

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.

**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**

Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, P.L. ("Farmer Jaffe"), through counsel, hereby moves this honorable Court for 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, and as grounds therefore states as follows:

INTRODUCTION

As the Court will recall from previous litigation in this matter, Jeffrey Epstein is a convicted sex offender who has been sued by dozens of victims for sexual abuse of children. In the course of the above-captioned bankruptcy proceedings, in 2010, Epstein served a broad subpoena attempting to secure thousands of attorney communications by Farmer Jaffe attorney Bradley J. Edwards, Esq., who while previously employed as an attorney at Rothstein Rosenfeldt Adler ("RRA") had represented a number of Epstein's victims in their civil suits against Epstein. Farmer Jaffe sought to have Epstein bear the costs of copying and Bates stamping these thousands of documents [DE 1120], ultimately resulting in an order from this Court that Epstein's counsel—attorneys at the law firm of Fowler White Burnett, P.A. ("Fowler White")—would make a copy of the materials and return them to Farmer Jaffe. Because of Farmer Jaffe's obvious concern that

Epstein or his legal counsel might misappropriate these documents while in their physical possession for the limited purpose of copying and Bates numbering them, this Court specifically ordered 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.” [DE 1194]. To ensure compliance with its order involving the transmission of highly sensitive materials, this Court specifically added an enforcement provision: “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.” [DE 1194].

Remarkably, in clear and intentional defiance of this Court’s order, Farmer Jaffe recently discovered that Fowler White indeed retained a copy of the confidential materials at issue—and those materials have now been passed along to Epstein’s current set of lawyers, as well as to Epstein personally. Not to put too fine a point on it, Epstein and his lawyers at Fowler White appear to have misappropriated a set of confidential documents, which include sensitive and attorney-client protected communications about Epstein’s sex abuse victims, and those documents to this day remain in the possession of the victims’ sexual abuser, Epstein.

Farmer Jaffe asks this Court to enter an order to show cause, to allow appropriate discovery into the apparent misconduct, and to ultimately enter sanctions and costs as may be appropriate.

HISTORICAL BACKGROUND

While information surrounding the apparent misappropriation of privileged documents is continuing to be revealed, it appears that the following facts cannot be reasonably contested by Fowler White or Epstein and, should any of them be contested, Farmer Jaffe requests an evidentiary hearing to prove them:

1. From the 1990s through the 2000s, billionaire Jeffrey Epstein sexually abused dozens of then-minor girls in his Palm Beach mansion in the Southern District of Florida and elsewhere. Several of these victims, including L.M., E.W., and “Jane Doe,” were represented by Farmer Jaffe attorney Bradley J. Edwards in their civil suits against Epstein. [DE 1120].

2. Edwards filed the three sexual abuse lawsuits against Epstein in 2008 while a sole practitioner before taking the cases with him while Edwards was employed at RRA from April 2009 through the firm's implosion in November 2009.

3. In late 2009, Epstein sued Edwards for purportedly improperly representing his clients who were Epstein's sex abuse victims. *Jeffrey Epstein v. Scott Rothstein, Bradley J. Edwards, and L.M.*, Fifteenth Judicial Circuit, in and for Palm Beach County, Florida Case No. 50-2009 CA 040800XXXX MB AG (hereinafter “the Epstein lawsuit”).

4. On April 17, 2010, Epstein served a subpoena in the Epstein lawsuit upon Rothstein Rosenfeldt Adler, PA (“RRA”) Bankruptcy Trustee Howard Stettin, seeking to obtain documents from the Trustee, which included documents from attorney Edwards related to Edwards' representation of the sex abuse victims while at RRA. [DE 807].

5. On May 18, 2010, this Court entered an Order approving a proposed Document Production Protocol delineating the process that the RRA Bankruptcy Trustee would use to identify documents responsive to (among other requests) Epstein's subpoena. [DE 672]. The Order provided this Court with jurisdiction over all discovery sought from the RRA Trustee.

6. On August 13, 2010, this Court appointed former Broward County Circuit Judge Robert Carney as Special Master, who was directed to work with counsel for the Trustee to obtain documents responsive to the subpoena served upon the Trustee by Jeffrey Epstein. Specifically, the Special Master was to: “(i) review all electronically stored information (“ESI”) and other

documents in the Trustee's possession, including Qtask¹ data for purposes of determining the applicability of the attorney/client and work product privileges that may inure to the benefit of L.M., and Brad Edwards, and other current or former clients of Farmer, Jaffe; (ii) segregate any such privileged documents; and (iii) prepare a privilege log in accordance with standard practice and law." [DE 888].

7. On September 20, 2010, Special Master Carney moved for clarification of this Court's order, suggesting that Farmer Jaffe be permitted the opportunity to review the documents themselves in order to determine the applicability of privileges. [DE 1013].

8. On October 15, 2010, this Court amended [DE 888] to require the RRA Trustee to provide the emails at issue to Farmer Jaffe and requesting that Farmer Jaffe prepare the privilege log. [DE1068].

9. On November 2, 2010, L.M. and Edwards filed a Motion requesting that Epstein, the party seeking the discovery, bear the printing expense and other reasonable costs and attorney's fees associated with his discovery request. [DE 1120].

10. On November 30, 2010, this Court entered an Agreed Order directing the law firm of Fowler White Burnett, P.A. to print a hard copy of all of the documents contained on the discs with Bates numbers added, and provide a set of copied, stamped documents to the Special Master and an identical set to Farmer Jaffe Weissing Edwards Fistos & Lehrman ("Farmer Jaffe"). The Farmer Jaffe attorneys were to then use their set to create its privilege log. [DE 1194].

11. The Court, recognizing the trust Farmer Jaffe was being forced to place in the adversary lawyers to perform the copying and Bates numbering without stealing the materials, specifically ordered, "**Fowler White will not retain any copies of the documents contained on**

¹ Qtask was an internal firm electronic communication platform.

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.” [DE 1194].

12. On December 13, 2010, 27,542 bates stamped documents were provided to Farmer Jaffe.

13. On January 25, 2011, Farmer Jaffe provided Epstein with 8,408 pages of non-privileged emails.

14. On January 26, 2011, Farmer Jaffe served Epstein with a privilege log governing the remainder of the documents.

15. On February 15, 2011, Epstein challenged the privilege log as insufficient before this Court. [DE 1442].

16. On February 23, 2011, Farmer Jaffe provided Epstein with an additional 12,711 pages of emails,² and an Amended Privilege Log containing 159 pages identifying the remaining 6,471 pages of emails containing privileged information that were not being produced.

17. On March 25, 2011, Special Master Carney filed his Interim Report before this Court confirming that of the more than 27,000 pages of emails, all documents had been released to Epstein subject to confidentiality provisions, with the exception of the documents identified on

² The 12,711 pages of documents were divided into two separate categories respectively labeled “attorneys eyes only” and “Farmer Jaffe Irrelevant E-Mails.” Two boxes of “attorneys eyes only” documents were produced containing 1,829 pages of documents in the first box and 3,198 pages of documents in the second box, totaling 5,027 pages. Two additional boxes of “Farmer Jaffe Irrelevant E-Mails” were also produced containing 3,804 pages of documents in the first box and 3,880 pages of documents in the second box, totaling 7,684 pages.

Farmer Jaffe's 159-page privilege log of February 23, 2011, which documents were not subject to discovery. [DE 1570].

18. In 2012, additional litigation ensued regarding some of the documents in state court in the Epstein lawsuit against Edwards.³

19. To date, 21,282 pages of emails have been permissibly and lawfully provided to Epstein. Consequently, 6,471 pages of emails have *never* been provided to be retained by Epstein and his lawyers as they are protected by various privileges including attorney client privilege and work product privilege and remain on the privilege log.

RECENT EVENTS

20. On November 1, 2017, the law firm of Link & Rockenbach, P.A. entered a Notice of Appearance in the Epstein lawsuit, pending before Judge Donald Hafele (the successor to Judge Crow). As it has evolved, Epstein's lawsuit against Edwards was dismissed and the lawsuit now

³ Specifically, on April 10, 2012, Judge David F. Crow (presiding over the Epstein lawsuit) entered an Order requiring Edwards to produce any non-privileged documents identified in paragraph 13 of Epstein's Motion to Compel and Amend Protective Order, which specifically only included emails relating to news reporters or the media. On May 7, 2012, Judge Crow entered an Order on Plaintiff Jeffrey Epstein's Motion to Compel Production of Documents from Defendant Bradley Edwards and for Sanctions stating, "Bradley Edwards shall within 30 days of the date of this order file a more complete privilege log. The Court finds the privilege log is insufficient on its face and does not comply with the requirements of F.R.C.P. 1.280(b)(5) and *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001). In all other respects the Motion is denied at this time."

On May 8, 2012, Edwards provided Epstein with 163 pages of emails pursuant to Judge Crow's April 10 Order. On May 15, 2012, Edwards filed a Motion for Clarification of Recent Discovery Orders before Judge Crow. On August 17, 2012, Judge Crow granted Edwards's Motion for Clarification and vacated its Order of May 7, 2012 without prejudice upholding Edwards's February 23, 2011 Privilege Log and requiring Edwards only to file 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.

Ultimately, following a summary judgment motion by Edwards, Epstein dropped his lawsuit; currently pending before Judge Crow's successor, Judge Hafele, is a follow-on action, *Edwards v. Epstein*, for malicious prosecution by Epstein in filing his lawsuit in the first place.

involves a malicious prosecution claim brought by Bradley Edwards against Jeffrey Epstein. Edwards alleges that Epstein sued him, with malice and without probable cause, for representing then-minor girls sexually abused by Epstein, including L.M.

21. On March 2, 2018, Epstein, through counsel Scott Link and Kara Rockenbach, Epstein filed Plaintiff/Counter-Defendant Jeffrey Epstein's Notice of Filing of Redacted Appendix in Support of Response in Opposition to Defendant/Counter-Plaintiff Bradley J. Edwards' Second Supplement to Motion in Limine Addressing Scope of Admissible Evidence. Included in Epstein's 353-page filing were at least 49 privileged emails spanning over 100 pages, that are subject to various privileges pursuant to the privilege log and that were *never* lawfully permitted to be provided to Epstein or retained by his lawyers. Epstein attached not only actual copies of various emails, but also provided a purported "summary" of the emails, which included specific quotations from communications over which attorney-client privilege and other protections had been repeatedly asserted, by Farmer Jaffe, Edwards, and L.M. Epstein also provided a wholly out-of-context and substantially misleading summary of what he believed the emails demonstrated. In subsequent filings in court proceedings, he has continued to reference the content of privileged documents and mischaracterize their significance in the pending state court malicious prosecution case.

22. On March 5, 2018, Edwards filed his Motion to Strike Epstein's Untimely Supplemental Exhibits and to Strike all Exhibits and Any Reference to Documents Containing Privileged Materials Listed on Farmer Jaffe's Privilege Log.

23. On March 7, 2018, L.M. and two other minor girls Epstein had sexually abused, E.W. and Jane Doe, filed an emergency motion to intervene and an emergency motion to join

Edwards' motion to strike. The three victims alleged that Epstein's recent filing disclosed their protected attorney-client communications.

24. On March 7, 2018, counsel for Epstein delivered a flash drive to counsel for Edwards, "*which duplicates the disc we located in Fowler White's files.*" Letter of transmittal attached hereto as **Exhibit A**. The subject flash drive contained three separate PDF files respectively titled: (1) "Bradley Edwards.pdf" containing 8,507 pages of emails; (2) "Epstein Searches.pdf" containing 17,348 pages of emails; and (3) "Scott Rothstein.pdf" containing 1,687 pages of emails ("subject documents"). Notably, the flash drive indicated that the three PDF files had been last "modified" on December 8, 2010, a mere nine days after this Court ordered Fowler White to take very limited possession of the subject documents to print and Bates stamp them, and then not to retain any copies. This was also a short five days before the Bates stamped documents were delivered to Farmer Jaffe on December 13, 2010.

25. On March 7, 2018, counsel for Epstein also provided a sworn affidavit from certified paralegal Tina L. Campbell that she had obtained these materials from Fowler White's files. Specifically, Ms. Campbell attested under oath that on January 10, 2018, she had reviewed approximately 36 boxes of Fowler White's Epstein files at Fowler White's Miami, Florida offices. During that review, electronic discs found in the Fowler White files were marked for review, but the contents were not reviewed. Affidavit attached hereto as **Exhibit B**. On February 1, 2018, Link & Rockenbach, P.A. received three boxes from the Fowler White firm containing copies of the items that had been marked for reproduction including a disc labeled "Epstein Bate Stamp" handwritten in black sharpie. The disc marked "Epstein Bate Stamp" was not reviewed until February 25, 2018.

26. It is thus undisputed that a disk containing the privileged emails in question was in the possession of Fowler White in early January 2018—a disc showing that it had last been modified on December 8, 2010.

27. On March 8, 2018, Judge Hafele held a hearing regarding the privileged communications. Counsel for Epstein, Edwards, and the three victims at issue (L.M., E.W., and Jane Doe) all appeared. Counsel for Edwards began the hearing by explaining the relevant background as well as how Fowler White had made and retained a copy of the privileged communications in violation of this Court’s order. Counsel for Epstein then responded, arguing that they (i.e., Link & Rockenbach) had not improperly taken any documents from Fowler White. This argument led Judge Hafele to ask, “[t]he critical question, though, is why did Fowler White have these documents, why were they continued to be held, and was it in violation either expressly or constructively as it relates to Judge Ray’s order?” Hearing Trans. at 32:10-14 (all portions of the March 8, 2018 hearing transcript cited herein are attached hereto as **Exhibit C**).

28. Without offering any real explanation in response to the Court’s inquiry, counsel for Epstein simply stated, “[s]o let’s talk about Fowler White because it is as clear as mud.” Hearing Trans. at 35:6-7. Counsel for Epstein further explained that “[w]hen these issues came up, we asked Fowler White to please give us the original boxes. We got the original boxes and found the disc in a folder that says J. Carney printing on it. That’s it. That’s all that’s on this folder.” Hearing Trans. at 45:11-15. Epstein’s counsel then conjectured certain speculative scenarios,⁴ but

⁴ Epstein’s current legal counsel speculated that after a copy of the materials were provided to the Special Master, Judge Carney, that Judge Carney somehow turned around, contacted Fowler White and gave the disk to them. Judge Hafele, however, summarily rejected this speculation, explaining that this would require believing that Judge Carney, “a respected jurist,” was “somehow engaged in some type of ex parte communications with Fowler White.” Hearing Trans. at 44:19-25.

ultimately admitted “I wasn’t there. I can’t tell you what [Fowler White] did. . . .” Hearing Trans. at 45:23-24.

29. During the hearing, counsel for Epstein revealed that Epstein personally had retained copies of the confidential materials, in contravention of the November 30, 2011 Order. Hearing Trans. at 64:7-8 (counsel for Epstein admits that copies of the documents have been provided “within my law firm, and my client.”). When further asked, “Has Mr. Epstein been provided with copies of the documents or the contents of these privileged documents?,” counsel for Epstein replied, “I just said my client. My law firm and my client. And I can say legal counsel, Mr. Goldberger. So that’s it.” Hearing Trans. 64:14-19.

30. During the hearing, counsel for Epstein (Link and Rockenbach) also revealed that Fowler White was disclaiming any memory of the circumstances surrounding the creation and retention of the disc: “We have reached out to lawyers for Fowler White. They have no memory of it.” Hearing Trans. at 35:15-21.

31. Epstein’s claim that Fowler White had “no memory” of the surrounding circumstances led counsel for Edwards to respond that it was difficult to believe Fowler White had no records regarding the disc: “Your Honor knows very well that Fowler White is a very large law firm that keeps meticulous time records with regard to the services they render. And the concept that it is impossible to reconstruct through those time records what was received, when it was received, when it was reviewed, what happened with it, who was informed of what was happening with it, quite frankly, is inconceivable to me.” Hearing Trans. at 60:8-19.

32. Judge Hafele responded in agreement by noting his surprise that Fowler White was not explaining what had happened: “And that’s a good point. What I was going to point out earlier . . . is that I would have expected certainly in deference to the fact that Mr. Epstein was a client of

Fowler White that someone from Fowler White would have had the ability to weigh in somehow as to these critical issues. 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 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 [bankruptcy] court order and in light of this ongoing litigation. And as a matter of respect to Mr. Epstein and his ongoing legal team, to have made some type of affirmative steps to have dealt with this issue head on because of the apparent implications of same." Hearing Trans. at 60:20-61:14.

33. Counsel for victims L.M., E.W., and Jane Doe also asked Judge Hafele to order Fowler White to explain who they had distributed the confidential materials to. Judge Hafele indicated that, in light of Fowler White's withdrawal from the case in front of him, he did not have "that ability" to enter such an order directed against them. Hearing Trans. at 79:25-80:1.

34. Based on the foregoing facts, over the past seven years, Fowler White has been in possession of a disc containing over 27,000 pages of documents—6,741 pages of which were privileged materials *never* lawfully received by them—that they were specifically ordered not to retain in any format. The retained disc in question had the exact number of documents copied to it that Fowler White copied at the direction of this Court on November 30, 2010. And, the subject disc was last modified a mere nine days after this Court ordered Fowler White to copy, Bates stamp, turn over, and permanently destroy the materials from their internal system. This was also a short five days before the final Bates stamped documents were delivered in hard copy to Farmer Jaffe by Fowler White on December 13, 2010—a date after which Fowler White had no lawful reason to retain the subject documents in any format whatsoever.

MEMORANDUM OF LAW

Based on the egregious conduct of Epstein and his attorneys, the exact fear contemplated by the parties, the Special Master, and this Court when the November 30, 2010 order was entered, has alarmingly come to fruition. Despite obligations as officers of this Court to follow a specifically delineated procedure designed to protect highly confidential and privileged materials, Fowler White has apparently deliberately copied and retained highly sensitive confidential and privileged materials for over seven years. Recently, these materials have been disclosed to additional counsel for Epstein and these materials remain in the possession of Epstein personally. The misappropriation of this information has caused irreparable harm. Epstein's current counsel, Link & Rockenbach have also now filed privileged information in the public court file in the *Edwards v. Epstein* matter (although that filing has since been placed under seal) and have repeatedly referenced the privileged content of the misappropriated documents in other filings. Specifically foreseeing the need to ensure that its earlier order was complied with in full, this Court expressly retained jurisdiction to award sanctions in the event of any breach. This Court should take steps to ensure that its order is complied with in the future and to punish and remedy violations in the past.

Farmer Jaffe believes that the true extent of its damages can only be determined through a thorough inquiry into the entire chain of custody detailing the whereabouts of the subject documents since inception and including any person who has seen or been informed of the content of said documents. To that extent, an evidentiary hearing and corresponding discovery are essential, as complete determination of the breadth and degree of complicity by Fowler White and Jeffrey Epstein, both jointly and severally, is imperative to the formulation of the appropriate sanctions in this matter. Farmer Jaffe has the right to inquire as to whether the subject documents

were downloaded into the Fowler White system, whether they were disseminated to third parties, and ultimately when and how they ended up in the hands of Jeffrey Epstein. Stated more succinctly, the sanctions here must be commensurate with the misconduct.

Specific Relief Sought

This Court previously entered an order directing that *both* Fowler White and Epstein were not to “retain[] images or copies of the subject documents on [their] computer[s] or otherwise.” [DE 1194]. In light of the clear violation of that order, Farmer Jaffe⁵ now asks this Court to enter an additional order as follows:

1. Fowler White and Epstein are directed within seven days of the entry of this order to show cause as to why they should not be held in contempt of the Court’s order, DE 1194.

2. Fowler White and Epstein (including all of Epstein’s past and present legal counsel) are directed, within seven days of the entry of this order, to provide to counsel for Farmer Jaffe all physical, electronic, and other information in their possession concerning the copying, retention, and dissemination of the documents covered by DE 1194 (and any materials disclosing the contents of those documents), including (but not limited to) all information regarding the making, retention, and dissemination of these materials on and after December 8, 2010. This information shall include, but is not limited to, any electronic or other information showing the date on which copies were made, the authors of any such copies, emails or transmission of such copies, and any discussion or reference to such copies. Epstein (and all of his past and present legal counsel) shall also provide all correspondence and billing records related to the copying, retention, review, discussion, and dissemination of the subject documents, the Bates stamping of the subject

⁵ This motion is filed on behalf of Farmer Jaffe. It is counsel’s understanding that separate motions to the same effect will be filed shortly by Mr. Edwards and by three victims with privileged materials at issue, L.M., E.W., and Jane Doe.

documents, or any other activity related to the November 30, 2011 Order from the day that the Epstein subpoena was issued on April 17, 2010 through the present.

3. Fowler White and Epstein (including all of Epstein's past and present legal counsel) will provide to Farmer Jaffe within seven days of the entry of this order a listing of all persons or entities to whom the subject documents (or any information derived from the contents of the subject materials) have been viewed and distributed, as well as a certification that they have asked for return of the subject materials.

4. Fowler White and Epstein and any other persons know to have ever possessed these materials, including Epstein's current counsel, shall allow neutral IT specialists appointed by this Court to search all computer servers, including back-up servers and hard-drives, for designated search terms especially found within these privileged materials. While mandatory anyway, under the circumstances Epstein and all past and current counsel, as well as anyone else known or believed to have ever possessed the materials should be strictly ordered to maintain all possible platforms that may contain such privileged information to ensure there is no spoliation of the evidence of the improper retention, review, dissemination or other use of these materials by any person or entity.

5. Counsel for Farmer Jaffe is permitted to obtain deposition testimony of all persons reasonably believed to have knowledge of the circumstances surrounding the copying, retention, or dissemination of the documents at issue in DE 1194.

6. An evidentiary show cause hearing will be held wherein Farmer Jaffe is afforded the opportunity to inquire into the facts and circumstances surrounding the wrongful retention and resulting dissemination of the subject privileged materials, in order for the aggrieved parties and the Court to learn of the full scope of the wrongdoing. Such inquiry should include, but not be

limited to, testimony from Special Master Robert Carney, Jeffrey Epstein, Fowler White Attorney Joseph L. Ackerman, Fowler White Attorney Lilly Ann Sanchez, Jack Goldberger, Tina Campbell, Scott Link, Kara Rockenbach, and the currently unidentified attorneys that Mr. Link has represented are also working on this case on behalf of Epstein from the Gunster law firm.

7. Epstein will pay Farmer Jaffe reasonable attorneys' fees and expenses connected with Farmer Jaffe's efforts to determine the circumstances surrounding the retention and release of the materials and to remedy any damage caused to Famer Jaffe or its clients from the retention, use or release of the materials.

8. Farmer Jaffe is permitted to seek further relief and sanctions after the discovery described above is completed.

Authority to Enter an Additional Order

This Court's November 30, 2010 Order specifically noted that the Court was retaining jurisdiction to enforce compliance: "Should it be determined that Fowler White or Epstein retained images or copies of the subject documents on its compute or otherwise, the Court *retains jurisdiction* to award sanctions in favor of Farmer, Brad Edwards or his client." [DE 1194 at 2] (emphasis added). The Court clearly has power to now award sanctions and take all other steps necessary to secure compliance.

Of course, all federal courts have the power, by statute, by rule, and by common law, to impose sanctions against recalcitrant lawyers and parties litigant. *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1446 (11th Cir. 1985). Even absent explicit legislative enactment, deeply rooted in the common law tradition is the power of any court to "manage its affairs [which] necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it." *Id.* at 1447. Federal courts have the inherent power to enforce compliance

with their lawful orders through civil contempt remedies. *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.3d 1297, 1301 (11th Cir. 1991). Courts also have the inherent power to sanction a party for misconduct. *Chambers v. Nasco*, 501 U.S. 32, 42 (1991). As the Supreme Court stated in *Chambers*, “[i]t has long been understood that certain implied powers must necessarily result to our courts of justice from the nature of their institution, powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others”. *Id.*

Before the Court uses its inherent contempt power, “[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) (quoting *United States v. Roberts*, 858 F.2d 698, 700 (11th Cir. 1988)). Once such a prima facie showing of civil contempt has been made, the burden shifts to the contemnor to produce evidence at a show cause hearing that the underlying order was not violated or that the violation was excused by an inability to comply. *Chairs*, 143F.3d at 1436. The violation need not be willful to support a finding of civil contempt. *McComb*, 336 U.S. 187, 191 (1949) (“Since the purpose [of civil contempt] is remedial, it matters not with what intent the defendant did the prohibited act.”). Even inadvertent or partial non-compliance with orders of the Court constitutes civil contempt if the party has not in good faith made all reasonable efforts to comply. *U.S. v. Hayes*, 722 F.2d 723, 725 (11th Cir. 1984).

However, “if the court finds the defendant acted willfully or maliciously in disregarding the injunction, then the court may cite the defendant for criminal contempt.” *Mercer v. Mitchell*, 908 F.2d 763, 769 (11th Cir. 1990) (citing 18 U.S.C. § 401(3) (stating, “[a] court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice; (2) Misbehavior of any of its officers in

their official transactions; (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command)).⁶

The fundamental purpose behind contempt sanctions are twofold, (1) sanctions can coerce the contemnor into complying in the future with the Court's orders or (2) they can compensate the complainant for losses resulting from the contemnor's past noncompliance. *Citronelle-Mobile*, 943 F.2d at 1304. *See also* *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *EEOC v. Guardian Pools, Inc.*, 828 F.2d 1507 (11th Cir. 1987); *Perfect Fit Industries, Inc. v. Acme Quilting Co.*, 673 F.2d 53, 56-57 (2d Cir. 1982), *cert. denied*, 103 S.Ct. 73 (1983). In fact, the Court has "wide discretion to fashion an equitable remedy for contempt that is appropriate to the circumstances." *Guardian Pools*, 828 F.2d at 1515. *Accord* *United States v. City of Miami*, 195 F.3d 1292, 1298 (11th Cir. 1999). Such options include a coercive daily fine, a compensatory fine, attorney's fees, expenses to the aggrieved party, and coercive incarceration. *Citronelle-Mobile*, 943 F.2d 1297. Courts have broad power to fashion an appropriate sanction, including anything from entry of monetary sanctions to entry of a final judgment on the merits against a party demonstrated to have committed a fraud upon the court. *See Vargas v. Peltz*, 901 F.Supp. 1572 (S.D. Fla. 1995).

Compensatory sanctions generally include a fine payable to the petitioner the amount of which "is determined by the extent of the actual loss." *Id.* (citing *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947)). Compensatory sanctions also frequently include the payment of the complainant's attorney's fees in seeking the redress. *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978) ("[a]n equity court has the unquestioned power to award attorney's fees against a

⁶See Federal Rule of Criminal Procedure 42, requiring that notice be provided in open court in an order to show cause before indirect criminal contempt can be imposed.

party who shows bad faith by delaying or disrupting the litigation or by hampering enforcement of a court order” and “[o]f course, fees can also be awarded as part of a civil contempt penalty”); *Watkins*, 943 F.2d at 1301, 1304 1301; *Jaeger v. Massis*, No. 00-7390. 2000 U.S. App. LEXIS 27908 (2d Cir. Nov. 3, 2000). Courts within the Eleventh Circuit have not hesitated to impose severe sanctions pursuant to their inherent powers, including cases where a party has acted in bad faith. *See, e.g., In re Mroz*, 65 F.3d 1567 (11th Cir. 1995).

In light of the Court’s sweeping powers to secure compliance with orders, this Court should grant the relief sought by Farmer Jaffe above. There can be no doubt that a prima facie showing of contempt has been made by clear and convincing evidence. Fowler White and Epstein were directed not to retain copies of privileged documents. The events cited above show that Fowler White apparently made—and indisputably retained—a copy of the privileged documents. Sometime thereafter, Epstein also obtained and retained a copy of the privileged documents and now numerous unauthorized people have these documents and knowledge of their privileged content.

At the hearing surrounding the confidential materials, Judge Hafele indicated his “respectful belief that [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 [bankruptcy] court order and in light of this ongoing litigation.” Hearing Trans. at 61:5-9. Fowler White, however, has failed to come forward voluntarily. Accordingly, this Court should enter an order to show cause as to why they have not violated this Court’s order. In light of Epstein’s possession of the materials, he should be directed to show cause as well.

In addition, it is already clear that efforts to avoid responsibility for violating the Court’s order are underway. Indeed, Link and Rockenbach has certified that instead of gathering,

cataloguing, and filing under seal all improperly acquired and retained privileged materials, it has directed their destruction, thereby impeding further investigation of the origin of those materials. Accordingly, Fowler White and Epstein (including his legal counsel, past and present) should be ordered to provide all relevant discovery about how the violation occurred. To get to the bottom of this violation and be permitted to identify the necessary witnesses to be examined at the anticipated evidentiary hearing before this Court, Farmer Jaffe also seeks to depose those persons who appear to be in the chain of custody of the improperly copied and retained materials.

Because it is clear that Farmer Jaffe is going to have to bear additional burdens, in terms of time and effort in responding to Fowler White and Epstein's improper copying, retention, and distribution of privileged materials, the Court should award attorneys' fees and expenses. Epstein and his legal counsel have caused these problems; innocent third parties should not bear the financial consequences. Finally, because the violation of this Court's order appears to be evolving and on-going, Farmer Jaffe requests leave to seek supplemental sanctions and remedies after discovery on the violation has been completed.

CONCLUSION

WHEREFORE, Farmer Jaffe respectfully requests that this Court enter an order to Fowler White and Epstein to show cause why they should not be held in contempt of court, allowing discovery and an evidentiary hearing on the circumstances surrounding the improper copying, retention, and distribution of privileged materials, and allowing Farmer Jaffe to seek such other sanctions and remedies as may be appropriate following discovery on these matters. A proposed order to this effect is attached.

I HEREBY CERTIFY that, pursuant to L.R. 9073-1(D), Movant's counsel has contacted Fowler White in a good faith attempt to resolve the matter without a hearing before bringing this motion. Fowler White has failed to respond.

I HEREBY CERTIFY that a true and correct copy of the foregoing was served electronically to the examinee, the debtor, the attorney for the debtor, the trustee, all CM/ECF subscribers, and by email or U.S. Mail on those parties listed on the attached service list this 19th day of March, 2018.

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).

EDWARDS POTTINGER LLC

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 19, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certified that the foregoing document is being served this day on all counsel of record or pro se parties identified on the on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Bradley Edwards
Bradley Edwards

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Special Master