

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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**NON-PARTY DAVID ASHENFELTER'S RESPONSE TO PLAINTIFF'S "SUPPLEMENTAL BRIEF"
IN SUPPORT OF HIS ARGUMENT THAT ASHENFELTER
HAS WAIVED ANY FIFTH AMENDMENT PRIVILEGE**

Concise Statement of Issues Presented

Should this Court refuse to reconsider its April 21, 2009 rulings sustaining non-party David Ashenfelter's Fifth Amendment privilege based upon Plaintiff's new argument that Ashenfelter's March 2008 declaration waived his privilege where:

a. Plaintiff failed to raise that argument, or any argument about the 14-month-old declaration at any point during the litigation, despite numerous opportunities to do so;

b. Plaintiff's failure to timely raise his new waiver argument constitutes a waiver of that argument, *i.e.*, a "waiver of waiver";

c. The Supreme Court has cautioned that a waiver of the Fifth Amendment is not to be lightly inferred;

d. Non-party Ashenfelter's declaration, submitted defensively in response to Plaintiff's motion to compel, cannot constitute waiver as a matter of law.

Controlling/Most Appropriate Authority

Smith v. U.S., 337 U.S. 137, 150 (1949)

United States v. Boudreau, ___ F.3d ___, No. 07-2143 (6th Cir. 2009) (Ex I).

Local Rule 7.1(g)(3)

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I. Introduction

Only after failing to overcome Respondent David Ashenfelter's Fifth Amendment privilege on its merits does Plaintiff Richard Convertino now claim that Ashenfelter waived the privilege over 14 months ago. This eleventh-hour tactic comes far too late. Convertino passed up numerous, more appropriate, opportunities to raise this argument. He could have raised it six months ago, in November 2008, when he learned that Ashenfelter would assert the privilege at his deposition, but he did not. He could have raised it during Ashenfelter's December 2008 deposition, but he did not. He could have raised it in his more than 50 pages of briefing in support of his motions for contempt and sanctions—where he *did* make a *different* waiver argument—but he did not. He could have raised it before the Court at the 90-minute oral argument on his contempt motion on February 11, 2009, but he did not. Simply put, this is a clear case of “waiver of waiver,” a rule the Sixth Circuit routinely applies. To hold otherwise would disrupt judicial economy and encourage piecemeal litigation.

In any event, the Supreme Court has cautioned that a waiver of the Fifth Amendment is not to be lightly inferred, especially where the witness is not a party and is not offering testimony offensively as a party. Ashenfelter's March 26, 2008 declaration (“Declaration”) revealed nothing of substance about the newspaper article at issue in this case (“Article”), other than what is contained in the Article itself. The Declaration does not concern, and does not waive the Fifth Amendment privilege as to anything that Convertino now seeks to learn about Ashenfelter's confidential source(s) or facts leading to their identit(ies). Convertino's motion should be denied.

II. Relevant Background

A. The Events Leading Up to These Proceedings

On January 17, 2004, *Detroit Free Press* reporter David Ashenfelter published the Article, entitled “Terror case prosecutor is probed on conduct.”¹ It discussed the Department of Justice’s (“DOJ”) investigation of possible misconduct by Convertino. Ashenfelter wrote in the Article that “[t]he inquiry is being conducted by the Justice Department’s Office of Professional Responsibility (OPR), according to officials, who spoke on the condition of anonymity, fearing repercussions.”²

On February 13, 2004, Convertino responded by filing a federal Privacy Act complaint against the DOJ in the U.S. District Court for the District of Columbia. On April 30, 2007, Convertino served a nonparty witness subpoena issued from this District on Ashenfelter. In a May 14, 2007 letter, Ashenfelter timely objected to the subpoena, citing, among other things, the Reporter’s Privilege, and “reserv[ing] his right to amend and supplement these objections if more information becomes available to him.”³ On July 6, 2007, Convertino filed a motion to compel, challenging Ashenfelter’s assertion of the Reporter’s Privilege.⁴

B. Motion Practice Concerning Ashenfelter’s First Amendment Privilege

On March 26, 2008, Ashenfelter responded to Convertino’s motion to compel.⁵ Ashenfelter’s 30-page brief expounded on his argument that a qualified Reporter’s Privilege created by the First Amendment and common law shielded him from revealing his confidential source(s). One of the many arguments contained in that brief was that Convertino “need not know the specific identity of Ashenfelter’s source(s) to establish the elements of his [Privacy Act] claim—only that they worked for the DOJ.”⁶ To that end, Ashenfelter attached (as Exhibit O to the brief) the Declaration, stating, in relevant part:

¹ Ex. A (January 17, 2004 *Detroit Free Press* article).

² *Id.*

³ Ex. B (May 14, 2007 Letter from H. Fink to S. Kohn).

⁴ D/E 1.

⁵ D/E 17.

⁶ *Id.* at 17.

4. Each statement of fact I made in the Article was true, to the best of my knowledge and belief. Specifically, I wrote in the Article that it was based on information from “[Justice Department] officials, who spoke on the condition of anonymity, fearing repercussions.” That was true. The source(s) communicated with me knowingly, and only on the condition that I protect the source(s)’ anonymity.⁷

Ashenfelter then argued that this “proposed stipulation, and the Article itself, provide sufficient evidence [to establish Convertino’s prima facie case] on this point.”⁸

On April 18, 2008, Convertino filed a Reply Brief in support of his subpoena. He did not mention the Declaration or even that, by submitting it, Ashenfelter waived any privileges he might then or later assert. On June 2, 2008, the Court heard oral argument on Convertino’s motion to compel. Ashenfelter’s counsel again referenced the argument that “Ashenfelter’s stipulation . . . should suffice” for the purposes of Convertino’s Privacy Act claims.⁹ Again, however, no one made any suggestion that the Declaration constituted any form of waiver as to *any* privilege, First or Fifth.

On August 29, 2008, the Court granted Convertino’s motion to compel Ashenfelter’s deposition.¹⁰ In relevant part, the Court held that “Convertino’s case has a pressing need for the identity of Ashenfelter’s sources,”¹¹ although it made no direct mention of the Declaration or Ashenfelter’s argument that Convertino did not need to know the source(s)’ precise identity.

On October 13, 2008, Ashenfelter filed a motion (subsequently denied) for a protective order and remission to the District Court for the District of Columbia.¹² Convertino’s Response Brief, filed two weeks later, contained no reference to the Declaration or First Amendment waiver.¹³

⁷ Ex. C (also Ex O to D/E 17) ¶ 4 (March 24, 2008 Declaration of D. Ashenfelter).

⁸ D/E 17 at 17.

⁹ Ex. D at 29 (Transcript from June 2, 2008 Hearing); *see id.* at 26.

¹⁰ D/E 27.

¹¹ D/E 27 at 17-18.

¹² D/E 28.

¹³ D/E 30.

C. Convertino Passed Up Several Logical Opportunities to Raise His “Declaration as Waiver” Argument During Ashenfelter’s Depositions and Related Motion Practice

On November 24, 2008, two weeks before Ashenfelter’s scheduled deposition, Ashenfelter’s counsel warned Convertino’s counsel in an email that Ashenfelter could assert privileges at his deposition and would do so on a question-by-question basis (as a witness asserting the Fifth Amendment must do):

As for the deposition itself, we cannot tell you in advance of same what questions Ashenfelter will answer, if any, nor what privileges might be applicable to some or all of your questions. Our understanding of the assertion of privilege is that it must be asserted question by question and a deponent cannot simply assert a blanket refusal to answer all questions, pre deposition, as a means to avoid the deposition. We tell you this as a courtesy so you can guide yourself accordingly about coming to Detroit versus electing to take a telephonic deposition, having your local counsel conduct same with you in attendance via telephone, having you conduct same over the telephone with local counsel in attendance, or perhaps some other method which you can think of to save you time and expense.¹⁴

In response, Convertino’s counsel confirmed that the Ashenfelter’s deposition would proceed on December 8, 2008 and that he would attend in person. Convertino did not assert any objections or file any motions with the Court, nor did he raise any pre-deposition arguments about waiver.

On December 8, 2008, Ashenfelter appeared for deposition, and repeatedly asserted (among other privileges) his Fifth Amendment privilege against self-incrimination. At the deposition, Convertino did not raise any objections, and did not argue waiver.¹⁵ In fact, Convertino’s counsel asked Ashenfelter a question about his Declaration, but never asserted that it constituted a waiver of his privileges.¹⁶

On December 23, 2008, Convertino filed a motion for an order to show cause why Ashenfelter should not be held in contempt, arguing in his 18-page brief that Convertino’s assertion of the Fifth Amendment was invalid.¹⁷ That same day, Convertino also filed a motion for sanctions, asserting similar

¹⁴ Ex. E (November 24, 2008 Email from R. Zuckerman to S. Kohn).

¹⁵ Ex. F (Transcript from December 8, 2008 Deposition of D. Ashenfelter).

¹⁶ *Id.* at p. 30.

¹⁷ D/E 38.

arguments in his accompanying 21-page brief.¹⁸ *Neither* of these briefs made any reference to the Declaration, let alone that the Declaration constituted a waiver of any privilege.

On January 28, 2009, Convertino filed a Reply Brief in support of his two motions.¹⁹ There, Convertino mused in a footnote that Ashenfelter had waived the Fifth Amendment by failing to raise it within 14 days of service of the deposition subpoena. Convertino did not expound on this issue, did not mention the Declaration, and did not make any further argument concerning waiver.²⁰

On February 11, 2009, the Court conducted an extensive, 90-minute-long hearing on Convertino's contempt motion.²¹ The Court heard argument from Convertino, Ashenfelter and the DOJ.²² At the very beginning of the oral argument, counsel for Convertino suggested, as he did in the footnote from his Reply Brief, that Ashenfelter's failure to timely raise the Fifth Amendment as a blanket objection to the subpoena *duces tecum* constituted a waiver.²³ But at no point did Convertino's counsel suggest that the Declaration waived his privilege. In fact, at no point during the hearing did the Declaration ever come up.

On February 26, 2009, this Court issued an order requiring Ashenfelter to provide "personal testimony or other evidence which sufficiently indicates the nature of any criminal liability he may fear."²⁴ Thus, the Court impliedly (and, by later upholding Ashenfelter's privilege, explicitly) rejected Convertino's argument that Ashenfelter had waived the Fifth Amendment privilege by not asserting it within 14 days of service of the deposition subpoena, as Convertino had argued. On March 3, 2009, Ashenfelter moved for an order to authorize an *ex parte*, *in camera* submission that would in no way waive his assertion of the

¹⁸ D/E 39.

¹⁹ D/E 47.

²⁰ *Id.* at p. 6, n. 2.

²¹ Ex. G (Transcript from February 11, 2009 Hearing).

²² *Id.*

²³ *Id.* at pp. 4-6.

²⁴ D/E 51 at p. 9.

privilege, noting for the Court that he respectfully disagreed with the Court that this procedure was necessary in this case.²⁵ Convertino filed nothing in response.

On March 30, 2009, Ashenfelter filed a motion for immediate consideration of the *ex parte* declaration and, provisionally, to certify the case for interlocutory appeal.²⁶ Convertino filed nothing in response. The Court denied Ashenfelter's motion, whereupon Ashenfelter simultaneously filed a notice of appeal and a petition for writ of mandamus.²⁷ Convertino filed nothing in response to either.

On April 21, 2009, Ashenfelter was deposed for a second time. Again, Ashenfelter asserted his Fifth Amendment privilege in response to particular questions posed by Plaintiff's counsel.²⁸ Ultimately, the Court sustained Ashenfelter's Fifth Amendment privilege on questions central to Convertino's quest.²⁹ *Only then*, when all was seemingly lost, did Convertino's counsel theatrically produce the Declaration—having obviously kept it in reserve during the entire deposition for just such a contingency—then asserting that it constituted a waiver of Ashenfelter's Fifth Amendment privilege.³⁰

III. Argument

A. Standard for Reconsideration

Local Rule 7.1(g)(3) governs motions for reconsideration and provides:

Generally, and without restricting the court's discretion, the court will not grant motions for rehearing or reconsideration that merely present the same issues ruled upon by the court, either expressly or by reasonable implication. The movant must not only demonstrate a palpable defect by which the court and the parties have been misled but also show that correcting the defect will result in a different disposition of the case.³¹

"A 'palpable defect' is a defect which is obvious, clear, unmistakable, manifest or plain."³²

²⁵ D/E 52 at p. 4.

²⁶ D/E 57.

²⁷ D/E 60.

²⁸ See, e.g., Ex. H at pp. 62,-63, 80-81 (Transcript from April 21, 2009 Deposition of D. Ashenfelter).

²⁹ *Id.* at p. 105.

³⁰ *Id.* at pp. 106-07.

³¹ E.D. Mich. LR 7.1(g)(3).

³² *Fleck v. Titan Tire Corp.*, 177 F. Supp. 2d 605, 624 (E.D. Mich. 2001).

B. Convertino Waived His Waiver Argument by Failing to Raise It Earlier

1. An Argument Is Waived When a Party Fails to Raise It in a Timely Fashion

New arguments raised in a motion for reconsideration “that were not raised in any of [the movant’s] earlier briefs” are untimely.³³ “One major ground used to justify reconsideration of an order is a clear error of law by the Court or the need to prevent a ‘manifest injustice’ from occurring. In order for a party to demonstrate clear error, the moving party’s arguments cannot be the same as those made earlier. ***If a party simply inadvertently failed to raise the arguments earlier, the arguments are deemed waived.***”³⁴ This is because judicial economy requires a party to present all available arguments at the same time³⁵ in order to avoid prejudice to the other side and piecemeal litigation.³⁶

Courts have also found that a party waived an argument by failing to raise an issue in an opening brief,³⁷ cursorily raising an issue in a footnote,³⁸ raising an issue for the first time in a reply brief,³⁹ failing to

³³ *United States v. Skeddle*, 989 F. Supp. 912, 914 (N.D. Ohio 1997); *Czajkowski v. Tindall & Assoc., P.C.*, 967 F.Supp. 951, 952 (E.D. Mich. 1997); see also *Winget v. JP Morgan Chase Bank, N.A.*, No. 06-13490, 2007 WL 1101184, at *1 (E.D. Mich. April 12, 2007) (noting that the presence of “new arguments not raised in response to the motion to dismiss...militates against granting the motion [for reconsideration]”). *In re Stivender*, 301 B.R. 498, 501 (Bkrcty. S.D. Ohio 2003) (denying debtor’s motion for reconsideration and refusing to allow the debtor to present additional oral argument on a new issue where he failed to raise that issue at the original oral argument or in his pre-hearing and post-hearing briefs); *Capital Indem. Corp. v. Dayton Bd. of Educ.*, No. 03-404, 2006 WL 2233429, at *2 (S.D. Ohio Aug. 3, 2006) (denying motion for reconsideration where “Plaintiff has failed to explain why it did not attempt” to address an issue in its original briefs.)

³⁴ *Glavor v. Shearson Lehman Hutton, Inc.*, 879 F.Supp. 1028, 1033 (N.D. Cal. 1994) (internal citations omitted) (emphasis added).

³⁵ See *U.S. v. Jones*, 78 Fed.Appx. 844, 850 (4th Cir. 2003).

³⁶ See, e.g., *Int’l Union, United Auto., Aerospace, and Agr. Implement Workers of America and its Locals 656 and 985 v. Greyhound Lines, Inc.*, 701 F.2d 1181, 1189 (6th Cir. 1983).

³⁷ *Sheet Metal Workers’ Local 73 Welfare Fund Bd. of Trustees v. DeGryse*, 579 F.Supp.2d 1063, 1069 (N.D. Ill. 2008) (citing *See St. John’s United Church of Christ v. City of Chicago*, 502 F.3d 616, 627-28 (7th Cir. 2007); *Smith v. Astrue*, 2008 WL 794518 *12 (E.D. Wis. March 24, 2008)).

³⁸ *United States v. Johnson*, 440 F.3d 832, 846 (6th Cir. 2006) (refusing to address a party’s argument because the argument was raised only in a single footnote and was not otherwise developed in the initial brief).

³⁹ *Sundberg v. Keller Ladder*, 189 F.Supp.2d 671, 681-83 (E.D. Mich. 2002) (Lawson, J.) (“[I]t is not the office of a reply brief to raise issues for the first time.”); *U.S. v. Perkins*, 994 F.2d 1184, 1191 (6th Cir. 1993)

cite relevant authority in a brief,⁴⁰ failing to raise an argument in objections to a magistrate's report,⁴¹ and failing to raise an issue in a motion or at a hearing, particularly where "there is nothing in the record that compels the court to raise it *sua sponte*."⁴² As explained below, Convertino has waived his current waiver argument several times over during the course of these proceedings.

2. As With Any Other Argument, a Party Can Waive a Waiver Argument

In *United States v. Boudreau*,⁴³ the Sixth Circuit recently held that "[as] with any other argument, [a party] can forfeit a waiver argument by failing to raise it in a timely fashion."⁴⁴ In *Boudreau*, the government waived its waiver argument where it "remained silent and participated in an extensive hearing" but failed to raise its waiver argument at that hearing.⁴⁵ The Sixth Circuit held that the government could have and should have made its waiver argument at the hearing, which would have "allowed the district court the opportunity to rule on it" and "obviated the need for further consideration of [the opposing party's] argument."⁴⁶ Because the government remained silent, the Sixth Circuit found that the government "waived its waiver argument."⁴⁷

3. Convertino Waived His Waiver Argument by Failing to Timely Assert It

Boudreau is materially indistinguishable from this case. There is no reason that Convertino could not have cited the Declaration as a basis of waiver over a year ago. Convertino's counsel had the

("Issues raised for the first time in a reply brief are not properly before this court.") (citing *Pachla v. Saunders Systems, Inc.*, 899 F.2d 496, 502 (6th Cir.1990); *Wright v. Holbrook*, 794 F.2d 1152, 1156 (6th Cir.1986)).

⁴⁰ *Independent Trust Corp. v. Fidelity Nat. Title Ins. Co. of New York*, 577 F.Supp.2d 1023, 1040 (N.D.Ill. 2008) (citing *Weinstein v. Schwartz*, 422 F.3d 476, 477 n. 1 (7th Cir.2005)).

⁴¹ *Crongeyer v. Comm'r of Social Security*, 87 Fed. Appx. 472, 474 (6th Cir. 2003).

⁴² *Grandis Family Partnership, Ltd. v. Hess Corp.*, 588 F.Supp.2d 1319, 1332 (S.D. Fla. 2008) (citing *See Batiste v. Burke*, 746 F.2d 257, 259 n. 2 (5th Cir.1984) (noting courts will only raise an issue *sua sponte* for exceptional circumstances)).

⁴³ *United States v. Boudreau*, ___ F.3d ___, No. 07-2143 (6th Cir. 2009) (Ex I).

⁴⁴ *Id.*, slip op. at 6.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

Declaration since March 2008. If Convertino believed that the Declaration constituted a waiver of one or more privileges that Ashenfelter would otherwise assert, Convertino could have sought a ruling as soon as he received the Declaration. Ashenfelter's counsel referenced the Declaration during the June 2, 2008 hearing on Convertino's motion to compel, but Convertino said nothing about waiver. Convertino's counsel demonstrated his subjective awareness of the Declaration by asking a question about it during Ashenfelter's December 8, 2008 deposition, where Ashenfelter first asserted his Fifth Amendment privilege. Still, he said nothing about waiver. The latest "logical" time for Convertino to raise the waiver issue would have been in his December 2008 motion, which sought to overcome Ashenfelter's assertion of the Fifth Amendment and hold him in contempt. Convertino spent over 50 pages of briefing attempting to persuade the Court to overrule Ashenfelter's claim of Fifth Amendment privilege. He filed two separate motions and a reply in support of those motions. Convertino was the moving party; he selected the issues for the Court to resolve.⁴⁸ But instead, Convertino made no waiver arguments in any of those briefs.

Convertino *did* raise an *entirely different* basis for waiver in his January 2009 Reply Brief and the February 2009 oral argument. Of course, Convertino waived that argument as well, by raising it for the first time in a single footnote⁴⁹ in a reply brief.⁵⁰ But since Convertino chose to argue waiver at that point, he should have at least asserted all of his bases for that argument at one time. His failure to do so precipitated an "extensive hearing" and further briefing and proceedings, including an appeal, a mandamus proceeding, plus a second deposition under the Court's personal supervision. To allow him to now raise this new waiver argument, which has been available to him for 14 months, would severely prejudice

⁴⁸ Compare, e.g., *U.S. v. Luna*, 2001 WL 822784, *3 (5th Cir. 2001) (holding that a court can construe the waiver rule "more leniently when the party who fails to brief an issue is the appellee because appellees "do not select the issues to be appealed [,] ... [and] are at a procedural disadvantage in appeals because they can neither file reply briefs nor choose when to appeal.").

⁴⁹ *Johnson*, 440 F.3d at 846 (6th Cir. 2006) (refusing to address a party's argument because the argument was raised only in a single footnote and was not otherwise developed in the initial brief).

⁵⁰ *Sundberg*, 189 F.Supp.2d at 681-83 ("[I]t is not the office of a reply brief to raise issues for the first time.").

Ashenfelter and would turn the rules of judicial economy and against piecemeal litigation on their heads.⁵¹ Just like the government in *Boudreau*, because of Convertino's failure to timely raise *any* argument concerning the Declaration, Convertino waived his waiver argument.

4. Convertino Is Engaging in Gamesmanship

Convertino's reason for sitting on the "Declaration as waiver" argument for over a year, until all other Fifth Amendment arguments had been exhausted, is plain. Up until that point, one of Ashenfelter's arguments for why the Court should not require him to personally provide factual justification for his Fifth Amendment privilege was that "even seemingly innocuous questions nonetheless may harbor hidden dangers for the unwary witness, who may, by inadvertence, give an answer that waives his privilege against self-incrimination, his attorney-client privilege, or some other right."⁵² Even during the April 21, 2009 deposition, Ashenfelter's counsel argued to the Court that "I don't want you to say that because he answered a question about the Free Press, everything in his employ is now fair game because he waived the subject matter of his employ. That's the basis of this. Now we have the government to contend with . . . [and] I don't know what anyone [else] will make out of an ostensibly innocuous answer."⁵³ In an attempt to get an answer to his questions, Convertino's counsel even offered "to stipulate that [the answer is] not a waiver of the 5th Amendment privilege to a related question."⁵⁴

Convertino now argues that, simply by attesting in the Declaration that his Article was accurate, Ashenfelter waived his Fifth Amendment protection as to *the entire subject matter* of anything having to do with the confidential source(s), *including* the source(s)'s identity.⁵⁵ If Convertino had made this argument at any earlier point in time, and if he had failed to persuade the Court that the Declaration was a complete waiver of the Article's entire subject matter, he would have nevertheless bolstered the strength of

⁵¹ See, e.g., *Jones*, 78 Fed.Appx. 850; *Greyhound Lines*, 701 F.2d at 1189.

⁵² D/E 57 at 11 (quotations and footnotes omitted).

⁵³ Ex. H at 93-94.

⁵⁴ *Id.* at 93.

⁵⁵ D/E 66 at p. 2

Ashenfelter’s argument that answering seemingly innocuous questions could later be interpreted by the government as subject matter waiver. In other words, Convertino would have risked triggering a ruling in Ashenfelter’s favor on the merits of Ashenfelter’s Fifth Amendment assertion. Convertino chose not to take that risk.

Instead, Convertino saved the Declaration as his “nuclear option”—a tactic to be employed only as a last resort, after the Court had already sustained Ashenfelter’s privilege, when Convertino had nothing left to lose. That is gamesmanship, not a legitimate basis for reconsideration, and it should not be rewarded.⁵⁶

C. In Any Event, the Declaration Did Not Waive Ashenfelter’s Fifth Amendment Privilege

1. A Waiver of the Fifth Amendment “Is Not Lightly to Be Inferred”

The Supreme Court has held that a waiver of the Fifth Amendment “is not lightly to be inferred.”⁵⁷ “[C]ourts accordingly indulge every reasonable presumption against finding a testimonial waiver.”⁵⁸

A court should find a waiver of a witness’s Fifth Amendment privilege against self-incrimination only when “(1) the witness has made an incriminating, testimonial statement; (2) that statement creates a significant likelihood that, absent further testimony, the finder of fact will be left with and prone to rely on a distorted version of the truth stemming from the earlier testimony; and (3) the witness has reason to know that the statement would create such a distortion.”⁵⁹ “[A]n ordinary witness may ‘pick the point beyond which he will not go,’ and refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating, as long as the answers sought may tend to further incriminate

⁵⁶ Further suggestive of gamesmanship is Convertino’s disingenuous labeling of his motion for reconsideration as a “supplemental brief,” avoiding any reference to a motion for reconsideration, which is what the Court expressly authorized him to file. Ex. H at 109-11.

⁵⁷ *Smith v. U.S.*, 337 U.S. 137, 150 (1949) (holding that “A witness cannot properly be held after claim to have waived his privilege . . . upon vague and uncertain evidence.”); see also *Emspak v. U.S.*, 349 U.S. 190 (1955) (applying *Smith* and holding that witness properly asserted, and had never waived, his Fifth Amendment privilege).

⁵⁸ *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981) (citing *Emspak*, 349 U.S. at 198).

⁵⁹ *E. F. Hutton & Co. v. Jupiter Dev. Corp.*, 91 F.R.D. 110, 117 (S.D.N.Y. 1981).

him.”⁶⁰ As the Sixth Circuit has held, “waiver does not occur where further disclosure carries a risk of incrimination beyond that raised by previous testimony.”⁶¹

2. Ashenfelter’s Refusal to Go Beyond the Declaration—Which Itself Merely Confirmed What Was Already Known—Does Nothing to Distort or Hinder the Truth-Finding Function of Litigation

The Declaration does nothing more than to affirm that Ashenfelter is a reporter, that he wrote the Article, and that the Article is true. That is the express purpose for which Ashenfelter originally offered the Declaration, and he did so in the course of *defending* his source(s)’ confidentiality. The Declaration does not, nor can it reasonably be read as, implicitly or explicitly saying anything about *how* Ashenfelter obtained the information, the *name(s)* of his source(s), or whether he in fact received the OPR report.⁶² To the contrary, Ashenfelter has consistently refused to testify on any of these issues,⁶³ for the reason that to do so would risk waiving his Fifth Amendment privilege and forming a link in a chain of evidence that would tend to incriminate him. Because “further disclosure [beyond the subject matter of the Declaration] carries a risk of incrimination beyond that raised by previous testimony” in the Declaration, under Sixth Circuit precedent there can be no waiver.

The cases Convertino cites are inapposite. In each of these cases, the witness who allegedly waived the privilege was a *party*.⁶⁴ In other words, these parties testified voluntarily, on their own behalf, in order to advance their positions in the litigation. The Courts were persuaded to find waiver in these cases because the *party* submitted an affidavit to support its position affirmatively seeking relief, for example filing

⁶⁰ *In re Master Key*, 507 F.2d 292, 294 (9th Cir. 1974) (citing *Shendal v. United States*, 312 F.2d 564, 566 (9th Cir. 1963); *Hashagen v. United States*, 283 F.2d 345, 349 (9th Cir. 1960)).

⁶¹ *United States v. LaRiche*, 549 F.2d 1088, 1096 (6th Cir. 1977) (citing *United States v. Seavers*, 472 F.2d 607, 610-11 (6th Cir. 1973); see also *In re Master Key Litigation*, 507 F.2d 292, 294 (9th Cir. 1974).

⁶² D/E 17 at Ex. O.

⁶³ See, e.g., D/E 44, D/E 52, D/E 57.

⁶⁴ See, e.g., *United States v. Parcels of Land*, 903 F.2d 36 (1st Cir. 1990) (party was a claimant in a government forfeiture action); *In re Edmond*, 934 F.2d 1304 (4th Cir. 1991) (debtor offered an affidavit in support of his motion for summary judgment); *Tolliver v. Federal Republic of Nigeria*, 256 F.Supp.2d 873, 875-76 (W.D. Mich. 2003) (plaintiff offered an affidavit in support of his complaint).

an affidavit in support of a complaint⁶⁵ or in support of the party's own motion.⁶⁶ To allow these parties to rely on their affidavits in support of their offensive efforts to seek relief, and then turn around and defensively assert the Fifth Amendment would be misleading or false, and "absent further testimony, the finder of fact [may] be left with and prone to rely on a distorted version of the truth stemming from the earlier testimony."⁶⁷ Convertino points to no distortions of the truth with respect to the filing of the Declaration.

These concerns simply are not present with the Declaration. Ashenfelter is not a party, he is an ordinary witness. "[A]n ordinary witness may 'pick the point beyond which he will not go,' and refuse to answer any questions about a matter already discussed, even if the facts already revealed are incriminating, as long as the answers sought may tend to further incriminate him."⁶⁸ The Declaration was not offered offensively to increase his chances of recovering damages, like the plaintiff in *Tolliver*, or to get summary judgment, like the party in *In re Edmond*.

Rather, the Declaration was used only defensively. There is simply no risk that based upon the statements made in Declaration that the Court "will be left with and prone to rely on a distorted version of the truth."⁶⁹ This is particularly true where the Court never chose to rely on the Declaration in the first place, and rejected the qualified First Amendment Reporter's Privilege argument that the Declaration was intended to serve. Therefore, as a matter of law, Ashenfelter's declaration cannot constitute a waiver of his rights under the Fifth Amendment.⁷⁰

⁶⁵ *Tolliver*, 256 F.Supp.2d at 875-876.

⁶⁶ See, e.g., *Nutramax Labs. v. Twin Labs., Inc.*, 32 F.Supp.2d 331, 333, 336 (D. Md. 1999); *In re Edmond*, 934 F.2d 1304.

⁶⁷ *E.F. Hutton*, 91 F.R.D. at 116-17.

⁶⁸ *In re Master Key*, 507 F.2d at 294 (internal citations omitted).

⁶⁹ *E.F. Hutton & Co.*, 91 F.R.D. at 116-17.

⁷⁰ See, e.g., *id.*; *In re Candor Diamond Corp. v. John P. Maguire & Co. Inc.*, 21 B.R. 147, 152 (Bankr. S.D. N.Y. 1982) (holding that affidavit submitted in support of motion did not constitute waiver of Fifth Amendment privilege because "even if the affidavit and testimony presented a distorted view of the facts,

Convertino then argues in passing that Ashenfelter's "publication of the *Article [itself]*" waives his Fifth Amendment privilege.⁷¹ Of course, he cites no case law to support this argument, asserting instead that "public policy" demands this result. But this is contrary to black-letter law. A waiver can only occur if the witness' prior statement was "testimonial," or "made voluntarily under oath in the context of the same judicial proceeding."⁷² The Article clearly does not meet any of these requirements. The legal issues in this litigation concern how Ashenfelter got the information reflected in the Article, not the merits of the information itself. Even if the Court chose to entertain this argument, moreover, Convertino has waived it for the reasons described above, by choosing not to make it *at all* until the pending motion for reconsideration.

3. The Declaration Was Made in a Different Stage of the Proceedings

"[A] waiver of the Fifth Amendment privilege at one stage of a proceeding is not a waiver of that right for other stages."⁷³ For example, in one case, a witness "did not waive his right to refuse to give self-incriminating testimony when he executed the incriminating affidavit" in support of a co-defendant's motion to sever the trials.⁷⁴ Ashenfelter filed the Declaration in March 2008 as a proposed stipulation in aid of his argument that the qualified First Amendment Reporter's Privilege shielded Ashenfelter from appearing for any deposition. Specifically, the Declaration served one component of that argument, namely that Convertino needed to prove only that Ashenfelter's source(s) worked for the DOJ, not their specific names to make his prima facie Privacy Act case. This Court resolved that argument in its August 29, 2008 order

no prejudice could inhere . . . since this court has not relied on either the [] affidavit or testimony" where the court denied the motion containing the supporting affidavit); *Universal Trading & Investment Co. v. Kiritchenko*, 2006 WL 3798157, *4 (N. D. Cal., Dec. 22, 2006) (holding that defendant did not waive his Fifth Amendment privilege by submitting affidavits).

⁷¹ D/E 66 at 6 (emphasis added).

⁷² *Klein*, 667 F.2d at 289 (internal citations omitted).

⁷³ *United States v. Trejo-Zambrano*, 582 F.2d 460, 464 (9th Cir. 1979).

⁷⁴ *Id.*

granting Convertino's motion to compel, and has since repeatedly declined to revisit First Amendment issues.

Ashenfelter did not raise the Fifth Amendment privilege until December 8, 2008, during his first deposition. This was a different stage of the proceedings, in which the issue was no longer *whether* Ashenfelter would appear for a deposition, but, rather, *how much* Ashenfelter could be required to say in that deposition. Therefore, Ashenfelter's statements from the prior stage of the proceeding cannot be held against him in this later stage.

IV. Conclusion

For all of the foregoing reasons, the Court should deny Convertino's motion for reconsideration.

Date: May 19, 2009

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CERTIFICATE OF SERVICE

I hereby certify that on May 19, 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