

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

JANE DOE NO. 2,

Plaintiff,  
vs.

**CASE NO.: 08-CIV-80119-MARRA/JOHNSON**

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

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**Defendant's Supplementary Brief Pursuant To The Magistrate's Order (DE 242)  
Requesting A More Particularized Showing Demonstrating How The 5<sup>th</sup> Amendment May  
Be Asserted To Plaintiff's Requests For Production, With Memorandum Of Law**

Defendant, Jeffrey Epstein (hereinafter "Epstein"), by and through his undersigned attorneys, hereby files his Supplementary Brief Pursuant to the Magistrate's Order (DE 242) relative to Plaintiff's Request for Production Numbers 10, 11, 19 and 21.

In support, Epstein states:

**I. Procedural Background**

1. Plaintiff served her First Request for Production, and Epstein served his responses and objections thereto. **See Exhibit "A."** Plaintiff filed her Motion to Compel (DE 57), and Epstein filed his Response thereto (the "Response Memorandum"). (DE 63) The objections and responses set forth in Epstein's initial response and the arguments set forth in his Response Memorandum are incorporated herein such that a concise statement and more particularized showing can be made herein as to why Epstein's Fifth Amendment Privilege as to Request for Production Numbers 10, 11, 19 and 21 should be sustained.

2. This court entered an order (DE 242) stating that Epstein must supplement his Response Memorandum to Plaintiff's Motion to Compel as to request for production numbers 10, 11, 19 and 21 (collectively, the "Specified Requests"). (DE 242, p. 19). Defendant's time to respond and submit this supplementary brief was extended to August 31, 2009.

3. Epstein is submitting this Supplementary Brief with supporting case law only as to the Specified Requests. An Amended Response will be provided as to Request to Produce Number 18.

**II. Supplementary Brief, With Incorporated Memorandum of Law**

**The Magistrate's Order (DE 242) Correctly Sustained Epstein's 5<sup>th</sup> Amendment Privilege As To Several Requests And Interrogatories Seeking Testimonial And Incriminating Information Similar To The Specified Requests**

4. The Magistrate Judge found that several of the requests were ". . . testimonial in nature, in that by production, Epstein would be implicitly communicating 'statements of fact' to which the Fifth Amendment privilege may be validly asserted." (DE 242, p. 10). On that basis, and as a limited example, this Court denied request number 5 (seeking telephone records of calls made by Epstein) and request number 6 (seeking telephone calls made by Epstein to his employees). Likewise, this court denied interrogatory numbers 1, 2, 10 and 12 because those interrogatories sought the names of Epstein's employees or their telephone numbers and thus "would furnish a link in the chain of evidence needed to prosecute Epstein of a crime." (DE 242, p.8-9). Additionally, this court denied interrogatory numbers 13, 14 and 17 because those asked Epstein to identify persons or witnesses that have knowledge of the events in question. *Id.* at p. 8. In making the decision, the court recognized, much like this Supplementary Brief

contends *infra*, that “. . . the facts alleged in the Complaints, the elements needed to convict Epstein of a crime, and . . . the Court’s knowledge concerning the cases at issue” provide a basis for Epstein to raise the privilege based upon “genuinely threatening questions” which could furnish a link in the chain of evidence needed to convict Epstein of a crime. (DE 242, p.18) United States v. Goodwin, 625 F.2d 693, 701 (5<sup>th</sup> Cir. 1980).

5. As detailed below, the Specified Requests seek similar information or will lead to the production of the exact information that this court has already ruled is protected by Epstein’s Fifth Amendment Privilege.

**The Background Of This Case And Other Related Cases As Well As The Federal Statutory Claims And Elements Of Those Offenses Must Be Considered In Connection With Epstein’s More Particularized Showing Demonstrating How The 5<sup>th</sup> Amendment Is Validly Applied To Plaintiff’s Requests For Production**

6. The circumstances of this case (and in other related cases) are such that not only does Epstein face allegations of sexual misconduct with and abuse, exploitation, and sexual battery of alleged minors in this and other civil actions in the State of Florida, but he also faces a potential federal criminal prosecution based on the same factual allegations. The Plaintiff’s attorney represents Jane Doe Nos. 2, 3, 4, 5, 6, and 7, in civil actions against Epstein filed in this Court. In this and the other civil actions, the Plaintiffs reference federal and state criminal statutes in an attempt to allege claims ranging from sexual battery to intentional infliction of emotional distress, including, as to Jane Doe 2 violations of 18 U.S.C. 2422, entitled “Coercion and enticement”, contained in Title 18, “Crimes and Criminal Procedure,” Part I – “Crimes,” Chapter 117 – “Transportation for Illegal Sexual Activity and Related Crimes,” and as to other Jane Does violations of 18 U.S.C. 2423(b) which criminalizes interstate or foreign travel for the purpose of having illicit sexual activity, each of which in turn is a potential predicate for federal damages

lawsuits pursuant to 18 U.S.C. §2255 – which creates a civil remedy for personal injuries where a plaintiff can show a violation of specified statutory criminal statutes. See current text of 18 U.S.C. §2422, along with pre-2006 amended text. See Exhibit “B” hereto – copy of Plaintiff’s Second Amended Complaint, see also 18 U.S.C. 2423(b) appended hereto as Exhibit “B-1” Most importantly, the lynchpin for the exercise of federal criminal jurisdiction under 18 U.S.C. 2422(b) 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) is “travel{s} in interstate commerce or travels into the United States or {as} to a United States citizen...travels in foreign commerce”. Thus, facially, an essential proof of any allegation of 18 U.S.C. 2422(b) – the statutory precondition alleged by Jane Doe 2 for a 2255 civil damage recover - includes telephone, cellular phone, e-mail records or other “communications” as a facility of interstate commerce during which use there was persuasion, inducement, enticing, or coercing of an underage person to engage in prostitution or sexual activity). As more fully discussed, *infra*, contested requests for production numbers 10, 11, 19 and 21 ask that Epstein produce information (i.e., documents reflecting Epstein’s air travel, aircraft used and flight manifests, all communications with female models, MC2 models or Jean Luc Brunel relating to or referring to females coming into the United States from other countries and his personal calendars and schedules and his personal calendars and schedules) that could reveal the availability to him or such interstate facilities and thus would constitute a link in the chain of evidence that could potentially expose him to the hazards of self-incrimination as to 18 U.S.C. 2422(b) federal criminal violations.

7. Likewise, other Jane Does such as Jane Doe 102 have contended that they are entitled to 18 U.S.C. 2255 damages based on Epstein's violation of 18 U.S.C. 2423(b), a separate federal criminal statute that prohibits "a person who travels in interstate commerce or travels into the United States...for the purpose of engaging in illicit sexual activity". As more fully discussed, *infra*, contested request to produce numbers 10, 11, 19 and 21 ask Epstein to produce information that 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 female models, MC2 models, or Jean Luc Brunel 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) (an alternative predicate for 2255 claims) includes travel records, schedules regarding trips and locations, flight records, and calendars evidencing Epstein's whereabouts, the requested information could furnish evidence that could potentially expose him to the hazards of self-incrimination as to 18 U.S.C. 2423(b) violations. This is especially true given that, according to Jane Doe 2's complaint, he has residences and businesses in New York and the Virgin Islands as well as Florida.

8. Moreover, both 18 U.S.C. 2422(b) and 18 U.S.C. 2423(b) were amongst the target offenses of a joint FBI-United States Attorney investigation further demonstrating the extent to which Epstein's refusal to respond or produce information to each request is, as required, based on a specific apprehension of a compelled production and disclosure providing a link in the chain of evidence adverse to him. Blau v. United States, 340 U.S. 159 (1950).

*Responding to the Specified Requests Would Violate Epstein's 5<sup>th</sup> Amendment Privilege And Would Expose Him to the Hazards of 18 U.S.C. 2422(b) And The 18 U.S.C. 2423(b)*

9. Request for Production Numbers 10, 11, 19 and 21 seek the following information:

**Request No. 10.** All documents referring to or relating to air travel and aircraft used by Defendant, including without limitation, flight logs and flight manifests.

**Request No. 11.** Any and all documents referring to or relating to modeling agencies, including but not limited to documents relating to or reflecting communications with female models.

**Request No. 19.** Any and all documents reflecting or consisting of communications between Jeffrey Epstein and MC2 Models or Jean-Luc Brunel, relating or referring to females coming into the United States from other countries to pursue a career in modeling, including, but not limited to, letters, notes and e-mails.

**Request No. 21.** Any and all personal calendars or schedules of or for Jeffrey Epstein from January 1, 2003 to the present.

10. As discussed below, production of the specified information is tantamount to compelled testimonial authentication of the information, its existence, its authenticity, and as well Epstein's alleged possession, custody or control of same. Production may result in self incrimination and potential federal-criminal prosecution of Epstein.

11. The Second Amended Complaint includes allegations that "[REDACTED], Epstein's [REDACTED]" was a part of "Epstein's plan and scheme (which) reflected a particular pattern and method" in the alleged recruiting of girl's to come to Epstein's Palm Beach mansion and give him "massages" in exchange for money. See 2<sup>nd</sup> Am. Complaint, ¶11-12. Given the allegations of violations of 18 U.S.C. 2422 in Count III, the plaintiff is alleging the recruiting occurred over the telephone, see par 9-10 of the Second Amended Complaint. (Paragraph 10 includes an averment that it was [REDACTED] routine to seek telephone contact information from the plaintiff) According to the

allegations – “Upon information and belief Epstein has a sexual preference and obsession for underage minor girls.” *Id.* ¶8. “██████████ would “bring the girl up a flight of stairs to a bedroom that contained a massage table [in his Palm Beach mansion]. . . .” The girl would be alone with Epstein. Epstein would “lie naked on the massage table, and direct the girl to remove her clothes.” “Epstein would then perform one or more lewd, lascivious and sexual acts, including masturbation and touching the girl’s vagina.” *Id.* ¶11, Exhibit B. Plaintiff alleges that Epstein “sexually assaulted” her. *Id.* ¶12 Plaintiff also alleges that Epstein “maintains his principal home in New York and also owns residences in New Mexico, St. Thomas and Palm Beach, FL.” *Id.* ¶7. “Upon information and belief, Jeffrey Epstein carried out his scheme and assaulted girls in Florida, New York and on his private island, known as Little St. James, in St. Thomas.” *Id.* ¶9. The nature of the allegations are serious, and state clearly that the alleged assaults occurred in Florida, New York and in St. Thomas.

12. The foregoing allegations demonstrate clearly how the requested documents, if produced, as to Epstein’s air travel information and his personal calendar and schedules and his communications with participants in a modeling agency as well as the foreign travel of models from the MC2 agency would be compelled testimonial authentication by Epstein of the genuineness, the existence, and his control of such records and as such his principled refusal to respond to the requests for production based on his “act of production” Fifth Amendment is squarely supported by Supreme Court case law as more fully discussed herein. Based upon the foregoing, Epstein has a well-founded, non-speculative fear that voluntary production would constitute evidence (or a clue or link in the chain of evidence) that would subject him to a risk of self-

incrimination i.e. that his assertion of his act of production privilege is warranted and non-speculative and entitled to judicial approval. *See infra*.

13. The Second Amended Complaint also includes an averment that Epstein both resided in and engaged in illegal sexual conduct in districts outside the Southern District of Florida, see ¶¶ 7 and 9. In other words, the fact that there exists a NPA (*see infra*) does not mean that Epstein is free from future criminal prosecution. (DE 242, p.4) Here, there is too close a nexus between the information requested in request numbers 10, 11, 19 and 21 and the pivotal jurisdictional requisites of 18 U.S.C. 2422(b)(the use of “interstate facilities” such as telephones, cellulars and e-mail – all of which could be gleaned from the requested records themselves or Epstein’s personal calendars and schedules or his alleged e-mail communications with models) and 18 U.S.C. 2423(b)(the requirement of interstate travel i.e., Epstein’s air travel, his use of aircraft, flight logs, flight manifests, as well as his alleged communications with models and those models coming into and out of the United States and from other countries – all of which could be gleaned his personal calendars or schedules). As such, responses and responsive documents will obviously reveal Epstein’s whereabouts through his travel information, whom he might have traveled with, the individuals Epstein communicated with through such “interstate facilities”, the content of those communications, the time and place where the communications occurred and his scheduling of events, all of which could provide leads to other evidence, identities of other potential witnesses, and would themselves constitute records that would therefore provide the links in the chain of evidence that could inculcate Epstein. If Epstein is compelled to provide any information relative to the Specified Requests that information could subsequently be used to

incriminate him and it might be used to establish the elements of two separate federal criminal offenses identified above, each of which was an active target offense of the FBI-United States Attorney's investigation of Epstein.

14. Significantly, producing the specified information would result in testimonial disclosures that would communicate statements of fact by admitting that Epstein did travel to and from Florida and/or throughout the United States or other foreign jurisdictions, thereby requiring him to admit the very facts upon which Plaintiff's Second Amended Complaint is based (i.e., presence in Florida (or other jurisdictions) at the time of an allegation of misconduct or control of a particular telephone or other means of communication (e.g., e-mail) at the time of a claim that the plaintiff was recruited and persuaded or enticed in violation of 18 U.S.C. 2422(b)). The resulting hazard is that Epstein's travel records, his communication records (i.e., by telephone, cellular, or by e-mail) and/or his personal calendars or schedules can predictably be used to bolster the criminal-related allegations against Epstein and provide links in the chain that no citizen is required to produce. See infra – 5<sup>th</sup> Amendment Application. Again, the information sought relates to potential federal claims of violations of 18 U.S.C. 2422(b), 18 U.S.C. 2423(b), and 18 U.S.C. 1591. 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. 479, 486 (1951) and United States v. Hubbell, 530 U.S. 27, 36, 120 S.Ct. 2037, 2043 (2000). Plaintiff is free to obtain this information from other sources but not from Epstein. See infra.

15. As to the two particular requests for information regarding models and modeling agency (requests numbers 11 and 19), such information was within the criminal investigatory objectives of the FBI-United States Attorney's Office joint investigation of Epstein. Both the FBI case agent [REDACTED] and Assistant United States Attorney [REDACTED] traveled to New York and attempted to interview the owner of MC2 modeling, Jean-Luc Brunel to further their joint criminal investigation of Epstein. On information and belief the subject matter of the intended interview was alleged violations of 18 U.S.C. 2423(b) and 18 U.S.C. 2422(b). Producing and therefore authenticating evidence of communications between Epstein and Brunel, or producing and therefore authenticating evidence of communications with other models and modeling agencies is again tantamount to testimonial admissions of the communications, of the relationships, and of the identities of the various parties to the travel and communication (i.e., it too would provide links in the chain of evidence towards self-incrimination, in violation, if compelled, of the core of a citizen's privilege against self-incrimination). See *infra* – Application of the Fifth Amendment.

**Responding to the Specified Requests Would Violate Epstein's 5<sup>th</sup> Amendment Privilege And Would Expose Him to the Hazards of 18 U.S.C. 2422(a) And The 18 U.S.C. 2423(b)**

16. Likewise, 18 U.S.C. 2422(a) also criminalizes interstate or foreign travel for the purpose of having illicit sexual activity, and is also a potential predicate for federal damages lawsuits pursuant to 18 U.S.C. §2255 which, as set forth above, creates a civil remedy for personal injuries where a plaintiff can show a violation of specified statutory criminal statutes.

17. Here, there is also too close a nexus between the information requested in request numbers 10, 19 and 21 and the pivotal jurisdictional requisites of 18 U.S.C.

2422(a)(the requirement of interstate travel i.e., Epstein’s air travel, his use of aircraft, flight logs, flight manifests, as well as his alleged communications with models and those models coming into and out of the United States and from other countries – all of which could be gleaned his personal calendars or schedules). Moreover, responding to request numbers 10, 19 and 21 may expose Epstein to the hazards of 18 U.S.C. 2423(b), which was a target offenses of the joint FBI-United States Attorney investigation discussed above.

18. Accordingly, for the same reasons set forth *supra*, the requested information would provide links in the chain of evidence towards self-incrimination, in violation, if compelled, of the core of a citizen’s privilege against self-incrimination, and may result in criminal prosecution for an alleged violation of 18 U.S.C. 2422(a) and 2423(b). *See supra*, ¶¶6-15

***The NPA And The Underlying Criminal Investigation  
That Led To The NPA Must Also Be Considered In Connection With  
Epstein’s More Particularized Showing Demonstrating How The 5<sup>th</sup>  
Amendment Is Validly Applied To Plaintiff’s Requests For Production***

19. The threat of criminal prosecution is real and present as Epstein remains under the scrutiny of the United States Attorney’s Office (“USAO”), which is explained and acknowledged in the Court’s Order (DE 242). As this Court knows, Epstein entered into a Non-Prosecution Agreement (“NPA”) with United States Attorney Office for the Federal Southern District of Florida. The terms and conditions of the NPA also entailed Epstein entering into a Plea Agreement with the State Attorney’s Office, Palm Beach County, State of Florida. By its terms, the NPA took effect on June 30, 2008. As well, pursuant to the NPA, any criminal prosecution against Epstein is deferred as long as the terms and conditions of the NPA are fulfilled by Epstein. The federal grand jury

investigation against Epstein is held in abeyance i.e. it is not concluded with finality until the NPA expires by its terms in late 2010 and as long as the USAO determines that Epstein has complied with those terms and conditions. The threat of criminal prosecution against Epstein by the USAO continues presently and through late 2010. The USAO possesses the right to declare that the agreement has been breached, give Epstein's counsel notice, and attempt to move forward with the prosecution. Moreover, the NPA does not provide Epstein with any protection from criminal investigation or prosecution in any federal district other than the Southern District of Florida.

20. Additionally, the underlying criminal investigation that led to the NPA was focused as well on violations of 18 U.S.C. 1952. This statute titled the Interstate and Foreign travel or Transportation in Aid of Racketeering Enterprises, has the following underlying criminal elements - “. . . *travels in interstate or foreign commerce* or uses the mail or any facility in interstate or foreign commerce, with intent to. . . (1) distribute the proceeds of any unlawful activity; or (2) commit any crime of violence to further any unlawful activity; or (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity, all in connection with, among other things, ‘prostitution’. (emphasis added). Clearly, the request for travel information (or other form of communications by telephone, cellular, e-mail or schedules or calendars that could authenticate same) would be a link in the chain to further any investigation of this statute.

#### **Application Of The 5<sup>th</sup> Amendment**

21. In the instant case, it is evident from the requests themselves, the allegations in the various Complaints, and the facts and circumstances surrounding these

cases, that to demand from Epstein a more particularized showing, requires Epstein to walk a thin line with regard to “surrender[ing] the very protection which the privilege is designed to guarantee.” Hoffman, 341 U.S. at 479. The United States Supreme Court has made clear that the scope of the Fifth Amendment Privilege also encompasses the circumstance where “the act of producing documents in response to a subpoena (or production request) has a compelled testimonial aspect.” United States v. Hubbell, 530 U.S. at 36; see also Fisher v. United States, 425 U.S. 391 (1976); McCormick on Evidence, Title 6, Chap. 13. *The Privilege Against Self-Incrimination*, §138 (6<sup>th</sup> Ed.). The “implicit authentication” rationale appears to be the prevailing justification for the Fifth Amendment's application to documentary subpoenas, which is no different from producing documents responsive to a request for production. See U.S. v Hubbell, 530 U.S. 27, 36 (2000); Schmerber v. California, 384 U.S., 757, 763-764, (1966) (“the privilege reaches . . . the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers); Couch v. United States, 409 U.S. 322, 344-46 (1973) (the person complying with the subpoena “implicitly testifies that the evidence he brings forth is in fact the evidence demanded”); People v. Defore, 242 N.Y. 13, 27 (1926) (“A defendant is ‘protected from producing his documents in response to a Subpoena duces tecum, for his production of them in court would be his voucher of their genuineness.’ There would then be ‘testimonial compulsion’”).

22. As stated, in responding to each request, Epstein would be compelled to provide assertions of fact, thereby admitting that such documents existed and further admitting 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 v. United States, 341 U.S. 479, 71 S.Ct. 814 (1951). As such, the act of production might not only provide evidence to support a conviction, but also a link in the chain of evidence for prosecution. Importantly, such compulsion to produce is the same as being compelled to testify. Thus, in those instances where the existence and/or location of the requested documents are unknown, or where the production would “implicitly authenticate” the requested documents, the act of producing responsive documents is considered “testimonial” and is protected by the Fifth Amendment. In re Grand Jury Subpoena, 1 F.3d 87, 93 (2<sup>nd</sup> Cir. 1993); see also Fisher v. U.S., 425 U.S. 391, 410 (1976)(issue expressed as whether compliance with a document request or subpoena “tactically conceded” the items authenticity, existence or possession by defendant). Even more egregious is that fact that producing or responding to the Specified Requests could result in self-incrimination and potential prosecution.

23. The United States Supreme Court has expressly encompassed the innocent citizen as well as the guilty within the ambit of Fifth Amendment protections (i.e., that Epstein may deny any allegation that he violated either of the above-described federal statutes is not in conflict with his constitutional right not to be compelled by requests to make disclosures that would further any investigation against him or incriminate him.) The Fifth Amendment privilege against self incrimination is accorded “liberal construction,” Hoffman, 341 U.S. at 486, and extends not only to answers that would in themselves support a criminal conviction, but extends also to those answers (or responses as in the instant matter) that would furnish a link in the chain of evidence needed to

prosecute the claimant for a crime. *Id.* 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). In practice, the Fifth Amendment’s privilege against self-incrimination “permits a person not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.” *Edwin v. Price*, 778 F.2d 668, 669 (11<sup>th</sup> Cir. 1985), citing *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)). Thus, 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.” *United States v., Neff*, 615 F.2d 1235, 1239 (9<sup>th</sup> Cir.), *cert. denied*, 447 U.S. 825 (1980). “The claimant must [also] be ‘confronted by substantial and ‘real,’ and not merely trifling or imaginary, hazards of incrimination.” *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980). Accordingly, responses to the requests propounded upon Epstein would provide information which is protected by the privilege i.e., “the responses [c]ould merely provide a ‘lead or clue’ to evidence having a tendency to incriminate [Epstein]” *United States v., Neff*, 615 F.2d 1235, 1239 (9<sup>th</sup> Cir.), *cert. denied*, 447 U.S. 825 (1980).

### **Brief Conclusion**

For all of the foregoing reasons, this Court should sustain Epstein’s objections to the Specified Requests and uphold Epstein’s right to assert his 5<sup>th</sup> Amendment Privilege in connection with same.

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



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