

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

CIVIL ACTION NO. 8:20-cv-325-T-35AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

**BRIAN DAVISON,
BARRY M. RYBICKI,
EQUIALT LLC, *et al.*,**

Defendants.

**Supplemental Memorandum of Law in Support of Injunctive and Other Relief and
Motion for Adverse Inference**

Plaintiff Securities and Exchange Commission (the “Commission”) through undersigned counsel hereby submits this supplemental memorandum of law in support of Injunction and Other Relief (D.E. 138) and respectfully moves the Court to draw an adverse inference against Defendant Barry M. Rybicki based on his invocation of his Fifth Amendment privilege against self-incrimination.

Introduction

The Court should draw an adverse inference against Rybicki in connection with the preliminary injunction hearing scheduled for July 31, 2020. Specifically, the Court should consider Rybicki’s refusal to answer any questions concerning any issues in this matter in evaluating the Commission’s likelihood of success on the merits. Otherwise, Rybicki will be emboldened to improperly use the Fifth Amendment privilege as both a sword and a shield.

Facts

On July 17, 2020, the Commission attempted to depose Rybicki. During the deposition, Rybicki invoked his Fifth Amendment right against self-incrimination and refused to answer any question about any issue in the instant matter. As a result, the Commission was unable to question Rybicki about his: (1) role in hundreds of unregistered securities offerings; (2) representations in and dissemination of corresponding offering and marketing materials; (3) misuse and commingling of offering proceeds; (4) recruitment and supervision of unregistered third-party sales agents; and (5) control over the management company and the investment funds. Furthermore, Rybicki is also the owner of Relief Defendant BR Support Services. Therefore, Rybicki's invocation of the Fifth Amendment privilege also precluded the Commission from questioning him about the millions in commissions that BR Support Services collected from the investment funds involved in this matter.

The Commission has sought unsuccessfully to question Rybicki about his role in the events underlying the Amended Complaint since November 2019 before this action was filed. For several months prior to the filing of this emergency action, the Commission sought investigative testimony from Rybicki as well as documents from his company BR Support Services. Despite numerous attempts to schedule Rybicki's investigative testimony, Rybicki failed and/or refused to provide dates for his testimony within the time the Commission requested. In an effort to further hinder or delay the Commission's investigation, Rybicki also failed to produce any documents relating to his company BR Support Services which paid millions of dollars in unauthorized commissions to numerous unlicensed sales agents.

Thus, both in the investigation and this lawsuit, Rybicki has failed to provide any information concerning his involvement in the scheme alleged in the Amended Complaint. Not only has this impeded the Commission's ability to gather critical evidence to meet its burden of

proof, but it has also prevented Rybicki from meeting his burden of showing that the facts alleged against him are false or incorrect. Consequently, the Commission will be unfairly and unnecessarily prejudiced if Rybicki is allowed to benefit from his efforts to stymie the Commission's claims against him. Accordingly, the Court should draw an adverse inference against Rybicki and consider his silence as evidence of the Commission's likelihood of success on the merits in connection with its request for preliminary injunction.

Legal Argument

It is well settled that the Fifth Amendment does not forbid adverse inferences against a party to a civil action. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *United States v. A Single Family Residence & Real Prop. Located at 900 Rio Vista Blvd., Fort Lauderdale*, 803 F.2d 625, 629 n. 4 (11th Cir. 1986). While an adverse inference from a defendant's invocation of his right against self-incrimination in a criminal case violates the Fifth Amendment, *see Griffin v. California*, 380 U.S. 609, 615 (1965), the Constitution does not preclude the jury from drawing a negative inference from the defendant's invocation of his Fifth Amendment right in a civil case. *See Palmigiano*, 425 U.S. at 318. This distinction exists largely because the reasons for preventing the government from utilizing the invocation of the right against self-incrimination in a criminal case are far less persuasive in a civil case. *See Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509, 522 (8th Cir.), *cert. denied*, 469 U.S. 1072 (1984); *Rad Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 274 (3d Cir. 1986).

Courts routinely draw adverse inferences against parties who refuse to testify in civil cases. *See, e.g., A Single Family Residence*, 803 F.2d at 629 n.4 (district court properly drew adverse inference from corporate representative's refusal to testify that testimony would not have been favorable to corporation's position); *FDIC v. Elio*, 39 F.3d 1239 (1st Cir. 1994) (district court "entitled

to draw a negative inference” from co-defendant’s refusal at deposition to answer any questions about her involvement in the alleged fraud). With limited exceptions¹, adverse inferences have been regularly drawn from a defendant’s invocation of the Fifth Amendment privilege in SEC enforcement actions. *See, e.g., SEC v. Chester Holdings, Ltd.*, 41 F. Supp. 2d 505, 525 (D.N.J. 1999) (“Invocation of one’s Fifth Amendment privilege in civil cases, either in depositions or at trial, permits an adverse inference to be drawn against the party invoking the privilege” citing *Baxter*, 425 U.S. at 318); *SEC v. Scott*, 565 F. Supp. 1513, 1533 (S.D.N.Y. 1983), *aff’d sub nom.*, *SEC v. Cayman Islands Reinsurance Corp.*, 734 F.2d 118 (2d Cir. 1984); *SEC v. Musella*, 578 F. Supp. 425, 429 (S.D.N.Y. 1984); *SEC v. Benson*, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987); *SEC v. Softpoint, Inc.*, 958 F. Supp. 846, 856-60 (S.D.N.Y. 1997), *aff’d SEC v. Softpoint*, 159 F.3d 1348, 1998 WL 537522, at *1 (2d Cir. June 29, 1998); *SEC v. Invest Better 2001*, 2005 WL 2385452, at *2-3 (S.D.N.Y. May 4, 2005); *SEC v. Pittsford Capital Income Partners, LLC*, 2007 WL 2455124, at *14-15 (W.D.N.Y. Aug. 23, 2007); *SEC v. Cassano*, 2000 WL 1512617 at *2 n.1 (S.D.N.Y. Oct. 11, 2000); *SEC v. Herman*, 2004 WL 964104, at *7 (S.D.N.Y. May 5, 2004); *SEC v. DiBella*, 2007 WL 1395105, at *1-4 (D. Conn. May 8, 2007); *SEC v. PacketPort.Com, Inc.*, 2006 WL 2349452 at * 6 (D. Conn. July 28, 2006).

¹ While the Eleventh Circuit recognizes that courts may take an adverse inference against a civil defendant for refusing to testify on Fifth Amendment grounds, there is an exception to this rule when a claimant in the civil case is also a defendant in the criminal case and is forced to choose between waiving the privilege and losing the case on summary judgment. *United States v. Two Parcels of Real Prop. Located in Russell Cty., Ala.*, 92 F.3d 1123, 1129 (11th Cir. 1996) (citing *A Single Family Residence*, 803 F.2d at 629; *United States v. Premises Located at Route 13*, 946 F.2d 749 (11th Cir.1991)). To trigger this rule, the invocation of the privilege must result in an adverse judgment, not merely the loss of “his most effective defense.” *United States v. Premises Located at Route 13*, 946 F.2d 749, 756 (11th Cir. 1991), *as amended* (Nov. 5, 1991). Here, Rybicki is not a defendant in a criminal case and an adverse inference alone will not result in summary judgment in favor of the Commission.

In the context of a preliminary injunction, courts may consider a defendant's refusal to answer questions in evaluating the movant's likelihood of success on the merits. *See, e.g., Sentinel Trust Co. v. Namer*, 1998 WL 887287, at *3 (6th Cir. Dec. 9, 1998) (affirming the district court's grant of preliminary injunction without a live hearing where the court drew an adverse inference from defendant's refusal to answer certain questions at deposition); *see also SEC v. Cherif*, 933 F.2d 403, 412 (7th Cir. 1991) (affirming preliminary injunction where the district court took adverse inference from defendant's assertion of Fifth Amendment privilege, which left probative evidence unrebutted). The rationale supporting this position is "the prevailing rule 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." *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (quoting *Baxter*, 425 U.S. at 318). Notably, "[s]ilence is often evidence of the most persuasive character." *See Baxter*, 425 U.S. 319. Consequently, "failure to contest an assertion . . . is considered evidence of acquiescence . . . if it would have been natural under the circumstances to object to the assertion in question." *Id.* (citation and quotation marks omitted).

Moreover, a party who asserts the privilege may not "convert [it] from the shield against compulsory self-incrimination which it was intended to be into a sword whereby [he] would be freed from adducing proof in support of a burden which would otherwise have been his." *United States v. Rylander*, 460 U.S. 752, 758–59 (1983). This limitation is appropriate because "the privilege, when fully exploited, puts the private civil plaintiff at a disadvantage more severe than previously appreciated. Especially when civil liability allegedly arises from criminal conduct, the privilege precludes discovery and frustrates the truth-determining capacity of the litigation process to an alarming extent." Heidt, *The Conjurer's Circle—The Fifth Amendment Privilege in Civil Cases*, 91 Yale L.J. 1062, 1135 (1982). Thus, "[u]se of the privilege in a civil case may, therefore,

carry some disadvantages for the party who seeks its protection.” *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir. 1994). However, forcing an individual to risk non-criminal disadvantage by remaining silent for fear of self-incrimination in a parallel criminal proceeding does not rise to the level of an unconstitutional infringement. *Baxter*, 425 U.S. at 317-18; *U.S. v. White*, 589 F.2d 1283, 1287 (5th Cir. 1979)².

Here, Rybicki’s invocation of his Fifth Amendment privilege against self-incrimination during the deposition—especially, given that he failed to provide testimony during the investigative proceeding—is highly probative and this Court should draw an adverse inference against him as a result. The Court should not allow Rybicki to exploit the privilege and frustrate the fact finding capacity of the litigation process to the inequitable detriment of the Commission. Accordingly, the Court should assess Rybicki’s silence as evidence of the Commission’s likelihood of success in connection with its Amended Complaint for Injunctive and Other Relief.

Conclusion

For the forgoing reasons, the Commission respectfully requests that the Court draw an adverse inference from Defendant Barry M. Rybicki’s assertion of his Fifth Amendment privilege and refusal to testify.

Respectfully submitted,

July 24, 2020

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² Fifth Circuit decisions decided on or before September 30, 1981, are binding precedent in the Eleventh Circuit. *Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

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