

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

x

IN MATTER OF APPLICATION OF BRADLEY  
JAMES EDWARDS SEEKING CPLR 3102(E)  
ORDER FOR DAILY NEWS, L.P. TO PRODUCE  
TAPE RECORDING

Index No. 112345/10

x

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

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## INTRODUCTION

The *Daily News* objects to producing a “confidential” recording that it has already described thoroughly to a number of people. The purported basis for this refusal is the journalist privilege, recognized in N.Y. Civil Rights Law § 79-h(g) (McKinney 2010). Yet that statute plainly provides that the privilege can be waived. A journalist “*waives such exemption if . . . [the journalist] 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) (emphases added). Remarkably, although the waiver statute was the lead argument in Bradley Edwards’ opening memorandum of law (pp. 10-13), the *Daily News* does not even cite the statute in its response – much less demonstrate that the provisions do not apply here. The Court should simply find what Edwards has argued and the *Daily News* has not rebutted: That any journalist privilege has been waived – as specifically provided by law.

The *Daily News* also stakes out the stark position that an audio recording of a sex offender discussing girls he sexually abused and their attorney is somehow not even relevant to litigation about that very subject in Florida. Movant Bradley J. Edwards is involved in a hotly contested lawsuit, in which he has been sued by Jeffrey Epstein for allegedly fabricating claims against Epstein, and in which he is seeking in response – via a counter-claim – millions of dollars in damages from billionaire Jeffrey Epstein. The recording is Edwards’ only opportunity to place before the jury Epstein’s own words about the abuse of the girls (clear evidence that the claims prosecuted against him by Edwards were not fabricated). The recording also demonstrates Epstein’s hatred of Edwards himself (evidence displaying Epstein’s ulterior motive which will support Edwards’ counter-claim) and Epstein’s lack of remorse for his crimes. The recording is therefore unique and indispensable evidence for his case – as the federal district court judge

reviewing the same tape recording has already concluded in connection with a “Jane Doe” lawsuit against Epstein. Accordingly, for this reason as well, the Court should order the *Daily News* to honor the Florida Commissioner’s order for production of the tape.

### **RESPONSE TO THE DAILY NEWS’ STATEMENT OF FACTS**

The *Daily News* has offered its own version of the facts. That version, however, omits many of the critical details necessary for fully understanding why Bradley Edwards is seeking production of the tape. Edwards therefore respectfully directs the Court’s attention to his more complete statement of facts contained in his initial memorandum of law and accompanying affidavits and exhibits. A few of the “facts” presented by the *Daily News*, however, are worthy of a brief response here.

First, the *Daily News* would have this Court conclude that “Epstein made *no* material admissions regarding the young women suing him for sexual abuse.” Daily News Memo. of Law at 6 (*citing* Rush Supp. Aff. ¶¶ 4-5) (emphasis in original). This conclusory assertion is flatly inaccurate, as others who have listened to the recording have explained. One of the participants in a meeting at which the *Daily News* reporter played portions of the tape immediately called Edwards’ investigator and said, “My god, you’ve [got to] get this tape. [Epstein] talks about the girls.” Fisten Aff. at ¶ 3. Similarly, Judge McKenna – who had the benefit of listening to the recording<sup>1</sup> – specifically ruled that the recording contains statements that are “of likely relevance to a significant issue in [*Jane Doe v. Epstein*], . . . or rather, depending on how used, two issues, liability and damages.” McKenna Op. at 5, Lewis Aff., Exh.

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<sup>1</sup> The *Daily News* argues at length that Judge McKenna’s ruling is not binding on this Court. While this is true, Judge McKenna’s ruling about what the very same tape contains is surely persuasive on the very same issues presented to this Court.

5. Indeed, Judge McKenna specifically highlighted a statement made by Epstein in the first full paragraph of page 15 of the transcript as being particularly salient.

Second, in its statement of facts, the *Daily News* does not acknowledge that its reporter has repeatedly and thoroughly disclosed the contents of the recording. For example, the single sentence in *Daily News*' memorandum on the disclosure to Edwards' investigator states – misleadingly – that its reporter “paraphrased *aspects* of the Epstein interview.” *Daily News* Memo. of Law at 7(emphasis added). In fact, the reporter thoroughly described what was on the recording, including revealing the following information:

- Epstein begins the recorded interview by describing how he came from Brooklyn and became wealthy (Fisten Aff. at & 8);
- Epstein said that 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.*);
- Epstein said that he (Epstein) had done nothing wrong (*id.*);
- Epstein said that he (Epstein) had gone to jail in Florida for soliciting prostitution for no reason (*id.*);
- 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.*);
- Epstein made very negative and derogatory 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.*);
- Epstein said that ■■■, one of Edwards' clients who has sued Epstein for sexual abuse as a minor, was a prostitute and a drug user (i.e., came to Epstein for sex, rather than Epstein pursuing her) (*id.*);<sup>2</sup>
- Epstein said that all the girls suing him (e.g., Jane Doe) are only trying to get a meal ticket (*id.*);
- Epstein said that the only thing he might have done wrong was to maybe cross the line a little too closely (*id.*);

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<sup>2</sup> ■■■ was identified as a co-defendant of Edwards in the Epstein vs. Edwards lawsuit.

- 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.*);<sup>3</sup>
- Epstein spoke directly about another civil case that was filed against him, *Jane Doe 102 v. Epstein*,<sup>4</sup> 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.*).

In light of these details that have been disclosed, it seems obvious that the *Daily News* reporter did much more than just describe a few “aspects” of the recording: rather, he described the sum and substance of the recording. Thus, as Judge McKenna concluded after listening to the entire recording and comparing it to what has been disclosed, the reporter “paraphrased the interview *relatively thoroughly*.” McKenna Op. at 3 (emphasis added).<sup>5</sup>

Third, the *Daily News* inaccurately describes the litigation that forms the basis for Florida Commissioner’s order that Edwards seeks to enforce. Epstein filed a suit against Edwards, alleging that Edwards and others had been involved in “the filing of legal motions and the pursuit of a civil litigation strategy that was unrelated to the merits or values of their clients’ cases . . . .” Complaint, Introductory Paragraph. Epstein further alleged that Edwards and others created bogus allegations by “claiming the need for anonymity with regard to existing or fabricated clients . . . [and] were able to effectively use initials, Jane Doe or other anonymous designations . . . [as] a key element of the fraudulent scheme.” Complaint ¶ 23.

<sup>3</sup> Edwards subpoena to Maxwell appears to form one of the grounds for the Epstein vs. Edwards lawsuit. See Epstein Complaint at ¶ 41.

<sup>4</sup> See *Doe No. 102 v. Epstein*, No. 9:09-CV-80656-KAM (S. D. Fla. 2009).

<sup>5</sup> The *Daily News* asserts that Judge McKenna “did not accept Edwards’ waiver argument.” *Daily News Legal Memo.* at 8. In fact, Judge McKenna never *reached* the waiver argument because he granted full relief for Jane Doe on the basis that any privilege had been overcome.

In response, Edwards filed a counter-claim against Epstein. The counterclaim alleges that Epstein filed his lawsuit “for the sole purpose of further attempting to intimidate Edwards, [REDACTED], and others into abandoning or settling their legitimate claims for less than their just and reasonable value.” Counterclaim, ¶ 9.<sup>6</sup> The counterclaim also alleges that “Epstein has ulterior motives and purposes in exercising such illegal, improper, and perverted use of process. His real purpose was to put pressure on Edwards, [REDACTED], and other victims by publishing what amounts to nothing more than a press release issued under the cloak of protection of the litigation privilege.” *Id.* at ¶ 11. The counterclaim accordingly requests compensatory damages and a Motion to add punitive damages is pending.

The *Daily News* describes the counterclaim as solely an abuse of process claim, involving only events after Epstein filed his lawsuit. *See Daily News Memo. of Law* at 17-18. But as is apparent from the recitation of the counterclaim above, it is not so narrowly circumscribed: it includes both Epstein’s actions in filing the suit and in prosecuting the suit. More importantly, the *Daily News* never acknowledges that Edwards is seeking through the counterclaim millions of dollars in punitive damages – the minimum amount necessary to deter a billionaire from filing and pursuing frivolous litigation as a means of intimidating victims of his sexual assaults and the attorneys representing Epstein’s sexual abuse victims. Perhaps more importantly, Edwards is still defending Epstein’s claims that Edwards fabricated claims against him, including claims that Edwards prosecuted on behalf of [REDACTED].

## ARGUMENT

### **I. THE *DAILY NEWS* HAS WAIVED ANY PRIVILEGE THAT IT MIGHT OTHERWISE POSSESS.**

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<sup>6</sup> The counterclaim is attached to the *Daily News*’ Balin Aff. at Ex. B.

In his opening brief, Edwards' lead argument was that the *Daily News* has waived any privilege by disclosing the contents of the recording. The *Daily News* only briefly responds. It contends that because the disclosures were part of some alleged "newsgathering process," they did not constitute a waiver. Daily News Memo. of Law at 27.

The *Daily News* does not explain how its "newsgathering process" theory operates under New York law. The *Daily News* cites cases from Pennsylvania, Arizona, and Florida which (it claims) support such a theory. *See id.* at 29-30. But entirely missing from this section of its brief is *any* reference to New York law.

The reason the *Daily News* is unable to cite New York law is that the New York shield law does not draw fine distinctions between disclosures for a "newsgathering process" and disclosures for any other reason. Instead, it simply says that if information is disclosed, then any privilege is waived. New York's shield law flatly provides:

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 controlling New York statute, the *Daily News* has obviously waived any privilege. As explained both in Edwards' opening brief (Edwards Memo. of Law at 11-12) and above (*supra* at 3-4), the *Daily News*' reporter has disclosed at least ten parts of the recording to Edwards' private investigator and has played at least several minutes of the tape to other non-exempt persons. These disclosures were obviously (in the words of the statute) "voluntary." And these disclosures were obviously made to persons "not otherwise entitled to claim the exemptions provided by this section" – i.e., persons who are not journalists working for the *Daily*

*News*, such as the private investigator working for Edwards. Simply put – the *Daily News* has waived its privilege. Accordingly, the Court should order the *Daily News* to provide the recording to Edwards.

In addition, the *Daily News* “newsgathering theory” is not supported by the law of other jurisdictions or by notions of sound public policy. The *Daily News* attempts to take this position even though the reporter was *giving* information, not “gathering” information or news. If the *Daily News*’ theory were to be accepted, then reporters could avoid subpoenas for any information, no matter how lacking in confidentiality that information might be. The reporter would simply claim that the information was part of some amorphous “newsgathering” process to gain privilege. For example, in this case, the *Daily News* takes the position that describing to Edwards’ investigator what Epstein said to the reporter – not under any promise of confidentiality – is apparently a newsgathering process entitled to privilege.

Not surprisingly, other jurisdictions have been unwilling to create such a broad exemption from complying with lawful subpoenas. Thus, the cases cited by the *Daily News* generally stand for no such sweeping rule, but rather different propositions -- such as the fact that broadcasting a small part of a document does not waive protection of all parts (*Altemose Constr. Col. v. Building & 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)). In any event, these off-point authorities do not constitute any reason for deviating from the clear command of a New York statute that a journalist can and does waive privilege if he

“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).

**II. THE QUALIFIED JOURNALIST PRIVILEGE IS OVERCOME BY EDWARDS' COMPELLING NEED TO OBTAIN JEFFREY EPSTEIN'S OWN WORDS ABOUT HIS SEXUAL ABUSE OF MINOR GIRLS AND HIS LACK OF REMORSE.**

While the *Daily News'* waiver of privilege is a full and complete basis on its own to enforce the Florida commissioner's order, a second reason for doing so is that Edwards has overcome the *Daily News'* privilege claim. As the *Daily News* concedes, New York law provides only 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 (McKinney 2010). Edwards easily meets each of these three prongs.

**A. Edwards Needs Epstein's Own Words to Defend Against Epstein's Civil Suit and to Pursue his Counterclaim for Compensatory and Punitive Damages.**

In his opening brief, Edwards explained at length why he needs the recording of Epstein to defend against Epstein's civil suit and to pursue compensatory and punitive damages on his counterclaim. See Edwards Memo. of Law at 14-18. In response, the *Daily News* argues that Edwards is merely on a “fishing expedition.” *Daily News* Memo. of Law at 16. As the *Daily News* describes the issue, the Epstein-vs.-Edwards lawsuit involves only a “Ponzi scheme” and, since the scheme was exposed two months after *Daily News'* interview, it cannot be relevant. *Id.* This is poppycock. The central issues in the Epstein-vs.-Edwards lawsuit revolve around Epstein's sexual abuse of minor girls. Epstein has argued that Edwards was involved in

fabricating claims, motions, and clients for such sexual abuse lawsuits. Edwards has counterclaimed that all his actions in the sexual abuse cases were proper and that Epstein's lawsuit was itself fraudulently motivated to deter victims of Epstein's sexual abuse from pursuing their civil actions. Thus, at the heart of lawsuit is Epstein's abuse of minor girls – the central subject of the recording.

Underscoring the direct link between the Epstein interview and the Epstein lawsuit are several important points. First, the recording provides the best evidence of Epstein's motive for harassing Edwards by filing his fraudulent suit. In the recording, Epstein made very negative comments about Brad Edwards, specifically 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. at & 8. This is obviously critical evidence for Edwards, particularly with regard to his effort to expose Epstein's true motive for filing his lawsuit and to obtain punitive damages against Epstein.

Second, in the interview, Epstein specifically discusses █████ (one of Edwards' clients), stating in the interview that █████ came to him as a prostitute and a drug user (i.e., came to Epstein for sex, rather than Epstein pursuing her). *Id.* Here again, this links directly to the Epstein-vs.-Edwards lawsuit. A number of Epstein's allegations pertain to Edwards' handling of █████'s lawsuit. *See* Complaint, & 7 (alleging █████ was part of the scheme against Epstein); & 31(c) (alleging █████ was paid "up-front money"); & 41(i) (alleging that █████'s case was "weak and had minimal value"); & 42 (j) (alleging that Edwards filed in bad faith a complaint seeking damages for Epstein forcing █████ to engage in oral sex); & 46 (alleging that █████'s allegations and testimony were "severely compromised"); & 47 (alleging that █████'s allegations of abuse were altered and enhanced once she was represented by Edwards); & 48 (alleging fraud on the court by █████). The recording clearly sheds important light on these issues in the lawsuit.

Third, and perhaps most importantly, the entire recording is going to show a billionaire sex offender devoid of any remorse for his crimes and any pity for his victims – a billionaire who will stop at nothing to get his way sexually and otherwise. This will be central evidence in Edwards’ punitive damages case against Epstein. It is therefore no exaggeration to say that the tape recording is evidence on which millions of dollars in damages could turn. As Edwards explained in his opening brief (without response from the *Daily News*), punitive damages are “‘quasi-criminal,’ [and] operate as ‘private fines’ intended to punish the defendant and to deter future wrongdoing.” Edwards Memo. of Law at 16 (citing *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001)). Thus, if Epstein lacks remorse for his abuse of the young victims and was motivated by animus towards their attorney (i.e., Edwards), the jury will need to impose a substantial punitive damage award to deter future abusive actions.

The evidence is uncontradicted in this case that lack of remorse “will be a central issue in the punitive damages case against Epstein at trial.” Edwards Aff. at ¶17. And the evidence is also uncontradicted that the tape contains critical evidence on this subject. Commenting on his 18-month jail sentence, Epstein states he did nothing wrong and went to jail for no reason. Fisten Aff. at ¶ 2. He further claims in the interview that if he had done the same abuse in New York, he would have only received a \$200 fine. *Id.* And – critical to the lawsuit involving Brad Edwards – Epstein remarkably blames Edwards for his problems rather than taking responsibility for sexually abusing minor girls. *Id.* This is unique and direct evidence of Epstein’s lack of remorse that is not cumulative of anything else Edwards can present.<sup>7</sup>

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<sup>7</sup> In its brief to the Second Circuit on the “Jane Doe” case, the *Daily News* claimed that Epstein’s recording “shows little more than a defendant, charged in multiple actions with committing heinous sexual abuse on a massive scale, defending himself to a reporter in an off-the-record interview.” Appt’s Br. at 29. *But this is exactly the point*: Rather than express any contrition for what he has done when speaking candidly and privately, Epstein believes he has essentially done

## **B. Epstein's Statements Are Not Available from Any Other Source.**

In his opening brief, Edwards explained why Epstein's own words about the abuse are not available from any our source. Edwards Memo. of Law at 18. In response, the *Daily News* claims that information is available from many other sources. Indeed, the *Daily News* goes so far as to argue that Edwards has admitted he can get the same information from an "overwhelming" number of sources. Daily News Memo of Law at 20 (citing Edwards' motion for summary judgment).

The *Daily News* is mixing apples and oranges. Edwards does have other witnesses who will testify that Epstein sexually abused them. ■■■■, for example, will testify to that fact. But the *Daily News* never responds to the glaring point that all of these other witnesses will be brutally attacked at trial. See Edwards Memo. of Law at 15. Edwards need not rely solely on witnesses whose credibility will be challenged. More importantly, Edwards does not possess any direct evidence of Epstein's own state of mind about his repeated sexual abuse of minor girls. This is a critical fact in the counterclaim against Epstein. The recording provides compelling evidence of Epstein's knowledge of what he was doing and lack of remorse.

In addition, Edwards currently lacks *any* evidence of Epstein's own state of mind about Edwards. The recording will demonstrate that shortly before filing the fraudulent lawsuit against Edwards – i.e., in October 2009, just two months before the lawsuit was filed in December 2009 – Epstein blamed Edwards for all of his problems. Fisten Aff. at & 8. This is clearly powerful evidence of Epstein's motive for filing the fraudulent lawsuit – motive evidence that *no other source can provide*.

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nothing wrong – or, more precisely, has done something so trivially wrong that it is worth only a \$200 fine. This is powerful evidence for Edwards that Epstein will continue abuse behavior unless a large punitive damages award is imposed.

Judge McKenna reviewed this issue of whether the materials can be obtained from other sources. He specifically found that Epstein's statements on the recording "are not reasonably obtainable from other available sources" 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. The fact that the recording is in Mr. Epstein's own voice is also significant from a trial perspective." McKenna Op. at 3-4. Nothing in the *Daily News*' pleading here undercuts Judge McKenna's conclusions. Accordingly, this Court should reach the same conclusion as Judge McKenna.

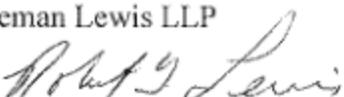
**CONCLUSION**

For the foregoing reasons, the Court should order the *Daily News* to produce the recording.

New York, New York  
November 11, 2010

Respectfully submitted,

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**AFFIRMATION OF SERVICE**

As agreed in advance with counsel for the Daily News, I HEREBY AFFIRM that on November 11, 2010, I caused to be e-mailed a true and correct copy of the foregoing Reply Memorandum of Law in Further Support of Motion for CPLR 3102(e) Order dated November 11, 2010 upon:

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