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

TERRY GENE BOLLEA professionally known as HULK HOGAN,

Plaintiff,

vs. Case No. 12012447CI-011

GAWKER MEDIA, LLC, *et al.*,

Defendants.

DEFENDANTS' OPPOSITION TO BUBBA THE LOVE SPONGE CLEM'S MOTION TO QUASH DEFENDANTS' SUBPOENA FOR TRIAL

Defendants Gawker Media, LLC, Nick Denton, and A.J. Daulerio hereby oppose the motion of Bubba The Love Sponge Clem to quash the trial subpoena served on him in this matter. Should the Court grant Clem's motion, Defendants move in the alternative for dismissal of this action.

BACKGROUND

On December 14, 2015, Defendants served Mr. Clem with a trial subpoena (the "Subpoena"), commanding him to appear and testify at the trial in this matter. Ex. 1 (Subpoena). And, during the February 17, 2016 pretrial conference, Mr. Clem's counsel confirmed that "he had accepted [the] subpoena from Gawker" on Mr. Clem's behalf and that "we are cooperating." Ex. 2 (Feb. 17, 2016 Hrg. Tr.) at 69:10-23.

Nevertheless, on March 11, 2016 – the fifth day of trial – Clem moved to quash the Subpoena. Clem asserts that he will invoke the Fifth Amendment and "refuse to testify" at all in this proceeding. But Clem's assumption that he has a Fifth Amendment right to "refuse to testify" at all is simply wrong in the circumstances of this case. Rather, the law requires Clem to take the stand, answer questions that plainly raise no conceivable risk of self-incrimination, and,

if he wishes to do so, invoke the Fifth Amendment to any questions which do pose such a bona-fide risk. In fact, if Clem's eleventh-hour assertion of privilege were to render him completely unavailable to testify at trial, this action must be dismissed because Defendants will be deprived of evidence that is necessary to establish certain facts and is of central importance to their defenses.

ARGUMENT

I. Clem's Blanket Assertion of the Fifth Amendment Fails as a Matter of Law.

The Fifth Amendment provides in part that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." As the Second District Court of Appeal has explained, there are "two aspects" to this constitutional privilege: "The first involves the absolute prohibition of compelling a defendant in a criminal case to testify against himself. The second pertains to the right of a witness in a proceeding other than a criminal prosecution in which he is a defendant to refuse to respond to interrogation on the grounds that his answers might tend to incriminate him." *Delisi v. Smith*, 423 So. 2d 934, 935 (Fla. 2d DCA 1982). It is that second aspect that is implicated here.

Clem's motion asserts that he will refuse to testify at all. But Florida law is clear that "[a] blanket assertion of the Fifth Amendment right is insufficient to invoke the privilege against self-incrimination." *Taubert v. State, Office of Atty. Gen.*, 79 So. 3d 77, 81 (Fla. 1st DCA 2011) (quoting *Urquiza v. Kendall Healthcare Group, Ltd.*, 994 So. 2d 476, 477 (Fla. 3d DCA 2008)); *see also Commitment of Smith v. State*, 827 So. 2d 1026, 1029 (Fla. 2d DCA 2002) (stating that a deponent may not "assert[] a blanket privilege" under the Fifth Amendment). Instead, a witness "is required to make a ***specific*** objection to a ***particular*** question and, at that time, assert his fifth

amendment privilege." *Fischer v. E.F. Hutton & Co.*, 463 So. 2d 289, 291 (Fla. 2d DCA 1984) (emphases added). That is so for two reasons.

First, Florida courts have long and consistently held that, because the Fifth Amendment right against self-incrimination is a personal privilege, it must generally be asserted in person by the objecting individual after the question in dispute has been asked. *See Hargis v. Fla. Real Estate Comm'n*, 174 So. 2d 419, 422 (Fla. 2d DCA 1965) ("The objection to testifying must be taken by the witness on his oath after the question has been asked."); *Fischer*, 463 So. 2d at 291 ("Petitioner is required to make a specific objection to a particular question and, at that time, assert his fifth amendment privilege."). One Florida federal court addressed this issue directly in *State ex rel. Butterworth v. Southland Corp.*, 684 F. Supp. 292, 294 (S.D. Fla. 1988). There, a witness refused to answer certain questions at his deposition on Fifth Amendment grounds, and, at a subsequent hearing to determine if those objections were proper, the witness's counsel "argued that the privilege may be invoked by counsel for the witness and need not be invoked by the witness himself." The court rejected this argument, explaining that "the history and the subsequent case law reveals that the 'Fifth Amendment is a personal privilege.'" *Id.* (quoting *Couch v. United States,* 409 U.S. 322, 328 (1973)). The court added that the "privilege against self-incrimination is limited to and can only be invoked by 'a person who shall be compelled in any criminal case to be a witness against himself.'" *Id.* (quoting *Fisher v. United States,* 425 U.S. 391, 398 (1976)). The court therefore concluded that "where the interrogating party stands on the requirement that the witness must personally invoke the privilege against self-incrimination, the witness must do so absent some compelling circumstance." *Id.* at 294-95; *see also id.* at 295 n.5 (listing "physical incapacity" and "illness" as examples of compelling

circumstances). Here, Clem has not alleged, much less demonstrated, any circumstances that would prevent him from invoking the Fifth Amendment in person during trial.

Second, "it is not for the witness to determine whether the answers are protected; it is a decision left to the sound discretion of the trial court after considering the circumstances of the case." *Taubert*, 79 So. 3d at 81. The Court can only make that assessment once it has heard the particular question, at which point it "should determine whether the answer could lead to criminal conviction." *Fischer*, 463 So. 2d at 291 (Fla. 2d DCA 1984); *see also Magid v. Winter*, 654 So. 2d 1037, 1039 (Fla. 4th DCA 1995) (holding that trial court erred by not "determining the propriety of [the witness]'s apprehensions of incrimination on a question-by-question basis"). Clem states that he simply "refuse[s] to testify on behalf of any party," *see* Motion at 1, but there are numerous areas of relevant questioning to which Clem can have no conceivable Fifth Amendment objection, such as the nature of his relationship with Plaintiff and the circumstances of Plaintiff's appearance on his radio show.

For this reason, Clem's reliance on *Ins. Co. of State of Pa. v. Guzman's Estate*, 421 So. 2d 597 (Fla. 4th DCA 1982), is completely misplaced. There, plaintiff called a witness to the stand to ask a single question, plaintiff knew that the witness would assert the privilege, and the witness indeed refused to answer. *Id.* at 603. The court found this improper and held that a party may not call a non-party witness "to the stand ***for the sole purpose*** of having him claim his fifth amendment privilege." *Id.* at 603 (emphasis added). But the scenario presented by *Guzman's Estate* is simply not presented here. Rather, here Defendants are calling Clem so that he can testify about the subjects listed above and others that cannot give rise to a reasonable fear of self-incrimination. If in the course of his testimony Clem objects to answering *certain* questions –

and if the Court agrees with him – then Clem would be entitled to make those specific assertions of the privilege.

Indeed, Clem has not cited, and Defendants have not found, a single case suggesting that a party in a civil suit may not call a witness if that witness can potentially answer some questions, but may try to refuse others under the Fifth Amendment. If that were the law, then all witnesses could avoid testifying in civil cases merely by asserting that because there might be some question might pose a risk of self-incrimination, they can "refuse to testify" at all.[1] Clem's motion to quash therefore amounts to an improper blanket assertion of the Fifth Amendment privilege. *See In re Commitment of Sutton*, 884 So. 2d 198, 202 (Fla. 2d DCA 2004) (finding that where deponents "have objected to every question posed to them, including questions as innocuous as those requesting their date of birth, on the ground that the information sought is protected by the Fifth Amendment," they "have done nothing more than raise a blanket assertion of their Fifth Amendment privilege, something we have previously held is not available to [them] because of the civil nature of these proceedings."); *see also PNC Bank v. Maranatha Properties, Inc.*, 2016 WL 259566, at *3 (M.D. Fla. Jan. 21, 2016) ("It is hard to fathom that [an] admission or denial of his citizenship would reasonably lead to incriminating information. Because [the] blanket assertion necessarily covers innocuous information, such a blanket assertion of the privilege is improper and does not suffice to invoke the privilege against self-

[1] Here, for example, there is good reason to suspect that Clem's preference to "refuse to testify" at all has little to do with fear of self-incrimination. On his radio program this week, Clem stated that although he is "smack dab in the middle" of this case, he "chose not to testify" at trial "because [he's] tired of it all. I'm tired of it all." *See* Ex. 3 (Mar. 9, 2016 Bubba the Love Sponge Radio Show) at 56:23-56:50; *see also id.* (explaining that he is "tired of it, and the media, and everybody and the little excerpts that they play"); *id.* at 4:23-4:36 ("This Hogan trial deal is just – man, I know that I've pled the fifth because I'm done. . . . [B]asically, I pled the fifth because I'm done being people's pin cushion around here."); *id.* at 5:42-6:00 ("I don't want to get up on the witness stand and get into this whole nonsense, quite frankly.").

incrimination."). In short, Clem's blanket invocation of the Fifth Amendment is overbroad and improper as a matter of law, and so it must be rejected on its face.

II. Clem's Relationship With Plaintiff Requires Him to Take the Stand in this Case.

Clem's motion to quash also points to federal case law regarding when witnesses should be required to assert the Fifth Amendment in front of the jury. While, as discussed above, Clem is not being called to testify solely to ask him questions that might incriminate him, that body of federal law likewise cuts against Clem's effort to avoid testifying.

In *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976), the Supreme Court ruled that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Since then, various Courts of Appeal, including the Eleventh Circuit, have held that this rule can apply to non-parties as well, because a non-party may tactically invoke the privilege to support one party in the case. *See Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, 1310 (11th Cir. 2014); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir.1987); *LiButti v. United States*, 107 F.3d 110, 123 (2d Cir. 1997); *FDIC v. Fid. & Deposit Co. of Maryland*, 45 F.3d 969, 978 (5th Cir. 1995); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 277 (3d Cir. 1986). In this case, Defendants do not intend to ask the Court to issue any adverse inference instructions in the event that Clem were to validly assert the Fifth Amendment in his response to any specific questions, so that issue likewise is not presented here. In any event, the four-factor federal test that Clem's motion discusses supports denying his motion to quash here. The relevant factors are:

> *1. The Nature of the Relevant Relationships:* While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be. The closer

> the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.
>
> *2. The Degree of Control of the Party Over the Non-Party Witness:* The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2), and may accordingly be viewed . . . as a vicarious admission.
>
> *3. The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation:* The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.
>
> *4. The Role of the Non-Party Witness in the Litigation:* Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.

LiButti, 107 F.3d at 123-24. In *Coquina Investments*, the Eleventh Circuit applied this test and affirmed the trial court's decision to allow plaintiff to call a non-party witness and "hav[e] him invoke the Fifth Amendment privilege in the jury's presence." *Coquina Investments*, 760 F.3d at 1311. As the court explained, "a nonparty witness . . . may invoke the privilege for a variety of reasons that are unrelated to the possibility of self-incrimination; for instance, a nonparty may purposefully choose not to contradict incriminating evidence in order to 'saddle a defendant with liability by insinuation, particularly where the chance of prosecution of the witness is slim.'" *Id.* at 1310. There, the Eleventh Circuit found that three of the four *LiButti* factors weighed in favor of plaintiff's calling the witness, noting in particular that the witness "still retained some loyalty to [defendant]," and that "the assertion of the privilege likely advanced the interests of both [the witness] and [defendant] in the outcome of this litigation." *Id.* at 1311.

Here, *all four* factors weigh in favor of permitting Defendants to call Clem at trial and requiring Clem to invoke the Fifth Amendment to individual questions on the witness stand. Clem suggests the opposite, but a point-by-point analysis reveals the flaws in his argument:

1) The Nature of the Relevant Relationships: Clearly Plaintiff and Clem go back a long way – Plaintiff was Clem's best friend, best man at his wedding, and godfather to his son. Although Clem claims that their relationship is now "fractured," Motion at 5, the settlement agreement between Plaintiff and Clem that dismissed Clem from this matter for a token sum provides that Clem will not disparage Plaintiff and that Clem will "fully cooperate" with Plaintiff "in pursuing Gawker and its and its affiliated people and companies with criminal and civil prosecution." Defendants' Trial Ex. D-615 at 1, ¶ 4. In fact, Plaintiff agreed only to dismiss his civil claims against Clem "without prejudice," such that they continue to hang over Clem since they may be reinstated if Clem were to violate any of the Agreement's material terms. *Id.* at 3-4, ¶¶ 13-14. As a result, Clem maintains exactly the kind of "bond" with Plaintiff that favors requiring him to testify. While Clem's motion asserts that he has "no economic, professional or personal interest in the outcome of this trial," Motion at 4, that is demonstrably incorrect. *See also* Ex. 3 at 4:23-4:44 (announcing to his radio audience that in the case between "Hogan and Gawker . . . I hope Gawker has to pay him a lot of money. Period.").

2) The Degree of Control of the Party Over the Non-Party Witness: For the same reasons, Plaintiff clearly exerts control over Clem, indeed contractually so. Thus, Clem's statement that he "does not work for [Plaintiff] or any entity owned by [Plaintiff]," Motion at 6, is a complete non sequitur.

3) The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation: Clem states that he does not stand to profit from a judgment in

Plaintiff's favor and that a verdict for Defendants "will likewise not have a negative effect on [him]." Motion at 6. That may be so, but Clem's assertion of the privilege clearly advances his own interests by allowing him to comply with the Settlement Agreement and to avoid future civil claims. It further advances Plaintiff's interests because if Clem is unavailable to testify, no witness at trial will be able to dispute Plaintiff's account of his liaisons with Heather Clem and various other facts to which Bubba Clem was a key witness. Although not as compelling as actual testimony, answering questions about that subject in front of the jury will allowing it to draw conclusions about the veracity of that assertion.

4) The Role of the Non-Party Witness in the Litigation: Given Clem's central involvement in creating the recording of Plaintiff at the heart of this lawsuit, as well as his prior status as a co-defendant, Clem's conclusory assertion that he "plays a role but not a significant role as a witness in this litigation" is absurd. It cannot seriously be disputed that Clem is "a key figure in the litigation and played a controlling role in respect to . . . its underlying aspects." *LiButti*, 107 F.3d at 123-24. Indeed, on his radio program this week, Clem confirm that he is "one of the largest characters within this . . . worldwide story. . . . I am a huge part of it." Ex. 3 at 9:42-9:55.

It bears noting that Clem has again not cited and Defendants have not found a single case suggesting that a court should also consider whether an in-person assertion of the privilege "will result in [the witness] being embarrassed and mocked." *See* Motion at 3. In sum, the details of Clem's involvement in this litigation make it appropriate for Defendants to call him at trial and to require that he assert any Fifth Amendment protections he might have in person on the witness stand in response to particular questions, should he ultimately make the choice to do so.

III. Clem's Complete Unavailability at Trial Would Irreparably Prejudice Defendants.

If Clem is found to be completely unavailable to testify at trial, Defendants will be deprived of evidence that is necessary to establish certain facts and is of central importance to their defenses in this action. Case law is clear that in such circumstances, the action itself must be dismissed. For instance, in *Trulock v. Lee*, 66 F. App'x 472, 476 (4th Cir. 2003) (per curiam), plaintiff, an official at the Department of Energy, sued nuclear scientist Dr. Wen Ho Lee for defamation after Lee made statements to the press that plaintiff focused an investigation on him because of his ethnicity. During discovery, the government refused to produce key documents on privilege grounds – there, the state secrets privilege – and the district court subsequently granted the government's request as an intervenor to dismiss the case. The Fourth Circuit affirmed, explaining that "basic questions about truth, falsity, and malice" could not be answered without access to information that a third party (the government) would not provide. Likewise, in *Restis v. Am. Coal. Against Nuclear Iran, Inc.*, 2015 WL 1344479 (S.D.N.Y. Mar. 23, 2015), the district court dismissed a defamation action where a third party (the government, again acting as intervenor) asserted the same privilege to prevent access to information that would be key to establishing plaintiff's claims. The court wrote that while it "recognizes that dismissal is a 'harsh sanction,'" it is "nonetheless appropriate" where "there is no intermediate solution that would allow this litigation to proceed while also safeguarding the secrets at issue." *Id.* at *8. That would be the situation here as well: if Clem is completely unable to testify at trial, there is no "intermediate solution" – Defendants would be irreparably prejudiced because they would have no means to rebut Plaintiff's self-serving testimony about his alleged expectation of privacy

in his encounter with Heather Clem. Should that be the case, the Court must dismiss this action entirely.[2]

CONCLUSION

For the foregoing reasons, the motion to quash should be denied, without prejudice to Clem's right to invoke the Fifth Amendment in response to any particular question and to renew his objection in that context. In the alternative, if Clem's motion to quash is granted, such that the jury would be completely deprived of testimony and even conclusions based on his assertion of the privilege, the Court should take the appropriate step of dismissing this action entirely.

March 14, 2016

Respectfully submitted,

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[2] That is particularly true here where, unlike in *Trulock* and *Restis* (where the information was not known), the parties and the Court know that some of Clem's testimony would directly contradict plaintiff's.

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