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'S, CONSOLIDATED RULE 4 REVIEW AND APPEAL OF PORTIONS OF THE MAGISTRATE'S ORDERS DATED FEBRUARY 4, 2010 (DE 462), (DE 480) AND APRIL 1, 2010 (DE 513), WITH INCORPORATED OBJECTIONS AND MEMORANDUM OF LAW

Defendant, Jeffrey Epstein (hereinafter "Epstein"), by and through his undersigned attorneys, hereby files his Consolidated Rule 4 Review and Appeal of Portions of the Magistrate's Orders (DE 462), (DE 480) and (DE 513) pursuant to Rule 60, Fed.R.Civ.P. Rule 4, Rule 4(c) and Fed. R. Civ. P. 53(e). In support, Epstein states:

I. Introduction

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). Add new case from my e-mail of yesterday: (Court in Englebrick v Worthington Industries Inc 670 F Supp2d 1048 (CD Cal, 2009) rejected motion to compel in helpful language: "A valid assertion of the privilege does not require an imminent criminal prosecution or investigation: 'The right to assert one's privilege against self-incrimination does not depend upon the likelihood, but upon the possibility of prosecution' cite omitted ...a possibility of prosecution exists where the witness has not received a grant of immunity, the statute of limitations has not run, double jeopardy does not apply, and there are no other concrete indications that criminal prosecution is barred. See also Belmonte v Lawson, 750 F. Supp. 735, 739 (E.D. Va. 1990)("Courts should avoid engaging in crystal ball forecasts about what a prosecutor may or may not do...).

Significantly, these cases have been consolidated for discovery. Therefore, consistent rulings must 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, 293). 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 and in another jurisdiction. Id. and *infra.*

Moreover, in addition to the testimonial privilege discussed herein, the Fifth Amendment includes an act of production which encompasses circumstances highly relevant to certain of the discovery requests at issue where the act of producing documents in response to a subpoena or production request has a compelled testimonial aspect in that it would constitute an implied admission as to the defendant's possession or control of the requested documents, as to their authenticity, and as to the defendant's selection of them as meeting the requests for production. 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, 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); 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 addition, several of the requests outlined below implicate Federal Rules of Evidence 408, 410 and 502, and the confidentiality protections intrinsic to federal tax returns that would be unavailable under 26 U.S.C. 6103 even if a subpoena is served upon the IRS. Furthermore,

II. Procedural Background

Epstein filed his Motions for Reconsideration or, Alternatively, Rule 4 Appeal, at DE 477 and 488. However, this court entered an order (DE 513) allowing for Consolidated Rule 4 Appeals relative to the above docket entries.

(a) Jane Doe

Plaintiff, Jane Doe's Motion to Compel is filed at DE (194). Defendant's Response in Opposition is filed at DE (339), and the arguments set forth therein are incorporated herein by reference as if completely set forth herein as each apply to request numbers 10, 12 and 13.

(b) Jane Does 2-8

Plaintiffs, Jane Doe 2-8s' Motion to Compel is filed at DE (333). Defendant's Response in Opposition is filed at DE (390) and the arguments set forth therein are incorporated herein by reference as if completely set forth herein as each apply to request number 1 of Plaintiff's First request to produce Net Worth Discovery.

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

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

a. Jane Doe - 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.
> It appears there is now a direct conflict with what Jane Doe requests (see e.g., DE 354, p. 3). In short, Plaintiff is fast and loose in her argument regarding what she seeks (i.e., she states in no uncertain terms (DE 354, p.3) that she seeks information that the Federal government gave to Epstein. However, in her Reply to the Response in Opposition, she now seeks everything that the government gave to Epstein's lawyers and what his lawyers gave to the Federal government (i.e., the full breadth of the requests). The far broader ambit of the requests implicates whether the Plaintiff is seeking just the communications provided by USAO to Epstein's counsel or all Epstein's counsel's communications with, e.g., the USAO, the State Attorneys' Office or any other local, state or Federal law enforcement. If Jane Doe seeks "all" communications, it deeply implicates the work product of Epstein's lawyers. If Plaintiff seeks just the communication provided by the USAO or the State Attorney, it deeply implicates the work product of the USAO and the State Attorney negotiating and communicating with Epstein's counsel which include, but are not limited to, information that resulted in a plea and information that did NOT result in a plea and information that may have resulted in the entering of the Non-Prosecution Agreement ("NPA"). Either way, the requests deeply implicate the protections and policies of FRE 408, 410 and 502 as more fully set forth *infra.*

Before this limitation was made by Plaintiff, Epstein argued in his response in opposition (DE 339, p.7-8) that these requests are the same type requests the court found subject to the Fifth Amendment. With the limitation made by Plaintiff and her counsel in the Reply, the court ruled "[t]hat the earlier requests referenced by Epstein were significantly broader than the narrow

requests at issue here, including for example, a request for all documents 'relating to' the federal non–prosecution agreement, and all documents 'relating to' either the federal or state criminal investigations. These requests would have required Epstein to pick and choose which documents were responsive and in this way force Epstein to use to effectively make 'use of the content his mind,' an action that would undeniably implicate the Fifth Amendment." (DE 462, p.9) Clearly the instant requests are exactly the same type of broad requests this court has already ruled upon. Had the Plaintiff not limited the scope of the requests in her Reply (DE 354, p.3), the court would not have labeled these requests as "narrow" because these requests now seek all information related to the federal non–prosecution agreement and all documents relating to either the federal or state criminal investigations, which clearly require Epstein to effectively make use of the content his mind to determine what is and what is not responsive to these broad requests.

As a result of the limitation made by Plaintiff in her Reply (DE 354) and as a result of this court's Order (DE 462), Epstein responded - "[a]s to Request Number 7, Epstein and his attorneys do not have any "discovery information" provided to them by the federal government and [a]s to Request Number 9, Epstein has not been given any evidentiary materials or evidentiary documents by the federal government." (DE 477) Certainly, these responses were not intended to "gild the lily" as Plaintiff contends nor are they misleading. Despite what the interrogatory sought, Plaintff chose to limit same in her Reply to only what the Federal Government gave Epstein, and that is exactly how the Magistrate interpreted same. The responses were made based upon Plaintiff's limitation in what she sought from Epstein and because this court entered an Order based upon that limitation. Had the limitation not been made, neither this court nor Epstein would have been misled down this primrose path.

Nonetheless, Plaintiff now seeks to obtain the full breadth of information sought under request numbers 7, 9 and 10. However, that argument shall meet a short death in that Plaintiff herself limited the scope of the requests in her Reply and failed to timely file her own Rule 4 Appeal after the court entered its order at DE 462, which adopted Plaintiff 's limited scope of the requests (which Plaintiff now wishes to change). See S.D. Fla., Rule 4(a)(1), Mag. J. 2009. If the court made a mistake in adopting the limited scope of the requests (which it did not), Plaintiff should have timely appealed, which she did not. As such, Plaintiff's requested relief in this regard should be denied.

Next, the Magistrate's order as to Request No.: 10 must be reversed because it contravenes critical public policy of encouraging resolution of criminal prosecutions without trial and the concomitant understanding that defendants will be considerably more likely to engage in full and frank discussions with the government if they need not fear that statements they or their counsel make to government prosecutors will be used against them to their detriment. The policies behind FRE 408, 410 and 502 provide this court with a basis for sustaining Epstein's objections to Request No.: 10. For instance, the critical importance of plea bargaining to the criminal justice system has long been recognized. "[W]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned." Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978), *quoting* Blackledge v. Allison, 431 U.S. 63, 71 (1977). To encourage defendants to participate in the plea negotiation process, rules have developed to prohibit admission into evidence against the defendant of any and all statements he or his counsel acting on his behalf makes to government prosecutors during the plea negotiation process. This confidentiality protection is embodied in both Fed. R. Evid. 410 and Fed. R. Crim.

P. 11(f). While these rules by their express terms refer only to admissibility of evidence, the purposes and policies underlying these rules is instructive in this context, in which a civil plaintiff seeks discovery of documents falling within the scope of these two rules.

> Rule 410 was created to promote active plea negotiations and plea bargains, which our Supreme Court has acknowledged are "important components of this country's criminal justice system.". . . Our Court of Appeals has held that "in order for plea bargaining to work effectively and fairly, a defendant must be free to negotiate without fear that this statements will later be used against him.". . . Indeed, absent the protection of Rule 410, "the possibility of self-incrimination would discourage defendants from being completely candid and open during plea negotiations."

S.E.C. v. Johnson, 534 F.Supp.2d 63, 66-67 (D.D.C. 2008), *quoting* United States v. Davis, 617 F.2d 677, 683 (D.C.Cir. 1980). See, e.g., United States v. Mezzanatto, 513 U.S. 196, 205, 207 (1995)(purpose of the rules is to encourage plea bargaining, and rules "creat[e], in effect, a privilege of the defendant," *quoting* 2 J. Weinstein & M. Berger, Weinstein's Evidence ¶410[05] at 410-43 (1994)); United States v. Barrow, 400 F.3d 109, 116 (2d Cir. 2005)("The underlying purpose of Rule 410 is to promote plea negotiations by permitting defendants to talk to prosecutors without sacrificing their ability to defend themselves if no disposition agreement is reached"); Fed. R. Crim. P. 11, Advisory Committee Notes, 1979 Amendment ("the purpose of Fed. R. Ev. 410 and Fed. R. Crim. P. 11(e)(6) [now Rule 11(f)] is to promote the unrestrained candor which produces effective plea discussions").[1]

Additional illustration of the high degree of confidentially accorded settlement negotiations is found in Fed. R. Evid. 408, which precludes the introduction into evidence

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[2] 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. Epstein pled guilty to Fla. Stat. 796.07(2)(f), *Unlawful to Solicit, Induce, Entice, or Procure Another to Commit Prostitution, Lewdness or Assignation*, and Fla. Stat. 796.03, *Procuring Person Under Age of 18 For Prostitution*. Therefore, in the event this court orders production of said correspondence, then it must first hold an in camera inspection to determine what, if any, documents are related to the foregoing pleas and what documents are not. Along those same lines, an in camera inspection must be had in an effort to redact any information that may violate third-party privacy rights or information that would implicate Epstein's Fifth Amendment rights. See *infra*.

communications made during settlement negotiations. The purposes underlying Rule 408 are essentially the same as those underlying Fed. R. Crim, P. 11(f) and 410: "to encourage non-litigious solutions to disputes." Reichenbach v. Smith, 528 F.2d 1072, 1074 (11th Cir. 1976). See, e.g., Stockman v. Oakcrest Dental Center, *P.C.*, 480 F.3d 791, 805 (6th Cir. 2007)("the purpose underlying Rule 408 . . . is the promotion of the public policy favoring the compromise and settlement of disputes that would otherwise be discouraged with the admission of such evidence"); Bankcard America, Inc. v. Universal Bancard Systems, Inc., 203 F.3d 477, 483 (7th Cir. 2000)("Because settlement talks might be chilled if such discussions could later be used as admissions of liability at trial, the rule's purpose is to encourage settlements"); *In* re A.H. Robins Co., Inc., 197 B.R. 568, 572 (E.D.Va. 1994)("Rule 408 aims to foster settlement discussions in an individual lawsuit, and therefore insulates the particular parties to a settlement discussion from possible adverse consequences of their frank and open statements"). So crucial is this policy of confidentiality to the functioning of our federal court system that some courts have held that communications falling within the parameters of Rule 408 are covered by a settlement privilege which insulates them not just from admission into evidence but from discovery as well. See, e.g., Goodyear Tire & Rubber Co. v. Chiles Power Supply, Inc., 332 F.3d 976, 979-983 (6th Cir. 2003).

Given the powerful and long-standing policy of according confidentiality to settlement negotiations in both the civil and criminal context, civil plaintiffs should, at a minimum, be required to demonstrate real and concrete need for the material. They should not be permitted to rummage through such sensitive documents based on nothing more than a vague and contentless statement that the materials are "likely to lead to the discovery of other admissible evidence." Motion to Compel at 12 n.3, which is all that plaintiff offers as to Request No. 10. This is

particularly so given the reality that parties often take positions or offer potential compromise solutions during plea negotiations which are inconsistent with the litigation strategy they will pursue if the case goes to trial. As one court has explained in the civil context:

> There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. . . . The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. . . . Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative *quid pro quos*, and generally make statements that would otherwise belie their litigation efforts.

Goodyear Tire, 332 F.3d at 980. The same is no less true in the plea negotiation context particularly where a central component of the discussions and negotiations between counsel for Epstein and counsel for the USAO was to reach an agreement on conditions relating to 18 USC 2255 including certain waivers and other obligations of Epstein's NPA. The plaintiffs have contended that such provisions relating to 2255 are civil in nature, thus squarely implicating FRE 408 protections. The free availability in discovery to civil plaintiffs of communications made during the plea negotiation process has profound potential to chill frank and open communications during that process so crucial to the functioning of the criminal justice system in any criminal case which has potential to become a civil or regulatory matter as well. Such defendants will be loath to be fully forthcoming during plea discussions or communications and indeed, if the potential civil or regulatory consequences are sufficiently severe, may decline to enter into plea negotiations at all, if they must fear that their communications will be made available to civil plaintiffs in discovery, thus entirely defeating both the purpose and spirit of Rules 410 and 11(f).

In addition, the communications made during the plea negotiation process contain fact and opinion attorney work product of both Mr. Epstein's attorneys and government attorneys. Particularly given the strong public policy in favor of confidentiality of plea/settlement

negotiations, the disclosure of such information should be treated as falling within the selective waiver provisions of Fed. R. Evid. 502 and not be treated as an open-ended waiver of the attorney-client and work product privileges, and, if the discovery order is upheld as to request 10 a request for an order pursuant to FRE 502(d) mandating that the communications that led to the execution of a Non-Prosecution Agreement and communications regarding its implementation should be, to the extent they involve fact or opinion work product, not disclosed to third parties in civil litigation outside the criminal proceedings to which they relate. FRE 502(D) provides: ***". . . a Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court - -in which event disclosure is also not a waiver in any other Federal or State proceeding."***

The correspondence in question contained what would constitute paradigm opinion work product with the single caveat that the opinions of each counsel, Epstein's and the United States Attorney's were exchanged with each other pursuant to the overall expectation that they were safeguarded from disclosure by the policies of confidentiality that protect communications during settlement and plea negotiations. The requested communications include the views of Epstein's counsel in the criminal case regarding why a federal prosecution was inappropriate, why the federal statutes did not fit the alleged offense conduct, why certain of the alleged victims were not credible. It also includes Epstein's counsel's views on the limits and inapplicability of certain elements of 18 U.S.C. §2255, one of the principal causes of action in the Jane Doe cases. This opinion work-product should not be disclosed when it was incorporated into heartland plea negotiations that are accorded protection under the federal rules of evidence. It is the disclosure of such legal opinions – and not just their admissibility – that should be protected from a civil

discovery request that lacked any statement as to why this information was even necessary to the fair litigation of the civil cases.

Concomitantly, to the extent that the request is now limited to communications from the Government to Epstein, see DE 54, pgs 3 and 8, the narrowed request implicates the same concerns for the opinions, the work product, and the expectation of privacy of the United States Attorney or Assistant United States Attorney who authored the many letters received by counsel for Epstein. As such, to the extent that the Court is considering affirming any part of the Magistrate-Judge's opinion allowing request 10 that would result in the required disclosure of communications from the Government counsel to Epstein, that notice be provided to the United States Attorney so they may intervene to protect their opinion work product, assert their rights to confidentiality under FRE 408 and 410, and assert where appropriate their interests in grand jury secrecy and in the privacy rights of their witness who in at least one document are identified. The defendant requests that if the Court were considering allowing the disclosure of any portion of the communications sent by Epstein to the Government which are within the original request for production but apparently not plaintiff's latest filing, DE 354, pg 3, the Court first consider permitting the defendant to provide a privilege log that would identify specific portions of the correspondence that contains the opinion work product of counsel for Epstein and permitting leave to seek an order under FRE 502(d) that would protect such communications from disclosure to third parties such as requested in this matter.

If the USAO cannot be compelled to release its investigation(s) and related work-product directly due to the protections of Fed. R. Crim. Pro. 6, Epstein cannot be compelled to disclose same in violation of his constitutional rights? He cannot. Rules 408, and 410 all counsel strongly against the discoverability of such documents. The court is requested to reverse the

Magistrate-Judge's order as to paragraph 10. Alternatively, the Court is requested to permit a privilege log that would be filed by Epstein's counsel – and if they so desire the Government – particularizing the prejudice to their work product and to the values otherwise protected by FRE 408 and 410 on a document by document basis.

Epstein also continues to maintain that the requested correspondence is protected under the Fifth Amendment, as it could furnish a link in the chain of evidence needed to prosecute him for a crime or provide the federal government with information that provides a lead or clue to evidence having a tendency to incriminate Epstein. See *infra*; Hoffman v. United States, 341 U.S. at 486; United States v. Neff, 315 F.2d at 1239; Blau v. United States, 340 U.S. at 159; and SEC v Leach, 156 F.Supp.2d at 494.

As this court has recognized, the threat of criminal prosecution is real and present as Epstein remains under the scrutiny of the USAO, which is explained and/or acknowledged in the Court's Orders (DE 242, p.4 and 462, p.2). As this Court knows, Epstein entered into a Non-Prosecution Agreement ("NPA") with the USAO for the Federal Southern District of Florida . However, the NPA does not provide Epstein with any protection from criminal investigation or prosecution other than in the Southern District of Florida. As the court has acknowledged in its orders (e.g., DE 462), complaints in these related matters allege that Epstein both resided in and allegedly engaged in illegal sexual conduct in districts outside the Southern District of Florida, and that he allegedly lured economically disadvantaged girls to homes other than in Palm Beach. Thus, the fact that there exists a NPA does not mean that Epstein is free from a reasonable fear of future criminal prosecution. In fact, this court acknowledged that "[t]he danger Epstein faces by being forced to testify in this case is substantial and real, and not merely trifling or imaginary as required." (DE 242, p. 10).

As such, in the event Epstein is required to produce information provided to him by the federal government – or provided by Epstein to the Government - that information could provide a link in the chain of evidence needed to prosecute Epstein of a crime outside the protections of the NPA. Given the nature of the allegations, to wit, a scheme and plan of sexual misconduct, this court should find it entirely reasonable for Epstein to assert his Fifth Amendment privilege as to request Number 10, especially since it is broad enough to encompass information that could violate Epstein's Fifth Amendment Privileges. Hubbell, *supra*. In responding to the request, Epstein would be compelled admit that such documents exist, admit that the documents were in his possession or control, and further admit that the documents produced were authentic. In other words, the very act of production of the category of documents requested would implicitly communicate "statements of fact." as well as authenticate the letters as genuine examples of communications that include disclosures made by Epstein's attorney i.e., his agent on his behalf, see Hubbell, *supra*; Hoffman, *supra*.

The defendant requests that the Court order that the documents in question are protected by FRE 408 and 410, that if not they should be subject to a "selective waiver" order under FRE 502(d) given their inclusion of attorney opinion and fact work product that was only disclosed in reasonable expectation they would be solely used to further plea and settlement discussions. o the extent this court orders production of any of the requested materials, the information should first be produced *in camera* to determine what portions of the materials should be redacted to protect the attorneys' mental impressions and to assist the Court in making further determinations as to what information , should be protected by Federal Rules 408, 410, and 502. See *supra*. Again, as set forth in the Reply attached hereto as Exhibit "B", the USAO and the

Palm Beach State Attorneys' Office should be put on notice that their underlying files are being requested by and through backdoor methods.

(b) Plaintiffs' Attorneys Already Have Much Of The Information They Seek Pursuant To This Improper Motion Practice And Have No Demonstrable Need For More

Several depositions have occurred over the last 4 weeks wherein it appears Mr. Edwards already has the information he seeks responsive to these requests, which is likely the reason Mr. Edwards has not filed any affidavits supporting the specious arguments set forth in Plaintiff's Motions. As such, there is no substance or factual representations made by Plaintiff to support her argument. Plaintiff is wasting attorney time and judicial resources in her effort to obtain what she already has in her possession. For example, at a deposition of Mr. Epstein on February 17, 2010, the following exchange occurred:

> **Mr. Edwards**: The 87-page Palm Beach Police Department incident report where there are numerous underage females describing their interaction with Mr. Epstein at his house. I'm specifically reading from page 41 related to A.H., who was one of the victims he pled guilty to.
>
> **Mr. Pike**: Is that the same document that you're seeking production of, in this same exact case?
>
> **Mr. Edwards**: I don't know what you're talking about. This is something from the state attorneys' file.

It is clear from Mr. Edwards's response above (attached as **Exhibit "C"**) that he has the information from the Palm Beach Police Department and the information from the State Attorneys' file. This begs the question – if plaintiff already has the information she seeks, why is Plaintiff wasting valuable attorney time and judicial resources to obtain what is already in hand? See also **Exhibits "D-1" and "D-2" and "E,"** a copy of the 89-page incident report marked as an Exhibit by Plaintiff's counsel at Detective Recarey's deposition as well as certain message pads Plaintiff claims was pulled from the residence at 358 Brillo Way.

Moreover, at the deposition of AR on March 15, 2010, the following exchange occurred:

> **Mr. Edwards**: Well, at some point in time what's been marked as defense Exhibit "1", you received a grand jury investigation target letter, correct?
>
> ***
>
> **Mr. Edwards**: There's another message from 9/11/05 saying "I got a car for," and then the name is blotted out. The State Attorneys' Office blotted the names of minors out sometimes in their file. . . .
>
> ***

Once again, Mr. Edwards's response above (attached as **Exhibit "F"**) establishes that he has the information from both the Palm Beach Police Department and the State Attorneys' file. In fact, as argued infra, Mr. Edwards has certain information from the Palm Beach Police Department, which resulted from various alleged "trash pulls" from a residence on Palm Beach (e.g., certain notepads).

Finally, at the deposition of Detective Recarey of the Palm Beach Police Department, on March 19, 2010, the following exchange occurred:

> **Mr. Kuvin**: Okay. And what were the dates of the surveillance?
>
> **Witness:** [Referencing his Report] It appears she met with members of the B.S.F. unit, Burglary Strike Force. . . .
>
> ***
>
> **Mr. Kuvin**: [Referencing the Report] If we go down to page 40 in your report, first let me back up. . . .
>
> **Mr. Kuvin**: Okay. So the chain of custody which we have marked as Exhibit 5 shows that all the evidence you had in this case was given to the FBI. . . . See **Exhibit "G"**.
>
> ***

The undersigned was at Detective Recarey's deposition. Mr. Kuvin and Mr. Edwards had copies of various reports and also had copies of various message pads claimed to be "pulled" from Epstein's trash by the Palm Beach Police Department. See *infra*. It is clear from the

deposition that opposing counsel has the information from the Palm Beach Police Department and the State Attorneys' file. See also, *infra* for additional argument.

(i) Work-Product – Palm Beach State Attorneys' File

Next, as to any information obtained from the State Attorney at any phase (request numbers 801), the State Attorney has not provided anything to Epstein or his attorneys. While the State Attorneys' file was made available for inspection, Jack Goldberger, Epstein's criminal lawyer, went over to the State Attorneys' Office and hand selected information from the file for copying, including certain witness interviews. See **Exhibit "H"** Affidavit of Jack Goldberger. Accordingly, the information hand selected by Mr. Goldberger falls under the work-product doctrine as production of same would reveal Mr. Goldberger's mental impressions, thought processes and strategy relative to the defense of Epstein. Smith v. Florida Power & Light Company, 632 So.2d 696, 698 (Fla. 3rd DCA 1994)(even if individual documents are not work-product, "the selection process itself represents defense counsel's mental impressions and legal opinions as to how the evidence in the documents relates to the issues and the defenses in the litigation"). Id. The information simply falls under the "highly protected category of opinion work-product." Id; see also Fla.R.Civ.Pro. 1.280.

Also, Counsel for Jane Does 2-8 in the Federal companion cases apparently obtained a copy of the file retained by the Palm Beach State Attorneys' Office. It is reasonably believed that all Plaintiffs' attorneys in this action have extensive materials from the State Attorney and the Palm Beach Police Department pursuant to various public records requests. Certainly, Mr.

Edwards is able make such public records requests or can subpoena the requested information, neither of which would implicate the work product privilege as outlined above.

Here, the standard is a showing of a need to obtain the information, and the inability to obtain the substantial equivalent without undue hardship. Metric Engineering, Inc. v. Small, 861 So. 2d 1248, 1250 (Fla. 1st DCA 2003)(To show 'need,' a party must present testimony or evidence demonstrating the material requested is critical to the theory of the requestor's case, or to some significant aspect of the case); Ashemimry v. Ba Nafa, 847 So.2d 603 (Fla. 5th DCA 2003). In addition, Florida Rule of Civil Procedure 1.280(b)(3), does allow discovery of fact work product where the requesting party can show need and the inability to obtain the substantial equivalent by other means without undue hardship. Vesta Fire Ins. Corp. v. Figueroa, 821 So.2d 1233, 1234 (Fla. 5th DCA 2002)(the showing of need and undue hardship necessary to overcome the work product immunity must include specific explanations and reasons). Again, Mr. Edwards fails to submit any affidavit or any other document meeting the above criteria.

Additionally, this court should consider placing the Palm Beach State Attorney and the USAO on Notice that their investigative files are being requested. Since Plaintiff seeks information given by federal government and the state attorney to Epstein, including correspondence, Epstein reincorporates the arguments set out in his initial Rule 4 Appeal as that information is within the penumbra of the protections of Federal Rules of Evidence 408 and 410. Moreover, despite Plaintiff's contention, Federal Rule of Evidence 410 is applicable because negotiations did not end with a federal plea. Furthermore, Federal Rule of Evidence 408 is applicable given that 18 U.S.C. 2255 is quasi-civil remedy. Clearly, the information sought by Plaintiff has no evidentiary value - given that Plaintiffs have the raw materials and police reports and affidavits resulting from state investigation. Accordingly, there is a chance that the Palm

Beach State Attorney and the USAO may not want to disclose their files for one reason or another.

(ii) Third Party Privacy Rights And Judge Jeffrey's Colbath's Order

The Magistrate's Order does not consider the privacy rights of other alleged victims. As this Court knows, attached to the NPA is a list which delineates alleged victims. Once the NPA was made public, Judge Colbath, with the agreement of the Palm Beach Post, Brad Edwards, Esq. and Spencer Kuvin, Esq. agreed that the "list" would remain private. As such, Request for Production Numbers 7, 9 and 10 seeks information that may violate others third-party privacy rights in that certain names may be mentioned in correspondence, including those on the "list." As noted 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 question would require Epstein to produce information that may identify third parties (including alleged victims), which would 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). The Magistrate's Order did not address this issue.

Federal law provides crime victims with rights similar to those afforded by the Florida constitution which includes, but is not limited to, "the right to reasonable, accurate, and timely notice of any pubic court. . .proceeding involving the crime. . . . ," "the right not to be excluded from any public court proceeding. . . . ," and "the right to be heard." 15 Fla. Jur.2d Crim.Proc. §1839; Fla. Stat. 960.0021. Based upon the foregoing, any alleged victim that may be identified in any of the requested information must first be notified, which means that this court must, at the very least, conduct an in camera inspection of any and all information to determine which alleged victim must be placed on notice that their identity may be revealed or redact their names in camera. See also Fla. Stat. §794.03, §794.024 and §794.026. The right to privacy encompasses at least two different kinds of interests, the individual interests of disclosing

personal matters and the interest in independence in making certain kinds of important decisions. Favalora v. Sidaway, 966 So.2d 895 (Fla. 4th DCA 2008).

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. In addition, this Court must address the privacy rights of others as outlined above.

c. Jane Doe - Request Numbers 12 and 13

Request No. 12: Personal tax returns for all years from 2002 through the present.

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 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 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; overly broad.

As set forth in more detail in DE 282 and 283, which were provided to the court in camera and which the court considered in other Rule 4 Appeals, Epstein cannot provide answers/responses to questions relating to his financial history and condition without waiving his Fifth, Sixth, and Fourteenth Amendments. Asking for Epstein's personal tax returns is financial in nature and it is confidential, proprietary and seeks information much of which 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. Importantly, the Magistrate did not make a ruling on relevancy as to the personal tax returns, and the Plaintiff has not met the burden of establishing a "compelling need" for the tax returns.

Producing the specified information, in full, would result in testimonial disclosures that would communicate statements of fact and would require Epstein to produce the returns and thereby "stipulate" to their genuiness, their existence, his control of the records, and their authenticity as his executed tax returns even though his possession of such records are by no means a foregone conclusion. Again, the information sought relates to potential federal claims violations. See DE 282 and 283, in camera, which the court permitted sua sponte. 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. at 486; United States v. Hubbell, 530 U.S. at 36 and United States v. Apfelbaum, 445 U.S. at 128.

The Court's order seems to hone in on the "required records" exception for the proposition that, as a matter of law, Epstein's personal tax returns must be produced because they are allegedly a mandatory part of a civil regulatory scheme and have assumed some public aspect. (DE 462, p.12) However, "required records" are ordinarily records collected by highly regulated business (e.g., physicians) wherein the records themselves have assumed public aspects which render them analogous to public documents. See In re Dr. John Doe, 97 F.R.D. 640, 641-643 (S.D.N.Y. 1982). Usually, these documents are known to more than the filer and the agency in which the document(s) were filed (i.e., known to other persons of the general public). Id. Even though the IRS may have certain returns, they remain confidential under 26 U.S.C. §6103

from any disclosures and are therefore different than a regulated/public record that can be accessed by the public. In Trudeau v. New York State Consumer Protection Bd., 237 F.R.D. 325 (N.D.N.Y. 2006), the court maintained that "[r]outine discovery of tax returns is not the rule but rather the exception." Id. at 331. The Court went on to note that [f]or nearly the past thirty-five years, tax returns have been considered 'confidential,' pursuant to 26 U.S.C. §6103." Id. Because of the principle of confidentiality, it further noted, "courts in the Second Circuit have found personal financial information to be presumptively confidential or cloaked with a qualified immunity," and must, therefore, "balance the countervailing policies of liberal discovery set forth in the Federal Rules of Civil procedure against maintaining the confidentiality of such documents." Id.

To achieve that balance, courts in the Second Circuit have developed a "more stringent" standard than that set forth in the rules. To order disclosure of tax returns, a court must find that "the requested tax information is relevant to the subject matter of the action" *and* that "there is a compelling need for this information because the information contained therein is not otherwise readily available." Id. The Magistrate's Order makes no such finding in the instant matter. In fact, the burden of showing compelling need is on the party seeking discovery, but once a compelling need has been found, the party whose tax return information has been requested has the burden to "provide alternative sources for this sensitive information. Id. If the requested information is available from alternate sources, disclosure should not be compelled. Potential alternate sources to which the court pointed were gathering the information through deposition or disclosure in an affidavit by the requested party of net worth, wealth, and income. Id. at 331-32. See Barton v. Cascade Regional Blood Services, 2007 WL 2288035 (W.D.Wash. 2007)("Tax returns are confidential communications between the taxpayer and the government [citing

§6103] and although not privileged from discovery there is a recognized policy against unnecessary public disclosure. . . . . The Court finds no compelling need which overcomes this recognized policy"). Courts have broadly construed these provisions to embody a general federal policy against indiscriminate disclosure of tax returns from any source. Federal Sav. & Loan Ins. Corp. v. Krueger, 55 F.R.D. 514-15 (N.D. Ill. 1972)("it is the opinion of this court that [§6103] reflect[s] a valid public policy against disclosure of income tax returns. This policy is grounded in the interest of the government in full disclosure of all the taxpayer's income which thereby maximizes revenue. To indiscriminately compel a taxpayer to disclose this information merely because he has become a party to a lawsuit would undermine this policy"); see also Premium Service Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975)(would have been appropriate for district court to quash subpoena for tax returns based on the "primacy" of the "public policy against unnecessary disclosure [of tax returns] arises from the need, if tax laws are to function properly, to encourage taxpayers to file complete and accurate returns").

In Pendlebury v. Starbucks Coffee Co., 2005 WL 2105024 at *2 (S.D. Fla. 2005), the court agreed that "[i]ncome tax returns are highly sensitive documents" and that courts should be reluctant to order disclosure during discovery. *Citing*, Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1411 (5th Cir. 1993); DeMasi v. Weiss, Inc., 669 F.2d 114, 119-20 (3d Cir. 1982)(noting existence of public policy against disclosure of tax returns); Premium Serv. Corp. v. Sperry & Hutchinson Co., 511 F.2d 225, 229 (9th Cir. 1975). The court in Pendlebury agreed that parties seeking the production of tax returns must demonstrate (1) relevance of the tax returns to the subject matter of the dispute and (2) a compelling need for the tax returns exists because the information contained therein is not otherwise available. Id. at *2; see also Dunkin Donuts, Inc. v. Mary's Donuts, Inc., 2001 WL 34079319 (S.D. Fla. 2001);

Cooper v. Hallgarten & Co., 34 F.R.D. 482, 483-84 (S.D.N.Y. 1964). Thus, before the Court can order production of the requested returns in this matter, the Plaintiff must satisfy the "relevance" and "compelling need" standards. The Magistrate's Order fails to address the "relevancy" standard and Plaintiff fails to provide same with supporting argument and case law, and the Plaintiff fails to delineate any "compelling need" or availability of net worth from other sources (e.g., a stipulation as to net worth, which is certainly an alternative means). To the extent that the Court determines that the tax returns are relevant and that there is a compelling need for at least their disclosure of Epstein's wealth for punitive damage purposes, Epstein through his attorneys, as per the discussion at the status conference on May 7, 2010, agreed to a confidential stipulation that his net worth is in excess of nine figures. Such a stipulation more than satisfies any necessity for the disclosure of the tax returns or any additional net worth information. See e.g., Myers v. Central Florida Investments, Inc., 592 F.3d 1201 (11th Cir. 2010)(reasoning that a compensatory award of $103,622.09 and a punitive damage award of $506,847.78 for 5 years of sexual harassment and sexual touching was reasonable). Unfortunately, the parties were unable to reach a agreement.

Myers clearly demonstrates that Epstein's offer to agree to a net worth in excess of $50,000,00 is reasonable in light of the allegations made by Jane Doe as compared to the allegations in Myers. Moreover, allowing such discovery at this juncture goes against the grain and the law in that Plaintiff has not made a reasonable showing establishing that she will recover on her claims or that if she did such a compensatory damage recovery could possible implicate punitive damages in excess of Epstein's offer to stipulate.. Ward v. Estaleiro Itajai S/A. 541 F.Supp.2d 1344. 1357 (S.D. Fla. 2008)(The court cannot apply Rule 26 and allow Plaintiff to obtain discovery she seeks without any prior showing of a reasonable basis for recovery). See

also Fed.R.Civ.P. 26(b)(1) and Fla. Stat. 768.72; Gallina v. Commerce And Industry, Ins., 2008 WL 3895918 (S.D. Fla. 2009)(unless liability for punitive damages is established at trial, the discovery sought is not relevant).

In Gallina, the court held that in light of the proprietary of the financial worth information sought, and the statutory protections against discovery of such information, it was recommended that the court defer financial discovery until it is deemed necessary and that production of such financial information not occur until the ". . . final pretrial conference. . . or when it becomes apparent that punitive damages can be awarded." Id. at *5. Since bifurcation is required in the instant matter, W.R. Grace & Company v. Waters, 638 So.2d 502 (Fla. 1994), it is reasonable and consistent with the applicable law, that any tax returns not be produced until such time as it becomes apparent at the first stage of the trial that punitive damages will be an issue.

To the extent this court orders production of tax returns and to the extent Epstein's personal tax returns contain such information, same should be redacted and subject to heightened confidentiality order pursuant to the court's previous orders. However, this can only be done subsequent to an *in camera* hearing wherein this court can make a ruling on relevancy, production, redaction and confidentiality; but only after the Plaintiff shows a compelling need. In addition, for the reasons outlined herein including, but not limited to, the discovery abuses and bad faith litigation tactics that Epstein has been the subject of at the hands of Scott Rothstein and his-co-conspirators, any tax returns must be redacted to preserve confidently and to prevent further abuses. See *supra*.

Further, Epstein's complicated business transactions have no relevancy to this lawsuit and, therefore, evidence of same should not be produced. 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 at 494. 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").

Based upon the above admissions, it is clear that Plaintiff now seeks information that may provide a link in the chain of evidence used to prosecute Epstein including, but not limited to the significant fact that target letters and subpoenas were issued relating to certain financial offenses. See e.g., DEs 282 and 283 submitted in camera and U.S. v. Zolin, 491 U.S. 554 (1989)(disclosing materials to the district court does not have the legal effect of terminating a privilege thereby allowing parties to disclose documents in camera and make that in camera request – which request is made in the instant Rule 4 Appeal for which Defendant is awaiting the court's response). As a result, DEs 282 and 283 (in camera) and other related Orders must be analyzed to reach the correct legal conclusion. The court must be cognizant of the allegations in

the related cases regarding sexual misconduct with and abuse, exploitation, and sexual battery of alleged minors. For example:

> In this and the other civil actions, the Plaintiffs reference federal and state criminal statutes in an attempt to allege claims ranging from sexual battery to intentional infliction of emotional distress, to a violation of 18 U.S.C. 2422, Chapter 117 – "Transportation for Illegal Sexual Activity and Related Crimes," to a cause of action pursuant to 18 U.S.C. §2255 – which creates a civil remedy for personal injuries where a plaintiff can show a violation of specified criminal statutes. Most importantly, the lynchpin for the exercise of federal criminal jurisdiction under 18 U.S.C. 2422(b) is the use of "any facility or means of interstate or foreign commerce". Thus, facially, an essential condition of any allegation of this statutory offense is the use of a facility of interstate commerce during which use there was persuasion, inducement, enticing, or coercing of an underage person to engage in prostitution or sexual activity. As more fully discussed, infra, contested request numbers 12 asks that Epstein to make a testimonial disclosure of information regarding the availability to him of such interstate facilities (e.g., the tax returns could list assets such as planes) and thus would constitute a link in the chain of evidence that could potentially expose him to the hazards of self-incrimination as to 18 U.S.C. 2423(b) violations. Likewise, other Jane Does have contended that they are entitled to 18 U.S.C. 2255 damages based on Epstein's violation of 18 U.S.C. 2423(b) a separate federal criminal statute that prohibits "a person who travels in interstate commerce or travels into the United States...for the purpose of engaging in illicit sexual activity". As more fully discussed, infra, contested request number 13, by seeking testimonial disclosures regarding Epstein's passport and dates Epstein traveled to and from the State of Florida, would constitute a link in the chain of evidence that could potentially expose him to the hazards of self-incrimination as to 18 U.S.C. 2423(b) violations.
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> Both 18 U.S.C. 2422(b) and 18 U.S.C. 2423(b) were amongst the target offenses of a joint FBI-United States Attorney investigation further demonstrating the extent to which Epstein's refusal to respond to each request is, as required, based on a specific apprehension of a compelled disclosure providing a link in the chain of evidence adverse to him as required by Hoffman v United States, 341 US 479, 486 (1951). Epstein, in fact, can deny the occurrence of the assaults alleged and still maintain the safe harbor of the 5th Amendment.[2] See Ohio v. Reiner, 532 U.S. 17 (1991).

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[2] See DeLisi v. Bankers Ins. Company, 436 So.2d 1099 (Fla. 4th DCA 1983); 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."); 5 Fed.Prac. & Proc. Civ. 3d §1280 *Effect of Failure to Deny – Privilege Against Self-Incrimination* ("…court must treat the defendant's claim of privilege as equivalent to a specific denial."). See also 24 Fla.Jur.2d *Evidence* §592. *Defendants in civil actions.* – "… a civil defendant who raises an affirmative defense is not

Plaintiffs also allege that Epstein had a plan and scheme (which) reflected a particular pattern and method" in the alleged recruiting of girl's to come to Epstein's Palm Beach mansion and give him "massages" in exchange for money. Plaintiffs also allege that Epstein "sexually assaulted" them, and that Epstein "maintains his principal home in New York and also owns residences in New Mexico, St. Thomas and Palm Beach, FL." They further allege "Upon information and belief, Jeffrey Epstein carried out his scheme and assaulted girls in Florida, New York and on his private island, known as Little St. James, in St. Thomas." The nature of the allegations are serious, and state clearly that the alleged assaults occurred in Florida, New York and in St. Thomas. See e.g., Second Amended Complaints of Jane Does 2-8. and DE 485, p.18.

As this Court knows, Epstein entered into a Non-Prosecution Agreement ("NPA") with United States Attorney's Office for the Federal Southern District of Florida. The terms and conditions of the NPA also entailed Epstein entering into a Plea Agreement with the State Attorney's Office, Palm Beach County, State of Florida. By its terms, the NPA took effect on June 30, 2008. As well, pursuant to the NPA, any criminal prosecution against Epstein is deferred as long as the terms and conditions of the NPA are fulfilled by Epstein. The federal grand jury investigation against Epstein is held in abeyance i.e. it is not concluded with finality 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. Moreover, the NPA does not provide Epstein with any protection from criminal investigation or prosecution in any federal district other than the Southern District of Florida. The Second Amended Complaints and Plaintiff Response at DE 485, p.18 include averments that Epstein both resided in and engaged in illegal sexual conduct in districts outside the Southern District of Florida. In other words, the fact that there exists a NPA does not mean that Epstein is free from future criminal prosecution, which the Magistrate Judge's Order also acknowledged. (DE 242, p.4) In fact, the Order acknowledged that "[t]he danger Epstein faces by being forced to testify in this case is substantial and real, and not merely trifling or imaginary as required." (DE 242, p. 10). For the reasons set forth in Epstein's Rule 4 Appeal and herein, that same ruling should be reached relative to Request Numbers 12 and 13 given the close nexus between the information requested and the pivotal jurisdictional requisites of 18 U.S.C. 2423(b)(the requirement of interstate travel i.e. travel from one of Epstein's out of state residences to Florida or from Florida to one of such residences.

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precluded from asserting the privilege [against self-incrimination], because affirmative defenses do not constitute the kind of voluntary application for affirmative relief" which would prevent a plaintiff bringing a claim seeking affirmative relief from asserting the privilege.

Accordingly, it is clear that Plaintiff and her counsel seek this information not to further their civil case, but to gain information to aid in the future prosecution of Epstein in direct violation of his Fifth Amendment rights. In fact, the Mermelstein and Horowitz firm was quoted in the Palm Beach Post stating, among other things, that the book sold to undercover agents could open the door to future prosecution of Epstein. As such, Plaintiffs' counsels' intention is clear – to use the civil discovery process to attempt to further prosecute Epstein. See http://jessicaarbour.blogspot.com/2010/03/horowitz-discusses-possibility-of.html. Moreover, Mr. Edwards himself admitted at his own deposition to repeated disclosures to a variety of media outlets including, but not limited to, the NY Post and Vanity Fair. Accordingly, Epstein's 5th Amendment rights in this regard should be sustained.

Furthermore, as set forth in a Civil Complaint attached hereto as **Exhibit "I"** attorney Scott Rothstein aided by other lawyers and employees at the firm of Rothstein, Rosenfeldt, and Adler, P.A., deliberately engaged in a pattern of racketeering that involved a staggering series of gravely serious obstructions of justice, actionable frauds, and the orchestration and conducting of egregious civil litigation abuses that resulted in profoundly serious injury to Jeffrey Epstein, including substantial attorneys' fees and costs. In short, Rothstein and his co-conspirators forged Federal court orders and opinions and, among other things, staged a series of depositions that were unrelated to any principled litigation purpose but instead designed to discover extraneous private information about Epstein or his personal and business associates (including well-known public figures) in order to defraud investors and support extortionate demands for payment from Epstein. The misconduct featured the filing of legal motions and the pursuit of a civil litigation strategy that was unrelated to the merits or value of their clients' cases and, instead, had as its improper purpose the furthering of Rothstein's misrepresentations and deceit to third-party

investors. As a result, Epstein was subject to abusive investigatory tactics, unprincipled media attacks, and unsupportable legal filings and discovery abuses. Since Plaintiff's counsel is formerly of RRA and due to the fact that certain information may contain the names of third-parties, that information (should this court order production of same after an in camera inspection) must be redacted to secure the names of unsuspecting third-parties. Moreover, Michael Fisten (formerly an employee of RRA and now an employee/independent contractor of Mr. Edwards' firm) acted, upon information and belief, as a broker or middleman who staged regular meetings during which false statements were made about the number of cases/clients that existed or RRA had against Epstein. For this reason alone, such information should be redacted in order to protect those unsuspecting third parties.

(i) Request Number 13

As to Request Number 13, Defendant 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) See *infra*, regarding private aircraft.

The Magistrate's Order (DE 462) provides that Epstein's Fifth Amendment privilege does not extend to his passport because its existence is known to the government or is a "foregone conclusion." Id. at p. 11. First, the magistrate's order presupposes that Epstein has all his passports from 2002 up through to the current date and that the government has an exact copy of same. Second, the Order presupposes that U.S. Customs and Border Patrol ("CPB") keeps a record and/or has maintained records of Epstein's travel and whereabouts from 2002 up through to the current date. Third, assuming Epstein traveled internationally, the Order presupposes that the CPB has records of all of Epstein's destinations and that other countries have shared that information with the CBP. In short, the order would require Epstein to produce documents that he may or may not have 8 years of passport information thus requiring him to "admit" to the genuiness and possession of the documents produced.

For instance, CBP now offers "Global Entry" to enter the United States by kiosk. However, it is unclear whether the Global Entry kiosk records and copies the pages of a traveler's destinations outside of the United States, or does it simply record exit from and entry back into the United States?[3] Moreover, it is unclear whether CBP maintains the Sample Customs Declaration Form for any period of time, which form sets out (i.e., if filled out) the countries visited by a traveler.[4] This Court cannot Compel Epstein to produce information in violation of his Fifth Amendment by simply stating that Epstein's passport is "known to the government" or is a "forgone conclusion." In fact, from the websites listed herein, any CBP documents or forms filled out by a traveler take on a complete different form when compared to an original passport, which is initially issued with blank pages. This Court would be hard-

[3] See e.g., http://www.customs.gov/xp/cgov/travel/trusted_traveler/global_entry/
[4] See e.g., http://www.customs.gov/xp/cgov/travel/vacation/sample_declaration_form.xml

pressed to find that the CBP has an exact copy of every page of every traveler's passport. Obviously, this would create more document management than CBP anticipates on its website.

Moreover, pursuant to 19 C.F.R. §122.2, pilots of private aircraft are required to electronically transmit passenger and crew manifest information for all flights arriving into and/or departing out of the United States. As this court knows, Mr. Edwards has conducted extensive discovery, has questioned individuals as to whether Epstein owns private aircraft and has obtained certain flight manifests. Arguably, if such a procedure were followed in Epstein's case pursuant to 19 C.F.R. §122.2, then Epstein's passport would arguably take on a substantially different form when compared to the information maintained by the CBP (i.e., information that was electronically transferred). Under that circumstance, CBP would not have an exact copy of Epstein's passports. Accordingly, the assumptions made in the Magistrate's Order have serious Fifth Amendment implications in that the exact information sought is not "known to the government" and is not a "forgone conclusion" in that the government is not likely to have an exact copy of Epstein's passports.

Again, Plaintiff's request for Epstein's passport "reflecting travel to locations outside the 50 United States between 2002 and 2008, 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.

As such, if you believe Plaintiff's footnote 4 at (DE 210), responding to this request could very well implicate Epstein's Fifth Amendment privilege. The allegations of Epstein's use of interstate commerce and travel and any compelled production is clearly a violation of Epstein's Fifth Amendment rights.[5] 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. (DE 293). If not, this court may be requiring Epstein to produce a log of his travels, which this Court already sustained under the Fifth Amendment.

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.

IV. Jane Does 2-8 - Request Number 1

As to Request number one of Jane Doe 2-8s' request for production, it provides:

Request No. 1: All Federal and State income tax returns, including all W-2 forms, 1099 forms and schedules, for tax years 2003-2008.

Accordingly, for the same reasons expressed herein relative to Jane Doe's request for tax records, same should be denied. Epstein adopts and reincorporates the arguments set out above and the relief requested herein relative to Jane Doe's request for tax returns as if same was fully set forth in this section.

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

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[5] Once again, a ruling on these issues cannot be made in a vacuum. This court must, as it has done in the past, consider the other related cases and the allegations made therein when considering whether a response to a particular discovery requests would implicate Epstein's Fifth Amendment rights. See DEs 242, 283 and 462.

a. granting the relief requested above as to Jane Doe and Jane Does 2-8;

b. finding that the danger Epstein faces by being forced to testify in these cases relative to the above requests is substantial and real, and not merely trifling or imaginary;

c. sustaining Epstein's Fifth Amendment Privilege as it relates to the above requests and denying Plaintiffs' Motions in that regard;

d. reversing the Magistrate's Order (DE 462, 480 and 513) relative to Request Numbers 7, 9, 10, 12 and 13 (Jane Doe) and Request Number 1 (Jane Does 2-8) and entering an amended order sustaining Epstein's objections to the Magistrate's Order as to those specific requests and not requiring him to produce information relative to same;

e. sustaining Epstein's arguments as stated above and ordering that FRE Sections 408, 410 and 502 provide substantive reasoning to sustain Epstein's arguments relative to requests numbers 7, 9 and 10 including, but not limited to, the entering of an order as provided for under FRE 502(d), denying the requests as irrelevant and as barred by Fed. R. Evid. 408 and 410 and issuing a selective waiver order under Fed. R. Evid. 502(d) thereby applying the selective waiver provision of Rule 502(d) to the information exchanged between Epstein's attorneys, the USAO and the State Attorney during the criminal stage of said proceedings. Alternatively, and only to the extent this court orders production of any information, this court should put the USAO and the State Attorney on notice before any disclosure to give each entity an opportunity to raise objections to protect their work-product and attorney-mental impressions and to allow Epstein and the USAO the opportunity to submit objections and a privilege log outlining why the content of the documents sought have no relevance and should be barred from production under Fed. R. Evid. 408, 410 and 502(d). This should occur only after an in camera hearing, after this court determines what portions of the requested documents should be redacted as privileged and only after this court ensures that each and every document produced is the subject of a heightened-confidentiality order where disclosure will result in the disclosing party being held in contempt of court;

f. likewise, if this court rules that any of the information requested herein should be produced (e.g., Requests Numbers 12 and 13 (tax returns and passport – Jane Doe) and Request Number 1 (tax returns-Jane Doe 2-8)), it shall only do so after an in camera hearing allowing the documents to be reviewed and placed on a privilege log outlining why the content of those documents have no relevance and establishing why the danger of disclosure is more prejudicial than probative, and after this court determines what portions of the requested documents should be redacted as privileged including, but not limited to, what portions of the tax returns should be redacted due to the confidentiality interests relative to detailed information and financial tax data which was provided to the IRS within the context of the protections of 26 U.S.C. 6103. Again, the foregoing should only occur after this court ensures that each and every document

produced is the subject of a heightened-confidentiality order where disclosure will result in the disclosing party being held in contempt of court;

g. accepting the offered stipulation of net worth as identified above in lieu of any net worth discovery being produced; and

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

Respectfully submitted,

By: M PIKE
MICHAEL J. PIKE, ESQ.
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 12 day of April, 2010.

Respectfully submitted,

By: M PIKE
ROBERT D. CRITTON, JR., ESQ.
Florida Bar No. 224162
rcrit@bclclaw.com
MICHAEL J. PIKE, ESQ.
Florida Bar #617296
mpike@bclclaw.com
BURMAN, CRITTON, LUTTIER & COLEMAN
515 N. Flagler Drive, Suite 400
West Palm Beach, FL 33401
561/842-2820 Phone
561/515-3148 Fax
(*Counsel for Defendant Jeffrey Epstein)*

Certificate of Service
Jane Doe No. 2 v. Jeffrey Epstein
Case No. 08-CV-80119-MARRA/JOHNSON

Stuart S. Mermelstein, Esq.
Adam D. Horowitz, Esq.
Mermelstein & Horowitz, P.A.
18205 Biscayne Boulevard
Suite 2218
Miami, FL 33160
305-931-2200
Fax: 305-931-0877
ssm@sexabuseattorney.com
ahorowitz@sexabuseattorney.com
Counsel for Plaintiffs
In related Cases Nos. 08-80069, 08-80119, 08-80232, 08-80380, 08-80381, 08-80993, 08-80994

Jack Alan Goldberger, Esq.
Atterbury Goldberger & Weiss, P.A.
250 Australian Avenue South
Suite 1400
West Palm Beach, FL 33401-5012
561-659-8300
Fax: 561-835-8691
jagesq@bellsouth.net
Counsel for Defendant Jeffrey Estein

Farmer , Jaffe, Weissing, Edwards, Fistos & Lehrman, PL
425 N. Andrews Avenue
Suite 2
Fort Lauderdale, FL 33301
Phone: 954-524-2820
Fax: 954-524-2822
brad@pathtojustice.com
Counsel for Plaintiff in Related Case No. 08-80893

Paul G. Cassell, Esq.
Pro Hac Vice
332 South 1400 E, Room 101
Salt Lake City, UT 84112
801-585-5202
801-585-6833 Fax
cassellp@law.utah.edu
Co-counsel for Plaintiff Jane Doe
Isidro M. Garcia, Esq.
Garcia Law Firm, P.A.
224 Datura Street, Suite 900
West Palm Beach, FL 33401
561-832-7732
561-832-7137 F
isidrogarcia@bellsouth.net
Counsel for Plaintiff in Related Case No. 08-80469

Robert C. Josefsberg, Esq.
Katherine W. Ezell, Esq.
Podhurst Orseck, P.A.
25 West Flagler Street, Suite 800
Miami, FL 33130
305 358-2800
Fax: 305 358-2382
rjosefsberg@podhurst.com
kezell@podhurst.com
Counsel for Plaintiffs in Related Case