

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

JANE DOE NO. 2,

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

Plaintiff,

vs.

JEFFREY EPSTEIN

Defendant.

JANE DOE NO. 3,

CASE NO.: 08-CV-80232-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN

Defendant.

JANE DOE NO. 4,

CASE NO.: 08-CV-80380-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN

Defendant.

JANE DOE NO. 5,

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

Plaintiff,

Vs.

JEFFREY EPSTEIN,

Defendant.

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CASE NO.: 08-80994-CIV-MARRA/JOHNSON

JANE DOE NO. 6,

Plaintiff,

JEFFREY EPSTEIN,

Defendant.

CASE NO.: 08-80993-CIV-MARRA/JOHNSON

JANE DOE NO. 7,

Plaintiff,

JEFFREY EPSTEIN

Defendant.

CASE NO.: 08-80811-CIV-MARRA/JOHNSON

C.M.A.,

Plaintiff,

JEFFREY EPSTEIN

Defendant.

CASE NO.: 08-80893-CIV-MARRA/JOHNSON

JANE DOE,

Plaintiff,

JEFFREY EPSTEIN et al,

Defendants.

CASE NO.: 09-80469-CIV-MARRA-JOHNSON

DOE II,

Plaintiff,

JEFFREY EPSTEIN et al,

Defendants.

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JANE DOE NO. 101,

CASE NO.: 09-80591-CIV-MARRA-JOHNSON

Plaintiff,

JEFFREY EPSTEIN

Defendant.

JANE DOE NO. 102,

CASE NO.: 09-80656-CIV-MARRA-JOHNSON

Plaintiff,

JEFFREY EPSTEIN,

Defendant.

DEFENDANT JEFFREY EPSTEIN'S RESPONSE TO PLAINTIFFS JANE DOE NOS. 101 and 102's MOTION FOR AN ORDER FOR THE PRESERVATION OF EVIDENCE & INCORPORATED MEMORANDUM OF LAW (dated 5/26/09, DE 114)

Defendant, JEFFREY EPSTEIN, ("EPSTEIN"), by and through his undersigned attorneys responds to the Plaintiffs' Jane Doe No. 101 and Jane Doe No. 102 ("Plaintiffs") Motion For And Order For The Preservation Of Evidence And Incorporated Memorandum Of Law, [DE 114], and states:

1. Plaintiffs once again mislead and mischaracterize the criminal counts to which EPSTEIN pled guilty. Contrary to Plaintiffs' representations in ¶1 of their motion and in their memorandum of law, EPSTEIN pled guilty to one count of felony solicitation (which was not related to a minor), under §796.07(2)(f), Fla.Stat., and one count of procuring a minor for prostitution under §796.03, Fla. Stat. Plaintiffs' reference to the "pleas of 'guilty' ... to various Florida state crimes involving the solicitation of minors for the prostitution and procurement of

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minors for the purposes of prostitution” mischaracterizes the specific counts to which EPSTEIN pled guilty.

2. As to Plaintiffs’ allegations in ¶¶ 2 and 3, many of the Plaintiffs’ allegations are without any factual basis and know such assertions to be false and untrue.

3. Defendant agrees with Plaintiff’s assertion that the Palm Beach Police Department (PBPD) executed a search warrant at EPSTEIN’s Palm Beach mansion on October 25, 2005. See ¶4 Plaintiffs’ motion.

4. Defendant’s attorneys have no objection to an order to preserve evidence similar to the one entered in the case of Doe v. Epstein, et al, Case No. 08-80804-CIV-MARRA/JOHNSON, [DE 20], and attached hereto as **Exhibit A**. EPSTEIN’s attorneys are unaware of any items referenced in Plaintiffs’ motion, ¶5-6, having been returned to EPSTEIN or his attorneys, but will agree to a preservation of such items to the extent such items exist.

5. As to ¶7 of Plaintiffs’ motion, EPSTEIN and his attorneys have no objection to the referenced authorities, (PBPD, FBI, USAO, and PBSAO), preserving items to the extent such items even exist, in a manner that said authorities deem appropriate.

6. As to ¶¶8, 9, and 10 of Plaintiffs’ motion re: documents, Defendant has asserted in other matters and asserts here, specific legal objections as well as his U.S. constitutional privileges, as follows: My attorneys have counseled me that at the present time I cannot select, authenticate, and produce documents relevant to this lawsuit and I must accept this advice or risk 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

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unconstitutionally burden my exercise of my constitutional rights, would be unreasonable, and would therefore violate the Constitution. In addition to and without waiving his constitutional privileges, the information sought is privileged and confidential, and inadmissible pursuant to the terms of the deferred prosecution agreement, Fed. Rule of Evidence 410 and 408, and §90.410, Fla. Stat. Further Defendants objects as the request to preserve evidence is overly broad and includes 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.

7. Responding to the grossly overly broad list and categories of documents and items alleged in Plaintiff's motion (§§8-10) involves a testimonial component. The Fifth Amendment Privilege extends to the act of production where, as here, it involves a self-incriminating testimonial communication or "a compelled testimonial aspect." United States v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037 (2000); Fisher v. United States, 425 U.S. 391 (1976); McCormick on Evidence, Title 6, Chap. 13. *The Privilege Against Self-Incrimination*, §138 (6th Ed.). *See also Malloy v. Hogan*, 84 S.Ct. 1489, 1495 (1964)(the Fifth Amendment's Self-Incrimination Clause applies to the states through the Due Process Clause of the Fourteenth Amendment - "[i]t would be incongruous to have different standards determine the validity of a claim of privilege based on the same feared prosecution, depending on whether the claim was asserted in state or federal court."); Hoffman v. U.S., 71 S.Ct. 814, 818 (1951), and progeny).

The Fifth Amendment Privilege may be invoked in a civil action where a litigant or witness is being asked to provide information or respond to a question that may incriminate him in a crime. See generally, DeLisi v. Bankers Ins. Company, 436 So.2d 1099 (Fla. 4th DCA 1983). The privilege against self-incrimination may be asserted during discovery when a litigant

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has “reasonable grounds to believe that the response would furnish a link in the chain of evidence needed to prove a crime against a litigant.” A witness, including a civil defendant, is entitled to invoke the Fifth Amendment privilege whenever there is a realistic possibility that the answer to a question could be used in anyway to convict the witness of a crime or could aid in the development of other incriminating evidence that can be used at trial. Id; Pillsbury Company v. Conboy, 495 U.S. 248, 103 S.Ct. 608 (1983).

The United States Supreme Court has made clear that the scope of the Fifth Amendment Privilege includes the circumstances as here “the act of producing documents in response to a subpoena (or production request) has a compelled testimonial aspect.” United States v. Hubbell, 530 U.S. 27, 36, 120 S.Ct. 2037, 2043 (2000). In explaining the application of the privilege, the Supreme Court stated:

We have held that “the act of production” itself may implicitly communicate “statements of fact.” By “producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic.”^{FN19} Moreover, as was true in this case, when the custodian of documents responds to a subpoena, he may be compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena.^{FN20} The answers to those questions, as well as the act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents. Whether the constitutional privilege protects the answers to such questions, or protects the act of production itself, is a question that is distinct from the question whether the unprotected contents of the documents themselves are incriminating.

FN19. “The issue presented in those cases was whether the act of producing subpoenaed documents, not itself the making of a statement, might nonetheless have some protected testimonial aspects. The Court concluded that the act of production could constitute protected testimonial communication because it might entail implicit statements of fact: by producing documents in compliance with a subpoena, the witness would admit that the papers existed, were in his possession or control, and were authentic. United States v. Doe, 465 U.S., at 613, and n. 11, 104 S.Ct. 1237; Fisher, 425 U.S., at 409-410, 96 S.Ct. 1569; id., at 428, 432, 96 S.Ct. 1569 (concurring opinions). See Braswell v. United States, [487 U.S.,] at

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104, 108 S.Ct. 2284; [*id.*,] at 122, 108 S.Ct. 2284 (dissenting opinion). Thus, the Court made clear that the Fifth Amendment privilege against self-incrimination applies to acts that imply assertions of fact. "... An examination of the Court's application of these principles in other cases indicates the Court's recognition that, in order to be testimonial, an accused's communication must itself, explicitly or implicitly, relate a factual assertion or disclose information. Only then is a person compelled to be a 'witness' against himself." *Doe v. United States*, 487 U.S., at 209-210, 108 S.Ct. 2341 (footnote omitted).

FN20. See App. 62-70. Thus, for example, after respondent had been duly sworn by the grand jury foreman, the prosecutor called his attention to paragraph A of the Subpoena Rider (reproduced in the Appendix, *infra*, at 2048-2049) and asked whether he had produced "all those documents." App. 65.

Finally, the phrase "in any criminal case" in the text of the Fifth Amendment might have been read to limit its coverage to compelled testimony that is used against the defendant in the trial itself. It has, however, long been settled that its protection encompasses compelled statements that lead to the discovery of incriminating evidence even though the statements themselves are not incriminating and are not introduced into evidence. Thus, a half century ago we held that a trial judge had erroneously rejected a defendant's claim of privilege on the ground that his answer to the pending question would not itself constitute evidence of the charged offense. As we explained:

"The privilege afforded not only extends to answers that would in themselves support a conviction under a federal criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951).

Compelled testimony that communicates information that may "lead to incriminating evidence" is privileged even if the information itself is not inculpatory. *Doe v. United States*, 487 U.S. 201, 208, n. 6, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). It's the Fifth Amendment's protection against the prosecutor's use of incriminating information derived directly or indirectly from the compelled testimony of the respondent that is of primary relevance in this case.

In summarizing its holding regarding the application of the Fifth Amendment Privilege to a production request, the Hubbell Court left "no doubt that the constitutional privilege against self incrimination protects" not only "the target of a grand jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of

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potentially incriminating evidence,” but the privilege also “has the same application to the testimonial aspect of a response to a subpoena seeking discovery of those sources.” At 43, and 2047. Here, Plaintiffs’ motion to preserve evidence by listing a large inventory of items is in reality no different than propounding a discovery request upon Defendant, and thus, Defendant is afforded the protection of the Constitutional privileges asserted herein.

8. As stated above, Defendant and Defendant’s attorneys have no objection to the entry of an order similar to **Exhibit A** hereto.

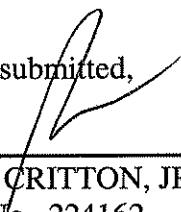
WHEREFORE, Defendant requests that the Court enter an order similar to that as entered in Exhibit A hereto.

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 10th day of June, 2009

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