UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[redacted] L [redacted],
Plaintiff

Case No. 15-cv-07433-RWS

v.

HEARING REQUESTED

Ghislaine Maxwell,
Defendant
_____/

JEFFREY EPSTEIN'S REPLY TO PLAINTIFF'S RESPONSE TO HIS MOTION TO QUASH TRIAL SUBPOENA

Mr. Epstein respectfully requests that he be permitted to be heard on his Motion to Quash. Far from being an "important witness," as plaintiff asserts, Jeffrey Epstein would not be a witness at all in any real sense even if forced to personally appear before the jury. Plaintiff has not provided the Court with any reason which withstands scrutiny as to why it would further the interests of justice for Mr. Epstein to be compelled to appear personally to assert his Fifth Amendment privilege. Indeed, the weakness of plaintiff's arguments provides additional compelling reason why Mr. Epstein's Motion to Quash Trial Subpoena should be granted.

Before proceeding to elucidate all the many reasons why plaintiff's arguments cannot justify requiring Mr. Epstein to appear personally to repeat the assertions of his Fifth Amendment privilege that he made during his videotaped deposition, it bears noting that the recent March 9, 2017, hearing before the Court provide further illustration of why the Motion to Quash should be allowed. Importantly, the hearing clearly reflects Mr. Cassell's full understanding of the principled basis for Mr. Epstein's assertion of his Fifth Amendment privilege. Tr. 3/9/17 at 39-40. Thus, his arguments that he wishes to call Mr. Epstein as a witness

so that the jury can "hear what he has to say," *id.* at 17, or to "see which questions he invokes on, which one's he's unable to" decline to testify about, *id.* at 31, or to "hear what his answers are" (regarding a flight to London allegedly with the plaintiff and others), *id.* at 42, do not provide a valid basis for the denial of Mr. Epstein's Motion to Quash, as all that the jury will hear Mr. Epstein say is the invocation of his Fifth Amendment privilege – something they can just as easily view on a monitor from his video deposition. Unlike plaintiff, defendant Maxwell properly recognizes that, given Mr. Epstein's intention to assert his Fifth Amendment privilege if the Court decides not to quash the subpoena, Mr. Epstein's assertion of the privilege would "bring[] nothing" of value to the trial of this case. *Id.* at 29. At the same time, Mr. Cassell's impassioned labeling of Mr. Epstein as the "most important witness in this case after the two identified parties," and as a "non-captioned party in interest here," *id.* at 10, only reinforces Mr. Epstein's understandable belief that Mr. Cassell's and Mr. Edwards' interests in parading Mr. Epstein before the jury to force him to repeat assertions of his Fifth Amendment privilege that the jury can observe full well in his videotaped deposition, with the inevitable toxic and widespread media attention it would draw, extend beyond the plaintiff's case. Those interests are reflected in their over-energized (54 pages of briefing on their now-rejected Motion to Compel Mr. Epstein's testimony despite his Fifth Amendment privilege. *See* Plaintiff's Sealed Motion to Compel the Production of Documents and Testimony from Jeffrey Epstein; Plaintiff's Sealed Reply in Support of Motion to Compel the Production of Documents and Testimony from Jeffrey Epstein. It is also reflected in their serial zealous attempts to call Mr. Epstein as a trial witness even after this Court quite properly held he has a testimonial Fifth Amendment privilege with respect to the subject matter relevant to this case, the over-litigation of which is in turn reflected in its 754-and-counting docket entries. It is further reflected in Mr. Cassell's aggressive

and personalized attacks upon Mr. Epstein and in his vehement insistence that only Mr. Epstein's personal appearance will permit the Court to rule on the adverse inference issues raised by plaintiff when it is plain that Mr. Epstein's videotaped deposition will provide the Court with a more than adequate basis to adjudicate plaintiff's adverse interest claims. Then there is the fact that Mr. Cassell and Mr. Edwards have repeatedly sued Mr. Epstein on behalf of other plaintiffs and have, since this litigation commenced, brought yet another lawsuit, *see Jane Doe 43 v. Epstein et al.*, No. 17-cv-00616-JGK (Southern District of New York), on behalf of Ms. [redacted], who alleges commercial sexual activity while she was an adult, not a minor. Their efforts to expose Mr. Epstein to the inevitability of toxic media prejudice from an unnecessary court appearance at which he would do no more than re-assert his core constitutional rights can also reasonably be viewed as an effort to advance Mr. Edward's personal counterclaim against Mr. Epstein, with its request for punitive monetary damages, which remains pending in Florida, *Epstein v. Rothstein and Edwards*, No. 50 2009 040800XXXXMBAG (Circuit Court of the 15th Judicial District in and for Palm Beach County, Florida); *see* Tr. 3/9/17 at 57-58, a case in which Mr. Edwards, in his previously-filed Motion for Summary Judgment and Statement of Undisputed Facts, discussed Ms. [redacted] allegations against Maxwell. These considerations, along with plaintiff's failure to provide the Court with adequate justification for requiring Mr. Epstein's personal appearance before the jury, amply warrant the granting of Mr. Epstein's Motion to Quash.

I. NONE OF THE REASONS ADVANCED BY PLAINTIFF JUSTIFY REQUIRING MR. EPSTEIN TO APPEAR PERSONALLY BEFORE THE JURY.

Plaintiff first contends that Mr. Epstein should be required to appear because live testimony is preferable to deposition testimony. That may be true when the witness actually has

testimony to give regarding the matter on trial, but that is not the case here. In neither *United States v. International Bus. Machines Corp.*, 90 F.R.D. 377 (S.D.N.Y. 1981), or *Napier v. Bassard*, 102 F.2d 467 (2d Cir. 1939), on which the plaintiff relies, Response at 2, did the witnesses at issue assert their Fifth Amendment privileges; instead, they had actual substantive testimony to give regarding the disputed issues in the case. There is absolutely nothing to be gained by either party from the jury's ability to observe Mr. Epstein's demeanor as he asserts the Fifth Amendment privilege, *see id.*, and plaintiff offers no explanation for why that would be the case. In any event, Mr. Epstein's deposition was videotaped, and anything the jury might conceivably gain from observing Mr. Epstein's demeanor will be available to it through the playing of the deposition videotape. Where the witness intends to assert his Fifth Amendment privilege, as Mr. Epstein would do if forced to appear at trial, just as he did at his deposition, and where the Court has already ruled on the validity of that assertion, there is nothing "second best" about videotaped deposition testimony. *See* Response at 3. Mr. Epstein should not be subjected to the additional burden on his assertion of his fundamental constitutional right of being forced to appear personally simply to repeat his assertion of his Fifth Amendment privilege.

Second, plaintiff argues that Mr. Epstein should be required to appear because defendant Maxwell has objected to the use of Mr. Epstein's deposition testimony, claiming that he is not an unavailable witness. Response at 3. This is simply a non-issue. Given Mr. Epstein's prior invocation of his Fifth Amendment privilege at his deposition and this Court's validation of it, Mr. Epstein is plainly an unavailable witness within the meaning of Fed. R. Evid. 804(a)(1):

> We start with the text of the rule. Fed. R. Evid. 804(a)(1) states that a declarant who "is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement" is unavailable. As we recently stated in *United States v. Salerno,* "[w]e have long recognized that 'unavailability' includes within its scope those witnesses who are called to testify but refuse based on a valid assertion of

their fifth amendment privilege against self-incrimination."

United States v. Bahadar, 954 F.2d 821, 827 (2d Cir. 1992), *quoting Salerno*, 937 F.2d 797, 805 (2d Cir. 1991). *See, e.g., Davis v. Velez*, 797 F.3d 192, 202-03 (2d Cir. 2015)(no abuse of discretion in finding witness unavailable where attorney had represented to court that client would assert Fifth Amendment privilege).

Third, plaintiff argues that Mr. Epstein "contaminated" his deposition testimony through his initial assertion of the privilege. Response at 3-4. Leaving aside the question whether one can "contaminate" proceedings by quoting from opinions of the Supreme Court, *see Ohio v. Reiner*, 532 U.S. 17, 21 (2001)("we have emphasized that one of the Fifth Amendment's basic functions . . . is to protect *innocent* men ... who otherwise might be ensnared by ambiguous circumstances" (emphasis in original; internal quotation marks omitted)), the phrase to which plaintiff objects—relating to a "supposed" function of the Fifth Amendment privilege which the Supreme Court has repeatedly said is not a "supposed" function at all but rather a critically important function of the Fifth Amendment privilege— is but a tiny snippet of a multi-hour deposition. Plaintiff's claim that the insertion of this phrase into Mr. Epstein's initial invocation of his Fifth Amendment privilege somehow contaminated the entire deposition is as overblown as it is unavailing. Contrary to plaintiff's unsupported assertion, Response at 4, this snippet can easily be redacted if the Court deems necessary. Since it comes in the middle of Mr. Epstein's assertion of his Fifth Amendment privilege, the jury—in the extraordinarily unlikely event that it could even detect the omission—would have no reason to think that the redacted words had to do with anything other than Mr. Epstein's assertion of the privilege. In any event, this is a remote eventuality that, if it arises, can readily be dealt with through an instruction by the Court. Mr.

Epstein should not be required to appear personally to reassert his Fifth Amendment privilege in language which is more to plaintiff's liking.

Fourth, plaintiff contends that Mr. Epstein should be required to appear personally to answer questions regarding any photographs he produces pursuant to plaintiff's subpoena or, if he does not produce any, about how thoroughly he searched for them. Response at 5. The short answer to this argument is that Mr. Epstein has no photographs falling within the parameters of the subpoena description and would not, therefore, be producing any were he required to appear personally.1 Contrary to plaintiff's argument, this Court did not rule that "questions about how thorough a search he conducted for the photographs" were not testimonial and therefore not protected by the Fifth Amendment. It ruled only that the production of the photographs at issue was not testimonial. *See* Sealed Opinion, February 2, 2017, at 18. Responses to questions regarding the whereabouts of photographs and where and how Mr. Epstein looked for them would, in fact, be testimonial (as well as being irrelevant to any issues in the case) within the meaning of the Fifth Amendment, as it would "require[] him to disclose the contents of his own mind. . . . contrary to the spirit and letter of the Fifth Amendment." *Curcio v. United States*, 354 U.S. 118, 128 (1957). *See, e.g., United States v. Edgerton*, 734 F.2d 913, 921 (2d Cir. 1984). Answering questions about where nude photographs might have been in the past or about places where he looked for them (with the obvious implication that he must have thought them places where nude photographs might be found) would plainly "furnish a link in the chain of evidence

[1] Although plaintiff has argued elsewhere that the existence of such photographs is a foregone conclusion, the information on which she relied to support that proposition uniformly dated from 2005 and earlier, twelve and more years ago. *See* Plaintiff's Sealed Reply in Support of Motion to Compel the Production of Documents and Testimony from Jeffrey Epstein at 8-9 & n.4.

needed to prosecute [him] for a federal crime." *Rajah v. Mukasey*, 544 F.3d 427, 441 (2d Cir. 2008), *quoting* United *States v. Hubbell,* 530 U.S. 27, 38 (2000). *See, e.g., United States v. Greenfield*, 831 F.3d 106, 114 (2d Cir. 2016)("the Fifth Amendment privilege has been found to extend not only to answers that are directly incriminatory but also to those that, while not themselves inculpatory, would furnish a link in the chain of evidence needed to prosecute the claimant" (internal quotation marks omitted)).

Fifth, plaintiff argues that Mr. Epstein should be required to appear personally so that she can rephrase questions with respect to which defendant Maxwell objected as to form at his deposition, despite having had every opportunity at this 500+ question deposition to cure objections by asking the objected-to questions in a different form. Ultimately, the form of the questions matters little, as, however they are phrased, Mr. Epstein would again assert his Fifth Amendment privilege. To the extent that plaintiff's concern related to the adverse inference issue, she has not identified a single question where the form of the question might impact the determination.

Sixth, plaintiff argues that Mr. Epstein should be required to appear personally to answer questions regarding his relationship with Professor Dershowitz on the off chance that it might prove admissible and even though she has herself moved to exclude information about Prof. Dershowitz from the trial. Response at 6-7. The Court has already found questions about Prof. Dershowitz to be irrelevant, and they remain equally irrelevant now. Mr. Epstein's personal appearance should not be required for such patently flimsy reasons.

Seventh, plaintiff argues that Mr. Epstein should be required to appear personally so that she can obtain adverse inferences against defendant Maxwell. Response at 7-8. As Mr. Epstein

has already contended in his Motion to Quash, the adverse inference issues can be decided by the Court based on Mr. Epstein's deposition testimony, and nothing will be added to the inquiry by requiring him to assert his Fifth Amendment privilege in the presence of the jury. In support of this argument, plaintiff posits hypothetical circumstances which might conceivably arise at trial in which she might want Mr. Epstein's testimony to rebut evidence presented or objections raised by the defendant. These is no evidence that calling Mr. Epstein would rebut, as he would again assert his Fifth Amendment privilege. In any event, speculation that defendant Maxwell might present evidence in her case-in-chief that calling Mr. Epstein might rebut cannot justify requiring him to appear during plaintiff's case in chief. Nor does speculation that Ms. Maxwell might object to the authenticity of the "blackbook" provide a sufficient basis for requiring Mr. Epstein's personal appearance at trial. Absent evidence (which is nonexistent) that Mr. Epstein would waive his Fifth Amendment privilege and testify about matters such as the "blackbook," Mr. Epstein's personal appearance would not produce any relevant testimony which is not protected by Mr. Epstein's Fifth Amendment privilege.

Finally, plaintiff advances the argument that Mr. Epstein is somehow shirking his civic duty by seeking to quash the trial subpoena for his personal appearance at trial. The jury is not entitled to every man's evidence when that man has a valid Fifth Amendment privilege to decline to answer questions, as this Court has ruled that Mr. Epstein has. The jury will have everything from Mr. Epstein which it needs to fulfill its function in the form of his videotaped deposition. In his Motion to Quash, Mr. Epstein has set forth sound reasons why his personal appearance should not be compelled and why he should not be forced to appear personally to assert his Fifth Amendment privilege in front of the jury. Among those reasons is the inevitable

media circus which would predictably result from his personal appearance; simple common sense dictates that a personal appearance by Mr. Epstein would generate considerably more media buzz than would the playing of his videotaped deposition. Plaintiff's demonstrably weak arguments in opposition to the granting of Mr. Epstein's Motion to Quash fall far short of providing this Court with a sound basis for requiring Mr. Epstein's personal appearance at trial.

CONCLUSION

For all the foregoing reasons, and for all the reasons set forth in Mr. Epstein's Motion to Quash, his motion should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I, Martin G. Weinberg, hereby certify that on this ___ day of March, 2017, I

electronically filed the foregoing Motion with the Clerk of the Court using the CM/ECF system, thus effecting service on counsel of record:

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