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, AMENDED MOTION FOR MODIFICATION AND RECONSIDERATION OF THE MAGISTRATE'S ORDER DATED JUNE 1, 2010 (DE 555), OR ALTERNATIVE RULE 4 APPEAL, WITH INCORPORATED OBJECTIONS AND MOTION FOR PROTECTIVE ORDER AND MEMORANDUM OF LAW

Defendant, Jeffrey Epstein (hereinafter "Epstein"), by and through his undersigned attorneys, hereby files his Motion for Modification and Reconsideration of the Magistrate's Order (DE 555) pursuant to Rule 60, or Alternative Rule 4, Rule 4(c) and Fed. R. Civ. P. 53(e) (the "Motion and Rule 4 Appeal"), and other applicable Federal Rules and Local Rules and Motion for Protective Order pursuant to Fed.R.Civ.P. 26(c). In support, Epstein states:

Procedural Background

1. This court entered an order (DE 555) stating that Alfredo Rodriguez ("Rodriguez")(DE 469), must produce, to the extent in his possession, "…any and all journal, notes, diaries, and writings relating to Jeffrey Epstein including the journal described by

Rodriguez to Palm Beach Police that [allegedly] contains the names of girls who visited the residence." (the "journal" or "book") (DE 555, p.2)

2. On June 4, 2010, Epstein filed his initial Motion and Rule 4 Appeal (DE 559).[1] On or about that same day, counsel for Jane Does 2-8 came into possession of the journal or book by and through the Federal Public Defender's office, Dave Brannon, Esq.. At or around that same time, Counsel for Jane Does 2-8 provided a copy of the book or journal to counsel for Jane Doe, Mr. Bradley Edwards. Upon learning of Jane Does 2-8's counsel and Jane Doe's counsel coming into possession of the journal or book in the face of a Rule 4 Appeal, the undersigned and those attorneys reached an agreement that they will not disseminate the book to any other third parties or attach any portion of same to any pleadings pending the outcome of the Rule 4 Appeal. See *infra*

Argument

3. As set forth in Rodriguez's deposition, he was an employee of Epstein. Rodriguez Deposition, **Exhibit "A"** at p. 12-13. Moreover, as an individual employee, Rodriguez claims he executed a confidentiality agreement with Epstein. **Exhibit "A"** at p. 135. Furthermore, in his plea agreement, Rodriguez "admitted removing [a book or journal] from Epstein's home without Epstein's permission. . . ." Plea Agreement, **Exhibit "B"** at p.8. In short, according to Rodriguez's sworn testimony (including his plea agreement), he stole the property from Epstein's home and neither Epstein nor anyone else gave him permission to remove the book or journal, conduct which constitutes a clear breach of his fiduciary obligations as an employee, a clear breach of the Employment Agreement he testified he executed and, again

[1] The initial Rule 4 Appeal has been replaced with this Amended Rule 4 Appeal and Motion for protective Order. Both are timely under the applicable Rule.

according to Rodriguez' own representations, an invasion of Epstein's privacy rights and, given Epstein's business, potentially his commercially sensitive financial and trade secret information.

4. Courts have often enjoined the dissemination of confidential or private information wrongfully obtained from the employer by an (now) ex-employee during the course of his employment, either through a free-standing action for injunctive relief or in conjunction with a tort action for, among other things, breach of fiduciary duty. See, e.g., Saini v. International Game Technology, 434 F.Supp.2d 913, 924 (D.Nev. 2006)(court finds that company had shown likelihood of success in proving breach of implied covenant of good faith and fair dealing where former employee's "decision to distribute internal IGT documents to a party adverse to IGT in litigation demonstrates a deliberate attempt to violate the spirit of his confidentiality agreements with IGT;" injunction issued); see also In re Zyprexa Injunction, 474 F.Supp.2d 385, 419 (E.D.N.Y. 2007)(court has power to enjoin dissemination of stolen documents obtained in violation of court's protective order). Even where the employee is not subject to a formal confidentiality agreement, "an employee may still be enjoined from using confidential information where he or she has obtained such information by wrongful means, such as theft or intentional memorization." Tactica Intern., Inc. v. Atlantic Horizon Intern., Inc., 154 F.Supp.2d 586, 608 (S.D.N.Y. 2001); Standard Brands, Inc. v. Zumpe, 264 F.Supp. 254, 262 (D.La. 1967)(internal quotation marks omitted). See A.H. Emery Co. v. Marcan Products Corp., 268 F.Supp. 289, 299 (S.D.N.Y. 1967)("A confidential relationship exists between an employee and his employer. It survives the termination of his employment. It does not depend on any express contract. Disclosure by an employee of a trade secret entrusted to him by his employer in the course of his employment is a classic instance of a disclosure which constitutes a breach of confidence and which is therefore actionable. It is not necessary that the employee expressly

agree not to disclose it"), *aff'd* 389 F.2d 11 (2d Cir. 1968), *cert. denied*, 393 U.S. 835 (1968). The simple fact is that this court must determine, in camera, what is in the "book" or "journal", whether it in fact was taken in violation of an employee's fiduciary and employment obligations, and whether it contains information that impacts the privacy and business interests of his employer before (rather than after) issues of dissemination, relevance, and litigation use can be assessed.

5. Upon information and belief the "book" or "journal" does in fact contain the names of Epstein's business associates and other highly confidential commercially sensitive information that would be entirely irrelevant to this action and not reasonably calculated to lead to the discovery of admissible evidence.[2] Accordingly, there is commercially sensitive and trade secret information contained therein including, but not limited to, lists of business associates which could result in irreparable harm to Epstein if disseminated. Lynch v. Silcox, 2001 WL 1200656 (S.D. Fla. 2001).

6. According to Rodriguez's sworn testimony, the book or journal is stolen property and, thus, subject to confidentiality, privacy and fiduciary protection. This court should have had the opportunity to review what is in this "book" or "journal" before it ordered carte blanch production of same. After review and production of the book or journal to Epstein's civil lawyers, the court should provide Epstein an opportunity to assert various legal objections including, but not limited to, those under the 4th, 5th, 6th, and 14th Amendments as well as other legal objections and privileges such as those addressed in paragraphs 3 and 4, supra. Therefore, an in camera hearing should occur to determine what objections and privileges must be raised before further disclosure is made. U.S. v. Zolin, 491 U.S. 554, 575 (1989)(disclosing materials

[2] Because of the relief sought in this Rule 4 Appeal, Epstein's civil lawyers have not obtained a copy of said book or journal.

to the district court does not have the legal effect of terminating a privilege thereby allowing parties to disclose documents in camera and make that in camera request – especially when there is a question as to whether those documents were obtained by unlawful means); St. Andrews Park, Inc. v. U.S. Dept. of Army Corps of Engineers, 299 F.Supp.2d 1264 (S.D. Fla. 2003)(court determined that an in camera proceeding was appropriate when it involved a small volume of documents); see also In re Alberto Duque, 134 B.R. 679 (S.D. Fla. 1991)(in camera inspection afforded adequate protection against disclosure of any privileged documentary material). A trial court departs from the essential requirements of law in ordering production of confidential information without conducting an *in camera* review to determine whether the assertion of privilege is valid. See Westco, Inc. v. Scott Lewis' Gardening & Trimming, Inc., 26 So. 3d 620, 622 (Fla. 4th DCA 2009).

7. Moreover, the right to privacy encompasses at least two different kinds of interests, the individual interests of disclosing personal matters and the interest in independence in making certain kinds of important decisions. Favalora v. Sidaway, 966 So.2d 895 (Fla. 4th DCA 2008). The Supreme Court has "consistently held that a person has no legitimate expectation of privacy in information he voluntarily turns over to the third parties." Smith v. Maryland, 442 U.S. 735, 743-44, 99 S.Ct. 2577, 2582 (1979). To the extent this "book" or "journal" exists, Rodriguez admitted that he took same without Epstein's permission. Therefore, Epstein could not have voluntarily given same to him and, as such, Epstein has not waived any objections, privileges and/or privacy interests in the "book" or "journal.". Likewise, Article 1, s. 23, Right of Privacy, provides that every natural person has the right to be let alone and free from governmental intrusion into the person's private life. Colorado v. Bertine, 479 U.S. 367, 387 (1986); State v. Jardines, 9 So.3d 1 (Fla. 3d DCA 2008)(the Fourth Amendment clearly protects

the right of people to be secure in their persons, houses, papers and effects from intrusions); New Jersey v. T.L.O., 469 U.S. 325, 375 (1985)(search of a woman's purse by a school administrator is a serious invasion of her legitimate expectation of privacy). Based upon the foregoing, Epstein should be afforded his due process rights to in camera judicial review of this alleged "book" and/or "journal" in an effort to determine what, if any, legal objections and privileges should be vindicated prior to any disclosure or use of its contents by civil plaintiffs adversarial to the rights of the defendant;

Motion for Protective Order

8. Rule 26(c), Federal Rules of Civil Procedure, provides the Court with the power to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including … (D) forbidding inquiry into certain matters, or limited the scope of **disclosure** or discovery to certain matters."

9. While the scope of discovery is broad, it is not without limits. Washington v. Brown & Williamson Tobacco, 959 F.2d 1566, 1570 (11th Cir. 1992). Courts have long held that while the standard of relevancy in discovery is a liberal one, it is not so liberal as to allow a party to roam in the shadow zones of relevancy and to explore matters which does not presently appear germane on the theory that it might conceivably become so. Food Lion, Inc. v. United Food & Commercial Workers Intern. Union, 103 F.3d 1007, 1012-13 (C.A. D.C. 1997) (string cite omitted). See also Capco Properties, LLC v. Monterry Gardens of Pinecrest Condo., 982 So. 2d 1211, (Fla. 3d DCA 2008) (holding that discovery in civil cases must be relevant to the subject matter of the case and must be admissible or reasonably calculated to lead to admissible evidence); Morton Plant Hospital Ass'n, Inc. v. Shahbas, 960 So. 2d 820, 824 (Fla. 2d DCA 2007) (holding that "discovery should be denied when it has been established that the

information requested is neither relevant to any pending claim or defense nor will it lead to the discovery of admissible evidence," citing Tanchel v. Shoemaker, 928 So. 2d 440, 442 (Fla. 5th DCA 2006)).

10. Accordingly, consistent with counsels' agreement noted above, a protective order should further be entered ordering that counsel for Jane Doe and counsel for Jane Does 2-8 not disseminate the book to any third parties other than the Court through the pendency of the Rule 4 Appeal and not attach any portions thereof to any pleading,

11. Court's have observed that private documents collected during discovery are not judicial records. United States v. Anderson, 799 F.2d 1438, 1441 (11th Cir.1986). Thus, while the public may enjoy the right of access to "pleadings, docket entries, orders, affidavits or depositions *duly filed,*" Wilson v. American Motors Corp., 759 F.2d 1568, 569 (11th Cir. 1985) (emphasis added), common-law right of access does not extend to information collected through discovery which is not a matter of public record. See Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33, 104 S.Ct. 2199, 2207, 81 L.Ed.2d 17 (1984); Anderson, 799 F.2d at 1441; United States v. Gurney, 558 F.2d 1202, 1209 (5th Cir.1977), cert. denied sub nom., Miami Herald Publishing Co. v. Krentzman, 435 U.S. 968, 98 S.Ct. 1606, 56 L.Ed.2d 59 (1978).

12. In addition, discovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press. See Seattle Times Co. v. Rhinehart, 467 U.S. at 32-34, (pretrial interrogatories and depositions "were not open to the public at common law"); Gannett Co. v. DePasquale, 443 U.S. 368, 396, 99 S.Ct. 2898, 2914, 61 L.Ed.2d 608 (1979) (Burger, C.J., concurring) ("[I]t has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants."). Moreover, documents collected during discovery are not

"judicial records." Discovery, *whether civil or criminal*, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private.

13. The request sought herein is reasonable as Mr. Edwards himself in the past has spoken to the media several times as evidenced by his own affidavit attached hereto as **Exhibit "C"** at paragraphs 14-28.

14. Based upon the foregoing, the journal is not a "public" document subject to dissemination to any third parties, including counsel for Jane Doe and Jane Does 2-8. Nevertheless, the court ordered that the journal or book be produced to Mr. Horowitz who then subsequently produced it to counsel for Jane Doe, Mr. Bradley Edwards and it was produced prior to the defendant being able to intervene and seek reconsideration, appeal, or a protective order. . As such, a protective order should be entered requiring Mr. Horowitz and Mr. Edwards from further disseminating the journal and book, from attaching any portion of same to any pleadings, or from in anyway relying on the contents of the journal or book to advance their litigation interests or to contact third parties identified therein.

15. It is therefore requested that the original and any copies of the journal or book be placed under seal and returned to the Federal Public Defender, David Brannon, pending the outcome of this Motion and/or alternative Rule 4 Appeal. If the court comes into possession of the book or journal, the Court shall order each party in possession of same to follow the procedures outlined in Local Rule 5.4, S.D. Fla.

Local Rule 7.1 Certification

Counsel for the movant conferred with counsel for Jane Doe and Jane Does 2-8 and, with

the exception of the agreement outlined above, no other agreements were reached.

WHEREFORE, Epstein requests that this court enter an order:

a. granting the relief requested above inclusive of a modification of the order and/or reconsideration of same for the reasons set out above;

b. finding that an in camera hearing should occur to determine if any privileges, objections, privacy interests, and/or discovery objections can be made by Epstein before further disclosure is made and granting a reasonable time to do so;

c. ordering that a protective order be entered requiring that Mr. Horowitz and Mr. Edwards not disseminate the journal and book to any third parties, that each of them return same and all copies of same to the Federal Public Defender, David Brannon, pending the outcome of this Amended Rule 4 Appeal and that they refrain from attaching any portion of the book or journal to any pleadings;

d. likewise, if this court rules that the "book" or "journal" should or was rightfully produced, Epstein respectfully requests that it do so only after an in camera hearing allowing the document to be reviewed and placed on a privilege log outlining why the content of those documents have no relevance and establishing why the danger of disclosure is more prejudicial than probative, and after this court determines what portions of the requested document should be deemed privileged including, but not limited to, what portions should be protected from disclosure due to the confidentiality and privacy interests, trade secret and commercially sensitive financial and business information. Again, the foregoing should only occur after this court ensures that the document (i.e., the "journal" or "book") produced is the subject of a heightened-confidentiality/protective order where disclosure will result in the disclosing party being held in contempt of court; and

e. or, alternatively, reversing the Magistrate's Order relative to the carte blanch production of the "journal" or "book" (DE 555) pursuant to Mag. J. Rule 4, S.D. Fla. for the reasons set out above;

f. for such other and further relief as this Court deems just and proper.

By:_____
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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was being served this day on all counsel of record identified on the following Service List via electronic mail (EMAIL) on this day of June 10, 2010.

Respectfully submitted,

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Certificate of Service
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