

CARLTON FIELDS

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
Fort Lauderdale Division**

In re:

ROTHSTEIN ROSENFELDT
ADLER, P.A.,

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

Debtor.
_____ /

**FINDINGS OF FACT AND CONCLUSIONS OF LAW
ON ORDER TO SHOW CAUSE**

This matter came before the Court on October 26, 2018 for an evidentiary hearing on the Court's Order to Show Cause Why Fowler White and Jeffrey Epstein Should Not be Held in Contempt and Scheduling Show Cause Hearing (the "Order to Show Cause") (D.E. 6366). Based on the Sworn Declarations and the testimony of the witnesses, and the exhibits admitted into evidence, the Court makes the following findings of fact and conclusions of law pursuant to Fed. R. Bankr. P. 7052, made applicable to this contested proceeding by Fed. R. Bankr. P. 9014.

Procedural History and Findings of Fact

This proceeding arises from an agreed order canceling a hearing on a motion to shift costs and setting forth a procedure for the printing of certain documents under a subpoena issued from the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida, in a case styled *Jeffrey Epstein, Plaintiff v. Bradley Edwards, individually, Scott Rothstein, individually, and L.M., individually, Defendants*, Case No. 502009CA040800XXXX MB AG (the "State Court Action"). Edwards Ex. 1. The subpoena was issued by Jeffrey Epstein seeking documents to support his

allegation that Bradley Edwards and Scott Rothstein were engaged in a conspiracy to manufacture claims against Epstein which could be used to attract investors in Mr. Rothstein's now-infamous Ponzi-scheme.¹ Edwards and several other attorneys who had been employed at Rothstein Rosenfeldt Adler, P.A ("RRA") later formed Farmer, Jaffe, Weissing, Edwards, Fistos & Lerhman, P.L. ("Farmer Jaffe"), where Edwards continued to litigate numerous cases filed against Epstein before and during Edwards' employment at RRA. Sworn Declaration of Bradley J. Edwards at ¶s 4 & 5. Epstein retained Fowler White after filing the State Court Action and after serving the Rothstein bankruptcy Trustee with a subpoena seeking RRA communications related to the cases brought against Epstein.

L.M. objected to the subpoena on the basis of attorney-client and work product privileges. [D.E. Nos. 818, 819]. On August 13, 2010, this Court appointed retired Judge Robert B. Carney as special master to receive the documents from the Trustee and to produce a privilege log. D.E. 888. On October 15, 2010, this court entered an Amended Order Respecting Production of Documents Regarding Jeffrey Epstein requiring, *inter alia*, that the Trustee instead turn over the CD² with responsive documents to Farmer Jaffe to duplicate and Bates number, to prepare a privilege log, and to produce non-privileged documents to Mr. Epstein. D.E. 1068.

The Trustee subsequently produced two CDs to Farmer Jaffe on October 18, 2010. Edwards Declaration at ¶13 & Exhibit 6. One of the two CD's was unusable, Edwards Exhibit 7, and the Trustee sent two replacement CDs to Farmer Jaffe on or about November 9, 2010. Edwards Exhibits 9-12. Edwards and L.M. subsequently filed a Motion for Relief from Amended Order [D.E. 1068] and to Compel Jeffrey Epstein to Pay for the Production of all Documents in Response to his Request. D.E. 1120. This Motion led to entry on November 30, 2010 of an Agreed Order Cancelling Hearing on Motion for Relief from Amended Order [D.E. 1068] and to Compel Jeffrey Epstein to Pay for the

¹ That scheme ultimately led to the involuntary bankruptcy proceedings filed against the Debtor in this Case No. 09-34791 and the appointment of Herbert Stettin as Trustee.

² Although D.E. 1068 referred to a single CD, the Trustee ultimately produced two CDs on October 18, 2010 followed to two replacement CDs on November 9, 2010.

Production of all Documents in Response to his Request Filed by Interested Party Farmer, Jaffe, Weissing, Edwards, Fistos, & Lehrman, P.L. D.E. 1194 (hereinafter, the "Agreed Order"). That Order provided:

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

As such, the Motion for Relief is deemed moot, and, the hearing set on the Motion for Relief [D.E. 1146]³ set for November 30, 2010 is hereby cancelled...

On December 7, 2010, Joseph Ackerman of Fowler White and Seth Lehrman of Farmer Jaffe agreed that Special Master Carney could deliver the discs to a representative of Fowler White for copying and bates stamping as set forth in the Agreed Order, and that no one from the Farmer Jaffe firm wished to be present during the process. Fowler White Exhibit A; Declaration of Joseph Laurence Ackerman at ¶7. The discs were picked up from Judge Carney later that day and were delivered by overnight mail to Fowler White's Miami office on December 8, 2010. Fowler White Exhibit B; Sworn Declaration of Lilly Ann Sanchez at ¶10. On Friday, December 10, 2010, Ms. Sanchez, an attorney at Fowler White, informed Mr. Lehrman that the printed documents were being

³ D.E. 1146 was the Notice of Hearing on with respect to D.E. 1120.

sent in seven boxes for next business day delivery and that the discs were being returned to Judge Carney. Fowler White Exhibit C; Sworn Declaration of Lilly Ann Sanchez at ¶11.

Ms. Sanchez was the attorney at Fowler White who received the discs in the Firm's Miami office on December 8, 2010, and was responsible for the discs and the Bates numbering and printing of the documents. Declaration of Lilly Ann Sanchez at ¶s 11 & 12; Transcript at p. 135, lines 16-21. Although the Agreed Order refers to delivering printed copies of the Bates numbered documents to Farmer Jaffe and Special Master Carney, pursuant to Judge Carney's request, Ms. Sanchez sent the originals discs and another disc with the Bates numbered documents to Judge Carney in lieu of printed copies. Transcript at p. 116, lines 17-25; p. 118, line 18 – p. 119, line 2; p. 120, lines 21-24. Farmer Jaffe was aware of and did not object to this arrangement. Transcript at p. 134, line 20 – p. 135, line 4; Fowler White Exhibit C. Ms. Sanchez testified that to her knowledge, as the person responsible for the discs and the Bates numbering and printing of the documents, none of the discs or any copies of the printed documents were retained at Fowler White. *Id.* at 135, lines 16-25. *Accord* at p. 131, lines 14-19. No one at Fowler White instructed Ms. Sanchez to retain a copy of the disc with the Bates numbered documents, and she is not aware of anyone at Fowler White being instructed to do so. *Id.* at 121, line 25 – p. 122, line 6. Ms. Sanchez further testified that the printing was performed in the Miami office and that she never reviewed, copied, used or obtained any documents that Fowler White was not supposed to have. Transcript at p. 135, line 16 – p. 136, line 19.

Farmer Jaffe received 27,542 pages of printed and Bates numbered documents on December 13, 2010, and Farmer Jaffe produced a privilege log on January 26, 2011. Edwards Declaration at ¶s 27 & 29. After Epstein challenged that log as insufficient, Farmer Jaffe produced an amended privilege log on February 23, 2011. Edwards Declaration at ¶s 30 & 31. Through February 23, 2011, Edwards produced 21,119 out of the 27,542 pages of emails to Epstein, and 6,471 pages remained on the amended privilege log. Edwards Declaration at ¶s 28 and 31.⁴ Fowler White withdrew from its

⁴ These figures, taken from Mr. Edwards' Sworn Declaration as corporate representative of Farmer Jaffe, indicate that Farmer Jaffe must have produced approximately 48 pages of privileged emails to Epstein. If Fowler White printed and delivered 27,542 Bates numbered pages to Farmer Jaffe on December 10, 2010, and Farmer Jaffe subsequently produced 21,119 pages back to Fowler

representation of Epstein in May 2012, D.E. 3034 and Declaration of James Hurley at ¶5, and the State Court ultimately found Edwards' amended privilege log sufficient in August 2012, Edwards Declaration at ¶33.

Fowler White sent its files related to its representation of Mr. Epstein to offsite storage in 2014 or 2015, where they remained until requested by Mr. Epstein's current counsel in late 2017 or early 2018. Transcript at p. 39, line 2 – p. 40, line 1.

At some point after August 2012, Epstein dropped his case against Edwards, leaving only Edwards' counterclaim for malicious prosecution to be litigated in the State Court Action. Edwards Declaration at ¶ 34. Mr. Epstein retained Scott Link and the law firm of Link & Rockenbach, P.A. in November 2017. Transcript at p. 84, line 24 – p. 85, line 1. From the time of Fowler White's withdrawal in May 2012 until Mr. Link's retention in November 2017, Epstein was represented by at least one other firm. Transcript at p. 85, line 22 – p. 86, line 1.

Shortly after being retained, Mr. Link contacted Fowler White and requested access to Fowler White's files related to Mr. Epstein. *Id.* at p. 85, lines 19-21. Mr. Link and his paralegal initially reviewed 36 boxes of documents in Fowler White's Miami office in January 2018 and flagged certain documents and several discs for copying. *Id.* at p. 87, lines 2-10. Among possibly thousands of documents flagged for copying, *id.* at 95, lines 13-21, was a file folder with a label "Judge Carney – Printing of CD Issue", a disc labeled "Epstein Bates Stamp", and approximately 30 pages of printed materials. *Id.* at p. 87, lines 13-23. Mr. Link testified that the disc contained 27,544 pages of sequentially-numbered documents (*id.* at p. 89, lines 16-24), and that some of the 30 printed pages were documents listed on Edwards' amended privilege log. *Id.* at p. 88, lines 9-16. Mr. Link subsequently requested that Fowler White deliver all thirty six boxes of documents to his office. *Id.* at p. 89, lines 8-13. The boxes were collected by Link & Rockenbach's courier on March 1, 2018. Sworn Declaration of James N. Hurley at ¶12.

White, as sworn to by Mr. Edwards in his Declaration, only 6,423 pages remained which could have been listed on the Amended Privilege Log. Mr. Edwards' testimony that 6,471 pages were listed on the log indicates that 48 pages (or 6,471 less 6,423) of documents which were listed on the Amended Privilege Log must have been produced back to Fowler White at some point.

In March 2018, shortly before the trial of Mr. Edwards' malicious prosecution counterclaim, Mr. Link filed several emails in the State Court Action which he had printed from the disc located in Fowler White's files, several of which emails were listed on Edwards' amended privilege log.

Fowler White has been unable to determine how or when the disc or documents came to be in its files. In his Declaration, Joseph Laurence Ackerman, stated that

9. On December 10, 2010, Fowler White sent seven boxes of printed and bates numbered documents to Farmer Jaffe...

10. Farmer Jaffe subsequently produced documents back to Fowler White at various times in 2011. These are the only documents, of those printed and bates numbered in December 2010, which I was ever aware that Fowler White had copies of.

11. I am aware of the allegations in Farmer Jaffe's filing at D.E. 6326. If Fowler White had a copy of any of the printed materials in its files, other than those produced by Farmer Jaffe in 2011, or of any disc containing all of the bates numbered and printed materials, I have no knowledge of how any such materials could have been in the Firm's files.

12. As far as I was aware, all materials bates stamped and printed in December 2010 under the terms of the Agreed Order and all discs related thereto were out of the Firm's possession once the materials were sent to Farmer Jaffe on December 10, 2010 and the discs were returned to Judge Carney, and the only materials produced by the RRA Trustee pursuant to the Subpoena and subsequently received by Fowler White were those produced by Farmer Jaffe in 2011. I am not aware of anyone at Fowler White having had any of the discs related to the documents produced by the RRA Trustee pursuant to the Subpoena at any time after December 10, 2010.

Ackerman Declaration at ¶s 9-12.

Ms. Sanchez stated in her Declaration that:

12. ... Fowler White did not retain any of the discs or any copies of the printed materials in December 2010.

13. Farmer Jaffe subsequently produced documents back to Fowler White at various times in 2011. These are the only documents, of those printed and bates numbered in December 2010, which I was ever aware that Fowler White had copies of.

14. I have reviewed the filing of Farmer Jaffe, Weissing, Edwards, Fistos &

Lehrman, P.L. (“Farmer Jaffe”) at D.E. 6326. If Fowler White had a copy of any of the printed materials in its files, other than those produced by Farmer Jaffe in 2011, or of any disc containing all of the bates numbered and printed materials, those items can only have been placed in the files substantially after December 2010. I have no knowledge of how any such materials could have been in Fowler White’s files.

Sanchez Declaration at ¶s 12-14.

Mr. Hurley similarly testified to his understanding, based on review of the Epstein files and his investigation of the circumstances related to discovery of the documents in January 2018, that the Bates numbered disc was sent to Special Master Carney. Transcript at p. 49, line 21 – p. 50, line 11 and page 66, lines 8-12. Although Scott Link testified to finding the disc and 30 printed pages in Fowler White’s files, Mr. Hurley’s investigation gave him no idea as to how or when those materials got into the files. *Id.* at p. 54, lines 11-18. Edwards’ counsel suggested that the \$14.79 cost of the December 7, 2010 Federal Express package from West Palm Beach to Miami and the \$10.79 cost of the December 28, 2010 Federal Express shipment back to Judge Carney suggested that the December 28 package contained fewer discs than the December 7 package. Transcript at p. 77, lines 8-15; p. 78, lines 12-15. However, Mr. Hurley testified that he didn’t know how Federal Express charges were calculated or whether point of origin impacted cost. *Id.* at p. 79, lines 12-19. Moreover, a review of the Fowler White’s Exhibit I, reflecting those charges, indicated that three of the seven banker’s boxes of printed documents sent to Farmer Jaffe on December 10, 2010 actually cost less than the December 7, 2010 shipment of discs.

The Order to Show Cause

On March 19, 2018, Farmer Jaffe filed a 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 [DE 6326]. That Motion was joined by Edwards [DE 6325] and by Jane Doe, E.W and L.M. [DE 6343]. All of these parties sought findings of civil and criminal contempt and compensatory and punitive damages against both Fowler White and Epstein for alleged violation of the Agreed Order.

On April 20, 2018, the Court issued its Order directing Fowler White and Epstein to appear and show cause why they should not be held in civil contempt of the Agreed Order. The Court rejected any requests to consider criminal contempt or sanctions other than compensatory damages resulting from any violation of the Agreed Order if a finding of civil contempt is made. D.E. 6366.

On October 3, 2010, the Court struck the claims of Jane Doe and E.W. as they were not parties to and were not referenced in the Agreed Order. D.E. 6471. The Court also bifurcated the contempt proceedings in order to address liability for contempt before addressing discovery and damages if a finding of contempt is made. D.E. 6472. On October 29, 2018, the Court entered an Order Discharging Order to Show Cause Against Jeffrey Epstein, D.E. 6508, after the Movants filed a Notice of Joint Voluntary Dismissal of Jeffrey Epstein, D.E. 6496.

Conclusions of Law

To prevail in a civil contempt proceeding, the movant must establish by “‘clear and convincing’ proof that the underlying order was violated.” *Howard Johnson Co. v. Khimani*, 892 F.2d 1512, 1516 (11th Cir. 1990) (citing *Newman v. Graddick*, 740 F.2d 1513, 1525 (11th Cir. 1984); *Piambino v. Bestline Prods., Inc.*, 645 F. Supp. 1210, 1213 (S.D. Fla. 1986)). A party may only be found in contempt for violating an order which is clear, definite and unambiguous. *S.E.C. v. Pension Fund of Am., L.C.*, 396 Fed. Appx. 577, 580 (11th Cir. 2010); *Jordan v. Wilson*, 851 F.2d 1290, 1292 (11th Cir. 1988). The Court’s “contempt power is a potent weapon which should not be used if the court's order upon which the contempt was founded is vague or ambiguous.” *Matter of Baum*, 606 F.2d 592, 593 (5th Cir. 1979)⁵ (internal quotes, citations omitted). Therefore, the court's order “must set forth in specific detail an unequivocal command.” *Id.* Where there is “possible uncertainty” as to the effect of a bankruptcy court’s order, there can be no finding of

⁵ In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit adopted as binding precedent all cases decided by the Fifth Circuit, prior to October 1, 1981.

contempt. *Id.* Any ambiguities or uncertainties in such a court order must be construed in a light favorable to the person charged with contempt. *Georgia Power Co. v. N.L.R.B.*, 484 F.3d 1288, 1291 (11th Cir. 2007). The court’s focus in a civil contempt proceeding “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.” *Id.* The court’s inquiry is limited to whether the “four corners” of the order, “in clear and unambiguous terms, prohibited” the conduct complained of. *Id.* at 1292

This prima facie showing of a violation of an unambiguous order must be made before the burden shifts to the alleged contemnor to produce evidence explaining his noncompliance at a show cause hearing. *Chairs v. Burgess*, 143 F.3d 1432, 1436 (11th Cir. 1998).

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

Once the moving party makes a prima facie showing concerning a violation of an unambiguous order, “the burden of production shifts to the alleged contemnor to show a ‘present inability to comply that goes ‘beyond a mere assertion of inability.’” *Howard Johnson Co. v. Khimani*, 892 F.2d at 1516. (quoting *Combs v. Ryan’s Coal Co.*, 785 F.2d 970, 984 (11th Cir. 1986)). While the Court may not consider the “subjective beliefs or intent of the alleged contemnors in complying with the order”, substantial compliance made in good faith can preclude a finding of contempt where compliance with the order is not complete. *Id.* (citing *Jim Walter Res.*,

Inc. v. Int'l Union, etc., 609 F.2d 165, 168 (5th Cir. 1980); *United Student Aid Funds, Inc. v. Gary's Grading & Landscaping*, 2009 WL 161711 *4 (M.D. Fla. 2009) *citing Khimani*, 892 F.2d at 1516.

The evidence is unclear how or when the offending disc or materials got into Fowler White's files. During the hearing, Edwards' counsel acknowledged the possibility that the materials may have been the actual materials sent by Fowler White to Judge Carney, not copies. Transcript at p. 33, 13-14.⁶ Fowler White's representatives—including the attorneys who worked on the Epstein file and the attorney who was responsible for custody of the original discs and the Bates numbering and printing of the documents—testified unambiguously that they all understood that the discs were sent to Judge Carney in December 2010, and they were not aware of the disc or any documents in Fowler White's files at any time after December 10, 2010 other than the documents produced back to Fowler White by Edwards' counsel in 2011. Lilly Sanchez testified similarly that the printing was performed in the Miami office and that she, the attorney in Miami tasked with handling the discs in accordance with the Agreed Order, never reviewed, copied, used or obtained any documents that Fowler White was not supposed to have. There is no direct evidence regarding how the materials got into Fowler White's files. The unambiguous testimony of the attorneys at Fowler White indicates that the materials were not retained when the documents were Bates numbered and printed in 2010, and both parties have speculated that the materials may have been returned by the Special Master at some point.

If the disc was returned by Special Master Carney sometime after 2010, no one at Fowler White realized it, and the Agreed Order's prohibition on "retaining" copies of the documents should not be read so broadly as to make such unknowing receipt a violation of the Order punishable by

⁶ In response to an inquiry from the Court regarding whether the disc located by Scott Link in 2018 was a copy of the disc sent to Judge Carney, Mr. Scarola replied "it may be a copy of the one that went to Judge Carney. *It may be the one that went to Judge Carney.* That's, at this point, a matter of pure speculation." Transcript at p. 33, lines 10-14 (emphasis added).

contempt. Such a reading would conceivably allow Farmer Jaffe to create a violation of the Agreed Order by its apparent production of forty-eight privileged pages in 2011 even though the production of those forty-eight pages was unknown by either party. The Court will not so construe the Agreed Order, obviously designed to address how the materials were to be handled when printed in December 2010 and not some unforeseeable occurrence at any point in the future, nor is there a need to consider such a construction as the Court finds substantial good faith compliance with said Order.

No one at Fowler White used any of the privileged materials at any time during the Firm's representation of Epstein, and neither Edwards nor Farmer Jaffe produced any evidence to the contrary. Epstein dropped his claims against Edwards after the State Court upheld the amended privilege log. The disc and documents at issue did not surface between December 2010 and Fowler White's withdrawal as Epstein's counsel almost eighteen months later, or at any time while Epstein was represented by the firm or firms who represented him between Fowler White's withdrawal and Mr. Link's retention. It is hard to imagine that any party who went so far as to intentionally violate an order prohibiting the retention of documents would do so only to store the documents away unused for nearly seven years. The worst that can be said is that the disc and the 30 pages sat unused in Fowler White's files from whenever they were received, in storage from 2014, until discovered by Mr. Link when he reviewed and obtained the thirty six boxes of documents in early 2018.

The Agreed Order was prepared and agreed to between the parties, and the order was submitted for entry by Farmer Jaffe on behalf of Edwards and L.M. The procedure set forth was the result of negotiations between counsel. If the retention of documents several years later was a legitimate concern, counsel should have addressed that specifically and unambiguously. Unfortunately, the Agreed Order is unclear and susceptible of two differing interpretations. As set

forth above, in order to be enforced by contempt sanctions, the Agreed Order must be clear and definite.

Additionally, sanctions are not warranted because the Court finds that Fowler White clearly complied with the Agreed Order in December, 2010 when it did not retain any of the documents. At best and as suggested by Edwards counsel in argument, the materials could have been returned to Fowler White at any time. The most that has been shown is that at some unknown time certain restricted materials came into Fowler White's possession and sat, unused in its closed file, until early this year therefore amounting to an inadvertent and innocent mistake. Thus, it is clear that Fowler White substantially complied with the Agreed Order and acted in good faith as the documents were never utilized until new counsel was retained years later and publicly filed the documents.

For all of the above reasons, the Court declines to find Fowler White in contempt of the November 30, 2010 Agreed Order. Pursuant to Bankruptcy Rule 9021, the Court is contemporaneously entering a separate order in accordance with this ruling.

###

Submitted by:
Niall T. McLachlan, Esq.
Carlton Fields, PA
100 Se 2nd Street, Suite 4200
Miami, Florida 33131

