

CIVIL REPRESENTATION OF A PARTY ARISING FROM CRIMINAL ALLEGATIONS

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This paper and presentation will examine issues facing counsel for a civil defendant when the allegations against that defendant arises out of allegedly criminal conduct and there is a parallel criminal proceeding against that defendant. Many of these issues flow from the criminal defendant's right against self-incrimination pursuant to the Fifth Amendment to the United States Constitution.

### FIFTH AMENDMENT

The Fifth Amendment allows an individual "not to answer official questions put to him in any... proceeding, civil or criminal, formal or informal, where the answer might incriminate him in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973).

While there is no adverse inference in a criminal case against a defendant who invokes the Fifth Amendment, Baxter v. Palmigiano, 425 U.S. 308, 317 (1976), the Fifth Amendment does not prevent adverse inferences against parties in civil actions when they refuse to testify in response to probative evidence offered against them. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976).

The potential for a civil defendant incriminating him or herself in a civil action in a pending or future criminal action is obviously a significant concern. The obvious downside in the civil context is that in a majority of jurisdictions, there will be a negative inference against the civil litigant for invoking the Fifth Amendment. The authors do note the notable exception that California does not permit the trier of fact to draw any adverse inferences. (See Cal. Evid. Code Section 913).

While there is certainly an adverse interest against a party in a civil case, Federal Rules of Evidence 402 and 403 do not preclude the use of adverse inferences against employers for the invocation of the Fifth Amendment by nonparty employees since the evidence is admissible and there is no constitutional or other legal impediment. Brinks, Inc. v. City of New York, 717 F.2d 700, 710 (2<sup>nd</sup> Cir. 1983).

Also, the invocation of the Fifth Amendment by a nonparty witness who was neither an employee, an ex-employee nor a member to any of the parties to litigation could still be imputed to one of the parties. The Fifth Circuit found "district courts will have to evaluate these situations on a case-by-case basis." FDIC v. Fidelity and Deposit Company, 45 F.3d 969, 978 (5th Cir. 1995). In this case, the Fifth Circuit allowed an adverse inference to be drawn from the invocation of the privilege against self-incrimination by witnesses who had allegedly fraudulently made loans which contributed to the bank's demise. The adverse interest supported liability against the surety of the bank's loans made by the chief lending officer. The court stated that these cases must be determined by a case-by-case basis evaluating the nature of the relation of the relevant relationships such as the nonparty witness's loyalty to the party, the degree of control of the party over the nonparty witness, the compatibility of the interest of the party nonparty witness and the outcome of litigation and the role of the nonparty witness in litigation. The overall concern is fundamentally whether the adverse interest inference is trustworthy under all the circumstances and will advance the search for truth.

In all such cases where a civil litigant faces pending or potential criminal charges, civil defense counsel should consult and coordinate with criminal defense counsel as well as the client. When faced with an issue where in order to protect him or herself from self-incrimination, defense counsel expects the civil litigant to invoke the Fifth Amendment, one initial step to consider is to stay the civil action until resolution of the criminal action. Factors courts will consider in determining whether to exercise their discretion include whether the two actions have the same subject matter, the posture of the criminal proceeding, including whether the defendant has been indicted, the burden of any particular aspect of the proceedings may impose on the defendant, the corresponding burdens that may be placed upon the plaintiff if the civil cases not proceed expeditiously, the interests of the courts and the public interest. Alcala v. Tax Web Cty, 625 F. Supp. 2d 391, 399 (S.D. Tex. 2009).

The authors attach a redacted motion to stay, redacted opposition to motion to stay in a case in Massachusetts Superior Court. The court ultimately denied this motion to stay.

One argument plaintiffs may advance against staying a civil action is that a defendant may initially invoke the Fifth Amendment and then waive it at a point in the civil action and then, if circumstances allow, waive it at a later point in discovery. Plaintiffs may, therefore, argue that there is no prejudice to the defendant, while staying (and delaying) the civil case prejudicing plaintiff. However, subsequent waiver of the Fifth Amendment is also a matter of the court's discretion. Circuit courts have not allowed a litigant to withdraw the privilege when the party invoked it throughout discovery but then sought to withdraw it to support or defend against a motion for summary judgment. Davis – Lynch Inc. v. Marino, 667 F.3d 539, 547 (5<sup>th</sup> Cir. 2012); Edmond v. Consumer Protection Division, 934 F.2d 1304, 1308 – 09 (4<sup>th</sup> Cir. 1991).

Generally, withdrawing the Fifth Amendment privilege at a late stage places the opposing party at a significant disadvantage because of increased costs, delays and the need for new investigation. U.S. v. Parcels of Land, 903 F.2d 36, 44 – 45 (1<sup>st</sup> Cir. 1990). Courts may allow a party to withdraw the Fifth Amendment plea depending on the facts and circumstances. The inquiry is really whether the litigant is attempting to abuse or gain some unfair advantage. Davis – Lynch Inc. v. Marino, 667 F.3d 539, 547 (5<sup>th</sup> Cir. 2012).

The following are examples of Federal Courts allowing the withdrawal of the privilege:

-The Third Circuit allowed defendants to withdraw their Fifth Amendment privilege when the court determined that the SEC was not unduly prejudiced by the withdrawal, as it had already collected a great deal of discovery, including 30,000 documents from one defendant. Moreover, the defendants were not using the privilege to gain a tactical advantage, as the defendants were pro se and unaware of the consequences of asserting the Fifth. SEC v. Graystone Nash, Inc., 25 F.3d 187, 191 (1<sup>st</sup> Cir. 1989).

-The Seventh Circuit allowed defendants to withdraw their invocation of the privilege because it did not appear the defendants were “gaming the system” when the defendants sought to withdraw their Fifth Amendment privilege when the parallel criminal investigation was ending. Evans v. City of Chicago, 513 F.3d 735, 743 (7<sup>th</sup> Cir. 2008).

-the Fifth Circuit allowed a defendant to waive his privilege when there was more than a month left before the discovery deadline, so the plaintiff still had the opportunity to depose the defendant. Davis-Moreno, 667 F.3d at 549.

If the court in its exercise of discretion denies a motion to stay, civil defense counsel, again, must consult with his or her client and criminal defense counsel as to how to proceed regarding invocation of the Fifth Amendment. If the civil court denies the motion to stay, while the litigant and counsel have to deal with the potential negative inference (if they are not allowed at a later date to waive the privilege), there is a potential benefit. The (albeit limited) "silver lining" is that the defendant can use the civil action to obtain normally unavailable discovery which can assist in the criminal case. Civil and criminal defense carriers can and should coordinate as to witness depositions.

Invocation of the Fifth Amendment also has implications when there is potential insurance for the civil litigant. A concern for that defendant/insured is that most insurance policies require the insured's "duty to cooperate" which often includes providing an Examination Under Oath. The majority of states and circuits found that an insured's invocation of the Fifth Amendment in communicating with its carrier vitiates coverage. Some jurisdictions address whether or not there is prejudice to the insured, while other jurisdictions find that the failure to answer questions regarding potential loss on the basis the Fifth Amendment constitutes prejudice as matter of law and a material breach of the contract. In either event, the effect is vitiation of coverage for the insured.

In Anderson v. Southern Guar. Ins. Co. of Georgia, 235 Ga. App. 306 (1989), an insured homeowner invoked the Fifth Amendment privilege against self-incrimination but the insured did cooperate after termination of the criminal proceedings against her. Therefore, the court found that the Fifth Amendment privilege against self incrimination did not excuse the insured from cooperating with the insurer but the initial failure to cooperate, when insured did ultimately cooperate did not vitiate coverage. The court did state, however, that the insured "cannot wield her Fifth Amendment privilege as a shield and a sword by demanding coverage and a defense under the insurance contract, while at the same time refuse to answer questions material to determining (insurers) duties under the contract."

When faced with this situation, the civil defense lawyer may have been retained by an insurer but his/her primary duty is to the client/insured. It may be possible to negotiate with the carrier to a limited Examination Under Oath that would not incriminate the insured in a pending or future criminal action. Again, consternation with defense counsel would be necessary on this point. It may also be possible to negotiate with the carrier as to an initial invocation of the Fifth Amendment and then a later duty to cooperate. The case law, however, is strongly against the insured in this scenario.

#### RESOLUTION OF THE CRIMINAL CASE, EFFECT ON CIVIL ACTION

In addition to Fifth Amendment issues, there are concerns regarding preclusive effect of a judgment in a criminal action. While there is a verdict against the criminal defendant on the same facts, as the basis of the civil action, that guilty verdict has preclusive effect on the basis of

res judicata. The guilty verdict may also have preclusive effect, even if it is not on the exact same facts on the basis of collateral estoppel. The issues that have gone to the criminal jury and came back against the defendant legally and practically bind that defendant in a subsequent civil action.

There is also an issue as to the effect of resolution of a criminal case via plea agreement. When resolving a criminal case, a defendant is typically required to admit to his or her conduct and agree to a statement of facts. There is a risk of collateral estoppel, both individual and corporate, in government litigation matters such as Civil False Claims, Civil Forfeiture, Exclusion in Debarment, regulatory litigation: SEC FTC etc. There is also a risk of omissions being used in private third-party litigation.

At least in the First Circuit, however, while a guilty plea is evident against the insured, a party to a civil proceeding can advance a position inconsistent with the guilty plea. Where a criminal conviction falls guilty plea, the plea may be offered as evidence of the defendant's guilt and subsequent civil litigation, but is not given preclusive effect. Aetna Casualty and Surety Company v. Niziolek, 395 Mass. 737, 747 – 748 (1985). Because the plea "may be explained and reasons shown for entering it, a plea is "not necessarily conclusive as to the facts admitted." Id. at 747.

In the First Circuit's decision applying Massachusetts law, the First Circuit Court of Appeals concluded that a party to a civil proceeding cannot be judicially estopped from advancing a position inconsistent with the guilty plea in a previous criminal proceeding. Thore v. Howe, 466 F.3d 173, 183 – 84 (1<sup>st</sup> Cir. 2006). The First Circuit reasons that a guilty plea "does not necessarily establish absolute historic facts; what is stated in a plea arrangement is an agreed-upon version of the facts that, while it avoids misrepresentation, is sufficient to support the entry of the plea. It is uncommon for the statement of those facts to be shaped by bargaining between the parties." Moreover... "All facts recited during the plea colloquy are not necessarily 'accepted' by a judge" as required for application of judicial estoppel. Id. at 184. Instead, "the failure of the defendant to acknowledge all the elements of the factual basis for the charge to which he pleads guilty shall not preclude a judgment excepting a guilty plea. Thus, it is possible for a court in a criminal proceeding to accept a plea of guilty without the defendant adopting the position that all elements of the crime charged were established in the criminal action. In such a situation, it would not be inconsistent for that defendant to later dispute those facts in a subsequent civil action.

Furthermore, pursuant to Massachusetts law, a guilty plea in a criminal action would not in itself be dispositive as to whether the putative insured's acts were "intentional" pursuant to an "intentional acts exclusion" found in homeowners and commercial general liability policies.

### CONCLUSION

When representing a civil defendant facing or potentially facing criminal culpability under the same set of facts and allegations, it is crucial for civil defense counsel to be vigilant as to the risks facing his or her client. These risks include the loss of insurance coverage, a negative inference in the civil action due to invocation of the Fifth Amendment and possible preclusive

effect of a criminal finding in the civil action. Civil defense counsel, in addition to zealous and careful representation of his or her client at all stages of the civil action, must also communicate and coordinate with criminal defense counsel at all stages of the litigation. Together, counsel must advise the client as to the plusses and minuses of invocation of the Fifth Amendment, resolution of the criminal case and other issues.

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT

C.A. NO. [REDACTED]

[REDACTED]

Plaintiffs,

v.

[REDACTED]

Defendant.

DEFENDANT [REDACTED] MOTION TO STAY CIVIL PROCEEDINGS  
UNTIL CONCLUSION OF CRIMINAL PROCEEDINGS

Now comes the Defendant [REDACTED] and respectfully requests that this honorable court stay the Proceedings in the above captioned case pending the outcome of the criminal cases against [REDACTED]. In support of his motion, [REDACTED] states the following:

I. BACKGROUND AND PROCEDURAL HISTORY

The plaintiff alleges that on or about February 26, 2016, [REDACTED] was driving a van in Somerset, Massachusetts when a load fell from the back of his vehicle. The load allegedly caused the plaintiffs' decedent, [REDACTED] to crash and sustain injuries that ultimately resulted in his death (hereinafter "the Accident").

On September 15, 2016, the Commonwealth of Massachusetts filed a Criminal Complaint against [REDACTED] related to the Accident in the Fall River District Court. Criminal Complaint, Exhibit A. The Commonwealth alleges that the plaintiff committed the following offenses:

- 1) Leaving the Scene of Personal Injury & Death (M.G.L. ch. 90, § 24(2)(a1/2)(2));
- 2) Negligent Motor Vehicle Homicide (M.G.L. ch. 90, § 24G(b))
- 3) Uncovered/Unsecured Load (M.G.L. ch. 85, §36)
- 4) Leaving Scene of Property Damage (M.G.L. ch. 90, §24(2)(a))
- 5) Negligence Operation of Motor Vehicle (M.G.L. ch. 90, §24(2)(a))
- 6) Intimidation of Witness/Juror/Police/Court Official (M.G.L. ch. 268, §13B)

(the "criminal case").<sup>1</sup>

On December 27, 2017, the plaintiffs filed this lawsuit against [REDACTED]. They allege that [REDACTED] "carelessly and negligently operated and controlled a motor vehicle . . . thereby causing or permitting a load to fall from his vehicle . . . and in an apparent attempt to avoid collision with said object(s), [REDACTED] was caused to crash, causing him to sustain severe personal injuries, which said personal injuries resulted in his death." The plaintiffs included counts of negligence, gross negligence, and wrongful death in their Complaint against [REDACTED].

**II. THE COURT SHOULD STAY THIS CIVIL PROCEEDING TO PROTECT [REDACTED] FIFTH AMENDMENT PRIVILEGE**

The Court should stay this proceeding so that [REDACTED] does not have to choose between defending this case and asserting his Fifth Amendment privilege against self-incrimination (the "Privilege"). The Privilege is available to parties in a civil case when

<sup>1</sup> The Fall River District Court does not have jurisdiction over Count 1, Leaving the Scene of Personal Injury & Death. The Commonwealth presented a case against [REDACTED] to a grand jury and it indicted [REDACTED] the week of [REDACTED]. The Defendant does not know the counts in the Superior Court case because the indictment has not been released.



an answer may subject a party to criminal prosecution. U. S. Trust Co. of New York v. Herriott, 10 Mass. App. Ct. 313, 316 (1980). The Privilege extends to matters that may support a conviction and also to matters that "would furnish a link in the chain of evidence needed to prosecute the claimant for a crime." Id. quoting Hoffman v. United States, 341 U.S. 479, 486 (1951).

Although there is no requirement that the criminal case take precedent over a civil case, "it would constitute a clear abuse of discretion for the judge to turn a deaf ear to a serious claim of privilege." Id. To determine whether to stay a civil matter, the Court balances the potential harm that the privilege claiming party may suffer if he must "choose between defending the civil action and protecting himself from criminal prosecution" against any prejudice that might result against the other civil litigants. Wansong v. Wansong, 395 Mass. 154, 157 (1985) citing United States Trust Co of New York v. Herriott, 10 Mass. App. Ct. 313, 317 (1980). The Court should consider that an adverse party may draw an inference from a party's assertion of the Privilege in a civil case. See Wansong v. Wansong, 395 Mass. 154, 157 (1985).

Here, the plaintiffs' Complaint arises out of the same accident and makes substantively the same allegations against ██████████ as the criminal case. The plaintiffs will be seeking to prove facts that would simultaneously support a criminal conviction. The plaintiff will seek to prove at trial that ██████████ was negligent by allegedly failing to secure a load and leaving the scene of an accident. The plaintiffs will seek to prove their case through procedures unavailable to the Commonwealth, i.e., Interrogatories, Request for Admissions, and a Deposition. ██████████ will therefore be forced to choose

between asserting the Privilege in order to protect his rights in the criminal case and being unable to present a defense in the civil case, or defending himself in the civil case at the expense of forfeiting his constitutional right to the Privilege in the criminal case. It would be unduly prejudicial to [REDACTED] for the Court to force him to make such a choice when the plaintiffs would suffer no undue prejudice if the civil case is stayed.

The plaintiffs may argue that they would be prejudiced by a delay in the civil case if it is stayed, but delay alone does not outweigh the potential prejudice to [REDACTED] when the plaintiffs' rights and liberties are not at stake. See, J & G Foods, Inc. v. Eaton, 30 Mass. L. Rptr. 232 (2012)(Motion to Stay allowed where plaintiff in civil case regarding defendant's alleged embezzlement would be seeking to establish same facts as in criminal case, plaintiff's assets were attached and only prejudice to plaintiffs would be delay) (attached as Exhibit B); But cf., In Re Quin, 54 Mass.App.Ct. 117 (lower Court did not abuse discretion in declining to continue the care and protection trial pending completion of father's criminal case because of the "paramount interest of the children involved"), In Re Adoption of Rona, 79 Mass.App.Ct. 1107 (2011) (Appeals Court upheld Juvenile Court's denial of mother's motion to continue trial on whether she abused her daughter until criminal case on same charges was concluded because of the daughter's strong interest in completion of the trial) (Issued pursuant to Appeals Court Rule 1:28). The plaintiffs' case is not one concerning their rights, liberties or wellbeing. Their only prejudice would be a delay, which does not outweigh [REDACTED] constitutional right to the Privilege.

Also, the civil case against [REDACTED] is a wrongful death action. The witnesses in the criminal case would be the same as the liability witnesses in the civil case. There is no danger of evidence or witnesses becoming unavailable due to the stay of the civil action pending the resolution of the criminal case.

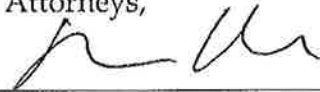
### III. CONCLUSION

On September 26, 2016, the Commonwealth of Massachusetts brought a Criminal Complaint against [REDACTED] for the Accident. The plaintiffs in the captioned case have brought a civil case against [REDACTED] for the same Accident and with the same allegations. [REDACTED] will be unduly prejudiced if he is forced to choose between defending himself in the civil suit, at the risk of losing his Fifth Amendment privilege against self incrimination, and being unable to present a defense in the civil suit. The plaintiffs will not be unduly prejudiced by a delay in the civil proceeding until the conclusion of the criminal cases against [REDACTED]

WHEREFORE, [REDACTED] respectfully requests that this honorable Court grant his Motion to Stay the above captioned civil proceeding until the conclusion of the criminal cases against him.

The Defendant,  
[REDACTED]

By his Attorneys,



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COMMONWEALTH OF MASSACHUSETTS

BRISTOL, SS.

SUPERIOR COURT  
DEPARTMENT OF  
THE TRIAL COURT

[REDACTED]

Plaintiffs,

v.

[REDACTED]

Defendant.

[REDACTED]

**PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO STAY CIVIL  
PROCEEDINGS UNTIL CONCLUSION OF CRIMINAL PROCEEDINGS**

The plaintiffs, [REDACTED]

[REDACTED] respectfully

request that this Court deny the Defendant, [REDACTED] Motion to Stay Civil

Proceedings until Conclusion of Criminal Proceedings.

I. RELEVANT FACTS

On or about [REDACTED], the defendant, [REDACTED] was operating a pickup truck on a public way in [REDACTED], Massachusetts. Due to his negligence, a

load, thought to be a metal filing cabinet(s), fell from his vehicle.<sup>1</sup> [REDACTED] the plaintiffs' decedent, was operating his motor vehicle, an SUV, behind the defendant. In an apparent attempt to avoid collision with the object(s), his vehicle rolled over. [REDACTED] died due to the injuries he sustained in the rollover. The decedent, age 55, left as his surviving heirs four children, two of whom are minors.

On June 3, 2016, plaintiffs' counsel notified the defendant's insurer, [REDACTED] of the claim against the defendant. On July 7, 2016, [REDACTED] advised plaintiffs' counsel that they were investigating whether the defendant's policy would cover the loss.<sup>2</sup> [REDACTED] has since communicated to plaintiffs' counsel that they are appearing under reservation of rights.

On September 15, 2016, the Commonwealth of Massachusetts filed a complaint in Fall River District Court, alleging the defendant committed the following offenses:

1. Leaving the Scene of Personal Injury (M.G.L. ch. 90 §24(2)(a½)(2));
2. Negligent Motor Vehicle Homicide (M.G.L. ch. 90 §24G(b));
3. Uncovered/Unsecured Load (M.G.L. ch. 85 §36);
4. Leaving the Scene of Property Damage (M.G.L. ch. 24(2)(a));
5. Negligent Operation of a Motor Vehicle (M.G.L. ch. 24(2)(a));
6. Intimidation of a Witness/Juror/Police/ Court Official (M.G.L. ch. 268 §13B).

A grand jury has since indicted the defendant, but he has not been arraigned.

On December 27, 2016, the plaintiffs filed suit against the defendant, seeking damages for wrongful death due to negligence and gross negligence. On January 23, 2017, Plaintiffs served the complaint, a request for production of documents, and interrogatories upon the defendant. On March 21, 2017, the defendant simultaneously

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<sup>1</sup> Upon information and belief, the filing cabinets belonged to the office of the Bristol County District Attorney. The defendant was an independent contractor hired to transport the cabinets. Because of a potential conflict, a special prosecutor from the Office of the Worcester County District Attorney was appointed to handle the criminal case against the defendant.

<sup>2</sup> Attached as Exhibit A.

answered the complaint and filed this Motion to Stay Civil Proceedings until Conclusion of Criminal Proceedings. The plaintiffs have not had the opportunity to conduct discovery.

II. AN INDEFINITE STAY OF THE CIVIL MATTER WOULD UNFAIRLY PREJUDICE THE PLAINTIFFS' ABILITIES TO DISCOVER EVIDENCE AND PROTECT THEIR RIGHTS

Courts considering whether to stay civil proceedings during the pendency of criminal charges must balance the potential harm faced by the party claiming the privilege against the prejudice to other litigants which might result.<sup>3</sup> Civil claims against a defendant facing criminal charges should not be stayed for Fifth Amendment considerations unless proceedings would violate concepts of elementary fairness.<sup>4</sup> The defendant has been indicted and not arraigned; a trial may not occur for years. Appeals may follow. The defendant's motion asks this Court to deny the plaintiffs' access to discovery indefinitely. An indefinite stay of civil proceedings would deny the plaintiffs' rights to justice "without delay."<sup>5</sup>

A stay of civil proceedings would also unreasonably prejudice the plaintiffs' ability to exercise those powers that would not implicate the defendant's Fifth Amendment rights. For example, the plaintiffs may seek to depose third party witnesses. If the Court grants the defendant's motion, the plaintiff may not be able to depose those witnesses for years. In the interim, witnesses may move or their memories may fade. Evidence in their possession may be lost or destroyed.

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<sup>3</sup> Wansong v. Wansong, 395 Mass. 154, 157-58 (1985).

<sup>4</sup> U.S. Trust Co. of New York v. Herriot, 10 Mass. App. Ct. 313, 385 (1980).

<sup>5</sup> Old Colony Railroad Co. v. Assessors of Boston, 309 Mass. 439 (1941) ("Our Constitution, Part I, art. 11, guarantees to the people of the Commonwealth equal justice, freely . . . without delay and in conformity to the laws.").

The effect of [REDACTED]'s reservation of rights remains unknown. A judgment in the plaintiffs' favor may entitle them to satisfaction through the defendant's assets. A stay would prevent the plaintiffs' rights to prejudgment attachment, limiting the plaintiffs' abilities to assert priority over the defendant's other debtholders and as well as the plaintiffs' abilities to investigate a potential fraudulent conveyance of property.<sup>6</sup>

Through his motion, the defendant proffers a blanket assertion to Fifth Amendment privilege, which the courts have rejected.<sup>7</sup> A stay of proceedings would permit him to decline questions that would not implicate his right to avoid self-incrimination, and would merely frustrate the plaintiffs' rights to discovery concerning issues outside liability such as fact-finding, damages, identification of witnesses, determination of insurance coverage, and issues related to the defendant's financial responsibility.

The Court should deny the defendant's motion because it would unfairly prejudice the plaintiffs' rights to seek discovery from the defendant as well as third parties, unfairly prejudice the plaintiffs' rights to protect their ability to recover damages, and stretch the defendant's Fifth Amendment privilege beyond its constitutional boundaries.

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<sup>6</sup> On June 8, 2016, five days after plaintiff gave [REDACTED] notice of the claim, the defendant granted a quitclaim deed to [REDACTED] for One Dollar (\$1.00) for the property known as [REDACTED]. Both the defendant and [REDACTED] reside at [REDACTED]. Upon information and belief, she is the wife of the defendant. [REDACTED] subsequently sold that property for \$360,000.00. See Exhibit B, attached.

<sup>7</sup> Commonwealth v. Martin, 423 Mass. 496, 502 (1996) ("A witness also is not entitled to make a blanket assertion of the privilege. The privilege must be asserted with respect to particular questions, and the possible incriminatory potential of each proposed question, or area which the prosecution might wish to explore, must be considered.").

III. THE DEFENDANT'S FIFTH AMENDMENT PRIVILEGE DOES NOT ENTITLE HIM TO STAY CIVIL PROCEEDINGS

The defendant's assertion that his rights are endangered by these proceedings is both misplaced and premature. His choice is not, as he suggests, "between defending this case and asserting his Fifth Amendment privilege against self-incrimination."<sup>8</sup> Instead, his choice to decline questions at any stage of litigation is merely a choice to waive the opportunity to testify on his own behalf and face cross-examination. "That the defendant faces ... a choice between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination."<sup>9</sup> Though the defendant must make a choice at that stage, it is hardly an unfair one. As the defendant rightly points out, "there is no requirement that the criminal case take precedent over a civil case."<sup>10</sup> "[N]ot every undesirable consequence which may follow from the exercise of the privilege against self-incrimination can be characterized as a penalty."<sup>11</sup> "[T]he fact that a man is indicted cannot give him a blank check to block all civil litigation on the same or related underlying subject matter."<sup>12</sup>

At trial, a plaintiff may properly comment on a defendant's invocation of the Fifth Amendment right during argument without infringing upon his constitutional rights.<sup>13</sup> Plaintiff's counsel may merely comment on the defendant's invocation; plaintiff is not

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<sup>8</sup> Def's Mot. To Stay Civil Proceedings until Conclusion of Criminal Proceedings, 2.

<sup>9</sup> U.S. Trust Co. of New York, 10 Mass. App. Ct. at 320-21 (citing United States v. Hearst, cert. denied, 435 U.S. 1000 (1978)).

<sup>10</sup> Def's Mot. To Stay Civil Proceedings until Conclusion of Criminal Proceedings, 3.

<sup>11</sup> Wansong, 395 Mass. at 157 (citing Flint v. Mullen, 499 F.2d 100 (1<sup>st</sup> Cir.), cert. denied, 419 U.S. 1026 (1974)).

<sup>12</sup> U.S. Trust Co. of New York, 10 Mass. App. Ct. at 317 (citing Gordon v. Federal Deposit Ins. Corp., 427 F.2d 578 (D.C. Cir. 1970)).

<sup>13</sup> Kaye v. Newhall, 356 Mass. 300, 305 (1969).



entitled a directed verdict merely because defendant asserts his right.<sup>14</sup> Nevertheless, the defendant is not without recourse: he retains his right to enter his own evidence and set forth his own arguments concerning the implication of his invocation.

IV. CONCLUSION

The defendant's motion for an indefinite stay of proceedings is unnecessarily burdensome upon the plaintiffs' rights to pursue their claims. The plaintiff should be permitted to engage in discovery, including the opportunity to propound interrogatories, request admissions, and take the defendant's deposition. The defendant is free to assert the privileges afforded him under the Fifth Amendment, but he would not be unfairly prejudiced. Staying the proceedings only denies the plaintiff's rights.

WHEREFORE, the plaintiffs move that this Court deny the defendant's motion to stay these proceedings without further action, or alternatively, to tailor the least intrusive remedy by means of a discovery order without staying the proceedings.

PLAINTIFFS,

By their Attorneys,

[REDACTED]

[REDACTED]

[REDACTED]

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<sup>14</sup> Id.