UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JUDICIAL WATCH, INC., **Plaintiff,** **v.** **U.S. DEPARTMENT OF STATE,** **Defendant.**	**Civil Action No. 13-CV-1363 (EGS)**

NONPARTY DEPONENT BRYAN PAGLIANO'S MEMORANDUM OF LAW

Pursuant to the Court's June 3, 2016 Minute Order, nonparty deponent Bryan Pagliano respectfully submits this Memorandum of Law "addressing the legal authority upon which Mr. Pagliano relies to assert his Fifth Amendment rights in this civil proceeding, including requisite details pertaining to the scope of Mr. Pagliano's reported immunity agreement with the Government." As set forth below, Supreme Court and Circuit precedent clearly provide that Mr. Pagliano may assert his Fifth Amendment rights in this civil case as a nonparty, and that is true despite his proffer of testimony to the U.S. Department of Justice ("DOJ") pursuant to any grant of "use" and "derivate use" immunity in a separate matter.

BACKGROUND

In December 2015, Mr. Pagliano proffered testimony to the DOJ in connection with an ongoing DOJ investigation. A short time later, Mr. Pagliano and the DOJ entered into an agreement granting Mr. Pagliano limited "use" and "derivative use" immunity consistent with 18 U.S.C. § 6001 *et seq*. for that testimony and other testimony offered in connection with the same investigation. In response to the Court's Order, Mr. Pagliano has today filed copies of his use immunity agreements with the Government, with a Motion asking the Court to maintain those

documents *ex parte* and under seal. The U.S. Government counsel responsible for the investigation that gave rise to the grant of use immunity consented to that request. The DOJ has not authorized a grant of immunity for Mr. Pagliano in connection with any other matter, including this civil case.

ARGUMENT

MR. PAGLIANO MAY ASSERT HIS FIFTH AMENDMENT RIGHTS AND DECLINE TO TESTIFY AT A DEPOSITION IN THIS CIVIL CASE.

A. The Protections of the Fifth Amendment Extend to Discovery in Civil Cases.

Although the Fifth Amendment provides that "no person . . . shall be compelled *in any criminal case* to be a witness against himself," U.S. Const. amend. V (emphasis added), for at least 90 years the Supreme Court has recognized the right of an individual to assert the Fifth Amendment in a civil proceeding where the compelled testimony might later be used against him in a criminal case. The Supreme Court explained:

> The Government insists, broadly, that the constitutional privilege against self-incrimination does not apply in any civil proceeding. The contrary must be accepted as settled. The privilege is not ordinarily dependent upon the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant.

McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); *see also Kastigar v. United States*, 406 U.S. 441, 444 (1972) (the privilege against compulsory self-incrimination "can be asserted in any proceeding, civil or criminal, administrative or judicial, investigative or adjudicatory"). Thus, "[it] is well settled that the scope of protection afforded by the Fifth Amendment is sufficiently broad to encompass civil pretrial discovery." *SEC v. United Brands Co.*, Civil Action No. 75-

509, 1975 U.S. Dist. LEXIS 11380, at *3 (D.D.C. July 18, 1975) (citing *McCarthy*, 266 U.S. at 40).

B. Mr. Pagliano Has a Reasonable Basis For Intending To Assert The Privilege In Connection With His Forthcoming Deposition.

In the context of a civil proceeding, "[a] witness may properly invoke the privilege when he reasonably apprehends a risk of self-incrimination though no criminal charges are pending against him." *In re Corrugated Container Antirust Litig.*, 662 F.2d 875, 882 (D.C. Cir. 1981) (holding that a Fifth Amendment assertion was proper in a civil action because there was no "guarantee . . . that a criminal action would not be started"). "[A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing." *Slochower v. Board of Education*, 350 U.S. 551, 557 (1956). A claim of privilege passes constitutional muster where "a fear of prosecution . . . is more than fanciful or merely speculative." *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 883. The Fifth Amendment privileges both directly incriminating answers, as well as any answers that "would furnish a link in the chain of evidence needed to prosecute[.]" *Id.* at 882.

Notably, the witness does not bear the burden of actually establishing the risk of prosecution. *See In re Corrugated Container Antitrust Litig.*, 662 F.2d at 882-83 ("[I]f the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee."). The "inquiry into the scope of the privilege is limited by the Fifth Amendment and the judge may not force a witness to prove incrimination by testimony." *Anton*, 233 F.R.D. at 218. Instead, the court need "determine only whether there is a reasonable basis for believing a danger to the witness might exist." *Id.* (quotations omitted).

The potential for self-incrimination here is sufficient to justify Mr. Pagliano's intention to assert his Fifth Amendment rights. Mr. Pagliano's prospective deposition will inevitably cover matters that might "furnish a link in the chain of evidence needed to prosecute." *Id.* at 218-19. The Court has authorized Judicial Watch to obtain discovery relating to "the creation and operation of clintonemail.com for State Department business." It is not "fanciful" to conclude that those matters could fall within the scope of an ongoing (or possible future) criminal investigation of the same or a similar subject matter. *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 883. Indeed, the mere fact that the government was willing to offer Pagliano "use" immunity here in exchange for his testimony indicates that his fear of prosecution is more than fanciful or speculative. *See id.* at 883 (fact of immunity grant to appellant non-party witness and others "strongly attests to the injurious nature of [witness's] evidence"). Moreover, there is nothing present in this case to prevent a prosecution as a matter of law, such as a statute of limitations. *See Anton*, 233 F.R.D. at 219-20 (noting that absent some legal bar, fear of prosecution is reasonable).

Under these circumstances, there is plainly a "reasonable basis" for believing that a danger to Mr. Pagliano "might exist." *Id.* at 218. Indeed, Plaintiff has neither contended otherwise nor moved to compel Mr. Pagliano's testimony; the current dispute is limited only to whether Plaintiff may videotape Mr. Pagliano's assertion of his Fifth Amendment rights at his forthcoming deposition.

C. The DOJ's Conferral of "Use" Immunity in a Separate Proceeding Does Not Preclude Mr. Pagliano from Asserting the Fifth Amendment in this Case.

The fact that the DOJ has conferred "use" immunity in connection with a separate "matter under investigation" does not hinder his ability to invoke his Fifth Amendment rights in this case. As an initial matter, "use" immunity does not provide blanket immunity from

prosecution: "The only benefit as far as the witness is concerned is that . . . any information directly or indirectly derived from such testimony may not be used against him in a subsequent criminal prosecution." *In re Corrugated Container Antitrust Litig.*, 662 F.2d at 887. In other words, a grant of "use" immunity does not prevent the government from prosecuting; it merely limits the government's sources of evidence.

For this reason, the Supreme Court has squarely held that a nonparty deponent in a civil action retains the right, despite a grant of "use" immunity by the DOJ under 18 U.S.C. § 6002, to rely on the Fifth Amendment in declining to testify. *See Pillsbury Co. v. Conboy*, 459 U.S. 248, 263-64 (1983). In *Conboy*, a district court held a nonparty deponent in contempt for asserting the Fifth Amendment privilege in response to a series of deposition questions that were identical to those asked during his grand jury testimony, which testimony was subject to a separate grant of "use" immunity under Section 6002. *Id.* at 250. The district court held Conboy in contempt, but stayed that contempt order pending appeal. The court of appeals, sitting en banc, reversed on rehearing. *Id.* at 251.

The Supreme Court agreed that the contempt order was improper because the deponent was entitled to the protection of the Fifth Amendment. *Id.* The Court held that a nonparty "deponent's civil deposition testimony," even where it "closely track[s] his prior immunized testimony, is not, without duly authorized assurance of immunity at the time, immunized testimony within the meaning of § 6002." *Id.* at 263-64. For example, the witness's answers that merely repeated prior immunized testimony verbatim might reflect his "current, independent memory of events" and might be used in a future prosecution. *Id.* at 255 (describing petitioner's argument). The Court thus held that "District Courts are without power to compel a civil

deponent to testify over a valid assertion of his Fifth Amendment right, absent a separate grant of immunity pursuant to § 6002." *Id.* at 257 n.13. The Supreme Court explained:

> Unless the grant of immunity assures a witness that his incriminating testimony will not be used against him in a subsequent criminal prosecution, the witness has not received the certain protection of his Fifth Amendment privilege that he has been forced to exchange. No court has authority to immunize a witness. That responsibility, as we have noted, is peculiarly an executive one, and only the Attorney General or a designated officer of the Department of Justice has authority to grant use immunity. See 18 U. S. C. §§ 6002, 6003. Nor should a court, at the time of the civil testimony, predetermine the decision of the court in a subsequent criminal prosecution on the question whether the Government has met its burden of proving that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
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> . . . .
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> Whatever justification there may be for requiring a witness to give incriminating testimony in aid of a criminal investigation after the government has granted use immunity, there is no similar justification for compelling a witness to give incriminating testimony for the benefit of a private litigant when the government has not chosen to grant immunity.

Id. at 261, 262.

Courts have consistently followed *Conboy* and held that, even where deposition testimony in a separate proceeding overlaps with—or is identical to—immunized testimony, that deposition testimony is not "derived from" the immunized testimony and therefore not protected by the grant of immunity. *See, e.g.*, *Judicial Watch, Inc. v. United States Dep't of Commerce*, 196 F.R.D. 1, 3-4 (D.D.C. 2000) (denying Judicial Watch discovery in a FOIA action from a nonparty, who had received "use" immunity in connection with his plea agreement, because the discovery "would constitute independent information that could be used in a subsequent criminal prosecution"); *SEC v. ARVCO Capital Research, LLC*, No. 12-cv-221, 2014 U.S. Dist. LEXIS 145460, at 37-38 (D. Nev. Oct. 10, 2014) (immunized witness "did not waive the privilege when

he gave statements to the United States Attorney's Office in connection with the criminal proceeding" pursuant to limited "use" immunity).

As noted, Judicial Watch has not moved to compel Mr. Pagliano's testimony—presumably because, as *Conboy* makes clear, "absent a separate grant of immunity pursuant to § 6002," Mr. Pagliano may not be compelled to testify over an assertion of his Fifth Amendment rights. 459 U.S. at 257 n.13. Indeed, Mr. Pagliano's Fifth Amendment interests are even stronger than those at issue in *Conboy*, where the witness had been asked merely to "repeat[] verbatim or closely track[]" his prior immunized statements. *Id.* at 255. Unlike in *Conboy*, however, Judicial Watch does not have Mr. Pagliano's immunized testimony or the questions asked of him (which are not public). If the witness in *Conboy* could validly invoke his Fifth Amendment rights to refuse to repeat verbatim prior immunized statements, *a fortiori* Mr. Pagliano may invoke the privilege in declining to provide answers to Judicial Watch that are not covered by any immunity grant. In short, because Mr. Pagliano's immunity agreement with the DOJ immunizes only "statement[s] or testimony responsive to a question put to Bryan Pagliano in *[that] matter*," he is free to assert his Fifth Amendment rights against self-incrimination in *this* matter.

CONCLUSION

For the foregoing reasons, Mr. Pagliano may properly assert the Fifth Amendment in response to the questions that may permissibly be posed to him at his prospective deposition in this civil action.

Dated: June 7, 2016

Respectfully submitted,

By: /s/ Mark J. MacDougall

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CERTIFICATE OF SERVICE

The undersigned certifies that on this 7th day of June 2016, a true and correct copy of the foregoing document was served upon the parties in this case via the Court's electronic filing system and is available for viewing and downloading from the ECF system.

/s/ Mark J. MacDougall
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