UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted],
Plaintiff

Case No. 15-cv-07433-RWS

v.

Ghislaine Maxwell,
Defendant
_____/

JEFFREY EPSTEIN'S MOTION TO QUASH TRIAL SUBPOENA

Jeffrey Epstein, a non-party to the above captioned action, has been subpoenaed to testify at the trial of this case, being commanded to appear on March 13, 2017. He now moves to quash that subpoena for the reasons set forth herein.

Mr. Epstein was deposed by the parties on November 10, 2016. At that deposition, he asserted his Fifth Amendment privilege and declined to answer all substantive questions posed to him during the deposition. The validity of his assertion of the privilege has already been the subject of extensive litigation in this case, with this Court ruling that, as to questions which the parties sought to compel him to answer, his assertion of the privilege was valid and proper. Order, February 2, 2017 (under seal).[1] Mr. Epstein's good faith basis for his assertion of his Fifth Amendment privilege remains unabated. As plaintiff is well aware, it is Mr. Epstein's intention, if he is called as a witness at the trial of this case, to once again assert his Fifth Amendment privilege in response to questioning, and his assertion of the privilege at trial will be no less valid

[1] As to other questions that the parties sought to compel Mr. Epstein to answer, the Court concluded that the information sought was irrelevant. *Id.* at 13. The upshot of the Court's ruling was that Epstein was not required to answer any of the questions to which the parties sought to compel his answers.

than it was at his deposition. Under the circumstances of this case, this Court should not require Mr. Epstein to physically appear to assert his Fifth Amendment privilege in front of the jury.

While there is no blanket prohibition in civil cases against a party's calling a witness who the party knows will assert his Fifth Amendment privilege, *see, e.g., Brinks, Inc. v. City of New York*, 717 F.2d 700, 708-10 (2d Cir. 1983); *see also LiButti v. United States*, 107 F.3d 110 (2d Cir. 1997), neither is this Court required to permit it in all cases. Instead, the question must be evaluated on a case-by-case basis. "The trial judge maintains discretion under Fed. R. Evid. 403 to control the way in which non-party claims of privilege reach the jury." *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 272 (3d Cir. 1986), *quoted in LiButti*, 107 F.3d at 122. *See Evans v. City of Chicago*, 513 F.3d 735, 740-41 (7th Cir. 2008)(finding no abuse of discretion in district court's refusal to permit plaintiff to "maximize and dramatize the moment" by calling witness to assert Fifth Amendment privilege in front of jury); *see also Brinks*, 717 F.2d at 715 (Winter, J., dissenting)(decrying the "invitation to sharp practice" inherent in "permitting the systematic interrogation of witnesses on direct examination by counsel who knows they will assert the privilege against self-incrimination").

Here, Mr. Epstein submitted to a ___ hour deposition at which the parties had an unlimited opportunity to examine him at length, asking approximately 600 separate questions, to all of which Mr. Epstein asserted his Fifth Amendment privilege. No different result would obtain were Mr. Epstein forced to take the stand and assert his Fifth Amendment privilege in front of the jury. Plaintiff seeks to call Mr. Epstein as a witness in the hope not of eliciting substantive testimony but of obtaining adverse inferences against defendant Maxwell based on

Mr. Epstein's assertion of the Fifth Amendment privilege with respect to various questions. Whether or not such adverse inferences are appropriate under the circumstances of this case is a matter to be litigated between the parties and decided by the Court, and Mr. Epstein expresses no position on that ultimate issue. The Second Circuit has identified four factors which are relevant to the determination whether courts should permit juries to draw adverse inferences against a party based on a witness' invocation of his Fifth Amendment privilege:

> *1. The Nature of the Relevant Relationships:* While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be. The closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.
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> *2. The Degree of Control of the Party Over the Non-Party Witness:* The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2), and may accordingly be viewed, as in *Brink's,* as a vicarious admission.
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> *3. The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation:* The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.
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> *4. The Role of the Non-Party Witness in the Litigation:* Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.

LiButti, 107 F.3d at 123-24 (Italics in original). In her motion seeking to present Mr. Epstein's assertions of his Fifth Amendment privilege in response to various questions, plaintiff has argued why these factors should result in adverse inferences against defendant Maxwell. *See* Plaintiff

[redacted] Motion to Present Testimony from Jeffrey Epstein for Purposes of Obtaining an Adverse Inference (Doc. ___)("Motion to Present Epstein Testimony") at 10-13. **[how deal with this since it's under seal??]**

Requiring Mr. Epstein to appear personally to assert his Fifth Amendment privilege in front of the jury has no potential whatsoever to add to or detract from either plaintiff's arguments in favor of an adverse inference or arguments in opposition presented by defendant Maxwell. These factors all present questions which can be determined entirely independently of Mr. Epstein's appearance as a witness at trial. Indeed, plaintiff appears to recognize as much, as she makes no distinction in her motion between live testimony and deposition testimony; indeed, plaintiff indicates in her motion that, if Mr. Epstein were to appear as a witness, she would put the very same questions to him as she did at his deposition. *See id.* at 4 ([redacted] now intends to call Epstein to ask him *these same questions*, either live an in-person if he honors a trial subpoena served on his legal counsel, or, if he fails to appear, via deposition testimony such as the designations just discussed" (emphasis added)). **[under seal]** Indeed, in *LiButti* itself, the issue was the admissibility of the witness' deposition testimony and the extent to which, if any, adverse inference inferences should be drawn from the witness' invocation of the Fifth Amendment at his deposition. Nothing will be added to the adverse inference inquiry by requiring Mr. Epstein to appear personally and reassert his Fifth Amendment privilege in front of the jury, nor would the jury be aided in determining whether to draw any adverse inferences it is permitted to consider by seeing Mr. Epstein assert the privilege in front of it.

Adverse inference issues are often submitted to the jury based on deposition testimony rather than on live invocation of the privilege in front of the jury, *see, e.g., SEC v. Jasper*, 678 F.3d 1116, 1125 (9th Cir. 2012); *RAD*, 808 F.2d at 272; *Data Gen. Corp. v. Grumman Sys. Support Corp*., 825 F. Supp. 340, 352 (D. Mass. 1993); *East Coast Novelty Co. V. City of New York*, 842 F. Supp. 117, 121 (S.D.N.Y. 1994); *Penfield v. Venuti*, 589 F. Supp. 250, 255-56 (D.Conn. 1984), and that is the procedure which should be followed in this case.

Not only will nothing be gained by either party by requiring Mr. Epstein to invoke his Fifth Amendment privilege in front of the jury, but there are other countervailing concerns as well. First, Mr. Epstein's personal appearance would likely generate substantial media attention which would threaten to undermine the parties' rights to a fair trial, a result which neither plaintiff or defendant could legitimately welcome. Second, requiring Mr. Epstein's personal appearance would impose an undue and unnecessary burden on him. Mr. Epstein is not a resident of New York; on the contrary, he resides in the Virgin Islands.2 Since his deposition assertion of the privilege is the functional equivalent of an in-person assertion, the distance of travel required and the expenses which would be incurred—here, not just the cost of travel to New York but also additional legal fees for representation during his testimony—would impose a substantial and unwarranted burden on Mr. Epstein.

Fed. R. Civ P. 45(d)(3)(A)(iv) provides that the court for the district when compliance is required must quash a subpoena that "subjects a person to undue burden." "An evaluation of

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[2] Normally, a party cannot be required to appear outside the state where he resides, is employed, or regularly transacts business in person. Fed. R. Civ. P. 45(c)(1).

undue burden requires the court to weigh the burden to the subpoenaed party against the value of the information to the serving party." *Travelers Indem. Co. v. Metro. Life Ins. Co.*, 228 F.R.D. 111, 113 (D. Conn. 2005). "Whether a subpoena subjects a witness to undue burden within the meaning of [Rule 45(d)(3)(A)(iv)] 'depends upon such factors as relevance . . . and the burden imposed.'" *Garneau v. Paquin*, 2015 WL 3466833, at *3 (D. Conn. June 1, 2015), *quoting In re Application of Operacion y Supervision de Hoteles, S.A.*, 2015 WL 82007, at *4 (S.D.N.Y. Jan. 6, 2015). *See Cusumano v. Microsoft Corp*., 162 F.3d 708, 717 (1st Cir. 1998)("concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs"). Here, forcing Mr. Epstein to travel to New York to assert his Fifth Amendment privilege in front of the jury would add no "value" to plaintiff's case beyond whatever may be afforded by his deposition testimony, nor would Mr. Epstein's personal appearance add anything of relevance to plaintiff's case. Given the wholesale lack of value or relevance of Mr. Epstein's personal appearance before the jury, the burdens to which such an appearance would subject him should be controlling. This is particularly true when the additional burden on Mr. Epstein's assertion of the Fifth Amendment privilege is factored into the analysis, as well as the spectre of this trial's becoming even more of a media event than it already will be.[3]

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[3] Mr. Epstein has been, and continues to be, the subject of extensive publicity, much of it salacious. A Google search for "Jeffrey Epstein returns 508,000 entries **CONSIDER RESERVING DETAIL FOR REPLY**, the most recent of which center on the new nominee for Secretary of Labor, Alexander Acosta, who, when he was United States Attorney for the Southern District of Florida, approved Mr. Epstein's nonprosecution agreement. *See, e.g.*, New York Daily News, "Labor Secretary nominee Alexander Acosta gave 'sweetheart deal' to sex offender Jeffrey Epstein," February 16, 2017, available at http://www.nydailynews.com/news/national/labor-pick-acosta-gave-sweetheart-deal-sex-

Finally, plaintiff also argues in her motion that she should be permitted to call Mr. Epstein as a witness to forestall the possibility that the jury would find it odd that she had not called Mr. Epstein to testify. Motion to Present Epstein Testimony at 13-15. **[under seal]** Presenting Mr. Epstein's deposition testimony in which he asserted his Fifth Amendment privilege in response to questioning regarding plaintiff's allegations would, however, completely alleviate this concern, as the jury would know from that testimony exactly "what Epstein . . . has to say about all this." *Id.* at 14. There is no indication in *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987), on which plaintiff relies, *id.* at 14-15, that deposition testimony of the witness was available in lieu of personal appearance before the jury to assert the Fifth Amendment privilege. The Court, stressing that the determination must be made on a case-by-case basis, *id.* at 1481, concluded that there was no error in permitting the

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offender-epstein-article-1.2975065 (last visited February 17, 2017); Politico, "Trump's Labor nominee oversaw 'sweetheart plea deal' in billionaire's underage sex case," February 16, 2017, available at http://www.politico.com/story/2017/02/alexander-acosta-trump-jeffrey-epstein-plea-235096 (last visited February 17, 2017). Mr. Epstein's name has been widely linked in the press with prominent individuals such as Donald Trump, Bill Clinton, Prince Andrew. *See, e.g.*, New York Post, "The 'sex slave' scandal that exposed pedophile billionaire Jeffrey Epstein," October 9, 2016, available at http://nypost.com/2016/10/09/the-sex-slave-scandal-that-exposed-pedophile-billionaire-jeffrey-epstein/ (last visited February 17, 2017); Newsweek, "Jeffrey Epstein: the Sex Offender Who Mixes with Princes and Premiers," January 29, 2015, available at http://www.newsweek.com/2015/02/06/sex-offender-who-mixes-princes-and-premiers-302877.html (last visited February 17, 2017). He is the subject of a recently released book by best-selling author James Patterson titled *Filthy Rich: A Powerful Billionaire, the Sex Scandal that Undid Him, and All the Justice that Money Can Buy - The Shocking True Story of Jeffrey Epstein* (Little, Brown & Co. October 10, 2016). His personal appearance at the trial of this case would predictably be the focus of massive media attention, of both the main-stream and gutter variety.

witness to be called even though he had indicated that he would assert the privilege because

> [h]earing Richards invoke the privilege informed the jury why the parties with the burden of proof, i.e., the insurance companies, resorted to less direct and more circumstantial evidence than Richards' own account of what had occurred. . . . Otherwise, the jury might have inferred that the companies did not call Richards to testify because his testimony would have damaged their case.

Id. at 1482. Use of Mr. Epstein's deposition testimony would serve these purposes equally well, as the jury would be left in no doubt as to why the plaintiff had not called Mr. Epstein as a witness. And plaintiff's comparison of her circumstances to *Hamlet* ignores the central fact that the ghost actually had something to say about the murder of Hamlet's father.

CONCLUSION

For all the foregoing reasons, Mr. Epstein's Motion to Quash should be granted.