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, MOTION FOR RECONSIDERATION AND/OR REQUEST FOR RULE 4 REVIEW AND APPEAL OF PORTIONS OF THE MAGISTRATE'S ORDER DATED FEBRUARY 4, 2010 (DE 462), WITH INCORPORATED OBJECTIONS AND MEMORANDUM OF LAW

Defendant, Jeffrey Epstein (hereinafter "Epstein"), by and through his undersigned attorneys, hereby files his Motion for Reconsideration and/or for Request Rule 4 Review and Appeal of Portions of the Magistrate's Order (DE 462) 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. Procedural Background

Plaintiff'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.

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, and 462).

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.*

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

II. The Fifth Amendment

The Fifth Amendment serves as a guarantee against testimonial compulsion and provides, in relevant part, that "[n]o person…shall be compelled in any Criminal Case to be a witness against himself." (DE 242, p.5); see also Edwin v. Price, 778 F.2d 668, 669 (11th Cir. 1985) (citing Lefkowitz v. Turley, 414 U.S. 70, 77 (1973)). The privilege is accorded liberal construction in favor of the right and extends not only to answers that would support a criminal conviction, but extends also to those answers which would furnish a link in the chain of evidence needed to prosecute the claimant for a crime. See Hoffman v. United States, 341 U.S. 479, 486 (1951). Information is protected by the privilege not only if it would support a criminal conviction, but also in those instances where "the responses would merely 'provide a lead or clue' to evidence having a tendency to incriminate." See United States v. Neff, 315 F.2d 1235, 1239 (9th Cir.), cert denied, 447 U.S. 925 (1980); Blau v. United States, 340 U.S. 159 (1950); SEC v Leach, 156 F.Supp.2d 491, 494 (E.D. PA. 2001).

Moreover, the act of production itself may implicitly communicate statements and, for this reason, the Fifth Amendment privilege also encompasses the circumstances where the act of producing documents in response to a subpoena or production request has a compelled testimonial aspect. See United States v. Hubbell, 530 U.S. 27, 35-36 (2000). Thus, where the existence or location of the requested documents are unknown, or where production would

"implicitly authenticate" the requested documents, 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).

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

a. 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.

In light of the Court's Order and the Reply which further defines exactly what Plaintiff seeks (DE 354, p. 3), Epstein is now permitted to cautiously elaborate on his responses.

As to Request Number 7, Epstein and his attorneys do not have any "discovery information" provided to them by the federal government.[1]

As to Request Number 9, Epstein has not been given any evidentiary materials or evidentiary documents by the federal government.

Request No. 10 contravenes the critical public policy of encouraging the 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 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

[1] As set forth *infra*, the federal government provided Epstein with the NPA and the list attached thereto. The NPA is now a public document and the list, pursuant to Brad Edward's Agreement with Judge J. Colbath, remains confidential.

[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.

purposes and policies underlying these rules in 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").[3]

Additional illustration of the high degree of confidentially accorded settlement negotiations is found in Fed. R. Evid. 408, which precludes the introduction into evidence communications made during settlement negotiations. The purposes underlying Rule 408 are essentially the same as those underlying Rules 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. 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.

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 implicate 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

Here, the information requested involves negotiations with the USAO and its investigation. If the USAO cannot be compelled to release its investigation(s) and related work-product, how can Epstein be compelled to disclose same in violation of his constitutional rights? He cannot. Rules 11(f), 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 and 462). 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 in 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 were authentic. In other words, the very act of production of the category of documents requested would implicitly communicate "statements of fact." Hubbell, *supra*; Hoffman, *supra*.

Moreover, the production of such information may lead to the identity of witnesses that could testify against Epstein and those that may have knowledge or are in possession of evidence that could be used against Epstein in another district. This court has already ruled that Epstein can properly invoke his Fifth Amendment right to not identify a person who may have a photograph

or physical evidence pertaining to the alleged events. (DE 242). For these reasons, Epstein's justified concern with regard to answering the above request and the resulting waiver of his Fifth Amendment Privilege in this regard and/or providing self-incriminating information is substantial, real and not merely imaginative.

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 full well, 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 Number 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.

b. Request Number 12

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

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, Epstein cannot provide answers/responses to questions relating to his financial history and condition without waiving his Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution, which includes his tax returns. 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 of violations. See DE 282 and 283, in camera. Production would therefore constitute a testimonial admission of the genuineness, the existence, and Epstein's control of such records, and thus presents a real and substantial danger of self-incrimination in this case, in other related cases and as well in areas that could result in criminal prosecution. See generally Hoffman v United States, 341 U.S. 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 networth 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 would agree to stipulate, through his attorneys, that he has a net worth of over $50,000,000. Such a stipulation more than satisfies any necessity for the disclosure of the tax returns or any additional net worth information.

This court already ruled in DE 462 that Epstein is not required to produce his financial history information to the extent same seeks to identify Epstein's assets, where such assets are located and whether such assets have been transferred. Id. Moreover, the names and addresses of his accounts, financial planners and money managers were also sustained pursuant to the Fifth Amendment. Id. Therefore, 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. 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.

Furthermore, 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").

c. Request Number 13

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

Response: Defendant asserts his U.S. constitutional privileges. I intend to produce all relevant documents regarding this lawsuit, however, my attorneys have counseled me that at the present time I cannot select, authenticate, and produce documents relevant to this lawsuit without risking waiver of my Fifth Amendment rights and I must accept this advice or risk losing my Sixth Amendment right to effective representation. Accordingly, I assert my federal constitutional rights under the Fifth, Sixth, and Fourteenth Amendments as guaranteed by the United States Constitution. Drawing an adverse inference under these circumstances would unconstitutionally burden my exercise of my constitutional rights, would be unreasonable, and would therefore violate the Constitution. In addition to and without waiving his constitutional protections

> and privileges, the scope of information is so overbroad that it seeks information that is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence; compiling such information over a six year period would be unduly burdensome and time consuming.

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.

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?[5] 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.[6] 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-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

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

"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.[7] 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

[7] 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.

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.

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

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

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

c. reversing and/or revising the Magistrate's Order (DE 462) relative to Request Numbers 10, 12 and 13 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; and/or

d. remanding this appeal to the Magistrate-Judge for her reconsideration of these portions of her order;

e. alternatively, if this court rules that any of the information requested herein is relavent, it shall only do so after an in camera hearing and only after this court ensures that each and every documents produced is the subject of a heightened-confidentality order;

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

Respectfully submitted,

By: _____
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 26th day of February, 2010.

Respectfully submitted,

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

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