

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE NO. 2,

Plaintiff,

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

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 Response In Opposition to Jane Doe 2-8s' Rule 4 Appeal (DE 493),
With Incorporated Memorandum Of Law

Defendant, Jeffrey Epstein (hereinafter "Epstein"), by and through his undersigned attorneys, hereby files his Response In Opposition to Jane Doe 2-8s Rule 4 Appeal (DE 493), With Memorandum Of Law. In support, Epstein states:

I. Procedural Background

Plaintiffs served their First Request for Production of Net Worth documents and Interrogatories, and Epstein served his responses and objections thereto. See Composite Exhibits "A" and "B" attached to the Responses In Opposition to Plaintiffs' Motion to Compel (DE 390). The Interrogatory Responses/Objections and the Responses/Objections to the Requests for Production and the arguments set forth in the initial opposition motion (DE 390)(attached hereto as **Exhibit "A"**) are incorporated herein by reference.

Previously, this Court entered orders (DE 242 and 293) sustaining several of Epstein's objections under the Fifth Amendment. Many of the instant requests are

covered by the Court's orders at DE 242 and 293. At DE 480, the court granted *sua sponte* (which is not the subject of this appeal), the *in camera* submissions provided to the court by Epstein and, in particular, it noted the "unique circumstances of this case" relative to, among other things, the sensitive 5th Amendment issues outlined therein. DE 480 at pp. 4-5; See also 242 and 293.

It appears that Plaintiffs take issue with the court's rulings relative to document request numbers 2-5 and interrogatory numbers 1-13, which shall be specifically addressed below.

a. **Argument**

Since these cases have been consolidated for discovery, a brief outline of prior rulings is necessary in order to maintain consistency. The Magistrate Judge found that several prior requests were ". . . testimonial in nature, in that by production, Epstein would be implicitly communicating 'statements of fact' to which the Fifth Amendment privilege may be validly asserted." (DE 242).

The Magistrate in the instant matter made the same ruling specifically finding that the net worth information sought encompassed ". . . compelled statements/admissions. . ." which could result in Epstein's waiver of the Fifth Amendment, would require [Epstein] to be a witness against himself and could result in ". . . forc[ed] testimonial disclosures . . ." (DE 480, p.6-7) The court also found that "[t]he potential for providing a "link" is high when one considers that by forcing [Epstein] to respond, he will [not only] be implicitly communicating statements of fact, authenticating documents and testifying to their location, [but] as well . . . providing clues as to the identity and location of witnesses that by such disclosure may serve to further a criminal investigation against [Epstein.]"

What Plaintiffs Rule 4 Appeal misses or intentionally ignores is that this is not a case wherein a subpoena or request for production was served on a non-party, but one which was served directly on Epstein. Therefore, the “act of production doctrine” as well as the testimonial privilege against self-incrimination was correctly and specifically applied to each net worth request (see argument *infra*) and, thus, the court correctly ruled that Epstein’s Fifth Amendment privilege must be sustained as it has correctly been applied relative to similar requests throughout this litigation.

For example, Plaintiff (Jane Doe) also sought Request for Admissions dealing with Epstein’s “financial history,” “net worth,” “fraudulent conveyances” and “real-estate ownership.” (Order at DEs 462 at p.5 and 342-1)) Plaintiff also sought to compel interrogatory responses dealing with Epstein’s “. . . financial history information such as what assets Epstein has, where such assets are located, and whether such assets have been transferred or fraudulently concealed. . .” and “. . .the names of Epstein’s current accountants, financial planners or money mangers . . .” (DEs 462 at p.6 and 343) Finally, Plaintiff sought “. . . financial information in formation documents. . .” (DE 462 at p. 10 and 341-1). The court categorically and respectively sustained Epstein’s Fifth Amendment Privilege to the foregoing and stated, among other things, that:

“. . .[T]o force him to respond to the these requests would involve compelled statements that could reasonably furnish a link in the chain of evidence needed to prosecute Epstein in future criminal proceedings or even support a criminal conviction. . .” (DE 462 at p.5, 6 and 7)

“Given the allegations raised in the various Complaints and the elements required to convict Epstein of a crime, and considering the background facts [including the *in camera* submissions] underlying the case, these concerns are reasonable, real and not unjustified.” (DE 462 at p.5-6)

“In sustaining Epstein’s Fifth Amendment privilege, the court has considered the facts alleged in the Complaints, the elements needed to

convict Epstein of a crime, the particularized showing made in Epstein's Response Brief *and in camera submission*, and drawn upon the Court's knowledge of the cases at issue. On this basis, the court finds that the privilege raised as to these requests valid, and asserted by Epstein only with reference to 'genuinely threatening questions.' United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980). (DE 462 at p.10-11)

Based upon the foregoing, it is clear that this court made the correct ruling relative to Epstein's net worth information as the requests are similar and rulings have been consistent, have always considered the *in camera submissions* and have always been supported by the law.

Likewise, this Court denied Plaintiff's motion relative to requests seeking telephone records of calls made by Epstein to his employees. This Court denied Plaintiff's motion relative to interrogatories seeking the names of Epstein's employees or their telephone numbers finding that same "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 Plaintiff's motion relative to interrogatories that required Epstein to identify persons or witnesses that have knowledge of the events in question. *Id.* at p. 8. In ruling, the court recognized that ". . . the facts alleged in the Amended 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). Now, Plaintiffs wish to side-step these orders and attempt to obtain similar information (i.e., net worth information potentially containing incriminating information and requiring Epstein to be a witness against himself) that has already been determined to be protected by the Fifth Amendment.

For instance, the court has specifically recognized:

In this and the other civil actions, Plaintiffs 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 if 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 in to the United States … travels in foreign commerce.” Accordingly, requiring Epstein to provide responses to the subject production requests would in essence be compelling him to provide assertions of fact, thereby admitting that such documents existed and further admitting that the documents in his possession or control were authentic. In re Grand Jury Subpoena, 1F.3d 87, 93 (2d Cir. 1993) (noting that 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)(DE 293).

The net worth information sought here could very well provide a link in the chain of evidence necessary to prosecute Epstein for a crime under 18 U.S.C. §2422(b) and §2423(b), and could also provide information showing Epstein’s availability and/or use of any facility or means of interstate or foreign commerce. Therefore, requiring Epstein to respond to the net worth requests here is tantamount to requiring him to provide testimonial admissions and to be a witness against himself. In re Grand Jury Subpoena, 1F.3d 87, 93 (2d Cir. 1993).

Again, Epstein was the subject of a grand jury investigation by the United States Attorney’s Office, Southern District of Florida (“USAO”) – U.S. Department of Justice, which convened in 2007. The target offenses of that investigation are specifically outlined in the in camera submissions provided to this court and, therefore, cannot be ignored. Furthermore, the target offenses were specifically considered by this court as

outlined herein. See also DE 480. If leave is granted, a more particularized submission could be made demonstrating that Epstein's fears are well-grounded regarding the relationship between the requested financial information and certain offenses that were once within the broad ambit of federal criminal investigation.

As this court knows, the threat of criminal prosecution for certain crimes remains real, substantial and present, and not merely trifling or imaginary. In that regard, Epstein cannot be compelled to produce or identify net worth information because doing so may support a criminal conviction for those delineated crimes, could furnish a link in the chain of evidence needed to prosecute Epstein and would require that Epstein be a witness against himself.

In Jane Doe No. 2 v. Epstein, Case No. 80119, the Magistrate Judge found, “[i]n 2008, Epstein entered into a Non-Prosecution Agreement (“NPA”) 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 NPA, 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 USAO’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 undersigned would agree with Epstein ... that the fact there exists a NPA does not mean that Epstein is free from future criminal prosecution, and that in fact, ‘the threat of prosecution is real, substantial and present.’” See August 4, 2009 Order (DE 242) and September 9, 2009 Omnibus Order (DE 293); and Manson v. United States, 244 U.S. 362, 365 (1917). Moreover, as this court knows, the NPA only defers prosecution in the

Southern District of Florida, not other districts. Therefore, Epstein is “confronted by a substantial and ‘real,’ and not merely trifling or imaginary, hazard[] of incrimination” when it comes to Plaintiff’s discovery requests. United States v. Apfelbaum, 445 U.S. 115, 128 (1980).

(i) The Fifth Amendment and Plaintiffs’ Rule 4 Appeal

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); see also 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 and extends not only to answers that would 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. See Hoffman v. United States, 341 U.S. 479, 486 (1951). 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.” See United States v. Neff, 315 F.2d 1235, 1239 (9th Cir.), cert denied, 447 U.S. 925 (1980); Blau v. United States, 340 U.S. 159 (1950); SEC v Leach, 156 F.Supp.2d 491, 494 (E.D. PA. 2001).

The Request for Production

Plaintiffs claim that the “act of production doctrine” does not encompass request numbers 2-5 and that the Magistrate failed to evaluate each discovery request. As to the latter, Plaintiffs’ claims are not only offensive, but fail to take into account the exact wording of the order entered by the Magistrate - “[t]he Court begins with an analysis of

the Fifth Amendment privilege as applied to each request or category of requests.” (Emphasis added). (DE 480, p.5); see also DE 480 at p.5 wherein the court specifically applies the “act of production doctrine.” See also *supra* wherein several examples are delineated whereby the Magistrate considers each request in connection with the evidence submitted to meet the particularized showing and burden including, but not limited to, the in camera submissions.

The following requests are the subject of Plaintiff’s Appeal:

Request No. 2: All documents relating to the assets, liabilities, income, expenses and net worth of Defendant, including without limitation, the following for each of the past five (5) years.

Request No. 3: All documentation which refer or relate to financing or loans requested or applied for by the Defendant, including loan applications, appraisals, financial spreadsheets, etc.

Request No. 4: Any and all appraisals indicating fair market value of real estate or other property of Defendant.

Request No. 5: Any and all documents referring or relating to investment or savings accounts, including without limitation, account statements and summaries.

Plaintiffs fail to consider that financial statements (Request No. 2), financing or loans (Request No. 3), real estate appraisals (Request No. 4) and bank account and investment account documents (Request No. 5) have each been ruled on as stated *supra* in that the requests overlap certain subject matter that would force Epstein to identify employees (e.g., cancelled checks and itemized bank account statements), to identify persons or witnesses that have knowledge of the events in question (e.g., those who worked for him by and through cancelled checks and itemized bank statements), and to provide information identifying the use of any facility or means of interstate or foreign commerce (e.g., financial statements, financing or loans, real estate appraisals and bank

account documents – all of which could provide a link in the chain of evidence necessary to prosecute Epstein for the target offenses outlined above). Such information could also delineate Epstein’s travels in interstate commerce or travels in to the United States or foreign commerce, as well as the use of or availability to Epstein of interstate facilities and could potentially corroborate many of the allegations of wrongdoing raised by plaintiffs regarding Epstein’s wealth, his many residences, his use of cash, his interstate and international travel on private airplanes owned or controlled by him, and his regular payments of moneys to intermediaries as well as plaintiffs themselves all of which are allegations inextricably interwoven with the underlying federal criminal predicates that are at the heart of at least the 18 USC 2255 claims of certain plaintiffs.

Finally, Jane Does 2-8 rely extensively on Fisher, which is a case involving a subpoena served on an accountant requesting that the accountant produce and authenticate a defendant’s tax-work papers. Fisher v. United States, 425 U.S. 391, 410 (1976). Jane Does 2-8 also rely extensively on U.S. v. Ghidoni, 732 F.2d 814 (11th Cir. 1984) wherein the court directed a defendant to execute a consent directive to a foreign bank allowing the bank to release records of the defendant which, according to the court, did not confirm the existence of any accounts or defendant’s control over them, nor did it serve to authenticate any documents produced by the bank. Id. at 818-819. Such is NOT the case here. Plaintiffs simply has the cart before the horse. In the instant matter, Plaintiffs unequivocally request that Epstein not only produce but identify banking records and other net worth information for which Plaintiff has no prior knowledge whatsoever. That is “testimonial” in its rawest form. The Plaintiffs seemingly do not distinguish between compelling production from third parties such as a defendant’s

accountant (Fisher) or a defendant's foreign bank (Ghidoni) where the Defendant in no way authenticates the documents nor attests to control or genuiness or even existence and, therefore, where no Fifth Amendment, compelling production or testimonial admissions are required of said Defendant. As such, Plaintiffs entire brief is flawed by this fundamental error in analysis by resting largely on distinguishable precedents where the compulsion emanated from a demand on third parties not on the defendant himself.

Accordingly, requiring Epstein to provide responses to the subject production requests would in essence be compelling him to provide assertions of fact, thereby admitting that such documents existed and further admitting that the documents in his possession or control were authentic.

The Interrogatories

In the wherefore clause of their Rule 4 Appeal, Plaintiffs request that this court require Epstein to answer interrogatory numbers 1 through 13 or 1 through 11 (SIC). However, Plaintiffs offer argument only as to interrogatory numbers 1, 4 and 7. Surprisingly, it appears that Plaintiff has abandoned interrogatories 2, 3, 5, 6, and 8-13, which appear to request the same information as the above requests for production. The following interrogatories provide:

Interrogatory No. 1: State the fair market value of all assets in which Defendant has an ownership interest.

Interrogatory No. 4: List all real property, by legal description and/or street address, in which Defendant holds an ownership interest, and state for each the title holder of the property shown in the public records, and identify the nature and extent of Defendant's ownership.

Interrogatory No. 7: List all cars, boats, airplanes and other modes of transportation in which Defendant has an ownership interest. As to each, list the year, make and model, the appraised value, and the percent of Defendant's ownership interest.

Epstein cannot provide answers/responses to questions relating to his financial history and condition without waiving his Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. The requests are unreasonable, overbroad, confidential, proprietary in nature, the subject of potential federal claims violations (see *supra*) and thus seek information that is neither relevant to the subject matter of the pending action. 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 such financial records, assets, and information would provide “links in the chain” of evidence that could support allegations made by the plaintiffs tying the alleged underlying criminal occurrences to Epstein’s wealth, travel, and ownership of expensive residences and could further provide “links in the chain” of evidence that could result in disclosures that would further any financial investigation. For those specific target offices and argument related to same, see what the court has already considered *sua sponte* and in camera in redacted form See DE 242, 293, 390 and 480, *in camera*, 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”) and United States v. Hubbell, 530 U.S. 27, 36, 120 S.Ct. 2037, 2043 (2000). See *in camera submissions* for detailed argument applying the Fifth Amendment to the target offenses. Here, the information sought is financial in nature and, therefore, directly relates to Epstein’s business activities and thus the target offenses outlined above and referenced in several orders entered by this court. Answers to the specified discovery requests could provide a

link in the chain of evidence used to prosecute Epstein for those crimes. Sheldon v. Sheldon, 193 B.R. 152, 162 (S.D.N.Y 1996).

Answers to the interrogatories, on their face, could also provide information showing Epstein's availability and/or use of any facility or means of interstate or foreign commerce (e.g., cars, boats, planes or other modes of transportation). Therefore, requiring Epstein to respond to the net worth requests here is tantamount to requiring him to provide testimonial admissions and to be a witness against himself and to authenticate the existence of certain items. In re Grand Jury Subpoena, 1F.3d 87, 93 (2d Cir. 1993).

For the same reasons set out above, the interrogatories seek compelled statements and further ask that Epstein authenticate and testify to the existence of certain information that could reasonably "furnish a link in the chain of evidence needed to prosecute Epstein in future criminal proceedings or even support a criminal conviction." See *supra* regarding target offenses as well as the in camera information submitted to the court.

II. Conclusion

These discovery requests require Epstein to pick and choose documents that are responsive and/or provide testimonial disclosers that could lead to future prosecution, require Epstein to authenticate information and, in this way, force Epstein to effectively make 'use of the content his mind,' an action that would undeniably implicate the Fifth Amendment." (DE 462, p.9)

Moreover, under Fed.R.Civ. P. 72(a), a district court reviewing a Magistrate Judge's order shall only modify or set aside the order if it is "found to be clearly erroneous or contrary to law." See also 28 U.S.C. 636(b)(1)(A) and Local Magistrate

Rule 4(a)(1). An order is clearly erroneous if the reviewing court, after assessing the evidence in its entirety, is left with a definite and firm conviction that a mistake has been committed. Krys v. Lufthansa German Airlines, 119 F.3d 1515, 1523 (11th Cir. 1997); see also U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948). The mere fact that the reviewing court might have decided the issues differently is not sufficient to overturn a decision. Georgia State conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1416 (11th Cir. 1985).

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

- a. Upholding the Magistrate's order;
- b. Declining Plaintiffs' Rule 4 Appeal and continuing to sustain Epstein's Fifth Amendment Privilege and other delineated constitutional privileges as it relates to the above interrogatories and requests; and
- c. for such other and further relief as this Court deems just and proper.

Respectfully submitted,

By: /s/ Michael J. Pike
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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 9th day of April, 2010

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