UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JANE DOE NO. 2, CASE NO.: 08-CV-80119-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

JANE DOE NO. 3, CASE NO.: 08-CV-80232-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

JANE DOE NO. 4, CASE NO.: 08-CV-80380-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

JANE DOE NO. 5, CASE NO.: 08-CV-80381-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

JANE DOE NO. 6, CASE NO.: 08-CV-80994-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

JANE DOE NO. 7, CASE NO.: 08- 80993-CIV-MARRA/JOHNSON

Plaintiff,

vs.

JEFFREY EPSTEIN,

Defendant.
_____/

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO EPSTEIN'S MOTION TO COMPEL RESPONSE TO FIRST REQUEST TO PRODUCE, OVERRULE OBJECTIONS AND FOR AN AWARD OF REASONABLE EXPENSES

Plaintiffs, JANE DOES 2-7, by and through their undersigned counsel, hereby file this Memorandum in Opposition to Epstein's Motion to Compel Response to First Request to Produce, Overrule Objections, and for an Award of Reasonable Expenses, and state as follows:

I. Introduction

Defendant Epstein served a Request for Production, which includes (Request #s 10, 11, 17 and 18) requests that seek to unearth all recordings and depictions of every instance of sexual conduct and activity which each Jane Doe might have engaged and documents evidencing the names and contact information of each sexual partner over the past nine years. Plaintiffs properly objected to these Requests, in that discovery on the sexual history of a childhood abuse victim is substantially limited in federal court; "courts should *presumptively* issue protective

orders barring discovery unless the party seeking discovery makes a showing that 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." See Fed. R. Evid. 412, Advisory Committee Notes to 1994 Amendments, subdivision (c). Defendant has made no such showing in his Motion to Compel to overcome this presumption. Accordingly, Defendant's Motion to Compel must be denied in its entirety.

Defendant also seeks in Request #1 "all tax returns and supporting documentation" dating back to 2002. Plaintiffs properly objected to this harassing and burdensome request, which is not reasonably calculated to lead to admissible evidence in the present sexual abuse case, particularly since Plaintiffs are not making a lost wages or lost income claim. Plaintiffs have already disclosed their entire employment history and the request at issue is far broader than necessary to determine Plaintiffs' employment or earnings history.

II. Argument

Initially, it must be brought to the Court's attention that Epstein's request for depictions or recordings of the plaintiff engaged in sexual or simulated sexual activity since the year 2000 includes materials which are unlawful for anyone to possess, particularly a registered sex offender such as Epstein. The notion that a registered sex offender is seeking child pornography should disturb this Court as much as it irks the Plaintiffs.

Epstein incorrectly argues that Fed.R.Evid 412 is strictly an evidentiary rule and that Rule 26(b) must be read exclusively to determine whether information about an abuse victim's sexual history is discoverable. The Rule 412 Advisory Committee Notes, however, instruct that Rule 412 affects not only the admissibility of evidence at trial, but must also "inform the discovery process." Barta v. City and County of Honolulu, 169 F.R.D. 132 (D. Haw. 1996). The

Committee Notes state, in relevant part, as follows:

> Courts should presumptively issue protective orders barring *discovery* unless the party seeking discovery makes a showing that 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.

Nowhere in Defendant's Motion is it explained how or why this presumption should be overcome. It is well established under Fed.R.Evid. 412 that a victim's past sexual behavior is wholly irrelevant to the credibility of her testimony, and that her prior and subsequent sexual activity with third parties has *no* bearing on the issue of whether she consented to or complied with the sexual acts charged. See United States v. Stone, 472 F.2d 909, 919 (5th Cir. 1973); Virgin Islands v. Jacobs, 634 F.Supp. 933, 936-37 (D. V.I. 1986) (policy of rule disallowing evidence to show character of assault victim); Dept. of Professional Regulation v. Wise, 575 So.2d 713 (Fla. 1st DCA 1991) (holding that evidence of sexual relations with a person other than an accused is not relevant). One commentator has noted that once the identity of persons and similarity of circumstances are removed, "probative value all but disappears." See Ordover, *Admissibility of Patterns of Similar Sexual Conduct: The Unlamented Death of Character for Chastity*, 63 Cornell L. Rev. 96, 106 (1977). The discovery at issue is not limited to sexual contact involving similar circumstances, and is therefore lacking in probative value. Defendant fails in his Motion to demonstrate otherwise.

Defendant's argument that Rule 412 is merely an evidentiary rule that should be disregarded in discovery disputes has been routinely *rejected* in federal courts. See, e.g., Barta v. City and County of Honolulu, 169 F.R.D. 132 (D. Haw. 1996) (granting protective order pursuant to Rule 412 to prevent a sexual battery and harassment victim from having to disclose off-duty sexual contacts with persons other than defendant in discovery); Herron v. Eastern

Industries, Inc., 2007 WL 2781211 (N.D. Fla. Sept. 19, 2007); Gibbons v. Food Lion, Inc., 1999 WL 33226474 (M.D. Fla. Feb. 19, 1999); P.J. Herchenroeder v. John Hopkins Univ. Applied Physical Lab, 171 F.RD. 179 (D. Md. 1997) (looking at both Rule 26 and Rule 412 in resolving discovery motion); Sanchez v. Zabihi, 166 F.R.D. 500 (D. N.M. 1996) (explaining that "[a]lthough the present motion arises in the context of discovery under Rule 26, the Court must remain mindful of Rule 412 and its implications); Stalnaker v. Kmart Corp., 1996 WL 397563 (D. Kan. 1996) (noting that Rule 412 "is applicable and has significance in deciding certain discovery motions").

As the above-referenced cases make abundantly clear, childhood sexual abuse cases are not garden-variety litigation subject to traditional broad discovery concerning a victim's sexual history. Rule 412 is designed to protect victims of sexual misconduct from undue embarrassment and intrusion into their private affairs. See Fed R.Evid. 412. The committee notes explain that the Rule is also intended to prevent "sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process." Rule 412, Advisory Committee Notes to 1994 Amendments. Common sense dictates that requiring a sexual abuse victim to disclose the intimate details and recordings sought by Epstein during the discovery process – which then would presumably lead to additional discovery of the victim's other sexual partners – would be at least as embarrassing and intrusive during the discovery process as it would be if the victim were questioned about these facts at trial, if not more. Thus, in order to carry out its purpose, Rule 412 "must inform the discovery process" and the Court "must impose certain restriction on discovery to preclude inquiry into areas which will clearly fail to satisfy the balancing test" set forth in Rule 412. See Barta v. City and County of Honolulu, 169 F.R.D. at 135.

In Barta, the Court confronted this issue in the context of a discovery motion in a civil case. 169 F.R.D. at 133. A former employee brought a sexual harassment and battery claim against her former employer and individual employees. Id. The defendants asked questions at deposition which delved into the plaintiff's sexual conduct outside the workplace. Id. at 134. The Court did not allow these questions and wait until trial to determine admissibility. Id. at 135. Instead, the Court sustained the plaintiff's objections. Id. The Court based its decision on Fed.R.Evid. 412. Id. Although noting that Rule 412 controls the admissibility of evidence, the Court explained that it must also apply Rule 412 to "impose certain restrictions on discovery to preclude inquiry into areas which will clearly satisfy the balancing test of 412(b)(2)…" Id. Thus, the Court concluded that the defendants should not be permitted to inquire into the plaintiff's conduct while she was off-duty, outside the workplace, and which did not involve the same defendants. The same rationale should apply here. The Defendant should not be permitted to seek intimate details and recordings of Plaintiff's sexual conduct throughout her life.

Defendant attached three Florida state court orders to its Motion, two of which are trial court decisions. These cases do not serve as precedent for this Court, and in any event, they are not persuasive. Unlike state courts, federal courts must focus on the interplay between Fed.R.Evid. 412 and Fed.R.Civ.P. 26(b), and in this regard must be concerned with embarrassment to the victim and protection of her privacy. Indeed, it does not appear that an analogous argument was made in any of the state court cases relied upon by Defendant. Furthermore, the discovery in Balas v. Russo, 703 So.2d 1076 (Fla. 3d DCA 1997) was far narrower than that which is at issue here. It was limited to asking plaintiffs for their employment history (which admittedly included prostitution), employment records, electronic recording of the conduct which was the subject of the complaint, and a description of her damages. 703 So.2d

1077-78. At no time were the plaintiffs in Balas asked to disclose their entire sexually history beginning at age 10. Id. Thus, the three state court cases cited in the Motion are not helpful to the Defendant, and should not deflect attention from the burden placed on the party in federal court seeking discovery of a victim's other sexual contacts.

With regard to Request #1 for "all tax returns and supporting documentation", the Defendant has not (and cannot) show how these documents are conceivably relevant. Plaintiffs are not making a claim for lost income or wages. See Exhibit "A". Moreover, Plaintiffs have disclosed their entire employment history and agreed to execute authorizations allowing Defendant to obtain their employment personnel records. Given the nature of the claim involving sexual assault, it is inconceivable how the tax returns, W-2s, and 1099s, and all other "supporting documentation" could be relevant. Cases in which the plaintiff has been ordered to produce tax returns is limited to situations involving stock transactions or in which the plaintiff is seeking to recover lost wages, lost profits, royalty payments, or similar relief. See Bellose v. Universal Tile Restoration, 2008 WL 2620735 (S.D. Fla. June 30, 2008); United States v. Certain Real Property ,444 F.Supp.2d 1258 (S.D. Fla. 2006). The instant case involving sexual assault is readily distinguishable and the mere filing of a lawsuit does not place all of one's income and earnings at issue. Further, if it is Plaintiff's employment history or earnings that Defendants are seeking to discover, a request for all "supporting documentation" pertaining to their tax returns is overbroad and far more burdensome than necessary to acquire this information.

Finally, Defendant's request for attorney's fees and costs is completely unwarranted. The present motion and response involve good-faith, timely and well-founded objections by Plaintiffs to over-reaching and harassing discovery efforts. Accordingly, Defendant's request for award of

reasonable expenses should be denied.

Conclusion

Based on the foregoing, Plaintiffs respectfully request that Defendant's Motion to Compel Response to First Request to Produce, Overrule Objections, and for an Award of Reasonable Expenses be denied in their entirety.

Dated: May 6, 2009

Respectfully submitted,

By: s/ Adam D. Horowitz

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2009, 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/ Adam D. Horowitz .

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

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