

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

)	
RICHARD G. CONVERTINO)	
)	
Plaintiff,)	
)	
v.)	Case No. 07-CV-13842
)	Assigned to: Hon. Robert H. Cleland
UNITED STATES DEPARTMENT OF JUSTICE,)	
<i>et al.</i>)	
)	
Defendants.)	
)	

**PLAINTIFF RICHARD G. CONVERTINO’S REPLY TO DAVID ASHENFELTER’S
RESPONSE TO PLAINTIFF’S MOTION FOR RECONSIDERATION**

In his response to Mr. Convertino’s request for reconsideration, Mr. Ashenfelter raises a series of straw men in an to attempt to distort the underlying facts of this case. As set forth below, each of his arguments are entirely without merit and the Court should reconsider its April 21, 2009 ruling and find that Mr. Ashenfelter has waived any Fifth Amendment privilege he might have had, at least with respect to the identity of his source(s).

I. There Has Been No “Waiver of Waiver”

Mr. Ashenfelter devotes a considerable portion of his brief to the argument that Mr. Convertino has waived his right to argue waiver. However, it is completely irrelevant that Mr. Convertino did not previously argue that Mr. Ashenfelter’s March 26, 2008 affidavit (hereinafter “Affidavit”) waived his Fifth Amendment privilege with respect to the accuracy of his article and the identity of his source(s). Nothing precludes a the Court from exercising its discretion to entertain any argument it chooses, including those not previously raised. E.D. Mich. LR 7.1(g). As the Court explicitly ordered both parties to brief the issue of waiver, Mr. Ashenfelter is in no way prejudiced and his position that the Court should not consider Mr. Convertino’s arguments

because they have been “waived” is thus without merit. If the Court agrees that Mr. Ashenfelter has waived his privilege, then that is certainly a “palpable” defect that would change the outcome of the Court’s April 21, 2009 ruling as required by the local rules.

II. The Identity of Mr. Ashenfelter’s Source(s) Cannot Further Incriminate Him

Mr. Ashenfelter argues that he made his declaration “in the course of *defending* his source(s)’ confidentiality” and then “consistently refused to testify on any of these issues, 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.” Dkt. # 70, Ashenfelter Response, at 12. This, however, is exactly the conduct forbidden by the Supreme Court in *Rogers*, which forbade “open[ing] the way to distortion of facts by permitting a witness to select any stopping point in the testimony.” *Rogers v. United States*, 340 U.S. 367, 371 (1950) (“where criminating facts have been voluntarily revealed, the privilege cannot be invoked to avoid disclosure of the details.”). Indeed, by vigorously arguing that *any* information, including the identities of his editors, that could conceivably lead to the identification of his source(s) is privileged because it could provide “a link in a chain of evidence tending to incriminate him,” Mr. Ashenfelter has effectively conceded that his own sworn testimony *regarding the identity of his source(s)* could provide such a link and is thus incriminating. Thus, by voluntarily testifying that his source(s) were employees of the Department of Justice, Mr. Ashenfelter has unequivocally waived his privilege at least as to further questions regarding their identities.

Mr. Ashenfelter attempts to avoid this problem by asserting that “further disclosure [beyond the subject matter of the Declaration] carries a risk of incrimination beyond that raised by previous testimony,” but this is not the case. Testimony only risks further incrimination if it concerns crimes not implicated by prior testimony. See *United States v. La Riche*, 549 F.2d

1088, 1096 (6th Cir. 1977) (upholding a witness' invocation of the Fifth Amendment on cross examination, where the question inquired into criminal activity not discussed on direct); *Usery v. Brandel*, 87 F.R.D. 670, 684 (W.D. Mich. 1980) (holding that the witness' "privilege to avoid questions [concerning conduct not discussed on direct]... turns on whether his answers could... expose him to indictment for additional violations of the FLSA (or any other statute, for that matter)," and finding that "to the extent that [the witness] may have already testified to facts incriminating him under various sections of FLSA, his additional testimony about [related conduct] cannot further incriminate him under those sections."). An "ordinary witness" may *not* "pick the point beyond which he will not go" when doing so cannot "further incriminate" him and will leave his version of the record uncontested.

By swearing, under oath, that he obtained the information in his article from employees of the DOJ, Mr. Ashenfelter provided a "link in a chain of evidence" that could lead to any of the crimes for which he claims to fear prosecution. For example, if Mr. Ashenfelter fears prosecution for receipt of stolen government documents or information (or conspiracy thereto) under 18 U.S.C. § 641, then admitting that he obtained the information at issue from employees of the Department of Justice certainly provides a link towards such prosecution, just as surely as revealing the identity of his source. Indeed, Mr. Ashenfelter has pointed to no crimes where identifying his source(s) could be incriminating, but admitting that the source(s) worked for the DOJ would not. Accordingly, testimony regarding the identity of Mr. Ashenfelter's source(s) cannot "further incriminate" him.

III. Mr. Ashenfelter is a "Party" to this Proceeding

That Mr. Ashenfelter is not a party to Mr. Convertino's Privacy Act suit is wholly irrelevant; he is a "party" to the collateral action in this Court, which has its own docket number

and has involved nearly two years of litigation. Mr. Ashenfelter asserts that the cases Mr. Convertino cited regarding a witness who waived their Fifth Amendment rights by submitting an affidavit “are inapposite” because the witnesses were parties who “testified voluntarily, on their own behalf, in order to advance their position in the litigation.” Dkt. # 70, Ashenfelter Response, at 12.¹ Yet this is exactly what Mr. Ashenfelter did.

Mr. Ashenfelter submitted his affidavit in order to “advance [his] position” opposing Mr. Convertino’s motion to compel. Mr. Ashenfelter attempts to confuse the issue by arguing that he used his declaration only “defensively,” but that too is irrelevant. The witness in *United States v. Parcels of Land*, 903 F.2d 36, 42-43 (1st Cir. 1990) also submitted his affidavit “defensively” in opposition to the government’s motion for summary judgment. Mr. Ashenfelter, having waived his Fifth Amendment rights in order to support his opposition to Mr. Convertino’s motion to compel with sworn testimony, cannot now retract that testimony to use the Fifth Amendment to shield himself from the enforcement of the Court’s order granting that motion.

IV. The Declaration Was Not Made “in a Different Stage of the Proceedings”

Mr. Ashenfelter’s assertion that the adjudication of Mr. Convertino’s motion to compel occurred in a different stage of the proceedings from his deposition is completely spurious. In support of this argument, Mr. Ashenfelter relies on *United States v. Trejo-Zambrano*, 582 F.2d 460 (9th Cir. 1979), yet that case is inapplicable. In *Trejo*, a defendant submitted an affidavit in support of his brother’s (another defendant) motion to sever the trials. *Id.* at 463. The defendant and his brother were then convicted. *Id.* at 464. The defendant then refused to testify, on Fifth Amendment grounds, at the jury trial of a third defendant, which the court upheld because he had executed the affidavit in a pre-trial matter and was now in the post-trial (pre-sentencing) stage of

¹ Mr. Ashenfelter also neglects to mention that the witnesses in *Nutramax Labs v. Twin Labs*, 32 F. Supp. 2d 331, 333 (D.Md. 1999) were *not* parties to the litigation.

his proceedings. *Id.* This is entirely consistent with *Parcels of Land*, where the court held that a deposition held during discovery was not held in a “separate, distinct proceeding” than his affidavit, which was submitted in opposition to a subsequent motion for summary judgment. 903 F.2d at 43 (1st Cir. Mass. 1990) (holding that the witness’ “deposition and the filing of his affidavit, however, were part of the same proceeding, and thus this limitation does not apply.”).

In the instant case, Mr. Ashenfelter waived his Fifth Amendment rights by submitting an affidavit in support of his opposition to Mr. Convertino’s motion to compel his deposition. To argue that the subsequent enforcement of the Court’s order granting that motion is part of a separate and distinct proceeding is disingenuous. Indeed, unlike the pre-trial vs. pre-sentencing interests of a criminal defendant, which may differ significantly, Mr. Ashenfelter’s interests in opposing the motion to compel are identical to his interests in resisting the enforcement of the Court’s order granting that motion.

V. Klein is Inapplicable

Finally, Mr. Ashenfelter spends considerable energy arguing that the Court should apply the heightened standard for finding testimonial waiver articulated in *Klein v. Harris*, 667 F.2d 274 (2d Cir. N.Y. 1981), *i.e.*, that the Court should only find waiver if the witness’ prior statements “created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth.” However, the Sixth Circuit has never adopted this test, relying instead on the standard set out in *Rogers v. United States*, 340 U.S. 189, 195. *See, e.g., United States v. Seltzer*, 794 F.2d 1114, 1122 (6th Cir. 1986) (a witness “waives his privilege against self-incrimination with respect to all matters reasonably related to the subject matter of his direct examination.”). Had the Sixth Circuit desired to adopt a heightened standard for testimonial waiver in the 28 years since *Klein* was decided, it surely would have done so.

Indeed, the Supreme Court cases on which *Klein* relies concern testimonial waiver only tangentially. In both *Smith* and *Emspak*, the relevant issue was whether the witness had properly invoked or preserved the Fifth Amendment privilege, not whether prior testimony had waived it. *See Smith v. U.S.*, 337 U.S. 137, 150 (1949) (where a witness properly asserted Fifth Amendment and was granted immunity by statute, simply answering “no” to the compound question: “This is a voluntary statement. You do not claim immunity with respect to that statement?” is not sufficient to constitute waiver of the immunity); *Emspak v. United States*, 349 U.S. 190, 193, 198 (1955) (the Court found that the witness’ refusal to answer questions on grounds of “primarily the first amendment, supplemented by the fifth,” was sufficient to invoke Fifth Amendment protection, and the statement: “I don’t think this committee has a right to pry into my associations. That is my own position” was insufficient to waive it).

Accordingly, because no heightened standard for testimonial waiver exists in the Sixth Circuit, the Court should apply *Rogers* and find that, by testifying that his source(s) worked for the DOJ, he has waived any Fifth Amendment privilege as to the natural follow-up question regarding the identity of the source(s). The Court should thus reconsider its April 21, 2009 ruling and order Mr. Ashenfelter to disclose the identity of his source(s).

Respectfully submitted,

/s/ Erik D. Snyder
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Dated: May 26, 2009

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2009, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which shall send notice to all counsel of record.

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