IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WILLIAM CARTER	)	
	)	
Plaintiff,	)	No. 17-cv-7241
	)	
v.	)	Judge Maldonado
	)	
	)	Magistrate Judge Finnegan
CITY OF CHICAGO, RONALD WATTS, PHILIP J. CLINE, DEBRA KIRBY, DARRYL EDWARDS, ALVIN JONES, KALLATT MOHAMMED, JOHN RODRIGUEZ, CALVIN RIDGELL, JR., ELSWORTH SMITH, JR., GEROME SUMMERS, JR., and KENNETH YOUNG, JR.,	)	
Defendants.	)	

DEFENDANT KALLATT MOHAMMED'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR LEAVE TO FILE AMENDED ANSWER TO PLAINTIFF'S COMPLAINT

Defendant, Kallatt Mohammed ("Mohammed"), by and through one of his attorneys, Special Assistant Corporation Counsel Eric S. Palles of Mohan Groble Scolaro, P.C., in further support of his motion for leave to file his Amended Answer to Plaintiff's Complaint replies as follows:

THE FIFTH AMENDMENT INVOCATION WAS IN GOOD FAITH

Defendant Mohammed has moved, pursuant to Fed. R. Civ. P. 15, to amend his May 11, 2018 Answer to Plaintiff's Complaint. In response to certain of the allegations contained in the Complaint, Mohammed asserted his Fifth Amendment privilege against self-incrimination. (Dkt. 71). Mohammed now wishes to withdraw these assertions and, if requested, to resubmit to a deposition on the subject matter of the subject case.

On October 6, 2017, Plaintiff filed a dramatic and panoramic Complaint alleging that Plaintiff was the victim of "a criminal enterprise run by convicted felon and former Chicago Police Sergeant Ronald Watts and his tactical team" and that the "Watts Gang" "engaged in robbery and extortion, used excessive force, planted evidence, fabricated evidence, and manufactured false charges" Dkt. 1 at ¶ 1, 2. The use of language evocative of a RICO conspiracy could not have been unintentional. The Complaint further alleged a pattern of "lawlessness" known to CPD since 2004 culminating when Watts and Mohammed were criminally charged in federal court in February 2012 after "shaking down a federal informant they believed was a drug dealer." Defendant Mohammed pleaded guilty in 2012. *Id*. at ¶¶ 46, 67. In fact, the investigation disclosed that Watts and Mohammed had been convicted of the theft of $5200 in violation of 18 U.S.C. § 641 in Case No 12 CR 87(N.D. Ill.). The file also disclosed that an extensive federal criminal investigation had been undertaken, including Title III wiretaps, pen registers, and consensual recordings involving Watts and Mohammed. Counsel was also aware that Mohammed had made certain post-arrest statements to the FBI memorialized in FBI 302s. The undersigned did not have access to any of this information, and there was no evidence whether or not the federal investigation had been concluded.

As Carter points out, he was the fourth of almost 200 plaintiffs to claim similar conduct. By the time Mohammed's Answer was filed in May 2018, counsel estimates that there were already 23 individuals who had overturned their convictions overturned, based upon the Watts and Mohammed federal convictions. Specifically, on November 16, 2017, Judge LeRoy K. Martin, Jr. vacated 18 such convictions.

> Accordingly, in answer to such allegations as contained, for example, in paragraph 85
>
> Watts and his gang . . . engaged in robbery, extortion, the use of excessive force, planting evidence, fabricating evidence, and manufacturing false charges against

> persons at the Ida B. Wells Homes, including but not limited to the wrongful arrest, detention, and prosecution of plaintiff, as described above.

Mohammed answered:

> To the extent that this paragraph makes allegations against Defendant Mohammed directly, *under the advice of counsel*, Defendant Mohammed respectfully invokes the rights guaranteed to him by the Fifth Amendment of the United States Constitution. (Emphasis added).

Similarly, Mohammed was deposed about the Carter case and six others on November 21, 2019, and he asserted the privilege against self-incrimination to the majority of questions posed about the Carter case. On May 7, 2024, the undersigned advised Plaintiff's counsel that Mohammed would not invoke the privilege at trial and offered that Mohammed be deposed about Carter at a previously agreed-upon but as yet unscheduled deposition. Plaintiff's counsel now claims, without evidence, that Mohammed (and, *a fortiori*, the undersigned counsel) asserted the Fifth Amendment in bad faith and in an effort to game the judicial system.

Plaintiff's counsel papers over the absence of any evidence of bad faith by instead arguing "Mohammed is unable to point to anything showing that he acted in good faith in asserting the privilege." (Dkt 164 at p.8). Except, of course, that "[s]ubsequent investigation of Plaintiff's allegations revealed information that resulted in the undersigned counsel's determination that the privilege could, and should, be withdrawn." (Dkt.162 ¶ 3). Counsel dismisses this and contends that the assertion of the Amendment privilege is presumptively made in bad faith and must be rebutted. (Dkt. 164 at pp. 8-9-). As doubtful as this proposition may be, we will address the circumstances surrounding the initial assertion of the Fifth Amendment in the Answer and its withdrawal by the time of the deposition.

The assertion of the privilege against self-incrimination is appropriate where there is "some tendency to subject the person to criminal liability." *In re High Fructose Corn Syrup*

Antitrust Litig., 295 F.3d 651, 663-64 (7th Cir. 2002); see *Kastigar v. United States*, 406 U.S. 441, 444-45, (1972) (privilege "protects against any disclosures which the witness reasonably believes could be used in a criminal proceeding or could lead to other evidence that might be so used.") *Allen v. Starks*, No. 12 C 8543, 2013 U.S. Dist. LEXIS 74669, *6 (N.D. Ill., May 28, 2013) (Guzman, J.) (refusing to compel testimony of defendant officer that "could have some tendency to subject him to criminal liability.") The witness must have some objectively reasonable basis to perceive some real danger of prosecution. This perception must not be imaginary or fanciful. *Chagolla v. City of Chicago*, 529 F. Supp. 2d 941, 947(N.D. Ill. 2008) (Kennelly, J.), *citing United States v. Apfelbaum*, 445 U.S. 115, 128 (1980):

The specter of potential prosecution has existed throughout the life of the litigation. The Civilian Office of Police Accountability (COPA) opened numerous investigations involving numerous Watts plaintiffs and officers who served on the team, including Carter's case. (Exhibit 1). Ultimately, COPA referred some of its findings to the Civil Rights Division of the United States Department of Justice. (Exhibit 2). COPA investigators also met with the Cook County State's Attorney's Office to discuss William Carter specifically in May 2018. (Exhibit 3). As early as February 2018, Watts plaintiffs were appearing with their attorneys before federal law enforcement authorities. (Exhibits 4 and 5) Mohammed himself was subpoenaed by COPA in May 2019 and approached for an interview by an FBI agent and an Assistant United States Attorney sometime after November 2022. Over the same period, COPA interviewed several of the co-defendant officers, as did the Cook County State's Attorney's Office (from at least December 2019 to 2021). (Exhibit 6).

Mohammed was deposed about the Carter case and six others on November 21, 2019. He

invoked the Fifth Amendment to most, but not all, questions concerning the Carter case.[1] As he specifically stated,

> Because I am concerned that the *mere act of testifying to this subject matter*, this incident, may cause me to be criminally indicted by the United States Attorney's Office and/or Cook County State's Attorney's Office, *on the advice of counsel* -- any questions about certain aspects -- I am going to decline to answer any questions about certain aspects of my conduct as a police officer, based upon the rights guaranteed to me by the Fifth Amendment of the United States Constitution. (Emphasis added).

Mohammed Deposition Excerpt (Dkt 164-3) at p.250.

Throughout the deposition, Mohammed (and his counsel) were required to weigh not only the incriminating nature of a particular answer but also the potential for waiver of the privilege. "A witness, in a single proceeding, may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details." *Mitchell v. United States*, 526 U.S. 314, 321, 143 L. Ed. 2d 424, 119 S. Ct. 1307 (1999); *Rogers v. United States*, 340 U.S. 367, 373, 71 S. Ct. 438, 95 L. Ed. 344 (1951). Rather than risk waiving the privilege in the early stages of litigation, Mohammed, on advice of counsel, prudently and in good faith asserted the privilege.

SUBSEQUENT DEVELOPMENTS

Because Plaintiff offers no substantive evidence of bad faith, his attempt to elicit the specifics of the undersigned's investigation, which led to his 2023 advice to Mohammed to testify fully and waive his Fifth Amendment privilege seems rather designed to invade both the attorney-client and work product privileges. It should suffice to note some significant events in the Watts Coordinated Proceedings that transpired over the subsequent six years.

[1] Blanket assertion of the privilege is inappropriate. See *Shakman v. Democratic Org.*, 920 F. Supp. 2d 881, 887 (N.D. Ill. 2013) (Shenkier, M.J.)

1. As Plaintiff notes, discovery was exchanged by 2022, and Carter was deposed on August 23, 2022. (Dkt. 164 at p. 13).
2. Counsel received and reviewed the contents of three separate COPA investigations that involved Plaintiff.
3. After several years of litigation, negotiations, and a July 24, 2023 order by Judge Valderrama in the Coordinated Proceedings (19 C 1717, Dkt. 574), the parties began to receive recordings from the FBI, DEA, and ATF in August 2023. In fact, the United States has yet to turn over in excess of 100 consensual recordings taken by the FBI, although counsel listened to pertinent ones at FBI headquarters in January and February 2024. None of these disclosed any unlawful activity related to the instant case.
4. The apparent quiescence of the investigations, in addition to the simple passage of time and its corresponding impact upon any potential criminal statutes of limitation, resulted in counsel's determination that prosecution is unlikely.

Plaintiff's "bad faith" claim seems disingenuous. If his counsel truly believed that Mohammed's claims of privilege were unwarranted, he could have moved to compel answers after Mohammed asserted them. Instead, he contented himself with the benefits that the adverse inference provided him.

Courts must liberally construe the privilege against compulsory self-incrimination in favor of the right it was intended to secure. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). In contrast to a criminal proceeding, assertion of the Fifth Amendment privilege in civil litigation comes with a catch: an adverse inference against the asserting the privilege may be drawn from the Fifth Amendment silence. *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 390 (7th Cir.

1995). Nonetheless, the Supreme Court has cautioned against "the imposition of any sanction which makes assertion of the Fifth Amendment privilege "costly." *Baxter v, Palmigiano,* 425 U.S. 308, 329 (1976). "Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *Johnson v Guevara*, No 20 C 4156, 2023 U.S. Dist. LEXIS 131972 (N.D. Ill. July 31, 2023); *United States v. 4003-4005 5th Ave.,* 55 F.3d 78, 85 (2d Cir. 1995). See also *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 549 (5th Cir. 2012) ("the Supreme Court has cautioned against making invocations of the Fifth Amendment privilege against self-incrimination unnecessarily burdensome to the defendant.") Consequently, the Court must consider whether the remedy that Plaintiff seeks, denial of the amendment, would serve the interests of justice.

Here, the Response offers no guidance. If the Fifth Amendment was invoked in bad faith, is Plaintiff requiring Mohammed to nonetheless persist in invoking it during the course of trial? If the original Answer is allowed to stand, it will do nothing to advance any dispositive motions subsequently filed by either party. Mohammed's Fifth Amendment assertions are denials, not admissions. See *National Acceptance Co. of America v. Bathalter,* 705 F.2d 924 (7th Cir. 1983); *United Auto Ins. v. Veluchamy, supra*, 2010 U.S. Dist. LEXIS 19432,*4, *King v. Evans*, No. 13 C 1937, 2015 U.S. Dist. LEXIS 121488, *6 (September 11, 2015) (Gilbert, M.J.). It might reasonably be anticipated that Plaintiff would try to impeach Mohammed concerning his prior Fifth Amendment assertions if he testifies. Suppose, however, that Mohammed chose not to testify. If Plaintiff called Mohammed solely for the purpose of dramatizing his previous and obsolete assertion against self-incrimination, would Mohammed be compelled to invoke the privilege? Of course, this exercise would be unduly prejudicial and a detriment that is

disproportionate to the invocation. *Cf. Martinez v. City of Chicago*, No. 14 C 369, 2016 U.S. Dist. LEXIS 84231 (June 29, 2016), at *26, 29, 62.

PLAINTIFF HAS NOT BEEN PREJUDICED

Federal Rule 15 explicitly states that a court should freely grant leave to amend "when justice so requires." Case law makes clear that "justice so requires" in the absence of futility, undue delay, or, particularly, undue prejudice to the party opposing the motion. *Eastern Natural Gas Corp. v. ALCOA*, 126 F.3d 996, 999 (7th Cir. 1997); *Am. Hardware Mfrs. Ass'n v. Reed Elsevier, Inc*., No. 03 C 9241, 2006 U.S. Dist. LEXIS 49220, *6 (N.D.Ill., July 6, 2006). The trial of this matter is scheduled for May 27, 2025, with dispositive and Daubert motions due November 22, 2024. (Dkt. 158, 161).

Plaintiff claims that Mohammed's reliance upon *Evans v. City of Chicago*, 513 F.3d 735, (7th Cir. 2008), where "the trial had not yet begun when the officers waived the privilege, which gave them time to provide amended answers to all discovery and appear for redepositions" (*id*. at 745) is misplaced, while his reliance on *Harris v. City of Chicago*, 266 F.3d 750, 755 (7th Cir. 2001), where the court found it error to exclude evidence of a witness's prior invocation when he abandoned the privilege "just prior to trial" (*id*. at 755) is not. The two cases were recently harmonized by Judge Durkin, who observed, "According to the Seventh Circuit, timeliness in this context should be analyzed with respect to the trial date, not the close of discovery."[2] *In re Broiler Chicken Antitrust Litigation,* 2022 U.S. Dist. LEXIS 139544 * 48-49; 2022 WL 3139570 (August 5, 2022). In that case, the witness "invoked the Fifth Amendment when it was common knowledge

[2] To clarify an apparent dispute between the parties, Mohammed has asserted that fact discovery for *this matter* (i.e., *Carter*) is still open. While fact discovery in the Coordinated Proceedings is generally closed, there are exceptions, including the deposition of three witnesses Carter has yet to produce s (No. 19 C 1717, Dkt. 724, Ex, 1 at p. 3) and a final Mohammed deposition (No. 19 C 1717, Dkt. 684 at p. 3).

that there was an active criminal investigation that could potentially include him." The existence of the government's investigation provided a legitimate basis to invoke the Fifth Amendment until such time he no longer believed he was in criminal jeopardy. Under the circumstances, Judge Durkin found there was a good faith basis both for previously invoking the Fifth Amendment and for subsequently waiving it and sitting for a second deposition. Moreover, the motion was timely because there were still 42 days left until the summary judgment motions were due, and more than a year before trial. 2022 U.S. Dist. LEXIS 139544 *50-51. See *also Skillz Platform Inc. v. Aviagames Inc.*, No. 21-cv-02436-BLF, 2024 U.S. Dist. LEXIS 14486, at *3 (N.D. Cal. Jan. 26, 2024) ("The Court finds that this case is distinguishable from *Harris*. Although Chen withdrew her assertion of her Fifth Amendment privilege around one month before trial, unlike the witness in *Harris*, Chen sat for a further deposition of up to 8 hours and with no subject matter restrictions, as allowed by the Court.")

The circumstances of *In re Broiler Chicken* are substantially similar to the instant case, and Judge Durkin's analysis is persuasive. There is demonstrably no prejudice to the Plaintiff by reason of the amendment to the Answer. Nor is there any basis to deny the amendment as a sanction for a bad faith assertion of the privilege against self-incrimination. There was no bad faith and, in any event, denying leave to amend is a sanction "too costly" under the circumstances of this case.

WHEREFORE, Defendant, Kallatt Mohammed, moves this Court for leave to file his Amended Answer to Plaintiff's Complaint.

Respectfully submitted,

/s/ Eric S. Palles #2136473
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