

IN THE CIRCUIT COURT OF THE 15th
JUDICIAL CIRCUIT IN AND FOR PALM
BEACH COUNTY, FLORIDA

CASE NO: 502008CA028051XXXXMB AB

L.M.

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.

**PLAINTIFF L.M.'s MOTION TO COMPEL ANSWERS TO PLAINTIFF'S FIRST
REQUEST FOR PRODUCTION**

Plaintiff L.M. hereby moves this Court for an Order compelling Defendant, Jeffrey Epstein, to answer her first request for production or, in the alternative, to prove that his invocation of his Fifth Amendment privilege is proper. L.M. also requests production of a privilege log. As grounds for the foregoing L.M. states:

1. L.M. has propounded two straightforward requests for production of material previously provided to Epstein by law enforcement authorities in connection with their investigation of Epstein. In response to these requests, Epstein has asserted a Fifth Amendment privilege. That privilege is not well-founded. Epstein cannot plausibly claim that turning over materials already given to him *by law enforcement authorities* would somehow reveal something new to law enforcement authorities. Accordingly, his assertion of privilege is not well founded and he should be compelled to produce the requested information.

2. In ruling on this issue, the Court should require Epstein to prove that his Fifth Amendment invocations are valid. It is for the court, not the

claimant, to determine whether the hazard of incrimination is justified. *United States v. Argomaniz*, 925 F.2d 1349, 1355 (11th Cir. 1991). "A court must make a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded." *Id.* Typically this is done in an *in camera* proceeding wherein the person asserting the privilege is given the opportunity "to substantiate his claims of the privilege and the district court is able to consider the questions asked and the documents requested by the summons." *Id.*

3. Here Epstein has made boilerplate invocation of the Fifth Amendment to each and every request propounded by L.M.. That hardly suffices to carry *his* burden providing that his assertion of the Fifth Amendment is appropriate.

4. As part of this particularized inquiry, Epstein should also be required to produce a privilege log of the items over which he is asserting privilege.

SPECIFIC REQUESTS FOR PRODUCTION

5. For the convenience of the court, L.M.'s two specific requests for production and Epstein's objections are reprinted, followed by analysis as to why his assertion of privilege is improper:

Request No. 1. The ENTIRE FILE (including all discovery) provided to you by the State Attorney's Office, and/or Palm Beach County Police Department and/or U.S. Attorney's Office and/or the Federal Bureau of Investigation relating to the Defendant, JEFFREY EPSTEIN.

Response: Defendant is asserting specific legal objections including but not limited to relying on certain U.S. constitutional privileges in declining at present to respond to this request for production based on advice from my

counsel that I cannot provide answers/responses to the question without waiving my Fifth Amendment Privilege 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.

Responding to the above request would require Epstein to identify information regarding the offenses that were the prior subject of a federal investigation. The Fifth Amendment is a safe harbor for all citizens, including those who are innocent of any underlying offense, however responding to this and other relating inquiries have the potential to provide a link in a chain of information that would be protected. More specifically, the act of producing the above information may implicitly communicate statements of fact in that they would implicitly authenticate the requested information, require Epstein to admit that the request information exists and admit that same were in his possession, custody and control. The very act of production itself may therefore provide a link in the chain of evidence adverse to Epstein, see generally *United States v. Hubbell* 520 U.S. 27, 236 (2000).

In addition to and without waiving his constitutional privileges, Defendant also objects as the request for production as unreasonable, vague, overbroad, and may seek information that is protected by attorney-client and work-product privileges and 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 as worded. Moreover, Plaintiff's request seeks information available from other non party entities.

Request No. 2. All evidence, documents, statements, information, dvds, cds and ALL other information provided to Defendant Epstein, or his attorneys, in discovery by the Palm Beach State Attorney's Office, the Palm Beach Police Department, The FBI or the U.S. Attorney's Office.

Response: Defendant is asserting specific legal objections including but not limited to relying on certain U.S. constitutional privileges in declining at present to respond to this request for production based on advice from my counsel that I cannot provide answers/responses to the question without waiving my Fifth Amendment Privilege 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.

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ANALYSIS:

6. These two requests simply seek information that *the government* gave to Epstein in the course of its plea discussions with him. Remarkably, Epstein claims that these materials – which started in the government's possession -- are now somehow transformed and given Fifth Amendment protection by his mere receipt of them. The Fifth Amendment does not work such alchemy.

7. It is true, of course, that the Fifth Amendment covers situations where the act of producing documents has "communicative aspects of its own, wholly aside from the contents of the papers produced." *Fisher v. United States*, 425 U.S. 391, 410 (1976). But this "act of production" doctrine has stringent limits. It does not extend, for example, to a claim by a taxpayer that he would

incriminate himself by producing his accountant's work papers. As the Supreme Court has explained, the government's awareness of these documents was "a foregone conclusion" and therefore their production could be required:

It is doubtful that implicitly admitting the existence and possession of the papers rises to level of testimony within the protection of the Fifth Amendment. The papers belong to the accountant, were prepared by him, and are the kind usually prepared by an accountant working on the tax returns of his client. Surely the Government is in no way relying on the "truthtelling" of the taxpayer to prove the existence of . . . the documents. *The existence and location of the papers are a foregone conclusion.*

Fisher, 425 U.S. at 410 (emphasis added).

8. Courts applying this "foregone conclusion" standard to various facts have asked whether the government was aware of the documents' existence apart from any actions of the defendant. Thus, *United States v. Hubbell*, 530 U.S. 27 (2000), rejected the Government's argument that it was a foregone conclusion that the defendant possessed "ordinary business records." The Court noted that the government had no "prior knowledge" of these records:

Whatever the scope of this "foregone conclusion" rationale, the facts of this case plainly fall outside of it. While in *Fisher* the Government already knew that the documents were in the attorney's possession and could independently confirm their existence and authenticity through the accountants who created them, here the Government has not shown that it had *any prior knowledge* of either the existence or the whereabouts of the 13,120 pages of documents ultimately produced by respondent.

Id. at 44 (emphasis added).

9. In this case, of course, the government's "prior knowledge" of the evidence or documents that L.M. seeks is obviously and undeniably a foregone conclusion. *The government itself gave Epstein the documents or information!*

Therefore, there is no plausible argument that, in producing these documents to L.M., Epstein will somehow be incriminating himself by disclosing to the government something that it does not already know. The government clearly has prior knowledge of documents that *it* gave to Epstein. Here, then, the “existence and location of the documents . . . are a ‘foregone conclusion’ and [Epstein] . . . adds little or nothing to the sum total of the Government’s information by conceding that he in fact has the documents.” *In re Grand Jury Subpoena, Dated April 18, 2003*, 383 F.3d 905, 910 (9th Cir. 2004).

10. The D.C. Circuit has recently refused to extend the act of production doctrine to facts very similar to those here. In *United States v. Ponds*, 454 F.3d 313 (D.C. Cir. 2006), federal prosecutors sought information about possible crimes committed by a defense attorney in the course of representing a defendant in a federal case. The prosecutors subpoenaed the attorney to produce all correspondence between him and courts and prosecutors in that case. In summarily rejecting an argument that producing the documents would somehow fall within the act of production doctrine of the Fifth Amendment, the D.C. Circuit explained that “the government must have known of the existence of documents . . . because it was a party to that correspondence.” *Id.* at 325. The Circuit further explained that the government’s subpoena need not “name every scrap of paper that is produced. Because the government already had sufficient knowledge about the . . . [case-related] documents, . . . [the defense attorney] was simply surrendering them, not testifying, by complying with those demands in the subpoena.” *Id.* Other cases similarly reject attempts to use an act of

production as a shield to turning over documents whose existence is known to the government or is a foregone conclusion. See, e.g. *In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992*, 1 F.3d 87, 93 (2d Cir. 1993) (rejecting act of production argument because compliance with subpoena requiring production of a personal calendar "would require mere surrender of the calendar, and not testimony" (internal quotation omitted)); *United States v. Clark*, 847 F.2d 1467, 1473 (10th Cir. 1988) (accounting records not subject to act of production protection; in producing records the defendant would not "authenticate the documents as being his own or being accurate"); *Securities and Exchange Commission v. First Jersey Securities, Inc.*, 843 F.2d 74, 76 (2d Cir. 1988) (rejecting act of production argument regarding bank records because "everybody knew that they existed"); *United States v. Lang*, 792 F.2d 1235, 1242 (4th Cir. 1986) (rejecting act of production argument regarding bank records because an IRS agent "had been given access to and has examined some or all of the records" and thus the defendants "act of producing those records would add little or nothing to the sum total of the Government's knowledge of the existence and location of the summoned records").

11. Epstein seems to be asserting that giving to L.M. discovery produced by the government might disclose witnesses helpful to L.M.. But this assertion badly confuses how the Fifth Amendment works. Of course, the government's documents have information that might be harmful to Epstein's claims of innocence; presumably that is why the government was showing him the documents in the first place - to convince him to plead guilty to a crime. But it

is a "settled proposition that a person may be required to produce specific documents even though they contain incriminating assertions of fact or belief" *United States v. Hubbell*, 530 U.S. 27, 35 (2000). The only question here is whether turning over *the government's own documents* to L.M. somehow forces Epstein to provide "testimony" to the government – something forbidden by the Fifth Amendment. Epstein has no such viable claim here.

12. Epstein also argues some sort of attorney-client or work-product privilege bars production of the documents. This argument is frivolous. The attorney-client privilege, for example, extends only to a "confidential communication" made in the course of "rendition of legal services to the client." Fla. Stat. Ann. § 90.502(2). Documents given *by the government* to Epstein are obviously not confidential communications within the sense of the attorney client privilege. Similarly, the documents are not work product, because they do not involve any creation by Epstein's attorneys. *See, e.g., Balboa v. State*, 446 So.2d 1134, 1135 (Fla. App. 1984) ("opinions, theories, or conclusions of attorneys are privileged, but statements of witnesses to attorneys are not").

13. Of course, as part of analyzing these questions, a privilege log would be appropriate, as it would identify the documents that are in dispute and permit the court to determine the validity of Epstein's objections. Therefore, as part of ruling on this motion, the Court should direct Epstein to produce a privilege log of the documents covered by this request. It is well settled that "[a] blanket assertion of the Fifth Amendment right is insufficient to invoke the privilege against self-incrimination." *Urquiza v. Kendall Healthcare Group, Ltd.*,

994 So.2d 476, 477 (Fla. App. 2008). Moreover, the proper procedure in the case of a dispute is preparation of a privilege log. See Fla. R. Civ. P. 1.280(b)(5); *Gosman v. Lazinski*, 937 So.2d 293, 295 (Fla. App. 2006). That procedure should be followed here.

CONCLUSION

14. For all these reasons, the Court should compel Epstein to answer the request for production of information that was given to him by government authorities. Also, while this matter is under consideration, Epstein should be required to produce a privilege log.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the above and a copy of the foregoing has been provided this 19th day of January 2010 via U.S. Mail and email transmittal to all those on the attached service list.

**Farmer, Jaffe, Weissing,
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