

IN THE CIRCUIT COURT OF THE 15th JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION AG  
CASE NO. 502009CA040800XXXXMB  
Judge David F. Crow

JEFFREY EPSTEIN,

Plaintiff/Counter-Defendant,

v.

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

Defendants/Counter-Plaintiffs.

\_\_\_\_\_ /

**PLAINTIFF JEFFREY EPSTEIN'S MOTION TO COMPEL  
PRODUCTION OF DOCUMENTS BY DEFENDANTS AND FOR SANCTIONS**

Plaintiff, Jeffrey Epstein, by and through his undersigned counsel, hereby moves to compel Defendants to produce the documents listed in Defendants' privilege log or, in the alternative, seeks entry of an Order compelling Defendants to serve a privilege log that complies with Fla. R. Civ. P. 280(b)(5), together with an Order For Imposition of Sanctions and in support thereof would show as follows:

**SUMMARY OF ARGUMENT**

On or about February 23, 2011, Farmer, Jaffe, Weissing, Edwards, Fistos & Lehrman, in response to several orders entered by Judge Raymond Ray, filed a one hundred and fifty-nine (159) page privilege log, claiming that over two thousand (2000) documents are privileged. This represents the second log which fails to meet the requirements for a legally sufficient Privilege Log. The Special Master required a master list of names contained in the log,

describing who they are and who received blind copies. While the master list was provided, individuals who were copied directly or who received blind copies were not provided. The log, even with these supplements, is still inadequate and contains entries on their face which are not privileged. As detailed herein, Defendants' privilege log is patently incomplete, inadequate, and violates the mandatory requirements of Fla. R. Civ. P. 1.280 (b)(5), as interpreted by the Fourth District Court of Appeal in *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001). Defendants' failure to comply with Fla. R. Civ. P. 1.280(b)(5) prevents the Plaintiff and the Court from determining whether any valid privilege assertions have been made by Defendants, and results in a waiver of the privileges claimed.

## ARGUMENT

### I. REQUIREMENTS FOR A PRIVILEGE LOG

The requirements for a privilege log in Florida state court litigation are set forth in Fla. R. Civ. P. 1.280(b)(5), which provides as follows:

Claims of Privilege or Trial Protection Materials. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disposed in a manner that, without revealing information itself privileged, or protected, will enable other parties to assess the applicability of the privilege or protection.

The key case construing Fla. R. Civ. P. 1.280(b)(5) is *TIG Ins. Corp. v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001), in which the Fourth District Court of Appeal denied a petition for a writ of certiorari seeking review of an order requiring *TIG*, the homeowner's insurer, to produce documents. After filing a third-party complaint against *TIG* and requesting that *TIG* produce its

claim files, *TIG* served objections on the basis of attorney-client and work-product privileges, but did not identify the documents which were assertedly privileged. Nor did *TIG* serve a privilege log. *Id.* at 340.

The Fourth District in *TIG* noted that Rule 1.280(b)(5) is identical to its federal counterpart, Fed. R. Civ. P. 26(b)(5), whose Advisory Committee Notes state "to withhold materials without such notice is contrary to the rule, subjects the party to sanctions under rule 37(b)(2) and may be viewed as a waiver of the privilege or protection." 799 So. 2d at 340. The court further observed that Local Rule 26.1(G)(3)(b), of the Southern District of Florida, spelled out the requirements for a privilege log, *id.* at 341:

Where a claim of privilege is asserted in objecting to any interrogatory or document demand, or sub-part thereof, and an answer is not provided on the basis of such assertion:

(i) The attorney asserting the privilege shall in the objection to the interrogatory or document demand, or sub-part thereof, identify the nature of the privilege (including work product) which is being claimed and if the privilege is being asserted in connection with a claim or defense governed by state law, indicate the state's privilege rule being invoked; and

(ii) The following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information:

(A) For documents: (1) the type of document; (2) general subject matter of the document; (3) the date of the document; (4) such other information as is sufficient to identify the document for a subpoena duces tecum, including, where appropriate, the author of the document, the addressee of the document, and, where not apparent, the relationship of the author and addressee to each other.

...

The Fourth District in *TIG*, 799 So. 2d at 341, also quoted with approval from *Abbott Laboratories v. Alpha Therapeutic Corp.*, 2000 U.S. Dist. LEXIS 20834, at \*13 (N.D. Ill. Dec. 14, 2000), in which the federal court stated that a privilege log should:

describe the document's subject matter, purpose for its production, and a specific explanation of why the document is privileged or immune from discovery. These categories, especially this last category, must be sufficiently detailed to allow the court to determine whether the discovery opponent has discharged its burden of establishing the requirements expounded upon in the foregoing discussion. Accordingly, descriptions such as 'letter re claim,' 'analysis of claim,' or 'report in anticipation of litigation'--with which we have grown all too familiar--will be insufficient. This may be burdensome, but it will provide a more accurate evaluation of a discovery opponent's claims and takes into consideration the fact that there are no presumptions operating in the discovery opponent's favor. Any failure to comply with these directions will result in a finding that the plaintiff-discovery opponents have failed to meet their burden of establish the applicability of the privilege. (citations omitted)

Thus, there is no question that a party invoking a privilege "must...provide sufficient information to enable other parties to evaluate the applicability of the claimed privilege or protection." *Hoot Winc, LLC v. RSM McGladrey Fin. Process Outsourcing, LLC*, 2009 U.S. Dist. LEXIS 103045, at \*9 (S.D. Cal. Nov. 4, 2009) (quoting Advisory Committee Notes to Rule 26(b)(5)). *See also Evans v. United Fire & Cas. Ins. Co.*, 2007 U.S. Dist. LEXIS 58578, at \*9 (E.D. La. Aug. 9, 2007) ("United has provided a privilege log, but it is insufficient on its face. Rule 26(b)(5) requires such a log to 'describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.' "); *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 162 F.R.D. 490, 492 (E.D. Pa. 1995) (party's failure to explain nature of the assertedly privileged communication precluded court from

determining whether privilege applied); *Harper v. Auto-Owners Ins. Co.*, 138 F.R.D. 655, 664 (S.D. Ind. 1991) (requiring the log to list, for each separate document, the authors and their capacities, the recipients (including copy recipients) and their capacities, the subject matter of the document, the purpose for its production, and a detailed, specific explanation of why the document is privileged or immune from discovery).

## **II. DEFENDANTS' PRIVILEGE LOG VIOLATES FLA. R. CIV. P. 1.280(b)(5) AND THE TIG REQUIREMENTS**

The Privilege Log initially submitted by Farmer Jaffe without excuse or justification clearly violates the requirements of Florida, Federal Rules of Civil Procedure and *TIG*, because none of the log entries described the capacity of the author of the document or the capacity of the recipient. Descriptions for senders and recipients such as attorney and staff, litigation, RRA personnel, unknown staff attorneys at RRA also do not meet the *TIG* requirements. Even with names, no mention is made as to whether the documents were copied or distributed to others; i.e., there is no reference to whether the document was sent just to the recipient, and no indication or statement of whether copies were made and sent to others, thus possibly waiving any privilege claim.

The description of the documents for which the various privileges claimed are also clearly inadequate. Many say "in re Epstein," "litigation strategy", "Meeting" etc., which does not describe the type of document for which the privilege is claimed.

## **III. BASIC REQUIREMENTS TO DETERMINE EXISTENCE OF ASSERTED PRIVILEGE**

The Plaintiff has set forth below a synopsis of the basic elements for establishing the various privileges claimed by the Defendants in this log. By reviewing the basic elements, the

Court can clearly see the inadequacy of the Privilege Log and the resulting prejudice to Plaintiff to challenge whether the claimed privileges in fact exist.

#### A. ATTORNEY-CLIENT PRIVILEGE

The attorney-client privilege, which applies to confidential communications made in the rendition of legal services to the client, is codified in §90.502, Fla. Stat. A party invoking the attorney-client privilege must establish all of the following elements: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of a bar of a court, or his subordinate, and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (I) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. See § 90.502, Fla. Stat.; *State v. Rabin*, 495 So. 2d 257 (Fla. 3d DCA 1986); *Skorman v. Hovnanian of Florida, Inc.*, 382 So. 2d 1376, 1378 (Fla. 4th DCA 1980). See also *In re Grand Jury Proceedings*, 517 F.2d 666, 670 (5th Cir. 1975) (quoting *United States v. United Shoe Machinery Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950)).

The burden of establishing that a communication is subject to the attorney-client privilege is on the party asserting it. *Rabin*, 495 So. 2d at 260. The attorney-client privilege does not apply to communications between an attorney and a third party, or a person who is not a client. See, e.g., *Rabin*, 495 So. 2d at 260 (attorney-client privilege did not attach to attorney's communication with client's ex-wife). The attorney-client privilege is waived if the client

voluntarily discloses the substance of the communication. *See* § 90.507, Fla. Stat.; *Delap v. State*, 440 So. 2d 1242, 1247 (Fla. 1983) ("[W]hen a party himself ceases to treat the matter as confidential, it loses its confidential character.").

The Plaintiff has no way to determine if the basic requirements for establishing this privilege are met. As noted above, the capacities are not described; the alleged client involved is not disclosed; and the purpose is not described. Merely stating the name of people without knowing their role in relationship to confidentiality does not establish a claim of privilege.

### **B. WORK-PRODUCT PRIVILEGE**

Fla. R. Civ. P. 1.280(b)(3) contains a limited privilege for "fact" work product or factual information pertaining to the client's case and obtained or gathered in connection therewith if the party or his attorney prepares or directs the preparation of the materials for litigation or trial. Thus, the work-product privilege extends only to "materials in question [which] were prepared in anticipation of litigation with respondents." *Nationwide Mut. Fire Ins. Co. v. Harmon*, 580 So. 2d 192, (Fla. 4<sup>th</sup> DCA 1991).

Forty years ago, the Florida Supreme Court, in *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 112 (Fla. 1970), explained what is covered by the work product privilege:

[T]hose documents, pictures, statements and diagrams which are to be presented as evidence are not work products anticipated by the rule for exemption from discovery. Personal views of the attorney as to how and when to present evidence, his evaluation of its relative importance, his knowledge of which witness will give certain testimony, personal notes and records as to witnesses, jurors, legal citations, proposed arguments, jury instructions, diagrams and charts he may refer to at trial for his own convenience, but not to be used as evidence, come within the general category of work product.

*Id.* at 112 (emphasis added). The work product doctrine protects documents and papers of an

attorney or a party prepared in anticipation of litigation, regardless of whether they pertain to confidential communications between attorney and client. Fla. R. Civ. P. 1.280(b)(2). *See Southern Bell Tel. & Tel. Co. v. Deason*, 632 So. 2d 1377 (Fla. 1994). Work product is a qualified immunity from discovery. *See DeBartolo-Aventura, Inc. v. Hernandez*, 638 So. 2d 988 (Fla. 3d DCA 1994). The work product privilege does not extend to materials intended for use as evidence at trial. *Northup v. Acken*, 865 So. 2d 1267 (Fla. 2004).

Work product falls into two categories: 1) "fact" work product consisting of factual information pertaining to a client's case that is prepared in anticipation of litigation or for trial by another party; and 2) "opinion" work product, which includes all attorney's mental impressions, opinions or conclusions about a client's case. The former is discoverable upon a showing of (a) need for the materials to prepare the party's case, and (b) inability to obtain the substantial equivalent of such materials without undue hardship. *See, e.g., Metric Engineering, Inc. v. Small*, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003). The latter is subject to nearly absolute immunity. *See, e.g., Smith v. Fla. Power & Light Co.*, 632 So. 2d 696 (Fla. 3d DCA 1994).

Once the party seeking the documents challenges non-production, the burden shifts to the opposing party to establish that the materials were prepared in anticipation of litigation or whether the party that has need of the materials and cannot obtain the equivalent without undue hardship, may be entitled to them after an evidentiary hearing. *See, e.g., Tampa Med. Assoc., Inc. v. Estate of Torres*, 903 So. 2d 259, 263-64 (Fla. 2d DCA 2005). A trial court is instructed "to make particularized findings in support of its determination of which of the documents are, or are not, subject to the work product privilege." *Dismas Charities, Inc. v. Dabbs*, 795 So. 2d 1038, 1039 (Fla. 4th DCA 2001). The party asserting the privilege must *prove* that the

materials constitute work product. *See, e.g., Prudential Ins. Co. of Am. v. Fla. Dep't of Ins.*, 694 So. 2d 771, 773-74 (Fla. 2d DCA 1997) (objecting party provided affidavits stating that the documents were prepared in anticipation of litigation); *Wal-Mart Stores, Inc. v. Weeks*, 696 So. 2d 855, 856-57 (Fla. 2d DCA 1997) (party objecting to disclosure must present evidence to support the work product privilege). *See, e.g., Lloyds Underwriters of London v. El-Ad Villagio Condo. Ass'n*, 976 So. 2d 28 (Fla. 4th DCA 2008) (discovery order quashed where no in camera inspection was made).

The Plaintiff here has no way to determine whether the work product privileges claimed are fact work product, i.e. factual information which may be discoverable, or opinion work product. There is no effort to distinguish matters intended for use at trial or a deposition and those not intended.

The Plaintiff respectfully directs the attention of the special master to the sheer number of people identified who received emails from Edwards where no objection is made on the basis of joint defense but only work product. Edwards has failed to establish that each and every one of the parties, and there are over twenty (20) of them, were in fact part of the work product privilege.

### **C. POOLED, JOINT DEFENSE OR COMMON LITIGATION INTEREST**

Litigants who share "unified interests" may exchange privileged information to prepare their case without losing the benefit of the attorney-client interest pursuant to the "joint defense," "common interest" or "pooled information" exception. *Visual Scene, Inc., v. Pilkington Bros.*, 508 So. 2d 437, 440 (Fla. 3d DCA 1987). The exception has been recognized in the case of

co-defendants, co-parties to potential litigation, members of a class of plaintiffs pursuing separate suits, and defendants in separate actions. *Id.* (citations omitted).

However, "[t]he joint defense privilege, more properly identified as the 'common interest rule,' *see generally* Capra, The Attorney-Client Privilege In Common Representations, 20 Trial Lawyers Quarterly, Summer 1989, at 20, has been described as 'an extension of the attorney client privilege, *Waller v. Financial Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987). It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel. *See United States v. Bay State Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28 (1st Cir. 1989). *Only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected. Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir.), *cert. denied*, 474 U.S. 946, 106 S. Ct. 342, 88 L. Ed. 2d 290 (1985); *Matter of Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120 (3d Cir. 1986)." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. N.Y. 1989)(emphasis added). Thus, "parties seeking to invoke the exception must establish that they agreed to engage in a joint effort and to keep the shared information confidential from outsiders." *Ken's Foods, Inc. v. Ken's Steak House, Inc.*, 213 F.R.D. 89, 93 (D. Mass. 2002). *See also United States v. Sawyer*, 878 F. Supp. 295, 297 (D. Mass. 1995) (despite similar interests between employer and employee, there was insufficient evidence that communications were made during the course of a joint defense effort; proponent could not establish the time frame of the purported agreement or the acts creating and/or terminating the agreement). No evidence or statement that this occurred is in the Privilege Log.

The "common interest" doctrine does not apply to communications between Mr. Edwards representing various plaintiffs on the one hand, and other attorneys representing other plaintiffs, even if Mr. Epstein was a defendant in all of those cases. *See, e.g., North River Ins. Co. v. Columbia Casualty Co.*, 1995 U.S. Dist. LEXIS 53, at \*15 (S.D.N.Y. Jan. 5, 1995) ("common interest" doctrine did not apply because the parties were not represented by same counsel; one party did not contribute to the other's legal expenses, nor exercise control over the conduct of the legal proceedings; and no evidence was presented of a coordinated legal strategy). In general, just because a document is discussed among participants or transferred among participants in a joint common interest agreement does not make it work product privilege if is not privileged to begin with. For example, if the outside source is not part of a privilege and relates to a conversation involving a U.S. Attorney or FBI agent under no circumstances will have privity with the joint defense, passing it on does not make it work product and it is discoverable.

#### **D. "CONFIDENTIAL INFORMANT ISSUE"**

Epstein is not aware of any authority that permits a private party in a civil action to invoke the confidential informant privilege to preclude the discovery of information regarding civil cases. The law is settled that the privilege not to reveal the name of a confidential informant is "uniquely available to the government." *See, e.g., Holman v. Cayce*, 873 F.2d 944, 946 (6th Cir. 1989) (and cases cited). *Holman*, 873 F.2d at 946. *See, e.g., Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Systems, Inc.*, 2005 WL 1459555 (N.D. Cal. 2005)("informant privilege is typically reserved for governmental actions"); *Chao*, 2001 WL 34113146 at \*1 (informant's privilege is known as the "government's privilege"); *Herman v. Crescent Publishing Group, Inc.*, 2000 WL 1371311 (S.D. N.Y. Sept. 21, 2000)(informant privilege

“allows the government to protect the identity of persons who furnish information regarding violations of the law”); *State v. Carter*, 29 So. 3d 1217, 1218 (Fla. App. 2d Dist. 2010) (“The state has the privilege to withhold the identity of a confidential informant”); *Thomas v. State*, 28 So. 3d 240, 243 (Fla. 4<sup>th</sup> DCA 2010) (“The state has a limited privilege to withhold the CI’s identity”). *See also Hoffman v. Reali*, 973 F.2d 980, 987 (1st Cir. 1992) (the “informant’s privilege” entitles a state to refuse to disclose the identity of a person who has furnished information relative to an investigation); *Thomas v. State*, 28 So. 2d 240, 243 (Fla. 4th DCA 2010) (“the state has a limited privilege to withhold the CI’s identity.”); *In re Forfeiture of 1985 Dodge*, 529 So. 2d 767 (Fla. 1st DCA 1988) (sheriff’s office entitled to protect name of confidential informant in civil forfeiture proceeding). *See Gill v. Gulfstream Park Racing Ass’n, Inc.*, 399 F.3d 391, 401 (1st Cir. 2005) (noting that Florida had not ruled on whether the work product privilege could be asserted by a private party in the position of the industry self-regulatory investigative agency asserting the privilege in that case). Other than the cases which speak to the First Amendment privilege of reporters to protect their sources, there is no privilege for confidential informant in civil cases.

Limiting the informant’s privilege to the government makes sense in light of the underlying purpose of the privilege, which is to “foster[] the public’s interest in effective law enforcement by encouraging citizens to communicate to the government information regarding the commission of crimes.” *Holman*, 873 F.2d at 946. *See, e.g., Chao*, 2001 WL 34113146 at \*1 (“The privilege recognizes the obligation of citizens to communicate their knowledge of violations of the law to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation”); *Thomas*, 28 So. 3d at 243 (“The purpose of the

privilege is to encourage citizens to perform their obligation of communicating their knowledge of the commission of crimes to law enforcement”).

There is no comparable purpose to be served by permitting private litigants to withhold the identity of persons who have provided information or may have relevant information to a civil case. It should be irrelevant if the source was a government actor; the privilege belongs to the government and can only be asserted by the government, not by a private party to whom a government actor imparted information.

In the instance of this log, the Defendants do not claim an informant privilege, but claim a privilege of a confidential source. If the source is not part of the litigation team this is a waiver. Just because someone is named as source, does not make communications from that person to the lawyer privileged or any documents transmitted in this fashion. So unless the source is a lawyer or investigator, or part of Edwards' litigation team, then emails to and from this source are a facial waiver of the work product or any other privilege claim.

#### **E. NO PRIVILEGE BASED ON PRIVACY**

The Edwards firm objects to the production of numerous documents on the ground that they are “protected by privacy rights.” The objections do not identify the specific “privacy” privilege, or describe the person whose privacy interests are at stake or the nature of the privacy interest at stake. Neither Florida, nor Federal law, recognizes a privilege for unspecified and undisclosed “privacy right” as repeatedly asserted here. No valid privilege can be raised in an attempt to protect generic “privacy rights.”

Section 90.501, Fla. Stat., expressly states in relevant part that “[e]xcept as provided by this chapter, any other statute, or the Constitution of the United States or of the State of Florida,

no person in a legal proceeding has a privilege to . . . (3) [r]efuse to produce . . . any writing.” Neither the Florida Evidence Code, other Florida statutes or the Constitution recognizes an evidentiary privilege for generic “privacy rights.” In addition, we have found no statute, court rule or constitutional privilege for which bars the production of documents in a legal proceeding” based upon a general right of privacy. *See La Roche v. Wainwright*, 599 F.2d 722, 726 (5th Cir. Fla. 1979)(rejecting “fourteenth amendment rights to privacy” to protect marital relationship”: “[W]e see no persuasive reason to extend the right of privacy, based as it is on “penumbras and emanations” of other more explicit constitutional rights, to evidentiary matters protecting marital relationships, long thought to be uniquely within the regulatory province of the individual states.”)

#### **IV. FAILURE TO SUPPLY ADEQUATE LOG-WAIVER OF PRIVILEGES CLAIMED**

It is settled that the failure to supply an adequate privilege log results in the waiver of a privilege under Florida and federal law. *TIG*, 799 So. 2d at 342; *see also Aurora Loan Services, Inc. v. Posner & Assocs., P.C.*, 499 F. Supp. 2d 475, 479 (S.D.N.Y. 2007); *Burns v. Imagine Films Entertainment*, 164 F.R.D. 589, 594 (W.D.N.Y. 1996). *CSX Transp., Inc. v. Admiral Ins. Co.*, 1995 U.S. Dist. LEXIS 22359, 1995 WL 855421, at \*15 (M.D. Fla. July 20, 1995). The *TIG* court noted that Rule 1.280(B)(5) “uses mandatory language, and federal courts have found waiver where the federal rules was violated.” *Id.* (citing cases). The court concluded that there was no departure from the essential requirements of the law in compelling production based upon a privilege waiver: “Because the trial court did not have the benefit of specific descriptions of the documents, we assume that the court found a waiver.” *TIG*, 799 So. 2d at 342. *See also Century Bus. Credit Corp. v. Fitness Innovations & Techs., Inc.*, 906 So. 2d

1156, 1157 (Fla. 4th DCA 2005) (the Fourth District denied a petition for certiorari directed to an order finding a waiver of privilege in regard to the production of documents because the petitioner filed a privilege log which was "completely inadequate"); *Kaye Scholer LLP v. Zalis*, 878 So. 2d 447, 449 (Fla. 3d DCA 2004) (the purpose of the privilege log requirement is "to identify materials which might be subject to a privilege or work product protection so that a court can rule on the 'applicability of the privilege or protection' prior to trial." . . . Failure to comply with the requirements of Rule 1.280(b)(5) results in the waiver of any attorney-client and work-product privileges."); *Omega Consulting Group v. Templeton*, 805 So. 2d 1058, 1060 (Fla. 4th DCA 2002) (noting that where a privilege log "filed by the corporations did not contain sufficient detail to comply with the requirements of Florida Rule of Civil Procedure 1.280(b)(5)," the attorney-client privilege may be waived).

The Defendants have had numerous opportunities to file a proper log. At this point, particularly given the magnitude of the scope of the failure, their prior gross failure to file a proper log and their tardiness, now approximately six weeks after the deadline of January 31<sup>st</sup> 2011, in filing the Privilege Log, the Plaintiff requests a recommendation of a finding of waiver and the ordering of production the documents.

#### **V. REQUESTED RELIEF INCLUDING RECOMMENDATION FOR SANCTIONS**

Since Epstein's Motion to Compel was heard on August 4, 2010, the Bankruptcy Court has entered no less than four (4) orders directing Edwards, et al. to prepare a Privilege Log the last of which required the Privilege Log to be completed by January 31, 2011. The first log served on January 26, 2011 (Log #1) was in woeful noncompliance with the *TIG* requirements. Nonetheless, the Plaintiff waited until February 23, 2011, based on counsel's representations, that

a *TIG* compliant log would be presented. On February 23, 2011, another log was served by Edwards et al. (Log #2), again it patently failed to comply with *TIG* requirements as described above. So, after being almost 40 days late, as of this motion, after being served with notice of the second failure to provide a legally sufficient log and still not providing one, the plaintiff is entitled to sanctions.

The actual prejudice and impact on Epstein by this willful and continued non-compliance with this Court's many orders is measurable. In financial terms, Epstein has spent over tens of thousands of dollars in attorney's fees for rehashing and revisiting the same meritless arguments of Edwards relating to this subpoena. In addition, Epstein volunteered to pay the fees of a special master so that a in-camera hearing and privilege log could be reviewed without burdening the trustee and his counsel. In non-economic terms, Epstein has been prejudiced he has not been able to conduct critical discovery necessary for the prosecution of his claims and the defense of Edward's counterclaim.

It is clear that if a party disobeys a court order requiring the production of documents or the preparation of a Privilege Log, the court may enter such orders that are just, including sanctions enumerated in Federal Rules of Civil Procedure 37(b)(2). Sanctions may be granted against a party under Rule 37 if there is not compliance with a court order, notwithstanding a lack of willfulness or bad faith, although such factors are relevant to the sanctions imposed. *See: In Re: Seroquel Products Liability Litigation*, 244 FRD 650, 656 (M.D. Fla. 2007), cited in *H & I Corp. v. Advanced Medical Design, Inc.*, 251 FRD 667 (M.D. Fla. 2008). For the purposes of Rule 37, an incomplete response is to be treated as a failure to respond. Fed. R. Civ. P. 37(a)(3). Rule 37 sanctions are imposed not only to prevent unfair prejudice to litigants but also to insure

the integrity of the discovery process. *Aztec Steel Company v. Florida Steel Corp.*, 691 F. 2d 480, 482 ( 11<sup>th</sup> Cir.1982).

Rule 37 authorizes the court to impose the following sanctions:

1. an order that facts in dispute be taken to be established in the favor of the parties seeking the motion, i.e. determination that the privilege claims are waived;

2. an order precluding the party refusing to comply with the order from opposing or presenting evidence in opposition of the movant's claim, and

3. an order striking the offending party's pleading. Fed. R. Civ. P. 37(b)(2).

The Court may also order, in lieu of or in addition to these sanctions, that the party pay the reasonable expenses, including attorney's fees, caused by the failure to comply, unless the Court finds that the failure was substantially justified or that other circumstances make such an award unjust. The Defendants can offer no justification for failing to provide a legally sufficient Privilege Log.

Based on the above, the Plaintiff requests:

1) A determination and recommendation that the wholesale failure to provide a timely and legally sufficient log merits a determination that the privileges claimed as to the documents identified are waived;

2) A determination and recommendation that the claims of alleged privileges which on their face are not legally sufficient are denied and that the documents are to be produced to the plaintiff;

3) A determination and recommendation for an award of attorneys fees and costs, including fees of the special master related to obtaining a timely, legally sufficient Privilege Log;

4) Any other relief deemed appropriate by the Special Master.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via electronic mail and U.S. Mail on this \_\_\_\_ day of January, 2012 to: Jack Scarola, Esq., Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409; Jack Alan Goldberger, Esq., Atterbury, Goldberger & Weiss, P.A., 250 Australian Ave. South, Suite 1400, West Palm Beach, FL 33401-5012; and Marc S. Nurik, Esq., Law Offices of Marc S. Nurik, One East Broward Blvd., Suite 700, Fort Lauderdale, FL 33301.

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Joseph L. Ackerman, Jr.