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, 08-80380, 08-80381, 08-80994,
08-80993, 08-80811, 08-80893, 09-80469,
09-80591, 09-80656, 09-80802, 09-81092
_____/

ORDER

THIS CAUSE is before the Court on Plaintiffs' Motion to Compel Responses to Net Worth Discovery (D.E. #333). For the following reasons said Motion is granted in part and denied in part as follows.

In this case, which has been consolidated for purposes of discovery, Plaintiffs are former under-age girls who allege they were sexually assaulted by Defendant, Jeffrey Epstein ("Epstein"), at his Palm Beach mansion home. The scheme is alleged to have taken place over the course of several years in or around 2004-2005, when the girls in question were approximately 16 years of age. As part of this scheme, Epstein, with the help of his assistant Sarah Kellen, allegedly lured economically disadvantaged minor girls to his homes in Palm beach, New York and St. Thomas, with the promise of money in

exchange for a massage. Epstein purportedly transformed the massage into a sexual assault. The three-count Complaint alleges sexual assault and battery (Count I), intentional infliction of emotional distress (Count II), and, coercion and enticement to sexual activity in violation of 18 U.S.C. §2422 (Count III).

In 2008, Epstein entered into a Non-Prosecution Agreement with the United States Attorney General's Office for the Federal Southern District of Florida and the State Attorney's Office for Palm Beach County. Under the terms of the Non-Prosecution Agreement, any criminal prosecution against Epstein is deferred as long as he abides by the certain terms and conditions contained therein. If at any time the United States Attorney's Office has reason to believe Epstein is in breach of the Agreement, it need only provide Epstein's counsel with notice of the breach and then move forward with Epstein's prosecution. Accordingly, the mere fact the Government and Epstein have entered into a Non-Prosecution Agreement does not mean that Epstein is free from future criminal prosecution.

By the instant Motion Plaintiffs seek an order compelling Epstein to respond to various discovery requests (production and interrogatory) which seek information related to Epstein's net worth. Defendant has responded by asserting several objections, which to the extent necessary shall be discussed subsequently herein, the primary one of which is an assertion of his Fifth Amendment privilege.

The Fifth Amendment serves as a guarantee against testimonial compulsion and provides, in relevant part, that "[n]o person...shall be compelled in any Criminal Case to be a witness against himself." Id. In practice, the Fifth Amendment's privilege against self-incrimination "permits a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him

in future criminal proceedings." Edwin v. Price, 778 F.2d 668, 669 (11th Cir. 1985)(citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). The privilege is accorded "liberal construction in favor of the right it was intended to secure," Hoffman v. United States, 341 U.S. 479, 486 (1951), and extends not only to answers that would in themselves support a criminal conviction, but extends also to those answers which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. Id.; Blau v. United States, 340 U.S. 159 (1950). Thus, information is protected by the privilege not only if it would support a criminal conviction, but also in those instances where "the responses would merely 'provide a lead or clue' to evidence having a tendency to incriminate." United States v. Neff, 615 F.2d 1235, 1239 (9th Cir.), cert. denied, 447 U.S. 925 (1980).

The Fifth Amendment's privilege against self-incrimination comes into play only in those instances where the witness has "reasonable cause to apprehend danger from a direct answer." Hoffman, 341 U.S. at 486 (citing Mason v. United States, 244 U.S. 362, 365 (1917)). "The claimant must be 'confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." United States v. Apfelbaum, 445 U.S. 115, 128 (1980).

When the Fifth Amendment privilege is raised as a bar to discovery, a blanket refusal to answer questions or to produce documents is improper. Anglada v. Sprague, 822 F.2d 1035, 1037 (11th Cir. 1987). Instead, the privilege must be asserted in response to a particular question, and in each instance the burden is on the claimant to justify invocation of the privilege. Id. Once a particularized showing has been made, "[i]t is for the court to decide whether a witness' silence is justified and to require him to answer if it clearly appears to the court that the witness asserting the privilege is mistaken as to its validity." In re Morganroth, 718 F.2d 161, 166-67 (6th Cir. 1983). In making this

determination the judge is instructed to view the facts and evidence presented on a case-by-case basis, and "must be governed as much by his perception of the peculiarities of the case, as by the facts actually in evidence." Hoffman, 341 U.S. at 487.

The law is well established that the Fifth Amendment privilege may not apply to specific documents "even though they contain incriminating assertions of fact or belief, because the creation of those documents was not 'compelled' within the meaning of the privilege." United States v. Hubbell, 530 U.S. 27, 35-36 (2000). However, in certain instances, "'the act of production' itself may implicitly communicate 'statements of fact.'" Id. For this reason the Fifth Amendment privilege also encompasses the circumstance where the act of producing documents in response to a subpoena or production request has a compelled testimonial aspect Id. Thus, in those instances where the existence and/or location of the requested documents are unknown, or where production would "implicitly authenticate" the requested documents, the act of producing responsive documents is considered testimonial and is protected by the Fifth Amendment. In re Grand Jury Subpoena, 1 F.3d 87, 93 (2d Cir. 1993); see also Fisher v. United States, 425 U.S. 391, 410 (1976)(issue expressed as whether compliance with a document request or subpoena "tacitly conceded" the item's authenticity, existence or possession by the defendant).

The Court begins with an analysis of the Fifth Amendment privilege as applied to each request or category of requests. In the event the Court determines that a certain request does not infringe upon Epstein's Fifth Amendment privilege, Epstein's additional objections to that request shall be addressed. Where appropriate, the Court looks to those portions of Defendant's Response Memorandum submitted *in camera*. In this regard, the Court notes that in their Reply Memorandum (D.E. #426), Plaintiffs take issue with

Defendant's failure to obtain court approval before submitting the subject material for *in camera* review. While the Court agrees the better practice would have been to obtain court approval before such filing, under the unique circumstances of this case, the undersigned does not find such lapse fatal to Defendant's position. For purposes of completeness, however, the undersigned hereby *sua sponte* allows the *in camera* submission provided by Defendant, which the undersigned has this day submitted for filing under seal in the Clerk's Office.

The requests at issue are in the form of interrogatories and requests for production and essentially seek overlapping information, namely, all federal and state income tax returns and related documents filed with the government between 2003 and 2008 (Prod. Reqst. No. 1 and Interr. Reqst. Nos. 2 - 3); all documents relating to Defendant's assets, liabilities, income, expenses and net worth for the last five years (Prod. Reqst. No. 2 and Interr. Reqst. Nos 1-7, 10-12); all documentation relating to financing or loans requested or applied for by the Defendant including loan applications, appraisals, financial spreadsheets, etc. (Prod. Reqst. No. 3 and Interr. Reqst. Nos. 1-3, 7); all appraisals indicating fair market value of real estate and other property owned by Defendant (Prod. Reqst. No. 4 and Interr. Reqst. Nos. 8-9); and, all documents relating to any investment or savings accounts owned or controlled by Defendant such as account statements and summaries (Prod. Reqst. No. 5 and Interr. Reqst. Nos. 1-2, 10-12). As stated previously Defendant raised the same general objection to each of these requests, the primary objection being that to force him to respond would violate his Fifth Amendment privilege against self-incrimination.

With the exception of Prod. Reqst. No. 1, which shall be discussed subsequently, the Court finds the subject requests objectionable in that they seek compelled

statements/admissions that could reasonably furnish a link in the chain of evidence needed to prosecute Epstein in future criminal proceedings related both to the issues in the instant case and/or to the issues that relate to a separate criminal action about which Defendant has a substantial and reasonable basis to be concerned about. In the latter regard the Court relies, in part, upon the submission provided by Defendant *in camera* with respect to the "target offenses" referenced therein.

As noted previously, the Fifth Amendment privilege against self incrimination is accorded "liberal construction," Hoffman, 341 U.S. at 486, and extends not only to answers that would in themselves support a criminal conviction, but extends also to those answers which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. Id. Thus to be afforded protection, the answer need not necessarily be enough to support a criminal conviction; it is enough if the response merely provides a lead or clue to evidence having a tendency to incriminate. Neff, 615 F.2d at 1239.

In asserting his Fifth Amendment privilege, Epstein expresses a concern that if forced to respond to the subject requests regarding his financial net worth, financial history and witnesses with knowledge of his actions, he may be deemed to have waived 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 in Epstein's in camera submission. Given the allegations raised in the various Complaints and the elements required to convict Epstein of a crime, and considering the background facts underlying the instant case, and the issues outlined in Defendant's submission *in camera*, the Court finds these concerns are reasonable, real and not unjustified. It goes without saying that being forced to produce documents and/or produce lists identifying the existence of the detailed financial information sought and disclosing information regarding the identity and location of

potential witnesses against Defendant is tantamount to forcing testimonial disclosures that would communicate statements of fact. See Fisher, 425 U.S. at 410 (noting that the Fifth Amendment covers situations where the act of producing documents has "communicative aspects of its own wholly aside from contents of the papers produced").

Apart from Defendant's justified concerns regarding waiver, are the very real concerns that by forcing Defendant to respond to the subject discovery requests regarding his financial status and history, the Court risks providing the government with a link in the chain of evidence needed to convict Defendant of a crime. The potential for providing such a "link" is high when one considers that by forcing Defendant to respond, he will be implicitly communicating statements of fact, authenticating documents and testifying to their location, as well as providing clues as to the identity and location of witnesses that by such disclosure may serve to further a criminal investigation against him. Further, as the requests at issue would require disclosure in connection with Defendant's ownership of assets and transfers of assets inside and outside the United States, such disclosure could reveal the availability to him and/or use by him of interstate facilities, which again may implicate Defendant in additional crimes. In short, the requests at issue seek to have Defendant be a witness against himself, assist with Plaintiffs' investigation and identify areas that could result in future prosecution of Defendant, a result clearly prohibited by the Constitution. In this regard, Plaintiffs' claims that Defendant's constitutional rights are "not even remotely implicated" because the requests relate solely to Defendant's net worth and are "unrelated to Defendant's inducement of minors to sexual activity,"[1] ring hollow. See Rudy-Glanzer v. Glanzer, 232 F.3d at 1263 (the "privilege" against self-incrimination does

[1] See Plaintiffs' Mtn. (D.E. #333), p.7.

not depend upon the likelihood, but upon the possibility of prosecution and also covers those circumstances where the disclosures would not be directly incriminating, but could provide an indirect link to incriminating evidence).

In accordance with the foregoing the Court finds that such forced disclosure with regard to the requests at issue presents a real and substantial danger of self-incrimination in this case, in other related cases, and relative to other potential realistically based federal claims. The Court finds further that the danger Defendant faces by being forced to testify in this instance is "substantial and real, and not merely trifling or imaginary" as required. Apfelbaum, 445 U.S. 128. On this basis the Court finds the privilege raised as to all requests other than Prod. Reqst. No. 1, which shall be discussed shortly, validly asserted. Accordingly, Defendant's objection as it relates to each of the subject net worth discovery requests, other than Prod. Reqst. No. 1, is sustained and Defendant need not produce documents or serve answers to said discovery requests.

The Court does not hold similarly with respect to Prod. Reqst. No. 1, which seeks "all federal and State income tax returns, including all W-2 forms, 1099 forms and schedules, for tax years 2003-2008," The law is well established that the Fifth Amendment privilege against self-incrimination does not extend to documents whose existence is known to the government or is a foregone conclusion. Fisher, 425 U.S. at 410; United States v. Hubbell, 530 U.S. 27, 44 (2000); United States v. Ponds, 454 F.3d 313, 325 (D.C. Cir. 2006). Thus, while the Fifth Amendment covers situations where the act of producing documents has "communicative aspects of its own wholly aside from contents of the papers produced" Fisher, 425 U.S. at 410, the doctrine does not apply where the government has "prior knowledge of either the existence or the whereabouts of the...documents ultimately produced... ." Hubbell, 530 U.S. at 44.

Prod. Reqst. No. 1 seeks production of documents the government is already in possession of, making the government's prior knowledge of the documents sought an obvious and undeniable "foregone conclusion." As such, Defendant can not reasonably and in good faith argue that in producing these documents to Plaintiff he will somehow be incriminating himself. In re Grand Jury Subpoena, 383 F.3d 905, 910 (9th Cir. 2004) (noting there can be no self-incrimination by production where the "existence and location of the documents ... are a 'foregone conclusion' and [the claimant] ... adds little or nothing to the sum total of the Government's information by conceding that he in fact has the documents.").

Defendant's alternative objection that tax returns enjoy a higher degree of protection than ordinary financial documents because tax returns are "confidential under federal law,"[2] does little to advance his cause. The Court has already addressed and rejected this argument finding that where, as here, the moving party has demonstrated a need for the tax returns at issue, the court's order requiring such disclosure voids the confidentiality concerns the law was designed to protect. Notwithstanding the foregoing, in order to ameliorate Defendant's concerns in this regard the undersigned hereby orders that the tax returns and related documents filed with the government that are subject to production by virtue of the within Order may be disclosed only to the parties and to the attorneys of record in this case and to the agents of such parties and/or attorneys and may only be utilized for purposes of this litigation. In accordance with the above and foregoing, it is hereby,

ORDERED AND ADJUDGED that Plaintiffs' Motion to Compel Responses to Net

[2] See Defendant's Resp., p.13.

Worth Discovery (D.E. #333) is **GRANTED IN PART AND DENIED IN PART IN ACCORDANCE WITH THE TERMS OF THIS ORDER**. For the reasons stated herein, the Court finds Defendant's Fifth Amendment objections validly asserted with respect to each of the subject requests other than Prod. Reqst. No. 1. As for Prod. Reqst. No. 1, Defendant is ordered to produce the documents responsive to this request within ten (10) days from the date hereof, or if said documents are not in Defendant's possession or immediate control, must produce a release with regard to same within five (5) days from the date hereof.

DONE AND ORDERED in Chambers, in West Palm Beach Florida, this 4th day of March, 2010.

LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

CC: The Hon. Kenneth A. Marra
All Counsel of Record