

(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, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (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. 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 [*12] objections as initially stated, which in some cases were less specific in nature. The Court also notes Plaintiff's concession, stated at pages 3 and 5 of her Motion, that the act of producing items in response to Production Request Nos. 9, 12-13 and responding to Interrogatory No. 9, may implicate the Fifth Amendment. Finally, the Court approves Epstein's decision not to provide a detailed privileged log, in that it is reasonable under the circumstances to believe that in compelling production of same, the Court would in essence be compelling testimony to which Epstein's constitutional protections might apply. As such, the Court agrees with Epstein that it makes judicial sense to decide the constitutional issues first, before deciding the additional discovery request objections.

INTERROGATORIES

Epstein's assertion of the Fifth Amendment as it relates to Interrogatories 3, 4, 5, 6, 13, 14, 15, 16 and 17 is sustained and Plaintiff's Motion in this regard is denied. Interrogatories 3-6 ask Epstein to identify anyone who gave or were asked to give him massages. Epstein argues, and this Court agrees, that any answer to these questions involve compelled statements that could reasonably furnish a link in the chain of evidence [*13] needed to prosecute Epstein in future criminal proceedings or even support a criminal conviction. Interrogatory No. 15 seeks information relating to alleged sexual abuse or misconduct on a minor. On its face, this interrogatory seeks incriminating evidence which Epstein is entitled to protect by asserting his Fifth Amendment privilege against self incrimination.

Interrogatory No. 16 is a contention interrogatory seeking the facts upon which Epstein relies to support each of his pleading allegation denials and for each affirmative defense. As Epstein correctly observes, forcing him to answer this interrogatory unconstitutionally places him in the position of being compelled to testify as to his version of the facts, and, in asserting affirmative defenses, being compelled to admit to Plaintiff's version of the facts.

Interrogatories 13, 14 and 17 ask Epstein to identify any persons or witnesses who have knowledge of the events in question, or who are in possession or control of any photos, videos, written statements, etc. pertaining to the events in question. Clearly these interrogatories, all of which relate to claims of sexual abuse and exploitation of a minor,

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