

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 08-CV-80381-MARRA-JOHNSON

JANE DOE NO. 5

Plaintiff,

v.

JEFFREY EPSTEIN,

Defendant.

**DEFENDANT EPSTEIN'S MOTION TO COMPEL PLAINTIFF,
JANE DOE NO. 5, To ANSWER DEFENDANT'S FIRST SET OF
INTERROGATORIES AND TO OVERRULE OBJECTIONS, AND
FOR AN AWARD OF DEFENDANT'S REASONABLE EXPENSES**

Defendant, JEFFREY EPSTEIN, by and through his undersigned attorneys, moves this Court for an order compelling Plaintiff, JANE DOE No. 5 to answer Defendant's First Set of Interrogatories and to overrule her objections asserted in Plaintiff's Answers To Defendant's First Interrogatories, dated January 26, 2009. Defendant further seeks an award of his reasonable expenses, including expenses, associated with the making of this motion. Rule 37, Fed.R.Civ.P. (2008); Local Gen. Rules 7.1 and 26.1 H (S.D. Fla. 2008). In support of his motion, Defendant states:

Introduction

Prior to the filing of this motion, counsel for Defendant and counsel for Plaintiff corresponded with each other and were able to resolve some of the discovery issues related to Defendant's First Interrogatories and Plaintiff's answers and objections thereto. By letter, dated March 3, 2009, the Plaintiff agreed to withdraw her "General Objections" set forth in her response. As well, issues as to interrogatories nos. 10 and 14 are presently resolved.

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Also, Defendant has filed simultaneously with this motion a Motion To Compel directed to certain of Plaintiff's Responses to Defendant's First Request To Produce, also dated January 26, 2009, and which addresses identical discovery issues. Both motions should be determined at the same time.

Motion To Compel Answers to Interrogatories Nos. 18, 19, 20, and 21

18. List separately the names, addresses and phone numbers of all males, excluding Mr. Epstein, with whom you have had sexual activity since age 10 (by year) up through your current age. Describe the nature of sexual activity, the date(s) and whether you received money or other consideration from the person.

19. List separately the names, addresses and phone numbers of all males, excluding your claims against Mr. Epstein, whom you have claimed (formally or informally) committed sexual assault or battery on you since age 10 (by year) up through your current age. Describe the nature of sexual assault or battery, the date(s) and whether you received money or other consideration from the person.

20. State the names, addresses and phone numbers of all males, excluding your claims against Mr. Epstein, whom you have claimed (formally or informally) committed lewd or lascivious conduct to you since age 10 (by year) up through your current age. Describe the lewd or lascivious conduct, the date and whether you received money or other consideration from the person.

21. State the names, addresses and phone numbers of all males, excluding your claims against Mr. Epstein, whom you have claimed (formally or informally) committed lewd or lascivious exhibition to you since age 10 (by year) up through your current age. Describe the lewd or lascivious exhibition, the date and whether you received money or other consideration from the person.

Plaintiff asserted the identical answer to each of the above stated interrogatories:

Answer:

Plaintiff objects to this interrogatory as vague, overly broad, unduly burdensome, harassing, and not reasonably calculated to lead to discovery of admissible evidence. Moreover, this interrogatory is outrageous, offensive and apparently posed for the purpose of intimidating the victim. Fed.R.Evid. 412 makes any answer to this interrogatory inadmissible, and nothing in the answer could plausibly lead to discovery of admissible evidence.

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Legal Argument Supporting Entitlement to Discovery

Plaintiff does not make a relevancy objection, but instead claims that the requests are “not reasonably calculated to lead to the discovery of admissible evidence,” claiming that such “evidence ... would not be admissible under Fed.R.Evid. 412.” Plaintiff further claims, without making any showing in her answer and without moving for a protective order in accordance with Rule 26(c) and Local Gen. Rule 26.1 H (S.D. Fla. 2008), that the interrogatory is “harassing,” “outrageous, offensive and is apparently posed for the purpose of intimidating Plaintiff.”

It is well settled that relevant information is discoverable, even if not admissible at trial, so long as the discovery is reasonably calculated to lead to the discovery of admissible evidence. Rule 26(b)(1), Fed.R.Civ.P.; Donahay v. Palm Beach Tours & trans., Inc., 242 F.R.D. 685 (S.D. Fla. 2007). Contrary to Plaintiff’s assertion, Rule 412 does not automatically result in a determination that such sexual history and sexual activity/behavior information is never admissible. In fact, written into the Rule are the procedures to follow in determining when such information is admissible at trial. The Advisory Committee Notes to Rule 412, Fed.R.Evid, makes clear that the procedures to determine admissibility of an alleged victim’s/plaintiff’s sexual conduct or activity in civil cases does not apply to discovery of such information. Rather, discoverability of such information is governed by Rule 26, Fed.R.Civ.P., pursuant to which the scope of discovery is broad. Donahay, supra, at 686, and cases cited therein. “Parties may obtain discovery regarding any matter, not privileged, which is relevant to the claims or defense of any party involved in the pending action.” Id.

Rule 412, entitled “Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition,” provides in relevant part -

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(a) Evidence generally inadmissible.--The following evidence is not admissible in any civil ... proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.—

* * * * *

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) **Procedure to determine admissibility.**--

(1) A party intending to offer evidence under subdivision (b) must—

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

In confirming that Rule 412 does not control the discoverability of such information, the Advisory Committee Notes (1994 Amendments) state -

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by Fed. R. Civ. P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed. R. Civ. P. 26 (c) to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless **the party seeking discovery makes a showing that**

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the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. *Cf. Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 962-63 (8th Cir. 1993) (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). **Confidentiality orders should be presumptively granted as well.**

(Emphasis added).

In accordance with Rule 412 and Rule 26, the discovery sought regarding Plaintiff's sexual activity with males, including whether she received any compensation or consideration therefore, in interrogatory no. 18, whether she claims other males committed sexual assault or battery on her in no. 19, whether she claims other males committed lewd and lascivious conduct to her in no. 20, and whether other males committed lewd or lascivious exhibition to her in no. 21, are all relevant to Plaintiff's damages claims and the type of injury she claims she has suffered. Defendant has no other means of obtaining such information and obtaining such information through Plaintiff will better protect the confidentiality until the Court can make a determination in accordance with the procedures under Rule 412(c) whether such information will be admissible at trial. See Rule 412(c) quoted above. Defendant will agree to an order keeping the confidentiality of the information obtained through discovery.

The evidence sought is relevant based on the facts and theories of this action. In her Second Amended Complaint, Plaintiff attempts to allege claims in Count I for "Sexual Assault and Battery," Count II for "Intentional Infliction of Emotional Distress," and in Count III for "Coercion and Enticement to Sexual Activity in Violation of 18 U.S.C.A. §2422," and seeks damages pursuant to 18 U.S.C. §2255(a). (Plaintiff alleges

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diversity of citizenship as a basis for this Court's jurisdiction. 2d Am. Complaint, ¶5).
Counts I and II are brought pursuant to state law.

In her complaint, Plaintiff alleges that "she has suffered and will continue to suffer severe and permanent traumatic injuries, including mental, psychological and emotional damages," "severe emotional distress," and "severe mental anguish and pain." She also seeks actual (Count III) and compensatory damages for her alleged injuries. 2d Am. Complaint, ¶¶21, 26-27, 33, and "Wherefore" clauses. In her answers to interrogatory no. 9, Plaintiff further states that:

Plaintiff has sustained mental and emotional injuries, including, but not limited to, depressive episodes, anger, low self-esteem, flashbacks, mood swings, lack of trust generally, and lack of trust of men (particularly of older men around her daughter). (Interrog. No. 9).

Plaintiff also alleges that "Epstein's scheme involved the use of young girls to recruit underage girls." "Epstein's plan and scheme 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. 2nd Am. Complaint, ¶8-11. According to the complaint allegations – "Upon information and belief Epstein has a sexual preference and obsession for underage minor girls." ¶8. The "girl would be led up a flight of stairs to a bedroom that contained a massage table ... The girl would be alone with EPSTEIN; "Epstein would then perform one or more lewd, lascivious and sexual acts, including masturbation and touching the girl's vagina." 2nd Am. Complaint, ¶11. Plaintiff alleges that "in 2002-2003," she, "then approximately 15-16 years old, fell into Epstein's trap and became one of his victims." ¶8, 12. Plaintiff alleges that "she was recruited to give Epstein a massage for monetary compensation." ¶12. She was brought with another girl to Epstein's Palm Beach mansion, and were led up a flight of

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stairs by Sarah Kellen to a room with a massage table. ¶12. Plaintiff and the other girl were directed to remove their clothes and give Epstein a massage; "While on the massage table, Epstein masturbated and touched both girls on their vaginas" ¶12. Plaintiff alleges that Epstein's actions constitute "sexual assault." ¶13, Count I – Sexual Assault and Battery.

The information sought is clearly relevant to the injuries and damages claimed by Plaintiff. The nature of her claimed injuries and damages are such that Defendant is entitled to evidence which would show the nature of her relationship with males, whether she has suffered other acts of sexual misconduct as alleged in her complaint, and whether she suffered injury and damages as a result of the other claimed sexual misconduct with males. See United States v. Bear Stops, 997 F.2d 451 (8th Cir. 1993)(Defendant charged with sexual abuse of six year old boy was entitled to admission of evidence relating to victim's sexual assault by 3 older boys to establish alternative explanation for why victim exhibited behavioral manifestations of sexually abused child.).

In further support of Defendant's motion, a copy of Balas v. Ruzzo, 703 So.2d 1076 (Fla. 5th DCA 1997), rev. denied, 719 So.2d 286 (Fla. 1998), is attached hereto as **Exhibit A** as it is on point to the discovery issues in this action, and the relevancy and discoverability of Plaintiff's history of sexual activity and any payment, therefore. See interrogatories 8, 22 and 30 propounded in the Balas case and footnote 1 herein.¹

¹ In Balas v. Ruzzo, supra, the Plaintiffs alleged a multicount complaint including claims for "coercion of prostitution" pursuant to §796.09, Fla. Stat.; for battery for the unwanted and offensive touching of petitioners' bodies; false imprisonment for physically confining the petitioners against their will; invasion of privacy; and intentional infliction of emotional distress.

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Additionally and significantly, in other pending state court civil actions against Defendant EPSTEIN attempting to assert similar claims and damages, the Circuit Court Judges have already ruled that such information is discoverable as it is relevant to the damages claims of Plaintiff. See **Composite Exhibits B and C** hereto. **Composite Exhibit B** are the Orders, dated February 23, 2009, entered in the case of A.C. v. Epstein, and Kellen, Case No. 502008CA025129 MB AI, 15th Judicial Circuit, In and For Palm Beach County, State of Florida, which granted Defendant's motion to compel therein directed to discovery identical to interrogatory no. 18 above, and to requests for production nos. 17 and 18 addressed below herein. (In the A.C. case, the Plaintiff answered without objection interrogatories identical to nos. 19, 20, and 21 herein.) **Composite Exhibit C** is a portion the transcript from a March 3, 2009 hearing on Defendant's motion to compel discovery in the case of Jane Doe II v. Epstein, and Kellen, Case No. 502008CA020614 MB AF, 15th Judicial Circuit Court, In and For Palm Beach County, State of Florida. Again, the Circuit Court Judge determined that the information sought is relevant to the issue of damages and, thus, discoverable.

WHEREFORE, Defendant requests that this Court grant his motion to compel and award his attorney's fees and costs, associated with this motion, in accordance with Rule 37, Fed.R.Civ.P., and applicable Local Rules.

Rule 7.1 Certification

I hereby certify that counsel for the respective parties communicated by letters in a good faith effort to resolve the discovery issues prior to the filing of this motion to compel. Some of the issues were resolved.



Robert D. Critton, Jr.
Attorney for Defendant Epstein

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Certificate of Service

I HEREBY CERTIFY that a true copy of the foregoing was electronically filed with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record identified on the following Service List in the manner specified by CM/ECF on this 9th day of April, 2009:

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