UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE GRAND JURY SUBPOENAS FGJ 07-103(WPB)
DUCES TECUM NUMBERS
OLY-63 and OLY-64
_____ /

UNITED STATES' SURREPLY TO REPLIES FILED BY WITNESS WILLIAM RILEY AND INTERVENOR JEFFREY EPSTEIN
RE: MOTION TO QUASH GRAND JURY SUBPOENAS

UNDER SEAL

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RE: MOTION TO QUASH GRAND JURY SUBPOENAS

The United States, by and through the undersigned Assistant United States Attorney, hereby files this Surreply to the Replies filed by Witness William Riley and Intervenor Jeffrey Epstein, [F1] and notes the following:

1. Both the witness and the intervenor assert that Mr. Riley was excused from appearing before the grand jury and that Mr. Riley did not flout the subpoena by failing to appear. AUSA [redacted] agreed with Attorney Mr. Black that Mr. Riley would not have to appear and produce the disputed items if a motion to quash all aspects of the subpoenas was filed. Neither party's pleading has asserted that the subpoenas should be quashed as to Mr. Riley's testimony. Thus, the United States does not contend that Mr. Riley intentionally disobeyed the subpoena, but notes that the Motion to Quash does not address all aspects of the subpoenas and, therefore, the subpoena for testimony is enforceable. The undersigned has conferred with the office of Mr. Riley's counsel, and it has been agreed that Mr. Riley will appear before the grand jury on September 18, 2007. However, in footnote 3 of Intervenor Epstein's Reply, counsel asserts that, if "the Court were to sustain the government's standing objection as to Epstein, Riley and Riley Kiraly would file a motion to quash the subpoenas." (Epstein Reply at 5 n.3.) The United States would oppose such a motion on timeliness grounds.

2. In the Reply filed by Intervenor Epstein, counsel asserts that "simple possession of the physical containers [the computers] is not the government's real object here. What the government actually wants is unfettered access to the entire *contents* of Epstein's computers . . ." (Epstein Reply at 2.) Epstein is mistaken. The grand jury has subpoenaed the computers [illegible] the items as they were removed from Mr. Epstein's home.

The grand jury probably has the authority to subpoena the contents of those computers, but, in an abundance of caution, the undersigned's general policy is to seek a search warrant for the contents of a computer once it is securely in custody, and that is the United States' intended approach in this case, as well. This procedure will allow the Court to decide whether adequate probable cause exists for the search of the computers' contents without prematurely exposing to the target matters occurring before the grand jury, and will allow the target to challenge the probable cause for the search on a Motion to Suppress.

3. Epstein argues that he has no obligation to show that the computers (or the production of those computers) are incriminating before he can assert the act of production privilege. (Epstein Reply at 6.) This is not the case; if it were, every person could assert the act of production privilege to refuse to produce anything in response to a subpoena. [F2] Instead, a target must address the act of production privilege on a document by document basis explaining how the production of that document would tend to incriminate the target. *See, e.g., United States v. Grable* , 98 F.3d 251, 255, 257 (6 th Cir. 1996) ("The existence of 'substantial and real hazards of self-incrimination' is a prerequisite to the proper assertion of the 'act of production' privilege.") (citations omitted); *In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999* , 191 F.3d 173, 178 (2d Cir. 1999) (The act of production privilege applies only where the act is "(1) compelled, (2) testimonial, and (3) incriminating.") (*citing United States v. Doe* , 465 U.S. 605, 612-14 (1984)); *In re Three Grand Jury Subpoenas Dated January 5, 1988* , 847 F.2d 1024, 1028 (2d Cir. 1988) (subpoenaed party must produce subpoenaed audiotape to Court to allow Court to conduct *in camera* inspection to determine whether act of production privilege applied); *United States v. Bell* , [F3] 217 F.R.D. 335, 339 (M.D. Pa. 2003) (Although voluntarily created documents are not protected by the Fifth Amendment, an act of production privilege can be asserted, but only when "it meets two conditions: the evidence must be both (1) testimonial and (2) *incriminating* ."). Later in his Reply, in order to avoid the clear similarity between this case and *United States v. Hunter* , Epstein goes out of his way to assert that the computers are *not* incriminating. Epstein argues: "Unlike a murder weapon or bank robbery proceeds, the computers are not themselves evidence of a crime;" and "Therefore, even were the computers 'incriminating evidence' – *which they manifestly are not* – *Hunter* in no way undermines Epstein's challenges to the subpoena." (Epstein Reply at 8, 9 (emphasis in original).) Epstein simply cannot have it both ways. Either he is able to show that the production of the computers *would* incriminate him, or he cannot assert the act of production privilege.

4. Lastly, Epstein has still failed to provide a privilege log, saying that he not done so because he hopes that the subpoenas will be quashed in their entirety and, if not, a privilege log will *then* be produced. (Epstein

Reply at 10.) This effort to put the onus on the Court, ("The *Court* should not enforce the subpoenas without affording counsel an opportunity to exclude privileged materials from the production." (*id.*)), turns the law of attorney-client privilege on its head and disregards binding precedent requiring a subpoenaed party to produce such a log at the time of filing its motion. The objections related to billing records are demonstrative of the untenability of this position. In civil cases, issues related to attorney's fees are regularly litigated and billing records must be produced to the opposing party. If a party objects to that production, it must produced a redacted version of the documents with an accompanying privilege/work product log. *After* that, the issues are defined for the Court. Counsel complains that the United States has wrongly characterized their motion as a blanket assertion of privilege, but there is no other basis for a failure to produce *anything* . Epstein has *not* asserted that the production of the billing records is overly burdensome. Furthermore, Riley Kiraly is the owner of those documents and is best suited to make such a claim, if warranted. Riley Kiraly's failure to do so before the time for production waives such a claim.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the United States' Response to the Motion to Quash, the United States respectfully requests that the Court deny the Motion to Quash and order the prompt compliance with the subpoenas.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August ____, 2007, the foregoing document was served via Federal Express on Attorney Roy Black and Attorney William Richey. This document was not filed using CM/ECF because it is being filed under seal.

_____
[redacted]
Assistant U.S. Attorney

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F1 Witness William Riley did not file an initial motion to quash the grand jury subpoenas, but did file a Reply to the United States' Response to the Intervenor's Motion to Quash. Accordingly, the United States has not previously had the opportunity to respond to the issue raised by Mr. Riley.

F2 Following Epstein's logic, if a person were subpoenaed to produce her mother's coffee cake recipe, she could assert the act of production privilege because the production would be a "compelled communication that the item produced is the item called for in the subpoena." (Epstein Reply at 6.)

F3 *Bell* also discusses the "foregone conclusion" rationale, that is, that an act of production privilege exists only where the subpoenaed party's "production of the documents will *exclusively* establish their existence, authenticity, as well as [the party's] possession of them." *Id.* at 340 (emphasis in original). The United States relies upon the arguments in its Response to Intervenor Epstein's Motion to Quash and the information contained in the *Ex Parte* Affidavits to show the other methods of establishing the existence, authenticity, and Epstein's possession of the computers.