compelling evidence in Edwards' case for punitive damages against Epstein. 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 minor girls – 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 minor girls and for filing an abusive lawsuit against one of the attorneys who represented them (i.e., Edwards), the jury will need to impose a substantial punitive damage award to deter future abusive actions.

Lack of remorse “will be a central issue in the punitive damages case against Epstein at trial.” Edwards Aff. ¶ 17.⁴ And, in Florida, any punitive damages award that 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

⁴ 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).

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 girls. 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. ¶ 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" are only trying to get a meal ticket. *Id.* And – critical to the lawsuit involving Brad Edwards – Epstein remarkably blames Edwards for his problems rather than taking responsibility for committing serious sexual offenses against numerous minor girls! *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 Brad Edwards can present.

Finally, it bears mention that the tape recording is clear proof that Epstein has committed the crime of perjury. During a 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. ¶ 22. 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 Brad Edwards 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. ¶ 4. And, as Judge McKenna found after considering the issue, there are particularly significant

passages in the recording that are significant in the litigation against Epstein. *See* McKenna Op. at 4 (highlighting a statement from Epstein in the first full paragraph of page 15 of the transcript of the recording), Lewis Aff. Ex. 5.

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

Edwards can also easily establish that the Epstein interview is unique and not obtainable from other sources – conclusions that Judge McKenna also reached. Despite diligent efforts on her part, Edwards 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. ¶¶ 5, 11, 22 & 25. More importantly, despite diligent efforts, Edwards 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 Edwards' only opportunity to present Epstein's own words to the jury that hears his case. *Id.* As Judge McKenna held: "[T]he record is quite clear that Mr. Epstein has been regularly asserting, and will continue to assert, his Fifth Amendment privilege to relevant questions. The fact that the recording is in Mr. Epstein's own voice is also significant from a trial perspective." McKenna Op. at 5, Lewis Ex. 5. The interview is thus truly one-of-a-kind and Edwards has exhausted all reasonable alternatives to finding another recording.

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

III. THE COURT SHOULD EXAMINE THE RECORDING IN CAMERA.

The Court should examine the recording in camera to determine whether privilege applies in this case. A quick in camera review will confirm both the extent to which any privilege has