

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

CASE NO.: 50-2009-CA-040800-XXXX-MBAG
CIVIL DIVISION "AG"

JEFFREY EPSTEIN,

Plaintiff,

v.

SCOTT ROTHSTEIN, etc., et al.,

Defendant(s).

**ORDER DIRECTING PLAINTIFF TO PRODUCE A PRIVILEGE LOG
FOR AN IN CAMERA REVIEW OF PLAINTIFF'S ASSERTED PRIVILEGES
(AND SETTING STATUS CONFERENCE)**

THIS CAUSE came before the Court on Plaintiff/Counter-Defendant Jeffrey Epstein's (the "Plaintiff") Objections to Defendant/Counter-Plaintiff's Request for Production and Net Worth Interrogatories. This Court, having carefully reviewed the Plaintiff's objections and all applicable legal authority, and being otherwise fully advised in the premises does hereby determine as follows:

BACKGROUND

On March 12, 2013, this Court entered an Order requiring the Plaintiff to file a detailed privilege log in response to Defendant/Counter-Plaintiff Bradley Edwards' (the "Defendant") financial discovery requests for document production. The Order stated that the Plaintiff was not required to list any documents on the privilege log that he asserted were protected by his constitutional privilege against self-incrimination. The Plaintiff responded to this Court's Order by filing a privilege log wherein he asserted a Fifth Amendment privilege against self-incrimination as to essentially every document request, as well as asserting that many documents were protected by attorney-client privilege, accountant-client privilege, trade secret privilege,

work product privilege, and third party privacy rights. In addition to asserting the aforementioned privileges against the Defendant's document production requests, the Plaintiff also asserted the same privileges against many of the Defendant's interrogatories.

The Plaintiff's Fifth Amendment objections were based upon the assertion that the identification and certification of the existence of certain documents would be self-incriminating. Because of the Plaintiff's assertion that he could not identify the requested documents, the Plaintiff did not provide to this Court a basis upon which to substantiate his non-constitutional claims of privilege. On April 15, 2013, the Defendant filed his Response to Epstein's Objections to Edwards' Request for Production and Net Worth Interrogatories wherein he requested that this Court require a new privilege log for an *in camera* review to determine whether the Plaintiff's non-constitutional claims of privilege are valid.

LEGAL ANALYSIS

The Plaintiff has asserted a Fifth Amendment privilege against self-incrimination as to essentially every request to produce documents and against the majority of the Defendant's interrogatory requests. Because the validity of the Plaintiff's Fifth Amendment objections are based upon the nature of the underlying act of compulsion, the Plaintiff's objections are best divided into three categories: (A) document requests directed towards the Plaintiff personally, (B) document requests directed towards the Plaintiff as a custodian of business records, and (C) interrogatory requests. Accordingly, each of these categories is considered in turn.

A. Fifth Amendment Privilege in the Context of the Plaintiff's Production of Documents as an Individual.

The Plaintiff has responded to virtually every document request from the Defendant by asserting his Fifth Amendment privilege against self-incrimination. A litigant may assert, in the context of civil litigation, a Fifth Amendment privilege against self-incrimination as to

testimonial and communicative evidence. See *Fisher v. United States*, 425 U.S. 391 (1976); *Boyle v. Buck*, 858 So. 2d 391, 392-93 (Fla. 4th DCA 2003). With respect to the production of documents, however, the Fifth Amendment will not apply simply because the requested documents will incriminate the respondent. See *Fisher*, 425 U.S. at 409-10. Instead, the Fifth Amendment shields a respondent from document production when the compulsory *act of production itself* is equivalent to incriminating testimonial evidence. See *id.* at 411-12.

Before a court can consider whether the act of producing documents is equivalent to incriminating testimony, a court must first determine whether the act of production results in any testimony at all. See *id.* at 392-99. The United States Supreme Court considered circumstances where the act of production was not testimonial in *Fisher v. United States*. *Id.* at 411-12. In *Fisher*, the requested documents consisted of work papers belonging to an accountant but in the possession of the respondent-taxpayer. *Id.* at 395. The Court determined that the respondent-taxpayer's act of producing the documents was not testimonial because (1) the documents were not prepared by the taxpayer, (2) the documents were of the type typically created by accountants, (3) the documents had been created voluntarily, and (4) the existence and location of the requested documents were a foregone conclusion. *Id.* at 411. The Court considered the act of production in *Fisher* to be an act of surrender, not an act of testimony. See *id.* at 411-12.

The Supreme Court considered a different set of facts where the act of producing documents was testimonial in *United States v. Hubbell*. *United States v. Hubbell*, 530 U.S. 27 (2000). In *Hubbell*, the government requested over 13,000 pages worth of documents without knowing what the discovery request would produce. See *id.* at 41-42. The Court described the facts that influenced its decision to classify the respondent's production of documents as testimonial:

Given the breadth of the description of the 11 categories of documents called for by the subpoena, the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions. The assembly of literally hundreds of pages of material in response to a request for “any and all documents reflecting, referring, or relating to any direct or indirect sources of money or other things of value received by or provided to” an individual or members of his family during a 3-year period . . . is the functional equivalent of the preparation of an answer to either a detailed written interrogatory or a series of oral questions at a discovery deposition. Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a “lead to incriminating evidence,” or “a link in the chain of evidence needed to prosecute.

Id. Notably, the government argued in *Hubbell* that the respondent was a sophisticated businessman and, like the accountant’s working papers in *Fisher*, it was expected that the respondent would have the type of tax and accounting documents it had requested. *See id.* at 44. The Court rejected this analogy by stating that, unlike in *Fisher*, the government had no independent prior knowledge of the existence or whereabouts of the documents produced by the respondent. *See id.* at 44-45 (“The Government cannot cure this deficiency through the overbroad argument that a business man such as the respondent will always possess general business and tax records that will fall within the broad categories described in this subpoena.”). The Court noted that the nature of the testimony inherent in the act of production was the respondent’s certification as to the existence, custody, control, and authenticity of the documents. *Id.* at 32, 37.

The Supreme Court has recognized that determining whether an act of production is incriminating necessarily depends upon case-specific facts and circumstances. *See Fisher*, 425 U.S. at 410. In the instant case, the Defendant’s requests for production vary in scope. Some of the Defendant’s document requests are broad, which resemble the requests in *Hubbell*, and some

of the document requests are specific, which resemble the requests in *Fisher*. Further, some of the Defendant's document requests are of the type that the Plaintiff is certain to possess, as was the case in *Fisher*, while other document requests will likely generate an unknown result, as was the case in *Hubbell*. Thus, this Court finds that some of the Defendant's requests for production have a high probability of resulting in testimony on behalf of the Plaintiff and some of the requests for production have a low probability of resulting in testimony on behalf of the Plaintiff. Even if the Plaintiff's act of production does equate to testimony, however, the Plaintiff must still show, via an *in camera* inspection, that the Plaintiff has reasonable cause to fear that the testimony inherent in the act of producing the documents would be self-incriminating. See *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *Austin v. Barnett Bank*, 472 So. 2d 830, 830 (Fla. 4th DCA 1985).

B. Fifth Amendment Privilege in the Context of the Plaintiff's Production of Documents as a Custodian of Business Records.

The Plaintiff has raised Fifth Amendment objections to document requests targeted towards business records in his possession. A corporation (or other artificial business entity) has no Fifth Amendment rights. See, e.g., *Grant v. United States*, 227 U.S. 74 (1912); *Hale v. Hinkel*, 201 U.S. 43 (1906); *Fineberg v. United States*, 392 F.2d 417 (9th Cir. 1968). In the rare situation where a custodian of business records cannot produce requested documents without the act of production qualifying as self-incriminating testimony under the analysis of *Fisher* and *Hubbell*, the business is not relieved of the obligation to comply and must find or appoint another agent to produce the documents.¹ See *Bellis v. United States*, 417 U.S. 85 (1974); *In re Grand Jury Subpoenae Duces Tecum*, 769 F.2d 52, 57 (2d Cir. 1985). Thus, this Court finds that even if some of the Defendant's requests for business documents results in testimony on behalf of the

¹ A sole proprietorship may be the only exception to this rule. See *in re Matter of Grand Jury Empanelled*, 597 F.2d 851, 859 (3d Cir. 1979).

Plaintiff, and even if this Court determines that the Plaintiff's act of producing such business documents is self-incriminating, the underlying business entity that owns the documents cannot be relieved of the obligation to produce.

C. Fifth Amendment Privilege in the Context of the Plaintiff's Answers to Interrogatories.

The Plaintiff has asserted his Fifth Amendment privilege against self-incrimination in connection with many of the Defendant's interrogatory requests. Unlike a request to produce documents, the testimony inherent in an interrogatory is the answer itself. Therefore, this Court's analysis towards the Plaintiff's objections involves a standard Fifth Amendment analysis focused on the nature of the question asked and whether the respondent has reasonable cause to fear that answering the question may result in self-incrimination.² *Hoffman*, 341 U.S. at 486. To sustain the privilege "it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id.* at 486-87. A court may compel an answer if, after considering the foregoing, it clearly appears to the court that the witness (or in this case, the respondent) was mistaken. *See id.* at 486 (citing *Temple v. Commonwealth*, 75 Va. 892, 899 (1880)).

CONCLUSION AND RULING

With respect to the Plaintiff's act of producing documents, even if the Plaintiff's actions do qualify as individual testimony under *Fisher* and *Hubbell*, this Court must still determine whether the Plaintiff has a reasonable basis to fear self-incrimination as a result of the testimony inherent in his act of document production. *Austin v. Barnett Bank*, 472 So. 2d 830, 830 (Fla. 4th

² Article I, Section 9, of the Florida Constitution provides protection no greater than that afforded under the federal constitution. *See Commitment of Smith v. State*, 827 So. 2d 1026 (Fla. 2d DCA 2002); *State v. Tsavaris*, 382 So. 2d 56, 68 (Fla. 2d DCA 1980).

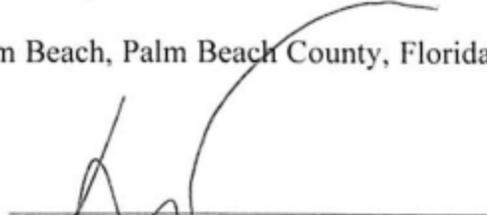
DCA 1985) (“Where a claim of privilege is asserted, the trial court should hold an *in camera* inspection to review the discovery requested and determine whether assertion of the privilege is valid.”) Further, because the Plaintiff has asserted that providing the Court with a standard privilege log to substantiate his claims of privilege would incriminate him, this Court must conduct an *in camera* inspection to both preserve the Plaintiff’s constitutional rights and to determine whether the privilege does in fact apply. *See Bailey v. State*, 100 So. 3d 213, 213 (Fla. 3d DCA 2012); *Del Carmon Calzon v. Capital Bank*, 689 So. 2d 279, 281 (Fla. 3d DCA 1996); *State Dep’t of Ins. v. Schuler*, 510 So. 2d 622, 623 (Fla. 3d DCA 1987) (noting a “mere conclusory assertion that [the respondent’s] constitutional privileges against self-incrimination are implicated is insufficient to discharge [the respondent’s] burden of demonstrating that there exists a reasonable or realistic possibility that production of [the respondent’s] remaining business records will lead to criminal prosecution). Therefore, a final determination on the validity of the Plaintiff’s Fifth Amendment and other non-constitutional claims of privilege will first require the Plaintiff to provide this Court with a privilege log substantiating his fear of self-incrimination under *Fisher* and *Hubbell* via an *in camera* inspection as well as the basis for the other privilege objections.

This Court finds that even though some of the Defendant’s requests for production are unlikely to result in testimony on behalf of the Plaintiff, in the interest of preserving the Plaintiff’s constitutional rights, this Court will conduct an *in camera* inspection as to all of the disputed documents. In the event that this Court is unable to determine from an *in camera* inspection of a privilege log whether the Plaintiff’s claims of privilege are valid, the Court may hold an ex-parte hearing with the Plaintiff to further clarify the Plaintiff’s objections and allow the Plaintiff to further substantiate his claims of privilege. Finally, because the Plaintiff’s

assertion of Fifth Amendment privilege has heretofore caused the Plaintiff to fail to substantiate his assertions of non-constitutional privileges, this Court finds that the Plaintiff shall include in a privilege log the basis for the Plaintiff's non-constitutional claims of privilege in addition to the basis for his Fifth Amendment claim of privilege. It is therefore

ORDERED and ADJUDGED that the Plaintiff will provide to this Court for an *in camera* review a detailed privilege log for all documents not previously and fully provided to the Defendant containing: (1) a list of the requested documents which (2) identifies each document, (3) clearly indicates all asserted privileges for each document, and (4) describes the basis for each asserted privilege within thirty (30) days from the date of this Order. A Status Conference is hereby scheduled for **Thursday, May 23, 2013 at 8:45 a.m., Courtroom 9C**, Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, Florida.

DONE and ORDERED in Chambers in West Palm Beach, Palm Beach County, Florida
this 17th day of May, 2013.



DAVID CROW
CIRCUIT JUDGE

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