

**IN THE UNITED STATES DISTRICT COURT
FOR THE 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 DETROIT FREE PRESS MEMORANDUM IN RESPONSE TO
PLAINTIFF'S RENEWED MOTION TO COMPEL PRODUCTION [D/E 65]**

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CONCISE STATEMENT OF ISSUES PRESENTED

Should this Court deny the renewed motion to compel of Richard Convertino (“Mr. Convertino”) where:

(a) the subpoena is impermissibly overbroad and seeks numerous documents not relevant to the one article at issue in the underlying Privacy Act case;

(b) the *Free Press* has offered to produce “documents related to the preparation, publication or source(s) for the January 2004 Article,” but Mr. Convertino has refused to narrow the subpoena;

(c) the *Free Press* has not identified a witness who can testify on the topics identified in the subpoena other than David Ashenfelter (“Mr. Ashenfelter”), whom this Court has held cannot be compelled to reveal that information.

CONTROLLING/MOST APPROPRIATE AUTHORITY

City of Chicago, Illinois v. Wolf, 1993 U.S. Dist. LEXIS 6810 (N.D. Ill. May 21, 1993)

Convertino v. United States Department of Justice, 2008 U.S. Dist. LEXIS 66889 (E.D. Mich. Aug. 29, 2008)

Martinez v. Majestic Farms, Inc., 2008 U.S. Dist. LEXIS 6121 (S.D. Fla. Jan. 28, 2008)

Microsoft Corp. v. Silver Star Micro, Inc., 2008 U.S. Dist. LEXIS 1526 (N.D. Ga. Jan. 9, 2008)

Fed. R. Civ. P. 45(c)(3)(a)(iii)

INTRODUCTION

Mr. Convertino has moved to compel the production of documents and the scheduling of a Fed. R. Civ. P. 30(b)(6) deposition of the *Detroit Free Press*. D/E 65.

With respect to the document demand, the subpoena is impermissibly overbroad. The only relevant documents that could properly be sought from the *Free Press* are those related to the source(s) for the single January 2004 article that is at issue in Mr. Convertino's Privacy Act case. However, the subpoena demands "[a]ll documents which *directly or indirectly* identify, discuss or reference *any* source of information related to Mr. Richard Convertino" and "[a]ll documents *directly or indirectly* related to *any* newspaper stories you wrote about Mr. Convertino." Exhibit D (emphasis added). The *Free Press* has advised Mr. Convertino that, if he narrows the subpoena to "documents related to the preparation, publication or source(s) for the January 2004 Article," the *Free Press* will produce those documents. Exhibit E. Mr. Convertino has refused to narrow his subpoena or withdraw his motion.

With respect to the Rule 30(b)(6) deposition demanded by the subpoena, the motion should be denied because it is futile. Mr. Convertino's counsel was previously advised that an inquiry uncovered no persons at the *Free Press* who can identify the source(s) for the January 2004 Article, other than Mr. Ashenfelter. Mr. Ashenfelter has twice refused to reveal that information, and the Court has upheld his right to do so under the Fifth Amendment. There is no deposition to compel.

For all of these reasons, the motion to compel should be denied.

STATEMENT OF RELEVANT FACTS

The Court is familiar with the general background of this dispute. With respect to the present motion, the following facts are relevant.

Mr. Convertino Improperly Seeks Discovery from Gannett Co., Inc.

On or about July 11, 2006, Mr. Convertino served Gannett Co., Inc. (“Gannett”) with a non-party subpoena, requiring Gannett to appear for a deposition pursuant to Fed. R. Civ. P. 30(b)(6) and to produce documents (“Gannett subpoena”). Exhibit A. The Gannett subpoena issued from the United States District Court for the District of Columbia. *Id.* The Gannett subpoena broadly, and improperly, defined “Gannett” to include the *Free Press* and Mr. Ashenfelter. *Id.* at Attachment A at § I.A.4. The subpoena sought documents and testimony related to the source(s) for the January 2004 article. *Id.* at Attachment A at § II.

By letter dated July 25, 2006, Gannett objected to the Gannett subpoena on a number of grounds. Exhibit B. Gannett advised Mr. Convertino, however, that it would inquire at the *Free Press* as to any persons with knowledge of the source(s) for the January 2004 Article. *Id.* By letter dated September 11, 2006, Mr. Convertino’s counsel was advised that:

we went beyond the obligations under the subpoena and contacted employees of the *Free Press* (who are not Gannett employees), but identified no one who knows the identity of the source(s), with one exception. Mr. Ashenfelter can identify the source(s) but, through his counsel, has asserted the reporter’s testimonial privilege under the First Amendment, federal common law, and Michigan statutory and common law, and refuses to reveal that identity.

Exhibit C at 1-2.

The Court Rejects Mr. Convertino's Pursuit of the *Free Press*

On or about April 30, 2007, Mr. Convertino served a subpoena on the *Free Press*, issued from this Court. Exhibit D. The subpoena required the *Free Press* to produce the following broad categories of documents:

- (1) All documents which directly or indirectly identify, discuss or reference any source of information related to Mr. Richard Convertino;
- (2) All documents directly or indirectly related to any newspaper stories you wrote about Mr. Convertino; and
- (3) All documents which directly or indirectly identify any confidential source of information about Mr. Convertino.

Id.

The subpoena also sought to compel a representative of the *Free Press* to appear for a deposition, pursuant to Fed. R. Civ. P. 30(b)(6), and testify on the following topics:

- (1) identify the names of all sources of information about Mr. Convertino to the Detroit Free Press referenced in the article entitled "Terror Case Prosecutor is Probed on Conduct" that appeared in the January 17, 2004 edition of the Detroit Free Press;
- (2) identify the information each such source provided to the Detroit Free Press; and
- (3) identify and provide testimony regarding the contents of all of the documents required to be produced herein.

Id.

After the *Free Press* objected to the subpoena (and Mr. Ashenfelter objected to an identical subpoena served upon him), Mr. Convertino filed a motion to compel their compliance. D/E 1. In an Opinion dated August 29, 2008 the Court overruled Mr. Ashenfelter's objections and ordered him to submit to a deposition, but denied Mr. Convertino's motion as to the *Free*

Press. D/E 27. The Court held that the discovery sought from the *Free Press* was cumulative of the identical discovery sought from Mr. Ashenfelter:

An organization's designated representative must be the individual with knowledge of the subject matter over which discovery is being had. When a party notices a newspaper for disclosure of confidential informants mentioned in one of its articles, its logical representative is the reporter who wrote the piece. . . . *Here, however, compelling enforcement of Convertino's subpoenas would essentially require Ashenfelter to be deposed as an individual and that the Free Press present him to be deposed as a representative of their organization, since he is the employee best qualified to testify about any communication with DOJ officials' regarding the Article.*

D/E 27 at 21 (emphasis added).

The Court held that “the First Amendment interests at stake in this matter counsel against compelling discovery from the *Free Press*, *id.* at 22, but noted that it “may be appropriate to revisit the court’s analysis as to the discovery obligations of the *Free Press*” if Mr. Convertino showed that it was impossible to obtain discovery from Mr. Ashenfelter. *Id.* at n.17.

Mr. Convertino Renews His Motion Against the *Free Press*

On April 29, 2009, after the Court upheld Mr. Ashenfelter’s invocation of his Fifth Amendment privilege, Mr. Convertino filed the present motion to compel. D/E 65. Mr. Convertino maintains that the *Free Press* must be compelled to produce the documents sought by his April 2007 subpoena and must produce a witness to testify on the topics identified therein. Mr. Convertino argues that “the *Free Press* knows the identity of Mr. Ashenfelter’s sources” because, according to Mr. Convertino, the *Free Press*’s December 22, 2008 ethics policy (obtained from the Internet) states that the use of unidentified sources requires the approval of an editor; “Ashenfelter acquired the knowledge of his source(s)’ identity in the course of his

employment with the Free Press”; and “Ashenfelter also directly informed Mr. Convertino that it was an ‘editorial decision’ to publish some of the confidential information which appeared in the newspaper.” D/E 65 at 4-5.

ARGUMENT

I. MR. CONVERTINO’S SUBPOENA TO THE *FREE PRESS* IS IMPERMISSIBLY OVERBROAD AND MUST BE QUASHED

The Court should deny Mr. Convertino’s motion to compel the production of documents sought by his subpoena to the *Free Press* because it is overbroad and thus improper under the Federal Rules of Civil Procedure.

Mr. Convertino’s suit is based on one article – published on January 17, 2004. However, his subpoena to the *Free Press* seeks a much broader range of documents, including “[a]ll documents which *directly or indirectly* identify, discuss or reference *any* source of information related to Mr. Richard Convertino” and “[a]ll documents *directly or indirectly* related to *any* newspaper stories you wrote about Mr. Convertino.” Exhibit D (emphasis added). There is no time limitation in the subpoena. Given that Mr. Convertino was an Assistant United States Attorney in Detroit for many years (and thus the subject of numerous articles in the *Free Press*), and has been pursuing discovery from the *Free Press* and Mr. Ashenfelter for the past three years (which has resulted in additional articles in the *Free Press* concerning matters before this Court), these requests are overbroad and burdensome. Indeed, a LEXIS/NEXIS search conducted on May 20, 2009 revealed 151 separate articles in the *Free Press* containing the name “Richard Convertino,” stretching from October 15, 1997 to May 6, 2009. Mr. Convertino has never explained why he needs “[a]ll documents which *directly or indirectly* identify, discuss or reference *any* source of information related to Mr. Richard Convertino” and “[a]ll documents

directly or indirectly related to *any* newspaper stories you wrote about Mr. Convertino” when his Privacy Act suit is based on one article, published January 17, 2004.

On May 11, 2009, counsel for the *Free Press* asked Mr. Convertino’s counsel to narrow the scope of the subpoena to “documents related to the preparation, publication or source(s) for the January 2004 Article.” Exhibit E. Mr. Convertino’s counsel has refused to do so.

Fed. R. Civ. P. 45(c)(3)(a)(iii) provides that “the issuing court must quash or modify a subpoena that . . . subjects a person to undue burden.” The subpoena should be quashed as impermissibly overbroad.¹

II. MR. CONVERTINO’S DEMAND FOR A DEPOSITION MUST BE DENIED AS FUTILE

Mr. Convertino’s demand that the *Free Press* produce a witness for a corporate deposition must be denied as futile. This Court has already ruled that Mr. Ashenfelter is the most appropriate person for the *Free Press* to make available at a corporate deposition. Mr. Ashenfelter has twice refused to reveal his source(s) and this Court has upheld his decision. There is no deposition to compel.²

Mr. Ashenfelter is the proper Rule 30(b)(6) witness on behalf of the *Free Press*: “compelling enforcement of Convertino’s subpoenas would essentially require Ashenfelter to be

¹ Not only is Mr. Convertino’s subpoena to the *Free Press* overbroad, but his motion impermissibly attempts to expand the scope of the subpoena by asserting that the *Free Press* must produce “additional documents and information related to the application of the Free Press ethics rule which mandated that an editor approve Mr. Ashenfelter’s use of confidential sources.” D/E 65 at 2. This belated addition is not contained in the subpoena to the *Free Press* and also extends well beyond anything that is reasonably calculated to lead to the identity of the source(s) for the January 2004 article.

² The *Free Press* explained this to Mr. Convertino’s counsel in a telephone conversation and letter last week. See Exhibit E (May 12, 2009 letter confirming conversation).

deposed as an individual *and* that the Free Press present him to be deposed as a representative of their organization, since he is the employee best qualified to testify about any communication with DOJ officials' regarding the Article." D/E 27 at 21 (italics in original). However, this Court has already ruled that Mr. Ashenfelter cannot be forced to testify against his will. As Mr. Ashenfelter is the only person with knowledge of the information sought by the *Free Press* subpoena, there is no deposition to compel.³

Mr. Convertino suggests that the *Free Press* must produce Mr. Ashenfelter as its Rule 30(b)(6) witness and that, because Mr. Ashenfelter would then be testifying as the corporation's witness, he cannot invoke the Fifth Amendment. This argument has no basis in the law. Numerous courts have held that individuals retain their Fifth Amendment rights against self incrimination, even if they are being deposed as corporate representatives. *See, e.g., Martinez v. Majestic Farms, Inc.*, 2008 U.S. Dist. LEXIS 6121, *7 (S.D. Fla. Jan. 28, 2008) ("It is further undisputed that Joel Steinger has a Fifth Amendment privilege against self-incrimination, and, so, cannot be compelled to answer questions as Defendant's corporate representative at a Rule 30(b)(6) deposition"); *City of Chicago, Illinois v. Wolf*, 1993 U.S. Dist. LEXIS 6810, *3 (N.D. Ill. May 21, 1993) ("this court cannot compel individuals to testify in their corporate capacity if they otherwise have an individual privilege that can properly be invoked"); *Microsoft Corp. v. Silver Star Micro, Inc.*, 2008 U.S. Dist. LEXIS 1526, *35 (N.D. Ga. Jan. 9, 2008) (in case in which deponent was deposed in both personal and corporate capacity, holding that "Campbell

³ In *United States v. Kohn*, 387 U.S. 1 (1970), the Court instructed that, where a corporation cannot identify a person who can respond to a discovery demand without invoking a privilege, the corporation should move for a protective order. *Id.* at 9. For this reason, the *Free Press* has also filed a motion for a protective order.

has a valid Fifth Amendment privilege to refuse to provide testimony which would tend to incriminate him, even if the questions might be interpreted as being directed to [the corporation] Silver Star Micro”). Mr. Ashenfelter cannot be forced to answer questions as the *Free Press*’s corporate representative at a Rule 30(b)(6) deposition.

The *Free Press* anticipates that Mr. Convertino will argue, as he has before, that the *Free Press* is not required to produce Mr. Ashenfelter, and can instead produce another person to testify on its behalf. *See* D/E 1 at 18 (“The fact that there may only be one individual within the Free Press that possesses the requested information does not in any way absolve it from its responsibility [to] produce information that is ‘known or reasonably available’ to it, nor does Mr. Convertino’s subpoena require the Free Press to designate that individual [Ashenfelter] as its representative”). Not only was this argument rejected by this Court in its August 2008 decision, but it completely misses the point that there is no other person that the *Free Press* can produce who has the information sought by the subpoena, other than Mr. Ashenfelter. *See* Exhibits C, E.

Mr. Convertino also argues that other *Free Press* employees must know the identity of Mr. Ashenfelter’s source(s) because: (a) the *Free Press*’s December 22, 2008 ethics policy obtained from the Internet states that the use of unidentified sources requires the approval of an editor; (b) “Ashenfelter acquired the knowledge of his source(s)’ identity in the course of his employment with the Free Press”;⁴ and/or “Ashenfelter also directly informed Mr. Convertino

⁴ Mr. Convertino cites *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519 (6th Cir. 2000), as one of his controlling or most appropriate authorities, but never discusses this decision in his brief. Because *Leahey* involved whether an agent’s knowledge of a fact should have been imputed to his principal for the purpose of liability, it appears that Mr. Convertino is arguing that, because Mr. Ashenfelter learned of the identity of his source(s) while employed by the *Free Press*, the *Free Press* now possesses this information. This

(Footnote continued on next page)

that it was an ‘editorial decision’ to publish some of the confidential information which appeared in the newspaper.”

Initially, Mr. Convertino ignores that the ethics policy attached to his brief is that of Gannett which, when the Article was written, did not own the *Free Press*. Knight-Ridder did.

Additionally, the policy provides only that “[t]he use of unidentified sources in published material requires the *approval* of a managing editor or the highest-ranking editor available.” D/E 65-3 (emphasis added). The policy does not require that the reporter tell his or her editor the name of the source(s); only that the editor approves the use of unidentified source(s) in the published material. *Id.* The policy does not support Mr. Convertino’s argument that Mr. Ashenfelter’s editors knew the identity of the source(s).

Moreover, the allegation that Mr. Ashenfelter told Mr. Convertino that it was an “editorial decision” to publish some of the confidential information is completely unsupported, and thus entitled to no weight. Even if it were true, however, it means only that an editor was involved in the decision to publish the information in the story; not that Mr. Ashenfelter told any editor the name of his source(s).

Finally, irrespective of Mr. Convertino’s speculation that “it is likely that at least one current or former employee of the Free Press was told, or otherwise knows, the identity of Mr. Ashenfelter’s source(s),” (D/E 65 at 4), Mr. Convertino’s counsel was told, more than two years

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argument borders on the frivolous. A case involving the legal fiction of principal/agent imputation for the purpose of liability has absolutely nothing to do with whether a news organization knows of a confidential source known only to its reporter. Mr. Ashenfelter’s knowledge cannot be “imputed” to the *Free Press*.

ago, that no *Free Press* employees had been identified as knowing the names of the source(s) (other than Mr. Ashenfelter). Exhibit C at 1-2. *See also* Exhibit E.

It would be futile to order the *Free Press* to submit to a corporate deposition because the *Free Press* cannot produce a witness capable of answering the questions sought by Mr. Convertino. *See, e.g., Strong v. U-Haul Co. of Mass.*, 2009 U.S. Dist. LEXIS 27390, *35 (S.D. Ohio Mar. 31, 2009) (filing a motion to compel would have been a futile act if it was impossible to provide the information sought by the discovery request); *Bowling v. Hasbro, Inc.*, 582 F. Supp. 2d 192, 211 (D.R.I. 2008) (“it would be futile to grant Hasbro’s motion for leave to file a motion to compel, as there is nothing for Bowling to produce”). The subpoena to the *Free Press* should be quashed.

CONCLUSION

For all of the foregoing reasons, the Court should deny Mr. Convertino’s renewed motion to compel.

Dated: May 22, 2009

Respectfully submitted,

/s/Leslie Paul Machado

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CERTIFICATE OF SERVICE

I hereby certify that, on May 22, 2009, I electronically filed the foregoing papers(s) with the Clerk of the Court using the ECF system, which shall send a notice to all counsel of record.

/s/Leslie Paul Machado