

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, MOTION FOR RECONSIDERATION AND/OR REQUEST
FOR RULE 4 REVIEW AND APPEAL OF PORTIONS OF THE
MAGISTRATE'S ORDER DATED AUGUST 4, 2009 (DE 242), WITH
INCORPORATED OBJECTIONS AND MEMORANDUM OF LAW**

Defendant, Jeffrey Epstein (hereinafter "Epstein"), by and through his undersigned attorneys, hereby files his Motion for Reconsideration and/or for Request Rule 4 Review and Appeal of Portions of the Magistrate's Order (DE 242) pursuant to Rule 60, Fed.R.Civ.P. Rule 4, Rule 4(c) and Fed. R. Civ. P. 53(e). In support, Epstein states:

I. Procedural Background

1. This court entered an order (DE 242) stating that Epstein must provide responses to interrogatory numbers 7, 8 and 12 (sic 11) within 10 days from the date of said order. The same ruling was made as to request for production numbers 7 and 23.

See DE 242.

2. However, Epstein is submitting his motion for Reconsideration and/or Request for Rule 4 Appeal and specific objections with supporting case law only as to Interrogatory Numbers 7 and 11. Responses will be provided as to Interrogatory Number 8 and Request for Production numbers 7 and 23.

II. Rule 4 Appeal and Review

3. Rule 4 provides, in pertinent part, that:

Any party may appeal from a Magistrate Judge's Order. . . [and] [s]uch party shall file with the Clerk of Court, and serve on all parties, written objections which shall specifically set forth the order, or part thereof, appealed from a concise statement of the alleged error in the Magistrate Judge's ruling, and statutory, rule, or case authority in support of the moving party's position The District Judge shall consider the appeal and shall set aside any portion of the Magistrate Judge's order found to be clearly erroneous or contrary to law. The District Judge may also reconsider sua sponte any matter determined by a magistrate Judge under this Rule.

a. Interrogatory Numbers 7 and 11

4. Plaintiff served her Amended First Set of Interrogatories on Defendant and Request for Production, and Epstein served his responses thereto raising his constitutional privileges and guarantees and, in the alternative, raising specific other applicable objections. See Exhibits "A" and "B". Plaintiff filed her Motion to Compel (DE 57) Epstein filed his Response to Plaintiff's Motion to Compel Answers to Interrogatories and Responses to 1st and 2nd Production of Documents, and Incorporated Memorandum of Law. (DE 63) The arguments set forth therein are incorporated herein by reference (the "Response Memorandum") such that a concise statement of the Magistrate's error(s) relative to Interrogatory Numbers 7 and 11 may be the focus of this Motion for Reconsideration and/or Rule 4 Appeal and Review. Plaintiff filed her Reply thereto at

DE 81. Thereafter, the Magistrate-Judge entered an order on the above at DE 242 requiring, among other things, that Epstein respond to Interrogatory Numbers 7 and 11.

5. Interrogatory Numbers 7 and 11 and the Responses thereto provide:

Interrogatory Number 7 - List all time periods during which Jeffrey Epstein was present in the State of Florida, including for each the date he arrived and the date he departed.

Answer: Defendant is asserting specific legal objections to the interrogatories as well as his U.S. constitutional privileges. I intend to respond to all relevant questions regarding this lawsuit, however, my attorneys have counseled me that I cannot provide answers to any questions 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 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, Defendant also objects as the interrogatory is overbroad and seeks information that is neither relevant to the subject matter of the pending action nor does it appear reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's Complaint alleges a time period of "in or about 2004-2005." Plaintiff's interrogatory seeks information for a time period from January 1, 2003 until present.

Interrogatory Number 11 – Identify all telephone numbers used by Epstein, including cellular phones and land lines in any of his residences, by stating the complete telephone number and the name of the service provider.

Response: Defendant is asserting specific legal objections to the interrogatories as well as his U.S. constitutional privileges. I intend to respond to all relevant questions regarding this lawsuit, however, my attorneys have counseled me that I cannot provide answers to any questions 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 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, Defendant

also objects as the interrogatory is overbroad and seeks information that is neither relevant to the subject matter of the pending action nor does it appear reasonably calculated to lead to the discovery of admissible evidence. Plaintiff's allegations claim a time period of "in or about 2004-2005" and involve Defendant's Palm Beach residence.¹

(i). The Allegations In the Second Amended Complaint and The NPA²

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¹ The Court also considered various objections set forth in Defendant's Response Memorandum. See Order at [DE 242.]

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The image is a black and white graphic with a repeating pattern. It features a grid of 20 horizontal rows and 2 vertical columns. The bars are black on the left and white on the right, separated by a thin black vertical line. The bars are evenly spaced both horizontally and vertically, creating a striped effect. The overall pattern is clean and minimalist.

The image shows a document page with 25 horizontal black redaction bars. The bars are of varying lengths, with some being shorter and others longer, creating a pattern across the page. The redaction bars are solid black and completely obscure the text that would normally be present in those lines.

11. The Magistrate Judge also denied interrogatory numbers 1, 2, and 10 because those interrogatories sought the names of Epstein's employees or their telephone numbers and thus "would furnish a link in the chain of evidence needed to prosecute Epstein of a crime." (DE 242, p.8-9). Additionally, this court denied interrogatory

numbers 13, 14 and 17 because those asked Epstein to identify persons or witnesses that have knowledge of the events in question. Id. at p. 8. In making the decision, the court recognized, much like this Motion for Reconsideration and/or Appeal contends, that “. . . the facts alleged in the Complaints, the elements needed to convict Epstein of a crime, and . . . the Court’s knowledge concerning the cases at issue” provide a basis for Epstein to raise the privilege based upon “genuinely threatening questions” which could furnish a link in the chain of evidence needed to convict Epstein of a crime. (DE 242, p.18) United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980).

b. The District Court Judge Court Should Reverse or Modify The Magistrate Judge’s Order (DE 242) Relative to Interrogatory Numbers 7 and 11 Because The Specific Findings Therein Are Erroneous and Contrary to Law

(i) Specific Objections

12. In his Response Memorandum, Epstein cites authority supporting his application of the 5th Amendment Privileges and other constitutional privileges in which he relies upon in objecting to Interrogatory Numbers 7 and 11. In addition to those arguments and objections, this court should consider the arguments and objections set forth herein.

13. In short, the Magistrate Judge’s Order requires Epstein to answer Interrogatory Numbers 7 and 11 based upon the finding that his objections are “. . . so general and sweeping in nature [that they] amount[] to a blanket assertion of the [Fifth Amendment] privilege.” (DE 242, p.11) Obviously, Epstein objects to such a ruling, and provides below detailed reasoning demonstrating the validity of Epstein’s objections that answers to the subject interrogatories would realistically and necessarily furnish a link in the chain of evidence needed to prove a crime against him and would require him to

provide self-incriminating evidence relative to this case and to the other related cases that could result in a specific hazard of self-incrimination. For the reasons set forth below, Epstein's justified concern with regard to answering Interrogatory Numbers 7 and 11 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, the District Court Judge should reverse and/or modify the Magistrate's Order relative to Interrogatory Numbers 7 and 11.

(ii) Argument and Memorandum of Law

14. By answering Interrogatory Numbers 7 and 11, Epstein is being compelled to testify as to the issues and facts not only asserted in Plaintiff's Second Amended Complaint, but also to facts which 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. Again, the information sought all relate to potential federal claims of violations of [REDACTED]

15. Here, Epstein's whereabouts and telephone numbers are central issues to this case and other related cases. Answers to the interrogatories will undoubtedly result in subsequent subpoenas requesting information regarding Epstein's whereabouts and his numbers for his cellular telephones and landlines in ANY of his residences, which will obviously reveal the individuals Epstein spoke to, and the time and place where the conversations occurred. If Epstein's travel to and from Florida is identified and he is compelled to provide his telephone information, that information coupled together could subsequently be used to incriminate him and it might be used to prosecute him for a criminal offense. See infra. In fact, providing his telephone information would not only

incriminate Epstein on the elements required to establish a criminal offense, but in this case it is asking Epstein to incriminate himself by providing information that could lead to the identification of potential witnesses against him. Epstein would also be providing information that would later result in documents being subpoenaed and possibly produced relative to his travel itinerary and his telephone records. As such, Epstein is now being asked to provide testimonial disclosures that would communicate statements of fact by admitting that he did travel to and from Florida on certain occasions and by admitting that he had certain telephone numbers and providers, thereby requiring him to admit the very facts upon which Plaintiff's Second Amended Complaint is based i.e. presence in Florida at the time of an allegation of misconduct or control of a particular telephone at the time of a claim that the plaintiff was recruited and will inexorably result in leads to further documents such as travel records and/or telephone records that themselves can be predictably used to bolster the criminal-related allegations against Epstein. See generally Hoffman v United States 341 US 479, 486 (1951), U.S. v Hubbell, 530 U.S. 27, 36 (2000).

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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Significantly, this Court sustained Epstein's objections to Interrogatory Number 12, which requested information similar to Interrogatory Number 11 (i.e., ". . . telephone numbers of employees of Epstein, used in the course or scope of their employment, including cellular phones and land lines in any of his residences, by stating the complete

telephone number and the name of the service provider.”) (DE 242, p.10). In short, the Court considered “the nature of the allegations, to wit, a scheme and plan of sexual misconduct carried out at Epstein various residences. . . [finding it] entirely reasonable for Epstein to assert that forcing him to testify as to. . . his employee’s telephone numbers [Interrogatory 12] may provide a lead or clue to evidence tending to incriminate him.” The Magistrate Judge further reasoned that “[n]ot only would such compelled testimony self-incriminate him on the elements required to establish a criminal violation, and thus serve as a link in the chain of evidence needed to prosecute Epstein for a crime, but in some cases serve to incriminate him by asking Epstein to identify potential witnesses against him.” (DE 242) That same reasoning and conclusion should have been reached with regard to Interrogatory Number 11.

19. In addition, compelling Epstein to provide the requested information could also lead to or provide a link in the chain of evidence allowing Plaintiff or others to satisfy one or more of the elements [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] Given the nature of the allegations, to wit, a scheme and plan of sexual misconduct, this court should find it entirely reasonable for Epstein to assert his Fifth Amendment privilege as to Interrogatory Numbers 7 and 11. For instance, Plaintiff

alleges and the Magistrate Judge's Order acknowledges allegations of a scheme where 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. As this Court noted in its order, "... the fact there exists a Non-prosecution Agreement does not mean that Epstein is free from future criminal prosecution, and that in fact, 'the threat of prosecution is real, substantial, and present.'" [REDACTED]

[REDACTED]

[REDACTED]

Accordingly, Epstein's travel to and from Florida and the telephone numbers to his cellular telephones and landlines would provide information which is protected by the privilege i.e., 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. 825 (1980).

19. [REDACTED]

20. On their face, Interrogatory Numbers 7 and 11 may not seem to seek incriminating evidence. However, after review of the objections and analysis set forth herein, it is clear that responding to same would violate Epstein's Fifth Amendment privilege against self incrimination. Accordingly, forcing Epstein to answer the interrogatories unconstitutionally places him in the position of being compelled to testify and provide information that support Plaintiff's version of the facts and which may lead to future criminal prosecution.

21. 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.” (DE 242, p.5). 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. 825 (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 Manson 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). Accordingly, for these reasons, Epstein’s objections to the Magistrate’s Order should be sustained, and this Court should enter an order reversing and/or modifying the Order allowing Epstein to assert his Fifth Amendment privilege and not requiring Epstein to provide compelled testimony that might incriminate him.

Based upon the underlying criminal elements of the targeted offenses , answers to Interrogatory Number 7 involving Epstein’s travel to and from Florida and Interrogatory Number 11 involving Epstein’s use of his telephones could provide a lead or clue to evidence of an alleged violation of any one of the above target offenses, which could result in criminal prosecution, a breach of the NPA and/or self-incriminating evidence relating to this case and/or to other cases that may result in criminal prosecution.

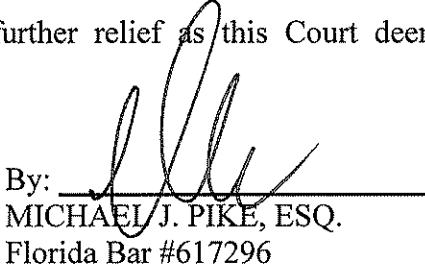
Accordingly, any compelled testimony that provides a “lead or clue to a source of evidence of such [a] crime” is protected by Fifth Amendment. SEC v Leach, 156 F.Supp.2d 491, 494 (E.D. PA. 2001). Questions seeking “testimony” regarding names of witnesses, leads to phone or travel records, or financial records that would provide leads to tax or money laundering or unlicensed money transmittal investigations are protected.

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”).

22. In this instance, the danger Epstein faces by being forced to testify in this case and on these subject matters is substantial and real, and not merely trifling or imaginary. Epstein has met his burden to sustain his 5th Amendment Privilege, and has further established that “[t]he danger [he] faces by being forced to testify in this case is substantial and real, and not merely trifling or imaginary as required.” (DE 242) Accordingly, this Court should reverse and/or revise the Magistrate’s Order as set forth below.

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

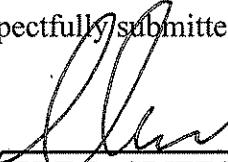
- a. finding that the danger Epstein faces by being forced to testify in this case relative to Interrogatory Numbers 7 and 11 is substantial and real, and not merely trifling or imaginary;
- b. sustaining Epstein’s Fifth Amendment Privilege as it relates to Interrogatory Numbers 7 and 11 and denying Plaintiff’s Motion in that regard;
- c. reversing and/or revising the Magistrate’s Order (DE 242) relative to Interrogatory Numbers 7 and 11 and entering an amended order sustaining Epstein’s objections to the Magistrate’s Order as to those specific interrogatories and not requiring him to testify as to same; and/or
- d. remanding this appeal to the Magistrate-Judge for her reconsideration of these portions of her order and
- e. for such other and further relief as this Court deems just and proper.

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 31 day of Aug, 2009.

Respectfully submitted,

By: 

ROBERT D. CRITTON, JR., ESQ.

Florida Bar No. 224162

rcrit@bclclaw.com

MICHAEL J. PIKE, ESQ.

Florida Bar #617296

mpike@bclclaw.com

BURMAN, CRITTON, LUTTIER & COLEMAN

515 N. Flagler Drive, Suite 400

West Palm Beach, FL 33401

561/842-2820 Phone

561/515-3148 Fax

(Counsel for Defendant Jeffrey Epstein)

Certificate of Service

Jane Doe No. 2 v. Jeffrey Epstein
Case No. 08-CV-80119-MARRA/JOHNSON

Stuart S. Mermelstein, Esq.
Adam D. Horowitz, Esq.
Mermelstein & Horowitz, P.A.
18205 Biscayne Boulevard
Suite 2218
Miami, FL 33160
305-931-2200
Fax: 305-931-0877
ssm@sexabuseattorney.com
ahorowitz@sexabuseattorney.com

Counsel for Plaintiffs

*In related Cases Nos. 08-80069, 08-80119,
08-80232, 08-80380, 08-80381, 08-80993,
08-80994*

Brad Edwards, Esq.
Rothstein Rosenfeldt Adler
401 East Las Olas Boulevard
Suite 1650
Fort Lauderdale, FL 33301
Phone: 954-522-3456
Fax: 954-527-8663
bedwards@rra-law.com
*Counsel for Plaintiff in Related Case No.
08-80893*

Paul G. Cassell, Esq.
Pro Hac Vice
332 South 1400 E, Room 101

Richard Horace Willits, Esq.
Richard H. Willits, P.A.
2290 10th Avenue North
Suite 404
Lake Worth, FL 33461
561-582-7600
Fax: 561-588-8819
Counsel for Plaintiff in Related Case No. 08-80811
reelrhw@hotmail.com

Jack Scarola, Esq.
Jack P. Hill, Esq.
Searcy Denney Scarola Barnhart & Shipley, P.A.
2139 Palm Beach Lakes Boulevard
West Palm Beach, FL 33409
561-686-6300
Fax: 561-383-9424
jsx@searcylaw.com
jph@searcylaw.com
Counsel for Plaintiff, C.M.A.

Bruce Reinhart, Esq.
Bruce E. Reinhart, P.A.
250 S. Australian Avenue
Suite 1400
West Palm Beach, FL 33401
561-202-6360
Fax: 561-828-0983
ecf@brucereinhartlaw.com
Counsel for Defendant Sarah Kellen

Theodore J. Leopold, Esq.
Spencer T. Kuvin, Esq.
Leopold, Kuvin, P.A.
2925 PGA Blvd., Suite 200
Palm Beach Gardens, FL 33410
561-684-6500
Fax: 561-515-2610
Counsel for Plaintiff in Related Case No. 08-08804

Salt Lake City, UT 84112
801-585-5202
801-585-6833 Fax
cassellp@law.utah.edu
Co-counsel for Plaintiff Jane Doe

Isidro M. Garcia, Esq.
Garcia Law Firm, P.A.
224 Datura Street, Suite 900
West Palm Beach, FL 33401
561-832-7732
561-832-7137 F
isidrogarcia@bellsouth.net
Counsel for Plaintiff in Related Case No. 08-80469

Robert C. Josefsberg, Esq.
Katherine W. Ezell, Esq.
Podhurst Orseck, P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
305 358-2800
Fax: 305 358-2382
rjosefsberg@podhurst.com
kezell@podhurst.com
Counsel for Plaintiffs in Related Cases Nos. 09-80591 and 09-80656

Jack Alan Goldberger, Esq.
Atterbury Goldberger & Weiss, P.A.
250 Australian Avenue South
Suite 1400
West Palm Beach, FL 33401-5012
561-659-8300
Fax: 561-835-8691
jagesq@bellsouth.net
Counsel for Defendant Jeffrey Epstein