

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CIV-80119-MARRA/JOHNSON

JANE DOE NO. 2,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

Related cases:

08-80232, 08-08380, 08-80381, 08-80994,
08-80993, 08-80811, 08-80893, 09-80469,
09-80591, 09-80656, 09-80802, 09-81092

**DEFENDANT'S, JEFFREY EPSTEIN, RESPONSE IN OPPOSITION
TO PLAINTIFF'S, JANE DOE, MOTION TO COMPEL RESPONSE TO
PLAINTIFF'S REQUEST FOR ADMISSIONS [DE 98]**

Defendant, JEFFREY EPSTEIN, hereby files his Response in Opposition to Plaintiff's, JANE DOE, Motion to Compel Response to Plaintiff's Request for Admissions dated July 10, 2009 [DE 98] (Consolidated Case No. 08-CIV-80119 [DE 195]).

I. Procedural Background

Plaintiff's Motion to Compel is filed at DE (98). The Motion to Compel was voluminous and orders had been entered by this court (DE 242 and 293) addressing other 5th Amendment issues; therefore, the undersigned counsel endeavored to eliminate certain Request outlined in Plaintiff's a Motion to Compel. As a result, a Joint Notice of Agreement was entered advising the court that several of the Requests had been addressed by counsel alleviating the court from having to rule on same. (DE 316).

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Defendant filed his Rule 4 Appeal (DE 282) and his Supplementary Brief (DE 283), which address several of the 5th Amendment arguments applicable to the Request outlined herein. Portions of DE 282 and 283 were provided to the court in camera pursuant to the court's order (DE 242). Therefore, for the Court's ease of reference and in an attempt to maintain brevity, Defendant hereby incorporates those arguments and case law as if fully set forth herein.

Significantly, these cases have been consolidated for discovery. Therefore, consistent rulings should apply. In making those rulings, this Court must continue to recognize that the allegations in the related cases cannot be forgotten. (E.g., see DE 242 and 293, p.5-6). Answers/Admissions/Denials to discovery Request in one case could provide a link in the chain of evidence used to prosecute Epstein for a crime or provide an indirect link to incriminating evidence in another case. Id. and *infra*. Here, Admissions or denials to the Request for Admissions is the equivalent of compelled testimonial disclosures affirming or denying the very existence of the evidence sought, which may result in a global subject-matter waiver of Epstein's 5th Amendment privilege relative to the topics addressed in these and other discovery Request.

From the outset, Plaintiff Motion to Compel incorrectly states that Epstein has only asserted objections relating to the Fifth Amendment. However, Epstein has asserted objections under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. See Request for Admissions and responses thereto attached as **Composite Exhibit "A".**

II. The Request for Admissions, Argument And Memorandum Of Law

a. Request for Admissions Numbers 1-9 & 21-23

Request Number 1 - Your net worth is greater than \$10 million.

Request Number 2 - Your net worth is great than \$50 million.

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Request Number 3 - Your net worth is greater than \$100 million.

Request Number 4 - Your net worth is greater than \$500 million.

Request Number 5 - Your net worth is greater than \$1 billion.

Request Number 6 - Since being incarcerated you have, directly or indirectly (through the services or assistance of other person), conveyed money or assets in an attempt to insulate or protect your money or assets from being captured in any civil lawsuits filed against you.

Request Number 7 - You own or control, directly or indirectly, real estate property in the Caribbean.

Request Number 8 - You own or control, directly or indirectly, real estate property in foreign countries.

Request Number 9 - In the last 2 years you have transferred assets and/or money and/or financial instruments to countries outside the United States.

Request Number 21 - You are moving significant financial assets overseas, outside of the direct territorial reach of the U.S. and Florida Courts.

Request Number 22 - You are making asset transfers with the intent to defeat any judgment that might be entered against you in this or similar cases.

Request Number 23 - You currently have the ability to post a bond of \$15 million to satisfy a judgment in this case without financial or other difficulty.

Response To Request for Admissions Numbers 1-9 & 21-23: In response, Defendant asserts his U.S. constitutional privileges as specified herein. I intend to respond to all relevant discovery regarding this lawsuit, however, my attorneys have counseled me that I cannot provide answers to any discovery relevant to this lawsuit and I must accept this advice or risk waiving my Fifth Amendment rights as guaranteed by the United States Constitution and losing my Sixth Amendment right to effective representation. Accordingly, I assert my federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. Drawing an adverse inference under these circumstances would unconstitutionally burden my exercise of my constitutional rights, would be unreasonable, and would therefore violate the Constitution.

The Fifth Amendment

As set forth in more detail in DE 282 and 283, which were provided to the court in camera, Epstein cannot admit or deny the Request for Admissions relating to his financial history

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and condition without waiving his Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. The Request are unreasonable, overbroad, confidential, proprietary in nature and seek information that is neither relevant to the subject matter of the pending action nor does it appear to be reasonably calculated to lead to the discovery of admissible evidence. The Fifth Amendment is a safe harbor for all citizens, including those who are innocent of any underlying offense. These Request for Admissions, if answered, may result in compelled testimonial communications from Epstein regarding his financial status and history and would require him to waive his right to decline to respond to other inquiries related to the same subject matter in this case, the related cases and those matters outlined for the Court in DE 282 and 283, on camera. Responding to this and other related inquiries would have the potential to provide a link in a chain of information and/or lead to other evidence or witnesses that would have the specific risk of furthering an investigation against him and therefore are protected from compulsion by Epstein's constitutional privilege.

Accordingly, any compelled testimony that provides a "lead or clue to a source of evidence of such [a] crime" is protected by Fifth Amendment. SEC v Leach, 156 F.Supp.2d 491, 494 (E.D. PA. 2001). See supra. Questions seeking "testimony" regarding financial assets or transactions would, if answered, risk waiving Epstein's constitutional privilege to decline to answer other related inquiries into his financial assets and past and current and intended future transactions thus he must respectfully decline to answer any inquiry even if the insinuation in the question is erroneous and unwarranted. See also Hoffman v United States, 341 U.S. 479, 486 (1951) ("the right against self-incrimination may be invoked if the answer would furnish a link in the chain of evidence needed to prosecute for a crime").

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While the Fifth Amendment states only that “[n]o person ... shall be compelled in any criminal case to be a witness against himself,” U.S. Const. amend. V, there is no question that an individual is entitled to invoke the privilege against self-incrimination during a civil proceeding. See, e.g., Lefkowitz v. Turley, 414 U.S. 70, 77 (1973) (explaining that the Fifth Amendment permits an individual “not to answer official questions put to him in any ... proceeding, civil or criminal, formal or informal, where the answer might incriminate him”). And this means that a civil litigant may legitimately use the Fifth Amendment to avoid having to answer inquiries during any phase of the discovery process. See 8 Charles A. Wright, Arthur R. Miller and Richard L. Marcus, Federal Practice and Procedure § 2018, at 273 (2d ed. 1994) (“[C]ourts have repeatedly held that the privilege against self-incrimination justifie[s] a person in refusing to answer questions at a deposition, or to respond to interrogatories, or Request for Admissions, or to produce documents.” (footnotes omitted)).

To the extent Plaintiff claims she needs the information concerning financial worth and/or asset transfers based on her unsupported presumption that Epstein is fraudulently transferring assets, same is premature and unsupported by the law for the reasons set forth in Epstein’s Memorandum of Law in Opposition to Plaintiff’s Motion for Injunction Restraining Fraudulent Transfer of Assets (DE 198).

Responding to the above financial requests would require Epstein to admit or deny the very existence of the information sought. As discussed *infra*, if compelled to respond to Plaintiff’s Request for Admissions, Plaintiff will allege a subject-matter waiver of Epstein’s Fifth Amendment Privilege regarding the information sought here and in other discovery requests. See *infra*. Admitting, denying and/or identifying the existence of the information sought by virtue of an admission or denial is tantamount to testimonial disclosures that would communicate

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statements of fact. Such Admissions or denials present a real and substantial danger of self-incrimination in this case, in other related cases and as well in areas that could result in criminal prosecution. See generally Hoffman v United States, 341 U.S. 479, 486 (1951) and United States v. Hubbell, 530 U.S. 27, 36, 120 S.Ct. 2037, 2043 (2000). Again, the information sought also relates to potential federal claims of violations. See DE 282 and 283, in camera.

While these Request for Admissions appear to be general-identification type information, which on their face may not appear to infringe upon Epstein's rights under the 5th Amendment, responding to same would allow Plaintiff to argue that Epstein has waived his 5th Amendment privilege relative to the Request for Admissions and, thus, a global waiver has occurred relative to the similar requests made by Plaintiff in her Request for Production and Interrogatories dealing with Epstein's financial condition, ownership of assets and alleged asset transfers. Therefore, Plaintiff is setting the stage to attempt to force a waiver of the 5th Amendment in hopes that such a waiver will then require Epstein to disclose the information sought in Plaintiff's Request for Production and Interrogatories. If successful, Plaintiff will then serve subpoenas on certain institutions, entities, and possibly individuals that Plaintiff would not know about but for Epstein being compelled to testify about same, which is a direct violation of his 5th Amendment privilege. Such an erroneous result may furnish a link in the chain of evidence needed to convict Epstein of a crime. See (DE 282 and 293, in camera) Epstein cannot be required to waive his privileges under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and provide compelled testimony and information that may, directly or indirectly, furnish Plaintiff a clue or link in the chain of evidence used to prosecute him. Rudy-Glanzer v. Glanzer, 232 F.3d at 1263(the "privilege" against self-incrimination does not depend upon the likelihood, but upon the possibility of prosecution and also covers those circumstances

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where the disclosures would not be directly incriminating, but could provide an indirect link to incriminating evidence). Essentially, Plaintiff's Request for Admissions seek to have Epstein be a witness against himself by admitting or denying that certain evidence exists, assist with Plaintiff's investigation and identify areas that could result in future prosecution of Epstein.

The court will note that, as worded, the Request for Admissions seek information regarding Epstein's assets, ownership of assets and transfer of assets in locations inside and outside the United States. Defendant has already provided this court with sufficient argument at DE 282 and DE 283 detailing why the production of such information s could provide a link in the chain of evidence regarding various allegations that were the subject of the investigation that resulted in the NPA. Here, Plaintiff's Request for Admissions regarding Epstein's financial information, ownership of assets and transfers of assets inside and outside the United States "could reveal the availability to him and/or use by him of interstate facilities and thus would constitute a link in the chain of evidence that could potentially expose [Epstein] to the dangers of self incrimination." (DE 293, p.6). Plaintiff wishes to obtain this information to corroborate her request for Epstein's passport and pages attached thereto identifying the locations Epstein has traveled outside of the United States, which is no different from the Request this Court has already ruled upon and sustained Epstein's Fifth Amendment privilege in response thereto. (DE 292). In summary, this court reasoned that:

"[i]n this and the other civil actions, Plaintiff's allege that Epstein violated certain federal and state criminal statutes in an attempt to make claims against Epstein ranging from sexual battery to intentional infliction of emotional distress. The lynchpin for the exercise of federal criminal jurisdiction under 18 U.S.C. §2422(b), which figures in some of the complaints filed, is 'the use of any facility or means of interstate or foreign commerce' and the analogous essential element of 18 U.S.C. §2423(b), which also figures in some of the Complaints, is 'travel[s] in interstate commerce or travels into the United States or . . . travels in foreign commerce.' Accordingly, requiring Epstein to provide responses. . .would in essence be compelling him to provide assertions of fact. . . .

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The court recognizes that: “[i]n light of the additional information provided [in DE 282], the court is now persuaded that Epstein’s whereabouts. . .are crucial issues in this case and other related cases and that if he is forced to reveal this information, these testimonial disclosures could subsequently be used to incriminate him and/or prosecute him for a criminal offense.” (DE 293, p.4-5) Accordingly, Epstein’s financial information is also protected from disclosure as revealing same (or admitting or denying same) may require him to identify the asset transferred or other financial information which would waive his 5th Amendment privilege not to testify about all assets and his financial condition. If such a subject-matter waiver occurred, subsequent subpoenas for information and the corresponding information may identify his whereabouts on a particular day and time and may also lead to the identity of witnesses that may have knowledge of the alleged events. Moreover, the information sought relates to potential federal claims violations that are not the subject of this action and, thus, a waiver in this regard could expose Epstein to future criminal prosecution. See DE 282 and 283, in camera. Plaintiff’s attempt to backdoor this information though Epstein by virtue of her artfully phrased Request for Admissions (coupled with her Request for Production and Interrogatories) must fail.

Clearly, this court has already ruled that Epstein can properly invoke his Fifth Amendment right to not identify a person who may have information pertaining to the alleged events. Stated differently, Epstein cannot be compelled to provide information that would lead to the identity of witnesses that may have knowledge of the alleged events or information concerning potential federal claims violations that are not the subject of this action because it could expose Epstein to future criminal prosecution and self-incrimination. See DE 282 and 283, in camera. In sum, Epstein cannot be required to be a witness against himself or provide information that may incriminate him and lead to future prosecution.

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For these reasons, Epstein's justified concern with regard to admitting and/or denying the above Request and the resulting waiver of his Fifth Amendment Privilege in this regard and/or providing self-incriminating information is substantial, real and not merely imaginative. Accordingly, based on the facts and circumstances of this case, and under applicable law, Defendant's assertion of the protections afforded under the 5th, 6th, and 14th Amendments of the United States Constitution are required to be upheld.

The Requests For Admissions Seek Attorney-Client And Work-Product Privileged Material And Rules 408 And 410, Fed. Evid. And §90.410, Fla. Stat., Preclude Responses

Next, a reading of the particular discovery requests reveals that they encompass attorney-client and work-product privileged material. See infra. As this court has already ruled (DE 242), Epstein cannot be compelled to create a privilege log because that would be tantamount to compelled testimony to which Defendant's constitutional protections apply.

This requests also seek the identification of information that was exchanged with federal authorities in the context of discussions that are in essence immunized under the provisions of FRE 410 in order to encourage the resolution of pending investigations without trials including, but not limited to, the potential federal claims violations provided to this court, *in camera*. (DE 282 and 282) FRE 410(4) is particularly directed to communications in matters which, like Epstein's, did not result in a plea of guilty to any federal charge. Fla. Stat. §90.410 provides parallel protections in state criminal matters. To the extent Epstein's counsel provided the authorities with any information it cannot, by the terms of that rule, be used in subsequent litigation as same is work-product. Likewise, the information received from the federal authorities, if any, as part of a give and take, is also subject to FRE 410. Finally, the purposes of FRE 408 provide further protection for both state and federal interchanges of information. If Epstein is compelled to respond to the requests for admissions or produce this information, not

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only will it violate his Fifth Amendment privilege, but it will also result in an open-ended waiver of his attorney-client and work-product privileges.

Additionally, the requests may pertain to the State Criminal Proceeding and the Federal Investigation by the USAO. Therefore, the requests may concern information relating to the negotiation(s) and eventual entering into of a Plea and the negotiation(s) and eventual entering into the NPA. Likewise, all the requests, as worded, seek an admission or denial of the existence of information in connection with "compromise negotiations." That alone is compelled disclosure. Federal Evidence Rules 408 and 410 and Florida Statute §90.410 prevent the production (or, in this case, the identification) of such material. The full text of Federal Evidence Rules 408 and 410, and Florida Statute §90.410 is found at footnote 1 and is incorporated herein¹. Clearly, discovery in criminal cases is not congruent with discovery in

¹ Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses.--Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.--This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

CREDIT(S)

(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933; Apr. 12, 2006, eff. Dec. 1, 2006).

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

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civil cases. Here, the information requested involves negotiations with the State and the USAO and their investigation. If the USAO cannot be compelled to release its investigation(s) and related work-product, how can Epstein be compelled to disclose or identify same in violation of his constitutional rights and his attorney-client and work-product privileges? He cannot.

Moreover, any information exchanged by Epstein's attorneys and the State was exchanged pursuant to Fla.R.Crim.P. §3.220 and is therefore protected under that Rule. Further, the information is "work-product" information. See id. and 14B *Fla. Jur.2d Criminal Law* §1412. Epstein cannot be compelled to admit or deny the existence of same.

Wherefore, Epstein respectfully Request that this Court issue and order:

- a. finding that the danger Epstein faces by being forced to testify in this case relative to the above Request for Admissions is substantial and real, and not merely trifling or imaginary;
- b. sustaining Epstein's Fifth Amendment Privilege and other delineated constitutional privileges as it relates to the above Request for Admissions and denying Plaintiff's Motion in that regard; and

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

Florida Evidence Code

90.410. Offer to plead guilty; nolo contendere; withdrawn pleas of guilty

Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

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c. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

By:

MICHAEL J. PIKE, ESQ.
Florida Bar #617296

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this 6 day of October, 2009

Respectfully submitted,

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Jane Doe No. 2 v. Jeffrey Epstein
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