UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE NO. 2,

Plaintiff, **CASE NO.: 08-CIV-80119-MARRA/JOHNSON**

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

Related cases:
08-80232, 08-08380, 08-80381, 08-80994,
08-80993, 08-80811, 08-80893, 09-80469,
09-80591, 09-80656, 09-80802, 09-81092
_____/

DEFENDANT, JEFFREY EPSTEIN'S RESPONSE IN OPPOSITION TO PLAINTIFF'S, JANE DOE, MOTION TO COMPEL RESPONSE TO PLAINTIFF'S REQUEST FOR PRODUCTION [DE 97], WITH INCORPORATED MEMORANDUM OF LAW

Defendant, JEFFREY EPSTEIN, hereby files his Response in Opposition to Plaintiff's, JANE DOE, Motion to Compel Response to Plaintiff's Request for Production **[DE 97]** (Consolidated Case No. 08-CIV-80119 **[DE 194]**).

I. Procedural Background

Plaintiff's Motion to Compel is filed at DE (97). The Motion to Compel was voluminous and orders had been entered by this court (DE 242 and 293) addressing other 5th Amendment issues; therefore, the undersigned counsel endeavored to eliminate certain requests outlined in Plaintiff's Motion to Compel. As a result, a Joint Notice of Agreement was entered advising the court that several of the requests had been addressed by counsel alleviating the court from having to rule on same. (DE 316).

Defendant filed his Rule 4 Appeal (DE 282) and his Supplementary Brief (DE 283), which address several of the 5th Amendment arguments applicable to the requests outlined

herein. Portions of DE 282 and 283 were provided to the court in camera pursuant to the court's order (DE 242). Therefore, for the Court's ease of reference and in an attempt to maintain brevity, Defendant hereby incorporates those arguments and case law as if fully set forth herein.

Significantly, these cases have been consolidated for discovery. Therefore, consistent rulings should apply. In making those rulings, this Court must continue to recognize that the allegations in the related cases cannot be forgotten. (E.g., see DE 242 and 293, p.5-6). Production of information in one case could provide a link in the chain of evidence used to prosecute Epstein for a crime or provide an indirect link to incriminating evidence in another case. Id. and *infra.*

The Request for Production and the responses thereto are attached as **Composite Exhibit "A"**.

I. The Requests For Production, Argument And Memorandum Of Law

a. Request Number 5

Request No. 5: Photos of the inside of your home located at 358 El Brillo Way, Palm Beach, Florida, that depict the room(s) where the massages took place (including massage table).

Response: Defendant asserts 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 without waiving my Fifth Amendment rights 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 Jane Doe No. 2 v. Epstein, Case No. 80119, the Magistrate Judge found, "[i]n 2008, Epstein entered into a Non-Prosecution Agreement ("NPA") with the United States Attorney General's Office for the Federal Southern District of Florida ("USAO") and the State Attorney's

Office for Palm Beach County. Under the terms of the NPA, any criminal prosecution against Epstein is deferred as long as he abides by the certain terms and conditions contained therein. If at any time the USAO's Office has reason to believe Epstein is in breach of the Agreement, it need only provide Epstein's counsel with notice of the breach and then move forward with Epstein's prosecution. Accordingly, the undersigned would agree with Epstein … that the fact there exists a NPA does not mean that Epstein is free from future criminal prosecution, and that in fact, 'the threat of prosecution is real, substantial and present.'" See August 4, 2009 Order (DE 242) and September 9, 2009 Omnibus Order (DE 293); and Manson v. United States, 244 U.S. 362, 365 (1917). Moreover, as this court knows, the NPA only defers prosecution in the Southern District of Florida, not other districts. Therefore, Epstein is "confronted by a substantial and 'real,' and not merely trifling or imaginary, hazard[] of incrimination" when it comes to Plaintiff's discovery requests. United States v. Apfelbaum, 445 U.S. 115, 128 (1980).

The Fifth Amendment serves as a guarantee against testimonial compulsion and provides, in relevant part, that "[n]o person…shall be compelled in any Criminal Case to be a witness against himself." (DE 242, p.5); see also Edwin v. Price, 778 F.2d 668, 669 (11th Cir. 1985) (citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). The privilege is accorded liberal construction in favor of the right and extends not only to answers that would support a criminal conviction, but extends also to those answers which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. See Hoffman v. United States, 341 U.S. 479, 486 (1951). Information is protected by the privilege not only if it would support a criminal conviction, but also in those instances where "the responses would merely 'provide a lead or clue' to evidence having a tendency to incriminate." See United States v. Neff, 315 F.2d 1235,

1239 (9th Cir.), cert denied, 447 U.S. 925 (1980); Blau v. United States, 340 U.S. 159 (1950); SEC v Leach, 156 F.Supp.2d 491, 494 (E.D. PA. 2001).

Moreover, the act of production itself may implicitly communicate statements and, for this reason, the Fifth Amendment privilege also encompasses the circumstances where the act of producing documents in response to a subpoena or production request has a compelled testimonial aspect. See United States v. Hubbell, 530 U.S. 27, 35-36 (2000). Thus, where the existence or location of the requested documents are unknown, or where production would "implicitly authenticate" the requested documents (as requested by Plaintiff here), the act of producing responsive documents is considered testimonial and is protected by the Fifth Amendment. See In re Grand Jury Subpoena, 1 F.3d 87, 93 (2nd Cir. 1993).

Here, Plaintiff's overly broad request seeks photos of the inside of Epstein's home. Moreover, it seeks to compel Epstein into implicitly admitting that there were rooms within his house where "the massages took place" and into selecting such rooms and even the alleged massage table. Any compelled "production" by Epstein would violate his Fifth Amendment rights in that he is implicitly being asked to authenticate same i.e., given the nature of the request, Epstein's selection and production of photos would constitute compelled testimonial admissions that "the massages" took place in a given room on a given table etc. . . . The requested information could potentially provide a 'lead or clue' or a link in the chain of evidence having a tendency to incriminate Epstein and would threaten to invade his privilege against being required to produce and/or testify. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir. 2000)(the "privilege" against self-incrimination does not depend upon the likelihood, but upon the possibility of prosecution and also covers those circumstances where the disclosures

would not be directly incriminating, but could provide an indirect link to incriminating evidence).

In Jane Doe No. 2 v. Epstein, the Court sustained Epstein's Fifth Amendment objections to interrogatories: asking Epstein to identify all employees who performed work inside his Palm Beach residence and all other employees who came to the residence, asking Epstein to identify any who gave or were asked to give him massages, requesting information regarding the identity of persons who provided transportation services, seeking a list of Epstein's employees' telephone numbers, asking Epstein to identify any persons or witnesses who have knowledge or are in possession of physical evidence pertaining to the events in question, seeking information related to alleged sexual abuse or misconduct on a minor, and seeking the facts on upon which Epstein relies to support pleading denials and affirmative defenses. See (DE 242).

If the Fifth Amendment protects Epstein from disclosing the identity of any person who has knowledge or are in possession of physical evidence (i.e. photographs, videos, written statements, etc.) pertaining the alleged events in question, it follows that Epstein's production himself of photographs of the same or related subjects would also violate his Fifth Amendment rights. Stated differently, if Epstein can properly invoke his Fifth Amendment right to not identify a person who may have a photograph or physical evidence pertaining to the alleged events, how can Epstein be required to produce the requested photographs? He cannot.

For these reasons, Epstein's justified concern with regard to answering the above request and the resulting waiver of his Fifth Amendment Privilege in this regard and/or providing self-incriminating information is substantial, real and not merely imaginative. 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.

b. Requests Numbers 7, 9 and 10

Request No. 7: All discovery information obtained by you or your attorneys as a result of the exchange of discovery in the State criminal case against you or the Federal investigation against you.

Request No. 9: Any documents or other evidentiary materials provided to local, state, or federal law enforcement investigators or local, state or federal prosecutors investigating your sexual activities with minors.

Request No. 10: All correspondence between you and your attorneys and state or federal law enforcement or prosecutors (includes, but not limited to, letters to and from the State Attorney's office or any agents thereof).

Response to Request Numbers 7, 9 and 10: 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 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.

As discussed in the supporting memorandum 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. See *supra*. 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, it is clear that the very act of production of such documents could implicate Epstein of a crime. See *supra*, same argument on 5th Amendment applies.

Moreover, the production of such discovery information may lead to the identity of witnesses that could testify against Epstein and those that may have knowledge or are in possession of evidence that could be used against Epstein. This court has already ruled that Epstein can properly invoke his Fifth Amendment right to not identify a person who may have a photograph or physical evidence pertaining to the alleged events. (DE 242). Moroever, the requested information could encompass documents identifying Epstein's whereabouts, schedules, calendars etc . . . Requiring Epstein to provide responses would in essence be compelling him to provide assertions of fact that could incriminate him under 18 U.S.C. §2422(b) and 18 U.S.C. §2423(b) and other federal violations discussed, in camera, at DE 282 and 283. As stated *infra*, the court has already ruled on this issue. See DE 242 and 293. Epstein should not be required to produce information in any State or Federal Agencies' possession, especially when doing so would violate his constitutional rights.

Notably, this court has already ruled on a similar request in 80119 whereby the Plaintiffs, Jane Doe 2-7, asked the following:

> **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.
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> **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.

The court specifically held at p.17 of its Order at DE 242 that "[d]efendant's Motion as it relates to Production request number(s) 1, 2, 3, 4. . . . is [granted]. The very act of producing documents in response to these requests is testimonial in nature, in that by production, Epstein would be implicitly communicating 'statements of fact,' to which the fifth Amendment privilege may be validly asserted . Hubbell, 530 U.S. at 35-36. Not only do the subject requests involve 'statements of fact,' given the nature of the allegations against Epstein, they could also serve as links in the chain of evidence needed for prosecution. As such, Epstein's fifth Amendment Privilege assertion as it relates to these requests is sustained." That same ruling should apply to the above requests.

The Requests Seek Attorney-Client And Work-Product Privileged Material And Rules 408 And 410, Fed. Evid. And §90.410, Fla. Stat., Preclude Production of the Material

Next, a reading of the particular discovery requests reveals that they encompass attorney-client and work-product privileged material. As this court has already ruled (DE 242), Epstein cannot be compelled to create a privilege log because that would be tantamount to compelled testimony to which Defendant's constitutional protections apply. Any exchange of information with federal authorities was done in the context of discussions that are in essence immunized under the provisions of FRE 410 in order to encourage the resolution of pending investigations

without trials. FRE 410(4) is particularly directed to communications in matters which, like Epstein's, did not result in a plea of guilty to any federal charge. Fla. Stat. §90.410 provides parallel protections in state criminal matters. To the extent Epstein's counsel provided the authorities with any information it cannot, by the terms of that rule, be used in subsequent litigation as same is work-product. Likewise, the information received from the federal authorities, if any, as part of a give and take, is also subject to FRE 410. Finally, the purposes of FRE 408 provide further protection for both state and federal interchanges of information. If Epstein is compelled to produce this information, not only will it violate his Fifth Amendment privilege, but it will also result in an open-ended waiver of his attorney-client and work-product privileges.

Additionally, Request Numbers 7, 9 and 10 all pertain to the State Criminal Proceeding and the Federal Investigation by the USAO. Therefore, the requests concern the negotiation(s) and eventual entering into of a Plea and the negotiation(s) and eventual entering into the NPA. Request Numbers 9 and 10 are so broad that production would encompass any information, assuming it exists, provided by Epstein's attorneys to local, state or federal prosecutors in the Southern District and/or outside of the Southern District in connection with Epstein's alleged sexual activities. Likewise, all the requests, as worded, seek production of information in connection with "compromise negotiations." Federal Evidence Rules 408 and 410 and Florida Statute §90.410 prevent the production of such material. The full text of Federal Evidence Rules 408 and 410, and Florida Statute §90.410 is found at footnote 1 and is incorporated herein[1].

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[1] Relevancy and Its Limits

Rule 408. Compromise and Offers to Compromise

Clearly, discovery in criminal cases is not congruent with discovery in civil cases. Here, the information requested involves negotiations with the State and the USAO and their investigation. If the USAO cannot be compelled to release its investigation(s) and related work-product, how

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(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.

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.

can Epstein be compelled to disclose same in violation of his constitutional rights and his attorney-client and work-product privileges? He cannot. The protections afforded by these evidentiary rules provide that such documents are not subject to discovery.

Moreover, any information exchanged by Epstein's attorneys and the State was exchanged pursuant to Fla.R.Crim.P. §3.220 and is therefore protected under that Rule. Further, the information is "work-product" information. See id. and 14B *Fla. Jur.*2d Criminal Law §1412.

Third Party Privacy Rights

Here, the requests also seek information that may violate others third-party privacy rights. 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 produce information that may identify third parties (that could also testify against him) 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).

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.

c. Requests Numbers 8, 11, 12, 14 and 15

> **Request No. 8:** All financial documents evidencing asset transfers from 2005 to the present for you personally or any company or corporation owned by you.
>
> **Request No. 11:** Any and all documents reflecting your current net worth.
>
> **Request No. 12:** Personal tax returns for all years from 2002 through the present.
>
> **Request No. 14:** A sworn statement of your net worth (including a detailed financial statement depicting all current assets and liabilities).

Request No. 15: All financial statements or affidavits produced by you for any reason, to any person, company, entity or corporation since 2005.

Response to Request Numbers : 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 without waiving my Fifth Amendment constitutional rightsand 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; overly broad.

As set forth in more detail in DE 282 and 283, which were provided to the court in camera, Epstein cannot provide answers/responses to questions relating to his financial history and condition without waiving his Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. The requests are unreasonable, overbroad, confidential, proprietary in nature and seek 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 information sought is privileged and confidential, and inadmissible pursuant to the terms of the NPA and, Fed. Rule of Evidence 410 and 408, and Fla. Stat. 90.410. See *supra* for argument.

Responding to the above financial requests would require Epstein to identify information regarding matters as set forth in more detail in DE 282 and 283, which were provided to the Court in camera. Producing the specified information would result in testimonial disclosures that would communicate statements of fact. Again, the information sought relates to potential federal claims of violations. See DE 282 and 283, in camera. Production would therefore constitute a testimonial admission of the genuineness, the existence, and Epstein's control of such records,

and thus presents a real and substantial danger of self-incrimination in this case, in other related cases and as well in areas that could result in criminal prosecution. See generally Hoffman v United States, 341 U.S. 479, 486 (1951) and United States v. Hubbell, 530 U.S. 27, 36, 120 S.Ct. 2037, 2043 (2000).

The Fifth Amendment is a safe harbor for all citizens, including those who are innocent of any underlying offense. This request, if answered, may result in compelled production and/or testimonial communications from Epstein regarding his financial status and history and would require him to waive his right to decline to respond to other inquiries related to the same subject matter. Responding to this and other related inquiries would have the potential to provide a link in a chain of information and/or leads to other evidence or witnesses that would have the specific risk of furthering an investigation against him and therefore are protected from compulsion by Epstein's constitutional privilege.

Accordingly, any compelled testimony that provides a "lead or clue to a source of evidence of such [a] crime" is protected by Fifth Amendment. SEC v Leach, 156 F.Supp.2d 491, 494 (E.D. PA. 2001). See *supra*. Questions seeking "testimony" regarding names of witnesses, leads to phone or travel records, or financial records that would provide leads to tax or money laundering or unlicensed money transmittal investigations are protected. See also Hoffman v United States, 341 U.S. 479, 486 (1951)("the right against self-incrimination may be invoked if the answer would furnish a link in the chain of evidence needed to prosecute for a crime").

In addition to the above argument, the specific information requested in request number 12 as to personal tax returns also seeks information that is confidential and protected by federal law, 26 U.S.C. §6103.

To the extent Plaintiff claims she needs the requested information concerning asset transfers based on her unsupported presumption that Epstein is fraudulently transferring assets, same is premature and unsupported by the law for the reasons set forth in Epstein's Memorandum of Law in Opposition to Plaintiff's Motion for Injunction Restraining Fraudulent Transfer of Assets (DE 198).

d. Requests Numbers 13 and 16

Request No. 13: A photocopy of your passport, including any supplemental pages reflecting travel to locations outside the 50 United States between 2002 and 2008, including any documents or records regarding plane tickets, hotel receipts, or transportation arrangements.

Response: Defendant asserts 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 without risking waiver of my Fifth Amendment rights 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 protections and privileges, the scope of information is so overbroad that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; compiling such information over a six year period would be unduly burdensome and time consuming.

Request No. 16: All medical records of Defendant Epstein from Dr. Stephan Alexander.

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 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.

As to Request Number 13, Defendant has already provided this court with sufficient argument at DE 282 and DE 283 detailing why the production of information showing Epstein's whereabouts could provide a link in the chain of evidence regarding: (a) Epstein's air travel within the United States and Foreign Territories; (b) Epstein's communications with others relating to or referring to females coming into the United States from other countries; and (c) Epstein's personal calendars and schedules. Given that the essential proof of an allegation of 18 U.S.C. 2423(b) would include travel records, schedules regarding trips and locations, flight records, calendars, and transportation arrangements, the court found that Epstein had made a more particularized showing because producing such information "could reveal the availability to him and/or use by him of interstate facilities and thus would constitute a link in the chain of evidence that could potentially expose [Epstein] to the dangers of self incrimination." (DE 293, p.6)

Here, Plaintiff's request for Epstein's passport "reflecting travel to locations outside the 50 United States between 2002 and 2008, including any documents or records regarding plane tickets, hotel receipts, or transportation arrangements" is no different from the requests this Court has already ruled upon and sustained Epstein's Fifth Amendment privilege in response thereto. (DE 292). In summary, this court reasoned that:

> "[i]n this and the other civil actions, Plaintiff's allege that Epstein violated certain federal and state criminal statutes in an attempt to make claims against Epstein ranging from sexual battery to intentional infliction of emotional distress. The lynchpin for the exercise of federal criminal jurisdiction under 18 U.S.C. §2422(b), which figures in some of the complaints filed, is 'the use of any facility or means of interstate or foreign commerce' and the analogous essential element of 18 U.S.C. §2423(b), which also figures in some of the Complaints, is 'travel[s] in interstate commerce or travels into the United States or . . . travels in foreign commerce.' Accordingly, requiring Epstein to provide responses. . .would in

> essence be compelling him to provide assertions of fact, thereby admitting that such documents existed and further admitting that the documents in his possession or control were authentic.

Based upon the arguments set forth in DE 283 (which is incorporated herein), this Court sustained Epstein's Fifth Amendment Privilege. That same ruling should apply here as Jane Doe's request is identical to the requests already ruled on by this court. (DE 293).

As to Plaintiff's request for Epstein's medical records, Dr. Stephen Alexander was hired as an expert consultant by Epstein's attorneys in the underlying criminal matter. Therefore, any information provided to Dr. Stephen Alexander or any information provided by the experts to Epstein's attorneys is protected by the attorney-work product and attorney-client privileges, Fla.R.Civ.P.1.280, 19 Fla. Jur.2d, Discovery and Depositions, §89, and Fed.R.Civ.P. 26(b)(3).

19A Fla. Jur.2d, Discovery and Depositions, §89, provides:

> [a] party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, ***only as provided in…Rule of Civil Procedure [1.360 (b)(1)], governing the report of an examining physician" [which is not applicable in the instant matter]***, "or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means. The statutory protection has been extended both to the facts known or opinions held by non-witness experts retained or specially employed by a party in anticipation of litigation and to their identities. Thus, absent a showing of exceptional circumstances, a litigant is not required to disclose the names and specialties of experts retained but not expected to testify at trial. Accordingly, a discovery order ordering a defendant to disclose the names of any persons who have examined, evaluated, or reviewed the defendant's records improperly compels the defendant to divulge the names of experts consulted for trial but not intended to be called to testify at trial where such information is protected by the work-product privilege and where the state makes no showing of exceptional circumstances.

Id.; see also Carrero v. Engle Homes, Inc., 667 So. 2d 1011 (Fla. 4th DCA 1996); Myron By and Through Brock v. Doctors General, Ltd., 573 So. 2d 34 (Fla. 4th DCA1990); see also 14B Fla.Jur.2d , Criminal Law, §1412.

In addition to the foregoing privileges, in the Court's prior order (DE 242), it found that Epstein's Health Insurance Portability and Accountability Act ("HIPAA") objections were "unfounded as the requests [i.e., the interrogatory] seek only the identification of Epstein's healthcare providers." Here, however, a request for production is at issue, not an interrogatory. Therefore, Epstein's HIPAA rights should be upheld. 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).").

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 requests is further barred by 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. Plaintiff claims - Count I – "*Sexual Battery Upon a Minor,*" Count II – "*Cause of Action Pursuant to 18 USC §2255,*" Count III – "*Intentional Infliction of Emotional Distress,*" Count IV – "*Civil Remedy for Criminal Practices*" *and* Count VI – "*Cause of Action Pursuant to Florida Statute 796.09 Against Defendant, Jeffrey Epstein*". 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, *e.g.*, 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.

Significantly, Epstein has not placed his medical history at issue. In Breeden v. Cook, 859 So. 2d 1276 (Fla. 4th DCA 2003), the court quashed an order compelling production of mental health records in a medical malpractice suit involving a failed ankle surgery finding that patient's mental health was irrelevant to claims asserted. See also Pusateri v. Fernandez, 707 So. 2d 892, 893 (Fla. 2d DCA 1998) (quashing order directing physicians to produce patient's medical record as the records were not relevant to any pending claim or defense nor were reasonably calculated to lead to the discovery of admissible evidence); Fla. Dept. of Corrections v. Abril, 969 So. 2d 201, 205-06 (Fla. 2007) (noting that "Florida has a long tradition of recognizing the privacy interests of patients in confidential medical records."); and State v. Cashner, 819 So. 2d 227, 229 (Fla. 4th DCA 2002) (holding that since "the compelled disclosure of a patient's medical records encroaches upon a patient's right to privacy, the state must demonstrate it has a compelling interest in the information contained in those records."). Plaintiff must also show

that the requested information is relevant to the disputed issues of the underlying action. See Young Circle Garage, LLC. v. Koppel, 916 So. 2d 22 (Fla. 4th DCA 2005); see also Equitable Life Assurance Society of the United States v. Daisy Worldwide, Inc., 702 So. 2d 263 (Fla. 3d DCA 1997). Plaintiff has failed to meet this burden and, in doing so, has also failed to show any substantial need for the documents

If this court orders production of the requested information (which it should not), an in camera inspection should be had to determine, as to each document, whether Fla. Stat. §39.204 is applicable. See DE 242, p.15; 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 clearly establishes that Fla. Stat. §39.204 does not provide Plaintiff with a carte blanche access to Defendant's medical history, especially those of non-testifying consulting experts.

Wherefore, Epstein respectfully requests that this Court issue and order:

a. finding that the danger Epstein faces by being forced to respond to the above requests is substantial and real, and not merely trifling or imaginary;

b. sustaining Epstein's Fifth Amendment Privilege and other delineated constitutional privileges as it relates to the above requests and denying Plaintiff's Motion in that regard; and

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

Respectfully submitted,

By: _____
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Florida Bar #617296

Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this

day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this ___ day of October, 2009

Respectfully submitted,

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