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

Case No. 50-2009CA040800XXXXMBAG

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

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

Defendants/Counter-Plaintiff.
_____/

COUNTER-DEFENDANT JEFFREY EPSTEIN'S MEMORANDUM OF LAW ON EDWARDS' WAIVER OF ATTORNEY-CLIENT AND WORK PRODUCT PROTECTIONS

Counter-Defendant Jeffrey Epstein ("Epstein"), submits this Memorandum of Law as to the Doctrines of Waiver of Attorney-Client and Work Product protections as claimed by Edwards and at issue for this Court's evaluation of multiple pending and case significant motions and states:

INTRODUCTION

The parties require this Court's ruling on whether Epstein may introduce at trial 47 e-mails authored and/or received by Edwards that go to the very heart of Edwards' now-severed claim against Epstein for malicious prosecution. Previously at a hearing on March 8, 2018, this Court ruled that it would not allow Epstein to introduce these materials discovered shortly before trial when trial was set for March 2018. With trial now reset for December 2018 and Epstein's counsel having significant reduced the amount of e-mails for review to 47, the procedural ruling regarding timeliness is moot and Epstein's Motion for Court to Declare Relevance and Non-Privileged Nature of Documents, and Request for Additional Limited Discovery, Evidentiary Hearing and

Appointment of Special Master, *inter alia*, returns for the Court's substantive ruling on admissibility.

Epstein files this Memorandum of Law in support his pending arguments that Edwards has waived all legal privileges and protections claimed in connection with the 47 e-mails. In short, Florida law provides four independent reasons why Edwards has waived all attorney-client privileges and work-product protections for the 47 e-mails – none of which are between attorney and client. Procedurally, Epstein's counsel also seeks permission to attend the *in camera* inspection with Edwards' counsel in order to assist the Court with the application of which waiver category below applies to which e-mail.

1. *Voluntary and Intentional Disclosure to Adversary Constitutes Waiver*

As a threshold basis for waiver, it is undisputed that the law firm of Conrad Scherer, through attorney William Scherer, represented investors in (e.g., victims of) Rothstein Rosenfeldt & Adler's Ponzi scheme, in the *Razorback* litigation. These investors were unquestionably adverse to both Rothstein and Edwards' law firm of which he was a partner. Despite this, Edwards voluntarily produced documents that he now claims are privileged to Mr. Scherer in the *Razorback* litigation. Florida law clearly demonstrates that this voluntary production constituted a waiver. Because Edwards and the *Razorback* victims' interests were *not* aligned in any way, and in fact were adversarial in every key respect, Edwards cannot "have his cake and eat it too" by voluntarily producing allegedly privileged information for one purpose while trying to withhold it when he knows it will be used for a different purpose.

2. *Edwards Placed the E-mails Squarely at Issue in this Malicious Prosecution Action*

Second, Edwards has engaged in issue injection by repeatedly making *central* the issues of the strength (or weakness) of Edwards' now-settled three clients' cases against Epstein, the extent

of Rothstein's interaction with Edwards in connection with those cases, and the credibility of Edwards' damages claim. Once this Court conducts an *in camera* review, it will be overwhelmingly clear that the e-mails directly concern the (1) veracity and value of Edwards' clients' claims, as well as (2) Edwards' claimed damages in this action. Having sought to avoid discovery by asserting privilege, while simultaneously injecting issues going to the very heart of this case which are refuted by the e-mails, Edwards has waived any potential attorney-client privilege and work-product protection under the doctrines of issue injection and implied waiver.

3. *Crime-Fraud Exception Eviscerates Any Claimed Privilege*

Third, Edwards cannot hide behind the attorney-client privilege or work-product protection because the crime-fraud exception applies to *some* of the e-mails. The e-mails demonstrate Edwards' future plan to institute and/or maintain a malicious prosecution suit against Epstein that is fraudulent in light of Edwards' actual beliefs and motivations. Concomitantly, some e-mails to which Edwards was a recipient or copied reference an intent to circumvent Florida law and involve a scheme with Rothstein. The Florida Evidence Code's exception to privilege applies to these particular e-mails.

4. *No Work-Product Protection Applies*

Finally, although Epstein believes the Court will find the work-product doctrine inapplicable to any of the e-mails, as to items or individual communications for which Edwards *did not* assert attorney-client privilege or the Court finds such assertion inapplicable, Epstein can and will demonstrate that he has need for the materials and is unable to obtain their substantial equivalent at all—let alone "without undue hardship." *See* Fla. R. Civ. P. 1.280(b)(4).

5. *In Camera Review Will Shed Light on the Truth – Central to this Malicious Prosecution Action*

To be clear, Epstein *does not* concede that Edwards' claim of privilege to any of the 47 e-mails is valid. Just the opposite: Epstein believes this Court, upon conducting its *in camera* inspection of these documents, will easily discern that Edwards' claims of privilege are wholly inapplicable and specious. Nevertheless, Epstein submits this Memorandum for the Court's benefit as Epstein's waiver arguments may preclude the need for the Court to evaluate Edwards' privileges claims, or alternatively, assist the Court as it reviews the e-mails *in camera* pursuant to Florida law.

MEMORANDUM OF LAW

A. Edwards has Waived Attorney-Client Privilege and Work-Product Protection Based on Voluntary Disclosure to a Clear Adversary in the *Razorback* Litigation.

Edwards waived attorney-client privilege and work-product protection claimed in the e-mails by producing them to Conrad Scherer in the *Razorback* litigation. Section 90.507, Florida Statutes governs this type of waiver by voluntary disclosure and provides:

> **Waiver of privilege by voluntary disclosure.**—A person who has a privilege against the disclosure of a confidential matter or communication waives the privilege if the person, or the person's predecessor while holder of the privilege, voluntarily discloses or makes the communication when he or she does not have a reasonable expectation of privacy, or consents to disclosure of, any significant part of the matter or communication.

§ 90.507, Fla. Stat. In plain English: "When a party himself ceases to treat the matter as confidential, it loses its confidential character." *Delap v. State*, 440 So. 2d 1242, 1247 (Fla. 1983). *See also Tucker v. State*, 484 So. 2d 1299, 1301 (Fla. 4th DCA 1986) ("The law is clear that once communications protected by the attorney-client privilege are voluntarily disclosed, the privilege is waived and **cannot be reclaimed**.") (emphasis added); 24 Fla. Jur. 2d § 716 (2018) ("Generally, a voluntary disclosure of the privileged material to a third party waives the privilege as such disclosure is inconsistent with the confidential relationship."); *Visual Scene, Inc. v. Pilkington*

Bros., 508 So. 2d 437, 440 (Fla. 3d DCA 1987) ("In most cases, a voluntary disclosure to a third party of the privileged material, being inconsistent with the confidential relationship, waives the privilege"); § 502.8 *Attorney Client Privilege*—Waiver, West Practice Series ("If the client voluntarily discloses the substance of a communication, the client has elected not to maintain the confidential nature of the communication and waives the privilege as to that communication."). Importantly, in most cases, counsel is vested with the *implied authority* to waive the privilege on behalf of his or her client. *Tucker*, 484 So. 2d at 1301. Selective disclosure of privileged material for tactical purposes waives the privilege. *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

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

"Voluntary disclosure of alleged work product waives work-product privilege where that disclosure is inconsistent with maintaining secrecy from the disclosing party's adversary." *Tumelaire v. Naples Estates Homeowners Ass'n, Inc.*, 137 So. 3d 596, 599 (Fla. 2d DCA 2014). In *Tumelaire*, the plaintiff was accused of conspiring with a mobile home park's owner in litigation against the park's homeowner's association. The plaintiff's attorney shared an e-mail with the park owner's attorney. Accordingly, after the homeowner's association requested an unredacted copy

of the e-mail, the plaintiff could not rely on work-product privilege: "[B]ecause Tumelaire's attorney sent the e-mail to the park owner's attorney, any work-product privilege that may have protected it has been waived." *Id.* at 599. *See also Kaplan v. Divosta Homes, L.P.*, 20 So. 3d 459, 462 (Fla. 2d DCA 2009) (noting that homeowners' voluntary disclosure of information to their next-door-neighbor's relatives would waive a claim of privilege in confidential matter); *Walker v. River City Logistics, Inc.*, 14 So. 3d 1122, 1123 (Fla. 1st DCA 2009) (holding that voluntary disclosure of allegedly privileged documents waived privilege). As simply put in *Walker*:

> The employer/carrier's (E/C) motion to disqualify counsel contains statements that the E/C disclosed privileged documents to Claimant's public defender in another proceeding. The E/C has not argued that this disclosure was inadvertent. The E/C's voluntary disclosure of the documents waived the privilege. § 90.507, Fla. Stat. (2006).

Id.

Notably, Edwards is already familiar with this basic principle. Specifically, in *Jane Doe No. 1 v. United States*, 749 F.3d 999 (11th Cir. 2014), it was Edwards who argued that the United States failed to confer with his clients before entering a non-prosecution agreement with Epstein. Edwards' clients had sought to discover correspondence between Epstein's attorneys in those proceedings, and the United States regarding the non-prosecution agreement. *Id.* at 1001. The federal district court had overruled Epstein's counsel's privilege objections. *Id.* at 1002. On appeal, in relevant part, the Eleventh Circuit Court of Appeals agreed with Edwards' waiver argument and held that Epstein's counsel had waived the work-product privilege as it relates to *Edwards' former clients*, for having voluntarily sent allegedly privileged correspondence to the United States during plea negotiations:

> The intervenors [Epstein's counsel] next contend that the correspondence falls under the work-product privilege, but the finding of the district court that the intervenors waived any privilege when they voluntarily sent the correspondence to the United States during the plea negotiations is not

> clearly erroneous. Disclosure of work-product materials to an adversary waives the work-product privilege. *See, e.g.*, *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988); *In re Doe*, 662 F.2d 1073, 1081-82 (4th Cir. 1981). **Even if it shared the common goal of reaching a quick settlement, the United States was undoubtedly adverse to Epstein during its investigation of him for federal offenses, and the intervenors' disclosure of their work product waived any claim of privilege**.

Id. at 1008 (emphasis added). Indeed, Edwards' clients made this argument in their Answer Brief to the Eleventh Circuit! *See* Excerpt of Ans. Br. in *Jane Doe 1 v. United States*, **Exhibit __**, at pp. 35-36. Edwards' contrary legal argument now is nothing more than presently convenient, but discordant with his prior argument on waiver.

It really is that simple. Edwards' decision years ago to voluntarily give away the allegedly privileged e-mails to Conrad Scherer in the *Razorback* litigation triggered section 90.507. After taking steps inconsistent with the maintenance of privileges in confidential information, the privileges cannot be resurrected. They are waived.

i. Edwards' "Selective Waiver" Argument Fails.

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

> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose

> confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment.

Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981). "Once a party has disclosed work product to an adversary, it waives the work product doctrine as to all other adversaries." *McMorgan v. Co. v. Fist Cal. Mortg. Co.*, 931 F. Supp. 703 (N.D. Cal. 1996).

The majority rule throughout the United States is that even a confidentiality agreement does not save the fundamental incorrectness of "selective waiver" theory. *McKesson Corp. v. Green*, 610 S.E.2d 54, 56 (Ga. 2005) (rejecting selective waiver of work-product protection where materials were disclosed to the government, despite confidentiality agreement); *McKesson HBOC, Inc. v. Superior Court*, 9 Cal. Rptr. 3d 812, 819 (Cal. Ct. App. 2004) (rejecting selective waiver of attorney-client privilege and work-product protection where materials were disclosed to government, despite confidentiality agreement); *State v. Thompson*, 306 N.W.2d 841, 843 (Minn. 1981) (finding "no occasion" to apply selective waiver where the attorney-client privilege was waived through disclosure of investigation reports, notes, and statements to attorney-general and grand jury). "The cases . . . generally reject a right of 'selective' waiver, where, having voluntarily disclosed privileged information to one person, the party who made the disclosure asserts the privilege against another person who wants the information." *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126 (7th Cir. 1997).

The lack of merit to "selective waiver" theory in American jurisprudence is illustrated by a series of cases where a party under investigation discloses allegedly privileged documents to a government agency, as part of efforts at cooperation. For example, in *Westinghouse Electric Corp. v. Republic of the Philippines*, 951 F.2d 1414 (3d Cir. 1991), the Court addressed "whether a party that discloses information protected by the attorney-client privilege and the work-product doctrine in order to cooperate with a government agency that is investigating it waives the privilege and the

doctrine only as against the government, or waives them completely, thereby exposing the documents to civil discovery in litigation between the discloser and a third party." *Id.* at 1417. There, the defendant, Westinghouse, disclosed documents generated during an internal investigation to the SEC and DOJ to cooperate with those agencies' respective investigations. The lower court and the Third Circuit found that by doing so, Westinghouse waived both the attorney-client privilege and the ability to rely on the work-product doctrine. *Id.* at 1418. Importantly, the Court rejected Westinghouse's reliance on the fact that there had been a stipulated court order memorializing the confidentiality agreement between Westinghouse and the DOJ as follows:

> We reject Westinghouse's argument that it did not waive the privilege because it reasonably expected that the SEC and the DOJ would maintain the confidentiality of the information that it disclosed to them.
>
> **Even though the DOJ apparently agreed not to disclose the information, under traditional waiver doctrine da voluntary disclosure to a third party waives the attorney-client privilege even if the third party agrees not to disclose the communications to anyone else.** We also note that the agreement between Westinghouse and the DOJ preserved Westinghouse's right to invoke the attorney-client privilege only as to the DOJ—and does not appear in any way to have purported to preserve Westinghouse's right to invoke the privilege against a different entity in an unrelated civil proceeding such as the instant case.

Id. at 1426-27 (emphasis added) (citations omitted). The Court reached the same conclusion when evaluating Westinghouse's reliance on the work-product doctrine. *Id.* at 1429 ("[W]e hold that Westinghouse's disclosures to the SEC and to the DOJ waived the protection of the work-product doctrine because they were not made to further the goal underlying the doctrine. When a party discloses materials to a government agency investigating allegations against it, it uses those materials to forestall prosecution (if the charges are unfounded) or to obtain lenient treatment (in the case of well-founded allegations). These objectives, however rational, are foreign to the objectives underlying the work-product doctrine.").

Similarly, in *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984), a law firm performed an investigation of a corporation on the subject of whether improper payments had been made to domestic or foreign officials, and the corporation, in turn, produced a copy of the investigation's final report and notes of counsel to the SEC under a voluntary disclosure program. *Id.* at 1368-69. These documents were sought in subsequent lawsuits. The District Court of Columbia Circuit unsurprising found waiver:

> Tesoro willingly sacrificed its attorney-client confidentiality by voluntarily disclosing material in an effort to convince another entity, the SEC, that a formal investigation or enforcement action was not warranted. Having done so, appellants cannot now selectively assert protection of those same documents under the attorney-client privilege. A client cannot waive that privilege in circumstances where disclosure might be beneficial while maintaining it in other circumstances where nondisclosure would be beneficial. . . . Having failed to maintain genuine confidentiality, appellants are precluded from properly relying on the attorney-client privilege.

Id. at 1370. The Court reached the same conclusion with respect to the corporation's reliance on the work-product doctrine. *Id.* at 1372 ("[A]ppellants did not have any proper expectations of confidentiality which might mitigate the weight against them of such general considerations of fairness in the adversary process."). In doing so, the Court rejected the corporation's arguments that "the SEC had agreed by letter to maintain the confidentiality of the submitted materials" as of no moment. *Id.* at 1373-74 ("In short, the letters exchanged between [the law firm] and the SEC warrant no expectations of confidentiality on appellants' part for the materials which were made available.").

Other federal appellate decisions compel the same conclusion. In *In re Columbia/HCA Healthcare Corporation Billing Practices Litigation*, 293 F.3d 289 (6th Cir. 2002), the company under investigation for fraud conducted several internal audits of its Medicare patient records. It later agreed to produce some of its coding audits to the DOJ in coordination of possible settlement.

In exchange for this cooperation, the DOJ "agreed that certain stringent confidentiality provisions would govern its obtaining of the documents," as follows:

> [T]he disclosure of any report, document, or information by one party to the to the other does not constitute a waiver of any applicable privilege or claim under the work product doctrine. Both parties to the agreement reserve the right to contest the assertion of any privilege by the other party to the agreement, but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this agreement, has waived any applicable privilege or work product privilege claim.

Id. at 292. Although the company settled with the DOJ, other entities later sued the company for overbilling them.

After conducting a detailed review of the law, the Sixth Circuit "reject[ed] the concept of selective waiver, in any of its various forms." *Id.* at 302. Despite the confidentiality agreement between the company and the DOJ entered into above, the Sixth Circuit held that it was not worth the paper it was written on: "[A]ny form of selective waiver, *even that which stems from a confidentiality agreement*, transforms the attorney-client privilege into 'merely another brush on an attorney's palate, utilized and manipulated to gain tactical or strategic advantage.'" *Id.* at 302 (emphasis added) (citation omitted). Moreover, the Court discounted the confidentiality agreement when evaluating the applicability of the work-product doctrine, because regardless, the materials had not been kept confidential and waiver of work product to one results in a waiver of work product to others. *Id.* at 306 (quoting *Chrysler Motors Corp.*, 860 F.2d at 847 and *In re Worlds of Wonder Sec. Litig.*, 147 F.R.D. 208 (N.D. Cal. 1992)). *See also Cooper Hosp./Univ. Med. Ctr. v. Sullivan*, 183 F.R.D. 119, 131 (D.N.J. 1998) ("The fact that Cooper attempted to preserve the work-product privilege in its letter of transmittal and confidentiality agreement with the State does not alter this conclusion [that voluntary disclosure to one adversary waived work-product privilege as to all adversaries].").

These cases demonstrate that the confidentiality agreement is of no moment because a litigant who chooses to disclose information claimed as confidential cannot have his cake and eat it too. Simply put, actions speak louder than words. At best, the confidentiality agreement is not controlling, and is but one factor for the Court to consider.

ii. The Common Interest Doctrine Does Not Apply Because Edwards and the *Razorback* Victims were Adversaries and their Interests were in No Way Aligned.

Edwards tries to avoid the obvious waiver that occurred by asserting that he and the *Razorback* victims had aligned interests vis-à-vis Epstein. It takes but one moment of considering this argument to realize its complete incoherency: Nothing could be further from the truth. At the time of Edwards' voluntary disclosure to the *Razorback* victims, they were as adversarial to one another as adversarial can be.

Visual Scene is the seminal Florida case on the "common interest" exception to the general rule that privilege is waived by voluntary disclosure. The "common interest" doctrine does not apply "where there is *no* common interest to be promoted by a joint consultation, and the parties meet on a purely adversary basis." *Visual Scene*, 508 So. 2d at 441 (citation omitted). Similarly, the doctrine does not apply "where the parties are *completely* adverse and the statements were not made in the expectation that the relationship was confidential." *Id.* (citation omitted). The Court should consider whether the communication was "made and maintained in confidence under circumstances where it is reasonable to assume that disclosure to third parties was not intended, and whether the information was exchanged 'for the limited purpose of assisting in their common cause.'" *Id.* (citation omitted). Put another way, it does not apply where there is no common interest to be promoted by a joint consultation and the parties meet on a purely adversary basis. *Volpe v. Conroy Simberg*, 720 So. 2d 537 (Fla. 4th DCA 1998). A mere hope or expectation that the person

to whom privileged materials are disclosed is an ally and not an adversary does not convert the relationship into one of a common interest. *See In re Grand Jury Subpoeanas Duces Tecum Dated Mar. 24, 1983*, 566 F. Supp. 883, 885 (S.D.N.Y. 1983).

Significantly, "the common interest exception must be examined from the perspective of an objectively reasonable client, not from a particular client's subjective expectations or from the attorney's perspective." *Cone v. Culverhouse*, 687 So. 2d 888, 892 (Fla. 2d DCA 1997). A reasonable client in Edwards' position would not believe he or she was disclosing the documents at issue to the *Razorback* victims to pursue aligned interests.

Application of the common interest doctrine is fact-specific. However, it is at least clear that where a party is under investigation or is a potential litigation target, claims of common interest should be considered specious. Here, if nothing else, comments made by Attorney Scherer at a bankruptcy hearing clearly demonstrate that the *Razorback* victims were adversarial to Edwards. They were not friends. They did not share the same stake, or have the same goal. *See McKesson HBOC, Inc. v. Superior Court*, 115 Cal. App. 4th 1229 (Cal. Ct. App. 2004) (waiver of privilege occurred where "target" of investigation voluntarily produced allegedly privileged materials to the government); *Mir v. L-3 Commc'ns Integrated Sys., L.P.*, 315 F.R.D. 460 (N.D. Tex. 2016) ("L-3's submission to the OFCCP at the time that the OFCCP was a potential adversary substantially increased the opportunities for potential adversaries to obtain the information . . . ."); *Westinghouse*, 951 F.2d at 1428 (discussing why the target of an investigation is in an adversarial relationship with the investigating agency); *United States v. Bergonzi*, 216 F.R.D. 487 (N.D. Cal. 2003) (rejecting contention that government was not the company's adversary).

A passage from the Court in *In re: Pacific Pictures Corp.*, 679 F.3d 1121 (9th Cir. 2012), is instructive. There, an attorney had been a victim of a crime, and disclosed documents to the

government in compliance with a grand jury subpoena. The Court refused to apply the "common interest" doctrine under these circumstances:

> We are similarly unpersuaded that, because Toberoff was a victim of the crime, Petitioners have a common interest with the government. Rather than a separate privilege, the "common interest" or "joint defense" rule is an exception to ordinary waiver rules designed to allow attorneys for different clients pursuing a common legal strategy to communicate with each other. However, a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within this exception. Instead, the parties must make the communication in pursuit of a joint strategy in accordance with some form of agreement . . . .
>
> There is no evidence that Toberoff and the Office of the U.S. Attorney agreed before the disclosure jointly to pursue sanctions against Toberoff's former employee. Toberoff is not strategizing with the prosecution. He has no more of a common interest with the government than does any individual who wishes to see the law upheld. Furthermore, the statements here were not "intended to facilitate representation" of either Toberoff or the government.

Id. at 1129. Similarly, Edwards was not "strategizing" with the *Razorback* victims. Edwards reason for producing the allegedly privileged documents to them was to try to save his own skin. Moreover, Edwards did not care to take the time to separate the privileged materials from the non-privileged materials. He did not produce the materials to the victims to pursue a strategy vis-à-vis Epstein. Epstein was not on the *Razorback* victims' minds—the fact that they had been the victims of one of the largest Ponzi schemes in history was.

B. By "Issue Injection" or Implied Waiver, Edwards Waived Attorney-Client and Work-Product Protection.

Edwards has also waived attorney-client and work-product protections in the 47 e-mails under Florida's "at issue" doctrine (also known as "issue injection"). Related to the "at issue" doctrine is the "implied waiver" doctrine.

The "at issue" doctrine requires that a court find a waiver of attorney-client privilege "when a party raises a claim that will necessarily require proof by way of a privileged communication."

Lender Processing Servs., Inc. v. Arch Ins. Co., 183 So. 3d 1052 (Fla. 1st DCA 2015); *see also Genovese v. Provident Life & Acc. Ins. Co.*, 74 So. 3d 1064 (Fla. 2011) (noting that privilege is waived where, for example, advice of counsel is raised as a defense and privileged communication is necessary to establish the defense). Under the "at issue" doctrine, "**a party cannot hide behind the shield of privilege to prevent an opponent from effectively challenging pertinent evidence**." *Carles Constr. Inc. v. Travelers Cas. & Sur. Co. of Am.*, 56 F. Supp. 3d 1259, 1273 n.40 (S.D. Fla. 2014) (emphasis added). As such, "waiver of the attorney-client privilege under Florida law may occur when a party affirmatively injects a privileged communication directly into the litigation, as necessary to prove an element of a claim or defense." *Id. See also, e.g.*, *GAB Bus. Servs., Inc. v. Syndicate 627*, 809 F.2d 755 (11th Cir. 1987) ("If 627 introduces evidence as to the strength of JDA Farms' case—as 627 must to prevail—it cannot hide behind the shield of privilege to prevent GAB from effectively challenging such evidence."). It is the rule in Florida that a party who bases a claim on privileged matters, proof of which will necessitate the introduction of privileged matter into evidence, and then attempts to raise the privilege such as to thwart discovery, may be deemed to have waived the privilege. *Home Ins. Co. v. Adv. Machine Co.*, 443 So. 2d 165, 168 (Fla. 1st DCA 1983).

Here, the e-mails are vital and necessary to defend against one or more elements of Edwards' malicious prosecution claim. The key elements at issue in Edwards' claim are "the absence of probable cause for the prosecution, malice, and damages." *See, e.g.*, *Rivernider v. Meyer*, 174 So. 3d 602 (Fla. 4th DCA 2015). Edwards' own statements in the e-mails are directly relevant to and go to the heart of Epstein's ability to demonstrate that he *had* probable cause, *no* "malice," and that Edwards' damages—particularly those claimed damages associated with his mental state—are plainly false.

A key rationale of the "at issue" doctrine is that a party "may not use the [attorney-client] privilege to prejudice his opponent's case or to *disclose some selected communications for self-serving purposes*." The 'at issue' doctrine rests on the principle of fairness and stems from the premise that the attorney-client privilege cannot be used as both a sword and a shield. A waiver of the privilege can occur when a party seeks to use the privilege to prejudice the opposing party's case and fairness requires an examination of otherwise protected communications." *In re Mongelluzzi*, 568 B.R. 702 (M.D. Fla. 2017).

While some courts, such as in *In re Mongelluzzi*, have defined the "at issue" doctrine this way, this focus on fairness implicates a related—but slightly different—doctrine, known as "implied waiver." Under the "implied waiver" doctrine, the allegedly privileged materials, does not focus directly on whether the communication is "necessary" for the proponent of the privilege to prove an element of their claim. Rather, this doctrine is more focused on the equities:

> The factors common to each exception may be summarized as follows: (1) assertion of the privilege was the result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to his case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense. **Thus, where these three conditions exist, a court should find that the party asserting a privilege has impliedly waived it through his own affirmative conduct.**

Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444 (S.D. Fla. 1980) (emphasis added); *see also Stern v. O'Quinn*, 253 F.R.D. 663 (S.D. Fla. 2008). "Implied waiver of the attorney-client privilege can occur where a party voluntarily injects either a factual or legal issue into the case, *the truthful resolution of which* requires an examination of the confidential communications." *Zarrella v. Pac. Life Ins. Co.*, No. 10-60754-CIV, 2011 WL 2447519, at *5 (S.D. Fla. June 15, 2011) (emphasis added); *see also Siegmund v. Bian*, No. 16-CV-62506-MORENO/LOUIS, 2018 WL 3725775

(S.D. Fla. Aug. 1, 2018) (privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party).

The implied waiver doctrine applies to Edwards' claims of privilege here. Edwards has 1) filed suit; 2) by doing so, placed the protected information at issue by making it relevant to his case; and 3) application of privilege would deny Epstein information vital to his defense. Based on Edwards' injections, the "truthful resolution" of this case required examination of the allegedly privileged material. Whether the communications are "necessary" to one of the elements of Edwards' claim is not even material to the analysis. The implied waiver is clear and well-supported by Florida law.

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

"It appears to be well settled that the perpetration of a fraud is outside the scope of the professional duty of an attorney and no privilege attaches to a communication and transaction between an attorney and client with respect to transactions constituting the making of a false claim or the perpetration of a fraud." *Kneale v. Williams*, 158 Fla. 811, 818 (1947).

Under Florida law, there is no attorney-client privilege when the services of a lawyer are sought to enable or aid anyone to commit a plan to commit what the client knew was a crime or fraud. § 90.502(4)(a), Fla. Stat.; *see also* Fla. R. Prof'l Conduct 4-1.6 ("A lawyer must reveal confidential information to the extent the lawyer reasonably believes necessary . . . to prevent a client from committing a crime."). The "crime-fraud exception to the attorney-client privilege . . . assures that the 'seal of secrecy' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime. *Am. Tobacco Co. v. State*, 697 So. 2d 1249, 1253 (Fla. 4th DCA 1997). "If a client communicates with an attorney

in order to obtain advice or assistance in perpetrating what the client knows to be a crime or fraud, the communication loses its privileged character." *First Union Nat'l Bank v. Turney*, 824 So. 2d 172 (Fla. 1st DCA 2001). The privilege "cannot prevent the disclosure of communications made in contemplation of a crime or the perpetration of a fraud." *Anderson v. State*, 297 So. 2d 871, 875 (Fla. 2d DCA 1974). The privilege ceases to exist where desired legal advice "refers not to prior wrongdoing, but to future wrongdoing." *Am. Tobacco Co.* If a client consults or retains a lawyer for advice which will aid in the perpetration of a fraud, or help the client in planning a fraud, no privilege exists. Charles W. Ehrhardt, Florida Evidence § 502.7 (2000). The contriving of a fraud does not form part of the professional business of an attorney. *Charlton v. Coombes*, 1863, 4 Giff. 372, 66 Eng. Reprint 751.

Related to the "fraud" portion of the exception, it's been said that "constructive fraud is the term typically applied where a duty under a confidential or fiduciary relationship has been abused, or where an unconscionable advantage has been taken. Constructive fraud may be based on misrepresentation or concealment, or the fraud may consist of taking an improper advantage of the fiduciary relationship at the expense of the confiding party." *First Union Nat'l Bank v. Whitener*, 715 So. 2d 979 (Fla. 5th DCA 1998).

Procedurally, the party seeking disclosure of the communication must allege that the communication was made as part of an effort to perpetrate a crime or fraud, and the party must also specify the crime or fraud. Second, the party must establish a prima facie case that the party asserting the attorney-client privilege sought the attorney's advice in order to commit, or attempt to commit, a crime or fraud. The trial court may review allegedly privileged communications *in camera* to determine the applicability of the crime-fraud exception. If it determines that the exception applies, the client is entitled to provide a reasonable explanation for the communication

or conduct at an evidentiary hearing, at which the client bears the burden of persuasion. *Butler, Pappas, Weihmuller v. Coral Reef of Key Biscayne Devs.*, 873 So. 2d 339 (Fla. 3d DCA 2004).

Edwards cannot hide behind the attorney-client privilege when some e-mails demonstrate that he intended for his lawsuit against Epstein to amount to a fraud. Edwards *wanted* ("bait Epstein to sue") Epstein to sue him. That is a fraud on not only Epstein, but on this Court and our entire system of justice because it is an admission to not using Florida's judicial resources for a valid, proper purpose.

Epstein has established a prima facie case that the reason Edwards communicated with counsel was to perpetrate a fraud in the future. The e-mails are available for the Court's *in camera* review, if it determines it must do so to corroborate that Epstein has establishes his prima facie case. Thus, the Court must afford the parties an evidentiary hearing. *Butler, Pappas*.

D. In the Unlikely Event that this Court Considers the Work Product Protection, it is Inapplicable Due to Epstein's Ability to Demonstrate Need and Inability to Obtain the Substantial Equivalent of the Materials by Other Means.

Upon the Court's *in camera* review of the e-mails for which Edwards claims work-product protection, Epstein believes the Court will correctly find that no work-product protection applies.

Even if the work-product protection applies, however, Epstein is entitled to obtain the communications under the exception to Rule 1.280(b)(4). For the items to which Edwards *only* claims work-product protection, or for which the Court determines that attorney-client privilege does not apply, the Court is governed by the basic mantra that the work-product doctrine is not absolute. Even the seminal case establishing the work-product doctrine, *Hickman v. Taylor*, recognized the doctrine's limits:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where

> production of those facts is essential to the preparation of one's case, discovery may properly be had. Such written statements and documents might, under certain circumstances, be admissible in evidence or give clues as to the existence or location of relevant facts. Or they might be useful for purposes of impeachment or corroboration. . . . Were production of written statements and documents to be precluded under such circumstances, the liberal ideals of the deposition-discovery portions of the Federal Rules of Civil Procedure would be stripped of much of their meaning. . . .

329 U.S. 495 (1947). As later put by the Florida Supreme Court, when discussing the work-product doctrine: "A search for truth and justice can be accomplished only when all relevant facts are before the judicial tribunal. Those relevant facts should be the determining factor rather than gamesmanship, surprise, or superior trial tactics." *Dodson v. Persell*, 390 So. 2d 704, 707 (Fla. 1980). "Relevant evidence cannot be allowed to remain hidden in a party's or an attorney's files. Knowledge of its existence is necessary before a judicial determination can be made as to whether the contents are privileged." *Id.*

The exception initially outlined in *Hickman* developed over time and is now memorialized in Florida Rule of Civil Procedure 1.280(b)(4): Under Florida law, party may obtain an opponent's alleged work product "upon a showing that the party seeking discovery has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fla. R. Civ. P. 1.280(b)(4).

The required "showing" under Rule 1.280(b)(4) "consists of specific explanations and reasons." *Speer v. Desrosiers*, 361 So. 2d 722 (Fla. 4th DCA 1978).

> To show "need," a party must present testimony or evidence demonstrating the material is critical to the theory of the requestor's case, or to some significant aspect of the case. **Once the trial court knows the requester's theory as to why the items are needed . . . the trial court should then conduct an in camera review.** During this review, the trial court can evaluate whether the contested materials provide the requisite evidentiary value alleged by the requesting party, and determine whether the requested materials are substantially similar to materials already available.

Metric Eng'g, Inc. v. Small, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003). In this case, Epstein's "theory" of need is obvious, mandating , at a minimum, *in camera* review.

Here, Epstein has made his showing that he needs the materials to properly and fairly prepare his defense, and he is unable to obtain the substantial equivalent of the materials by other means. A showing of need encompasses a showing of diligence by the party seeking discovery. *Proctor & Gamble Co. v. Swilley*, 462 So. 2d 1188, 1194 (Fla. 1st DCA 1985). And "[t]o determine whether a moving party will experience undue hardship, courts must balance the moving party's burden in obtaining information with the non-moving party's burden of production." *Paradise Pines Health Care Assocs., LLC v. Bruce*, 27 So. 3d 83, 84 (Fla. 1st DCA 2009). This is not a case where the work product is a witness statement obtained by opposing counsel, whom the undersigned may also interview or depose. There simply is no "substantial equivalent" of the material available. Thus, Epstein's burden in obtaining similar information is high (because his ability to do so is virtually nonexistent), while Edwards' burden of production is practically nothing. *See id.* (affirming order requiring production of work product where the moving party "had no realistic way to independently procure the information" and the party asserting the privilege "had the incident reports at their immediate disposal.").

There are two types of work-product recognized by Florida courts: "Fact" work-product, and "opinion" work product. *See Butler v. Harter*, 153 So. 3d 705, 711 (Fla. 1st DCA 2014). Significantly, while Edwards may claim that the e-mails amount to "opinion" work product, that is most definitely wrong here. This is a claim for malicious prosecution, implicating the relevance of the parties' thoughts and beliefs at critical points in time to a far greater degree than in a more ordinary tort action. In this unique case, *why* Edwards has brought his claim for malicious prosecution against Epstein goes directly to show why Epstein's original lawsuit against Edwards

was fully supported by probable cause and not malicious—and to refute Edwards' claims of damages to his mental and emotional health.

It is difficult, if not impossible, to conceive of a clearer case of a requesting party's ability to establish need and undue hardship, abundantly sufficient to pierce Edwards' claims of work-product. Concerning items that the Court determines are work-product (if there are any), and for which no other privilege was asserted, the Court must find that Epstein has satisfied the exception set forth in Rule 1.280(b)(4).

CONCLUSION

Edwards has waived the right to assert attorney-client privilege and work-product doctrine with respect to, or Epstein is otherwise entitled to, the 47 e-mails for all reasons set forth above. Epstein requests that this Court review the e-mails *in camera* and apply the law governing Edwards' indisputable waiver, issue injection, crime fraud exception, work-product doctrine exception, and allow the truth to be admitted in this courtroom. Procedurally, Epstein's counsel requests permission to be present with Edwards' counsel to provide specific legal argument (which waiver concept) to each e-mail which will assist or streamline the review for the Court and maintain the proper appellate record.