

FARMER JAFFE

**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.

ORDER OF CIVIL CONTEMPT AGAINST FOWLER WHITE

THIS CAUSE comes before the Court on Movants, Bradley J. Edwards (“Edwards”), Farmer Jaffe Weissing Edwards Fistos & Lehrman (“Farmer Jaffe”), and L.M.’s Motion for an Order to Show Cause [DE 6323] as to why Fowler White should not be held in contempt and for sanctions. After the evidentiary hearing on October 26, 2018 and being otherwise advised in the premises, the Court finds the law firm of Fowler White to be in Contempt of this Court’s Order of November 30, 2010 [DE 1194] which stated in pertinent part 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. 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.

The narrow issue before the Court is whether Fowler White “retained images or copies of the subject documents on its computer *or otherwise.*” *Id.* (emphasis added). The subject documents at issue are approximately 27,542 pages of documents, including thousands of documents eventually listed on the Edwards and Farmer Jaffe privilege log, that Fowler White was responsible

for Bates stamping and printing under the terms of the Agreed Order for the sole purpose of allowing Edwards and Farmer Jaffe to prepare the privilege log. [DE 1194].

Legal Standard

In a civil contempt proceeding, the petitioning party bears the burden of establishing by “clear and convincing” proof that the underlying order was violated. *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984); *Piambino v. Bestline Products, Inc.*, 645 F.Supp. 1210, 1213 (S.D.Fla.1986). However, once the moving party makes a prima facie showing that the Court Order was violated, the burden of proof shifts to the alleged contemnor to show an “inability to comply that goes ‘beyond a mere assertion of inability’” *Combs*, 785 F.2d at 984 (quoting *United States v. Hayes*, 722 F. 2d 723, 725 (11th Cir.1984)); *see also United States v. McAnlis*, 721 F. 2d 334,337 (11th Cir. 1983), cert. denied, 467 U.S. 1227 (1984). Therefore, the focus of the court's inquiry in civil contempt proceedings is not on the subjective beliefs or intent of the alleged contemnors in complying with the order, but whether in fact their conduct complied with the order at issue. *Jim Walter Resources, Inc. v. Int'l Union, United Mine Workers of America*, 609 F.2d 165, 168 (5th Cir.1980). Conduct that evinces substantial, but not complete, compliance with the court order may be excused only if it was made as part of a good faith effort at compliance. *Newman*, 740 F.2d at 1524; *see also Howard Johnson Co., Inc. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990).

Findings of Fact

Movants have presented clear and convincing evidence that this Order was violated by Fowler White. Furthermore, Fowler White was not in substantial compliance, and offered no proof that it made a good faith effort at compliance or any explanation of its substantial non-compliance.

It is undisputed that on December 7, 2010, two original Compact Discs (“CD”) were priority overnight expressed through Federal Express from West Palm Beach to the Miami law office of Fowler White, where they arrived on December 8, 2010. [Hearing Trans. 64:3-16]. The shipping cost of those two original CDs was \$14.78. [78:9-15].

The two original CDs were uploaded into a file folder on Fowler White’s computer, and a software program then placed consecutive Bates numbers on these documents ranging from 1 through 27,542. [48:21-25; 49:1-4]. At that point a third, blank CD was installed and the Bates stamped documents were burned to that CD. [48:21-25; 49:1]. Forensic review of the third CD revealed that the Bates stamping process occurred on December 8, 2010, as the application of Bates numbers constituted a “modification” to the CD. [32:14-21]. One hard copy of these documents was then printed with Bates numbers affixed. [69:16-21]. The hard copies were mailed to Farmer Jaffe on December 10, 2010. [50:4-5; 51:7-10]. The three CD’s—two original CD’s plus the Bates stamped CD created by Fowler White were kept at Fowler White for at least 18 days, until the *original* CD’s were returned to Special Master Carney on December 28, 2010. [51:17-20; 50:16-22]; Fowler White Ex. B. The original CDs were returned to Special Master Carney in West Palm Beach in the same manner as the initial delivery to Fowler White’s Miami office: FedEx priority express overnight mail. *See* Fowler White Ex. I. The cost for the return delivery of these two CDs was \$10.78, exactly \$4.00 less than the delivery cost from West Palm Beach to Miami. [78:9-15].

There is no evidence that the Bates numbered CD ever left the Fowler White office. The priority mail returning the CD’s cost \$10.79, compared to the priority mail delivering the original two discs to Fowler White, which was \$14.79. [78:9-15]. The fact that the return of the CD’s was cheaper than the original shipping of the CD’s conflicts with any suggestion that a greater number

of CD's were shipped from Fowler White than had been delivered to Fowler White. [79:2-6]. In addition, the Declarations of Fact of Lillian Sanchez, Esq., the Fowler White attorney responsible for the copying and Bates stamping process identified in the Court's Agreed Order, and James Hurley, Esq., Fowler White's corporate representative and general counsel, affirmed that the *original* CDs were returned to Special Master Carney, but made no reference to the third, new CD, for which there is no evidence to indicate that it ever left Fowler White's Miami office. *See* Fowler White Ex. A & B.

Fowler White is unaware how many copies of the Bates numbered CD's were made, who may have had access to the CD's during the 20-day period, why it took so long to return the CD's, or where the CD's were kept during that time period. [55:13-19; 52:6-12; 53:6-15; 111:21; 112:1-12]. Fowler White representative James Hurley opined that the Hanukkah holiday may have accounted for the delay; however, Hanukkah 2010 spanned from December 1 through December 9, and could not have been the cause of delay. [52:13-18]. The evidence unequivocally demonstrates that the CD containing all of the subject Bates numbered documents was in the possession of Fowler White from at least December 8, 2010 through December 28, 2010. [51:7-20]. Fowler White failed to provide any viable explanation for the 20-day retention of the documents in question after the copying of the documents was completed on December 8, 2010 pursuant to this Court's Order. *See* [51-53]. That unexplained retention is alone sufficient to support a finding of the violation of the Court's Order. However, there is substantially more.

The evidence also proves that the CD in question remained in Fowler White's possession in 2014 or early 2015 when Fowler White closed out and inventoried its Jeffrey Epstein file. [53:16-23]. Additionally, the undisputed evidence shows that a folder labeled "J. Carney – Printing of CD issue –" containing 32 hardcopies of the subject documents covered by the Court's

Agreed Order was also in Fowler White's possession at that time. [54:11-25; 56:7-12]. Fowler White testified that there was a notation on its 2014 Inventory List logging this exact label and proving that the folder, CD, and documents in question were in the possession of Fowler White in 2014 or 2015. [62:11-19]. Fowler White failed to present any evidence of substantial or good faith compliance with this Court's Order as they failed to identify who created these documents, who reviewed the CD at issue to perform the research project that resulted in the selection of these protected hardcopy documents, or who placed these restricted materials in the Jeffrey Epstein file folders of Fowler White. [57:11-17]. Of course, the retention of hard copy documents evidences a clear lack of good-faith compliance with this Court's Agreed Order, which explicitly barred Fowler White from retaining *any* copies of the documents at issue.

In January 2018, Scott Link of Link & Rockenbach, P.A. traveled to the Fowler White Miami Office to review the Jeffrey Epstein case files. [39:2-3; 86:20-25; 87:1]. While there, Mr. Link flagged certain items and documents for copying. [87:2-10]. On February 10, 2018 those flagged items arrived to Mr. Link's office. One item in the boxes that were delivered to Link was a CD bearing handwriting, "Epstein Bate Stamp." [87:16-18]. That CD contained the more than 27,500 Bates numbered documents which were delivered for copying to FW on December 8, 2010 and which were subject to the Court's November 30, 2010 Agreed Order. [53:16-20; 89:20-24; 94:10-15]. The CD was located by Mr. Link inside of the file folder labeled, "J. Carney – Printing of CD issue –" along with approximately 32 hardcopy documents derived from the CD in question. [87:13-25]. It is not disputed that both the subject CD created December 8, 2010, and select hardcopy restricted documents derived from that CD, were in the possession of Fowler White in 2018 and were produced to Jeffrey Epstein's new counsel, Scott Link, before portions were forwarded to Jeffrey Epstein personally. [54:19-25; 94:19-25; 95:1-3]. All record evidence

unequivocally shows that Fowler White was in possession of copies of the subject material, which had not been produced to Fowler White and remained on the Farmer Jaffe privilege log, at every point where the location of the material can be identified. [55:1-7; 88:9-16]. The only undisputed evidence presented by either party is that the restricted CD and hardcopy folder of materials remained in Fowler White's possession until 2018 without explanation. [55:1-7; 57:6-25; 58:1-17].

Conclusion

The November 30, 2010 Order [DE 1194] expressly restricted Fowler White from retaining any copies in any format whatsoever of those materials derived from the December 8, 2010 printing and Bates numbering project. Fowler White did in fact retain copies. [58:11-13]. Fowler White failed to present any evidence of substantial or good faith compliance with this Court's November 30, 2010 Order [DE 1194] because they were wholly unable to explain how a CD containing over 27,500 Bates numbered pages, which was formatted on December 8, 2010, remained in its possession in 2014 when the file was inventoried and in 2018 when the same files were delivered to Scott Link. [55:1-7; 13-20]. Fowler White has no explanation why hard copy documents from the Farmer Jaffe privilege log remained in its possession in 2014 when the file was inventoried, or in 2018 when the same files were delivered to Scott Link. [55:21-25; 56:12]. Furthermore, Fowler White offers no explanation as to who performed the research assignment resulting in the creation of the select document compilation in the folder, and cannot explain when the compilation was created, or for what purpose. [57:14-25; 58:1-17]. Regardless, the retention of both the CD and the hardcopy documents in direct violation of the Order is axiomatic.

For the foregoing reasons, this Court finds Fowler White to be in contempt for violating the November 30, 2010 Order [DE 1164]. The Court retains jurisdiction to address the issue of

sanctions upon proper notice and directs the parties to coordinate both the required hearing and such pre-hearing discovery as may be necessary.

DONE and ORDERED this ____ day of _____, 20__.

HONORABLE JUDGE RAYMOND RAY