UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE GRAND JURY SUBPOENAS
DUCES TECUM NUMBERS
OLY-63 and OLY-64
_________________________________/

UNITED STATES' SURREPLY TO REPLIES FILED BY WITNESS

AND INTERVENOR JEFFREY EPSTEIN
RE: MOTION TO QUASH GRAND JURY SUBPOENAS

UNDER SEAL

EFTA00234914

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

IN RE GRAND JURY SUBPOENAS
DUCES TECUM NUMBERS
OLY-63 and OLY-64
_______________________________/

FGJ 07-103(WPB)

UNDER SEAL

UNITED STATES' SURREPLY TO REPLIES FILED BY WITNESS V AND INTERVENOR JEFFREY EPSTEIN RE: MOTION TO QUASH GRAND JURY SUBPOENAS

The United States, by and through the undersigned Assistant United States Attorney, hereby files this Surreply to the Replies filed by Witness y and Intervenor Jeffrey Epstein,[1] and notes the following:

1. Both the witness and the intervenor assert that was excused from appearing before the grand jury and that did not flout the subpoena by failing to appear. The undersigned's supervisor, , agreed with Mr. Black that would not have to produce the disputed items if the motion was filed. It is understandable that this could have been interpreted as an excuse from appearing, as well, and the United States does not contend that y intentionally disobeyed the subpoena. The undersigned has conferred with the office of s counsel, and it has been agreed that will appear before the grand jury on September 18, 2007. However, in footnote 3 of Intervenor Epstein's Reply, counsel asserts that, if "the Court were to sustain the government's standing objection as to

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[1]Witness y did not file an initial motion to quash the grand jury subpoenas, but did file a Reply to the United States' Response to the Intervenor's Motion to Quash. Accordingly, the United States has not previously had the opportunity to respond to the issue raised by

Epstein, [redacted] d F[redacted] y would file a motion to quash the subpoenas." (Epstein Reply at 5 n.3.) The United States would oppose such a motion on timeliness grounds.

2. In the Reply filed by Intervenor Epstein, counsel asserts that "simple possession of the physical containers [the computers] is not the government's real object here. What the government actually wants is unfettered access to the entire *contents* of Epstein's computers . . ." (Epstein Reply at 2.) The intervenor is mistaken. The grand jury has subpoenaed the computers B the items as they were removed from Mr. Epstein's home. The grand jury probably has the authority to subpoena the contents of those computers, but, in an abundance of caution, the undersigned's general policy is to seek a search warrant for the contents of a computer once it is securely in custody – that is the United States' intended approach in this case, as well. This procedure will allow the Court to decide whether adequate probable cause exists for the search of the computers' contents without prematurely exposing to the target matters occurring before the grand jury, and will allow the target to challenge the probable cause for the search on a Motion to Suppress.

3. Epstein argues that he has no obligation to show that the computers (or the production of those computers) are incriminating before he can assert the act of production privilege. (Epstein Reply at 6.) This is not the case; if it were, every person could assert the act of production privilege to refuse to produce anything in response to a subpoena.2 Instead, a target must address the act of production privilege on a document by document basis explaining how the production of that document would tend to incriminate the target. *See, e.g., United States* █. *Grable*, 98 F.3d 251, 255, 257 (6th Cir. 1996) ("The existence of 'substantial and real hazards of self-incrimination' is a prerequisite to the proper assertion of the 'act of production' privilege.") (citations omitted); *In re Three Grand Jury Subpoenas Duces Tecum Dated January*

2 Following Epstein's logic, if a person were subpoenaed to produce her mother's coffee cake recipe, she could assert the act of production privilege because the production would be a "compelled communication that the item produced is the item called for in the subpoena." (Epstein Reply at 6.)

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29, 1999, 191 F.3d 173, 178 (2d Cir. 1999) (The act of production privilege applies only where the act is "(1) compelled, (2) testimonial, and (3) incriminating.") (*citing United States* █. *Doe*, 465 U.S. 605, 612-14 (1984)); *In re Three Grand Jury Subpoenas Dated January 5, 1988*, 847 F.2d 1024, 1028 (2d Cir. 1988) (subpoenaed party must produce subpoenaed audiotape to Court to allow Court to conduct *in camera* inspection to determine whether act of production privilege applied); *United States* █. *Bell*,[3] 217 F.R.D. 335, 339 (M.D. Pa. 2003) (Although voluntarily created documents are not protected by the Fifth Amendment, an act of production privilege can be asserted, but only when "it meets two conditions: the evidence must be both (1) testimonial and (2) *incriminating*."). Later in his Reply, in order to avoid the clear similarity between this case and *United States* █. *Hunter*, Epstein goes out of his way to assert that the computers are *not* incriminating. Epstein argues: "Unlike a murder weapon or bank robbery proceeds, the computers are not themselves evidence of a crime;" and "Therefore, even were the computers 'incriminating evidence' – *which they manifestly are not* – *Hunter* in no way undermines Epstein's challenges to the subpoena." (Epstein Reply at 8, 9 (emphasis in original).) Epstein simply cannot have it both ways. Either he is able to show that the production of the computers *would* incriminate him, or he cannot assert the act of production privilege.

4. Lastly, Epstein has still failed to provide a privilege log, saying that it has failed to do so because it hopes that the subpoenas will be quashed in their entirety and, if not, a privilege will *then* be produced. (Epstein Reply at 10.) This effort to put the onus on the Court, ("The *Court* should not enforce the subpoenas without affording counsel an opportunity to

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3 *Bell* also discusses the "foregone conclusion" rationale, that is, that an act of production privilege exists only where the subpoenaed party's "production of the documents will *exclusively* establish their existence, authenticity, as well as [the party's] possession of them." *Id.* at 340 (emphasis in original). The United States relies upon the arguments in its Response to Intervenor Epstein's Motion to Quash and the information contained in the *Ex Parte* Affidavits to show the other methods of establishing the existence, authenticity, and Epstein's possession of the computers.

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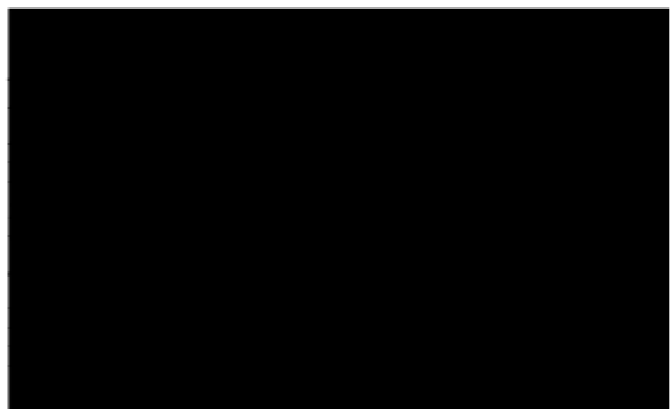
exclude privileged materials from the production." (*id.*)), turns the law of attorney-client privilege on its head and disregards binding precedent requiring a subpoenaed party to produce such a log at the time of filing its motion. The objections related to billing records are demonstrative of the untenability of this position. In civil cases, issues related to attorney's fees are regularly litigated and billing records must be produced to the opposing party. If a party objects to that production, it must produced a redacted version of the documents with an accompanying privilege/work product log. *After* that, the issues are defined for the Court. Counsel complains that the United States has wrongly characterized their motion as a blanket assertion of privilege, but there is no other basis for a failure to produce *anything*. The intervenor has *not* asserted that the production of the billing records is overly burdensome, and Riley Kiraly is the owner of those documents and is best suited to make such a claim, if warranted.

Respectfully submitted,

R. ALEXANDER ACOSTA
UNITED STATES ATTORNEY

By: 

CERTIFICATE OF SERVICE

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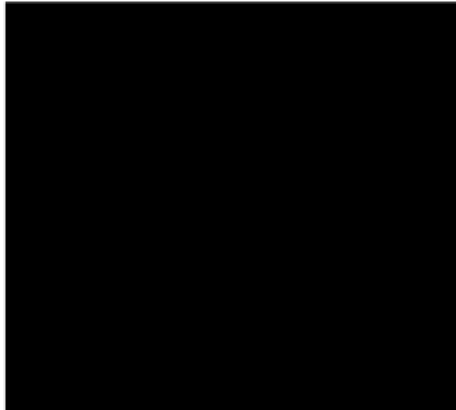
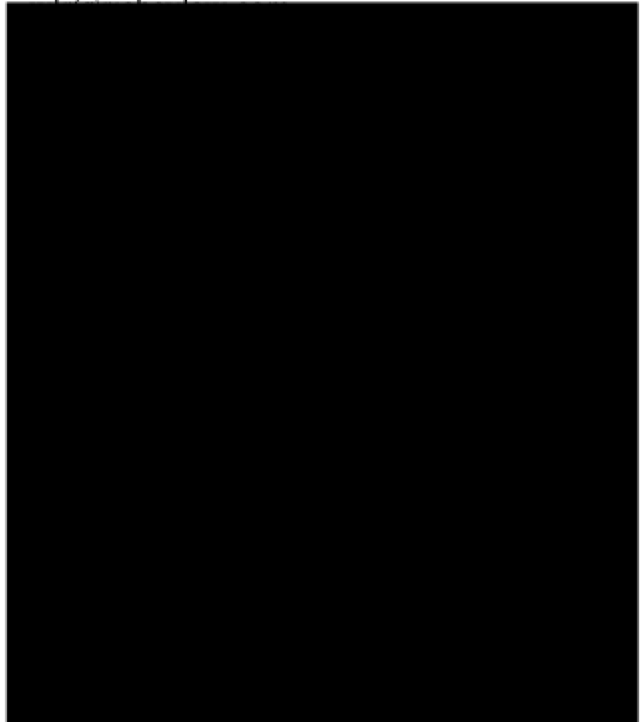
I HEREBY CERTIFY that on July ____, 2007, the foregoing document will be served via hand delivery on Attorney Roy Black, counsel for Jeffrey Epstein. The same document will be served on William Richey, counsel for [REDACTED]nd [REDACTED]y, via Federal Express. This document was not filed using CM/ECF because it is being filed under seal.

[REDACTED]
Assistant U.S. Attorney

SERVICE LIST
In re Federal Grand Jury Subpoenas No. OLY-63 and OLY-64
United States District Court, Southern District of Florida



William L. Richey, Esq.



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