UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80381-MARRA-JOHNSON

JANE DOE NO. 5,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.
_____/

MOTION TO COMPEL AND/OR IDENTIFY JANE DOE #5 IN THE STYLE OF THIS CASE AND MOTION TO IDENTIFY JANE DOE IN THIRD-PARTY SUBPOENAS FOR PURPOSES OF DISCOVERY, OR ALTERNATIVELY, MOTION TO DISMISS SUA SPONTE, WITH INCORPORATED MEMORANDUM OF LAW[1]

Defendant, JEFFREY EPSTEIN ("Epstein" or "Defendant"), by and through his undersigned attorneys, hereby requests that this Court enter an order identifying in the style of this case the complete legal name of the Plaintiff, JANE DOE #5 ("JANE DOE"), to substitute her complete legal name in this case in place of "JANE DOE" and, equally important, allowing Defendant to identify her in various subpoenas that Epstein must serve so Epstein can defend this case or, alternatively, Motion to Dismiss Entire Action Sua Sponte. In support, Mr. Epstein states as follows:

I. Motion And Incorporated Memorandum Of Law

a. Background

1. On April 15, 2008, Plaintiff, a 21-year-old female, filed this action

[1] Several of the discovery responses attached to this Motion and to the companion "Motions to Identify" filed in other related matters are markedly different. Therefore, each requires the court's attention on an individual basis.

against Epstein.

2. On February 27, 2009, Plaintiff filed her Second Amended Complaint against Epstein, which alleges three causes of action against him: Count I – Sexual Assault and Battery; Count II – Intentional Infliction of Emotional Distress; and Count III – Coercion and Enticement to Sexual Activity in violation of 18 U.S.C. §2422.

3. The Second Amended Complaint appears to raise both Federal and Florida State substantive issues (DE 63).

4. Plaintiff alleges, among other things, that she is entitled to money damages pursuant to 18 U.S.C.A. §2422 and 2255 (in the wherefore clause) and by virtue her claims that Epstein sexually battered her and caused her emotional distress. Plaintiff alleges separate counts against Mr. Epstein, on which he must conduct discovery to defend this case.

5. In particular, JANE DOE claims, in Count I for sexual battery, that she has and will suffer ". . .severe and permanent traumatic injuries, including mental, psychological and emotional damages." ¶21, 2nd Am. Comp., DE 63. In Count II for Sexual Battery, plaintiff claims entitlement to recover for the impairment to her "mental and emotional health," ¶25, 2nd Am. Comp., DE 63, and ". . .severe emotional distress. . ." and ". . .severe mental anguish and pain. . . ." ¶¶26, 27, 2nd Am. Comp., DE 63. In Count III for Coercion and Enticement to Sexual Activity in violation of 18 U.S.C. §2422, plaintiff claims entitlement to recover for ". . .personal injury, including mental, psychological and emotional damages" ¶33, 2nd Am. Comp., DE 63. Plaintiff also claims entitlement to

"punitive damages" and "actual and compensatory damages." DE 63. **See also Exhibit "A"**, Interrogatory Response Number 9.

6. Epstein has a constitutional due process right to defend himself and to seek the production of information that will assist in his defense of the allegations in the 2nd Amended Complaint. In this case, Plaintiff's counsel objected to Epstein serving subpoenas on Plaintiff's treating physicians and other third parties. Thus, this motion seeks to identify JANE DOE in the style of this case, to identify JANE DOE in various third-party subpoenas for discovery purposes and, alternatively, to dismiss this entire action sua sponte. The undersigned's experience in "Jane Doe" lawsuits is that once a Plaintiff is identified, other individuals come forward in the discovery phase with information which often directly contradicts allegations as to the events and damages. For instance, witnesses may testify that Plaintiff was paid by others for similar sexual acts she claims Mr. Epstein forced upon her or that she willingly participated in certain act(s) that would negate or lessen her damages. This goes directly to Plaintiff's damage claim.

7. Likewise, subpoenas must be issued to third-party treaters and current and former employers, and those subpoenas will seek to obtain records related directly to Plaintiff's claims and her damages (i.e., her claim for severe and permanent traumatic injuries, including mental, psychological and emotional damages" and loss of self-esteem as referenced above). Cherenfant v. Nationwide Credit, Inc., 2004 WL 5315889 (S.D. Fla. 2004)(order allowing discovery of medical records consistent with Plaintiff's allegations in complaint).

This too goes directly to Plaintiff's damage claims. Medical providers, employers, co-employees, etc...have direct and relevant personal knowledge and observations regarding damages, i.e., emotional state, activities, self-esteem, etc....

8. Fed.R.Civ.Pro. 26 allows for broad discovery. Epstein is not required to rely solely on Plaintiff's discovery responses in defending this case, nor is Epstein required by any statute or law to rely only upon what Plaintiff produces in discovery or may obtain from her own medical treaters through her counsel, and to then provide to Epstein only after Plaintiff has reviewed same. In certain related state court actions involving Epstein, the undersigned offered to serve certain subpoenas on the medical treaters and other third-parties with full name, date of birth and Plaintiff's social security number (last four digits), but agreed that the subpoenas filed with the clerk would be redacted. Several attorneys agreed to this procedure in those cases. In Federal Court, subpoenas are not filed with the clerk. Thus, in this matter, the undersigned offered to serve the third-party subpoenas with plaintiff's full name, date of birth and social security number (last four digits) and would agree to redact any identifying information on any documents filed with this court if that ultimately became necessary. As discussed below, Plaintiff's counsel did not agree. Further, Plaintiff's counsel claims a HIPPA complaint protective order is necessary. Such is not the case when a Plaintiff places her mental, emotional, psychological and physical condition at issue.

9. Moreover, when an order from the court is attached to the

Subpoena, treaters and other third parties produce the records and show up to the depositions with the records requested because the deponent knows what to bring by virtue of knowing the identity of the Plaintiff.

10. Epstein's counsel intends to serve and depose witnesses duces tecum. If Epstein is not permitted to identify JANE DOE, how will any deponent know who the parties are and what to bring to the deposition pursuant to the duces tecum? Further, how will Epstein be able to defend the claims. Just like the Plaintiff, Epstein is entitled to due process.

11. While it is within the sound discretion of this court to allow a party to proceed anonymously, Plaintiff should not attempt to utilize that discretion as a shield from legitimate and necessary discovery. Epstein has a fundamental due process right to conduct discovery.

b. Motion To Identify JANE DOE In Style Of This Case

12. As discussed below, Epstein has fundamental due process right to defend himself in this civil litigation. While JANE DOE travels under a pseudonym, various newspaper articles identifying Epstein have been released discussing the alleged claims against him. Allowing JANE DOE to litigate this matter under a pseudonym is preventing Epstein from defending this suit including, but not limited to, preventing him from locating individuals that may have information about this lawsuit and information about JANE DOE that may discredit her allegations and/or lessen the monetary damages she seeks to recover. It is the undersigned's experience that once identified, witnesses begin to come forward. See *supra*.

13. In Doe v. Lepley, 185 F.R.D. 605 (D. Ct. NV 1999), a sexual harassment case, the court reasoned that there is no express or implied right to bring an action anonymously. Id. at 606. Moreover, Fed. R. Civ. P 10(a) requires that the complaint include the names of the parties. Id. When Plaintiffs are permitted to proceed anonymously, the court must employ a balancing test to decide if the plaintiff has a substantial privacy interest that outweighs the presumption of openness in judicial proceedings. Id., *citing*, Doe v. Frank, 951 F.2d 320, 323 (11th Cir. 1992)(requiring complaint to include the names of the parties serves more than administrative convenience, it protects the public's legitimate interests in knowing all the facts involved, including the identity of the parties – thus denying request to proceed anonymously). The factors include:

a. whether the plaintiff is challenging governmental activity;

b. whether the party defending the suit would be prejudiced;

c. whether the plaintiff is required to disclose information of utmost intimacy;

d. whether the plaintiff is compelled to admit an intention to engage in illegal conduct, thereby risking criminal prosecution;

e. whether the Plaintiff would risk suffering injury if identified;

f. whether the interests of children are at stake; and

g. whether there are less drastic means of protecting the legitimate interests of either party.

Doe v. Frank, 951 F.2d at 323.

Plaintiff does not fall under any of the factors. Moreover, even if she did meet one of the factors, "[t]he fact that [a] Doe [Plaintiff] may suffer some

personal embarrassment, standing alone, does not require the granting of a request to proceed under a pseudonym." Id; see also Doe v. Rostker, 89 F.R.D. 159 (N.D. Calif. 1981). Any substantial privacy interests JANE DOE has must outweigh the customary and constitutionally embedded presumption of openness to judicial proceedings. Doe v. Frank, 951 F.2d at 323; Doe v. Bergstron, 2009 WL 528623 (C.A.9(Or.))(denying request to proceed anonymously in civil action by Plaintiff where Plaintiff's arrest, prosecution and acquittal were matters of public record).

14. In Sweetland v. State, 535 So.2d 646 (Fla. 1st DCA 1988), the court reasoned that the purpose of discovery is to eliminate the likelihood of surprise and to insure a fair opportunity to prepare for trial. Florida Rule of Civil Procedure 1.280(b)(1); see also Surf Drugs, Inc., v. Vermette, 236 So.2d 108, 111 (Fla. 1970)(stating that the rules of discovery should be afforded broad and liberal treatment to effectuate their purpose), citing, Hickman v. Taylor, 329 U.S. 495, 501, 507 (1947).

15. Next, the right to go to court to resolve disputes is a fundamental right. D.R. Lakes, Inc. v. Brandsmart U.S.A. of West Palm Beach, 819 So.2d 971 (Fla. 4th DCA 2002). All litigants are afforded an equal opportunity. Lingle v. Dion, 776 So.2d 1073 (Fla. 4th DCA 2001). The Florida Constitution establishes the right commonly known as access to courts. Mitchell v. Moore, 786 So.2d 521 (Fla. 2001). Courts shall be open to any person for the redress of any injury and justice shall be administered without sale, denial or delay. Art. I, §21, Fla. Const.; 10A Fla. Jur. 2d, Constitutional Law, §360.

16. If Jane Doe's name is not disclosed and identified, Mr. Epstein will not be afforded his fundamental right to fairly litigate this dispute and prepare for trial. Accordingly, Epstein requests that JANE DOE be identified by her legal name in the pleadings.

c. Motion To Identify JANE DOE In Third-Party Subpoenas

17. While discovery in this matter is underway; Epstein is effectively being denied due process rights by Plaintiff's counsel from conducting broad, open and liberal discovery in that Plaintiff's counsel has objected to, among other things, Epstein identifying JANE DOE in various third-party subpoenas to her medical providers and other third parties.

18. The undersigned must serve subpoenas on medical doctors to obtain medical information on JANE DOE's alleged psychological and physical damages as same goes to the heart of Epstein's defenses and Plaintiff's damages. Plaintiff is claiming emotional/psychological damages. See **Exhibit "A"**, Interrogatory Response Number 9. Therefore, Epstein is entitled to know her psychological condition(s) before and after the alleged incident(s) she references in the Second Amended Complaint. In particular, JANE DOE alleges specific disorders as a result of Epstein's alleged conduct – ". . .mental and emotional injuries. . .depressive episodes, anger, low self-esteem, flashbacks, mood swings, lack of trust, generally, and lack of trust in men (particularly of older men around Plaintiff's daughter)." (Emphasis Added). Id. Epstein is also entitled to know, among other things, whether she had any physical complaints or whether there was ever any evidence of physical battery on JANE DOE's body

from the acts she complains of in the 2nd Amended Complaint. The need to serve third-party subpoenas on medical doctors is a basic discovery need related to the claims alleged by JANE DOE for which Plaintiff's counsel refuses to compromise. Balas v. Ruzzo, 703 So.2d 1076 (Fla. 5th DCA 1997), rev. denied, 719 So.2d 286 (Fla. 1998)(discoverability of Plaintiff's history of sexual activity is relevant to damages); United States v. Bear Stops, 997 F.2d 451 (8th Cir. 1993)(deals with "admissibility of other acts of sexual abuse by individuals other than the defendant to explain why a victim of abuse exhibited behavioral manifestations of a sexually abused child.") If Plaintiff saw a psychologist or other physician during or after the time periods she claims she was assaulted by Epstein but either did not discuss or did discuss the incidents (or lack thereof) would be directly relevant to her damage claims. Plaintiff seeks physical and emotional/mental personal injury type damages, and the Epstein must conduct his own discovery thereon. See *supra*. No valid discovery objections or exemptions exist preventing necessary and reasonable discovery. To hold otherwise prevents Mr. Epstein from preparing and defending this matter.

19. In defending this lawsuit, Mr. Epstein should be permitted broad discovery, whether admissible at trial or not. Fed.R.Civ.Pro. 26 provides, in pertinent part, that "parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action." Plaintiff's counsel's refusal to identify JANE DOE in the third-party subpoenas referenced above is prejudicing Mr. Epstein by virtue of preventing discovery all together, which is in complete contradiction of the discovery rules and Epstein's

substantive due process rights.

20. In addition, subpoenas must also be served upon various local and state institutions in order to determine what crimes, if any, JANE DOE has committed (i.e., crimes that involve dishonesty and/or false statement). Obviously, this goes directly to the heart of JANE DOE's damages she claims ". . .mental and emotional injuries. . .depressive episodes, anger, low self-esteem, flashbacks, mood swings, lack of trust, generally, and lack of trust in men (particularly of older men around Plaintiff's daughter)" – caused by Epstein or other events in her life) for which a jury is entitled to hear about at trial, and certified records must be obtained from the clerk should JANE DOE answer certain questions regarding her crimes incorrectly. See Exhibit "A".

21. Esptein is entitled to know whether Jane Doe committed and/or was charged with any crimes. If Jane Doe was charged with crimes, Epstein is entitled to obtain certified copies of those crimes Plaintiff may have committed for purposes of discovery and impeachment. Questions will be asked regarding those crimes (e.g., Have you been convicted of a crime of dishonesty or false statement? If so, how many times? Have you been convicted of a felony? If so, how many times?) To hold otherwise would not only prevent broad discovery but would ultimately result in reversible error at any trial.

II. Conclusion

22. Epstein requests the following relief:

a. That JANE DOE be identified by her legal name in the style of this case;

b. That Epstein be granted leave to identify JANE DOE by her

legal name in Third-Party Subpoenas (but not file them in Court or, if required, in a redacted form); and

c. That, on an alternative basis, this court dismiss this action Sua Sponte until such time as JANE DOE identifies herself in the style of this matter. Doe v. Rostker, 89 F.R.D.at 163.

WHEREFORE, Epstein, Jeffrey Epstein, respectfully requests that this Court enter said order granting the relief requested above, and for such other and further relief as this Court may deem just and proper.

By: _____
ROBERT D. CRITTON, JR., ESQ.

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 , 2009:

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Respectfully submitted,

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