UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE NO. 4,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS

Plaintiff, by and through undersigned counsel, files this Reply Memorandum in Support of Motion to Compel Answers to Interrogatories and Production of Documents, as follows:

I. Introduction

Defendant relies upon generalization s regarding the nature of the case and the allegations in the pleadings in justifying his assertion of the Fifth Amendment privilege in response to each and every interrogatory and document request propounded by Plaintiffs. This blanket assertion of the privilege is insufficient to deny Plaintiffs all discovery in these cases. Defendant otherwise fails to set forth any basis for denying Plaintiffs any and all answers to its written discovery under the psychotherapist-patient privilege, the Federal Rules of Evidence, on grounds of relevance, third party privacy rights, or other grounds. Accordingly, Plaintiffs respectfully request an Order compelling answers to interrogatories and production of documents.

II. Argument in Reply

A. Defendant Has Made a Blanket Assertion of the Privilege Against Self-Incrimination That Is Insufficient

1. Defendant Cannot Rely on its Blanket Objections to Interrogatories on Fifth Amendment Grounds

Defendant Epstein insists that he has not asserted a "blanket privilege" to discovery under the Fifth Amendment, even though he has repeated the identical objection to each of Plaintiff's discovery request on this ground. The federal courts have noted that "[t]he term 'blanket assertion' is not limited to the situation where the defendant makes a single response to numerous questions." United States v. Buaiz, 2008 WL 5050102 (E.D. Tenn. 2008). Rather, as here, where the defendant refuses to answer on fifth amendment grounds each and every question, such repeated assertions are fairly characterized as a "blanket assertion". Id.; Capitol Products Corp. v. Hernon, 457 F.2d 541 (8th Cir. 1972).

Accordingly, it is not sufficient to support the invocation of the Fifth Amendment with nothing more than sweeping generalizations applicable to all questions that were asked in discovery. See United States v. Pierce, 561 F.2d 735 (9th Cir. 1977), cert. denied, 435 U.S. 923 (1978) ("a blanket refusal to answer any question is unacceptable").

Defendant Epstein's Response does not set forth reasonable cause for a concern of self-incrimination in response to specific interrogatories. It is particularly deficient with regard to interrogatory, nos. 1-2 (identity of employees who worked or came to Palm Beach residence), no. 7 (Defendant's presence in Florida), no. 8 (identity of health care providers), no. 9 (persons providing transport services), no. 11 (Epstein's telephone numbers) and no. 12 (employees' telephone numbers). Epstein's references to allegations of sexual abuse, exploitation and battery in the Complaints in this and other civil actions against him, along with the alleged plan and scheme of

recruiting girls to come to Epstein's Palm Beach mansion to give him "massages", fall well short of demonstrating that *any* interrogatory asked of Epstein that is relevant and within the broad scope of Fed.R.Civ.P. 26(b)(1) would realistically and necessarily furnish a link in the chain of evidence needed to prove a crime against him.

Epstein alternatively points out that there is a "narrow exception" which allows a blanket assertion of the privilege where the trial court determines it to be legitimate based on the court's knowledge of the case and the expected testimony. United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980); United States v. Tsui, 646 F.2d 365 (9th Cir. 1981). This is not a case, however, where this narrow exception should apply. In Tsui, the Court allowed a blanket assertion of the privilege only because it was clear that the witness would only be questioned about the real estate transactions that were at the heart of his criminal liability concerns, and the proponent of the testimony argued only that the witness did not have a reasonable fear of prosecution. Id. at 368. Such unusual circumstances are not present in the instant cases. Because a blanket assertion of the Fifth Amendment privilege is not legitimate in these cases, the Court must make a "particularized inquiry", and "only as to genuinely threatening questions should [the witness's] silence be sustained." Goodwin, 625 F.2d at 701 (quoting United States v. Melchor Moreno, 536 F.2d 1042, 1049 (5th Cir. 1976)).

Defendant further asserts that Plaintiff's interrogatories requesting that he identify employees may lead to evidence tending to incriminate him because one of his employees, Sarah Kellen, is identified in the Complaint. (Defendant Memorandum (DE 56), p. 18). This does not, however, support a blanket refusal to answer on Fifth Amendment grounds. It does not demonstrate how answers to these interrogatories, seeking the identities of all employees who were assigned or came to the Palm Beach residence, could realistically furnish a link in the chain of evidence needed to

prosecute Epstein.

Similarly, the allegations of the Complaints alone do not reveal the danger of self-incrimination from answers to interrogatories seeking information on when Epstein was in the State of Florida, who provided transportation services to Epstein, his telephone numbers, his employees' telephone numbers, and his health care providers.[1] Discovery requests that seek background information or information on events and experiences of the witness for which he cannot realistically or genuinely be expected to be charged with a crime are not subject to Fifth Amendment protection. See Krause v. Rhodes, 390 F.Supp 1070, 1071-72 (N.D. Ohio 1974) (allowing questions to be asked regarding personal backgrounds and experiences excluding the event at issue in the pending criminal indictment).

2. Defendant Has Not Demonstrated That the Act of Producing Documents in Response to Specific Requests Would be Sufficiently Testimonial and Incriminating

Defendant Epstein makes a general assertion that a response to *any* of Plaintiff's document requests would entail testimonial self-incrimination. (Defendant's Response (DE 56), pp. 22-23). Whether the act of producing a particular document would be sufficiently testimonial and incriminatory to support the Fifth Amendment privilege against self-incrimination is a "fact dependent inquiry." United States v. Wujkowski, 929 F.2d 981, 985 (4th Cir. 1991). It is the burden of the party asserting the privilege to "explain how the act of producing documents would pose a real danger of incrimination." Bear Sterns & Co. v. Wyler, 182 F.Supp. 2d 679, 681 (N.D. Ill. 2002).

Defendant's reliance on United States v. Hubbell, 530 U.S. 27 (2000), is inadequate. In Hubbell, it was apparent from the breadth of the description of documents demanded in the government's subpoena that "the prosecutor needed respondent's assistance both to identify

[1] See Interrogatory nos. 7, 8, 10, 11, 12.

potential sources of information and to produce those sources." Id. at 41. In Bear Sterns, the Court explained that the facts of Hubbell were unique and do not support a blanket, all-encompassing assertion by a witness or party that the production of documents would be testimonial and incriminating:

> To begin with, in *Hubell*, the incriminatory nature of the production of the document sought was obvious. The respondent was already incarcerated as a result of one investigation and he was the target of a second. Indeed, the second investigation was directed at whether the respondent was in compliance with a plea agreement-resulting from the first investigation-requiring him to produce information relating to the Whitewater investigation. If the respondent had produced such information in response to the subpoena, it would have constituted testimony that he had Whitewater information that he had not provided-it would be an admission that he failed to comply with the plea agreement. Accordingly, it was the testimonial aspect of the production that concerned the Court in *Hubbell*, 530 U.S. at 36-44 120 S.Ct. at 2043-48. At the appellate court level, the court specifically found that respondent's acknowledgment of the existence of certain records sought in the government's subpoena would be directly incriminating. *Hubbell*, 167 F.3d at 582.

Id. at 683.

As noted by the Court in Bear Sterns, a determination that the production of documents would be testimonial cannot be premised on the witness's say so:

> A witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself; his assertion does not of itself establish the hazard of incrimination.

Id. at 684. In Bear Sterns, the Court found that the defendant failed to meet his burden in asserting the privilege against self-incrimination in response to a request for production that included wire transfer records, telephone records, bank records, and records pertaining to specific investment firms. Id. Plaintiffs seek in their document requests, among other things, telephone records, travel records, correspondence and communications, and personal calendars and diaries. The act of producing such records is not a crime. See id. ("[a]s the plaintiff notes, it is not a crime to make a

wire transfer, use the phone, or possess corporate records"). Defendant Epstein has failed to meet his burden of demonstrating that the document requests made by Plaintiffs in these cases would pose a real danger of incrimination. As in Bear Sterns, the Plaintiff's Motion to Compel Production of Documents should accordingly be granted. Id.

B. Defendant Epstein Fails to Demonstrate Why His Invocation of the Fifth Amendment Would Not Warrant an Adverse Interest In These Civil Cases

Defendant Epstein does not dispute the general rule that an adverse inference may be drawn in a civil case from a defendant's refusal to testify or respond to discovery by invoking the privilege against self incrimination. Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976). He instead asserts that there is a "recognized exception" that applies in a case where the adverse inference is the *sole basis* for the plaintiff's prima facie case or will cause the *automatic entry* of summary judgment. (Defendant's Response, (DE 56), pp. 14-15); Federal Trade Comm'n v. Transnet Wireless Corp., 506 F.Supp. 2d 1247, 1252 n. 4 (S.D. Fla. 2007). This exception plainly would not apply here. There are witnesses other than Defendant to the acts and conduct alleged in these cases, including Plaintiffs and other victims. See Transnet Wireless, 506 F.Supp. 2d at 1252 n. 4 (holding that the Court "will draw adverse inferences where appropriate" in reviewing a motion for summary judgment, "in light of the myriad evidence presented by plaintiff").

In any event, it would be premature at this stage of the case for the Court to foreclose the use of an adverse inference from the Defendant's invocation of the privilege against self-incrimination. This issue would arise either in a motion for summary judgment or a motion in limine. Accordingly, based on the foregoing, Defendant's self-serving assertion in his discovery responses concerning the drawing of an adverse inference is improper, and should be rejected and stricken.

C. Plaintiff Is Entitled to Discovery of Health Care Information Requested In Interrogatory No. 8

Defendant Epstein argues that Plaintiff's Interrogatory no. 8 is overbroad because it seeks information over a ten year period. As to Defendant Epstein's psychological condition, particularly any problem of a sexual nature, ten years is more than reasonable. Any psychosexual condition has likely existed for most or all of Defendant Epstein's adult life.

Defendant Epstein next asserts Florida's psychotherapist-patient privilege under Florida Statute §90.503(2). As set forth in Plaintiff's Motion, the allegations of child sexual abuse in this case bring into play the exception to the psychotherapist-patient privilege of Florida Statute §39.204. Defendant asserts that this Court is required to hold an *in camera* inspection of documents to determine, as to each document, whether Florida Statute §39.204 is applicable. See Doherty v. John Doe No. 22, 957 So.2d 1267 (Fla. 4th DCA 2007). Plaintiff agrees that such an *in camera* inspection would be appropriate to evaluate whether the documents relate to allegations of child sexual abuse. In this regard, any notes or records relating to Epstein's sexual interests or tendencies produced in an *in camera* inspection would be relevant and should be turned over to Plaintiff as falling within the exception of §39.204.

D. Third Party Privacy Rights Are Not a Basis to Deny Discovery

The right to privacy discussed in Eisenstadt v. Baird, 405 U.S. 438, 454 (1972), has nothing to do with the discovery issues in this case. Eisenstadt concerns the distribution of a contraceptive device. Yet Defendant relies entirely on Eisenstadt in contending that third party privacy rights provide a basis for Defendant to object to discovery in this case. The vague argument and unsupported assertion raised by Defendant in this case, "that the privacy rights of third parties are implicated", is frivolous and must be rejected.

E. Plaintiff Is Entitled In Discovery to Documents Relating to Plea Agreements and Criminal Proceedings

Defendant asserts that Plaintiff should not be entitled to receive any documents responsive to her Request nos. 1-4 for the sole reason that these documents would not themselves be admissible under Fed.R.Evid. 408 and 410. It is well established that broad discovery under Fed.R.Civ.P. 26 should not, without more, be limited on the basis of admissibility at trial. See Fed.R.Civ.P. 26 (1946 Advisory Committee Note). (Rule 26(b) "may cover not only evidence for use at the trial but also inquiry into matters in themselves inadmissible as evidence but which will lead to the discovery of such evidence. The purpose of discovery is to allow a broad search for facts, the names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case"). Accordingly, the fact alone that plea agreements and related documents may not be admissible at trial is not a basis to deny their production in discovery.[2] In Cupac, Inc. v. Mid-West Agency, Inc., 100 F.R.D. 440 (S.D. Ohio 1983), the Court held on these grounds that a party could obtain discovery relating to a criminal plea, including the answers to questions asked by the prosecutor, even though this information would be inadmissible under Fed.R.Evid. 410. Any concerns regarding the disclosure of documents responsive to request nos. 1-4 could be addressed in an appropriate protective order. Plaintiffs and their counsel, however, should have these documents in discovery.

F. An *In Camera* Hearing May Be Appropriate To Determine Whether Defendant Properly Claims Privilege In Response To Interrogatories And Document Requests

Given the fact intensive nature of the inquiry into whether a defendant has met his burden in asserting a privilege against self-incrimination, some courts have conducted *in camera, ex parte* hearings to determine whether assertions of the privilege are valid in each instance. See United

[2] Plaintiff further notes that her document request no. 4 seeks documents obtained in discovery and investigation of the criminal cases, not documents pertaining to the plea agreement. Accordingly, Rules 408 and 410 could not serve as a basis to object to these requests.

States v. Duncan, 704 F.Supp 820 (N.D. Ill. 1989); see also United States v. Wujkowski, 929 F.2d 981, 986 (4th Cir. 1991) ("[w]e hold only that the district court must undertake a more careful examination of the documents in question and provide a basis for its findings"). To the extent that this Court is in doubt as to whether to uphold the Defendant's privilege claim as to any particular document request or interrogatory, then an *in camera* hearing would be appropriate.

III. Conclusion

Based on the foregoing, and for the reasons stated in Plaintiffs' Motion to Compel Answers to Interrogatories and Request for Production of Documents and Incorporated Memorandum of Law, Plaintiff requests that Defendant Epstein be ordered to answer interrogatories and produce responsive documents.

Dated: April 20, 2009

Respectfully submitted,

By: s/ Stuart S. Mermelstein

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CERTIFICATE OF SERVICE

I hereby certify that on April 20 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Stuart S. Mermelstein

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