

JEFFREY EPSTEIN,  
Plaintiff,

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

vs.

SCOTT ROTHSTEIN, individually,  
BRADLEY J. EDWARDS,  
Individually, and L.M., individually.

CASE NO.502009CA040800XXXXMBAG

Defendants.  
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**JEFFREY EPSTEIN'S RESPONSE TO BRADLEY EDWARDS'S MOTION TO  
DETERMINE ENTITLEMENT TO ADVERSE INFERENCE AND  
PRECLUDING EPSTEIN FROM OFFERING EVIDENCE AT TRIAL**

Plaintiff/Counter-Defendant Jeffrey Epstein ("Epstein"), by and through his undersigned counsel, hereby files this response to Defendant/Counter-Plaintiff Bradley Edwards's ("Edwards") Motion to Determine Entitlement to Adverse Inference and Precluding Epstein from Offering Evidence at Trial, and states:

**INTRODUCTION**

In his Motion, Edwards is seeking two separate Orders. He first requests that this Court "determine his entitlement to an instruction to the jury before whom this matter shall be tried, that the jury is entitled to conclude solely on the basis of Epstein's refusal to answer that had Jeffrey Epstein responded truthfully to any relevant discovery request as to which he has refused to answer or respond based upon an assertion of his Fifth Amendment privilege, that all such answers and responses would, in fact, have implicated him in the commission of a crime or would otherwise have disclosed information adverse to Jeffrey Epstein's interests in this lawsuit." *See Edwards's Motion*, page 1. Next, Edwards requests the entry of an Order "precluding Jeffrey Epstein from offering evidence or testimony as to any matter about which he has declined on the basis of the assertion of privilege to provide pre-trial discovery." *Id.* For the

reasons set forth below, as well as those that will be presented at hearing, this Motion should be denied.

### **MEMORANDUM OF LAW**

Edwards's Motion seeks two unrelated items of relief: a request for a *jury instruction* seeking an impermissibly broad negative inference; and an Order precluding Epstein from offering any evidence at trial regarding matters about which he asserted a privilege during pre-trial discovery. Edwards's request for a jury instruction regarding negative inference should be denied because Edwards's Motion fails to identify any specific questions/requests for which he is seeking a negative inference and, as delineated below, neglects to provide any applicable rule or body of law permitting him to prematurely request and/or receive such a jury instruction based exclusively on unspecified pre-trial discovery.

Edwards's second request, for an Order precluding Epstein from offering any evidence at trial regarding any matters for which he asserted privilege during pre-trial discovery, must likewise be denied. Edwards's reliance upon Rule 1.380(b)(2)(B) of the *Florida Rules of Civil Procedure* and *Securities and Exchange Commission v. American Beryllium and Oil Corp.*, 303 F.Supp. 912 (1969) in support of his request is misplaced, as neither the rule nor the case to which he cites permits such preclusion on the facts of the instant case. For these reasons, as demonstrated more fully in this Memorandum of Law, Edwards's Motion should be denied.

#### **I. EDWARDS'S REQUEST FOR A JURY INSTRUCTION REGARDING NEGATIVE INFERENCE MUST BE DENIED**

The sole case upon which Edwards relies in support of his request for an impermissibly broad negative inference jury instruction is *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). According to Edwards's own Motion, this case stands for the proposition that **a Defendant can be "compelled to take the stand and assert the privilege in response to questioning before**

**the fact finder.** The plaintiff is **then entitled** to an adverse inference in response to the unanswered questions and counsel is entitled to argue that adverse inference. ”*Edwards’s Motion*, page 2 (emphasis added). The procedure, as delineated by the court in *Baxter*, requires that the party asserting the privilege to do so *in front of the fact finder* after a question is asked. Thereafter, under certain specific circumstances (as to which Edwards has made no assertions whatsoever in his Motion), the Plaintiff may be entitled to some adverse inference limited in scope to the specific question that is asked. *Baxter* is neither on point nor analogous to the improper request Edwards has put before this Court. Edwards has requested an inconceivably broad and general negative inference without reference to any specific question as to which such an inference might be made or any showing of the requisite conditions for such an inference. Moreover, Edwards’s request is based solely on Epstein’s properly asserted privilege made during the discovery phase of litigation *outside the presence of the fact finder*. As such, *Baxter* provides no legal justification for the blanket negative inference requested by Edwards, and Edwards’s Motion as to such negative inference should be denied.

## **II. EDWARDS’S REQUEST FOR PRECLUSION FROM OFFERING EVIDENCE AT TRIAL SHOULD BE DENIED**

Edwards’s assertion of, and reliance upon, Rule 1.380(b)(2)(B) of the *Florida Rules of Civil Procedure* is equally inapposite to the relief he requests in the instant Motion. Rule 1.380(b)(2)(B) of the *Florida Rules of Civil Procedure* is applicable only in matters where a party has **failed to comply with a court order**. It provides, in relevant part:

(b) Failure to Comply With Order.

(2) If a party or an officer, director, or managing agent of a party or a person designated under rule 1.310(b)(6) or 1.320(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or rule 1.360, the court in which the action is pending may make any of the following orders:

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence.

1.380(b)(2)(B) FLA. R.CIV. P. (2013). This Rule is, irrefutably, inapplicable to the facts presented in this Motion.

Likewise, the case of *Securities and Exchange Commission v. American Beryllium and Oil Corp.*, 303 F.Supp. 912 (1969), the only case submitted by Edwards in support of the preclusion sought in his Motion, is inapplicable. In *American Beryllium*, the **defendant failed to comply with a court order** compelling him to turn over certain discovery. The defendant also failed to timely raise his Fifth Amendment Privilege, as the defendant did not assert it until after he had violated the court order. The court *then* held that the documents should be precluded because the defendant “fail[ed] to raise the asserted privilege before Judge MacMahon, or to at least respond on or before December 18, 1968, as ordered.” *Id.* at 921.

In the case at hand, Epstein timely asserted his Fifth Amendment Privilege. In fact, Edwards has never challenged that assertion. Moreover, Edwards does not allege that Epstein has failed to comply with a court order. Neither the rule nor the case law relied upon by Edwards states that an assertion of privilege is deemed a failure to comply with a discovery order. Again, *American Beryllium* is neither on point nor analogous to the facts of the instant case.

Finally, Edwards’s ambiguous and overly-broad request that Epstein be precluded “from offering evidence or testimony as to any matter about which he has declined on the basis of the assertion of privilege to provide pre-trial discovery” completely disregards the fact that Epstein has timely and properly provided Edwards with his trial exhibit and witness list. If there is a specific document/item/witness with which Edwards takes issue, Edwards

should properly identify same, either through a proper motion or at trial, so that this Court can properly examine the issue and rule on Edwards's request that it be precluded. *See Tomlinson-McKenzie v. Prince*, 718 So. 2d 394, 396 (Fla. 4th DCA 1998); *Aguila-Rojas v. City Management Group Corp.*, 606 So.2d 765, 766 (Fla. 3d DCA 1992).

### **CONCLUSION**

Based on the arguments presented above and the complete absence of any applicable or relevant legal authority cited by Edwards in support of his untenable and premature requests, Plaintiff/Counter-Defendant Jeffrey Epstein respectfully requests that this Court enter an Order denying Defendant/Counter-Plaintiff Bradley Edwards's Motion to Determine Entitlement to Adverse Inference and Precluding Epstein from Offering Evidence at Trial, and grant such other and further relief as deemed necessary and proper.

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served upon all parties listed below, via Electronic Service, this September 6, 2013.

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