UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division

In re

ROTHSTEIN ROSENFELDT ADLER, P.A.

Debtor.
_____/

Chapter 11 Case
Case No.: 09-34791-RBR

FOWLER WHITE'S RESPONSE TO MOTION FOR ISSUANCE OF AN ORDER TO SHOW CAUSE WHY FOWLER WHITE AND JEFFREY EPSTEIN SHOULD NOT BE HELD IN CONTEMPT OF COURT, TO PERMIT DISCOVERY, TO ASSESS SANCTIONS AND COSTS, AND FOR OTHER APPROPRIATE RELIEF

Fowler White Burnett, P.A. ("Fowler White"), by and through undersigned counsel, hereby responds to Farmer Jaffe's Motion for Issuance of an Order to Show Cause Why Fowler White and Jeffrey Epstein Should Not Be Held in Contempt of Court, to Permit Discovery, to Assess Sanctions and Costs, and for Other Relief (DE 6323; re-docketed as DE 6326) and Bradley Edwards' Joinder in Motion for Issuance of an Order to Show Cause (DE 6325)[1].

The Motions should be denied. As an initial matter, there is no power to make a finding of criminal contempt. Moreover, the Motions must be denied on the merits because the order which Movants claim was violated is an order cancelling a hearing which does not provide any detail—much less an unequivocal command—as to what Fowler White is to do with the disc at issue.

INTRODUCTION AND BACKGROUND

[1] Although L.M., E.W., and Jane Doe have sought to join in the motion for order to show cause, they have not been granted leave to intervene in this action. The motion to intervene purports to be based on a desire to protect attorney-client communications. DE 6344. However, upon information and belief, no attorney-client communications are at issue here. *See* DE 6351, p. 23. Accordingly, the request to intervene should be denied. To the extent this Court will consider L.M., E.W., and Jane Doe's Joinder in Motion for Order to Show Cause and Motion for Discovery, to Access Sanctions and Costs for Other Appropriate Relief (DE 6345), this response shall apply to that motion (DE 6345) as well. Farmer Jaffe, Bradley Edwards, L.M., E.W., and Jane Doe are collectively referred to herein as "Movants." DE 6323, DE 6325, DE 6326 and DE 6345 are collectively referred to as "the Motions."

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Movants seek the extraordinary remedy of sanctions, and discovery in support of sanctions, based on the purported violation of a 2010 Agreed Order Cancelling Hearing on Motion for Relief from Amended Order (DE 1068) and to Compel Jeffrey Epstein to Pay for the Production of All Documents in Response to His Request Filed by Interested Party Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L. (hereinafter "Agreed Order Cancelling Hearing"). DE 1194. Movants request sanctions against Fowler White, a law firm which withdrew from representing any party in this case nearly six years ago. DE 3034.

Fowler White's investigation has not revealed how the offending CF ended up in its files since it sent the disk back to Special Master Carney after printing the documents per the Court's order. Notwithstanding the uncertainty regarding how the CD got into Fowler White's files, one thing is clear: Neither Fowler White nor any of its successor attorneys attempted to use any of the allegedly privileged documents at any time in the more than seven years since it printed the documents pursuant to the parties' agreement and this Court's order in December 2010 until the filing of the Amended Exhibit List in the state court in March 2018. There is not even an allegation that Fowler White used the documents on the disk which Farmer Jaffe claims to be privileged. The worst that can be said is that a CD sat unused in Fowler White's files.

Farmer Jaffe and Bradley Edwards seek sanctions for civil contempt in the form of compensatory damages. DE 6323, p. 12. All Movants also seek either a finding of criminal contempt and "monetary sanctions" (*id*. at p. 17) or a finding of criminal contempt "as may be appropriate" and monetary sanctions of $25,000 for each of the intervenors against Epstein for any noncompliance with the order at issue, for which amounts "Epstein [be] permitted to seek reimbursement from any of his attorneys who may have been responsible." DE 6345, ¶¶ 5 & 6.

The Firm takes this matter seriously and its investigation has revealed the following:

- The Fowler Jaffe firm agreed that Fowler White would bates stamp and print the documents, then return the printed documents to Farmer Jaffe for preparation of a privilege log;

- Fowler White picked up the CD from Special Magistrate Carney on December 7, 2010 (**Exhibit A**).

- Fowler White printed the documents on December 8, 2010, and sent Farmer Jaffe seven boxes of printed material and a CD with an image of the printed material on December 10, 2010 (**Exhibit B**).

- Fowler White then returned the CD to Special Master Carney (**Exhibits B, C**);

- Any creation of the CD sent to Farmer Jaffe and to Special Master Carney which involved the addition of bates numbers would by definition result in a "modification" of the documents on the CD on December 8, 2010;

- Farmer Jaffe subsequently sent Fowler White five boxes of materials which it claimed were not privileged;

- Neither Fowler White nor any of its successor attorneys attempted to use any of the allegedly privileged documents at any time in the more than seven years since it printed the documents pursuant to the parties' agreement and this Court's order in December 2010 until the filing of the Amended Exhibit List in the state court in March 2018;

- An investigation by Fowler White since the filing of the Motions has revealed that there are no images of the allegedly-privileged documents from the CD at issue anywhere on its systems;

- In March 2018, Fowler White sent Epstein's files to his new counsel after counsel made an initial review of the files in January 2018;

- When Epstein's co-counsel contacted Fowler White and inquired about any confidentiality orders concerning the CD, counsel was specifically told that the Fowler White attorney could not specifically remember due to the age of the file, but that he thought there was such an order and that Epstein's counsel should tell the circuit court and ask whether the documents may be used before filing anything;

- It is alleged in the Motion that those files included a CD with images of all of the documents included in the seven boxes of documents printed by Fowler White and shipped to Farmer Jaffe on December 10, 2010.

What is not known is how the CD at issue got back into Fowler White's files if, as alleged in the Motion, the CD with all of the privileged and non-privileged document was in the firm's files obtained by Epstein. It might have been returned to the firm by Judge Carney in error at the conclusion of his work as Special Master. It might have been inadvertently included in the five boxes of "non-privileged" documents which Farmer Jaffe sent to Fowler White after preparation of the privilege log. In order to determine these items, Fowler White would need, at a minimum, access to the actual CD for analysis by an IT professional both to identify exactly which documents are on the CD and also to attempt to establish a chain of custody of the CD and any modification thereof, and access to Farmer Jaffe's records to determine whether the CD may have been inadvertently sent back to Fowler White, depositions of all employees of Fowler White who may have been in the chain of custody of the CD once returned to Farmer Jaffe, deposition of Judge Carney and a review of Judge Carney's records concerning his disposition of the CD after the conclusion of his work

The Motions must be denied. The sole basis for Movants' position that Fowler White violated an order of this Court is that Fowler White was purportedly in possession of a disc[2] which the Court "specifically ordered" Fowler White "not to retain." DE 6326, ¶ 34. However, *the Agreed Order Cancelling Hearing does not order Fowler White to take any specified action as to the disc*. Because the Agreed Order does not set forth in specific detail an unequivocal command as to the disc, sanctions cannot be awarded even if Movants could prove that Fowler White had possessed the disk between the printing of the documents in December 2010 and

[2] Movants claim that current counsel for Jeffrey Epstein in a pending state court case (Scott Link, Esq.) sent counsel for Bradley Edwards in that case (Jack Scarola, Esq.) a flash drive which purported to duplicate "the disc we located in Fowler White's files." DE 6326, ¶ 24. Movants contend that the flash drive contains three separate files which include thousands of pages of emails. DE 6326, ¶ 24. Movants infer that the disc purportedly found in Fowler White's files was the same disc referred to in the Agreed Order Cancelling Hearing.

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Epstein's counsel collecting Epstein's files in 2018.. Accordingly, the Motions should be denied in their entirety.

Given that there is no order requiring Fowler White to take any action as to the disc, whether or not Fowler White had the disc is of no consequence to the Motions seeking to hold Fowler White in contempt. Nonetheless, for the record, Fowler White has conducted an investigation relating to the allegations against it and concluded that it did not retain the disc referenced in the Agreed Order Cancelling Hearing. To the contrary, the disc was sent to Judge Carney, who was serving as special master. Fowler White states that it is not currently in possession of the disc which was purportedly contained in its files, having provided all hard files to Mr. Epstein's current counsel, Scott Link.

Movants' Motions must be denied.

MEMORANDUM OF LAW

I. No Ability to Find Criminal Contempt

The Court does not have the ability to make a finding of criminal contempt under its inherent powers or under 11 U.S.C. §105(a).

The Court's power to impose civil contempt sanctions can arise from two sources: courts have the inherent power to impose sanctions for violations of the court's lawful orders. *In re Ocean Warrior*, 835 F. 3d 1310, 1316 (11th Cir. 2016) *citing Alderwoods Group, Inc. v. Garcia*, 682 F. 2d 958 (11th Cir. 2012). Section 105(a) provides separate civil contempt power as "necessary or appropriate to carry out the provisions of" title 11. *Id.* at 1316-17 *quoting* 11 U.S.C. §105(a).

The Movants seek sanctions "commensurate with the misconduct." DE 6323 at p. 12. The proposed intervenors seek $25,000 each. These requests are requests for criminal contempt

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sanctions. Whether a sanction is one of criminal or civil contempt is determined by the type of relief awarded. "Punitive sanctions… take the form of a fixed fine and have no practical purpose other than punishment… Because punitive sanctions are for offenses already completed, they take on the character of criminal punishment and render the contempt criminal in nature. Keeping these differences in mind, "[i]n determining whether a sanction for contempt is coercive [rather than punitive], [we] must ask (1) whether the award directly serves the complainant rather than the public interest and (2) whether the contemnor may control the extent of the award.'" *In re McLean*, 794 F. 3d 1313 (11th Cir. 2015) *quoting In re Hardy*, 97 F. 3d 1384, 1390 (11th Cir. 1996).

Bankruptcy courts do not have inherent power to impose criminal contempt sanctions, that is, punitive sanctions not designed to coerce compliance with the court's orders or as compensation for actual damages. In *In re Hipp*, 895 F. 2d 1503 (5th Cir. 1990), the Fifth Circuit court held that the criminal contempt statute, 18 U.S.C. §401, gave criminal contempt powers only to Article III judges and that magistrates are not empowered to try criminal proceedings. As a result, the court concluded that Bankruptcy Courts do not have the inherent power to consider criminal contempt sanctions. *See also In re Lickman*, 288 B.R. 291, 292-93 (Bankr. M.D. Fla. 2003)(as Article I courts, bankruptcy courts lack criminal contempt powers, at least for contempts committed out of court); *Growers Packing Co. v. Community Bank of Homestead*, 134 B.R. 438, 444 (Bankr. S.D. Fla. 1991)(any implied power of bankruptcy courts to impose sanctions for criminal contempt would pose serious constitutional questions); *Walton v. Countrywide Home Loans, Inc*., 2009 WL 1905035 (S.D. Fla.)(no inherent authority to impose sanctions [for criminal contempt]); *In re WVF Acquisition, LLC*, 420 B.R. 902, 913 (Bankr. S.D. Fla. 2009)("without further guidance from the 11th Circuit Court of Appeals or the United States

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Supreme Court, this Court is unwilling to conclude that it has constitutional authority to address criminal contempt, absent statutory authority.") *citing In re Hipp* and *Walton v Countrywide Homes Loans*.

While the Eleventh Circuit has recently reviewed a bankruptcy court's ruling imposing both civil and punitive sanctions in *In re McLean*, 794 F. 3d 1313 (11th Cir. 2015), it did so without analyzing the constitutional issues. The court did, however, indicate that the source of the court's power to sanction in that case arose from §105(a). Since the conduct at issue was a creditor's violation of the discharge injunction imposed by 11 U.S.C. §524, there can be no question that the sanction was at least within the scope of §105. *See also Walton v. Countrywide Home Loans, Inc, supra* (imposing criminal contempt sanctions under §105(a) based on lender's seeking relief from stay based on false representations and subsequently filing of an unfounded foreclosure case in violation of the terms of the chapter 13 plan and the court's order discarding the debtors). Similarly, bankruptcy courts have not hesitated to impose under §105(a) punitive damages in favor of non-individual debtors for willful violations of the automatic stay imposed by §362(a). *See, e.g., In re WVF Acquisition, LLC*, 420 B.R. at 914.

Section 105(a) can have no application here since the Movants are not seeking an order "necessary or appropriate to carry out the provisions of title 11." Accordingly, the Court is unable to enter an order of criminal contempt even if there existed sufficient evidence to warrant such a finding.

II. Movants Fail to Present an Adequate Basis for an Order to Show Cause

The request for civil contempt must also be denied. Because the Agreed Order Cancelling Hearing does not specifically require Fowler White to take any action as to the disc, it

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would be impossible for Movants to prove by clear and convincing evidence that Fowler White violated a clear, definite and unambiguous order of this Court.

A. Movants' Burden of Proof: Clear and Convincing Evidence of Four Factors

In civil contempt proceedings, a petitioner must first establish by clear and convincing evidence that the alleged contemnor violated a court's earlier order. *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998) (vacating contempt order, holding that finding of contempt was abuse of discretion). The clear and convincing evidence must also establish that: (1) the allegedly violated order was valid and lawful; (2) the order was clear, definite and unambiguous; and (3) the alleged violator had the ability to comply with the order. *S.E.C. v. Pension Fund of Am., L.C.*, 396 Fed. Appx. 577, 580 (11th Cir. 2010); *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988). This prima facie showing of a violation of an unambiguous order must be made before the burden shifts to the alleged contemnor to produce evidence explaining his noncompliance at a show cause hearing. *Burgess*, 143 F.3d at 1436.

"Clear and convincing evidence entails proof that a claim is 'highly probable,' a standard requiring more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Mansfield v. Sec'y, Dept. of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012); *see also In re New Midland Plaza Associates*, 247 B.R. 877, 883 (Bankr. S.D. Fla. 2000) ("Preponderance means that the existence of a fact is simply more likely than not, while clear and convincing is a higher standard and requires a high probability of success").

Importantly, the burden to prove contempt is on the Movants. *Carroll v. TheStreet.com, Inc.*, 11-CV-81173, 2014 WL 5474048, at *9 (S.D. Fla. Apr. 10, 2014). Fowler White is "not tasked with the affirmative responsibility of reversely proving that they are *not* in contempt." *Id.* (emphasis original).

Movants cannot show by clear and convincing evidence that Fowler White violated a clear, definite and unambiguous order of this Court. Accordingly, their Motions should be denied.

B. The Agreed Order Cancelling Hearing Does Not Clearly and Unambiguously Direct Fowler White to Take Any Specific Action as to the Purported Disc

Contempt is committed when a person violates an order of a court "requiring in specific and definite language that a person do or refrain from doing an act." *Matter of Baum*, 606 F.2d 592, 593 (5th Cir. 1979)[3] (internal quotes, citations omitted). The Court's "contempt power is a potent weapon which should not be used if the court's order upon which the contempt was founded is vague or ambiguous." *Id.* Therefore, the court's order "must set forth in specific detail an unequivocal command." *Id.* Where there is "possible uncertainty" as to the effect of a bankruptcy court's order, there can be no finding of contempt. *Id.*

In *Matter of Baum*, an attorney sent a notice of deposition to six defendants, two of which moved to set aside the notice of deposition. The bankruptcy court granted the motion and ordered that "the notice of deposition mailed on August 3, 1976 noticing the deposition of Howard E. Samuel be vacated and set aside, same not being reasonable notice as required by the Federal Rules of Civil Procedure." *Id.* The attorney conducted the deposition despite the order setting aside the notice of deposition. *Id.* After an evidentiary hearing on a motion for an order to show cause why the attorney should not be held in contempt for taking the deposition, the bankruptcy court found the attorney in contempt of court. The contempt order was reversed on appeal because the order "did not explicitly direct that the deposition not take place." *Id.*

The basis of the Motions is an agreed order cancelling a hearing. DE 6326, citing DE 1194. The Agreed Order Cancelling Hearing states that a previously filed motion "was

[3] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all cases decided by the Fifth Circuit, prior to October 1, 1981.

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adequately resolved by agreement of the parties as follows" and goes on to recite the agreement of the parties. DE 1194. It does not order Fowler White to do anything. Even if it could be argued that the recitation of the agreement of the parties constitutes an order requiring Fowler White to take specific action, the agreement does not specify what is to be done with the disc. It states that "Fowler White will not retain any copies of the documents contained on the discs provided to it, nor shall any images or copies of said documents be retained in the memory of Fowler White's copiers." The Agreed Order Cancelling Hearing does not state that the disc is to be destroyed. It does not state that the disc shall be turned over to the Special Master. The Agreed Order does not state that the disc shall be given to the Trustee, or to Farmer Jaffe, or to anyone else.

The Agreed Order Cancelling Hearing provides, in its entirety:

> The Motion for Relief From Amended Order (D.E. #1068) and to Compel Jeffrey Epstein to Pay for the Production of All Documents in Response to his Requests filed by Interested Party Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L ("Farmer"), was adequately resolved by agreement of the parties as follows. The law firm of Fowler White Burnett, P.A., will print a hard copy of all of the documents contained on the discs with Bates numbers added, and will provide a set of copied, stamped documents to the Special Master and an identical set to Farmer, who will use same to create its privilege log. Farmer agrees to prepare that portion of the privilege log relating to emails on or before December 15, 2010, with the remaining portion due thirty days from the date of this order, subject to other court orders. Fowler White will not retain any copies of the documents contained on the discs provided to it, nor shall any images or copies of said documents be retained in the memory of Fowler White's copiers. Should it be determined that Fowler White or Epstein retained images or copies of the subject documents on its computer or otherwise, the Court retains jurisdiction to award sanctions in favor of Farmer, Brad Edwards or his client.
>
> As such, the Motion for Relief is deemed moot, and, the hearing set on the Motion for Relief [D.E. 1146] set for November 30, 2010 is hereby cancelled. The court reserves jurisdiction to tax fees and costs related to the preparation of the privilege log upon filing of a proper motion and hearing thereon.

Comparing the Agreed Order Cancelling Hearing to other orders of this Court relating to the same discovery helps to illustrate that the Agreed Order Cancelling Hearing is not "an order of a court requiring in specific and definite language that a person do or refrain from doing an act" and that there is no "unequivocal command" as to what Fowler White is to do with the disc. *Matter of Baum*, 606 F.2d 592, 593 (5th Cir. 1979) (internal quotes, citations omitted). For example, the Order Respecting Production of Documents Regarding Jeffrey Epstein states that the Court "DOES HEREBY ORDER" that "[n]o documents or ESI shall be released to anyone until such time as the Special Master has notified the Court that he has concluded his review of the responsive documents and is in a position to report to the Court his findings and to obtain further instruction." DE 888.

Additionally, in the Amended Order Respecting Production of Documents Regarding Jeffrey Epstein, the Court "DOES HEREBY ORDER" specific acts to take place within specified time frames. DE 1068. For example:

> Within two business days following receipt of this order, Berger Singerman, as counsel for the Trustee, Herbert Stettin ("Trustee"), shall deliver to Gary Farmer at the Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L. law firm ("Farmer Jaffe), a copy of the CD produced pursuant to Order 888 to Judge Robert Carney as Special Master and which contains all electronically stored information ("ESI") and other documents in the Trustee's possession, respecting the subject matter of the subpoena previously served upon the Trustee related to L.M., Scott Rothstein, Brad Edwards and Jeffrey Epstein.
> . . .
> Contemporaneous with the service and filing of the privilege log, *Farmer Jaffe shall provide to a reputable copy service an unredacted copy of the Trustee's CD of documents, and* ***that copy service shall*** duplicate and bate stamp all documents on the CD, and ***return all materials to Farmer Jaffe***, who shall forthwith notify Trustee's counsel and the Special Master of the bate stamp range of documents.

DE 1068, ¶ 1(a), (c) (emphasis provided).

In stark contrast, the Agreed Order Cancelling Hearing does not "order" Fowler White to take any action whatsoever, much less any specified action as to the disc. Instead, the Agreed

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Order recites the agreement of the parties as background for deeming the subject motion moot and cancelling the hearing thereon.

"In determining whether a party is in contempt of a court order, the order is subject to reasonable interpretation, though it may not be expanded beyond the meaning of its terms absent notice and an opportunity to be heard." *Georgia Power Co. v. N.L.R.B.*, 484 F.3d 1288, 1291 (11th Cir. 2007). Moreover, any ambiguities or uncertainties in such a court order must be construed in a light favorable to the person charged with contempt. *Id* The court's focus in a civil contempt proceeding "is not on the subjective beliefs or intent of the alleged contemners in complying with the order, but whether in fact their conduct complied with the order at issue." *Id*. The court's inquiry is limited to whether the "four corners" of the order, "in clear and unambiguous terms, prohibited" the conduct complained of. *Id.* at 1292.

Because it is clear on the face of the Agreed Order Cancelling Hearing that there is no "specific and definite language" which "unequivocal[ly] command[s]" Fowler White to take any specified action as to the disc at issue in the Agreed Order, Movants cannot prove contempt, even if they were to prove the other three required factors by clear and convincing evidence. *Matter of Baum*, 606 F.2d 592, 593 (5th Cir. 1979). Accordingly, further discovery aimed at proving those other factors is not merited, and the Motions should each be denied in their entirety.

III. Contempt Proceedings Not Appropriate as Fowler White is Now in Compliance

Even if there was a court order requiring Fowler White to turn over a disc, and even if Fowler White failed to comply with that order, civil contempt proceedings or sanctions against Fowler White are not the appropriate remedy here, and would be a waste of judicial resources, because there is no dispute that Fowler White no longer has the disc at issue. DE 6326, p. 2

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(claiming Epstein—not Fowler White—has possession of confidential documents); DE 6326-3, Transcript 64:7-8 (Link: "The documents were within my law firm, and my client. That's it."), 80:10- (Link: "The disk, the original disk, we now have it."); DE 6351, p. 11 ("Link & Rockenbach placed Fowler White's original disc in a sealed envelope which will be maintained with Fowler White's original records at the offices of Link & Rockenbach until further rulings by the state court."), pp. 6, 22 ("Fowler White never provided Epstein or his general counsel with either the disc or documents that Edwards now claims are privileged").

"It is well-settled that sanctions in civil contempt proceedings may [only] be employed to coerce a contemnor into compliance with the court's order, and/or to compensate a complainant for losses sustained." *Martin v. Guillot*, 875 F.2d 839, 845 (11th Cir. 1989). Since Fowler White is already in compliance with the Agreed Order Cancelling Hearing, sanctions cannot be entered to coerce it into compliance. Moreover, Movants do not specify any damages sought to compensate them for losses sustained. Instead, it is clear Movants seek monetary sanctions to punish Fowler White for its purported violation. *See, e.g.*, DE 6326, p. 12 (seeking "to punish and remedy violations in the past"), p. 16 (citing case regarding power of court to punish by fine or imprisonment). Such sanctions would be criminal in nature and cannot be awarded here for the reasons stated above as to jurisdiction and below as to the merits.

Accordingly, the Motions should be denied as to Fowler White.

IV. Sanctions for Criminal Contempt Cannot Be Awarded

Movants request sanctions for criminal contempt, although they have failed to allege any basis upon which criminal contempt could be found. If the Court were to consider the merits of the allegations of criminal contempt despite the lack of jurisdiction to do so, the Motions would still have to be denied.

"The essential elements of criminal contempt are a lawful and reasonably specific order of the court and the willful violation of that order." *United States v. KS & W Offshore Eng'g, Inc*., 932 F.2d 906, 909 (11th Cir. 1991). Absent a showing of either specific or general intent, a charge of criminal contempt cannot stand. *Id*. Moreover, "[n]egligent, accidental, or inadvertent violation of an order is insufficient." *Id*. In addition to the arguments set forth above regarding the fact that the Agreed Order Cancelling Hearing does not specify what is to be done with the disc—which apply equally to Movants' failure to allege a criminal contempt—Movants have failed to allege any facts which could support a finding that Fowler White's purported violation of the Agreed Order Cancelling Hearing was willful.

V. The Discovery Sought is Significantly Overbroad and Unnecessary

In their Motion, Farmer Jaffe and Brad Edwards seek virtually unprecedented discovery, including an order allowing IT specialists "to search all computer servers, including back up servers and hard drives, for designated search terms found within the privileged documents". It goes without saying that Fowler White's servers are filled with attorney-client communications and documents protected from prying eyes by the work product and other privileges, including such documents related to the many other cases in which Fowler White represent parties adverse to clients represented by Farmer Jaffe and/or its co-counsel Searcy Denny Scarola Barnhart & Shipley.

Farmer Jaffe claims that discovery is needed in order to determine "the true extent of its damages …". This lacks any credible basis. If Farmer Jaffe has been damaged (and its Motion is devoid of any allegation of damage suffered), then it should already know that. The only discovery regarding damages would be discovery required by Fowler White to evaluate any damages which Farmer Jaffe is seeking to recover. Farmer Jaffe also contends that the discovery

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is needed to identify "the breadth and complicity by Fowler White and Jeffrey Epstein … [in order that] sanctions be commensurate with the conduct". It is obvious that Farmer Jaffe seeks unprecedented access into Fowler White's computer systems in order to try and come up with a basis for punitive / criminal contempt sanctions. As noted above, such sanctions may not be sought in this Court. The request for access to Fowler White's computers must be denied. *See In re Ford Motor Co.*, 345 F. 3d 1315, 1316-17 (11th Cir. 2003)(quashing lower court's order granting access to defendant's computers as "Rule 34(a) does not grant unrestricted, direct access to a respondent's database compilations. Instead, Rule 34(a) allows a requesting party to inspect and to copy the product—whether it be a document, disk, or other device—resulting from the respondent's translation of the data into a reasonably usable form" and denying request where the defendant had complied with all discovery requests), *Procaps, S.A. v. Pantheon, Inc.*, 2014 WL 11498061 (S.D. Fla. 2014)(denying inspection of opponent's computers as such analysis is only permitted where there is a strong showing that the party (1) intentionally destroyed evidence, or (2) intentionally thwarted discovery."); *Hankerson v. Fort Lauderdale Scarp, Inc.*, 2016 WL 8793514 *2 (S.D. Fla. 2016)(denying request to examine computers without particularized showing that defendants had improperly responded to discovery); *Mirbeau of Geneva Lake, LLC v. City of Lake Geneva*, 2009 WL 3347101 at *1 (forensic analysis appropriate "[o]nly if the moving party can actually prove that the responding party has concealed information or lacks the expertise necessary to search and retrieve all relevant data").[4]

In addition to the overbreadth of the sought after discovery, and the inherent danger of exposing privileged communications, there is simply no basis for discovery. As Fowler White no longer has any disk, having turned all of Epstein's files over to Epstein's counsel in March 2018,

[4] None of these cases even examined when a party can delve into the computer served and hard drives of a law firm.

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there is nothing left for which to coerce compliance even if the order had instructed Fowler White to destroy the disk.

CONCLUSION

For the reasons set forth above, and those which will be argued at the hearing on the Motions currently scheduled for April 13, 2018, Fowler White Burnett, P.A. respectfully requests that the Court deny Farmer Jaffe's Motion for Issuance of an Order to Show Cause Why Fowler White and Jeffrey Epstein Should Not Be Held in Contempt of Court, to Permit Discovery, to Assess Sanctions and Costs, and for Other Relief (DE 6323; re-docketed as DE 6326); deny Bradley Edwards' Joinder in Motion for Issuance of an Order to Show Cause (DE 6325)[5]; deny L.M., E.W., and Jane Doe's Motion to Intervene (DE 6344); deny L.M., E.W., and Jane Doe's Joinder in Motion for Order to Show Cause and Motion for Discovery, to Access Sanctions and Costs for Other Appropriate Relief (DE 6345); and deny any discovery requested by Movants as improper and unnecessary.

CARLTON FIELDS JORDEN BURT, P.A.
Counsel for Fowler White Burnett, PA

/s/ Niall T. McLachlan
Niall T. McLachlan, Esq.
Florida Bar No [redacted]
[redacted]

[5] Although L.M., E.W., and Jane Doe have sought to join in the motion for order to show cause, they have not been granted leave to intervene in this action. The motion to intervene purports to be based on a desire to protect attorney-client communications. DE 6344. However, upon information and belief, no attorney-client communications are at issue here. *See* DE 6351, p. 23. Accordingly, the request to intervene should be denied. To the extent this Court will consider L.M., E.W., and Jane Doe's Joinder in Motion for Order to Show Cause and Motion for Discovery, to Access Sanctions and Costs for Other Appropriate Relief (DE 6345), this response shall apply to that motion (DE 6345) as well.
Farmer Jaffe, Bradley Edwards, L.M., E.W., and Jane Doe are collectively referred to herein as "Movants." DE 6323, DE 6325, DE 6326 and DE 6345 are collectively referred to as "the Motions."

CERTIFICATION

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 11, 2018, a true and correct copy of the foregoing was served electronically to all registered users on the CM/ECF system, which includes counsel identified on the service list below.

SERVICE LIST

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Counsel for Liquidating Trustee

/s/ Niall T. McLachlan
Niall T. McLachlan, Esq.

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Exhibit A

Subject: RE: Notice of filing
Date: Tuesday, December 7, 2010 at 4:37:23 PM Eastern Standard Time
From: Natalie A. Trompet
To: Lilly Ann Sanchez
CC: Joseph L. Ackerman, Jr.

We are working on this now and it will go in Fed Ex tonight for priority overnight delivery.

Thank you.

N

-----Original Message-----
From: Lilly Ann Sanchez
Sent: Tuesday, December 07, 2010 1:48 PM
To: Joseph L. Ackerman, Jr.; Natalie A. Trompet
Cc: Jacqueline M. Borrero
Subject: FW: Notice of filing

See below
Natalie ,
Please have courier at the judge's house today at 4:15 to pick up discs for copying & fed ex to me in Miami for 10 am delivery.
thanks

Lilly Ann Sanchez
SHAREHOLDER

vCard | Biography | Website

[redacted] main
direct
fax
lsanchez@fowler-white.com
[redacted]

www.fowler-white.com

-----Original Message-----
From: ROBERT CARNEY [mailto:rbcarney3@gmail.com]
Sent: Tuesday, December 07, 2010 1:46 PM

To: Lilly Ann Sanchez
Subject: Re: Notice of filing

I probably will not be back home until around 4pm today. Home is 2281 Saratoga Lane, West Palm Beach, 33409. The materials are there. I am working as a judge today and for the next two weeks a the PB Courthouse. If the courier can come at 4 or later I will have it ready. I will just give you what I have and you can mail it back to me as soon as copies are made.
On Dec 7, 2010, at 11:09 AM, Lilly Ann Sanchez wrote:

Judge
Please let me know where to send courier to pick up disk for bate stamping and copying
- I would like to get today if possible
Thanks

----- Original Message -----
From: Robert Carney <rbcarney3@gmail.com>
To: Gary Farmer <gary@pathtojustice.com>; Seth Lehrman <seth@pathtojustice.com>; Brad Edwards <brad@pathtojustice.com>; Lilly Ann Sanchez; Charles H. Lichtman <CLichtman@bergersingerman.com>
Sent: Tue Dec 07 07:46:20 2010
Subject: Notice of filing

Gentlemen and Lilly,

I received from Lilly a copy of the notice of filing in the Bankruptcy court the state court filing asking for a stay. This raises two concerns:

1. Why did I get it from Lilly and not from Seth Lehrman and Jack Scarola. In one of my last emails I said I wanted to be on the service list with email copies.

2. Isn't this setting up a direct conflict with Judge Ray's order? Without getting into the merits of which Judge should be handling this, the fact remains that Judge Ray has issued an Order that requires certain things to be done by certain times. Even if Judge Crowe were to grant the request, it would not trump Judge Ray's Order. Plainly put, since no relief is asked for from Judge Ray, Judge Ray might view this as and end run around his Order, and since Judge Ray has an Order in place, Judge Crowe is likely going to be reluctant to enter another Order that might be interpreted as an end run.

My marching orders are still contained in Judge Ray's Order. Unless and until Judge Ray modifies the Order or grants and extension or relief from that Order, it is still in play.

With that in mind, once again I am reminding the Defendants that the privilege log is due on or about the 15th of December. I have repeatedly asked for dates for a hearing and so far have gotten none. I am not looking to unilaterally set a hearing, but I will if I have to. For the last time, please advise of convenient dates in January for the privilege hearing. Any relief from Judge Ray's Order must come from Judge Ray.

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Exhibit B

Joseph L. Ackerman

From: Joseph L. Ackerman, Jr.
Sent: Friday, December 10, 2010 3:45 PM
To: Seth Lehrman (seth@pathtojustice.com)
Subject: RRA/Epstein/Edwards

Seth:
We have completed the copying. We are shipping seven bankers boxes of records to you by fed ex today for arrival on Monday, December 13. 2010. I would ask that you let me know when the arrive.
Joe Ackerman

Fowler White Burnett
ATTORNEYS AT LAW

Joseph L. Ackerman, Jr.
SHAREHOLDER
BOARD CERTIFIED IN CIVIL TRIAL

vCard | Biography | Website

[redacted] main
direct
fax
[redacted]

Phillips Point, West Tower
777 South Flagler Drive
Suite 901
West Palm Beach, Florida 33401

www.fowler-white.com

EFTA00793942

Exhibit C

Joseph L. Ackerman

From: Seth Lehrman [redacted]
Sent: Friday, December 10, 2010 3:49 PM
To: Lilly Ann Sanchez
Cc: Joseph L. Ackerman, Jr.; Jacqueline M. Borrero; [redacted]
Subject: RE: In re: RRA -- Epstein's subpoena

Lilly,

Thank you.

Seth Lehrman
Farmer, Jaffe, Weissing,
Edwards, Fistos & Lehrman, P.L.
425 N. Andrews Ave., Ste. 2
Ft. Lauderdale, Florida 33301
954-524-2820
954-524-2822 Fax
pathtojustice.com

From: Lilly Ann Sanchez [redacted]
Sent: Friday, December 10, 2010 3:46 PM
To: Seth Lehrman
Cc: Joseph L. Ackerman, Jr.; Jacqueline M. Borrero [redacted]
Subject: RE: In re: RRA -- Epstein's subpoena

Seth-
The documents are done and will be fed exed to you tonight for Monday 10 am delivery & the disks will be returned to judge carney- It is 7 boxes- approximately 27,000 documents.
regards

[cid:image001.png@01CB9881.6121CF80]

[cid:image002.png@01CB9881.6121CF80]

Lilly Ann Sanchez
Shareholder

vCard<http://www.fowler-white.com/uploads/illumanet/news/Lilly%20Ann%20Sanchez.vcf> | Biography<http://www.fowler-white.com/Attorneys/id/60> | Website<http://fowler-white.com>

[redacted] main
direct
fax
[redacted]

Espirito Santo Plaza
1395 Brickell Avenue
14th Floor

Miami, Florida 33131

www.fowler-white.com<http://fowler-white.com>

From: Seth Lehrman [redacted]
Sent: Tuesday, December 07, 2010 11:09 AM
To: Joseph L. Ackerman, Jr.
Cc: [redacted] Ann Sanchez; Seth Lehrman
Subject: RE: In re: RRA -- Epstein's subpoena

Joe,

That accurately reflects our agreement.

Seth Lehrman
Civil Justice Attorney
Farmer, Jaffe, Weissing,
Edwards, Fistos & Lehrman, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
Telephone: [redacted]
Facsimile: [redacted]
pathtojustice.com<http://www.pathtojustice.com>

From: Joseph L. Ackerman, Jr. [mailto: [redacted]
Sent: Tuesday, December 07, 2010 10:48 AM
To: Seth Lehrman
Cc: [redacted] Lilly Ann Sanchez
Subject: RE: In re: RRA -- Epstein's subpoena

Seth,

This will confirm our conversation today, that Judge Carney can deliver the disc to a representative from Fowler White for copying and bate stamping as specified in Judge Ray's order of November 30, 2010. This will also confirm that you do not wish to have a representative from your office to be present during the copying and bate stamping process. If my understanding is inaccurate, please let me know immediately. We will proceed right away to get this done.

Joe Ackerman

From: Seth Lehrman [mailto [redacted]
Sent: Tuesday, December 07, 2010 10:20 AM
To: Joseph L. Ackerman, Jr.
Subject: In re: RRA -- Epstein's subpoena

Joe,

I'd like to speak with you about the attached agreed order cancelling the hearing that was recently entered [DE 1194]. I will give you a call in a few minutes.

Regards,

Seth Lehrman
Civil Justice Attorney
Farmer, Jaffe, Weissing,
Edwards, Fistos & Lehrman, P.L.
425 North Andrews Avenue, Suite 2
Fort Lauderdale, Florida 33301
Telephon[redacted]
Facsimile[redacted]
pathtojustice.com<http://www.pathtojustice.com>

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