

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80119-MARRA/JOHNSON

JANE DOE NO. 2,

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.

Related Cases:

08-80232, 08-80380, 08-80381, 08-80994,
08-80993, 08-80811, 08-80893, 09-80469,
09-80591, 09-80656, 09-80802, 09-81092,

**PLAINTIFFS JANE DOES 2-8' MEMORANDUM IN
OPPOSITION TO DEFENDANT'S MOTION FOR RECONSIDERATION
AND RULE 4 REVIEW AND APPEAL OF MAGISTRATE
JUDGE'S ORDER ON NET WORTH DISCOVERY (DE 480)**

Plaintiffs Jane Does Nos. 2-8 ("Plaintiffs"), by and through undersigned counsel, hereby file this Memorandum in Opposition to Defendant's Motion for Reconsideration and Rule 4 Review and Appeal of Magistrate Judge's Order on Net Worth Discovery (DE 480), as follows:

Introduction

The Magistrate Judge's Order of March 4, 2010 (DE 480), denies Plaintiffs all discovery on Defendant's financial status and history, with the sole exception of Plaintiffs' document request for federal and state income tax returns. (Order, pp. 8-9). Defendant objects to the Magistrate Judge's Order to the extent it requires production of tax returns, and thereby seeks to deny Plaintiffs *all* discovery on the Defendant's net worth.

The Magistrate Judge correctly held that the act of producing tax returns is not protected by the Fifth Amendment privilege against self-incrimination because the existence of the tax returns is known to the government or is a foregone conclusion. (Order, p. 8). The case law is clear that the act of producing tax returns is not privileged. See United States v. Hubbell, 120 S.Ct. 2037, 2043 530 U.S. 27, 35 (2000).

Defendant further argues in the alternative that tax returns are protected from discovery in these cases because they are not relevant and there is no compelling need for this discovery. According to Defendant, there is a heightened burden on a party seeking to compel the production of tax returns in civil cases. A number of the district courts in the Eleventh Circuit have rejected such a heightened burden for discovery of tax returns. Rather, the broad relevance standard under [REDACTED], 26 is applicable, as in any other discovery matter. The Magistrate Judge was not in error in failing to apply a heightened standard. In any event, as Defendant recognizes, Plaintiffs seek recovery of punitive damages for Defendant's intentional torts under state law. Defendant's financial condition and history are plainly relevant to the issue of punitive damages. One must wonder how in good faith Defendant can contend that there is no compelling need for Plaintiffs to obtain Defendant's tax returns when Defendant has asserted the Fifth Amendment privilege in response to each and every net worth document request and interrogatory propounded by Plaintiffs.¹

For the reasons set forth herein, Plaintiffs request that the Defendant's Motion for Reconsideration and Request for Rule 4 Review and Appeal be denied, and that the tax return materials responsive to Plaintiffs' document request no. 1 be ordered to be produced forthwith.

¹ Defendant similarly asserted a Fifth Amendment privilege as to all deposition questions relating to net worth.

Argument

I. THE ACT OF PRODUCTION OF TAX RETURNS IS NOT PROTECTED BY THE FIFTH AMENDMENT PRIVILEGE

The Plaintiffs made the following document request, to which Defendant asserted the Fifth Amendment privilege:

Request No. 1: All Federal and State income tax returns, including all W-2 forms, 1099 forms and schedules, for tax years 2003-2008.

The Magistrate Judge rejected the Defendant's privilege assertion as to tax returns, holding that the act of producing tax returns was not testimonial because the government was obviously in possession of the documents and its prior knowledge of the tax returns was a foregone conclusion. (Order, pp. 8-9). In so holding, the Magistrate Judge applied the act of production doctrine set forth in Fisher v. United States, 425 U.S. 391, 410 (1976) and United States v. Hubbell, 530 U.S. 27, 35-36 (2000). As noted by the Magistrate Judge, "Defendant cannot reasonably and in good faith argue that in producing these documents to Plaintiff he will somehow be incriminating himself." (Order, p. 9). Yet Defendant, incredibly, argues just that. He asserts that production of the tax returns would "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 . . ." (Appeal, p. 5).

In Hubbell, the Supreme Court made express reference to tax returns in discussing documents that cannot be protected by the Fifth Amendment privilege under the act of production doctrine:

[T]he fact that incriminating evidence may be the byproduct of obedience to a regulatory requirement, *such as filing an income tax return*, maintaining required records, or reporting an accident, *does not clothe such required conduct with the testimonial privilege.*

120 U.S. at 2043, 530 U.S. at 35 (footnotes omitted) (emphasis supplied). Accord United States v. Hammes, 3 F.3d 1081, 1083 (7th Cir. 1993) (“[w]e reject [defendant’s] compulsory self-incrimination claim because the government may use voluntarily filed tax returns against a defendant without violating the Fifth Amendment”). See also Garner v. United States, 96 S.Ct. 1178, 424 U.S. 648 (1976) (holding that disclosures in tax returns are not compelled incriminations and may be used as evidence in criminal prosecution); Ebay, Inc. v. Digital Point Solutions, Inc., 2010 WL 147967 *8 (██████ Cal. 2010) (holding that a person cannot incriminate himself by turning over a document already in the government’s possession); Federal Savings and Loan Ins. Corp. v. Hardee, 686 F. Supp 885 (N.D. Fla. 1988) (holding that personal income tax returns and supporting schedules are not protected by the “act of production” doctrine under Fisher).

As an alternative to finding that the Fifth Amendment privilege does not apply because the act of producing documents is not testimonial and communicative, courts have invoked the “required records” exception to the act of production doctrine. See Federal Saving & Loan Ins. Corp. v. Rodrigues, 717 F. Supp. 1424, 1427 (██████ Cal 1988) (“required records” exception is a distinct basis to deny Fifth Amendment privilege alternative to the “foregone conclusion” rationale under Fisher). The “required records” exception defeats the Fifth Amendment privilege where: “(1) because of the public aspect of the required records the individual admits little of significance by their production; and (2) by doing business in an area where the government requires record keeping, and individual may be deemed to have waived the Fifth Amendment privilege as to the production of those records.” In re Grand Jury Subpoena, 21 F.3d 226, 229 (8th Cir. 1994). The Magistrate Judge did not rely on the “required records” exception in rejecting Defendant’s assertion of Fifth Amendment privilege to production of Defendant’s tax

returns. Nonetheless, Defendant contends that the “required records” exception does not apply to tax returns because they cannot be accessed by the public. This is wrong, however, as the “required records” exception requires only that there be “public aspects” to the documents at issue. Id. Numerous courts that have addressed this issue have found that tax returns have “public aspects”. See Rodrigues, 717 F. Supp. at 1426-27 (citing cases); accord Doe v. United States, 711 F.2d 1187, 1191 (2d Cir. 1983). As a result, the “required records” exception applies to the production of tax returns. In Rodrigues, the Court denied the Fifth Amendment privilege for the act of producing tax returns under the “required records” exception, noting that “records filed with a public body pursuant to a valid regulatory scheme have been held to have public aspects.” Id. at 1427. Accordingly, the fact that federal tax returns cannot be accessed by the public does not aid the Defendant. Accord Resolution Trust Corp. v. Lopez, 794 F. Supp. 1, 3 (██████, 1992).

Thus, there are two alternative grounds for holding that Defendant’s assertion of the Fifth Amendment privilege to production of tax returns is invalid: (1) the tax returns are in the possession of the government, their existence is a foregone conclusion, and there is no risk of “implicit authentication” by Defendant’s production of these documents; or (2) tax returns fall within the “required records” exception to the act of production doctrine, and are thus not protected by the Fifth Amendment. Under either of these grounds, the Defendant’s tax returns are not privileged and must be produced.

Defendant also objects to the Magistrate Judge’s decision on the basis that Plaintiffs’ request is not limited to personal tax returns, but also encompasses “tax returns filed by any business in which Epstein has an interest in.” (Appeal, p. 4). Defendant fails to recognize, however, that the Fifth Amendment does not apply to the documents of a corporation or other

business entity. Broswell v. United States, 108 S.Ct. 2284, 487 U.S. 99 (1988). It should be beyond dispute that all *corporate* records, including tax returns, in Defendant's possession, custody or control, are discoverable and not protected by the Fifth Amendment.²

II. THERE IS NO HEIGHTENED BURDEN FOR DISCOVERY OF TAX RETURNS

Defendant asserts that there is a heightened burden on a party seeking discovery of tax returns, requiring that party to show not only relevance, but also that "a compelling need for the tax returns exists because the information contained therein is not otherwise available." (Appeal, p. 8). A number of district courts in Florida, however, have held that there is no heightened burden to obtain discovery of tax returns, and a party does not need to show a "compelling need." Preferred Care Partners Holding Corp. v. Humana, Inc., 2008 WL 4500258 (██████, Fla. 2008) (citing cases relying upon Maddow v. Procter & Gamble Co., 107 F.3d 846 (11th Cir. 1997), in rejecting a heightened burden); accord Ruskin Co. v. Greenbeck Fan Corp., 2009 WL 383349 (██████, Fla. 2009). Significantly, in both Preferred Care and Ruskin the Court affirmed the decision of a Magistrate Judge, holding that, despite an arguable split of authority, the Magistrate Judge's decision was not "contrary to law." Id. Likewise, the Magistrate Judge's decision in this case concerning production of tax returns is consistent with authority in this District and the Eleventh Circuit, and thus should be affirmed.

² As discussed below, Defendant's financial status and history are relevant to the issue of punitive damages. It appears from evidence in this case that Defendant Epstein earns and funnels income among a labyrinth of business entities. The financial status and history of these closely held entities is essential and necessary discovery on the Defendant's net worth.

**III. EVIDENCE OF DEFENDANT'S FINANCIAL
STATUS AND HISTORY IS RELEVANT TO
PUNITIVE DAMAGES, AMONG OTHER ISSUES**

Defendant does not go so far as to contend that the discovery of his tax returns is not relevant under [REDACTED]. 26. Defendant only argues that the Magistrate Judge did not address the relevancy standard in her Order. (Appeal, p. 8). As a result, Defendant does nothing to show that the Magistrate Judge's Order as to tax returns is clearly erroneous or contrary to law. In any event, it is abundantly clear that Defendant's financial status and history are relevant to punitive damages, among other issues in these cases, and in this regard the Defendant's tax returns are pertinent and discoverable. Tennant v. Charlton, 377 so.2d 1169 (Fla. 1979) (holding that party may obtain tax returns for purposes of net worth discovery on issue of punitive damages). See also State v. O'Malley, 53 S.W. 3d 623 (Mo. App. 2001) ("[i]t is well settled that when a plaintiff seeks punitive damages against a defendant, evidence of the defendant's financial status is both relevant and admissible"); Interstate Narrow Fabrics, Inc. v. Century USA, Inc., 2004 WL 444 570 ([REDACTED], [REDACTED], 2004) (holding that tax returns are relevant to the jury's determination of the amount of punitive damages to award); E.J. Lavino & Co. v. Universal Health Services, Inc., 1991 WL 275767 ([REDACTED], Pa. 1991) ("[m]ost courts that have considered this issue have held that a plaintiff seeking punitive damages may discovery information pertaining to a defendant's net worth").

Even assuming that the "compelling need" standard were applicable for discovery of tax returns, clearly in this case there is a compelling need.³ Defendant has provided *no* net worth

³ "[T]he burden to identify an alternative source of the information lies within the resisting party." Interstate Narrow, 2004 WL 444570 at *2. Epstein has not even attempted to show that information from his tax returns is available from another source in light of his blanket Fifth Amendment privilege assertion to all net worth discovery.

discovery, asserting a blanket Fifth Amendment privilege. It is plain, therefore, that the information contained in the tax returns is not otherwise available. Defendant nonetheless contends that there exists an "alternative" - not to discovery of the necessary information, but through his offer to "stipulate" to a net worth of over \$50 million. Of course, a stipulation requires the consent of the parties, and Plaintiffs have never even been presented with a proposed stipulation; nor is it clear why Plaintiffs would ever stipulate to a \$50 million floor on Defendant's net worth when all indications are that Defendant's net worth is exponentially higher. In any event, it seems beyond dispute that Defendant's tax returns are relevant and discoverable, either under a straight relevance test under [REDACTED], 26 or a heightened "compelling need" standard.

Conclusion

Based on the foregoing, the Magistrate Judge's Order as to Defendant's production of tax returns in response to Plaintiffs' document request no. 1 is not clearly erroneous and not contrary to law. As a result, the Magistrate Judge's Order as to tax returns should be affirmed. Plaintiffs respectfully request that the documents responsive to Plaintiffs' document request no. 1 be ordered to be produced forthwith.

Respectfully submitted,

By: s/ Stuart S. Mermelstein
Stuart S. Mermelstein (FL Bar No. 947245)
[REDACTED]
Adam D. Horowitz (FL Bar No. 376980)
[REDACTED]
MERMELSTEIN & HOROWITZ, [REDACTED].
Attorneys for Plaintiffs
18205 Biscayne Blvd., Suite 2218
Miami, Florida 33160
Tel: (305) 931-2200
Fax: (305) 931-0877

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2010, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day to all parties on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Stuart S. Mermelstein

SERVICE LIST
DOE vs. JEFFREY EPSTEIN
United States District Court, Southern District of Florida

Jack Alan Goldberger, Esq.
[REDACTED]

Robert D. Critton, Esq.
rcritton@bclclaw.com

Bradley James Edwards
[REDACTED]

Isidro Manuel Garcia
isidrogarcia@bellsouth.net

Jack Patrick Hill
[REDACTED]

Katherine Warthen Ezell
[REDACTED]

Michael James Pike
[REDACTED]

Paul G. Cassell
cassellp@law.utah.edu

Richard Horace Willits
[REDACTED]

Robert C. Josefsberg
[REDACTED]