UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
[redacted]

IN RE: CASE NO. 09-34791-RBR

ROTHSTEIN ROSENFELDT ADLER, [redacted]., CHAPTER 11

Debtor.
_____/

JEFFREY EPSTEIN'S RESPONSE IN OPPOSITION TO FARMER, JAFFE, ET AL.'S 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

Jeffrey Epstein ("Epstein")[1] responds individually in opposition to the 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 filed by Farmer, Jaffe, Weissing, Edwards & Fistos & Lehrman, P.L. ("Farmer Jaffe") (D.E. 6326) and the Joinder filed by Interested Party Bradley Edwards ("Edwards") (D.E. 6325).

PRELIMINARY STATEMENT

As both Farmer Jaffe and Edwards well knew before filing and joining the Motion to Show Cause, Epstein does not have and has never had the disc, or any copy thereof, that is the subject of their Motion. In fact, neither Farmer Jaffe nor Edwards make any such assertions against Epstein. Instead, they level speculative allegations against Fowler White as to a matter of which Epstein had absolutely no knowledge and over which he could not possibly have had any control. An assessment of sanctions against Epstein or any other relief for something Fowler White may or may not have done, without his knowledge or consent, is wholly inappropriate.

[1]Fowler White Burnett, [redacted]. ("Fowler White") has retained its own counsel.

The Court should not spend its valuable time and resources on this transparent and frivolous attempt to taint Epstein in order to divert attention from the fact that for eight years Edwards has flouted legitimate discovery requests by improperly withholding and concealing critical case-ending documents that fatally undermine his malicious prosecution counterclaim against Epstein in the Florida Circuit Court.[2] The "privilege" assertions that Edwards has raised have *never* been ruled upon and it would be a gross miscarriage of justice to allow Edwards to hide behind this Court's November 30, 2010, Order (D.E. 1194) because, as Edwards well knows, the documents which Edwards refused to produce to Epstein in violation of the Florida Rules of Civil Procedure and his duties as an officer of the court, directly contradict misrepresentations that Edwards has repeatedly made to the trial court and effectively eviscerate his case against Epstein. For this very reason, Epstein has filed a motion seeking an *in camera* review of these documents from the Honorable Donald W. Hafele in the State Court Action. (**Exhibit 1,** w/o exhibits.)

INTRODUCTION

A. The Agreed Order

Farmer Jaffe's Motion is based on the November 30, 2010 Agreed Order which provides, in pertinent part:

> 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. … 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. …

[2] *Jeffrey Epstein v. Scott Rothstein and Bradley Edwards*, 15th Judicial Circuit, Palm Beach County Case No. 50-2009-CA-040800-XXXXMB-AG (the "State Court Action").

(D.E. 1194.) First, the Agreed Order does not provide that if Fowler White retained images or copies of the documents that Epstein would be sanctioned for Fowler White's actions. That would, of course, make no sense. The sins of an attorney are not visited on the client under these circumstances. *See In re Porto*, 645 F.3d 1294, 1304 (11th Cir. 2011). Second, in late 2010 when Fowler White made copies of the disc, neither the disc nor any copies made at that time were provided to Epstein. Epstein did not receive and, therefore, could not retain, images or copies of the subject documents, and he had no knowledge that Fowler White had done so. Nor have Farmer Jaffe and Edwards asserted that Epstein did. Thus, it is abundantly clear that Epstein did not violate the Agreed Order and Farmer Jaffe and Edwards were well aware of this when they filed their frivolous Motion and Joinder.

B. Link & Rockenbach, PA's Discovery of the Disc

On November 1, 2017, Link & Rockenbach, PA ("Link & Rockenbach") appeared as Epstein's trial counsel in the State Court Action. By that time, Epstein had previously been represented by a number of law firms, including Fowler White, whose representation of Epstein terminated almost six years ago in May 2012. As part of its due diligence, Link & Rockenbach reached out to the former law firms to review their records. On January 10, 2018, Link & Rockenbach reviewed Fowler White's files at its Miami, Florida offices. During that review, items were flagged for reproduction, including a disc labeled "Epstein Bate Stamp." Link & Rockenbach received copies of the flagged items from Fowler White on February 1, 2018 but did not begin reviewing the paper files until the week of February 12, 2018 and did not begin reviewing the disc until February 25, 2018. The disc contained approximately 27,000 pages of e-mails that were Bates stamped consecutively with no confidential, privilege or watermark designations. (*See* Affidavit of Tina L. Campbell as to Chain of Custody) (**Exhibit 2**).

When Link & Rockenbach appeared in the State Court Action, the only "production" it received was provided to it by Epstein's immediate former counsel (not Fowler White). That "production" consisted of a subset of documents produced on May 7, 2012, which contained 89 documents (163 pages), ***84 documents of which were identified on Farmer Jaffe's February 23, 2011 privilege log,*** and a few deposition exhibits. The May 7, 2012 production had been used in the State Court Action, including as evidence in summary judgment filings. Link & Rockenbach knew other production had been made because, in his October 2013 deposition, Bradley Edwards testified that he had reviewed 25,000-26,000 pages of e-mails that had been produced to Epstein. Specifically, when asked about an e-mail that was produced in the case, Edwards testified:

> I don't remember ever seeing this but **it has a Bates stamp number**, **which means that we turned it over**. So going through **26,000** pieces of paper, I must have seen it at some point in time during this case …
>
> ***
>
> [The e-mails] came to me by – from the trustee, sometime – in 2011 **and then I forwarded them on to you guys**.

(Edwards' 10/10/13 Tr. 150:10-15; 155:14-18.)[3]

Of the 27,000+ pages on the disc, Link & Rockenbach reviewed approximately 5,000 pages. The e-mails in that review were primarily among attorneys and staff within the Rothstein, Rosenfeldt and Adler firm ("RRA"), with Paul Cassell (Edwards' co-counsel) and with media sources. The e-mails that Link & Rockenbach reviewed were quite clearly ***not*** attorney-client privileged communications between Edwards and his three tort clients ([redacted]., [redacted]. or Jane Doe). ***Most significantly, numerous e-mails it reviewed were devastating to Edwards' case and contradicted both his sworn testimony and statements his counsel made to the court.*** As an

[3] Excerpts of Edwards' October 10, 2013, deposition transcript are attached as **Exhibit 3**.

officer of the court, Edwards took an oath to "never seek to mislead the judge or jury by any artifice or false statement of fact."

Link & Rockenbach reviewed the state court's and bankruptcy court's files for a Confidentiality Stipulation or Order, searched former counsels' records, spoke with former counsel from Fowler White and asked Edwards' counsel (David Vitale) if he was aware of any confidentiality orders that would govern the use of exhibits at trial. Link & Rockenbach found reference to confidentiality discussions in 2011 that related to how the documents would be produced, but no Confidentiality Agreement had been signed. Furthermore, while Link & Rockenbach recognized that some of the documents were listed on Farmer Jaffe's privilege log, as set forth above, the documents Link & Rockenbach had in its possession (produced in May 2012) were also listed on the privilege log so that did not cause Link & Rockenbach to believe it was in possession of documents that had not been produced in the case.

Furthermore, as explained in more detail below, there were communications from Farmer Jaffe in February 2011 which represented that Farmer Jaffe was producing all "work product" documents for clients' claims that were no longer active. Edwards' three clients' claims settled in July 2010, so Link & Rockenbach properly (albeit incorrectly) assumed, based on Farmer Jaffe's misrepresentations, that Edwards' production included all work product for those clients.

Link & Rockenbach shared key e-mails with its client and its client's general counsel, revised Epstein's Exhibit List to identify the newly discovered e-mails and, in support of a filing in the State Court Action in which Edwards was attempting to stop Epstein from using discovery learned in the State Court Action as evidence at trial, filed a summary of the key e-mails along with redacted copies of the e-mails themselves (replacing Edwards' clients' names with initials).

Importantly, neither Epstein nor Epstein's general counsel were ever provided with a copy of the disc nor did they ever review the disc's full contents. Rather, in 2018, Link & Rockenbach provided Epstein and his general counsel with certain of the key e-mails that were included in the Appendix filed in the State Court Action and some of the exhibits identified on Epstein's Clerk's Trial Exhibit List. Fowler White never provided Epstein or his general counsel with either the disc or documents that Edwards now claims are privileged. Nor did Epstein or his general counsel have any knowledge prior to 2018 of Fowler White's possession of the disc or those documents. Undeniably, there has been no violation by Epstein of this Court's Order.

C. The State Court's March 8, 2018, Hearing

At a hearing held on March 8, 2018, in the State Court Action, which included Edwards' Motion to Strike Epstein's Untimely Supplemental Exhibits and to Strike All Exhibits and Any Reference to Documents Containing Privileged Materials Listed on Edwards' Privilege Log, the state court found no fault with anything that Link & Rockenbach did:

> I have no problem and I don't think Mr. Scarola has any problem in terms of the fact that you all did your homework; albeit, from his position, late in the game, and secured this information from Fowler White.
>
> ***
>
> I'm not finding fault with anything you [Scott Link] or Miss Rockenbach or Miss Campbell did. That's not the issue. You've done your job.
>
> ***
>
> So I again want to make clear that I'm finding absolutely no fault with Mr. Link, Miss Rockenbach, Miss Campbell or anyone else from the Link and Rockenbach firm in terms of what they did, albeit in the manner in which they had to do it and the timing, unfortunately, of the matter from their perspective in having to do it …

(3/8/18 Aft. Tr. 32:6-10; 59:1-4; 61:15-21.)[4]

Epstein engaged the former Ethics Director of The Florida Bar, Timothy Chinaris, to review the circumstances under which Link & Rockenbach discovered the disc and its contents and the actions it engaged in once that discovery was made. Mr. Chinaris came to the same conclusion as the state court. Specifically, Mr. Chinaris opined that the documents (disc) in question were not inadvertently provided to Link & Rockenbach by Edwards or wrongfully retained by Link & Rockenbach, that Link & Rockenbach did nothing wrong and that Link & Rockenbach acted in an ethical and proper manner in bringing the documents to the state court's attention. (**Exhibit 5**.)

Because the trial was set for March 13, 2018, and the state court judge believed the exhibits were late disclosed, he would not entertain an *in camera* inspection of the 47[5] documents Edwards claimed were "privileged" on Epstein's Clerk's Trial Exhibit List. (3/8/18 Aft. Tr. 55.) The state court was also concerned about doing something potentially in derogation of a federal bankruptcy court's order or the potential extermination or derogation of a privilege and was "extremely reluctant to start taking" these issues into consideration just a few days before trial. (3/8/18 Aft. Tr. 54.)

As to any documents that may be subject to this Court's November 30, 2010 Order which had not already been produced to Epstein, the Court also barred Epstein's counsel from referring to them at the trial:

> Mr. Epstein will be barred from referring to any of those records as it relates to the documents that were gathered from Fowler White or from any other source that would have included those records that

[4] The transcript of the March 8, 2018, afternoon hearing session is attached as **Exhibit 4**.

[5] Edwards identified 49 e-mails he alleged were privileged from Epstein's Clerk's Trial Exhibit List, however, two of those e-mails were pages within other exhibits and the total number of alleged "privileged" exhibits is 47.

> were the subject of Judge Ray's order. So it's to preclude anything coming in through the back door which wouldn't be allowed through the front.

(3/8/18, Aft. Tr. 75:24-76:6.)

To address Edwards' and the Intervenors' concern, the state court also ordered no further dissemination of the documents (3/8/18, Aft. Tr. 78:8-9) and for a general blanket of confidentiality:

> As a general blanket order I would simply say that all attorneys who have or are representing Mr. Epstein shall be subject to this order of confidentiality, of sealing and of non-dissemination of any such information that is contemplated in any of the documents that are part of the umbrella order of Judge Ray. And that would include all of the exhibits that we spoke about today and that have been filed as a matter of record.

(3/8/18, Aft. Tr. 79:9-18.)

The state court and Edwards' counsel accepted Epstein's counsel's representations that select items from the disc were shared with Epstein, his general counsel, and an ethics expert, and that Epstein's current counsel and their trial team reviewed approximately 5,000 pages of the 27,000+ page disc:

> And Mr. Link [Epstein's counsel] has already represented to the Court that other than Mr. Epstein and his co-counsel, that there have been no eyes laid upon these documents. Hence, I'm accepting that representation, as Mr. Scarola has accepted those representations during the hearing as well.

(3/8/18 Aft. Tr. 78:20-25.)

While the state court found that Epstein could not use his newly identified exhibits because of their late disclosure, it noted that:

> … I've gotten a flavor for some of these documents that have been provided. … And that is that they are detrimental to the position taken by Mr. Edwards and that they are helpful to the position taken by Mr. Epstein.

(3/8/18, Aft. Tr. 51:24-52:5.)

D. Epstein's Compliance with the State Court's March 8, 2018, Oral Rulings

The state court judge instructed Epstein's counsel not to further disseminate the documents, to file the disc under seal and, in order to preserve Epstein's appellate rights, to file the stricken exhibits under seal. Epstein has complied with those directions and done more. In fact, Epstein's counsel has taken the following steps in compliance with the state court's rulings:

- Link & Rockenbach has not made any further dissemination of the documents, including those identified on the Appendix in Support of Epstein's Response in Opposition to Edwards' Second Supplement to Motion in Limine Addressing Scope of Admissible Evidence, the newly disclosed trial exhibits in which Edwards claims a privilege, or other documents from the disc that Edwards and the Intervenors have asserted privilege claims over.

- Neither Epstein nor his general counsel were ever provided with a copy of the disc nor did they review or have access to the disc or the disc's contents. Epstein and his general counsel also never received the disc or alleged "privileged" documents from the Fowler White firm or any other former counsel. Rather, in 2018, Epstein and his general counsel were provided with select e-mails by Link & Rockenbach that were included in the Appendix or identified as trial exhibits. Immediately after the hearing on March 8, 2018, Link & Rockenbach notified its client, its client's general counsel (who was at the hearing), its co-counsel (Jack Goldberger, who was at the hearing), and its litigation team working on this matter to destroy all hard copies and electronic versions of the documents obtained from the disc.

- Timothy Chinaris, the former Ethics Director of the Florida Bar who provided an expert affidavit, was also not provided with a copy of the disc but, rather, received a binder (in paper form) containing the unredacted Appendix. Mr. Chinaris was instructed to destroy the binder along with any electronic copies he may have had. Mr. Chinaris confirmed his compliance with this request.

- Neither the disc nor any of its contents were ever provided to the Gunster firm or any of its attorneys nor were the contents of the disc ever discussed with them.

- On March 6, 2018, Epstein filed his Notice of No Objection to Attorney Paul Cassell, on Behalf of [redacted]., [redacted]. and Jane Doe, or Defendant/Counter-Plaintiff Bradley J. Edwards Moving to Seal Court Records Until the Court Makes a Determination on How the Documents Shall be Treated.

  Mr. Cassell's request was addressed, and granted by stipulation, at the March 8, 2018, hearing. Both Mr. Cassell and Edwards' counsel, however, failed to provide the state court with a proposed order at the hearing, which would have resulted in the immediate sealing of two docket entries that had not yet been opened to the public. While Mr. Cassell and Edwards' counsel had ample time during the hearing to have an Order prepared and signed by the Court, a proposed order was not circulated to Epstein's counsel until the following afternoon, Friday, March 9, 2018. Judge Hafele had made known to the parties that he would not be in Court on March 9, 2018, because of the Bench Bar Conference, but he advised where he could be found, if needed. Nevertheless, the Fourth District Court of Appeal's stay was entered on March 9, 2018, within hours of the transmittal of the proposed order to Epstein's counsel. Furthermore, on the evening of March 9, 2018, the Clerk opened to the public the two docket entries that are at issue.

  During the weekend of March 10 and 11, 2018, Epstein's counsel worked tirelessly with Edwards' counsel to obtain emergency relief from the duty judge to seal the two docket entries at issue. The duty judge, however, deferred the matter to Judge Hafele. Accordingly, on the morning of March 12, 2018, Epstein's and Edwards' counsel went before the Court at 8:30 a.m. and obtained an Order, *nunc pro tunc*, sealing the two docket entries at issue. The Clerk then sealed the two docket entries which had been open to the public for more than 48 hours.

- Link & Rockenbach destroyed its paper copy of the Redacted Appendix that was filed in the State Court Action and deleted the electronic filed version from its system.

- Link & Rockenbach placed the Unredacted Appendix that was served but not filed in a sealed box that will be maintained in its office, unopened, for appellate purposes.

- Link & Rockenbach placed an exhibit sticker on the trial exhibits that were newly disclosed on Epstein's March 5, 2018, Clerk's Trial Exhibit List which were printed from the disc and placed them and a copy of the disc in sealed envelopes. On March 21, 2018, the day

after the stay was lifted, Epstein moved to make those records confidential in accordance with the Florida Rules of Judicial Administration and the 15th Judicial Circuit's Administrative Order concerning sealing of documents. On April 6, 2018, the Court entered an Agreed Order Directing Clerk to Seal Filings and those records have now been filed under seal. Link & Rockenbach has retained a set of the exhibits in a sealed envelope in a sealed box maintained in its offices for appellate purposes.

- With the exception of the trial exhibits and appendix items identified above which Link & Rockenbach is maintaining in a sealed box for appellate purposes, Link & Rockenbach has destroyed all hard copies of the documents it reproduced from the disc that Edwards has identified as privileged.

- Link & Rockenbach placed Fowler White's original disc in a sealed envelope which will be maintained with Fowler White's original records at the offices of Link & Rockenbach until further rulings by the state court.

- Link & Rockenbach will maintain control of the Fowler White boxes until further rulings by the state court.

- Link & Rockenbach deleted the electronic duplicate of the disc and the electronic version of the alleged privileged exhibits from its computer system and Dropbox, the online service by which those documents were transmitted to counsel of record.

- Link & Rockenbach began deleting electronic documents from its system and planned to work with IT personnel to remove copies of any documents Edwards and the Intervenors claimed as privileged from its e-mail servers. Although the state court specifically stated that it did not believe that a "fishing expedition" for discovery of Epstein's counsels' servers should be conducted at this juncture (3/8/18 Aft. Tr. 69:14-70:13), in an abundance of caution, and in light of Edwards' and the Intervenors' objection to the deletion of electronic documents, Link & Rockenbach has not taken further steps to delete electronic documents.

A copy of Epstein's March 23, 2018, Updated Notice of Compliance filed in the State Court Action is attached as **Exhibit 6**.

E. An *In Camera* Review Has Been Requested

In its Motion to Show Cause, Farmer Jaffe alleges that it produced 21,282 pages of e-mails to Epstein. (Mot. ¶19.) As set forth above, at least 84 documents produced by Edwards in May 2012 were on Farmer Jaffe's privilege log. Because Link & Rockenbach is new to the case, it has made *repeated* requests to Edwards' counsel to identify by Bates numbers the documents Edwards has allegedly produced so it could compare those documents to the documents Edwards now claims were inappropriately obtained. Edwards' counsel, however, has *refused* multiple requests to provide that information.

As set forth more fully below, the privilege assertions have *never* been ruled upon. Because all of the lawyers in this case have ethical obligations to our profession to bring the truth to light, Epstein has filed a request for an *in camera* review of the subject documents in the State Court Action. (**Exhibit 1**.)

HISTORICAL BACKGROUND

Farmer Jaffe's historical background is inflammatory, incomplete and inaccurate. As with other court filings, they are designed to evoke an extremely negative emotional reaction to Epstein and his counsel in order to overcome the complete lack of legal justification for the relief requested. The focus of this Court, however, should not be on those misstatements, but in recognizing that there is absolutely no basis for any relief against Epstein and that Edwards should have turned over all work product on the disc, after agreeing to do so and representing that he had done so, and, in any event, he certainly should do so now. There are no pending cases and, as to the attorney-client privilege, no privilege determination has ever been made. Of the 5,000 pages that Link & Rockenbach reviewed, there are none as to which the attorney-client privilege applies, and an *in camera* review by the state court, already properly requested by Epstein, is in order to confirm

this, as well as the absence and/or waiver of any work-product protection applicable to the 47 e-mails improperly claimed by Edwards to be privileged

A. Subpoenas to RRA's Trustee

Epstein served three Subpoenas upon RRA's Trustee:

i. First Subpoena: The First Subpoena to the Trustee, served in April 2010, sought a broad range of documents, including e-mails from RRA's server. (**Exhibit 7.**) Neither Farmer Jaffe nor Edwards objected to that Subpoena but, rather, Edwards served a Request for Copies. This Court appointed a Special Master (former Broward County Circuit Judge Robert Carney) to assist the Trustee in preparing a privilege log. (D.E. 888.) The Special Master sought clarification of the Court's Order and was ultimately allowed to let Farmer Jaffe prepare the privilege log. (D.E. 1013.) The Special Master was then tasked with ruling upon the claimed privileges. (D.E. 1068.) The Special Master was heavily involved in privilege and production issues relating to the First Subpoena from August 2010 until April 2011. The Special Master recognized that he was not making a determination upon Edwards' overbreadth objections because Edwards did not timely raise them and, therefore, Edwards was required to prepare a privilege log. (3/15/11 Special Master Meeting Tr. 39-42) (**Exhibit 8**). The Special Master also recognized that it was the state court judge who would be making evidentiary rulings. (D.E. 1570.) Unfortunately, the Special Master never completed his work.

Farmer Jaffe served its first deficient privilege log in January 2011, which merely identified more than 6,000 Bates numbers with one broad privilege claim that applied to all of the documents. (D.E. 1441-3.) The Special Master suggested that his work would be better served if the parties could limit the number of "privilege" items at issue and he suggested Farmer Jaffe prepare a better privilege log. (D.E. 1570.)

Edwards has expressly, on multiple occasions, waived work product privileges. On February 2, 2011, in negotiating the preparation of the privilege log, Farmer Jaffe informed Epstein's counsel and the Special Master that it would omit from the log any work product privilege objections: "All work product materials **will be turned over to Plaintiff except for materials related to new or ongoing cases**, AND on the condition that they be produced "For Attorneys' Eyes Only." (**Exhibit 9.**) Farmer Jaffe told the Special Master he would then only need to review and make privilege determinations as to work product materials for *existing* cases and attorney-client privilege materials. *Id.*

Farmer Jaffe confirmed this agreement more than once:

> [February 9, 2011] "We also have 2 more boxes that contain **work product materials** that we will turn over subject to the agreement that Plaintiff will not assert any privilege has been waived by turning them over now, and further subject to the agreement that they be produced 'For Attorneys' Eyes Only.'" (**Exhibit 10**.)
>
> [February 16, 2011] Farmer: "Do you still want to do the attorney's eyes only? Do you want to speed it up or not? **You'll get work-product stuff** if you agree to the attorney's-eyes only." Epstein's counsel confirmed their agreement. (**Exhibit 11**.)

This representation was significant. At the time Farmer Jaffe made this representation to Epstein, the three cases Edwards had been litigating against Epstein while he was Rothstein's partner at RRA had long been settled (in **July 2010**). Thus, based on Farmer Jaffe's representation, Edwards was supposed to have produced all e-mails reflecting work product pertaining to the three closed Epstein cases because they did not pertain to "new or ongoing cases." While at the time of the production Edwards had other clients who had claims against Epstein, those, too, have now long been settled[6], and none of those claims remain *pending against Epstein*.

[6]Edwards settled his last clients' claims against Epstein in August 2011.

On February 23, 2011, Farmer Jaffe served a new privilege log (**Exhibit 12**) and produced to Epstein documents it deemed "irrelevant" and documents it deemed "work product." The new log was still legally deficient and identified many documents as "work product" although Farmer Jaffe agreed to produce all work product for claims that were no longer pending as "Attorneys' Eyes Only." In other words, any "work product" relating to Edwards' three clients, whose claims were settled with Epstein in 2010 should have been produced under the parties' agreement with the February 2011 production -- however, it now seems that only *select* items were produced, and any inculpatory work product was specifically withheld.

The parties were simultaneously going before the state court seeking various relief concerning production and privilege issues while seeking the Special Master's guidance at the Bankruptcy Court level. On February 24, 2011, Edwards filed a Motion for Protective Order in the State Court Action objecting to the Second Subpoena to the Trustee (discussed below). In that Motion, Edwards claimed as to the production with regard to the First Subpoena that:

> Pursuant to this first request, the Trustee turned over more than 27,000 pages of email to the Defendant that **the Trustee identified as being responsive to Epstein's request**. Edwards **and his counsel reviewed all of the email that was turned over**. The document review clearly demonstrates that the vast majority of email was **absolutely irrelevant** to any action Epstein is purportedly pursuing.

(2/24/11, Edwards' Motion for Protective Order, ¶¶ 5-6) (**Exhibit 13**). The limited review of the documents on the disc, however, show this contention to be false and that the documents are, rather, **highly relevant**.

The parties continued to fight over the compliance of the log before the Special Master. At the March 15, 2011, meeting with the Special Master, Edwards' counsel claimed:

> The situation we have here is one where we have turned over the documents themselves for in-camera inspection. They are available

> to you [Special Master]. You can look at them. **We have told you to turn over anything and everything that you think is relevant, material, not privileged by attorney-client privilege, not work product. Give it to them**.
>
> ***
>
> We have waived our right to have the defense establish a prima facie showing for an in-camera inspection, the inadequacies that they are arguing exists in the privilege log become absolutely irrelevant.

(3/15/11, Meeting with Special Master Tr. 43, 45-46) (**Exhibit 8**).

> At that same meeting, the Special Master pointed out:
>
> As I go through many of these things, **many of these things at least on their face to me don't appear to be privileged at all**.
>
> ***
>
> I'm saying a lot of this stuff, **probably the majority of it**, can be either eliminated as it's not privileged and it is discoverable or it's not. I'm not looking to raise at this point or to rule on relevancy objections.

(3/15/11, Meeting with Special Master Tr. 65-66; 70-71) (**Exhibit 8**).

Instead of requiring a new log, the Special Master set an *in camera* review with counsel for April 6, 2011. (D.E. 1570.) The Special Master planned to review each and every document identified on the privilege log and make a privilege determination on a document-by-document basis. For those documents where there was a dispute, he was going to hold a second hearing on evidentiary issues. (**Exhibit 8**, pp. 80-81.) Unfortunately, that *in camera* review never took place because the state court entered an Order on a non-party's Motion for Protective Order which stayed the Subpoena to the Trustee, and the Trustee did no further work. (**Exhibit 14**.)

In any event, the state court found that issues concerning evidence that would be used in the State Court Action should be brought before the state court. (**Exhibit 15**.) The parties went before the state court on multiple occasions concerning the privilege issue. On at least three

occasions, Edwards' counsel suggested that Edwards had "nothing to hide" and also suggested that the state court conduct an *in camera* inspection:

> As much as we might like to take all of this and put it on the floor in the courtroom for Your Honor and everybody else in the world to take a look at because **we have nothing to hide**, we can't do that.

(7/13/11 Tr. 58) (**Exhibit 16**).

> And what we have repeatedly said is if we could take all of these documents and lay them out on the floor in the courtroom for anybody in the world to look at, we'd be happy to do that because **we've got nothing to hide**. **We'll produce them to Your Honor to conduct an in camera inspection** of whatever you want to inspect in camera because **we have nothing to hide**, but we don't [] have the right or the ability to waive our clients' privilege. We cannot do that.

(4/16/12 Tr. 21) (**Exhibit 17**).

> …we're not attempting to hide anything. You want to conduct an in-camera inspection, **we want you to conduct an in-camera inspection** because **it will confirm that we're not attempting to hide anything**.

(3/8/18, Aft. Tr. 15) (**Exhibit 4**.)

Epstein also continued to argue that Farmer Jaffe's privilege log was non-compliant with *TIG Ins. Corp. v. Johnson,* 799 So. 2d 339 (Fla. 4th DCA 2001) and that Edwards waived any privilege claims by issue injection and because he produced the same documents contained on the disc to Razorback's counsel. *See* Epstein's February 8, 2012, Motion to Compel Production of Documents from Edwards and for Sanctions. (**Exhibit 18.**)

On May 7, 2012, the state court found that Farmer Jaffe's privilege log was insufficient on its face and did not comply with the requirements of Florida Rule of Civil Procedure 1.280(b)(5) [now (6)] and *TIG Ins. Corp.* (**Exhibit 19.**) Although on August 17, 2012, the state court vacated the May 7, 2012, Order, its August 17, 2012, Order continued to direct Edwards to

produce a privilege log that complied with Rule 1.280(b)(5) and *TIG Ins. Corp.* (**Exhibit 20**.) Edwards, however, failed to do so. Furthermore, because the state court would not continue the hearing on Edwards' Motion for Summary Judgment until Epstein obtained the documents that Edwards had been avoiding producing for years, Epstein elected to dismiss his claims against Edwards without prejudice. The validity of Edwards' and Farmer Jaffe's "privilege" assertions were, therefore, never resolved or found by the state court to be valid.

ii. **Second Subpoena**. Epstein served a Second Subpoena upon the Trustee in January 2011 in the State Court Action. (**Exhibit 21.**) That Subpoena was limited to e-mail communications between RRA and law enforcement. The Trustee gathered approximately 10,000 pages in response to that Subpoena. Edwards, however, moved the state court for a protective order. On July 14, 2011, the state court found that the Second Subpoena was overbroad. (**Exhibit 22.**) Epstein then sought to modify the request for specific communication with law enforcement and media. On April 10, 2012, the state court allowed the modification, finding the request sought relevant documents or documents likely to lead to admissible evidence. (**Exhibit 23.**) Importantly, the Second Subpoena did not *replace* the First Subpoena but, rather, was in addition to it.

iii. **Third Subpoena**. On April 12, 2012, Epstein served his Third (modified) Subpoena upon the Trustee, seeking the discovery relating to communications with law enforcement and media as allowed by the state court's April 10, 2012, Order. (**Exhibit 24**.) Again, this *did not* replace the First Subpoena, but sought documents in addition to it. On May 30, 2012 (originally May 15, 2012), Epstein moved to compel on this Subpoena because Edwards only made a partial production with three or four reporters whom he communicated with and not all of them. (**Exhibit 25**.) The documents produced by Edwards on May 7, 2012 (identified above) were

responsive to this Subpoena and included at least 84 documents that were identified on the privilege log. Nevertheless, documents were identified in Link & Rockenbach's limited review of the disc that show additional communications with the media exist but were improperly withheld from production by Edwards.

ARGUMENT

A. Epstein Cannot Be Held Accountable for Fowler White's Actions

Epstein did not violate this Court's Order and he should not be held in contempt for any allegations of misconduct by Fowler White, his former counsel from six years ago, when Epstein had no knowledge of Fowler White's actions, was completely unaware of them and could not have consented and did not consent to them. Epstein was never provided with a copy of the disc at issue, and he only recently learned of the disc's existence and its contents. Neither Farmer Jaffe nor Edwards have made any allegations to the contrary.

As stated by the Eleventh Circuit in *In re Porto*, 645 F.3d 1294, 1304 (11th Cir. 2011), "While a client may be made to suffer litigation losses because of her attorney's missteps, [courts] reject[ ] the notion that an innocent client must also suffer sanctions because of misconduct by her attorney that is not fairly attributable to her. Without more, the rule that the sins of the lawyer are visited on the client does not apply in this context, and a court must specify conduct of the plaintiff herself that is bad enough to subject her to sanctions." *Id*. *Accord Cables v. SMI Sec. Mgmt., Inc.*, No. 10-CIV-24613, 2012 WL 12863234, at *11 (S.D. Fla. June 26, 2012) ("Simply put, the Plaintiffs have failed to meet their burden of showing by clear and convincing evidence that the Defendant SMI or Karina Aponte engaged in contemptuous conduct regarding the production of bank records in this action. In addition, the undersigned concludes that even if the Plaintiffs had established a prima facie case of contempt, based upon the undisputed testimony of Ms. Aponte

and the record as a whole, sanctions for civil contempt are not appropriate in this case."). *See also* *Atkinson v. Volusia Cty. Sch. Bd.*, No. 615CV619ORL40DCI, 2016 WL 6524410, at *1, 3 (M.D. Fla. Nov. 3, 2016):

> This cause comes before the Court on Defendant's Motion for Award of Attorney's Fees and Costs . . . . Plaintiff has not responded to Defendant's motion within the time permitted. Upon consideration, the Court will grant Defendant's motion and award $3,820.55 in attorney's fees and costs as a sanction for Plaintiff's failure to attend her deposition.
>
> . . .
>
> D. Whether Plaintiff or Her Attorney Shall Pay the Amounts Owed. As a final matter, the Court must determine who will pay the amounts awarded to Defendant. Rule 37(d)(3) permits the Court to assess the award against the party who failed to act, the party's attorney, or both. However, **while an attorney's misconduct can certainly be imputed to her client for the purpose of imposing sanctions, courts should be reluctant to sanction the client where the client is not responsible for the attorney's misconduct**. *See In re Hill*, 775 F.2d 1385, 1387 (9th Cir. 1985) (per curiam).
>
> Here, **there is no record evidence indicating that Plaintiff engaged in misconduct or directed her attorney to engage in the conduct which has caused this Court to impose sanctions**. Indeed, at the Rule 16 hearing, Plaintiff's attorney assumed full responsibility for the conduct at issue and requested that any monetary award be assessed against her rather than against her client. The Court therefore finds that all amounts should be assessed against Plaintiff's attorney.

(Emphasis added.)

Accordingly, to the extent this Court determines Fowler White violated the Agreed Order and awards sanctions, those sanctions should not be against Epstein.

B. The Court's Contempt Powers

"Bankruptcy courts have statutory contempt powers deriving from section 105 of the Bankruptcy Code." *In re Rhodes*, 563 B.R. 380, 387 (Bankr. [redacted]. Fla. 2017) (citing *Hardy v.*

United States (*In re Hardy*), 97 F.3d 1384, 1389 (11th Cir. 1996)). However, "[a] party seeking civil contempt sanctions for another's violation of a court order must establish by clear and convincing evidence: '(1) the allegedly violated order was valid and lawful; (2) the order was clear, definite and unambiguous; and (3) the alleged violator had the ability to comply with the order.'" *Id.* (quoting *McGregor v. Chierico*, 206 F.3d 1378, 1383 (11th Cir. 2000)) (emphasis added). Sanctions imposed for civil contempt cannot be punitive in nature. *Jove Eng'g, Inc. v. I.R.S.*, 92 F.3d 1539, 1558 (11th Cir. 1996).

"In the context of civil contempt, the clear and convincing standard requires a quantum of proof adequate to demonstrate 'reasonable certainty' that a violation occurred." *Levin v. Tiber Holding Corp.*, 277 F.3d 243, 250 (2d Cir. 2002) (citation omitted). "[S]uspicions do not rise to the level of clear and convincing evidence,"[7] and ambiguous cases must be construed in favor of the alleged contemnor. *See Ford v. Kammerer*, 450 F.2d 279, 280 (3rd Cir. 1971) ("The long-standing, salutary rule in contempt cases is that ambiguities and omissions in orders redound to the benefit of the person charged with contempt."); *Accord Frankford Trust v. Allanoff*, 29 B.R. 407, 410 (D.C.E.D. Pa. 1983).

If "a prima facie showing of a violation has been made, the burden of production shifts to the alleged contemnor, who may defend his failure on the grounds that he was unable to comply." *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir. 1992) (citing *United States v. Rylander*, 460 U.S. 752, 757 (1983) ("Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. . . .")). Upon a sufficient showing by the alleged contemnor, the burden shifts back to the initiating party. *Id.* "The party seeking to show contempt, then, has the burden of

[7] *Korman v. Gray*, No. 13-80031-CIV, 2015 WL 195508, at *5 (S.D. Fla. Jan. 14, 2015).

proving ability to comply." *Id.* (citing *Combs v. Ryan's Coal Co.*, 785 F.2d 970, 984 (11th Cir.), *cert. denied*, 479 U.S. 853 (1986) ("The party seeking the contempt citation retains the ultimate burden of proof . . .")) (emphasis added).

Here, Farmer Jaffe and Edwards have not met their initial burden of proving by clear and convincing evidence that *Epstein* did not comply with the terms of *any* Order of this Court. Epstein has never seen or reviewed the disc that is the subject of Farmer Jaffe's Motion. In fact, neither Epstein nor Epstein's general counsel was ever provided with a copy of the disc nor did they ever review the disc's full contents. Rather, only recently in 2018, Link & Rockenbach provided Epstein and his general counsel with the key e-mails that were included in the Appendix filed in the State Court Action and some of the exhibits identified on Epstein's Clerk's Trial Exhibit List.[8] Fowler White never provided Epstein or his general counsel with either the disc or documents that Edwards now claims are privileged.

"Civil contempt orders may serve either or both of two purposes: compensation of the complainant for losses sustained by the contemnor's failure to comply with court instructions; and coercion of the contemnor into compliance." *Gibraltar Metals, LLC*, 2008 WL 11331995, at *1 (citing *Jove Engineering, Inc. v. IRS*, 92 F.3d 1539, 1546 n.4 (11th Cir. 1996) (citing *Local 28, Sheet Metal Workers' Int'l Ass'n v. EEOC*, 478 U.S. 421, 443 (1986)). "[N]either of the purposes of civil contempt would appear to be served by entry of a contempt order in this case. [Farmer Jaffe] does not argue that it has suffered substantial losses due to [Epstein's] alleged conduct; nor, given [Epstein's] response, is there an apparent need for a further court order to coerce [Epstein]

[8] "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense . . . . Information within this scope of discovery need not be admissible in evidence to be discoverable." Fed. R. Civ. P. 26(b)(1); *see also Hickman v. Taylor*, 329 U.S. 495 (1947) (relevancy in discovery should be broadly and liberally construed).

into compliance." *See id*. Indeed, Epstein has fully complied with the Order to the extent that he possibly can—again, having never even seen or reviewed the disc that is the subject of Farmer Jaffe's Motion.

C. Waiver of Privilege

A privilege determination of the documents identified on Farmer Jaffe's privilege log has *never* been made – neither by this Court, the Special Master nor the state court. The alleged "privileged" documents contained on the disc which are the subject of Farmer Jaffe's Motion and which Epstein has identified as trial exhibits are critically relevant to the issues of the State Court Action and directly contradict Edwards' sworn testimony and representations his counsel has repeatedly made to the state court. Furthermore, they are not attorney-client privileged communications. At most, at one point in time, they may have been protected by the work-product doctrine. Farmer Jaffe, however, waived that protection: (1) when it agreed to produce all "work product" documents for cases that were no longer pending; (2) by producing the same documents to a third-party (Conrad, Scherer - Razorback's counsel); and (3) by issue injection. Epstein has recently requested an *in camera* review from the state court to address those issues. *See* **Exhibit 1**.

In addition, Farmer Jaffe and Edwards may have also waived the work-product protections by the crime-fraud exceptions. On March 23, 2018, the United States Court of Appeals for the Eleventh Circuit issued an opinion in the matter of *Drummond Co., Inc. v. Conrad & Scherer, LLP*, No. 2:11-cv-03695-RDP-TMP (11th Cir.). (**Exhibit 26**.) In that case, the Eleventh Circuit held that the crime-fraud exception may apply to overcome a law firm's claim of work-product protection for materials related to lawsuits where the firm served as counsel, despite the fact that its clients were innocent of wrongdoing.

Drummond sued Conrad, Scherer and one of its partners for defamation and sought discovery about witness payments. (Op. at 7.) Drummond sought to use the crime-fraud exception to overcome Conrad, Scherer's claim of attorney-client and work product protection over documents in their case files. (Op. at 11.) The district court determined that the crime-fraud exception may apply, ordered a special master to review the contested documents *in camera* that Conrad, Scherer and the partner claimed were privileged or work product protected, and certified its Order for immediate appeal. (Op. at 15.)

On appeal, the Eleventh Circuit reiterated that "the crime-fraud exception removes the 'seal of secrecy' from attorney-client communications or work product materials when they are made in furtherance of an ongoing or future crime or fraud." (Op. at 19 citing *United States v. Zolin*, 491 U.S. 554, 563 (1989).)

Following earlier precedent in *Parrott v. Wilson*, 707 F.2d 1262, 1271 (11th Cir. 1983), the Eleventh Circuit affirmed the part of the district court's order determining that the crime-fraud exception may be applied because an attorney's illegal or fraudulent conduct may, alone, overcome attorney work-product protection. (Op. at 23-24.) The court also relied on *Moody v. I.R.S.*, 654 F.2d 795 (D.C. Cir. 1981), as it did in *Parrott*, in recognizing that the client's innocence, where the attorney is accused of misconduct, does not absolutely bar the application of the crime-fraud exception to materials shielded by the work product doctrine. Instead, it requires the court to apply a balancing test to weigh the client's legitimate interest in secrecy against the reasons for disclosure. (Op. at 25-26.) The court resolved the pure legal issue by holding that "the crime-fraud exception may be applied to eliminate work product protection based on attorney misconduct when the client is innocent." (Op. at 26-27.) The court directed that, "[o]n remand, under the district court's order, the special master will perform an *in camera* review of certain categories of

documents that Conrad, Scherer and [the partner] contend are protected by the attorney-client privilege or work-product protection." (Op. at 27, n. 14.)

These issues, however, are for the state court to decide and should not be injected into the only issue pending before this Court, which is the alleged violation by Epstein of this Court's Order.

CONCLUSION

Epstein respectfully requests that Farmer Jaffe's Motion for sanctions and other relief and Edwards' Joinder against Epstein be denied. Furthermore, Epstein requests a finding that the discovery Farmer Jaffe seeks is improper and unnecessary and should not be allowed. Epstein has requested an *in camera* inspection from the state court which should resolve the alleged privilege claims as this Court originally contemplated should have taken place.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 9, 2018, a true and correct copy of the foregoing was served electronically to all registered users on the CM/ECF system, which includes counsel identified on the service list below.

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By: */s/ Chad P. Pugatch*
CHAD P. PUGATCH (FBN [redacted]

- AND –

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this Court set forth in Local Rule 2090-1(A).

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EXHIBITS TO EPSTEIN'S RESPONSE TO MOTION TO SHOW CAUSE

Ex.	Date	Document
1	4/4/18	Epstein's Supplement to Motion for Court to Declare Relevance and Non-Privileged Nature of Documents and with Specific Request for *In Camera* Review to Determine Relevance, Inapplicability and/or Waiver of Attorney-Client Privilege and Attorney Work Product With Regard to Sealed Documents (**without exhibits**)
2	3/7/18	Affidavit of Tina L. Campbell as to Chain of Custody of Disc
3	10/10/13	Excerpts of Bradley Edwards Deposition Transcript, pp. 111, 150, 155
4	3/8/18	Hearing Transcript, Afternoon Session
5	3/7/18	Affidavit of Timothy P. Chinaris
6	3/23/18	Epstein's Updated Notice of Compliance
7	4/16/10	Subpoena Duces Tecum for Deposition – Documents Only to Herbert Stettin, Trustee
8	3/15/11	Excerpt of Meeting With Special Master, pp. 1, 2, 39-46, 65-66; 70-71, 80-81
9	2/2/11	Email from Farmer Jaffe
10	2/9/11	Email from Farmer Jaffe
11	2/16/11	Transcript Excerpt of Meeting with Special Master, p. 1, 41
12	2/23/11	Farmer Jaffe's Privilege Log
13	2/24/11	Edwards' Motion for Protective Order
14	3/30/11	Order on Notice of Limited Appearance to File Motion for Protective Order and Objections to Subpoena for Joint Privilege Documents
15	1/31/11	Order on Defendant Edwards' Motion to Stay Subpoena, Etc.
16	7/13/11	Excerpt of Hearing Transcript, p. 58
17	4/16/12	Excerpt of Hearing Transcript, p. 21
18	2/8/12	Epstein's Motion to Compel Production of Documents from Edwards and for Sanctions
19	5/7/12	Order on Epstein's Motion to Compel Production of Documents from Edwards and for Sanctions
20	8/17/12	Order on Outstanding Discovery Motions
21	1/3/11	Subpoena for Deposition Duces Tecum to Herbert Stettin, Trustee
22	7/14/11	Order on Defendant's Motion for Protective Order in Regard to the Deposition Duces Tecum of Records Custodian and Trustee Herbert Stettin
23	4/10/12	Order on Plaintiff Jeffrey Epstein's Motion to Compel and Amend Protective Order
24	4/12/12	Subpoena Duces Tecum Without Deposition to Herbert Stettin
25	5/30/12	Plaintiff's Amended Motion to Compel Discovery Responses and for Sanctions
26	3/23/18	Opinion; *Drummond Co., Inc. v. Conrad & Scherer, LLP*, No. 2:11-cv-03695-RDP-TMP (11th Cir.)