UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80232-MARRA/JOHNSON

JANE DOE NO. 3,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

PLAINTIFF'S MOTION TO COMPEL ANSWERS TO INTERROGATORIES AND PRODUCTION OF DOCUMENTS, AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT

Plaintiff, by and through undersigned counsel, files this Motion to Compel Answers to Interrogatories and Production of Documents, and Memorandum of Law in Support, pursuant to Fed.R.Civ.P. 26 and 37 and S.D.Fla.L.R. 26.1(H)(2), as follows:

I. INTRODUCTION

Plaintiff in this case propounded 17 interrogatories and 24 documents requests. In response, Defendant has produced no information and no documents. Defendant's principal objection concerns his Fifth Amendment privilege against self-incrimination. Defendant, however, fails to set forth a sufficient predicate in his responses to interrogatories or documents requests for his refusal to provide any responsive documents or information. Defendant, rather, repeats in each response an all-encompassing, blanket assertion of Fifth Amendment privilege.

Defendant's responses also include a laundry list of objections to Plaintiff's interrogatories and documents requests, none of which serve as a basis for a denial of all discovery. For the reasons discussed below, Plaintiff requests an order compelling Defendant to answer interrogatories and

produce responsive documents.[1]

II. EPSTEIN'S BLANKET ASSERTION OF PRIVILEGE AGAINST SELF-INCRIMINATION IN RESPONSES TO INTERROGATORIES IS INSUFFICIENT

Defendant's response to each and every one of Plaintiff's Interrogatories[2] contains the following privilege objection:

> I intend to respond to all relevant questions regarding this lawsuit, however, my attorney has counseled me that 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.

Defendant's canned objection represents a "blanket" refusal to answer questions in this civil case. See Anglada v. Sprague, 822 F.2d 1035, 1037 (11th Cir. 1987) (rejecting a "blanket" refusal to testify as unacceptable). While Plaintiff does not dispute that Defendant Epstein's Fifth Amendment privilege may be asserted in a civil case,[3] the Fifth Amendment's "protection must be confined to instances where the witness has *reasonable cause* to apprehend danger from a direct answer." Hoffman v. United States, 341 U.S. 479, 486 (1951) (emphasis supplied).

"[A] witness has some minimal burden to justify invocation of the privilege." In re J.M.V.,

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[1] This Motion addresses almost entirely general or blanket objections to discovery, which are repeated in multiple or all of the Defendant's responses to Plaintiff's discovery requests. Accordingly, Plaintiff deviates where necessary from the format set forth in S.D.Fla.L.R. 26.1(H)(2) in the interests of clarity and efficiency.

[2] Attached as Exhibit "A" is Defendant's Response and Objections to Plaintiff's Interrogatories.

[3] This discussion addresses the Defendant's Fifth Amendment claim of privilege. Defendant also asserts a privilege under the Sixth and Fourteenth Amendments. The Sixth Amendment does not provide a basis to refuse to answer questions in a civil case as a means to preserve the Defendant's "right to effective representation", as Defendant asserts in his responses. The Fourteenth Amendment likewise is inapposite, as state action is not at issue in this federal case.

Inc., 90 F.R. 737, 739 (Bankr. E.D. Pa. 1988). The privilege must be asserted in response to a particular question, and in each instance "[i]t is for the court to decide whether a witness' silence is justified and to require him to answer if it clearly appears to the Court that the witness asserting the privilege is mistaken as to its validity." In re Morganroth, 718 F.2d 161, 166-167 (6th Cir. 1983) (holding that it was not sufficient for witness to answer every question with conclusory assertion of Fifth Amendment privilege). Accord Anglada, 822 F.2d at 1037 (noting that Court should not have to speculate as to which questions would tend to incriminate); See also Hoffman, 341 U.S. at 486 (witness' "say-so does not of itself establish the hazard of self-incrimination"); In re Wincek, 202 B.R. 161, 168 (Bankr. M.D. Fla. 1996) (rejecting assertion of Fifth Amendment privilege in "broad, unsupported fashion").

The "reasonable cause" for invocation of the Fifth Amendment privilege is not self-evident from the interrogatories propounded by Plaintiff. For example, Interrogatory no. 1 asks the Defendant to identify employees who performed work or services at his Palm Beach residence. It is not apparent that identifying the chef, chauffeur, gardener, etc., would tend to incriminate the Defendant. The information sought in the bulk of the Plaintiff's interrogatories may be categorized generally as follows:

Type of Information	**Interrogatory No.**
identification of persons	1, 2, 3, 4, 5, 6, 10, 17
Defendant's travel schedule and locations	7
identification of health care providers	8
telephone numbers used by Epstein and his employees	11, 12

general information based on Florida Standard Interrogatories, Fla.R.Civ.P. Form 2, nos. 7, 10, 12	13, 14, 16[4]

These Interrogatories, on their face, do not infringe upon or otherwise implicate the Defendant's rights under the Fifth Amendment. It is, therefore, incumbent upon the Defendant to set forth reasonable cause for his invocation of the Fifth Amendment in response to each of these Interrogatories. Absent some interrogatory-by-interrogatory showing of reasonable cause, Plaintiff asks that Defendant's claims of privilege under the Fifth Amendment be rejected and overruled.

III. DEFENDANT'S BLANKET ASSERTION OF FIFTH AMENDMENT PRIVILEGE IN RESPONSE TO REQUESTS FOR PRODUCTION IS INSUFFICIENT

In response to Plaintiff's Requests for Production,[5] Defendant has asserted an identical, "blanket" objection to each and every request, as follows:

> 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 effective representation. Accordingly, I assert my federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution.

Initially, it is well established that the Fifth Amendment privilege may not apply to specific documents "even though they contain incriminating assertions of fact or belief because the creation of those documents was not 'compelled' within the meaning of the privilege." United States v. Hubbell, 530 U.S. 27, 35-36 (2000). Accordingly, a party cannot avoid discovery merely because

[4] Plaintiff does not challenge at this time Defendant's assertion of a Fifth Amendment privilege in response to interrogatory no. 9, which seeks information on Defendant's sexual aids.

[5] Defendant's Response to Request for Production, which sets forth each Request and the Defendant's Response, is attached hereto as Exhibit "B".

demanded documents contain incriminating evidence, "whether written by others or voluntarily prepared by himself." Id.

Nonetheless, the act of procuring documents may be considered testimonial and protected by the Fifth Amendment privilege in two instances: (1) if the existence and location of the documents are unknown; or (2) where production would "implicitly authenticate" the documents. In re Grand Jury Subpoena, 1 F.3d 87, 93 (2d Cir. 1993); see also Fisher v. United States, 425 U.S. 391, 410 (1976) (issue expressed as whether compliance with a document request or subpoena "tacitly conceded" the item's authenticity, existence or possession by the defendant). It is the Defendant's burden to demonstrate that the act of producing any particular responsive documents would entail testimonial self-incrimination. United States v. Wujkowski, 929 F.2d 981, 984 (4th Cir. 1991). It is not self-evident or apparent from the Plaintiff's requests that the act of producing responsive items would be protected under the Fifth Amendment. In particular, there is no reason to believe that production of documents in response to the following requests would compel testimonial self-incrimination:

Types of Documents Requested	**Request Nos.**
Agreements with the U.S. Attorney and State Attorney, and documents exchanged between Defendant and the U.S. Attorney or State Attorney	1-4
Telephone records	5-6
Videos, photographs of residence	7
Documents relating to Plaintiff Jane Doe	8
Air travel records	10
Documents relating to modeling agencies	11

Correspondence with other witnesses	14, 15, 16, 17, 19
Social networking documents	18
Gifts to minor females	20
Personal calendars, diaries	21, 22
Prescription medicines	23[6]

As to the above-listed items, it is not possession or control of these items that would prove incriminating; rather, if anything, it is their contents, which are not protected by the Fifth Amendment privilege so long as they were created voluntarily. Fisher, 425 U.S. at 410; see also In re Ross, 156 B.R. 272, 177-78 (Bankr. D. Idaho 1993). Nor would production of items in response to these requests "implicitly authenticate" items that are themselves incriminating. See In re Grand Jury Subpoena, 1 F.3d at 93-94 (holding that defendant's calendar/diary not protected from discovery by "act of production" doctrine under the Fifth Amendment).

Without more, therefore, Defendant's blanket claim of a Fifth Amendment privilege in response to all of Plaintiff's document requests should be rejected, and responsive documents ordered to be produced.

IV. DEFENDANT'S OBJECTION AND STATEMENT CONCERNING ADVERSE INFERENCE IS INAPPROPRIATE AND INCORRECT

Defendant makes the following self-serving and unnecessary assertion in response to each and every interrogatory and document request propounded by Plaintiff:

> 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.

[6] Plaintiff concedes that the act of producing items in response to request no. 9, concerning witness statements, and request nos. 12-13, concerning photographs or images of females, may implicate the Fifth Amendment.

Although a defendant's assertion of his Fifth Amendment privilege cannot be used against a criminal defendant, it is well established that "an adverse inference based on a refusal to testify in a civil case is an appropriate remedy as it provides some relief to the civil litigant whose case is unfairly prejudicial by a witness' assertion of the Fifth Amendment privilege . . ." United States v. Custer Battles, L.L.C., 415 F. Supp. 2d 628, 632 (E.D. Va. 2006); accord Baxler v. Palmigiano, 425 U.S. 408, 318 (1976) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"); Securities and Exhange Comm'n v. Graystone Nash, Inc., 25 F.3d 187, 190 (3d Cir. 1994) ("[t]he [defendant's] dilemma of choosing between complete silence and presenting a defense [in a civil case] does not fatally infect the right against compelled self-incrimination").[7]

In any event, the issue of adverse inference, at this juncture, is premature. It is first necessary to determine whether the Fifth Amendment privilege is validly asserted in response to particular questions. This issue is typically resolved on a motion to compel. Custer Battles, 415 F. Supp. 2d at 633. If it is determined that the privilege is properly asserted, then adverse inferences are admissible consistent with the Rules of Evidence, *i.e.*, where they are relevant, reliable and not unfairly prejudicial, confusing or cumulative. Id. at 634. Such evidentiary issues concerning adverse inference are appropriately addressed at the time of summary judgment or trial. It is inappropriate and unnecessary to challenge the use of adverse inferences through self-serving statements in blanket objections to interrogatories.

V. PLAINTIFF IS ENTITLED TO DEFENDANT'S HEALTH CARE INFORMATION IN DISCOVERY

[7] Moreover, a defendant in a civil case may not manipulate his use of the Fifth Amendment privilege by shielding himself from inquiries during discovery, and then submitting surprise testimony in a summary judgment affidavit or at trial. Id. at 191.

A. Interrogatory at Issue

"**Interrogatory No. 8.** Identify all of Jeffrey Epstein's health care providers in the past (10) ten years, including without limitation, psychologists, psychiatrists, mental health counselors, physician, hospital and treatment facilities."

B. Pertinent Portion of Defendant's Objection

". . . [s]uch information is privileged pursuant to Rule 501, Fed.Evid., and §90.503, Fla.Evd. Code. In addition, such information is protected by the provision of the Health Insurance Portability and Accountability Act (HIPAA)."

C. Grounds for Objection and Reasons for Motion

The substantive basis for Defendant's objection is a claim of privilege under state law, Florida Statute §90.503 (psychotherapist-patient privilege) and federal law, HIPAA, 42 U.S.C. §1320d et seq. Neither of these privilege claims are a basis to withhold relevant health care information in this case. Initially, Florida Statute §90.503 does not protect as privileged the identity of health care providers, which is all that is sought in Plaintiffs interrogatory. Rather, it protects "confidential communications" with a psychotherapist. Florida Statute §90.503(2). Further, Plaintiff is ultimately entitled to discovery from the Defendant's psychotherapists because §90.503 does not apply to relevant documents *in a case of child abuse* under Florida Statute §39.204. This Statute abrogates the psychotherapist-patient privilege in cases involving child abuse:

> **Abrogation of privileged communications in cases involving child abuse, abandonment, or neglect.-** the privileged quality of communication . . . 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. . . .*

(Emphasis supplied).[8] "With the exceptions of the attorney-client privilege and the clergy communications privilege, section 39.204 abrogates the various evidentiary privileges in cases involving child abuse, abandonment or neglect." Nussbaumer v. State, 882 So.2d 1067 (Fla. 2d DCA 2004). It represents a determination by the legislature that discovery of facts relating to claims of child abuse is more important than the protection of otherwise confidential psychotherapist-patient communications:

> Obviously, the psychotherapist privilege provided by section 90.503(2) is intended to encourage people who need treatment for mental disorders (including child abusers) to obtain it by insuring the confidentiality of communication during treatment. We must assume, however, that the legislature, in passing [§39.204] weighed the desirability of encouraging treatment for child abusers against the desirability of discovering them and decided that the latter was more important than the former. The intent of [§39.204] is to discourage child abuse. That discouragement, in view of the statutory language, can occur by way of a civil lawsuit for damages as well as by way of a criminal prosecution.

Carson v. Jackson, 466 So.2d 1188, 1190 (Fla. 4th DCA 1985) (analyzing predecessor statute, §415.512, Fla. Stat.).

Defendant also asserts HIPAA, the Health Insurance Portability and Accountability Act, 42 U.S.C. §1320d et seq., as a ground for objection to Plaintiff's interrogatory. "HIPAA does not create substantive rights that act as a bar on discovery. . . . HIPAA regulations is (sic) purely procedural in nature and does not create a federal physician-patient or hospital-patient privilege."

[8] The term "child abuse" is defined broadly in the Statute to encompass the acts and conduct alleged against Epstein in this case. A "child" is a person under the age of 18, and "abuse" means "any willful or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child's physical, mental or emotional health to be significantly impaired."

Allen v. Woodford, 2007 WL 309485 *11 (E.D. Cal. 2007). Under HIPAA, health care information may be disclosed in discovery under a qualified protective order, which prohibits using or disclosing protected health care information for any purpose other than the litigation and requires return or destruction of the protected health care information. 45 C.F.R. §164.512(i)(e). Accordingly, there is no basis to withhold from discovery Epstein's health care information, particularly as it relates to Plaintiff's allegations of child abuse.

VI. OTHER OBJECTIONS TO PLAINTIFF'S DISCOVERY REQUESTS ARE MERITLESS

A. Overbroad; Relevance

In response to each and every interrogatory propounded by Plaintiff, Defendant asserts in blanket and conclusory fashion that it is "overbroad and seeks information that is neither relevant to the subject matter of the pending action nor dies it appear reasonably calculated to lead to the discovery of admissible evidence." Defendant also objects to each and every document request as overbroad. These objections are groundless. Plaintiff's discovery requests fall within the scope of broad discovery and relevance under Fed.R.Civ.P. 26. All of Plaintiff's interrogatories and document requests are sufficiently narrow and tailored for Defendant to reasonably provide substantive responses. Defendant fails to indicate unfair prejudice or undue burden from any interrogatory or document request. Defendant provides no responsive information whatsoever, nor has he made any suggestion to reasonably narrow or limit any of the Plaintiff's discovery requests.

Defendant complains that the time period covered in the interrogatories is too broad. The stated time period, applicable to Plaintiff's interrogatories and documents requests generally, as noted in Defendant's responses, is January 1, 2003 to present. This time frame is sufficiently

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Florida Statutes §39.201.

narrow, especially since the plan and scheme alleged in the Complaint to lure girls to the Defendant's Palm Beach mansion for "massages" has been in place since at least that date. Defendant's overbroad/relevance objections should, accordingly, be overruled.

B. Work Product; Attorney-Client Privilege

In response to various interrogatories and all of the documents requests, Defendant asserts in conclusory fashion objections based on the attorney work product and attorney-client communication privilege.[9] In making these privilege claims, Defendant failed to provide a privilege log as required by S.D.Fla.L.R. 26.1(G)(3). These interrogatories and requests generally do not on their face implicate the work product or attorney client privileges.[10] These privilege claims should therefore be rejected and overruled.

C. Plaintiff's Definitions of "Employee" is Reasonable

Defendant contests the definition of "Employee" in Plaintiff's document requests and interrogatories, which states as follows:

> g. "Employee" shall mean any person employed to perform work for services for Defendant or by Defendant, either directly or indirectly, including without limitation:
>
> i. a limited partnership, corporation, limited liability company, or other company or entity in which Defendant is a member, director, officer or person in control; and
>
> ii. persons employed by a partnership or a subsidiary of a partnership in which Defendant is a general partner or person in control.

[9] These privileges are asserted in response to Interrogatory nos. 13, 14, and 17, and each and every document request.

[10] The only possible exception would be Plaintiff's Document Request no. 9, which seeks witness statements; nonetheless, Defendant is required to comply with the Local Rule and provide a privilege log in response to this request as well as the others.

The term "Employee" appears in Interrogatory nos. 1, 2, and Document Request no. 6. The breadth of this definition is reasonable under the circumstances of this case. Upon information and belief, Defendant Epstein conducted his business and personal affairs through a labyrinth of corporate entities and other business forms. This definition of "Employee" is reasonable to encompass responsive information and documents.

D. Fed.R.Civ.P. 408 and 410 Do Not Create a Privilege in Discovery

Defendant objects to Document Request nos. 1-5, which seek the Defendant's agreements with the U.S. Attorney and State Attorney, and documents exchanged with their offices, on the grounds of Fed.R.Evid. 408 and 410. These Rules cover the admissibility in evidence of compromises and plea agreements; they do not set forth a privilege applicable to such agreements in discovery. To the extent a protective order with regard to such documents is deemed appropriate, Plaintiff's counsel agrees to limit their use to this litigation, and not to disclose documents responsive to these requests to third parties.

E. Third Party Privacy Rights

Defendant broadly and vaguely asserts third party privacy rights in response to various document requests. To the extent that any such privacy rights are properly raised in this case, Plaintiff consents to the entry of an appropriate protective order under which such documents will not be disseminated to third parties and will be used only for purposes of this litigation.

VII. Conclusion

Based on the foregoing, Plaintiff respectfully requests that Defendant's assertions of privilege and objections be denied and overruled, and that an Order be entered directing Defendant to answer the Plaintiff's Interrogatories and produce documents responsive to Plaintiff's Requests

for Production, subject to such protective order as may be necessary and appropriate. Plaintiff further requests such other relief as this Court deems just and proper.

Dated: March 2, 2009

Respectfully submitted,

By: s/ Adam D. Horowitz

Stuart S. Mermelstein (FL Bar No. 947245)
ssm@sexabuseattorney.com
Adam D. Horowitz (FL Bar No. 376980)
ahorowitz@sexabuseattorney.com
MERMELSTEIN & HOROWITZ, P.A.
Attorneys for Plaintiff
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Tel: 305-931-2200
Fax: 305-931-0877

CERTIFICATE PURSUANT TO S.D.FLA.L.R. 7.1(A)(3)

Counsel for Plaintiff has made reasonable efforts to confer with counsel for Defendant, by letter dated February 25, 2009, seeking in good faith to resolve or narrow the issues raised in the Motion, but Defendant's counsel failed to respond to Plaintiff's letter, and Plaintiff's counsel has been unable to resolve this dispute.

s/ Adam D. Horowitz

CERTIFICATE OF SERVICE

I hereby certify that on March 2, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Adam D. Horowitz .

SERVICE LIST
DOE vs. JEFFREY EPSTEIN
United States District Court, Southern District of Florida

Jack Alan Goldberger, Esq.
jgoldberger@agwpa.com

Robert D. Critton, Esq.
rcritton@bclclaw.com

/s/ Adam D. Horowitz