

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

RICHARD CONVERTINO,

Plaintiff,

Case No. 07-CV-13842-DT

v.

Hon. Robert H. Cleland

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

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**EMERGENCY MOTION TO AUTHORIZE *EX PARTE*, *IN CAMERA* SUBMISSION,  
AND TO STAY THE COURT'S FEBRUARY 26, 2009 ORDER IN THE INTERIM,  
WITH SUPPORTING BRIEF, BY NON-PARTY MEDIA RESPONDENT  
DAVID ASHENFELTER**

**MOTION**

Respondent David Ashenfelter hereby moves for an Order (1) permitting Ashenfelter to submit to the Court, in chambers, *ex parte*, and *in camera*, an affidavit in support of Ashenfelter's assertion of the Fifth Amendment privilege against self-incrimination; (2) deeming any such submission to not be a waiver of Ashenfelter's First or Fifth Amendment privilege and that it will not be distributed to any person or entity; (3) permitting Ashenfelter to present, as required, additional written or oral argument, *in camera* and *ex parte*, in support of his asserted Fifth Amendment privilege in light of the affidavit; and (4) staying the Court's February 26, 2009 directive to schedule and appear for an additional deposition, pending the Court's consideration of Ashenfelter's submission.

On Monday, March 2, 2009, the undersigned spoke with Plaintiff's counsel, Attorney Erik Snyder, and explained the contents of this motion in detail. Mr. Snyder advised the undersigned that Plaintiff will take no position, in support or opposition, on this motion, as he does not know what the affidavit will say.

In support of his motion, Ashenfelter provides the following brief.

**BRIEF**

**Issues Presented**

In its February 26, 2009 written order, the Court suggested that an affidavit of Respondent, submitted *in camera* and *ex parte*, could be a valid means for Respondent to substantiate his assertion of the Fifth Amendment privilege against self-incrimination to the Court's satisfaction. If Ashenfelter pursues this option, should the Court deem any such submission to not constitute a waiver of his First<sup>1</sup> or Fifth Amendment privilege, and—while the Court considers the effect of Ashenfelter's submission—stay its demand that Ashenfelter schedule and appear for another deposition?

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<sup>1</sup> The Court has already ruled that Ashenfelter has no First Amendment privilege, but Ashenfelter does not wish to do anything that, later in the litigation, might be deemed a waiver thereof.

**Controlling / Most Appropriate Authority**

U.S. Const, Amend. V

The Court's inherent authority to control its docket

### I. Argument

Respondent Ashenfelter proposes to supply the Court with the primary thing that the Court found lacking in Ashenfelter's reliance on the Fifth Amendment privilege—factual assertions made by Ashenfelter himself. The Court's February 26, 2009 Order agrees with Ashenfelter on many aspects of Fifth Amendment law and procedure—for example, that:

- Ashenfelter's "refusal to answer may be upheld where the witness has reasonable cause to apprehend a real danger of incrimination."<sup>2</sup>
- it is only the "*possibility* of prosecution," not its "*probability*," that matters;<sup>3</sup>
- where "the risk of incrimination inherent in a question [is] patent . . . a witness bears no further burden of establishing a reasonable cause to fear prosecution."<sup>4</sup>
- Even where the incrimination nature of the question is not patent, Ashenfelter "need not prove, in a traditional sense, the hazard of incrimination . . . [but rather] must [merely] present sufficient evidence such that the court can, by the use of *reasonable inference* or *judicial imagination, conceive* a sound basis for a reasonable fear of prosecution."<sup>5</sup>

One crucial point on which the Court and Ashenfelter have diverged, however, is on the universe of facts to which the Court may apply its judicial imagination when conceiving of possible bases for Ashenfelter to fear prosecution. In opposing Plaintiff Richard Convertino's contempt motion and defending his reliance on the Fifth Amendment privilege, Ashenfelter cited to the Court the allegations of Convertino's complaint, Convertino's own public statements, public statements by Attorneys General, and past prosecutions by the Department of Justice ("DOJ"). The Court also heard argument from a DOJ representative who admitted the DOJ could not rule out the possibility of prosecuting Ashenfelter. In his written and oral arguments,

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<sup>2</sup> Feb. 26, 2009 Order at 4 (internal quotations omitted).

<sup>3</sup> *Id.* (emphasis original).

<sup>4</sup> *Id.* at 5 (quotations omitted).

<sup>5</sup> *Id.* (quotations omitted, emphasis added).

Ashenfelter connected these facts to several charges—what the Court described as “an imaginative parade of horrors”<sup>6</sup>—under which Ashenfelter fears prosecution.

But the Court found itself unable to evaluate the reasonableness of these fears without “personal testimony or other evidence”<sup>7</sup> directly from Ashenfelter. It therefore chose to “provide Ashenfelter a further opportunity to either provide the requested information or to properly develop the factual record so that this court may weigh his claim under the Fifth Amendment.”<sup>8</sup> “*To that end*, the [Court’s Order required] Ashenfelter to re-appear for a deposition and *either* answer Plaintiff’s questions *or* to be prepared to supply personal statements under oath or provide evidence with respect to each question . . . .”<sup>9</sup> The Court made clear, however, that by giving this direction, it did “not intend to limit the possible ways in which Ashenfelter may provide such sufficient evidence. . . . This may result in a detailed affidavit *prior to the deposition* or *ex parte in camera* review of Ashenfelter’s basis as to particular questions.”<sup>10</sup>

Ashenfelter now seeks leave to proceed in exactly this manner. Specifically, although Ashenfelter respectfully disagrees with the Court that this procedure is called for here, he nevertheless offers to provide the Court with his own affidavit, submitted *ex parte* and *in camera* to chambers, provided that the Court assuages Ashenfelter’s apprehension that doing so will waive his First or Fifth Amendment privilege in any way, or that the affidavit will be disclosed to any person or entity. The affidavit will provide factual information that supports Ashenfelter’s reliance on the Fifth Amendment privilege in response to the questions that Convertino has already asked.

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<sup>6</sup> *Id.* at 8.

<sup>7</sup> *Id.* at 9.

<sup>8</sup> *Id.* at 10.

<sup>9</sup> *Id.* (emphasis added, quotation omitted).

<sup>10</sup> *Id.* at 10 n.9 (emphasis added).

This affidavit alone should enable the Court to reach conclusions about the validity of Ashenfelter's claimed privilege. To that end, Ashenfelter further requests that, after the Court has reviewed the affidavit, that the Court accept additional argument from Ashenfelter (written or oral, at the Court's pleasure), *ex parte* and *in camera*, supplementing his prior arguments in light of the affidavit.

In the meantime, Ashenfelter submits that staying the February 26, 2009 Order's requirement of scheduling a new deposition by March 6, 2009 would be a prudent preservation of both the Court's and the parties' time and resources.<sup>11</sup>

## **II. Conclusion**

For all of the foregoing reasons, Respondent Ashenfelter respectfully requests that this Court issue an Order (1) permitting Ashenfelter to submit to the Court, in chambers, *ex parte*, and *in camera*, an affidavit in support of Ashenfelter's assertion of the Fifth Amendment privilege against self-incrimination; (2) deeming any such submission to not be a waiver of Ashenfelter's First or Fifth Amendment privilege and that it will not be distributed to any person or entity; (3) permitting Ashenfelter to present, as required, additional written or oral argument, *in camera* and *ex parte*, in support of his asserted Fifth Amendment privilege in light of the affidavit; and (4) staying the Court's February 26, 2009 directive to schedule and appear for an additional deposition, pending the Court's consideration of Ashenfelter's submission.

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<sup>11</sup> Plaintiff's counsel and the undersigned have already discussed mutually acceptable deposition dates, if necessary, in April. Plaintiff wishes to coordinate Ashenfelter's deposition with those of DOJ employees in Detroit which depositions will likely be in April. In fact, Plaintiffs counsel advised he would not be a position to schedule all of his depositions until mid to late March.

Date: March 3, 2009

By: /s/ Richard E. Zuckerman  
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**CERTIFICATE OF SERVICE**

I hereby certify that on March 3, 2009, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which shall send a notice to all counsel of record.

/s/ Richard E. Zuckerman

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