

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT IN AND
FOR PALM BEACH COUNTY, FLORIDA

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

SCOTT ROTHSTEIN, individually, and
BRADLEY J. EDWARDS, individually,

Defendants/Counter-Plaintiff.

COUNTER-DEFENDANT JEFFREY EPSTEIN'S MOTION
FOR AN *IN CAMERA* INSPECTION OF 30 E-MAILS

Counter-Defendant, Jeffrey Epstein ("Epstein"), moves¹ this Court for an *in camera* inspection of 30² e-mails identified on Epstein's March 2, 2018 Clerk's Trial Exhibit List and to find that no privilege applies to them. Following this Court's *in camera* review, Epstein seeks a ruling from this Court that these 30 e-mails, which were improperly withheld by Edwards, **an officer of the court**, on the **false** bases of irrelevancy, attorney-client privilege and **inapplicable basis of** work product³, should be unsealed, and that leave should be granted **to add them to** Epstein's Exhibit List.

¹The original Motion was filed on March 5, 2018, but not ruled on before the March 9, 2018, appellate court stay. The parties further agreed to stay hearings on pending motions until mediation was completed. Additionally, The Honorable Donald W. Hafele's stated interest in first allowing the Show Cause proceedings before The Honorable Raymond B. Ray, United States Bankruptcy Court for the Southern District of Florida, to occur before this Court proceeded with this review. With trial approaching on December 4, 2018, this Court instructed Epstein to file this Motion and deliver the accompanying sealed Memorandum by November 9, 2018. Edwards was instructed to deliver a response sealed Memorandum by November 16, 2018.

²Epstein has reduced the original 47 e-mails for *in camera* review down to 30 e-mails.

³Farmer Jaffe agreed to produce all work-product related to closed cases to Epstein's attorneys.

PREFACE

The Bankruptcy Court, The Honorable Raymond B. Ray, entered an Order on October 29, 2018 (**Exhibit 1**), discharging the Order to Show Cause against Epstein in relation to the “disc” on which the e-mails were discovered. As of the time of this submission, Judge Ray has not yet determined whether Fowler White, Epstein’s counsel at the time of the November 2010 Agreed Order (and from whom Link & Rockenbach, PA received the disc⁴), violated the Agreed Order. Edwards is hoping that this Court will refuse to conduct an *in camera* inspection because of a possible finding by Judge Ray that Fowler White negligently or inadvertently held the disc in its storage facility for some number of years. Even if Judge Ray makes such a determination, this Court should not excuse Edwards’ (and Farmer Jaffe’s) failure to produce all of these e-mails as they were required to do and represented they would in 2011.

Importantly, this Court has found that Link & Rockenbach, PA did nothing wrong relating to its discovery and use of the disc:

- “I’m not finding fault with anything you or Miss Rockenbach or Miss Campbell did. That’s not the issue. You’ve done your job.” (March 8, 2018, Aft. Tr. 59:1-4.)⁵
- “So I again want to make clear that I’m finding absolutely no fault with Mr. Link, Miss Rockenbach, Miss Campbell or anyone else from the Link and Rockenbach firm in terms of what they did, albeit in the manner in which they had to do it and the timing,

⁴At the bankruptcy hearing and for the first time, Epstein’s counsel learned from Lilly Sanchez’s testimony that Fowler White was given two discs from the Farmer Jaffe firm to create two sets of hard copy documents that were bate stamped. This uncontroverted testimony demonstrated that the “disc” was created for Special Master Carney and not for Fowler White or Epstein. The disc was made because, according to Lilly Sanchez, Special Master Carney did not want 27,542 bate stamped pages of documents. Rather, Special Master Carney wanted a searchable disc. It is still a mystery how and when the disc came back into Fowler White’s possession after it was sent to Special Master Carney and no evidence has been presented to resolve that question definitively.

⁵Excerpts of the March 8, 2018, afternoon hearing transcript are attached s **Exhibit 2**.

unfortunately, of the matter from their perspective in having to do it ...” (March 8, 2018, Aft. Tr. 61:15-21.)

IN CAMERA REVIEW

Epstein requests that the 30 e-mails remain unsealed for the duration of the *in camera* inspection and counsel for both parties be allowed to review and present argument as to each e-mail. This is the same protocol agreed to by Farmer Jaffe in 2011 when the Special Master was contemplating this same review. That is, Farmer Jaffe agreed to turn over work product materials except for materials related to new or ongoing cases conditioned on a “For Attorneys’ Eyes Only” basis until such time as the Court overruled any privilege claim upon the Special Master’s (or Court’s) review with counsel present. (See **Exhibit 3**.)

During its *in camera* review, this Court must consider and determine:

1. The e-mails are directly relevant to the issues for trial and no *Binger*⁶ “surprise in fact” exists regarding them;
2. If any work product protection existed, it was waived or excepted based on:
 - a. Farmer Jaffe’s express agreement to turn over all work product to Epstein’s attorneys;
 - b. Edwards’ production to Razorback victims/adversaries;
 - c. Edwards’ issue injection; and
 - d. Crime fraud exception;
3. The e-mails do not constitute attorney-client communications.

BACKGROUND

A. Discovery of E-Mails

As this Court is well aware, in February 2018, Link & Rockenbach, PA discovered documents that were voluntarily produced years ago by Edwards to his potential adversaries at the

⁶*Binger v. King Pest Control*, 401 So. 2d 1310 (Fla. 1981).

time – the Razorback plaintiffs. These e-mails directly contradict Edwards’ sworn testimony and positions taken by Edwards in this action. Importantly, the e-mails eviscerate Edwards’ claim for emotional distress damages, and worse – they illustrate that Edwards provided suspect testimony in this action about his anxiety over being sued by Epstein. They also directly relate to Edwards’ interaction with Ponzi-schemer Scott Rothstein (“Rothstein”) and the strength/weakness of Edwards’ clients’ damage claims against Epstein, both which have become critical factual issues in this case.

First and foremost, the e-mails have become highly relevant in light of Edwards’ sworn testimony that Epstein’s lawsuit has caused him daily anxiety (emotional damages and credibility). Next, the e-mails are direct evidence controverting factual claims made by Edwards that he argues disproves probable cause, such as his interaction with Rothstein on the Epstein cases and the known “weakness” of the tort claimant’s damages. While the e-mails only became known to Epstein’s current counsel earlier this year, Edwards has known of them from the time of their existence! Moreover, the e-mails were produced by Edwards approximately eight years ago to counsel for Razorback, Edwards’ adversary at the time. Edwards, knowing how potentially damaging the e-mails are to him professionally, let alone their terminating effect on this lawsuit, has desperately taken multiple positions that Epstein’s current counsel improperly obtained the e-mails (proven to be untrue), that none of the e-mails were ever produced (incorrect), and that they are all protected subject to attorney-client privilege (false) and/or the work product doctrine (waived or broken by exceptions if ever applicable).

B. Edwards' Attempt to Hide E-Mails and Violation of Rule 1.280(b)(6)

Edwards is responsible for improperly withholding these undeniably relevant e-mails from Epstein for more than eight years after specifically agreeing to turn over all work product to Epstein's lawyers. Specifically, Farmer Jaffe agreed:

[February 2, 2011] All work product materials will be turned over to Plaintiff except for materials related to new or ongoing cases, AND on the condition that they be produced "For Attorneys' Eyes Only. (Exhibit 3.)

Unfortunately, this promise to produce all work product was hollow. Although Farmer Jaffe did in fact turn over purported work product specifically relating to Edwards' three clients' cases against Epstein, which had then been settled in July 2010, it did not turn over the e-mails in question relating to those same cases. Further, in order to ensure that the e-mails would never see the light of the courtroom, Edwards concealed their existence by hiding them within a deceptively worded 1,607-entry, 159-page privilege log that this Court's predecessor, The Honorable David Crow, found to be insufficient on its face and not-compliant with the requirements of Florida Rule of Civil Procedure 1.280(b)(5)⁷ and *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001).

Edwards has claimed that none of the documents on the disc that were listed on his privilege log had ever been produced. However, this is demonstrably inaccurate. Specifically, on May 7, 2012, Edwards produced 163 pages representing 89 documents identified on his 159-page privilege log. In addition, Edwards' counsel suggested that Link & Rockenbach received the evidence from attorney William Scherer (Razorback's counsel). Although that is inaccurate, it demonstrates that any potential work-product protection has been waived by virtue of production to at least one other potentially adverse party in separate litigation.

⁷Florida Rule of Civil Procedure 1.280 has been amended since the Court's Order and privilege claims are now addressed in subsection (6) of that Rule.

C. The Truth and this Court's Process-Driven "Level Playing Field"

This Court has repeatedly expressed its intention to preserve the integrity of the judicial process and maintain a level playing field between the parties in order to ensure a fair trial. Now is the time for process and this balance to yield the truth.

Consistent with this Court's efforts to level the playing field by allowing Edwards to introduce certain evidence bearing on Epstein's criminal history, his non-prosecution agreement with the government, settlements with Edwards' three clients and the existence and settlement of other civil claims against Epstein, this Court must allow the jury to review these 30 e-mails which would allow a full evaluation of Edwards' absurdly false anxiety damages claim, his conduct and the true value of his clients' cases as known by Edwards. The e-mails reveal as a sham Edwards' efforts to disprove Epstein's probable cause for believing Edwards' unusual litigation tactics were designed for an improper purpose, and leave undisputed and intact the extrinsic evidence on which Epstein reasonably relied as probable cause for the original action.

ARGUMENT

A. The 30 E-mails Are Relevant

The 30 e-mails directly relate to Edwards' damages claim, the weakness of Edwards' clients' damages claims against Epstein (*see* Exs. 13-60), Edwards' association and interaction with Rothstein (*see* Exs. 13-30, 13-34, 13-35, 13-36, 13-86, 13-88, 13-89, 13-90, 13-93, 13-94, 13-97, 13-98, 13-100, 13-101, 13-102, 13-103, 13-104, 13-105, 13-106, 13-107, 13-108, 13-110, 13-111), the litigation tactics in which Edwards improperly engaged (*see* Exs. 13-11, 13-15, 13-46, 13-66, 13-113), and the overall credibility of Edwards' allegations against Epstein (*see* Ex. 13-67). These e-mails are not only relevant and material, they eviscerate Edwards' case, making it impossible for

him to establish any damages at all or to satisfy his heavy burden to prove the absence of probable cause for Epstein to have filed suit against him.

Edwards claims that he has suffered and continues to suffer damages arising out of his “anxiety” from Epstein’s Complaint that was filed more than eight years ago and dismissed six years ago because it: (a) falsely characterized Edwards’ cases as “weak”; (b) indicated that Edwards knew or should have known of Rothstein’s Ponzi scheme; and (c) alleged that Edwards engaged in litigation conduct to support the Ponzi scheme. As support for this assertion, Edwards sets up as the central issues (and issue injection) in the trial of his Counterclaim against Epstein: (a) the strength of his clients’ cases against Epstein; (b) the lack of any association between Rothstein and either Edwards or Edwards’ clients’ cases against Epstein; and (c) the legitimacy of Edwards’ litigation conduct in his clients’ cases against Epstein.

Epstein is entitled to have the Court and jury consider these e-mails as the jury determines whether Epstein exceeded the wide latitude which the law confers on all plaintiffs “to use their best judgment in prosecuting . . . a lawsuit without fear of having to defend their actions in a subsequent civil action for misconduct.” *Echevarria, McCalla, Raymer, Barrett & Frappier v. Cole*, 950 So. 2d 380, 384 (Fla. 2007). It is also crucial that these e-mails be available to the jury as they evaluate the factual issues that Edwards claims determine whether it was objectively reasonable or unreasonable to rely on the extrinsic evidence that Epstein proffers as probable cause.

B. No Binger “Surprise in Fact” and Truth Requires the Courtroom’s Light

There is no *Binger* prejudice and truth and justice require admissibility of these 30 highly relevant, case-ending e-mails either authored or received by Edwards, and undeniably within Edwards’ possession since 2009. Based on this, Edwards – an officer of the court, who took an

oath to “never seek to mislead the judge or jury by any artifice or false statement of fact” - cannot claim “surprise.”⁸

The decision before this Court is one of right and wrong, and as this Court has acknowledged its task – “What is the right thing to do” which allows the Court to “look in the mirror at the end of the day,” and respond to one question: “Did I do the right thing by those who came before me...” – regardless of economic status or popularity of either party or his counsel. (11/2/18 Hearing Transcript, 88-89.) **Edwards** wrongly placed, and Edwards has advanced, an “attorney-client” label on the 30 e-mails with the intent that Epstein should never discover the existence of these devastatingly harmful documents, while at the same time allowing other adversaries access to these so called “privileged” e-mails.

Importantly, **the attorney-client label is false** because none of the 30 e-mails were to or from clients and none of the e-mails contain confidential information provided by Edwards’ three clients. **Further**, any information about Edwards’ clients’ past was all publicly available (and generally known) and even testified about by those very clients. Edwards also knows that Farmer Jaffe agreed to produce work-product e-mails in 2011 and, in fact, did so, including asserted work-product e-mails relating to Edwards’ three clients’ cases. Edwards’ hollow attorney-client privilege and work product assertions are now squarely challenged and must be rejected in favor of the truth. *See Loureiro v. State*, 133 So. 3d 948, 956 (Fla. 4th DCA 2013)(“A trial must be a search for the truth.”); *Katzman v. Rediron Fabrication, Inc.*, 76 So. 3d 1060, 1063 (Fla. 4th DCA 2011)(“...jury can the search for truth and justice be accomplished”).

Not only are the e-mails highly relevant and constitute no *Binger* “surprise in fact” to Edwards, as this Court has already glimpsed upon cursory review of the e-mails in March 2018, not

⁸*Oath of Admission to The Florida Bar*, <https://webprod.floridabar.org/wp-content/uploads/2017/04/oath-of-admission-to-the-florida-bar-ada.pdf>.

a single one of the 30 e-mails are attorney-client privileged. Further, if any work product existed, it was either waived or is subject to a clear exception to such protection under the law. If this Court follows Edwards' lead, a ruling shielding the jury from case-eviscerating e-mails would result in reversible error and lead to a second trial.

Because these e-mails are case-ending or worse for Edwards, Edwards has attacked Epstein's counsel and derided the truth of these e-mails in an attempt to hide them from the light of the courtroom, but in the end, there it is: truth.

C. **Edwards Expressly Waived Work Product Protection in 2011 and His Deceptive Concealment of the 30 E-Mails on a Legally Deficient Privilege Log Violated Florida Law and Court Orders**

Edwards expressly, and on multiple occasions, waived work-product protections. In negotiating the preparation of the privilege log, on February 2, 2011, Farmer Jaffe informed Epstein's counsel and the Special Master that it would omit from the log any work product objections that related to closed cases:

All work product materials **will be turned over to Plaintiff except for materials related to new or ongoing cases**, AND on the condition that they be produced "For Attorneys' Eyes Only. (Exhibit 3.)

Gary Farmer, Jr. told the Special Master **he** would then only list on the new privilege log work product materials for existing cases and attorney-client privilege materials. *Id.* Farmer confirmed this agreement more than once:

[February 9, 2011] "We also have 2 more boxes that contain **work product materials** what we will turn over subject to the agreement that Plaintiff will not assert any privilege has been waived by turning them over now, and further subject to the agreement that they be produced 'For Attorneys' Eyes Only.'" (Exhibit 4.)

[February 16, 2011] Farmer: "Do you still want to do the attorney's eyes only? Do you want to speed it up or not? **You'll get work-product stuff** if you agree to the attorney's-eyes only." Epstein's counsel confirmed their agreement. (Exhibit 5.)

This representation was significant. At the time Farmer made this representation to Epstein in 2011, the three cases Edwards had been litigating against Epstein while he was Rothstein's partner at Rothstein Rosenfeldt & Adler ("RRA") were closed and had long been settled (in **July 2010**). Thus, based on Farmer's representation, **Edwards was obligated as an officer of the Court** to have produced all e-mails reflecting work product pertaining to the three closed Epstein cases because they did not pertain to "new or ongoing cases." While at the time of the production Edwards had other clients who had claims against Epstein, those, too, have now long been settled⁹, and none of those claims remain *pending against Epstein*.

In fact, Edwards did produce more than 5,000 pages as "attorneys' eyes only" in February 2011 (including asserted work product relating to the cases of his three clients that Edwards intends to feature in the prosecution of his malicious prosecution claim against Epstein). Epstein has now discovered that Edwards did not produce *select* items, and specifically withheld inculpatory e-mails pertaining to his closed cases against Epstein, despite his partner's representation **to counsel and the Court (Special Master)**.¹⁰ To the extent that the 30 e-mails identified for this Court relate to actual cases Edwards litigated against Epstein, they were closed cases. If work-product protection ever even arguably applied to them, the e-mails should have been turned over for review by

⁹Edwards settled his last clients' claims against Epstein in August 2011.

¹⁰In anticipation of Edwards' response that some work-product documents relating to L.M. and E.W. were not produced because of some tangential privilege based on the pending Crimes Victims' Rights Act ("CVRA") action against the United States Government, this lacks merit. None of the subject e-mails are communications between the government and Edwards' clients or their counsel or implicate any issues relevant to the CVRA case. Importantly, other than filing a Notice of Change of Address in the CVRA action in April 2009 when Edwards joined RRA, *Edwards did nothing in that action while he was at RRA*. In fact, the first filing Edwards made in the CVRA action after April 2009 was in September 2010 after the court administratively closed the case for inactivity – almost a year after Edwards left RRA. (See excerpt of CVRA Court Docket attached as **Exhibit 6**.)

Epstein's counsel pursuant to Farmer Jaffe's agreement. Moreover, because all of Edwards' clients' claims against Epstein have now settled, in reliance on Edwards' previous waiver and agreement to produce the same, these e-mails must be deemed not protected by Edwards' clear waiver. *See Jane Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014)(held that Epstein's former counsel had waived the work-product privilege with respect to documents sought by Edwards' clients, after having voluntarily sent allegedly privileged correspondence to the United States during plea negotiations).

Moreover, this Court's conclusion that Edwards' waiver of any protection is further mandated by his subsequent deliberate concealment of the e-mails in question on a 159-page privilege log that was determined by this Court on May 7, 2012, to be legally deficient on its face and to have utterly failed to comply with the legal requirements of Florida Rule of Civil Procedure 1.280(b)(5) and *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001). (**Exhibit 7.**) It was through this device that Edwards prevented the e-mails from ever seeing the light of day despite Edwards' representations to Epstein's counsel that all e-mails qualifying as work product in closed cases against Epstein had been produced. While the e-mails remained concealed through Edwards' improper device, Edwards continued to prosecute his Counterclaim against Epstein based on the very issues directly refuted by e-mails Edwards concealed from existence. Edwards, **who is both an officer of the court, a plaintiff and counsel of record for himself in this action**, should not be rewarded for such unethical gamesmanship **and violation of court rules.**

On August 17, 2012, the Court vacated the May 7, 2012, Order, but did not relieve Edwards of the requirement to provide a new fully compliant privilege log. In fact, the Court's August 17, 2012, Order provides, in pertinent part:

EDWARDS shall file a written response specifically addressing the production sought in Paragraph 13 of EPSTEIN's Motion to Compel and

Amend Protective Order of March 9, 2012 as Ordered in this Court's April 10, 2012 Order. The response shall identify non-privileged responsive documents previously produced, shall be accompanied by all non-privileged responsive documents not previously produced, if any **and shall identify, in a proper privilege log as referenced in this Court's May 7, 2012 Order**, responsive documents withheld from production on the basis of any assertion of privilege. This response shall be filed within 10 days from the date of this Order.

(August 17, 2012, Order) (emphasis added) (**Exhibit 8**). Edwards failed to **comply with the court's order** and provide an accurate privilege log. **His** February 23, 2011 privilege log (**Exhibit 9**) is clearly invalid and the protections asserted thereunder must be deemed waived **for any number of reasons**, including Edwards' failure to comply with the Court's Order.

Because Edwards blatantly disregarded the Court's Order, as well as the requirements of Florida's Rules of Civil Procedure and the *TIG* case, the February 23, 2011 privilege log remains wholly deficient **and worse - misleading**. The privilege log misstates objections, improperly identifies or altogether excludes the required identities of the document authors and recipients, and its document descriptions are deceptively vague and misrepresent the true nature of the documents listed on the privilege log. Had Edwards ever provided a legally sufficient privilege log, Epstein would have been afforded the opportunity to identify as early as February 23, 2011, the improper assertions of attorney-client privilege, work-product protection and irrelevancy made by Edwards with respect to the 30 e-mails.

In light of Edwards' promise to turn "work-product" e-mails over coupled **with his non-compliant privilege log** and multiple instances of waiver regarding work product from closed cases, the Court need not make any further determinations other than to unseal the 30 e-mails and allow Epstein to use them at trial. Edwards' deceptive privilege log and subsequent disregard for the Court's Order mandating ("shall") a proper privilege log should not be rewarded by this Court, and

requires a finding that Edwards has waived any claim of protection, particularly protection he has already waived or lost for a variety of other reasons discussed herein.

D. Edwards Waived Any Attorney-Client and Work-Product Protection by Voluntary Disclosure to a Clear Adversary in the *Razorback* Litigation

Additionally, Edwards' counsel conceded on March 8, 2018, that the e-mails were shared with the Conrad, Scherer law firm -- counsel for Razorback. (**Exhibit 2**, 15:1-16; 18:18-19:3). (*Also see* April 2011 communication between Edwards' counsel and Razorback's counsel, **Composite Exhibit 10**.) Clearly, Razorback sought their production to prove its allegations in the *Razorback* lawsuit that Rothstein used the three cases against Epstein, in part, to lure investors into the Ponzi scheme. Once Edwards provided the documents that he claims are privileged in this case (both attorney-client and work product) to Conrad, Scherer, an adversarial party's counsel, Edwards waived those privileges. *See* § 90.507, Fla. Stat.; *Delap v. State*, 440 So. 2d 1242, 1247 (1983). *See also Tucker v. State*, 484 So. 2d 1299, 1301 (Fla. 4th DCA 1986) ("The law is clear that once communications protected by the attorney-client privilege are voluntarily disclosed, the privilege is waived and **cannot be reclaimed.**") (emphasis added).

Recognizing his voluntary disclosure to *Razorback*, Edwards has defended against Epstein's claim of waiver by arguing "selective waiver" or "common interest." Edwards claimed that "Conrad & Scherer . . . entered into a joint prosecution agreement with Edwards' counsel, whereby both parties agreed to share information relative to their claims and/or defenses related to Scott Rothstein without waiving privilege as to their communications or documents shared." Edwards' Supp. Resp. to Epstein's Mot. to Declare Relevance, July 26, 2018, at 14. This is a claim of "selective waiver"—that Edwards may waive privilege as to one recipient while maintaining it as to others. However, every court that has recently addressed the logic and viability of "selective waiver" has concluded that it fails as inconsistent with the purpose of the attorney-client privilege.

Permian Corp. v. U.S., 665 F.2d 1214, 1221 (D.C. Cir. 1981). In addition, “[o]nce a party has disclosed work product to an adversary, it waives the work product doctrine as to all other adversaries.” *McMorgan & Co. v. First Cal. Mortg. Co.*, 931 F. Supp. 703 (N.D. Cal. 1996).

Case law from across the country demonstrates that the confidentiality agreement is of no merit because a litigant who chooses to disclose information claimed as confidential cannot have his cake and eat it too. Simply put, actions speak louder than words.

The general rule applies here. On March 8, 2018, Edwards’ counsel, Jack Scarola, implied (incorrectly) that the e-mails were shared with Epstein’s counsel by Mr. Scherer, counsel for Razorback. Thus, Edwards admits that he voluntarily furnished the e-mails to Mr. Scherer. Razorback sought these allegedly privileged communications to prove its allegations in the *Razorback* litigation that Rothstein used Edwards’ three cases against Epstein *to lure investors into Rothstein’s Ponzi scheme*. When Edwards produced these documents to Mr. Scherer who was prosecuting an action against Rothstein and the firm, Edwards waived his claim to attorney-client and work-product privileges as to the whole world.¹¹ *See infra*.

Likewise, no “common interest” protection exists because the *Razorback* victims were outspokenly not aligned with Edwards. This is perhaps best illustrated in the hearing transcript before the United States Bankruptcy Court, Southern District of Florida, Case No. 09-34791-BKC-RBR, in *In re Rothstein Rosenfeldt Adler, P.A.*, in which the following were statements made by William Scherer, Razorback’s counsel:

- “[I]n November we filed a lawsuit in State Court and we alleged that as part of Mr. Rothstein and the firm, and the firm’s employees, and maybe some of the firm’s attorneys, conspired to use the Epstein/LM litigation in order to lure \$13.5 million worth of my victims, my clients, into making investments in these phoney [sic] settlements.” (17:7-14.)

¹¹Unless Edwards disclosed the information relating to his clients without their consent, which is unfathomable, then Edwards’ permitted disclosure waives it on their behalf as well.

- “In addition, as we have alleged, that Mr. Edwards and the firm put sensational allegations in the LM case that they knew were not true, in order to entice my clients into believing that Bill Clinton was on the airplane with Mr. Epstein and these young woman ...” (18:24-19:4.)
- “I can’t conceive that Mr. Edwards and the predecessor law firm would have any standing to prepare privilege logs or anything else, given what I just told the Court. That would be like having the fox guard the hen house.” (20:5-9.)
- “[The Complaint] names Rothstein. It does not name Mr. Edwards. It just names Rothstein, not the firm, and lays out the facts and says other people in the firm. We did not name them because we want to see the documents and see whether they had involvement.” (22:3-8.)
- “I support the same position that [Epstein] has asked the Court, and that is to have the trustee deal with this, get these documents and deal with it with you, rather than allow the successor law firm (i.e., Edwards’ law firm) to have them.” (22:19-24.)

(8/4/10 Hearing Transcript, **Exhibit 11.**)

It really is that simple. Edwards’ decision years ago (for whatever expedient or economic reason) to voluntarily give away the allegedly attorney-client privileged and work product e-mails to Conrad Scherer in the *Razorback* litigation triggered section 90.507. After taking steps inconsistent with the maintenance of privileges in confidential information, the privileges cannot be resurrected. They were waived.

E. Work-Product Protection Was Waived by Edwards’ Issue Injection

Edwards has also waived attorney-client and work-product protections in the 30 e-mails under Florida’s “at issue” doctrine (also known as “issue injection”). Related to the “at issue” doctrine is the “implied waiver” doctrine.

The “at issue” doctrine requires that a court find a waiver of attorney-client privilege. *Genovese v. Provident Life & Acc. Ins. Co.*, 74 So. 3d 1064 (Fla. 2011) (noting that privilege is waived where, for example, advice of counsel is raised as a defense and privileged communication

is necessary to establish the defense). Under the “at issue” doctrine, “[A] party cannot hide behind the shield of privilege to prevent an opponent from effectively challenging pertinent evidence.” *Carles Const. Inc. v. Travelers Cas. & Sur. Co. of Am.*, 56 F. Supp. 3d 1259, 1273 n.40 (S.D. Fla. 2014) (emphasis added).

Here, the e-mails are vital and necessary to defend against one or more elements of Edwards’ malicious prosecution claim. Among other things, the e-mails *directly relate* to the credibility of Edwards’ claim for damages based on “anxiety” he has allegedly suffered every single day of his life since December 2009 when Epstein’s lawsuit was filed, and continues to suffer through today. (Edwards, 11/10/17, 11:21-12:16; 21:14-22:8; 23:5-16.)¹² In addition, the e-mails directly debunk Edwards’ assertion that he had no involvement with Rothstein in connection with, that he acted properly in the litigation of, and that there is nothing to demonstrate any weakness in Edwards’ now-settled three clients’ cases against Epstein. Repeatedly, Edwards has made these central issues in his malicious prosecution counterclaim against Epstein. Edwards’ own statements in the e-mails are directly relevant and go to the heart of Epstein’s ability to demonstrate that Edwards had no damages, that any damages from anxiety as claimed by Edwards cannot be blamed on the allegations in the Complaint, but are attributable to Edwards’ voluntary association with Rothstein and his own litigation activities in the Epstein cases, and that in the end, Edwards’ claimed reasons that Epstein could not have *had* probable cause and acted with malice are plainly false. Therefore, they are critical to Epstein’s defenses to Edwards’ malicious prosecution claim and any work-product that may have applied to them must be deemed to have been waived.

F. The Crime-Fraud Exception Applies to Some E-mails

¹²Excerpts of Edwards’ November 10, 2017, deposition transcript are attached as **Exhibit 12**.

Under Florida law, there is no attorney-client privilege when the services of a lawyer are sought to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud. § 90.502(4)(a), Fla. Stat.; *see also* Fla. R. Prof'l Conduct 4-1.6 (“A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary . . . to prevent a client from committing a crime.”). Following earlier precedent in *Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983), the Eleventh Circuit affirmed the part of the district court’s order determining that the crime-fraud exception may be applied because an attorney’s illegal or fraudulent conduct may, alone, overcome attorney work-product protection. *See Drummond Co., Inc. v. Conrad Scherer, LLP*, No. 2:11-cv-03695-RDP-TMP (11th Cir. March 23, 2018), at 23-24. (**Exhibit 13.**)

As further support for this crime-fraud argument and Rothstein’s and Edwards’ working together as alleged in Epstein’s Complaint, Epstein directs the Court to his Memorandum filed under seal and the illustrative sampling of Exhibit Nos. 13-89, 13-93, 13-97, 13-98, 13-101, 13-102, 13-104, 13-106 and 13-107. This is more specifically explained in Epstein’s Confidential Memorandum.

G. No Attorney-Client Privilege Exists

Farmer Jaffe, and now Edwards, misleadingly and repeatedly have advanced the “attorney-client privilege” label again and again in the hope that this Court will turn away and preclude the documents from jury consideration. Of the 1,607 claimed privilege items on Farmer Jaffe’s privilege log, 938 entries were labeled as “irrelevant and not reasonably calculated to lead to the discovery of admissible evidence,” while 994 entries were labeled as “work product and attorney-client privilege” (only 19 were communications with a client as determined by the description in the privilege log).

Despite Edwards' and Paul Cassell's (counsel for the Intervenor) protestations to the contrary, this Court can plainly see that not a single one of the 30 e-mails are attorney-client privileged communications between Edwards (or any other co-counsel) and Edwards' and Mr. Cassell's three tort clients (L.M., E.W. or Jane Doe). Rather, the majority of the documents are e-mails among attorneys and staff within RRA, with Mr. Cassell, and with media sources and do not qualify for that protection as codified in section 90.502 of the Florida Statutes. A quick read of the 30 e-mails makes it easy to understand both that the e-mails do not in any way reflect attorney-client communications and that Edwards and Mr. Cassell have very **significant personal and professional reasons** that they do not want the e-mails to see the light of the courtroom. *See Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 223, 119 S. Ct. 636, 657, 142 L. Ed. 2d 599 (1999)(“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”) *citing Buckley v. Valeo, supra*, at 67, and n. 80, 96 S.Ct. 612 (quoting L. Brandeis, *Other People's Money* 62 (1933)).

Under Florida's Evidence Code, “[a] client has a privilege to refuse to disclose, and to prevent any other person from disclosing, the contents of confidential communications when such other person learned of the communications because they were made in the rendition of legal services to the client.” § 90.502(2), Fla. Stat. (2017). A communication between lawyer and client is “confidential” if it is not intended to be disclosed to third persons other than:

1. Those to whom disclosure is in furtherance of the rendition of legal services to the client.
2. Those reasonably necessary for the transmission of the communication.

Las Olas River House Condo. Ass'n, Inc. v. Lorh, LLC, 181 So. 3d 556, 557–58 (Fla. 4th DCA 2015); § 90.502(1)(c), Fla. Stat. (2017); *Witte v. Witte*, 126 So. 3d 1076 (Fla. 4th DCA 2012)(second exception applies to agents of the client such as a family member on behalf of an

incapacitated relative). Not one of the 30 e-mails provides any basis to conclude that the documents constitute or reflect attorney-client communications in the rendition of legal services to a client. This Court's *in camera* review of the 30 e-mails will easily confirm that no attorney-client privilege applies.

CONCLUSION

Edwards, an officer of the court, the Plaintiff in this case and counsel of record for himself, can claim no surprise for e-mails he authored, received or possessed since 2009 and deliberately and improperly concealed from disclosure to Epstein since February 2011. The 30 e-mails are relevant and clearly not attorney-client communications. Additionally, Edwards has waived the right to assert attorney-client privilege and work-product doctrine with respect to the 30 e-mails for all reasons set forth above. This Court is equipped with the controlling law and equitable principles to perform the now substantially narrowed request for an *in camera* review of the sealed 30 e-mails, and to confirm the critically relevant nature and admissibility of these e-mails based on the absence or waiver of any attorney-client privilege or work-product protection. The *in camera* review will confirm that Edwards expressly waived all privilege in February 2011 and such documents should be deemed to have been produced by him.

WHEREFORE, Counter-Defendant, Jeffrey Epstein, moves for this Court for an *in camera* review of the 30 e-mails, with counsel present to be heard, and for a ruling that no privilege exists, or that waiver or other reasons preclude any potential protection and the 30 e-mails may be identified by Epstein on his Exhibit List and introduced at trial.

CERTIFICATE OF SERVICE

I certify that the foregoing document has been furnished to the attorneys listed on the Service List below on November 9, 2018, through the Court's e-filing portal pursuant to Florida Rule of Judicial Administration 2.516(b)(1).

LINK & ROCKENBACH, PA



By: /s/ _____

Scott J. Link (FBN [redacted])

Kara Berard Rockenbach (FBN [redacted])

Primary: [redacted]

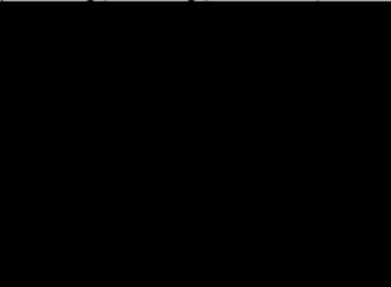
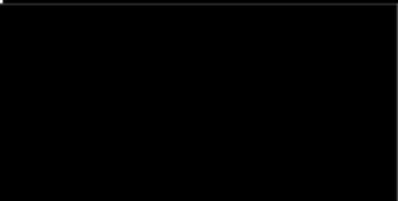
Primary: [redacted]

Seconda [redacted]

Seconda [redacted]

Counsel for Counter-Defendant Jeffrey Epstein

SERVICE LIST

<p>Jack Scarola Karen E. Terry David P. Vitale, Jr. Searcy, Denny, Scarola, Barnhart & Shipley, P.A.  Edward <i>Co-Counsel for Defendant/Counter-Plaintiff Bradley J. Edwards</i></p>	<p>Philip M. Burlington Nichole J. Segal Burlington & Rockenbach, P.A.   <i>Co-Counsel for Defendant/Counter-Plaintiff Bradley J. Edwards</i></p>
<p>Bradley J. Edwards Edwards Pottinger LLC  <i>Co-Counsel for Defendant/Counter-Plaintiff Bradley J. Edwards</i></p>	<p>Marc S. Nurik Law Offices of Marc S. Nurik  <i>Counsel for Defendant Scott Rothstein</i></p>
<p>Jack A. Goldberger Atterbury, Goldberger & Weiss, P.A.  <i>Co-Counsel for Plaintiff/Counter-Defendant Jeffrey Epstein</i></p>	<p>Paul Cassell  <i>Limited Intervenor Co-Counsel for L.M., E.W. and Jane Doe</i></p>
	<p>Jay Howell Jay Howell & Associates  <i>Limited Intervenor Co-Counsel for L.M., E.W. and Jane Doe</i></p>