UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 08-CIV-80119-MARRA/JOHNSON

JANE DOE NO. 2,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/
Related cases:
08-80232, 08-80380, 08-80381, 08-80994,
08-80993, 08-80811, 08-80893, 09-80469,
09-80591, 09-80656, 09-80802, 09-81092
_____/

OMNIBUS ORDER

THIS CAUSE is before the Court on the following motions: (1) Plaintiff's Motion to Compel Answers to Plaintiff's First Request for Production(D.E. #194 and #210); (2) Plaintiff's Motion to Compel Answers to Plaintiff's First Request for Admissions (D.E. #195 and #211); and, (3) Plaintiff's Motion to Compel Answers to Interrogatories (D.E.#196 and #212).

In this case, which has been consolidated for purposes of discovery, Plaintiffs are former under-age girls who allege they were sexually assaulted by Defendant, Jeffrey Epstein ("Epstein"), at his Palm Beach mansion home. The scheme is alleged to have taken place over the course of several years in or around 2004-2005, when the girls in question were approximately 16 years of age. As part of this scheme, Epstein, with the help of his assistant Sarah Kellen, allegedly lured economically disadvantaged minor girls to his homes in Palm beach, New York and St. Thomas, with the promise of money in

exchange for a massage. Epstein purportedly transformed the massage into a sexual assault. The three-count Complaint alleges sexual assault and battery (Count I), intentional infliction of emotional distress (Count II), and, coercion and enticement to sexual activity in violation of 18 U.S.C. §2422 (Count III).

In 2008, Epstein entered into a Non-Prosecution Agreement with the United States Attorney General's Office for the Federal Southern District of Florida and the State Attorney's Office for Palm Beach County. Under the terms of the Non-Prosecution Agreement, 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 United States Attorney'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 mere fact the Government and Epstein have entered into a Non-Prosecution Agreement does not mean that Epstein is free from future criminal prosecution.

In each of these motions Plaintiff Jane Doe seeks to compel answers to certain requests for admissions, interrogatories and requests for production that were propounded on Defendant Epstein. Defendant has responded by asserting several objections, the primary one of which is an assertion of his Fifth Amendment privilege.

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." Id. In practice, the Fifth Amendment's privilege against self-incrimination "permits a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." Edwin v. Price, 778 F.2d 668, 669 (11th Cir. 1985)(citing

Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). The privilege is accorded "liberal construction in favor of the right it was intended to secure," Hoffman v. United States, 341 U.S. 479, 486 (1951), and extends not only to answers that would in themselves 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. Id.; Blau v. United States, 340 U.S. 159 (1950). Thus, 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." United States v. Neff, 615 F.2d 1235, 1239 (9th Cir.), cert. denied, 447 U.S. 925 (1980).

The Fifth Amendment's privilege against self-incrimination comes into play only in those instances where the witness has "reasonable cause to apprehend danger from a direct answer." Hoffman, 341 U.S. at 486 (citing Mason v. United States, 244 U.S. 362, 365 (1917)). "The claimant must be 'confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." United States v. Apfelbaum, 445 U.S. 115, 128 (1980).

When the Fifth Amendment privilege is raised as a bar to discovery, a blanket refusal to answer questions or to produce documents is improper. Anglada v. Sprague, 822 F.2d 1035, 1037 (11th Cir. 1987). Instead, the privilege must be asserted in response to a particular question, and in each instance the burden is on the claimant to justify invocation of the privilege. Id. Once a particularized showing has been made, "[i]t is for the court to decide whether a witness' silence is justified and to require him to answer if it clearly appears to the court that the witness asserting the privilege is mistaken as to its validity." In re Morganroth, 718 F.2d 161, 166-67 (6th Cir. 1983). In making this determination the judge is instructed to view the facts and evidence presented on a case-

by-case basis, and "must be governed as much by his perception of the peculiarities of the case, as by the facts actually in evidence." Hoffman, 341 U.S. at 487.

The law is well established that the Fifth Amendment privilege may not apply to specific documents "even though they contain incriminating assertions of fact or belief, because the creation of those documents was not 'compelled' within the meaning of the privilege." United States v. Hubbell, 530 U.S. 27, 35-36 (2000). However, in certain instances, "'the act of production' itself may implicitly communicate 'statements of fact.'" Id. For this reason the Fifth Amendment privilege also encompasses the circumstance where the act of producing documents in response to a subpoena or production request has a compelled testimonial aspect Id. Thus, in those instances where the existence and/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. In re Grand Jury Subpoena, 1 F.3d 87, 93 (2d Cir. 1993); see also Fisher v. United States, 425 U.S. 391, 410 (1976)(issue expressed as whether compliance with a document request or subpoena "tacitly conceded" the item's authenticity, existence or possession by the defendant).

The Court begins with an analysis of the Fifth Amendment privilege as applied to each request or category of requests. In the event the Court determines that a certain request does not infringe upon Epstein's Fifth Amendment privilege, Epstein's additional objections to that request shall be addressed. Where appropriate, the Court looks to Epstein's Response Memorandum for more particularized objections, rather than relying solely on Epstein's objections as initially stated, which in some cases are less specific in nature.

REQUESTS FOR ADMISSIONS

The Admission Requests at issue herein, Request Numbers 1-9 and 21-23, all essentially seek admissions relating to the same general subject matter, namely, Defendant's financial history: Epstein's net worth (Requests 1-5, and 23); fraudulent conveyances (Requests 6, 9, 21 and 22); real estate ownership (Requests 7-8). Epstein argues, and this Court agrees, that to force him to respond to these requests would involve compelled statements that could reasonably furnish a link in the chain of evidence needed to prosecute Epstein in future criminal proceedings or even support a criminal conviction. Accordingly, Epstein's objection to responding to these requests on the basis of his Fifth Amendment Right against self incrimination is upheld and Plaintiff's Motion is denied.

As noted previously, the Fifth Amendment privilege against self incrimination is accorded "liberal construction," Hoffman, 341 U.S. at 486, and extends not only to answers that would in themselves 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. Id. Thus to be afforded protection, the answer need not necessarily be enough to support a criminal conviction; it is enough if the response merely provides a lead or clue to evidence having a tendency to incriminate. Neff, 615 F.2d at 1239.

In asserting his Fifth Amendment privilege, Epstein expresses a concern that these requests for admissions, if answered, may result in compelled 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 in this case, the related cases and those matters outlined in Epstein's in camera submissions at D.E. #s 282 and 283. Given the allegations raised in the various Complaints and the elements

required to convict Epstein of a crime, and considering the background facts underlying the case, these concerns are reasonable, real and not unjustified. It goes without saying that being forced to admit, deny and/or identify the existence of the information sought by virtue of an admission or denial is tantamount to forcing testimonial disclosures that would communicate statements of fact. Finding that such admissions or denials present a real and substantial danger of self-incrimination in this case, in other related cases, and relative to potential federal claims of violations, the Court concludes the subject requests are subject to Epstein's assertion of his Fifth Amendment privilege against self incrimination.

INTERROGATORY REQUESTS

The interrogatories at issue here fall into three general categories: contention-type interrogatories seeking information such as the facts upon which Defendant relies in support of his affirmative defenses and pleading allegations and the anticipated testimony of certain witnesses (Interrogatories 12 and 23); financial history information such as what assets Epstein has, where such assets are located, and whether such assets have been transferred or fraudulently concealed (Interrogatories 2-7 and 13-15); and one identity information interrogatory seeking the names, addresses and phone numbers of Epstein's current accountants, financial planners or money managers (Interrogatory 17). For the following reasons Epstein's objections on the basis of his Fifth Amendment privilege against self-incrimination are upheld and Plaintiff's Motion to Compel the subject Interrogatory Requests is denied.

As with the Admission Requests, Epstein argues, and this Court agrees, that to force Epstein to answer the above-stated Interrogatories would involve compelled statements that could reasonably furnish a link in the chain of evidence needed to

prosecute Epstein in future criminal proceedings or even support a criminal conviction. Asking Epstein to identify persons or witnesses who may have knowledge of the events in question, to state the facts upon which he relies in support of his affirmative defenses, and to give an accounting of all of his assets and list all actions taken by him and those retained by him with reference to those assets, would violate the Fifth Amendment in that Epstein would be forced to incriminate himself in the commission of crimes. Further, such an order would constitute compelled testimonial admissions that could potentially provide 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 or testify. Rudy-Glanzer v. Glanzer, 232 F.3d 1258, 1263 (9th Cir. 2000). Accordingly, finding the sought after information would result in testimonial disclosures that would communicate statements of fact which in turn would present a real and substantial danger of self-incrimination in this case and other related cases as well as in areas that could result in criminal prosecution, Epstein's objection to responding to these requests on the basis of his Fifth Amendment privilege against self incrimination is upheld and Plaintiff's Motion is denied.

PRODUCTION REQUESTS

The production requests at issue here fall into four general categories: requests for documents the federal government gave to Epstein in the course of its plea discussions with him (Requests 7, 9 and 10); requests for financial information documents (Requests 8, 11, 14 and 15); requests for personal tax returns from 2002 to the present and for a copy of Epstein's passport (Requests 12 and 13); and Epstein's medical records from Dr. Stephen Alexander (Request 16). Each of these categories of requests shall be addressed in turn.

Plaintiff's Motion to Compel as it relates to the first category of documents, consisting of documents the federal government gave to Epstein in the course of its plea discussions with him (Requests 7, 9 and 10), is granted. The law is well established that the Fifth Amendment privilege against self-incrimination does not extend to documents whose existence is known to the government or is a foregone conclusion. Fisher, 425 U.S. at 410; United States v. Hubbell, 530 U.S. 27, 44 (2000); United States v. Ponds, 454 F.3d 313, 325 (D.C. Cir. 2006). Thus, while the Fifth Amendment covers situations where the act of producing documents has "communicative aspects of its own wholly aside from contents of the papers produced" Fisher, 425 U.S. at 410, the doctrine does not apply where the government has "prior knowledge of either the existence or the whereabouts of the...documents ultimately produced... ." Hubbell, 530 U.S. at 44.

Requests 7, 9 and 10 seek production of documents the government itself gave to Epstein, making the government's prior knowledge of the documents sought an obvious and undeniable "foregone conclusion." As such, Epstein can not reasonably and in good faith argue that in producing these documents to Plaintiff he will somehow be incriminating himself. In re Grand Jury Subpoena, 383 F.3d 905, 910 (9th Cir. 2004) (noting there can be no self-incrimination by production where the "existence and location of the documents ... are a 'foregone conclusion' and [the claimant] ... adds little or nothing to the sum total of the Government's information by conceding that he in fact has the documents.").

In an attempt to get around this settled principle of law, Epstein argues that forcing him to give Plaintiff the discovery produced by the government would implicate the Fifth Amendment in that such production might disclose witnesses helpful to Plaintiff. Epstein Resp., p.7. This argument misses the point. As Plaintiff correctly observes, the question is not whether the government's documents have information that might be harmful to

Epstein's defense, indeed, a reasonable presumption would be that the documents do contain information harmful to Epstein and that is precisely why the government was showing Epstein the documents in the first place; Instead, the only pertinent question is whether turning over the government's documents to Plaintiff somehow forces Epstein to provide 'testimony' to the government in contravention of the privilege against self incrimination guaranteed by the Fifth Amendment. This question can only reasonably be answered in the negative.

Also without merit is Epstein's argument that these requests are the same requests the undersigned previously found subject to the Fifth Amendment. Epstein Resp., pp.7-8. This is not the case. 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, all documents "relating to" Epstein's Florida guilty plea, and all documents obtained in "investigation 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 effectively make "use of the content of his mind," an action that would undeniably implicate the Fifth Amendment. See Hubbell, 530 U.S. at 43.

Epstein also raises objections on the basis of the work product doctrine and the attorney client privilege. objections on the basis of the attorney client privilege and the work product doctrine are rejected out of hand. The attorney-client privilege protects "confidential communications" between a lawyer and his client for the purpose of obtaining legal advice. Fisher v. United States, 425 U.S. 391, 403 (1976); U.S. v. Schaltenbrand, 930 F.2d 1554, 1562 (11th Cir.), cert. denied, 112 S.Ct. 640 (1991); In re Grand Jury Subpoena (Bierman), 788 F.2d 1511, 1512 (11th Cir. 1986). Under the rule, only material

involving confidential communications between the attorney and the client which fall within the purview of the privilege are rendered immune from discovery. Fisher, 425 U.S. at 403. The documents at issue here were given *by the Government* to Epstein, and as such are clearly not confidential communications protected by the attorney client privilege. The work product doctrine, which protects from disclosure documents and tangible things prepared in anticipation of litigation by or for a party or by or for that party's attorney acting for his client, Fed. R. Civ. P. 26(b)(3)[1]; In re Grand Jury Proceedings, 601 F.2d 162, 171 (5th Cir. 1979), is also not implicated as the subject documents were not created by Epstein's attorneys. Id.

Finally, Epstein argues the information sought is protected from disclosure by Rules 408 and 410 of the Federal Rules of Evidence governing the admission into evidence of documents involving settlement discussions and plea negotiations. Plaintiffs acknowledge that Request Number 10 might, *at some point*, be implicated by the Rule, but they are correct when they avail themselves of the broad federal discovery rules and argue that the information sought, while it may ultimately be barred from use at trial, is nonetheless subject to disclosure at the instant discovery stage. See Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 352 (1978). Accordingly, Epstein is ordered to produce the documents subject to these Requests within ten (10) days from the date hereof.

Plaintiff's Motion to Compel as it relates to the second category of documents, financial information documents (Requests 8,11,14 and 15), is denied on the basis of the Fifth Amendment. In sustaining Epstein's Fifth Amendment privilege, the Court has considered the facts alleged in the Complaints, the elements needed to convict Epstein of

[1] Rule 26(b)(3) was adopted in 1970 to codify the holding in Hickman v. Taylor, 329 U.S. 495 (1947).

a crime, the particularized showing made in Epstein's Response Brief and *in camera* submission, and drawn upon the Court's knowledge of the cases at issue. On this basis the Court finds the privilege raised as to these Requests valid, and asserted by Epstein only with reference to "genuinely threatening questions." United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980).

In ruling as it does, the Court finds that ordering Epstein to produce the information sought, information which relates to potential violations of federal law and claims, constitutes testimonial disclosures that would communicate statements of fact and present a real and substantial danger of self-incrimination in both this case and other related cases that could result in criminal prosecution. Fisher, 425 U.S. at 410 (noting that the Fifth Amendment covers situations where the act of producing documents has "communicative aspects of its own wholly aside from contents of the papers produced"). The danger Epstein faces by being forced to testify in this instance is "substantial and real, and not merely trifling or imaginary" as required. Apfelbaum, 445 U.S. 128. Accordingly, finding the subject requests involve compelled statements that would furnish a link in the chain of evidence needed to convict Epstein of a crime, the Court finds Epstein's Fifth Amendment privilege claim validly asserted. Accordingly, Epstein's objection is sustained and he need not produce documents subject to these Requests.

The third category of documents requested consists of Epstein's personal tax returns for the year 2002 through the present (Request No. 12) and a copy of Epstein's U.S. Passport (Request No. 13). Plaintiffs' Motion as it relates to both these requests is granted. Once again, the Fifth Amendment privilege against self-incrimination does not extend to documents whose existence is known to the government or is a foregone conclusion. Fisher, 425 U.S. at 410; Hubbell, 530 U.S. at 44; Ponds, 454 F.3d at 325 (D.C.

Cir. 2006). In this instance the Government, namely the IRS, already has Epstein's tax returns, so it can hardly be incriminating for Epstein to produce them. Id. The same is true of Epstein's U.S. Passport. Since Epstein is required to show his Passport to Government officials every time he travels outside the United States, the Government undeniably has "prior knowledge" of the Passport's existence, and its whereabouts is a "foregone" conclusion. Hubbell, 530 U.S. at 44.

Even more persuasive is the fact that tax records and passports, considered by the courts to be "required records," are as a matter of law deemed not subject to Fifth Amendment protection. See, e.g., Rajah v. Mukasey, 544 F.3d 427, 442 (2d Cir. 2008)("Just as a taxpayer's W-2 forms are required records not subject to the Fifth Amendment because they are a mandatory part of a civil regulatory regime, so too are the passports...at issue in the current case."); In re Doe, 711 F.2d 1187, 1191 (2d Cir. 1983)(ordering production of W-2 forms over Fifth Amendment objection on grounds of required records exception); In re Doe, 97 F.R.D. 640, 644-45 (S.D. N.Y. 1982)(same).

Epstein's reliance on 26 U.S.C. §6103, governing the confidentiality of tax returns, does little to aid Epstein's cause. The same federal statute Epstein cites was cited by the claimant of the privilege in the cases referred to above and in each of them the court's ruled that the confidentiality provided by the IRS statute was properly overridden by the broad federal discovery rules. Id. Accordingly, Epstein's Fifth Amendment claim of privilege as it relates to these Requests is rejected and Epstein has ten (10) days from the date hereof to provide the discovery subject to these Requests.

The last category of documents concern Epstein's medical records from Dr. Stephen Alexander (Request 16). Epstein raises several objections to this category of Requests from relevancy concerns to privilege claims. Because Plaintiff has failed to articulate any

reasonable basis for obtaining the documents in question, Plaintiffs' Motion as it relates to this request is denied. While the scope of discovery is broad, it is not without limits. Washington v. Brown & Williamson Tobacco, 959 F.2d 1566, 1570 (11th Cir. 1992). Indeed the 2000 Amendment to Rule 26 has effectively limited the scope of discoverable information to those matters which are relevant to a claim or defense in the lawsuit. Dellacasa, LLC v. John Moriarty & Ass. Of Florida, Inc., 2007 WL 4117261 at *3 (S.D. Fla. 2007). Courts have long held that "[w]hile the standard of relevancy [in discovery] is a liberal one, it is not so liberal as to allow a party to 'roam in the shadow zones of relevancy and to explore matter which does not presently appear germane on the theory that it might conceivably become so.' " Food Lion, Inc. v. United Food & Commercial Workers Intern. Union, 103 F.3d 1007, 1012-13 (C.A. D.C. 1997)(quoting Broadway and Ninety Sixth Street Realty Co. v. Loew's Inc., 21 F.R.D. 347, 352 (S.D. N.Y. 1958)); Donahay v. Palm Beach Tours & Transp., Inc., 2007 W.L. 1119206 at *1 (S.D. Fla. 2007). Accordingly, Plaintiffs' Motion as it relates to Request No. 16 is denied. Epstein has raised detailed objections to the request, among other things calling into question the relevancy of his medical condition in this case where, according to him, he has not placed his medical condition at issue. This particular objection was met by Plaintiffs with silence. In light of the objection made by Epstein, Plaintiffs were obligated to come back in their reply and articulate some rational basis for seeking the records requested. Having failed in this regard, Plaintiffs' Motion as it relates to Request No. 16 is denied and Epstein need not produce documents responsive to this request.

In accordance with the above and foregoing, it is hereby

ORDERED AND ADJUDGED as follows:

(1) Plaintiff's Motion to Compel Answers to Plaintiff's First Request for Production (D.E. #194 and #210) is **GRANTED IN PART AND DENIED IN PART** in accordance with the terms herein;

(2) Plaintiff's Motion to Compel Answers to Plaintiff's First Request for Admissions (D.E. #195 and #211) is **DENIED**; and,

(3) Plaintiff's Motion to Compel Answers to Interrogatories (D.E.#196 and #212) is **DENIED**.

DONE AND ORDERED this February 4, 2010, in Chambers, at West Palm Beach, Florida.

LINNEA R. JOHNSON
UNITED STATES MAGISTRATE JUDGE

CC: The Honorable Kenneth A. Marra
All Counsel of Record