UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Plaintiff,	)	
v.	)	**CASE NO. 4:12-CV-00080-CEJ**
	)	
BURTON DOUGLAS MORRISS,	)	
ACARTHA GROUP, LLC,	)	
MIC VII, LLC,	)	
ACARTHA TECHNOLOGY PARTNERS, LP, and	)	
GRYPHON INVESTMENTS III, LLC	)	
	)	
Defendants, and	)	
	)	
MORRISS HOLDINGS, LLC,	)	
	)	
Relief Defendant.	)	
	)	

DEFENDANT BURTON DOUGLAS MORRISS' REPLY TO RECEIVER'S SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO MOTION REGARDING ADVANCEMENT OF DEFENSE EXPENSES UNDER INSURANCE POLICY

Defendant Burton Douglas Morriss ("Mr. Morriss") submits this Reply to the Receiver's supplemental memorandum in opposition (Doc. # 113) to Mr. Morriss' motion regarding the advancement of defense expenses under an insurance policy (Doc. ## 72, 73).

The Receiver makes a single point in her supplemental memorandum – that "[t]he Court should draw adverse inferences against Morriss with respect to the arguments raised in the pending motion" based on Mr. Morriss' invocation of his Fifth Amendment right against self-incrimination in a different proceeding. Doc. # 113 pp. 1-2. This contention is insupportable for a number of reasons.

First, the Receiver cites no support for the proposition that a party's invocation of the Fifth Amendment *in a different case* could justify the use of an adverse inference. Such an unwarranted extension of the adverse inference rule was expressly rejected by the district court in *Fujisawa Pharmaceutical Co., Ltd. v. Kapoor*, 1999 WL 543166 (N.D. Ill. July 21, 1999). As the court in that case explained:

> In a civil action the Fifth Amendment permits adverse inferences to be drawn against parties "when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). The implication is that this rule applies to Fifth Amendment invocations that take place in the proceeding at hand, not in a separate proceeding. *See National Acceptance Co. v. Bathalter*, 705 F.2d 924, 929–30 (7th Cir. 1983) (adverse inference would be appropriate if case went to trial and defendant "declined to answer a question and invoked his Fifth Amendment privilege"). However, Dr. Kapoor's invocation of the Fifth Amendment came in March 1991 during a congressional hearing that was prior to and separate from the instant case.

Id. at *9. *Cf. Dowe v. National Railroad Passenger Corp.*, 2004 WL 887410, *7 (N.D. Ill. Apr. 26, 2004) (granting motion in limine to preclude reference to self incrimination claim asserted in separate proceeding; "Under the circumstances, the Court believes that probative value of Stokes' privilege claim in a separate lawsuit has only limited probative value."). Under the version of the rule suggested by the Receiver, once a person has claimed the Fifth Amendment in any proceeding, he then faces an adverse inference on that issue in any subsequent proceedings, for the remainder of time.

Second, as the cases cited by the Receiver acknowledge, the rule does not permit an adverse inference in the absence of other evidence. As the Eighth Circuit explained in one of the Receiver's cases:

> There is, of course, another significant element in this case - Mazur failed to attend the trial and invoked the Fifth Amendment privilege in his deposition. In closing argument, plaintiffs referred to Mazur's claim of the privilege thirteen times and to his absence from the trial another fourteen times. Although an adverse inference may be drawn against a party who invokes the Fifth Amendment privilege and refuses to testify in a civil proceeding, that silence

> alone is insufficient to support an adverse decision. *See Baxter v. Palmigiano*, 425 U.S. 308, 317-18, 96 S. Ct. 1551, 1557-58, 47 L.Ed.2d 810 (1976); *Pagel, Inc. v. S.E.C.*, 803 F.2d 942, 946-47 (8th Cir. 1986). The government may not punish assertion of the constitutional privilege against self-incrimination. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S. Ct. 2132, 2135, 53 L.Ed.2d 1 (1977). Given the total absence of other evidence of bad motive or legal malice, we can only conclude that the punitive damage awards in this case reflect nothing more than punishment for Mazur's decision to invoke his Fifth Amendment privilege rather than defend himself at trial.

Koester v. American Republic Investments, Inc., 11 F.3d 818, 823-24 (8th Cir. 1993). *See Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 1558 (1976) (recognizing 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*") (emphasis added); *United States v. Zerjav*, 103 A.F.T.R.2d 2009-1525, 2009 WL 912821, *32 (E.D. Mo. Mar. 31, 2009) (court could not grant government's request for adverse inference against defendant based on his assertion of Fifth Amendment because silence alone was insufficient to support adverse decision); *Reasonover v. Washington*, 60 F. Supp. 2d 937, 960 (E.D. Mo. 1999) (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); *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) ("[A]n adverse inference can be drawn when silence is countered by *independent evidence* of the fact being questioned, but that same inference cannot be drawn when, for example, silence is the answer to an allegation contained in a complaint. In such instances, when there is no corroborating evidence to support the fact under inquiry, the proponent of the fact must come forward with evidence to support the allegation, otherwise no negative inference will be permitted.") (citation omitted) (emphasis in original); *In re Grant*, 237 B.R. 97, 111-12 (Bankr. E.D. Va. 1999) (Chapter 11 debtor's invocation of Fifth Amendment privilege against self-incrimination during his deposition by creditor-adversary

plaintiffs could not be used to establish proof of facts where no evidence concerning those facts was introduced or admitted).

Indeed, basing an adverse inference solely on the defendant's silence "exceeds constitutional bounds," as one district court recently explained:

> In addition, because DirecTV, by its admission, has not produced any evidence on the essential elements of its case and instead relies exclusively on negative inferences, it runs afoul of what is termed the *Baxter* limitation. In *Baxter*, although holding that the Fifth Amendment does not forbid adverse inferences against parties to civil actions, the United States Supreme Court noted that Mr. Palmigiano was silent "in the face of evidence that incriminated him" and his silence was given "no more evidentiary value than was warranted by the facts surrounding the case." *Baxter*, 425 U.S. at 317-18, 96 S. Ct. 1551. *Baxter*'s limitation has been interpreted as follows: "although inferences based on the assertion of the privilege are permissible, the entry of judgment based only on the invocation of the privilege and 'without regard to the other evidence' exceeds constitutional bounds." *LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391 (7th Cir. 1995) (citations omitted).

DirecTV, Inc. v. Lovejoy, 366 F. Supp. 2d 132, 139 (D. Me. 2005) (some citations omitted).

Third, the adverse inference rule is used to establish *facts* against the party claiming the Fifth Amendment. *See generally BNSF Ry. Co. v. Brotherhood of Maintenance of Way Employees*, 550 F.3d 418, 424 (5th Cir. 2008) ("The logic supporting the adverse inference rule is that a party fails to produce evidence in its control in order to conceal adverse *facts*.") (emphasis added); *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 13 (D. Mass. 1991) ("In a civil case, the *finder of fact* is not prohibited from making an adverse inference from a party's assertion of the Fifth Amendment privilege.") (emphasis added); *cf. Computer Identics Corp. v. Southern Pacific Co.*, 756 F.2d 200, 204 (1st Cir. 1985) ("Inference is the process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted.").

The Receiver is attempting to use the rule to establish *legal conclusions* which this Court is entitled to make. In effect, the Receiver argues that Mr. Morriss' invocation of his right against

self-incrimination should establish that the proceeds of the insurance policy at issue are outside the Receivership. *See* Doc. # 113 p.4. As discussed at length in the parties' briefing on this matter, this is a legal issue before the Court for its determination based upon undisputed facts. Nor can the Receiver convert this question into a factual matter by the following convoluted reasoning: "Drawing negative inferences from the responses: Morriss is not claiming a current right, much less a superior right, to use policy proceeds for his defense fees," or that "Morriss does not contend that the proceeds of the insurance policy are outside the Receivership[.]" Doc. # 113 p.4.

Furthermore, the factual assertions for which the Receiver seeks to have this Court draw negative inferences were well established before Mr. Morriss asserted his Fifth Amendment rights and independent of his testimony. The insurance policy (number 8207-6676) was written by the Federal Insurance Company ("Federal") and sets forth the terms of coverage and the priority of payments. A copy of the policy is attached hereto as Exhibit A. Federal acknowledged Mr. Morriss' claim and agreed to advance allocated defense costs incurred by counsel on behalf of Mr. Morriss "on a current basis," as provided for in the policy. A copy of Federal's February 13, 2012 coverage letter is attached hereto as Exhibit B. Mr. Morriss' legal assertion that the proceeds of the insurance policy are outside the Receivership is fully briefed in his motion and reply brief. It is not disputed that Morriss *is claiming a right* to policy proceeds, and that he *does contend* that the insurance proceeds are outside the receivership. These are matters of record in the pleadings filed in this case, and to claim otherwise based on his assertion of the Fifth Amendment in a different case borders on the absurd. Mr. Morriss' assertion of his Fifth Amendment rights does nothing to change those facts or undermine the independent sources that prove them.

Furthermore, even if a negative inference is drawn from Mr. Morriss' assertion of his Fifth Amendment rights, it is just that an inference and not a conclusion. Finally, it should be noted that the adverse inference rule only *permits* but does not require the fact-finder to draw a negative inference from a party's invocation of the Fifth Amendment. As a sister district court in the Eighth Circuit has explained:

> The adverse inferences that Plaintiff seeks are permissive. *See In re Carp*, 340 F.3d 15, 23 (1st Cir. 2003) ("[I]n a civil proceeding, the drawing of a negative inference is a permissible, but not an ineluctable, concomitant of a party's invocation of the Fifth Amendment."); *Daniels v. Pipefitters' Ass'n Local Union No. 597*, 983 F.2d 800, 802 (7th Cir. 1993) (agreeing that "the inference against a witness that may be drawn from the invocation of the Fifth Amendment is permissive"). A permissive inference permits but does not require the finder of fact to draw a particular conclusion *First Dakota Nat'l Bank v. St. Paul Fire & Marine Ins. Co.*, 2 F.3d 801, 813 (8th Cir. 1993).

United States v. 3234 Washington Ave. North, Minneapolis, Minn., Hennepin County, 2006 WL 487863, *5 (D. Minn. Jan. 27, 2006), *rev'd on other grounds*, 480 F.3d 841 (8th Cir. 2007). *See also In re Enron Corp. Securities, Derivative & Erisa Litigation*, 762 F. Supp. 2d 942, 1017 (S.D. Tex. 2010) ("While an adverse inference may be drawn in a civil case when a party asserts his Fifth Amendment privilege, the trier of fact is not required to draw a negative inference").

For the reasons set forth above, and in Mr. Morriss' prior Memorandum of Law (Doc. # 73), Defendant Morriss respectfully requests that this Court enter an order confirming that Federal Insurance Company ("Federal") may advance defense costs on behalf of Mr. Morris as an insured under an insurance policy purchased by Acartha Group LLC.

Respectfully submitted this 16th day of April, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on April 16, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

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