UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
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IN RE: CASE NO.: 09-34791-RBR

ROTHSTEIN ROSENFELDT ADLER, P.A., CHAPTER 11

Debtor.
_____/

[redacted]., [redacted]., AND JANE DOE'S REPLY IN SUPPORT OF JOINDER IN MOTION FOR ORDER TO SHOW CAUSE AND MOTION FOR DISCOVERY, TO ASSESS SANCTIONS AND COSTS FOR OTHER APPROPRIATE RELIEF

Sexual assault victims [redacted]., [redacted]., and "Jane Doe" (hereinafter "the Victims"), proceeding pseudonymously, having previously moved to intervene in this action and having filed a motion for an order to show cause [DE 6345], now file this reply to Jeffrey Epstein's Response in Opposition to [redacted]., [redacted]., and Jane Doe's Joinder in Motion for Order to Show Cause and Motion for Discovery, to Assess Sanctions and Costs, and for Other Appropriate Relief [DE 6353].

INTRODUCTION

In their motion, the Victims sought sanctions against Fowler White and Epstein for illegally retaining copies of materials forbidden to be retained or copied by this Court's November 2010 order – including a disk of thousands of sensitive emails connected with civil cases involving childhood sexual abuse committed by Jeffrey Epstein. In his response to the motion, Epstein makes numerous factual assertions, such as he was "never provided with . . . any documents" from the disk in question. DE 6353 at 10. But he never provides any support for this factual assertion, and the Court should give such unsupported claims no weight.

The Victims have sought various sanctions appropriate against Epstein (and his law firm, Fowler White). Because Epstein makes no effort to prove that he has complied with the Court's

order – apparently claiming only that any violation of this Court's order was somehow vitiated by actions of his current lawyers – the Court should grant sanctions against Epstein (and his law firm, Fowler White, an issue to be discussed in a separate reply).

EPSTEIN HAS ADMITTED THAT HE POSSESSED DOCUMENTS FROM THE DISK IN QUESTION

Epstein has previously admitted in the related state court proceedings before Judge Hafele that he possessed documents from the disk in question. Now, before this Court, he appears to take a different position. For example, Epstein states in his response that he "was never provided with a copy of the disc, *nor any documents from it* and never made any disclosure of the same." DE 6353 at 10 (emphasis added). This assertion appears to be contrary to representations made to the state court by Epstein's current lawyers (Link & Rockenbach), who directly told Judge Hafele in the related state court proceedings that the documents had been provided to Epstein. Specifically, Epstein's lawyer, Mr. Link, told Judge Hafele that Epstein had the documents:

> MR. LINK: The documents were within my law firm, *and my client*. That's it. They haven't been shown to any third parties. There's not a third-party witness for me to put on the stand. And you have ruled we can't use them. We won't use them.
> MR. SCAROLA: Does that include Mr. Epstein?
> THE COURT: Does what include Mr. Epstein?
> MR. SCAROLA: Has Mr. Epstein been provided with copies of the documents or the contents of these privileged documents?
> MR. LINK: *I just said my client. My law firm and my client.* And I can say legal counsel, Mr. Goldberger. So that's it.
> MR. SCAROLA: That may require some further relief that we can address at another time. And so that the record is clear, your Honor, we believe that sanctionable conduct has occurred, and we are reserving the right at a later time . . . to address the issue of appropriate sanctions . . . .

3/8/18 Aft. Tr. 64:7-65:2 (transcript available in DE 6351-4) (emphases added). Judge Hafele later commented on this point, explaining that: "Mr. Link has already represented to the Court that *other than Mr. Epstein* and his co-counsel, that there have been no eyes laid upon this documents." 3/8/18 Aft. Tr. 78:20-23 (DE 6351-4) (emphasis added).

Moreover, in his "notice of compliance" to the state court, Epstein's counsel (Mr. Link) indicated that he had "notified" his client – i.e., Mr. Epstein – "to destroy all hard copies and electronic versions of the documents obtained from the disk." DE 6351-6 at 2. Whether Epstein complied with that direction is unknown at this time, because Epstein's "notice of compliance" does not contain any information on that subject. But obviously no "notice" would have been needed if Epstein did not have the documents.

Indeed, quite remarkably, Epstein's response in this Court argues that for him to be compelled to "identify[] which key e-mails [were] provided to Epstein by his current counsel would, in fact, represent Link & Rockenbach's never-before-disclosed opinion work product and attorney-client privilege in the State Court Action." DE 6353 at 7. Somehow Epstein and his new lawyers argue that the attorney-client and work-product emails that were improperly obtained have now transformed into Epstein's work-product. Regardless, once again, Link & Rockenbach admit – on behalf of Epstein – that they provided certain "key mails" from the disk directly to Epstein.

The Court should disregard Epstein's seemingly contrary and unsupported factual assertions in his most recent pleadings, which are inadmissible in these proceedings. *See* Rule 9017, Fed. R. Bankr. P. 9017 (rules of evidence apply to bankruptcy proceedings). *See, e.g.*, *In re Arrow Air, Inc.*, No. 10-28831-BKC-AJC, 2012 WL 314192, at *2 (Bankr. S.D. Fla. 2012) (defendant "has not submitted an affidavit or other sworn testimony . . . in support of the Motion. Nor has [Defendant] provided an affidavit from its prior counsel . . . Without any such evidence, the Court finds that [the defendant] has failed to meet its burden here."). If Epstein is going to take the position that he has never seen or possessed documents from the disk, he should start by providing a sworn affidavit, based on personal knowledge, to that effect. No such affidavit exists

– and the Victims' firmly believe that Epstein will never provide such an affidavit. The Court should strike these allegations or, alternatively, given them no consideration in these proceedings.

Given Epstein's failure to take even the basic step of providing an affidavit to support his claims, this Court should act on the basis of the representation that Epstein's lawyer, Mr. Link, made to Judge Hafele – i.e., that Epstein personally possessed documents from the disk and had been "notified" to destroy such copies (a notification the effects of which are unknown). The Court should take judicial notice of these facts under Fed. R. Evid. 201, as their accuracy cannot be reasonably questioned by Epstein – his attorney (Mr. Link) has attested to these facts in arguments and pleadings before Judge Hafele, as well as before this Court. And this Court should then order the deposition of Epstein to learn the specifics of his possession of the documents in question.

ARGUMENT

A. THE UNDISPUTED FACTS SHOW THAT EPSTEIN VIOLATED THE NOVEMBER 2010 ORDER SPECIFICALLY FORBIDDING HIM FROM RETAINING "IMAGES OR COPIES OF THE SUBJECT DOCUMENTS."

In light of the fact that Epstein personally possessed documents from the disk in question, Epstein was obviously in violation of this Court's November 2010 order. The order specifically prohibited such action, stating that: "Should it be determined that Fowler White *or Epstein* retained images of 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 [[redacted].] . . ." DE 1194 at 2 (emphasis added).

While obscuring the fact that Epstein possessed – and so far as appears in the current fact-based record, may continue to possess – documents from the disk in question, Epstein appears to stake out the claim that he is entitled to such possession because he received the documents

indirectly. Epstein appears to claim that he got the documents from his current attorneys – Link & Rockenbach – rather than directly from his previous attorneys – Fowler White. Of course, the factual predicate for such a defense remains to be established. Epstein needs to provide a sworn affidavit, based on personal knowledge, if he wishes the Court to proceed on the basis for such facts. But in any event, the mere fact that Link & Rockenbach served as a "pass through" for the documents does not change the fact that Epstein *personally* possessed documents that he was not entitled to possess.

Under this Court's order, the Victims had the fundamental right to keep confidential attorney-client materials regarding their sexual abuse out of the hands of the man who sexually abused them. Epstein has now *personally* violated that order – under highly suspicious circumstances -- and the Victims are now entitled to have sanctions awarded in their favor and against him for that violation.

Moreover, as this Court can immediately see from even a quick glance at the pleadings, Epstein and his current lawyers are dedicated to injecting into the public record their alleged findings and conclusions that they have reached from their review of the improperly-obtained materials. Preventing such misuse of the privileged materials is the very reason this Court properly entered the Order in the first place. Yet even after confessing to possessing materials improperly, Epstein acting through his lawyers continues to insinuate that these documents demonstrate some sort of wrongdoing, either by the Victims or their lawyers – or both. The continued public dissemination of information allegedly gleaned from the emails, especially in light of the false, misleading, and distorted way in which Epstein so brazenly makes these assertions in pleadings, continues to cause irreparable harm.

B. WORK-PRODUCTION PROTECTION ISSUES ARE IRRELEVANT TO WHETHER EPSTEIN IMPERMISSIBLY RETAINED IMAGES OR COPIES OF THE MATERIALS ON THE DISK.

Epstein's response also seems to claim that there has been some waiver of work-product protections that is relevant to the pending issues. DE 6353 at 5-6. This argument does not address the more basic attorney-client privileges, which have never been waived in any way. But, as Farmer Jaffe's briefing clearly explains, there has never been any waiver – either of attorney-client privilege or work-product protection – over the "key emails" that are at issue here. Epstein's "waiver" argument is a red herring, having nothing to do with what sanctions should be awarded for his violation of the Court order.

THE RELIEF REQUESTED AGAINST EPSTEIN IS APPROPRIATE

Sanctions should be awarded against Epstein. This issue is not whether Epstein possessed "the disk," as he seems to assert (DE 6353 at 6), but whether he possessed "images or copies" of the documents in question. The format of the materials is not at issue – it is Epstein's unauthorized possession of the materials that should lead to appropriate sanctions.

1. A DIRECTION THAT EPSTEIN WRITE "RETRIEVAL LETTERS" IS APPROPRIATE.

The first relief that the victims requested is that Epstein (and Fowler White[1]) impermissibly retained documents in violation of this Court's order. DE 6353 at 6-7. The Victims want such a

[1] This response is addressed to sanctions against Epstein. Issues related to Fowler White will be dealt with in a separate pleading. It bears noting, however, that Judge Hafele noted more than a month ago his surprise that Fowler White had not offered an explanation: "Perhaps I'm being a bit naive when I say that having served Mr. Epstein in their capacity as counsel, it's my respectful belief that they [Fowler White] owed an obligation to Mr. Epstein, if not this Court, to explain how and why they had access and kept these records in their possession in light of that court order [from Judge Ray] and in light of this ongoing litigation.." 3/8/18 Aft. Tr. 61:3-61:14 (Transcript available in DE 6351-4)

letter – which they will refer to as a "retrieval letter" – to help them retrieve their confidential materials.

Epstein claims that the letter would be inaccurate. But as explained above, he has retained emails and other documents in violation of the Court's order. This Court should help the Victims undo the damage from the violation of its order through all available means including by directing Epstein to provide an appropriate retrieval letter.

2. FURTHER DISCOVERY REGARDING THE DISTRIBUTION OF THE MATERIALS ON THE DISK IS APPROPRIATE.

The Victims remain concerned about who has reviewed their privileged materials. Accordingly, the Victims asked for limited discovery concerning the distribution of the materials. DE 6345 at 2.

In response, Epstein asserts that his current legal counsel (Link & Rockenbach) has explained everywhere the documents have gone. *See* DE 6353 at 7. But a gaping hole exists in the representations of counsel. While counsel have explained what *they* have done to retrieve documents, counsel have not explained what *Epstein* has done with the documents. Indeed, the "notice of compliance" is entirely silent on whether Epstein has even bothered to return the documents in question. *See* DE 6351-6 at 2 (stating Epstein has been given "notice" to destroy the documents but failing to state what Epstein did after receiving that notice).

Epstein also cites a passage from Judge Hafele's hearing, in which Judge Hafele indicated that it was not for him to determine where all the documents had gone. DE 6353 at 7. But the reason that Judge Hafele gave for limiting his ruling was that he did not think he had "that ability" to inquire into what Fowler White had done, because they had withdrawn from the case in front of him. 3/8/18 Aft. Tr. 79:25-80:1 (DE 6351-4). Judge Hafele also made clear, however, that "Mr. Epstein will be barred from referring to any of those records as it relates to the documents that

were gathered from Fowler White or from any other source that would have included those records that were the subject of Judge Ray's order." 3/8/18 Aft. Tr. 75:24-76:3 (DE 6351-4). Moreover, Judge Hafele appears to have specifically contemplated that some follow up regarding any distribution of the documents would be made by this Court: "And there may be an issue with regard to Fowler White voluntarily turning them [the documents] over. Those are things that can be dealt with later on. And again, it may be a *different forum* than I'm even dealing with here today." 3/8/18 Aft. Tr. 31:16-31:18 (DE 6351-4) (emphasis added). Judge Hafele also commented that what he was interested in ultimately knowing was "how Fowler White got the documentation, do we to know that, whether or not that documentation was obtained or retained in a manner that either was in violation of Judge Ray's order or walked a certain tightrope that could be construed as a constructive violation of that order." 3/8/18 Aft. Tr. 31:19-31:25 (DE 6351-43).

Epstein offers no substantive reason why the Victims should not be given some limited discovery into the distribution of the documents in question. Accordingly, they should receive an opportunity to take discovery (in the form of interrogatories, requests for admission and production, as well as depositions as requested by Farmer Jaffe) on this important subject.

3. A DIRECTION THAT EPSTEIN WRITE A LETTER OF APOLOGY IS APPROPRIATE.

The Victims have also requested that Epstein (and others responsible) be directed to write a letter of apology. In response, Epstein claims that such a letter would be "wholly inappropriate." DE 6353 at 9. But Epstein's arguments hinge on the factual premise that he did not violate this Court's order. As explained above, he did. And Epstein's protestations that he acted innocently lack any factual support, as he fails to provide any statement under oath to the fact. Accordingly, on the undisputed record before this Court, Epstein has violated the Victims' rights under the

Court's order and he has failed to provide any explanation. A letter of apology is entirely appropriate.

4. A BAR REFERRAL OF THE RESPONSIBLE ATTORNEYS IS APPROPRIATE.

At the appropriate time, the Court should make a referral to the bar of any attorneys responsible for deliberately violating its order or other violation of ethical rules. As Epstein is not an attorney, this relief is inapplicable to him.

5. SANCTIONS IN THE AMOUNT OF $25,000 PER VICTIM FROM EPSTEIN ARE APPROPRIATE.

The three victims have each requested sanctions in the amount of $25,000 payable from Epstein (or his attorneys). DE 6345 at 3. In response to the Victims, Epstein does not argue that this Court has authority to award such sanctions. Nor does he claim (as a reputed billionaire) that such sanctions would be in any way burdensome to him. Nor does he dispute that he is perfectly positioned to identify which of the various legal teams he has hired at different points in the process was most responsible for violation of this Court's order – and thus can place the burden on the responsible actor(s).

Instead, Epstein argues that such sanctions are not appropriate because, he claims, he was "never provided with . . . any document from [the disc] . . . ." DE 6353 at 10. As noted repeatedly above, this claim by Epstein is unsupported – and contradicts representations made by his lawyers to Judge Hafele.

Sanctions in the amount of $25,000 per victim is on the low end of reasonable, because the Victims should have had their confidential materials protected, as this Court directed. Sanctions can be awarded either to deter future misconduct or remedy past misconduct. Both grounds exist

here and, given the deliberateness of the violation of the sensitivity of the materials (in a case involving childhood sexual abuse), $25,000 for each victim is an appropriate amount.

Epstein also discusses an affidavit from Timothy Chinaris, who is familiar with ethical obligations in Florida. But Chinaris was never asked to opine on the effect of this Court's order. To the contrary, so far as his opinion reveals (DE 6351-5), he was unaware of this Court's order.

6. AN EVIDENTIARY HEARING AND CONTEMPT FINDINGS ARE APPROPRIATE.

The Victims also seek an evidentiary hearing on the circumstances surrounding the violation of this Court's order, as the predicate for imposing appropriate sanctions – including the possibility of criminal and civil contempt sanctions. Epstein asserts that there has been no criminal act (DE 6353 at 11) – a claim that can only be fully assessed after he provides information under oath and the Court has a full factual record.

The Eleventh Circuit has recently reaffirmed that bankruptcy courts have authority to impose both civil and criminal contempt sanctions. *See In re McLean*, 794 F.3d 1313, 1323-24 (11th Cir. 2015). Indeed, the Eleventh Circuit has recently explained that "[c]ivil contempt power is inherent in bankruptcy courts since all courts have authority to enforce compliance with their lawful orders." *In re Ocean Warrior, Inc.*, 835 F.3d 1310, 1316 (11th Cir. 2016) (*citing Alderwoods Grp., Inc. v. Garcia*, 682 F.3d 958, 967 n.18 (11th Cir. 2012)). Before imposing sanctions, a bankruptcy court must provide "a level of process" that is appropriate to the circumstances. *In re McLean*, 794 F.3d at 1324. As part of the due process – to both the Victims and Epstein – Epstein must be part of the evidentiary hearing. He has made numerous factual assertions, through his current attorneys, in responding to the Victims. It will be interesting to see whether he would be willing to repeat those same assertions under oath and before this Court. The Victims predict that he will be unwilling to do so – and then the Court will then be in a much better

position to determine how the disk mysteriously surfaced shortly before Epstein was about to go to trial in the state court proceedings and impose such contempt and other sanctions or remedies as may be appropriate.

Epstein also states that his current counsel (Link & Rockenbach) have provided a "chain of custody" of the disk. DE 6353 at 11. However, as must be obvious to Epstein, only a very limited piece of the chain has been discussed by his attorneys. The beginning of the chain – i.e., the actions taken by Fowler White to impermissible copy and retain a disk of thousands of the Victims' attorneys' highly sensitive emails in a sexual abuse setting – remain uncertain at this point. And similarly, the end of the chain – i.e., any actions taken by Epstein to distribute the "key emails" – also remains a complete mystery. An evidentiary hearing is appropriate.

7. REASONABLE ATTORNEYS' FEES ARE APPROPRIATE.

Victims' counsel should also receive reasonable attorneys' fees. The Victims requested such relief with supporting authority (DE 6345), and Epstein offers no response. *See* DE 6353 (failing to contest attorneys' fees request). "Bankruptcy courts have broad discretion in awarding professional fees in bankruptcy proceedings." *In re Ocean Warrior, Inc.*, 835 F.3d 1310, 1319 (11th Cir. 2016). The complicated legal problems stemming from violation of this Court's order – in a case involving victims of childhood sexual abuse – make it appropriate that the Victims have legal representation. The Courts should accordingly award reasonable attorneys' fees.

CONCLUSION

For the foregoing reasons, the Court should grant the three Victims' the relief requested above, including joinder in Farmer Jaffe's motion for sanctions and their own sanctions and other relief as described above.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that 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, on this 12th day of April, 2018.

I HEREBY CERTIFY that the undersigned attorney is appearing pro hac vice in this matter pursuant to court order dated April 3, 2018.

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-AND –

I HEREBY CERTIFY that I am admitted to the Bar of the United State 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).

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