

7

IN THE COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR PALM
BEACH COUNTY, FLORIDA

A.C.,

CASE NO. 502008CA025129XXXXMB AI

Plaintiff,

v.

JEFFREY E. EPSTEIN, and SARAH
KELLEN,

Defendants.

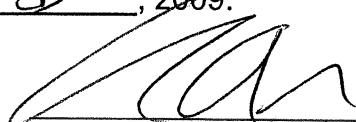
ORDER ON DEFENDANT, JEFFREY EPSTEIN'S RESPONSE &
OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION,
DATED FEBRUARY 6, 2009

THIS CAUSE came before the Court on Defendant, Jeffrey Epstein's Response & Objections To Plaintiff's First Request For Production, dated February 6, 2009 and the Court having heard argument of counsel and being fully advised in these premises, it is hereby

ORDERED and ADJUDGED that Defendant's Motion is hereby granted.

~~denied~~ sustained.

DONE AND ORDERED at Palm Beach County Courthouse, West Palm Beach, Florida, this 23 day of Feb, 2009.


Edward A. Garrison
Circuit Judge

Copies furnished:

ROBERT D. CRITTON, JR., ESQ., and MICHAEL J. PIKE, ESQ., 515 North Flagler Drive, Suite 400, West Palm Beach, FL 33401; JACK SCAROLA, ESQ., AND JACK P. HILL, ESQ., Searcy Denney Scarola Barnhart & Shipley, P.A., 2139 Palm Beach Lakes Blvd., West Palm Beach, FL 33409, and JACK A. GOLDBERGER, ESQ., Atterbury Goldberger & Weiss, P.A., One Clearlake Centre, Suite 1400, 250 Australian Avenue South, West Palm Beach, FL 33401

COMPOSITE EXHIBIT "C"

cc: JENKA D.

A.C.,

IN THE COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT, IN AND FOR PALM
BEACH COUNTY, FLORIDA

Plaintiff,
v.

CASE NO. 502008CA025129XXXXMB AI

JEFFREY E. EPSTEIN, and SARAH
KELLEN,

Defendants.

**DEFENDANT JEFFREY EPSTEIN'S AMENDED RESPONSE &
OBJECTIONS TO PLAINTIFF'S FIRST REQUEST FOR PRODUCTION**

Defendant, JEFFREY EPSTEIN, by and through his undersigned attorneys, hereby files his Amended Response and Objections to Plaintiff's First Request For Production To Defendant, served January 5, 2009 and states:

Introduction

This Amended Response amends Defendant's previously filed Response and Objections to Plaintiff's First Request for Production, dated February 6, 2009. This response does not change the legal objections previously raised but rather sets forth a discussion of the law in support of Defendant's constitutional objections to production, in particular, the Fifth Amendment privilege against self-incrimination. Except for the discussion of law set forth herein, this response sets forth the identical responses and objections previously filed and served. Accordingly, Plaintiff is in no way prejudiced by this Amended Response.

Legal Basis Applicable to Each of Defendant's Objections Set Forth Below

In response to each of the items requested, set forth below, Defendant asserts his Fifth Amendment Privilege against self-incrimination. The Fifth Amendment

cl: JEN/6, JF
blu

A.C. v. Epstein, et al.
Page 2

Privilege extends to the act of production where, as here, it involves a self-incriminating testimonial communication or “a compelled testimonial aspect.” United States v. Hubbell, 530 U.S. 27, 120 S.Ct. 2037 (2000); Fisher v. United States, 425 U.S. 391 (1976); McCormick on Evidence, Title 6, Chap. 13. *The Privilege Against Self-Incrimination*, §138 (6th Ed.). See also 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.”); Hoffman v. U.S., 71 S.Ct. 814, 818 (1951), and progeny).

The Fifth Amendment Privilege may be invoked in a civil action where a litigant or witness is being asked to provide information or respond to a question that may incriminate him in a crime. See generally, DeLisi v. Bankers Ins. Company, 436 So.2d 1099 (Fla. 4th DCA 1983). 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).

A.C. v. Epstein, et al.

Page 3

The United States Supreme Court has made clear that the scope of the Fifth Amendment Privilege includes the circumstances as here "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). 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.

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).

A.C. v. Epstein, et al.

Page 4

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:

"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).

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.

A.C. v. Epstein, et al.
Page 5

EPSTEIN entered into a Non-Prosecution Agreement ("NPA") with United States Attorney General's Officer ("USAO") 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. 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.

This is precisely the situation that the protection of the Fifth Amendment Privilege is to apply. By responding to the request as opposed to asserting his constitutional privilege, EPSTEIN would admit that the documents/items existed, were in his possession or control, and were authentic. The act of production itself, may certainly communicate information about the existence, custody, and authenticity of the documents/items. "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

A.C. v. Epstein, et al.
Page 6

question whether the unprotected contents of the documents themselves are incriminating." United States v. Hubbell, *supra*.

Given the type of documents requested (set forth below), the collection and production of the of the items demanded would be "tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents/[items] fitting certain broad descriptions." Hubbell, *supra* at 41-2, and 2046. Responding to the requests is "the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition." *Id.* As stated in Hubbell, "it is undeniable that providing a catalog of existing documents (items)" fitting within any of the requested documents "could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'"

Accordingly, Defendant's constitutional objection is required to be upheld.

Specific Requests & Responses, Including Objections

Request No. 1: Any and all evidence required to be maintained by Epstein and the United States Attorney for the Southern District of Florida, specifically evidence requested by or directly related to the grand jury subpoenas that have been issued in connection with the investigation referenced in the Non-Prosecution Agreement, and including certain computer equipment.

Response: Defendant is asserting specific legal objections to the production request as well as his U.S. constitutional privileges. I intend to produce all relevant documents regarding this lawsuit, however, my attorneys have counseled me that at the

A.C. v. Epstein, et al.

Page 7

present time I cannot select, authenticate, and produce documents relevant to this lawsuit and I must accept this advice or risk losing my Sixth Amendment right to effective representation. Accordingly, I assert my federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. Drawing an adverse inference under these circumstances would unconstitutionally burden my exercise of my constitutional rights, would be unreasonable, and would therefore violate the Constitution. In addition to and without waiving his constitutional privileges, the information sought is privileged and confidential, and inadmissible pursuant to the terms of the deferred prosecution agreement, Fed. Rule of Evidence 410 and 408, and §90.410, Fla. Stat. Further, the request may include information subject to work product or an attorney-client privilege.

Request No. 2: Any and all documents reflecting or relating to the identity of, the scheduling of, and/or the payment of any female compensated by or on behalf of Epstein for providing any service to Epstein that required, contemplated, or included in the provisions of such service, any physical contact between Epstein and the female, any act or prostitution, any illicit sexual conduct, the exposure of breast, buttocks or genitalia, or any commercial sex act as defined in 18 U.S.C. §1591(c)(1).

Response: Defendant is asserting specific legal objections to the production request as well as his U.S. constitutional privileges. I intend to produce all relevant documents regarding this lawsuit, however, my attorneys have counseled me that at the present time I cannot select, authenticate, and produce documents relevant to this lawsuit and I must accept this advice or risk losing my Sixth Amendment right to

A.C. v. Epstein, et al.

Page 8

effective representation. Accordingly, I assert my federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. Drawing an adverse inference under these circumstances would unconstitutionally burden my exercise of my constitutional rights, would be unreasonable, and would therefore violate the Constitution. In addition to and without waiving his constitutional privileges, the information sought is privileged and confidential, and inadmissible pursuant to the terms of the deferred prosecution agreement, Fed. Rule of Evidence 410 and 408, and §90.410, Fla. Stat. Further Defendants objects to the production as overly broad and seeking information that is neither relevant to the subject matter of the pending action nor does it appear to be reasonably calculated to lead to the discovery of admissible evidence. The Plaintiff in this instance has alleged in her complaint that she was sexually abused by the Defendant on one occasion sometime in the year 2004. The documents requested herein have no time period provided, and therefore the information sought is grossly overbroad.

Request No. 3: Any and all documents reflecting or relating to the identity of and/or the nature and extent of any other person's participation in the communication with and/or the scheduling of and/or the payment of any person who participated in any conduct described in Request #2.

Response: Defendant is asserting specific legal objections to the production request as well as his U.S. constitutional privileges. I intend to produce all relevant documents regarding this lawsuit, however, my attorneys have counseled me that at the

A.C. v. Epstein, et al.
Page 9

present time I cannot select, authenticate, and produce documents relevant to this lawsuit and I must accept this advice or risk losing my Sixth Amendment right to effective representation. Accordingly, I assert my federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. Drawing an adverse inference under these circumstances would unconstitutionally burden my exercise of my constitutional rights, would be unreasonable, and would therefore violate the Constitution. In addition to and without waiving his constitutional privileges, the information sought is privileged and confidential, and inadmissible pursuant to the terms of the deferred prosecution agreement, Fed. Rule of Evidence 410 and 408, and §90.410, Fla. Stat. Further Defendants objects to the production as overly broad and seeking information that is neither relevant to the subject matter of the pending action nor does it appear to be reasonably calculated to lead to the discovery of admissible evidence. The Plaintiff in this instance has alleged in her complaint that she was sexually abused by the Defendant on one occasion sometime in the year 2004. The documents requested herein have no time period provided, and therefore the information sought is grossly overbroad.

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was sent by *U.S. Mail* to the following addressees on this 19th day of February, 2009:

Jack Scarola, Esq.

Jack P. Hill, Esq.

Searcy Denney Scarola Barnhart & Shipley, P.A.

Jack Alan Goldberger, Esq.

Atterbury Goldberger & Weiss, P.A.

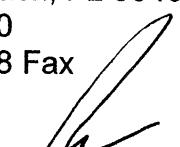
250 Australian Avenue South
Suite 1400

A.C. v. Epstein, et al.
Page 10

2139 Palm Beach Lakes Blvd.
West Palm Beach, FL 33409
561-686-6300 Phone
561-383-9424 Fax
Counsel for Plaintiff

West Palm Beach, FL 33401-5012
561-659-8300
Fax: 561-835-8691
jagesq@bellsouth.net
*Counsel for Defendants Jeffrey Epstein
and Sarah Kellen*

**BURMAN, CRITTON, LUTTIER
& COLEMAN, LLP**
515 N. Flagler Drive, Suite 400
West Palm Beach, FL 33401
(561) 842-2820
(561) 515-3148 Fax

By: 

Robert D. Critton, Jr.
Florida Bar #224162
Michael J. Pike
Florida Bar #617296
(Counsel for Defendant Jeffrey E. Epstein)

Connelly Copy: Judge Garrison

AFFIDAVIT OF JACK A. GOLDBERGER, ESQUIRE

STATE OF FLORIDA) SS
COUNTY OF PALM BEACH)

BEFORE ME, the undersigned authority, personally appeared
having personal knowledge and being duly sworn, deposes and says:

1. I, **Jack A. Goldberger**, have personal knowledge of the matters set forth herein. I am an attorney licensed to practice in the State of Florida since 1978. I am a partner with the law firm of Atterbury Goldberger & Weiss, P.A., located at One Clearlake Centre, Suite 1400, 250 Australian Avenue South, West Palm Beach, FL 33401.

2. My practice includes and specializes in the defense of criminal matters. I am board certified in criminal law. I have been and currently am the criminal defense attorney for JEFFREY EPSTEIN.

3. I represented Mr. EPSTEIN in the negotiation of and entering into a Non-Prosecution Agreement with the United States Attorney's Office (USAO) for the Federal Southern District of Florida. The terms and conditions of the Non-Prosecution Agreement also entailed the entering of a Plea Agreement with the State Attorney's Office, Palm Beach County, State of Florida. (The Non-Prosecution Agreement shall hereinafter be referred to as the "NPA").

4. By its terms, the NPA took effect on June 30, 2008. Also, pursuant to the terms of the NPA, any criminal prosecution against EPSTEIN is deferred as long as the terms and conditions of the NPA are fulfilled by EPSTEIN.

EXHIBIT "A"

5. The criminal matters against EPSTEIN remain ongoing until the NPA expires by its terms in late 2010, and as long as the USAO determines EPSTEIN has complied with those terms and conditions. The threat of criminal prosecution against EPSTEIN by USAO in the Southern District of Florida continues presently and through late 2010.

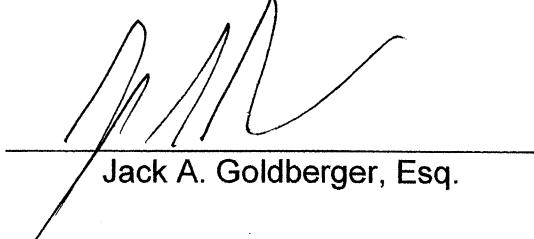
6. Pursuant to the terms of the NPA, the USAO possesses the right to declare that the agreement has been breached, give EPSTEIN's counsel notice, and attempt to move forward with a prosecution. As of the date of this Affidavit, the USAO has taken the position on a number of occasions that it might consider the following actions by EPSTEIN to be a breach of the NPA.

- Investigation by EPSTEIN (by and through his attorneys) of this Plaintiff and the other Plaintiffs in other pending civil cases for purposes of defending the civil actions;
- EPSTEIN's contesting damages in this action and other civil actions.
- EPSTEIN or his legal representatives making statements to the press about this Plaintiff or the other Plaintiffs.
- Using the word "jail" instead of "imprisonment" in the plea agreement with the Palm Beach County State Attorney's Office.

7. EPSTEIN, through counsel, submitted a Freedom of Information Act request to the Federal Bureau of Investigation (FBI) for documents relating to this and the other cases; the FBI denied the request stating the materials are at this time exempt from disclosure because they are in an investigative file, i.e. the matter is still an ongoing criminal investigation.

8. The NPA expires in late 2010.

FURTHER THE AFFIANT SAYETH NAUGHT

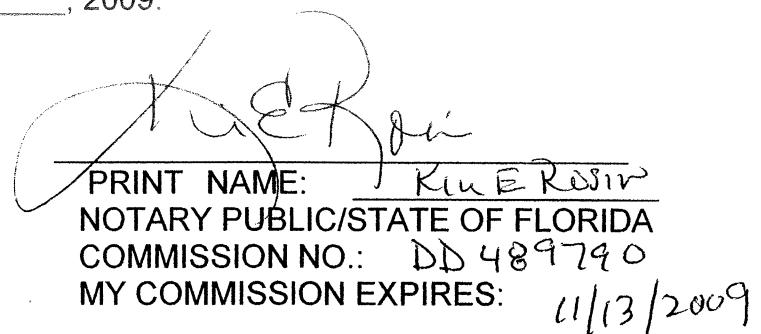
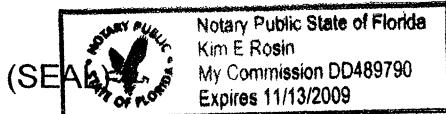


Jack A. Goldberger, Esq.

STATE OF FLORIDA
COUNTY OF PALM BEACH

I hereby Certify that on this day, before me, an officer duly authorized to administer oaths and take acknowledgments, personally appeared Jack A. Goldberger, Esquire, known to me to be the person described in and who executed the foregoing Affidavit, who acknowledged before me that he/she executed the same, that I relied upon the following form of identification of the above named person: Known Personally, and that an oath was/was not taken.

WITNESS my hand and official seal in the County and State last aforesaid this 19th day of February, 2009.



PRINT NAME: Kim E. Rosin
NOTARY PUBLIC/STATE OF FLORIDA
COMMISSION NO.: DD 489790
MY COMMISSION EXPIRES: 11/13/2009