UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

JANE DOE NO. 2,

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.
_____/

DEFENDANT EPSTEIN'S RESPONSE TO PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES, and RESPONSES TO 1st and 2nd PRODUCTION OF DOCUMENTS, AND INCORPORATED MEMORANDUM OF LAW

Defendant, JEFFREY EPSTEIN, by and through his undersigned counsel, serves his response and supporting memorandum of law to *Plaintiff's Motion to Compel Answers to Interrogatories and Production of Documents, and Incorporated Memorandum of Law In Support*, dated March 2, 2009. In support of Defendant's assertion of constitutional privileges and objections to discovery and in response to Plaintiff's motion to compel, Defendant states:

Introduction

As discussed more fully herein, Defendant has asserted constitutional based protections to the discovery requests propounded by Plaintiff. In addition and in alternative to the constitutional protections afforded under the Fifth, Fourteenth and Sixth Amendments, Defendant also asserted other factual/legal objections and privileges. However, as will be evident in reviewing Plaintiff's discovery requests and Defendant's response, the constitutional assertions are required to be determined first so that Defendant does not risk rendering these protections meaningless in attempting

to assert and argue the factual basis for the additional objections and privileges. See part II.A. herein.

I. Defendant EPSTEIN has properly asserted his constitutional claims of privilege and effective assistance of counsel, as guaranteed under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, to each of the specified interrogatories and production requests.

In accordance with applicable law, EPSTEIN has properly asserted his claims of privilege and effective assistance of counsel as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution to each of the interrogatories propounded by Plaintiff in her first set of Interrogatories and first production request. See Exhibit A to Plaintiff's Motion to Compel for Defendant's Response and Objections to Plaintiff's Amended Interrogatories, and Exhibit B to Plaintiff's motion for production requests and Defendant's responses thereto. Contrary to Plaintiff's assertion that Defendant made an improper "blanket objection," Defendant examined and responded to each of the discovery requests and raised constitutional privileges, along with other alternative objections applicable to the specific interrogatory or production request. See Exhibit A and B to Plaintiff's motion. (Although Defendant sets forth each of the interrogatories and requests below, because Plaintiff has attached the responses as Exhibits to her motion, Defendant does not retype the responses in their entirety herein).

The circumstances of this case (and the others) are such that not only does Defendant EPSTEIN face allegations of sexual misconduct with and abuse, exploitation, and sexual battery of alleged minors in this and other civil actions, but he also faces criminal prosecution based on the same factual allegations. The Plaintiff's attorney represents Jane Doe Nos. 2, 3, 4, 5, 6, and 7, in civil actions against EPSTEIN filed in

this Court. (There are additional state and federal civil actions against EPSTEIN). In this and the other civil actions, the Plaintiffs reference federal and state criminal statutes in an attempt to allege claims ranging from sexual battery to intentional infliction of emotional distress, to a violation of 18 U.S.C. 2422, entitled "Coercion and enticement, contained in Title 18, "Crimes and Criminal Procedure," Part I – "Crimes,' Chapter 117 – "Transportation for Illegal Sexual Activity and Related Crimes[1]," to a cause of action pursuant to 18 U.S.C. §2255 – which creates a civil remedy for personal injuries where a plaintiff can show a violation of specified statutory criminal statues. Plaintiff is attempting to allege a violation of 18 U.S.C. §2422. See endnote 1 for current text of 18 U.S.C. §2422, along with pre-2006 amended text. See **Exhibit B** hereto – copy of Plaintiff's Second Amended Complaint.

Plaintiff also alleges that "Sarah Kellen, Epstein's assistant" was a part of "Epstein's plan and scheme (which) reflected a particular pattern and method" in the alleged recruiting of girl's to come to EPSTEIN's Palm Beach mansion and give him "massages" in exchange for money. 2nd Am. Complaint, ¶11-12. According to the complaint allegations – "Upon information and belief Epstein has a sexual preference and obsession for underage minor girls." ¶8. "Sarah Kellen" would "bring the girl up a flight of stairs to a bedroom that contained a massage table ... ." The girl would be alone with EPSTEIN. EPSTEIN would "lie naked on the massage table, and direct the girl to remove her clothes." "Epstein would then perform one or more lewd, lascivious and sexual acts, including masturbation and touching the girl's vagina." 2nd Am. Complaint, ¶11, Exhibit B. Plaintiff alleges that "in 2004-2005," she, "then approximately 16 years old, fell into Epstein's trap and became one of his victims." ¶8.

Plaintiff alleges that Epstein "sexually assaulted" her. ¶12 Plaintiff also alleges that EPSTEIN "maintains his principal home in New York and also owns residences in New Mexico, St. Thomas and Palm Beach, FL." Id, ¶7. "Upon information and belief, Jeffrey Epstein carried out his scheme and assaulted girls in Florida, New York and on his private island, known as Little St. James, in St. Thomas." Id, ¶9. The nature of the allegations is (obviously) serious.

The threat of criminal prosecution is real and present as EPSTEIN remains under the scrutiny of the United States Attorney's Office (USAO) which, as explained more fully herein, possesses the power to move forward with its criminal prosecution against EPSTEIN. EPSTEIN entered into a Non-Prosecution Agreement ("NPA") with United States Attorney General's Office for the Federal Southern District of Florida. The terms and conditions of the NPA also entailed EPSTEIN entering into a Plea Agreement with the State Attorney's Office, Palm Beach County, State of Florida. By its terms, the NPA took effect on June 30, 2008. As well, pursuant to the NPA, any criminal prosecution against EPSTEIN is deferred as long as the terms and conditions of the NPA are fulfilled by EPSTEIN. Criminal matters against EPSTEIN remain ongoing until the NPA expires by its terms in late 2010 and as long as the USAO determines that EPSTEIN has complied with those terms and conditions. The threat of criminal prosecution against EPSTEIN by the USAO continues presently and through late 2010. The USAO possesses the right to declare that the agreement has been breached, give EPSTEIN's counsel notice, and attempt to move forward with the prosecution. In other words, the fact that there exists a NPA does not mean that EPSTEIN is free from future criminal prosecution. In fact, the threat of prosecution is real, substantial, and present. See

attached **Exhibit "A"**, Affidavit of Jack A. Goldberger, a board certified criminal defense attorney who has in the past and is currently representing EPSTEIN.

A.

Memorandum of Law Supporting Application of Constitutional Privileges

The Fifth Amendment provides in relevant part that "No person ... shall be compelled in any Criminal Case to be a witness against himself." Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814 (1951), citing Feldman v. United States, 1944, 322 U.S. 487, 489, 64 S.Ct. 1082, 1083, 88 L.Ed. 1408." The Fifth Amendment's privilege against self-incrimination is "accorded liberal construction in favor of the right it was intended to secure." "The immediate and potential evils of compulsory self-disclosure transcend any difficulties that the exercise of the privilege may impose on society in the detection and prosecution of a crime." Id, at 490; and In re Keller Financial Svcs. of Fla., Inc., 259 B.R. 391, 399 (M.D. Fla. 2000). The privilege not only extends to answers that would in themselves support a conviction under a criminal statute but likewise embraces those which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. Id, citing Blau v. United States, 1950, 340 U.S. 159, 71 S.Ct. 223. The Fifth Amendment 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, 94 S.C. 316, 322 (1973). See also Ohio v. Reiner, 532 U.S. 17, 21, 121 S.Ct. 1252 (2001)(The Fifth Amendment privilege is also available to those who claim innocence. One of the Fifth Amendment's "basic functions ... is to protect innocent men ... 'who otherwise might be ensnared by ambiguous

circumstances."); 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."); Kastigar v. U.S., 406 U.S. 441, 444-45, 92 S.Ct. 1653 (1972)(The Fifth Amendment privilege "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures which the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used. This Court has been zealous to safeguard the values which underlie the privilege." (Emphasis added)).

As EPSTEIN is here, "the claimant must be 'confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination.'" See generally, United States v. Apfelbaum, 445 U.S. 115, 128, 100 S.Ct. 948, 956, 63 L.Ed.2d 250 (1980)). See also, United States v. Neff, 615 F.2d 1235, 1239 (9th Cir.), cert. denied, 447 U.S. 925, 100 S.Ct. 3018, 65 L.Ed.2d 1117 (1980)(Information is protected by the privilege not only if it would support a criminal conviction, but even if "the responses would merely 'provide a lead or clue' to evidence having a tendency to incriminate.").

The United States Supreme Court has made clear that the scope of the Fifth Amendment Privilege also encompasses the circumstance where "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); see also Fisher v. United States, 425 U.S. 391 (1976); McCormick on Evidence,

Title 6, Chap. 13. *The Privilege Against Self-Incrimination*, §138 (6th Ed.). 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.
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> 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 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).
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> 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:
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> "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).
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> 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 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.

The privilege against self-incrimination may be asserted during discovery when a litigant 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). See also, Hubbell, supra, quoted above as to what is encompassed by the phrase "in any criminal case" contained in the Fifth Amendment.

As noted, the Fifth Amendment privilege against self-incrimination is broad. Hoffman; In re Keller Financial Svcs., supra. To deny a witness the right to invoke the privilege, the judge must be perfectly clear, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answers cannot possibly have such tendency to incriminate. Id, at 488, 399. Recognizing the breadth and magnitude of this constitutional privilege, the United States Supreme Court in discussing how a court is to analyze the application of the privilege stated –

> ... It is for the court to say whether his silence is justified, Rogers v. United States, 1951, 340 U.S. 367, 71 S.Ct. 438, and to require him to answer if 'it clearly appears to the court that he is mistaken.' Temple v. Commonwealth, 1880, 75 Va. 892, 899. However, if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim 'must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.'

Hoffman, supra at 486-487.

Hoffman and its progeny establish that "in view of the liberal construction of the provision [protecting against self-incrimination], after a witness has asserted the privilege, he should be compelled to provide the requested information only if it "clearly appears" to the court that the witness was mistaken in his invocation of the privilege." (Emphasis added). In re Keller Financial Svcs., supra at 399, citing Hoffman, at 486.

Finally, in order to preserve the privilege against self-incrimination, as EPSTEIN has properly done is response to each discovery request, the privilege must be asserted or one risks the loss or waiver of this liberty ensuring protection. See generally, U.S. v. White, 846 F.2d 678, 690 (11th Cir. 1988)("First, it ignores the settled principle which requires a witness to assert his Fifth Amendment rights. A witness who testifies at any proceeding, instead of asserting his Fifth Amendment rights, loses the privilege. ... A civil deponent cannot choose to answer questions with the expectation of later asserting the Fifth Amendment.").

In the instant case, the privilege applies as Defendant EPSTEIN "has reasonable cause to apprehend danger from a direct answer." The risk of incrimination resulting from answering each of the interrogatories and requests for production is "substantial and real" and "not trifling or imaginary haphazards of communication." See generally, In re Keller Financial Svcs., supra at 400. Based on the nature of Plaintiff's claims, along with the ongoing scrutiny of the USAO in the criminal matters, EPSTEIN has "reasonable grounds to believe that his responses to the discovery would furnish a link in the chain of evidence needed to prove a crime against him. The very nature of the claims brought and the discovery being sought by Plaintiff in order to attempt to prove those claims establish a realistic possibility that the answer to an interrogatory or production request could be used in a type of way to convict EPSTEIN of a crime or aid in the development of other incriminating evidence that can be used at a criminal trial. Under the circumstances of this case, the threat of criminal prosecution is not imaginary. See Exhibits A and B to Plaintiff's Motion to Compel. This Court is well aware of the "peculiarities" of this action as it has before it other civil actions against

EPSTEIN, all alleging similar underlying facts of sexual misconduct involving minors. The allegations of this action and others entail EPSTEIN allegedly "recruiting" Plaintiff and other minors to come to his home in Palm Beach to give him massages which allegedly became sexually inappropriate in nature, and EPSTEIN in turn would pay the minors. See Chapter 110 of Title 18, United States Code Annotated; and "predicate acts" specified in 18 U.S.C. §2255.

Also applicable in upholding the assertion of Defendant's Fifth Amendment privilege is the guarantee of effective assistance of counsel by the Sixth Amendment of the U.S. Constitution. See Yarborough v. Gentry, 124 S.Ct. 1, 540 U.S. 1, 157 L.Ed.2d 1 (2003)(Sixth Amendment guarantees criminal defendants effective assistance of counsel.), on remand 381 F.3d 1219. The United States Constitutional guarantees are applicable to the states through the Fourteenth Amendment. Obviously, EPSTEIN's assertion of his constitutional privileges and protections is on the advice of counsel. EPSTEIN continues to face criminal prosecution by the USAO until the expiration of the NPA; under the constitutional guarantee of effective assistance of counsel, he is entitled to follow the recommended advice of his criminal defense attorney. See Exhibit A hereto. A review of the complaint allegations and the circumstances of this case – including multiple civil actions attempting to allege claims based upon sexual abuse and exploitation of minors, parallel criminal matter under which EPSTEIN continues to face prosecution for crimes based on the same allegations until the terms of the NPA have expired and been fulfilled as determined by the USAO – establish that EPSTEIN's invocation of his constitutional protections of the Fifth, Sixth and Fourteenth

Amendments be upheld; otherwise such constitutional protections would be rendered meaningless.

Circuit Court, State of Florida, recently entered order upholding assertion of Fifth Amendment and constitutional based protections in response to discovery.

Further requiring the sustaining of Defendant's assertions of his constitutional protections, the 15th Judicial Circuit Court in and for Palm Beach County, State of Florida, recently entered an order sustaining Defendant's assertion of his 5th, 6th and 14th Amendment privileges and protections in response to Plaintiff A.C.'s request for production in A.C. v. Epstein, Case No. 502008CA025129XXXXMB AI. The Order, dated February 23, 2009, and the production requests and Defendant's responses are attached hereto as **Composite Exhibit C**. (Compare Requests for Production Nos. 1, 2, 3, and 4 in the instant case with the production request no. 1 in Composite Exhibit C hereto; compare requests nos. 20 and 21 in this case with nos. 2 and 3 in Comp. Ex. C; and compare information sought in interrogatories nos. 3, 4, 5, 6, and 15 in this case with information sought in request nos. 2 and 3 in Comp. Ex. C).

B. Even if the Court were to agree with Plaintiff's assertion that Defendant has asserted a "blank privilege" under the Fifth Amendment, under the facts and circumstances of this case, such assertion would be proper.

Plaintiff claims that Defendant has improperly asserted a "blanket privilege" to the discovery. As stated above, Defendant disagrees. Defendant evaluated each and every discovery request in asserting applicable constitutional privileges and other objections. The facts and circumstances of this case are such that in evaluating each of the interrogatories and production requests on an individual basis, the constitutional protections asserted by Defendant apply to each. The Court will note that the additional objections raised are also tailored to each interrogatory and production request. Even

the Court's analysis of the discovery will be on an individualized basis. However, simply for the sake of argument, as to Plaintiff's assertion that Defendant has made a "blanket assertion," under the facts and circumstances of this case, such an assertion is proper.

In allowing a blanket assertion, Courts have recognized a narrow exception to the rule that the assertion of the privilege must be to each specific question. The Courts, including this Circuit, acknowledged "an exception ... (where,) based on its knowledge of the case and of the testimony expected from the witness, (the trial court) can conclude that the witness could 'legitimately refuse to answer essentially all relevant questions." United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. Fla. 1980)); United States v. Tsui, 646 F.2d 365, 367-68 (9th Cir. 1981). This exception is narrow and is applicable where the trial judge has "some special or extensive knowledge of the case that allows evaluation of the claimed Fifth Amendment privilege even in the absence of specific questions to the witness." Id. See also U.S. v. Smith, 157 Fed.Appx. 215, 218 (11th Cir. Ga. 2005)("A district court must make a particularized inquiry, evaluating whether the privilege applies with respect to each specific area that the questioning party wishes to explore. Melchor Moreno, 536 F.2d at 1049. The witness may be totally excused from testifying only if the court finds that he could legitimately refuse to answer essentially all relevant questions. United States v. Goodwin, *625 F.2d 693, 701 (5th Cir.*1980).").

See also State of Washington v. DelGado, 18 P.3d 1141 (Wa. Ct. of App. Div. 2 2001)("There is a narrow exception allowing a blanket privilege where "based on its knowledge of the case and of the testimony expected of the witness, [the trial court] can conclude that the witness could legitimately refuse to answer essentially all relevant

questions. ... For the exception to apply, the trial judge must have 'some special or extensive knowledge of the case that allows evaluation of the claimed ... privilege even in absence of specific questions to the witness.'").

C. Plaintiff's statement of the law in section IV, (pp. 6-7), of her motion is incorrect under the circumstances. Contrary to Plaintiff's assertion, an adverse inference from invocation of the Fifth Amendment in a civil case is not always permitted.

In section IV, (pp. 6-7), of Plaintiff's motion to compel, Plaintiff's general claim that an adverse interest based on a defendant's invocation of the Fifth Amendment in a civil case may be made is improper under the facts and circumstances of this case. Plaintiff is correct as to the general rule that "adverse inferences may be drawn in the civil context when Defendants invoke the privilege in refusing to testify in response to probative evidence offered against them." F.T.C. v. Transnet Wireless Corp., 506 F.Supp.2d 1247, 1252, fn. 4 (S.D.Fla.,2007), citing Mitchell v. United States, 526 U.S. 314, 328, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999). However, there exists a well recognized exception to the general rule – "Courts may not draw adverse inferences, however, if it is the sole basis for Plaintiff's prima facie case, or will cause the "automatic entry of summary judgment." See generally, F.T.C., supra, at fn.4, citing United States v. Premises Located at Route 13, 946 F.2d 749, 756 (11th Cir.1991) (citing Pervis v. State Farm and Cas. Co., 901 F.2d 944, 948 (11th Cir.1990)). See also S.E.C. v. Keith Group of Companies, Inc., 1998 WL 1670405 (S.D. Fla. 1998)("When a party is a defendant in both a civil and criminal case and is forced to choose between waiving his Fifth Amendment privilege ... or losing the civil case on summary judgment, an exception to the general rule ... applies. In such a situation, the Court may not make an adverse inference about the party's refusal to testify.") Accordingly, Defendant's

assertion that an adverse interest "under the circumstances would unconstitutionally burden my exercise of my constitutional rights, would be unreasonable, and would therefore violate the constitution," is both proper and required to be upheld at this time.

D. Plaintiff's Amended First Set of Interrogatories to Defendant

Listed below is each of the interrogatories propounded by Plaintiff. As noted above, Defendant responded to each interrogatory separately in raising his constitutional privileges and guarantees, and, in the alternative, raising specific other applicable objections to each. See Exhibit A to Plaintiff's motion to compel.

No. 1. Identify all employees who performed work of services inside the Palm Beach Residence.

No. 2. Identify all Employees not identified in response to interrogatory no. 1 who at any time came to Defendant's Palm Beach Residence.

No. 3. Identify all persons who came to the Palm Beach Residence and who gave a massage or were asked to give a massage to Defendant.

No. 4. Identify all persons who came to the New York Residence and who gave a massage or were asked to give a massage to Defendant.

No. 5. Identify all persons who came to the New Mexico Residence and who gave a massage or were asked to give a massage to Defendant.

No. 6. Identify all persons who came to the St. Thomas Residence and who gave a massage or were asked to give a massage to Defendant.

No. 7. List all the time periods during which Jeffrey Epstein was present in the State of Florida, including for each the date he arrive and the date he departed.

No. 8. Identify all of Jeffrey Epstein health care providers in the past (10) ten years, including without limitation, psychologists, psychiatrists, mental health counselors, physicians, hospitals and treatment facilities.

No. 9. (**Not at issue.**)[1] List all items in Jeffrey Epstein's possession in Palm Beach, Florida, at any time during the period of these interrogatories, which were used or intended to be used as sexual aids, sex toys, massage aids, and/or vibrators, and for each, list the manufacturer, model number (if applicable), and its present location.

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[1] Fn. 4 of Plaintiff's motion states – "Plaintiff does not challenge at this time Defendant's Fifth Amendment privilege in response to interrogatory no. 9, which seeks information of Defendant's sexual aids."

No. 10. Identify all persons who provide transportation services to Jeffrey Epstein, whether as employees or independent contractors, including without limitation, chauffeurs and aircraft crew.

No. 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.

No. 12. Identify all 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.

No. 13. List the names and addresses of all persons who are believed or known by you, your agents, or your attorneys to have any knowledge concerning any of the issues in this lawsuit; and specify the subject matter about which the witness has knowledge.

No. 14. State the name and address of every person known to you, your agents, or your attorneys who has knowledge about, possession, or custody, or control of, any model, plat, map, drawing, motion picture, videotape or photograph pertaining to any fact or issue involved in this controversy; and describe as to each, what item such person has, the name and address of the person who took or prepared it, and the date it was taken or prepared.

No. 15. Identify all persons who have made a claim, complaint, demand or threat against you relating to alleged sexual abuse or misconduct on a minor, and for each provide the following information:

a. The person's full name, last known address and telephone number;
b. The person's attorney, if represented;
c. The date of the alleged incident(s);
d. If a civil case has been filed by or on behalf of the person, the case number and identifying information.

No. 16. State the facts upon which you intend to rely for each denial of a pleading allegation and for each affirmative defense you intend to make in these cases.

No. 17. Identify all witnesses from whom you have obtained or requested a written, transcribed or recorded statement relating to any issue in these cases, and for each, in addition to the witness's identifying information, state the date of the statement and identify the person taking the statement.

(Emphasis added).

Defendant will address interrogatories nos. **3, 4, 5, 6, 13, 14, 15, 16**, and **17**, above, as the analysis as to the application of the constitutional privileges and protections is straightforward. Nos. 3 through 6 ask Defendant to identify anyone who gave "massages" or were asked to give "massages" to him. Clearly, any answer to

these interrogatories, involve compelled statements that would furnish a link in the chain of evidence needed to prosecute the Defendant in future criminal proceedings or even support a criminal conviction. These interrogatories seek the precise information that the USAO investigated and continues to scrutinize. See Exhibit A hereto.

Any answer to **no. 15**, which seeks information "relating to alleged sexual abuse or misconduct on a minor," on its face would also lead to incriminating evidence protected under the Fifth Amendment privilege. The same is true for no. 16 – which seeks "facts upon which you intend to rely for each denial of a pleading allegation and for each affirmative defense," and **Nos. 13, 14, and 17** which seek to compel EPSTEIN to list any persons or witnesses in 13 "having any knowledge concerning any of the issues in this lawsuit," in 14 having "knowledge about, possession, or custody, or control of, any model, plat, map, drawing, motion picture, videotape or photograph pertaining to any fact or issue involved in this controversy," and in 17 "whom you have obtained or requested a written, transcribed or recorded statement relating to any issue in these cases." In answering no. 16, Defendant would be compelled to testify as to his version of the facts, and, in asserting affirmative defenses, he would further be compelled to admit Plaintiff's version of the facts. In listing such person or witness, the Defendant is further compelled to describe the subject matter, nature of the items and or statements of such witness or person. Again, the allegations of this action are such that in answering these interrogatories, Defendant is being compelled to incriminate himself in crimes. By answering the specified interrogatories Defendant is being compelled to testify as to the issues and facts not only asserted in Plaintiff's complaint, but also to facts which present a real and substantial danger of self-incrimination. Again, the

information sought all relate to claims of sexual abuse and exploitation of a minor. (See Chapter 110 of Title 18, United States Code Annotated; and "predicate acts" specified in 18 U.S.C. §2255, and 18 U.S.C. §2422).

Any answer to **nos. 1 and 2** would also be compelled testimony that "tends to show that the witness himself (EPSTEIN) committed a crime" based on the nature of the allegations. As noted above, Plaintiff alleges that at least one of EPSTEIN's employees, Sarah Kellen, was part of the scheme or plan of sexual misconduct, exploitation and abuse of the "girls." No. 1 is asking for any employee who performed work or services, and no. 2 is asking EPSTEIN to testify as to anyone who came to his Palm Beach mansion. Such compelled testimony is protected under the Fifth Amendment as the answers "would furnish a link in the chain of evidence needed to prosecute the claimant for a crime." Answering the questions as to who came and went from his Palm Beach mansion would provide a "'lead or clue' to evidence having a tendency to incriminate." See also 18 U.S.C. 2422, *Coercion and Enticement*. This analysis also applies to interrogatory **nos. 7** and **9** which seek, respectively, "all the time periods during which Jeffrey Epstein was present in the State of Florida, including for each the date he arrive and the date he departed," and "all persons who provide transportation services to Jeffrey Epstein, whether as employees or independent contractors, including without limitation, chauffeurs and aircraft crew." Plaintiff alleges a time period of 2004-05 as to when the alleged to when the sexual misconduct, including sexual assault, of a minor took place in Palm Beach, Florida. Plaintiff also alleges that EPSTEIN engaged in the same "scheme and plan" against minor girls at his other places of residence. Again, EPSTEIN's answer as to his travels to and from Florida,

and within Florida, would be a link in the chain of evidence needed to convict him of a crime.

The privilege against self-incrimination also applies to **Nos. 11** and **12** which seek, respectively, "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," and "all 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." Again, such compelled testimony would self-incriminate EPSTEIN based on the elements required to establish a violation of the criminal statute 18 U.S.C. §2422. Such information would be a link in the chain of evidence needed to prosecute EPSTEIN for a crime.

Finally, the compelled testimony sought in **no. 8** – "all of Jeffrey Epstein health care providers in the past (10) ten years, including without limitation, psychologists, psychiatrists, mental health counselors, physicians, hospitals and treatment facilities," could also lead to a link in the chain of evidence to convict EPSTEIN based on the allegations which are criminal in nature – sexual misconduct with minors, and a plan and scheme to "recruit" such minors to fulfill Epstein's "sexual preference and obsession." See ¶8 of complaint – "Upon information and belief Epstein has a sexual preference and obsession for underage minor girls."

As explained in Hoffman, EPSTEIN is not required to "prove the hazard in the sense in which a claim is usually required to be established in court." The United States Supreme Court recognized placing such a requirement on a person asserting his

constitutional privilege is in effect tantamount compelling him "to surrender the very protection which the privilege is designed to guarantee." Under the facts and circumstances of this case, it is evident from the implications of each of the interrogatories or an explanation of why they can't be answered "might be dangerous because injurious disclosure might result." Id.

Accordingly, under applicable law and the facts of this case, Defendant's assertion of the constitutional privilege and guarantee under the 5th, 6th and 14th Amendments of the United States Constitution are required to be upheld.

E. Plaintiff's First Production Request To Defendant

The constitutional protections are equally applicable to the request for production propounded on Defendant by Plaintiff. See Exhibit B to Plaintiff's motion to compel. The requests are as follows -

Request No. 1. The list provided to you by the U.S. Attorney of individuals whom the U.S. Attorney was prepared to name in an Indictment as victims of an offense by Mr. Epstein enumerated in 18 U.S.C. §2255.

Request No. 2. All documents referring or relating to the United States' agreement with Defendant to defer federal prosecution subject to certain conditions, including without limitation, the operative agreement between Defendant and the United States and all amendments, revisions and supplements thereto.

Request No. 3. All documents referring or relating to Defendant's agreement with the State of Florida on his plea of guilty to violations of Florida Criminal Statutes, including without limitation, the operative plea agreement and any amendments, revisions and supplements thereto.

Request No.4. All documents obtained in discovery or investigation relating to either the Florida Criminal Case or the Federal Criminal Case, including without limitation, documents obtained from any federal, state, or local law enforcement agency, the State Attorney's office and the United States Attorney's office.

Request No. 5. All telephone records and other documents reflecting telephone calls made by or to Defendant, including without limitation, telephone logs and message pads.

Request No. 6. All telephone records and other documents reflecting telephone calls made by or to Defendant, including without limitation, telephone logs and message pads, reflecting telephone calls made by or to employees.

Request No. 7. All surveillance videos, slides, film, videotape, digital recording or other audio or video depiction or image of the Palm Beach Residence.

Request No. 8. All documents referring or relating to Plaintiff Jane Doe No. 2, including without limitation, web pages, social networking site pages, correspondence, videotapes and audiotapes.

Request No. 9. (Not at issue).[2] All statements taken, transcribed or recorded from any person referring or relating to Defendant's sexual conduct, massages given to Defendant or any issue in these cases.

Request No. 10. All documents referring to or relating to air travel and aircraft used by Defendant, including without limitation, flight logs and flight manifests.

Request No. 11. Any and all documents referring to or relating to modeling agencies, including but not limited to documents relating to or reflecting communications with female models.

Request No. 12. (Not at issue). All photographs, videotapes, digital images and other documents depicting or showing females who, at the time thereof, were under the age of 21, which were taken or created by or for Defendant and not intended for sale commercially to the public.

Request No. 13. (Not at issue.) All photographs and painting of females which were displayed in any of Defendant's homes or residences in the time frame of these requests, including without limitation, photographs in standing or sitting frames or wall frames.

Request No. 14. Any and all documents consisting of, referring or relating to communications between Jeffrey Epstein and Haley Robson, including, but not limited to, letters, notes, text messages, messages on social networking sites, and e-mails.

Request No. 15. Any and all documents consisting of, referring or relating to communications between Jeffrey Epstein and Sarah Kellen, including, but not limited to, letters, notes, text messages, messages on social networking sites, and e-mails.

Request No. 16. Any and all documents consisting of, referring or relating to communications between Jeffrey Epstein and Nada Marcinkova, including, but not limited to, letters, notes, text messages, messages on social networking sites, and e-mails.

Request No. 17. Any and all documents consisting of, referring or relating to communications between Jeffrey Epstein and Ghislaine Maxwell, including, but not limited to, letters, notes, text messages, messages on social networking sites, and e-mails.

Request No. 18. Any and all documents and photographs placed by Defendant at any time in the period of these requests on a social networking website, including without limitation, Facebook.com and MySpace.com.

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[2] "Plaintiff concedes that the act of producing items in response to request no. 9, concerning witness statements, and requests nos. 12-13, concerning photographs or images of females, may implicate the Fifth Amendment." Plaintiff's motion, p. 5, fn. 6.

Request No. 19. Any and all documents reflecting or consisting of communications between Jeffrey Epstein and MC2 Models or Jean-Luc Brunel, relating or referring to females coming into the United States from other countries to pursue a career in modeling, including, but not limited to, letters, notes and e-mails.

Request No. 20. Any and all documents referring or relating to gifts or loans to females under the age of 21, including, but not limited to, notes, receipts and car rental agreements.

Request No. 21. Any and all personal calendars or schedules of or for Jeffrey Epstein from January 1, 2003 to the present.

Request No. 22. All documents written by Jeffrey Epstein consisting of personal thoughts, feelings or descriptions of events, incidents or occurrences in Defendant's life, including without limitation, any diaries of Jeffrey Epstein.

Request No. 23. All documents referring to or relating to Jeffrey Epstein's purchase or consumption of prescription medicine.

As discussed in the supporting memorandum law herein, it is well settled that the Fifth Amendment privilege against self-incrimination also encompasses situations as here where the act of production itself involves a testimonial compulsion. Hubbell, supra. In responding to each request, EPSTEIN would be compelled admit that such documents existed, admit that the documents were in his possession or control, and were authentic. In other words, the very act of production of the category of documents requested would implicitly communicate "statements of fact." Hubbell, supra; Hoffman, supra. The act of production might not only provide evidence to support a conviction, but also a link in the chain of evidence for prosecution. Such compulsion to produce is the same as being compelled to testify. The acts of EPSTEIN in being required to produce the requested documents imply assertions of fact – admitting the documents exist, admitting the documents are in his possession or control, and admitting the documents are authentic. Again, in reading each of the production requests in **Nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 14, 15, 16, 17, 18, 19, 20, 21, 22,** and **23**, (like the

interrogatories), it is clear that the very act of production of such documents could implicate EPSTEIN in a crime.

As noted above, EPSTEIN is constitutionally entitled to follow the advice of counsel in asserting the applicable Fifth Amendment privilege under the guarantee of effective assistance of counsel. Accordingly, based on the facts and circumstances of this case, and under applicable law, Defendant's assertion of the protections afforded under the 5th, 6th, and 14th Amendments of the United States Constitution are required to be upheld.

II. Defendant's objections made in addition to the constitutional based protections are required to be upheld.

A. Constitutional issues are required to be addressed first.

Obviously, the constitutional issues raised in Defendant's response permeate not only discovery, but the entire action itself. Defendant would suggest to the Court that the constitutional issues be decided before the additional objections are addressed. [3] In fact, in arguing certain of the additional objections, Defendant's constitutional rights under the 5th, 6th and 14th Amendments are clearly implicated. In setting forth factual reasons to support the additional objections, Defendant is being compelled to testify in response to a specific discovery request, thus, impeding his privilege against self-incrimination and guarantee of effective assistance of counsel. The same is true if Defendant is required to prepare privilege logs. (In section IV of her motion, Plaintiff recognized, in addressing Defendant's assertion that an adverse inference would be improper, that "It is first necessary to determine whether the Fifth Amendment privilege is validly asserted in response to particular questions."). Thus, Defendant also requests

[3] Should this Court overrule Defendant's constitutional based privileges and guarantees, Defendant will likely take an immediate appeal of such ruling.

that should this Court rule that the Fifth Amendment does not apply to certain of the discovery requests, that Defendant be given an additional 20 days from the date of the order thereon in which to assert other objections and privileges.

* * * * * * *

In alternative and addition to the applicable constitutional based protections, Defendant also raised objections to each of the interrogatories and requests for production. (See sections V, VI, and VII, pp. 7-12, of Plaintiff's motion to compel). Defendant will address Plaintiff's arguments pertaining to the additional objections in the order presented in Plaintiff's motion.

B. Interrogatory No. 8, Production Request No. 23

Section V. A. of plaintiff's motion pertains to interrogatory **no. 8** –

> Identify all of Jeffrey Epstein health care providers in the past (10) ten years, including without limitation, psychologists, psychiatrists, mental health counselors, physicians, hospitals and treatment facilities.

In addition to the constitutional protections, Defendant also stated –

> … 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. In addition, such information is privileged pursuant to Rule 501, Fed. Evid., and §90.503, Fla.Evid. Code. In addition, such information is protected by the provisions of the Health Insurance Portability and Accountability Act (HIPAA).

Federal Rule of Evidence 401 provides that - "'Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Pursuant to Rule 26(b)(1), the scope of discovery is as follows –

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense--including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of

> persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).

Plaintiff's complaint alleges a time period of 2004-05 as to when the alleged sexual misconduct of Defendant occurred. Plaintiff's request seeks to have EPSTEIN list "all health care providers" and "hospitals and treatment facilities" over a "ten year period." On its face, the interrogatory is overbroad as it seeks information over a 10 year period that is neither relevant nor does it "appear reasonably calculated to lead to the discovery of admissible evidence." EPSTEIN's physical health is not in issue in this matter. Whether or not he was treated for the flu over the past ten years is not relevant to any party's claim or defense in this matter. The same is true for whether or not Defendant received treatment for a physical ailment at a hospital or facility over a 10 year period. Plaintiff fails to tailor her question such that it can be determined what type of information she is seeking regarding "health care providers" and "hospitals and treatment facilities." The 10 year period is overbroad as it seeks information approximately 5 years prior to and four years after the alleged incident.

As to "psychologists, psychiatrists, mental health counselors," and the "hospitals and treatment facilities" where Defendant may or may not have received treatment from such professionals, such information would be protected under Fed. Evid. Rule 501 and §90.503, Fla.R.Evid. Rule 501 provides –

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness,

> person, government, State, or political subdivision thereof shall be determined in accordance with State law.
>
> (Emphasis added).

Plaintiff alleges diversity jurisdiction, and thus, state law of Florida controls application of the privilege. 2nd Am. Complaint, ¶5. The elements of Plaintiff's alleged claims in Counts I – Sexual Battery and Counts II – Intentional Infliction of Emotional Distress are also controlled by state law. Erie R.Co. v. Tompkins, 58 S.Ct. 817 (1938). Accordingly, the privileges recognized under state law apply to this action under Rule 501. See, for example, 1550 Brickell Associates v. Q.B.E. Ins. Co., 253 F.R.D. 697, 699 (S.D. Fla. 2008)("Attorney-client privilege is governed by state law in diversity actions.").

§90.503(2), Fla. Stat., provides –

> (2) A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications or records made for the purpose of diagnosis or treatment of the patient's mental or emotional condition, including alcoholism and other drug addiction, between the patient and the psychotherapist, or persons who are participating in the diagnosis or treatment under the direction of the psychotherapist. This privilege includes any diagnosis made, and advice given, by the psychotherapist in the course of that relationship.

As summarized in C.L. v. Judd, 993 So.2d 991, 995 (2d DCA Fla. 2007):

> Under the psychotherapist-patient privilege, a patient has a privilege to refuse to disclose confidential information or records made for the purpose of diagnosis or treatment of mental conditions, including any diagnoses made by the psychotherapist. § 90.503(2), Fla. Stat. (2005); *see Pauker v. Olson,* 834 So.2d 198, 200 (Fla. 2d DCA 2002). The psychotherapist-patient privilege does not apply: (1) during involuntary commitment proceedings, (2) when there is a court-ordered mental examination, or (3) when the patient raises and relies on the issue of his or her mental condition in litigation as part of any claim or defense. § 90.503(4); *Roberson,* 884 So.2d at 980; *State v. Famiglietti,* 817 So.2d 901, 903 (Fla. 3d DCA 2002). The privilege does not allow the invasion of a patient's privileged communications with his or her psychotherapist. *Roberson,* 884 So.2d at 979.

None of the three situations listed as exceptions to the privilege above exist in the present case to make the privilege inapplicable.

Plaintiff's position is that the protection afforded under §90.503, Fla. Stat., does not apply "in a case of child abuse under Florida Statute §39.204." See endnote 2 for full text of §39.204, Fla. Stat.[2] (¶'s Motion, p. 8-9). See Carson v. Jackson, 466 So.2d 1188, 1192 (Fla. 4th DCA 1985); and Doherty v. John Doe No. 22, 957 So.2d 1267 (4th DCA 2007). A reading of these cases establishes that §39.204 does not provide Plaintiff with a carte blanche access to Defendant's medical history. The Court is required to hold an in camera inspection to determine if the information sought by Plaintiff relates to "communications involving known or expected child abuse." Id.

As stated above, on its face the interrogatory is overbroad and encompasses information that has no relevance to the claims or defenses nor is it reasonably calculated to lead to the discovery of admissible evidence. Compelling Defendant to identify each and every health care provider, including psychologists, psychiatrists, mental health counselors, and hospital or treatment facility over the past ten year period, is not proper at this time. Plaintiff should be required to limit the information sought, as well as the time period, in her interrogatory, thus allowing the Defendant and Court to determine whether such information is relevant and discoverable.

As to Defendant's HIPAA (Health Insurance Portability and Accountability Act) objection, as noted in the case cited in Plaintiff's motion, Allen v. Woodford, 2007 WL 309485 (E.D. Cal. 2007), (p. 9), HIPPA institutes procedural safeguards to protect the privacy of an individual's medical information and history. In the context of HIPAA, Courts have recognized three methods of health care discovery (assuming it's relevant)

in civil litigation: (1) Obtaining a patient authorization that complies with the requirements and criteria, tailored to the specific case, of HIPAA as set forth in 45 C.F.R. §164.508; (2) Court Order, which also complies with the requirements of HIPAA ensuring that the privacy and confidentiality of the information is protected; and (3) Subpoena or discovery request, which again comply with the strictures of HIPAA, including that the person whose records are being sought has been given proper notice. See Handbook of Federal Civil Discovery And Disclosure (2d Edition), Chap. 18, Sect. A - Health Insurance Portability and Accountability Act (HIPAA), §18.3 – *Discovery of health care information in civil litigation*; and Graham v. Dacheikh, 991 So.2d 932, at fn. 3 (2d DCA Fla. 2008)("Even under HIPAA, ..., if the records are produced during normal discovery they are typically produced in a manner that restricts the persons who may access the documents and requires their return at the end of the litigation. See 45 C.F.R. §164.512(e).").

In production request **no. 23**, Plaintiff seeks – "All documents referring to or relating to Jeffrey Epstein's purchase or consumption of prescription medicine." On its face, this production request is over broad and seeks non-relevant information. For example, whether or not EPSTEIN takes prescription medicine for (purely as an example and for argument) blood pressure or cholesterol control has absolutely no relevance to this action.

Accordingly, EPSTEIN's objections to interrogatory **no. 8** and production request **no. 23** are required to be upheld. Plaintiff is not entitled to carte blanche discovery of Defendant's medical information.

C. Plaintiff's Second Request For Production

Regarding Plaintiff's request for –

> All policies of insurance, including the declarations page and all binders, amendments, and endorsements, covering Defendant's residence at 358 El Brillo Way, Palm Beach, FL 33480.

Defendant is willing to produce a "redacted version" of the policies only for the years 2003, 2004, and 2005. Plaintiff, in her motion has agreed to limit her request to those years. However, as stated in Defendant's objection, such "policies contain value and/or asset information which is not relevant, material nor calculated to lead to the discovery of admissible evidence at this point in time; said information is both private and confidential." Plaintiff's motion does not address Defendant's additional objection concerning the "value and/or asset information." Discovery of such information is premature and not relevant at this time. The relevant purpose of Plaintiff's discovery request is to determine whether some type of coverage is provided for the claims asserted. Any additional information concerning Defendant's value and asset information is required to be redacted. Plaintiff recently filed her Second Amended Complaint; Defendant has until April 3, 2009 (pursuant to an extension) to respond to or answer the complaint if Plaintiff has sufficiently alleged her causes of action. In counts I and II of her complaint, Plaintiff also seeks punitive damages. Defendant anticipates filing a motion to bifurcate the punitive damages claim – seeking to try liability first and then, a determination as to the amount, if necessary. In this way, Defendant's private financial information is protected until and if it becomes necessary to determine the amount of punitive damages to be awarded.

D. Overbroad, relevance objections to discovery.

As to Plaintiff's argument regarding Defendant's objections based on relevancy and the over-breadth of Plaintiff's discovery requests, (Part VII. A, pp. 10-11, of ¶'s Motion To Compel), in her motion Plaintiff represents that she is seeking the discovery

for a time period beginning January 1, 2003 to the present. As to **interrogatory nos. 1, 2, 3, 4, 5, 6, 7, 8, 10, 11,** and **12,** Defendant disagrees that time period proposed by Plaintiff is reasonable. Plaintiff's complaint alleges that the conduct involving her took place in 2004-05. The scope and breadth of these interrogatories evidences that information sought has absolutely no relevance and is not reasonably calculated to lead to the discovery of admissible evidence. The same is true for **production request nos. 5, 6, 7, 10, 11, 18, 20, 21, 22,** and **23.** As discussed more fully below, the length of the time period, along with the scope and breadth of the information and items sought, makes such requests improper under the rules governing discovery.

Without waiving any of the other alternative and additional objections asserted, Defendant does not disagree with the time period of January 1, 2003 to present as to **interrogatory nos. 13, 14, 15, 16,** and **17**; and **production request nos. 1, 2, 3, 4, 14, 15, 16,** and **17.** Defendant addresses the additional alternative objections below.

Plaintiff's motion to compel fails to address each of the discovery requests on an individual basis with respect to the objections asserted. A reading of each of the discovery requests, set forth above herein, establishes that each of the interrogatories and production requests is overbroad on its face and, thus, seeks non-relevant information. All of the interrogatories and production requests are phrased such that they encompass "all persons," "all Employees," "all telephone numbers," "all documents," "any and all," and so on. Contrary to Plaintiff's assertion, the definition of "employee" is on its face over broad and encompasses non-relevant information. (pp. 11-12 of Plaintiff's motion). Plaintiff should be required to restrict the information that is

sought to the issues relevant to this action and the claims asserted by her and defenses to those claims.

E. Work Product; Attorney Client Privilege

Plaintiff asserts that Defendant failed to provide a privilege log in asserting his objections based on attorney-client and work product privileges to interrogatories **nos. 13, 14,** and **17,** and production requests **nos. 4 – 8** and **10 – 23**. First, a reading of the particular discovery requests reveals that the encompass attorney-client and work product privileged material. Secondly, as set forth above herein, in being compelled to create a privileged log is in essence compelled testimony to which Defendant's constitutional protections would apply. Again, as stated previously, it makes judicial sense to decide the constitutional issues first, before deciding the additional objections to the discovery requests.

F. Rules 408 and 410, Fed. Evid. Code; §90.410, Fla. Stat. - Production requests nos. 1 – 5.

Production requests nos. 1 – 5 set forth above herein, all pertain to the negotiation and eventual entering into of a Non-Prosecution Agreement (NPA) with the United States Attorney's Office (USAO) for the Southern District of Florida. See part I above herein. Again, the constitutional issues raised in Defendant's response permeate these discovery requests. The full text of Federal Evidence Rules 408 and 410, and Florida Statute §90.410, are set forth in endnote 3.[3] Under the protections afforded by these evidentiary rules such documents are not subject to discovery.

G. Third Party Privacy Rights

In production requests **nos. 1, 2, 3, 4, 5, 6, 7, 11, 14, 15, 16, 17, 18, 19, 20, 21,** and **22**, Defendant has raised the additional objection that the privacy rights of third

parties are implicated. See specified requests. As noted by the United States Supreme Court in Eisenstadt v. Baird, 405 U.S. 438, 454, 92 S.Ct. 1029, 1038, at fn. 10 (1972):

> In Stanley, 394 U.S., at 564, 89 S.Ct., at 1247, the Court stated:'(A)lso fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy." The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, and their sensations. They conferred, as against the Government, the right to be let alone-the most comprehensive of rights and the right most valued by civilized man.' [Citations omitted].

The fundamental right of privacy is not only guaranteed under by the Fourteenth Amendment of the United States Constitution, but also under the Constitution of the State of Florida, Art. I, Sect. 23. As summarized by the Florida Supreme Court in Shaktman v. State, 553 So.2d 148, 150-51 (Fla. 1989):

> The right of privacy, assured to Florida's citizens, demands that individuals be free from uninvited observation of or interference in those aspects of their lives which fall within the ambit of this zone of privacy unless the intrusion is warranted by the necessity of a compelling state interest. In an opinion which predated the adoption of section 23, the First District aptly characterized the nature of this right.
>
> > A fundamental aspect of personhood's integrity is the power to control what we shall reveal about our intimate selves, to whom, and for what purpose.
>
> Bryon, Harless, Schaffer, Reid & Assocs., Inc. v. State ex rel, Schellenberg, 360 So.2d 83, 92 (Fla. 1st DCA 1978), *quashed and remanded on other grounds,* 379 So.2d 633 (Fla.1980). Because this power is exercised in varying degrees by differing individuals, the parameters of an individual's privacy can be dictated only by that individual. The central concern is the inviolability of one's own thought, person, and personal action. The inviolability of that right assures its preeminence over "majoritarian sentiment" and thus cannot be universally defined by consensus.
>
> (Emphasis added).

Clearly, the nature of the questions and production requests identified would require EPSTEIN to identify third parties and necessarily thwart such individuals' rights to assert their constitutional right of privacy as guaranteed under the United States and Florida Constitutions. See generally Eisenstadt v. Baird, supra at 454-455 (The right encompasses privacy in one's sexual matters and is not limited to the marital relationship.).

III. Conclusion

Under applicable law and the facts and circumstances of this case, Defendant's assertions of his constitutional privileges and guarantees are required to be upheld. To rule otherwise would render EPSTEIN's constitutional protections meaningless. Also, the constitution issues so permeate this action that this Court should first decide those issues before deciding the merits of any additional objections raised by EPSTEIN. EPSTEIN is between the proverbial "rock and a hard place" in asserting is constitutional guarantees and then being compelled to make factual arguments regarding the application of his additional objections. EPSTEIN's additional objections as discussed herein are also required to be upheld.

WHEREFORE Defendant requests that this Court deny Plaintiff's motion to compel and uphold EPSTEIN's assertion of his constitutional protections and, in the alternative or in addition to, uphold his additional objections to Plaintiff's discovery requests.

Certificate of Service

WE HEREBY CERTIFY that a true copy of the foregoing has been sent via U.S. Mail and facsimile to the following addressees this 25th day of March, 2009.

Adam D. Horowitz, Esq. Jack Alan Goldberger

Clearly, the nature of the questions and production requests identified would require EPSTEIN to identify third parties and necessarily thwart such individuals' rights to assert their constitutional right of privacy as guaranteed under the United States and Florida Constitutions. See generally Eisenstadt v. Baird, supra at 454-455 (The right encompasses privacy in one's sexual matters and is not limited to the marital relationship.).

III. Conclusion

Under applicable law and the facts and circumstances of this case, Defendant's assertions of his constitutional privileges and guarantees are required to be upheld. To rule otherwise would render EPSTEIN's constitutional protections meaningless. Also, the constitution issues so permeate this action that this Court should first decide those issues before deciding the merits of any additional objections raised by EPSTEIN. EPSTEIN is between the proverbial "rock and a hard place" in asserting is constitutional guarantees and then being compelled to make factual arguments regarding the application of his additional objections. EPSTEIN's additional objections as discussed herein are also required to be upheld.

WHEREFORE Defendant requests that this Court deny Plaintiff's motion to compel and uphold EPSTEIN's assertion of his constitutional protections and, in the alternative or in addition to, uphold his additional objections to Plaintiff's discovery requests.

By: _____
ROBERT D. CRITTON, JR., ESQ.

Certificate of Service

WE HEREBY CERTIFY that a true copy of the foregoing has been sent via U.S. Mail and facsimile to the following addressees this 25th day of March, 2009.

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[1] Title 18. Crimes and Criminal Procedure
Part I. Crimes
Chapter 117. Transportation for Illegal Sexual Activity and Related Crimes

§ 2422. Coercion and enticement

(a) Whoever knowingly persuades, induces, entices, or coerces any individual to travel in interstate or foreign commerce, or in any Territory or Possession of the United States, to engage in prostitution, or in any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

(b) Whoever, using the mail or any facility or means of interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so, shall be fined under this title and imprisoned not less than 10 years or for life.

2006 Amendments. Subsec. (b). Pub.L. 109-248, § 203, struck out "not less than 5 years and not more than 30 years" and inserted "not less than 10 years or for life".

2003 Amendments. Subsec. (a). Pub.L. 108-21, § 103(a)(2)(A), struck out "10" and inserted "20".

Subsec. (b). Pub.L. 108-21, § 103(a)(2)(B), struck out "15" and inserted "30".

Pub.L. 108-21, § 103(b)(2)(A)(i), struck out ", imprisoned" and inserted "and imprisoned not less than 5 years and".

Pub.L. 108-21, § 103(b)(2)(A)(ii), struck out ", or both" at end of subsec. (b).

[2] **39.204. Abrogation of privileged communications in cases involving child abuse, abandonment, or neglect**

The privileged quality of communication between husband and wife and **between any professional person and his or her patient** or client, and any other privileged communication except that between attorney and client or the privilege provided in s. 90.505, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, **shall not apply to any communication involving the perpetrator or alleged perpetrator in any situation involving known or suspected child abuse**, abandonment, or neglect and shall not constitute grounds for failure to report as required by s. 39.201 regardless of the source of the information requiring the report, failure to cooperate with law enforcement or the department in its activities pursuant to this chapter, or failure to give evidence in any judicial proceeding relating to child abuse, abandonment, or neglect.

(**Emphasis** added).

3 Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

(a) Prohibited uses.--Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish--or accepting or offering or promising to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

(b) Permitted uses.--This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

CREDIT(S)
(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933; Apr. 12, 2006, eff. Dec. 1, 2006).

Rule 410. Inadmissibility of Pleas, Plea Discussions, and Related Statements

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:

(1) a plea of guilty which was later withdrawn;

(2) a plea of nolo contendere;

(3) any statement made in the course of any proceedings under Rule 11 of the Federal Rules of Criminal Procedure or comparable state procedure regarding either of the foregoing pleas; or

(4) any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn.

However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record and in the presence of counsel.

CREDIT(S)
(Pub.L. 93-595, § 1, Jan. 2, 1975, 88 Stat. 1933; Pub.L. 94-149, § 1(9), Dec. 12, 1975, 89 Stat. 805; Apr. 30, 1979, eff. Dec. 1, 1980.)

Florida Evidence Code
90.410. Offer to plead guilty; nolo contendere; withdrawn pleas of guilty

Evidence of a plea of guilty, later withdrawn; a plea of nolo contendere; or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissible in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers is inadmissible, except when such statements are offered in a prosecution under chapter 837.

CREDIT(S)
Laws 1976, c. 76-237, § 1; Laws 1978, c. 78-361, § 8.