

IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT  
IN AND FOR PINELLAS COUNTY, FLORIDA

TERRY GENE BOLLEA professionally  
known as HULK HOGAN,

Plaintiff

Case No.: 12012447-CI-011

vs.

GAWKER MEDIA, LLC  
NICK DENTON and  
A.J. DAULERIO,

Defendants.

---

**MOTION TO QUASH SUBPOENA FOR TRIAL**

COMES NOW, the undersigned counsel on behalf of non-party witness BUBBA THE LOVE SPONGE CLEM, and hereby requests that this Honorable Court quash the trial subpoena served upon him in the above styled case, and in support states as follows:

1. On December 14, 2015 attorneys for the Defendants in the above styled case served a trial witness subpoena on Bubba the Love Sponge Clem for trial testimony in the above styled case beginning on March 7, 2016.
2. Mr. Clem retained undersigned counsel for the limited purpose of filing, and arguing, if necessary, a motion to quash the above trial subpoena.
3. Mr. Clem is not a party in the above styled case.
4. Mr. Clem is a potential witness in the above styled case.
5. By way of this pleading, Mr. Clem hereby asserts that he will invoke his Fifth Amendment privilege against self-incrimination and refuse to testify on behalf of any party should he be called as a witness in the above styled cause.

## Legal Issues

Is it lawful to force Mr. Clem to testify as a witness for either party once Mr. Clem made it known he would invoke his privilege against self-incrimination?

Assuming the answer to the above issue is no, may either party force Mr. Clem to invoke his Fifth Amendment privilege against self-incrimination while on the witness stand before the jury?

## Legal Analysis

### 1. Issue One

Should Mr. Clem be compelled by a trial subpoena to provide testimony by either party in the above style cause, he will invoke his Fifth Amendment privilege against self-incrimination. U.S.C.A. Const. Amend. 5. The Fifth Amendment privilege against self-incrimination protects a witness from being forced to give testimony, which may later be used to convict him or her in a criminal proceeding. *United States v. Washington*, 97 S.Ct. 1814, 1818-1819 (1977). This privilege is available to a witness in a civil proceeding, as well as to a defendant in a criminal prosecution. *Malloy v. Hogan*, 84 S.Ct. 1489, 1495 (1964).

It may be argued by a party in this cause that Mr. Clem has given multiple statements on whether the plaintiff knew he was being taped while engaging in sexual conduct with Mr. Clem's then wife, now ex-wife, Heather Clem. Should these statements prove to be differing, and we do not concede that they are, Mr. Clem could be subject to a state prosecution for perjury or a federal false statement prosecution. Further testimony under oath on this issue could subject Mr. Clem to additional harm. Mr. Clem could also be subject to prosecution for the act of making the taped recording of the plaintiff and

Ms. Clem. Mr. Clem lawfully may invoke his right against self-incrimination on these issues.

## 2. Issue Two

### *State of Florida Law*

A party to a cause may not call a non-party witness to the stand for the sole purpose of having a non-party witness assert his or her Fifth Amendment privilege against self-incrimination. *Insurance Co. of State of Pa. v. Guzman's Estate*, 421 So.2d 597 (1982); *Faver v. State*, 393 So.2d 49 (Fla. 4<sup>th</sup> DCA 1981) quoting *United States v. Johnson*, 488 F.2d 1206, 1211 (1<sup>st</sup> Circ. 1973). There is an underlying legal rationale for this rule of law. First, neither party to a cause should gain an advantage from an inference the jury may draw from a non-party witness' refusal to answer questions pursuant to his or her Fifth Amendment privilege against self-incrimination. *Guzman's Estate*, 421 So.2d 597 (1982). Second, if a non-party witness is forced to invoke his or her Fifth Amendment privilege against self-incrimination in front of a jury, the opposing party is then unfairly prejudiced because that party is prohibited from cross-examining the invoking non-party witness. *Id.*

Should this Court rule that Mr. Clem is allowed invoke his right against self-incrimination, the defendant will likely request that Mr. Clem invoke on the witness stand in front of the jury. Mr. Clem should not be forced to invoke his Fifth Amendment privilege against self-incrimination on the witness stand in front of a jury. First, this Court should deny the defendant's request because placing Mr. Clem will result in his being embarrassed and mocked before jury, the gallery, those watching the trial on line, and in the media and would result in an unnecessary public spectacle. Second, this Court

should deny the defendant's request because to rule otherwise would cause a secondary spectacle to the primary spectacle of the trial itself that could undermine the sanctity of the trial itself. A third reason is the legal analysis of federal law on this issue. While undersigned counsel later in this pleading provides an analysis of the federal law relevant to this issue, it should be made clear that Mr. Clem has no economic, professional or personal interest in the outcome of this trial. Therefore, while undersigned counsel is prepared to address the Court should he be ordered, this section of the argument should rightfully be left to the plaintiff and the defendant to address.

#### *Federal Law*

It may be argued that the Fifth Amendment privilege against compelled self-incrimination functions differently in a civil case versus a criminal case under federal law. The Supreme Court of the United States has held "the Fifth Amendment does not forbid adverse inferences against parties . . . when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 96 S.Ct. 1551, 1558 (1976). In a later case the Supreme Court went on to explain that "this rule allowing invocation of the privilege (by civil litigants), though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed." *Mitchell v. United States*, 119 S.Ct. 1307 1315 (1999). The theory is that when a party remains silent in the face of an accusation, the party's silence is indicative of reliability of the adverse inference drawn against him "if it would have been natural under the circumstances to object to the accusation in question." *Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300 (2014) quoting *Baxter*, 96 S.Ct. at 1558.

The distinction in this case is that Mr. Clem is not a party but merely a witness to this cause. In judging this scenario the Eleventh Circuit Court of Appeals in *Coquina* adopted the non-exclusive four-prong test set forth by the Second Circuit Court of Appeals to judge the trustworthiness of the negative inference at issue. *LiButti v. United States*, 107 F.3d 110, 123 (2<sup>nd</sup> Cir. 1997). *LiButti* identified four non-exclusive factors for courts to consider: 1) the nature of the relevant relationships; 2) the degree of control of the party over the nonparty witness; 3) the compatibility of the interests of the party and the non-party witness in the outcome of the litigation; and 4) the role of the non-party witness in the litigation. *Id.* at 123-24. The Eleventh Circuit in *Coquina*, like the Second Circuit in *LiButti*, ruled these factors are non-exclusive and should be ruled upon on a case-by-case basis in assessing the trustworthiness of the negative inference.

In applying the *LiButti* test to Mr. Clem and Mr. Bollea, it is clear this Court should not allow the defense to call Mr. Clem to the stand solely to have him invoke his Fifth Amendment privilege in the jury's presence.

The first factor to consider is the nature of the relationship between Mr. Bollea and Mr. Clem. While Mr. Clem and Mr. Bollea were once close friends, even possibly best friends at one point, their relationship is fractured. Mr. Bollea testified during trial that he no longer has any relationship with Mr. Clem and has not since 2012. Furthermore, Mr. Bollea sued Mr. Clem over his alleged involvement in a collateral issue related to this cause of action. Additionally, Mr. Clem retained his own counsel in this matter, unlike in *Coquina*, and has no economic, professional or personal interest in the outcome of the above styled case.

The second factor is the degree of control Mr. Bollea has over Mr. Clem. In addition to reiterating the above arguments under factor one for factor two, it is also important to note that Mr. Clem does not work for Mr. Bollea or any entity owned by Mr. Bollea.

Third, there is no compatibility of the interests of Mr. Bollea and Mr. Clem in the outcome of this litigation. Should Mr. Bollea win and be awarded a monetary award, no monetary spoils will spill down to Mr. Clem. Should Mr. Bollea lose, it will likewise not have a negative effect on Mr. Clem.

Fourth, Mr. Clem plays a role but not a significant role as a witness in this litigation.

#### *State versus Federal Law*

*Guzman's Estate* is the law in the State of Florida governing the issue of whether a non-party must invoke a privilege against self-incrimination in front of a jury. *Guzman's Estate*, 421 So.2d 597 (1982). From the analysis set forth above, it is clear Florida courts have chosen to provide greater protection than federal courts on this issue. Under our federalist system of government, states may place more rigorous restraints on government intrusion than the federal courts impose. *PruneYard Shopping Ctr. v. Robins*, 100 S.Ct. 2035 (1980). Put another way, a state Constitution may afford greater protection to the individual than the federal Constitution does. *Id.* So while the defendant may cite *Coquina* in support of forcing Mr. Clem to invoke his right against self-incrimination in front of a jury, Florida courts have opted to provide more, not less, protection than federal courts on this issue. This Court should do the same.

**CONCLUSION**

WHEREFORE, undersigned counsel, on behalf of non-party witness Bubba the Love Sponge Clem, prays this Honorable Court will grant the requested relief and/or any other relief deemed necessary.

Respectfully submitted,

/s/Mark J. O'Brien, Esquire

Mark J. O'Brien, Esquire

Bayshore Center

511 West Bay Street

Third Floor - Suite 330

Tampa, Florida 33606

Direct: (813) 228-6989

Email: [mjo@markjobrien.com](mailto:mjo@markjobrien.com)

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Pinellas County Clerk of Court which will electronically file a true and correct copy of this motion to all parties of record on this the 11<sup>th</sup> day of March 2016.

By: /s/ Mark J. O'Brien  
Mark J. O'Brien