IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

THOMAS C. AND PAMELA MCINTOSH	**PLAINTIFFS**
VERSUS	**1:06cv01080-LTS-RHW**
STATE FARM FIRE AND CASUALTY COMPANY, ET AL.	**DEFENDANTS**

DEFENDANT STATE FARM FIRE AND CASUALTY COMPANY'S MOTION *IN LIMINE* NO. 9: TO EXCLUDE TESTIMONY OF WITNESSES ASSERTING THEIR FIFTH AMENDMENT PRIVILEGE, OR TO PROHIBIT PLAINTIFFS FROM DRAWING ADVERSE INFERENCES AND/OR PRESENTING THAT TESTIMONY IN A PREJUDICIAL MANNER

Comes now Defendant, State Farm Fire and Casualty Company ("State Farm"), and moves this Court for an *in limine* order to preclude Plaintiffs and their counsel from introducing or making reference to the testimony of Alexis "Lecky" King or Lisa Wachter. In the alternative, State Farm moves this Court for an *in limine* order to prohibit the jury from drawing adverse inferences from the assertion of the Fifth Amendment privilege against self-incrimination by Ms. King and Ms. Wachter, and to exclude video, transcripts, or live testimony in which a witness asserts the Fifth Amendment privilege. In support of this motion,[1] State Farm would show as follows:

I.

State Farm anticipates that Plaintiffs' counsel at trial might attempt to introduce or refer to the testimony of certain witnesses who invoked their Fifth Amendment privilege and declined to answer questions at depositions, including

[1] No separate memorandum in support is filed with this motion as the motion speaks for itself, and all relevant authorities are cited therein.

State Farm team manager Lecky King and State Farm employee Lisa Wachter. Ms. King was deposed in this case on August 10, 2007 and October 9, 2007. At her depositions, Ms. King declined to answer any questions, other than stating her name, on the basis of her Fifth Amendment privilege against self-incrimination and on the advice of counsel. Ms. Wachter was deposed in this case on August 9, 2007. At her deposition, Ms. Wachter also declined to answer any questions, other than stating her name and address, on the basis of her Fifth Amendment privilege against self-incrimination and on the advice of counsel. Ms. King and Ms. Wachter would continue to assert their Fifth Amendment privilege if called to testify at trial.

Under Federal Rule of Evidence 403, this Court should exclude all testimony of Ms. King or Ms. Wachter from trial. In the alternative, this Court should instruct the jury not to draw any adverse inferences against State Farm on the basis of that testimony, and should prohibit Plaintiffs' counsel from introducing that testimony through unfairly prejudicial methods such as extended presentation of video or transcripts of deposition testimony.

A. The Testimony of Witnesses Invoking Their Fifth Amendment Rights Not to Testify Is Unfairly Prejudicial and Inadmissible In This Case Under Federal Rule of Evidence 403

Introduction of the testimony of Ms. King and Ms. Wachter at trial should be excluded under Federal Rule of Evidence 403, which prohibits admission of any evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . ." Fed. R. Evid. 403. The danger of unfair prejudice to State Farm posed by introducing to the jury the fact that Ms. King and Ms. Wachter invoked their Fifth Amendment privilege is

strongly implicated in the present case, and that danger substantially outweighs the minimal probative value of their consistent assertion of their Fifth Amendment privilege. As such, Plaintiffs should be prohibited from introducing or making any reference to any testimony of Ms. King or Ms. Wachter invoking the Fifth Amendment privilege. As proponents of any such evidence, Plaintiffs would bear the burden of establishing its admissibility. 12 Federal Procedure, Lawyers Edition § 33:110 (West 2007).

Introduction of deposition testimony consisting entirely of Ms. King or Ms. Wachter invoking the Fifth Amendment privilege will be highly and unfairly prejudicial to State Farm. As the Fifth Circuit stated in *Farace v. Independent Fire Insurance Co.*:

> [T]he inference flowing from . . . assertion of . . . fifth amendment privilege may not be as one-sided as it at first appears, and herein lies the danger of unfair prejudice. The assertion of the privilege, particularly on the advice of counsel, is an ambiguous response . . . [but] [t]he jury may attach undue weight to the . . . assertion of the privilege: "The revelation that the invoker has claimed the privilege marks him as a criminal who has probably eluded justice. The jury is not likely to realize that the innocent may invoke."

699 F.2d 204, 210-11 (5th Cir. 1983) (footnote and citations omitted). Similarly, in *Harrell v. DCS Equipment Leasing Corp.*, the Fifth Circuit affirmed the exclusion of evidence that a witness had previously invoked the Fifth Amendment, explaining that "[t]he potential prejudice in revealing the invocation of the Fifth Amendment is high, because the jury may attach undue weight to it, or may misunderstand [the witness'] decision to invoke his constitutional privilege." 951 F.2d 1453, 1465 (5th Cir. 1992). Because of this risk that the jury will find liability against State Farm based on whatever it imagines Ms. King and Ms. Wachter might be guilty of, rather

than based upon evidence relevant to the conduct of State Farm and its adjusters toward Plaintiffs here, this evidence is highly and unfairly prejudicial.

Furthermore, testimony in which Ms. King and Ms. Wachter invoked their Fifth Amendment privilege in response to every question asked has negligible probative value. The Fifth Circuit has recognized that a witness' assertion of Fifth Amendment privilege on the advice of counsel "'is an ambiguous response.'" *Id.* at 1465 (citation omitted); *State Farm Life Ins. Co. v. Gutterman*, 896 F.2d 116, 119 (5th Cir. 1990) (citation omitted). "An individual's assertion of his Fifth Amendment privilege is not a substitute for relevant evidence meeting the . . . burden of proof." *Tweeddale v. Comm'r*, 841 F.2d 643, 645 (5th Cir. 1988); *see also Gutterman*, 896 F.2d at 119 & n.3 (affirming summary judgment despite party's refusal to testify as to collateral matters, stating that an adverse inference based on the assertion of Fifth Amendment privilege does not raise issues of fact).

Nor do the questions posed to Ms. King and Ms. Wachter during their depositions have any probative value. It is well settled that "[w]hat the lawyers say is not evidence." Pattern Civ. Jury Instr. 5th Cir. 1.1 (2006). This includes "statements and arguments" as well as "questions and objections." Pattern Civ. Jury Instr. 5th Cir. 3.1 (2006); 3 Fed. Jury Prac. & Instr. Civil § 101.44 (5th ed. 2007). *See also*, Fed. Civ. Jury Instr. 7th Cir. 1.06 (2005) ("questions and objections or comments by the lawyers are not evidence."). Indeed, as discussed more fully below in Point III, *infra*, courts have repeatedly held that the questions posed to a witness asserting her Fifth Amendment privilege are themselves prejudicial in light of the risk of exploitation by a lawyer asking questions calculated

to maximize the prejudicial effect of the assertion. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, No. 02 CIV 3288, 2005 WL 375315, at *5 (S.D.N.Y. Feb. 17, 2005) ("[T]he practice of posing fact-specific questions designed to suggest that the answer would be yes invites jurors 'to give evidentiary weight to questions rather than answers.'" (citation omitted).) Here, as shown in Point II *infra*, the risk of unfair prejudice is further heightened because any inference of improper conduct by State Farm the jury might draw from Ms. King's and Ms. Wachter's assertion of their Fifth Amendment privilege is untrustworthy in light of the evidence and facts in this case.

Because the alleged facts in the questions put to Ms. King and Ms. Wachter during their depositions have no probative value and may themselves be prejudicial, and because their assertion of their Fifth Amendment privilege in response has minimal probative value, the sum probative value of their testimony is *de minimis*. Therefore, because the danger of unfair prejudice to State Farm is substantial and substantially outweighs any probative value, this Court should exclude evidence of the deposition testimony of Ms. King and Ms. Wachter from trial.

II.

B. Any Adverse Inference Based on the Assertion of Fifth Amendment Privilege By Witnesses In This Case Is Untrustworthy And Impermissible

Even if this Court permits introduction of the fact that Ms. King and Ms. Wachter asserted their Fifth Amendment privileges at their depositions, this Court should instruct the jury not to draw any adverse inferences against State Farm on that basis. Any possible adverse inferences are flatly contradicted by objective evidence already in the record and are therefore untrustworthy and impermissible.

When courts in the Fifth Circuit and elsewhere have considered whether to allow an adverse inference to be drawn against a party on the basis of non-party assertions of Fifth Amendment privilege, "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth." *LiButti v. United States*, 107 F.3d 110, 124 (2d Cir. 1997). The trustworthiness of a particular proposed adverse inference is examined in the circumstances of the case. *See id.* at 123; *FDIC v. Fid. & Deposit Co. of Md.*, 45 F.3d 969, 978 (5th Cir. 1995). In determining whether the adverse inference is trustworthy, courts require the fact to be inferred to be independently corroborated by other evidence. *See Fid. & Deposit Co. of Md.*, 45 F.3d at 978 (affirming adverse inference from invocation of Fifth Amendment where jury was instructed not to find liability without corroborating evidence); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271, 277 (3d Cir. 1986) (permitting adverse inference from Fifth Amendment refusal to testify where adequate independent evidence supported inference); *see also Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000) (recognizing "that such adverse inference can only be drawn when independent evidence exists of the fact to which the party refuses to answer"). Where the proposed adverse inference is unsupported by any independent evidence, courts will not permit the inference. *See Gutterman*, 896 F.2d at 119 & n.3 (affirming summary judgment because proposed adverse inference was unsupported by any other evidence and did not create issue of fact); *Cavalier Clothes, Inc. v. Major Coat Co.*, No. 89-3325, 1995 WL 314511, at *5-6 (E.D. Pa. May 18, 1995) (refusing to draw adverse inference of fraud from assertion

of Fifth Amendment privilege where proposed inference is unsupported by independent evidence).

Furthermore, Plaintiffs are not entitled to make a generalized adverse inference against State Farm, or an adverse inference from every single question asked at deposition, simply because Ms. King and Ms. Wachter asserted their Fifth Amendment privilege in response to every question posed to them. *Cf. United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 415 F. Supp. 2d 628, 634-35 (E.D. Va. 2006) ("[A] conclusion as to the reliability of an [adverse] inference cannot derive by bootstrapping from . . . seemingly blanket invocation of the privilege against self-incrimination."). Courts are clear that any proposed adverse inference must be narrowly inferred from a specific unanswered question, and that each specific narrow inference must be corroborated by specific evidence of that fact. *See Glanzer*, 232 F.3d at 1265-66 (refusing to permit adverse inference of facts beyond precise scope of unanswered question).

In the present case, under these principles no adverse inferences are permissible. Any specific fact Plaintiffs might seek to have the jury draw by adverse inference from Ms. King's and Ms. Wachter's assertion of their Fifth Amendment privilege in response to specific questions not only would be uncorroborated by any independent evidence, but is flatly rebutted by objective evidence in the record. For example, Plaintiffs might try to ask this Court to instruct the jury that they may draw an adverse inference based on Ms. King's or Ms. Wachter's assertion of their Fifth Amendment privilege in response to questions regarding the engineering reports prepared in the handling of Plaintiffs' insurance claim. But, as shown in State

Farm's memoranda in support of its motion for partial summary judgment on Plaintiffs' fraud claim, such an adverse inference would be improper in light of testimony from Plaintiffs' own witnesses, Brian Ford, the author of the first engineering report, and Kerri Rigsby, whose recent testimony supports the conclusions of the second engineering report on Plaintiffs' home. (*See* State Farm's Mem. in Supp. of Partial Summary Judgment. as to Pls.' Fraud Claims [821] at 6-10, 14-17; State Farm's Reply Mem. in Supp. of Partial Summary Judgment as to Pls.' Fraud Claims [950] ("SF Reply Mem.") at 6-10, 12-13.) Moreover, the email evidence from the relevant time period demonstrates that Ms. King's concerns with the original engineering report on the McIntosh house were based upon legitimate questions as to the accuracy of the report's conclusions. (*See*, *e.g.,* SF Reply Mem. at 3-6.) For example, Ms. King is described as objecting to engineering reports because "she said because our engineers obviously could not tell the difference between wind and water and our reports were wrong." (*Id.* at 3.) With regard to the McIntosh Report in particular, Ms. King is reported as having said: "This can't be wind! Look at photograph 3, look at the shingle damage. It just was not wind. This is a cabana house." (*Id.* at 3-4; *see also id.* at 4 (Ms. King reportedly stated that she was concerned with engineering reports from engineers "who happen to live in the area" because "[t]hey are all too emotionally involved and are all working very hard to find justifications to call it wind damage when the facts only show water induced damage")). None of this purported evidence corroborates an adverse inference that there was fraudulent intent on the part of Ms. King or State Farm. The same lack of support and outright contradiction by the record holds true for any adverse inference

Plaintiffs might propose to draw, and in the event the Court permits any of this testimony to be placed before the jury (which it should not), this Court should instruct the jury not to draw any adverse inference of any fact from the witness's invocation of their Fifth Amendment privilege not to testify.

III.

C. Plaintiffs Should Be Prohibited From Presenting Evidence of Any Witness's Assertion of Fifth Amendment Privilege Through Video, Deposition Transcripts, Or Any Other Unfairly Prejudicial Manner

Assuming *arguendo* that, were this Court to permit introduction of the fact that Ms. King and Ms. Wachter invoked their Fifth Amendment rights, this Court should strictly control the form in which the jury receives that evidence, in order to prevent unfair prejudice to State Farm. Plaintiffs should be limited, at most, to referring to the bare fact that Ms. King and Ms. Wachter were deposed, and asserted their Fifth Amendment privilege in blanket fashion, without presenting any of the questions asked and unanswered. Any other mode of presenting the fact of the Fifth Amendment assertions, such as playing video of the deposition or introducing the deposition transcript into evidence, would be unfairly prejudicial to State Farm, would confuse the issues and mislead the jury, and would implicate considerations of undue delay, waste of time, and needless presentation of cumulative evidence, and should therefore be prohibited under Federal Rule of Evidence 403. Moreover, the invocation of the Fifth Amendment by these witnesses has no probative value whatsoever as to the issue of whether any of the disputed damage to Plaintiffs' dwelling was caused directly by wind and therefore covered under Plaintiffs' policy. Accordingly, if any of this testimony (or the fact that these

witnesses invoked the Fifth Amendment) is permitted, it should be permitted only after the coverage determination has been made. (*See* State Farm Mots. *in limine* Nos. 1 & 2.)

Introduction of this testimony by presenting extended video or transcript portions or sustained live testimony is highly prejudicial because of the great risk that Plaintiffs' counsel will testify through Ms. King and Ms. Wachter by exploiting their inability to answer. Courts have long recognized that such tactics are improper and highly prejudicial. For example, in *In re WorldCom*, a recent case that, like the instant one, involved both civil litigation and parallel criminal proceedings, the Court explained why permitting such evidence to go before the jury is unduly prejudicial:

> Because of the potential for "lawyer abuse" when the examining attorney effectively testifies for the witness who is invoking the privilege, the court has discretion under Rule 403 to control the way in which the invocation of the privilege reaches the jury. . . . [T]he practice of posing fact-specific questions designed to suggest that the answer would be yes invites jurors "to give evidentiary weight to *questions* rather than answers. [I]t leaves the examiner free, once having determined that the privilege will be invoked, to pose those questions which are most damaging to the adversary, safe from any contradiction by the witness no matter what the actual facts."

In re WorldCom, Inc. Sec. Litig., No. 02 CIV 3288, 2005 WL 375315, at *5 (S.D.N.Y. Feb. 17, 2005) (emphasis in original) (second alteration in original) (refraining from ruling on exclusion of testimony but noting "[i]t is unlikely, however, that the substantive questions asked of these witnesses will be received in evidence" (citation omitted)). Where courts have suspected this improper conduct, they have often barred the deposition testimony and refused to allow adverse inferences to be drawn based on the assertion of the Fifth Amendment. For instance, in *Cavalier Clothes, Inc. v. Major Coat Co.*, the court refused to issue an adverse inference

instruction, explaining that "[t]he Third Circuit specifically warned against 'sharp practices' which would allow the 'systematic interrogation of witnesses on direct examination by counsel who knows they will assert the privilege against self-incrimination.' This type of calculated questioning 'by which the examining attorney effectively testifies for the invoking witness' has been specifically eschewed . . . ." No. 89-3325, 1995 WL 314511, at *6 (E.D. Pa. Apr. 6, 1995) (quoting *RAD Services, Inc. v. Aetna Casualty and Surety Co*., 808 F.2d 271, 278 (3rd Cir. 1986)); *see also Ullman-Briggs, Inc. v. Salton/Maxim Housewares, Inc.*, No. 92 C 680, 92 C 2394, 1996 WL 535083, at *17 (N.D. Ill. Sept. 17, 1996) (refusing to allow negative inference from invocation of Fifth Amendment privilege and finding that evidence could not come in under 403 where "counsel would then be able to fashion the questions in such a way as to be able to create the most damaging testimony through negative inference, 'safe from any contradiction by the witness no matter what the actual facts.'" (citations omitted).)

Similarly, permitting Plaintiffs' counsel to present repetitive and cumulative series of questions interrupted only by Fifth Amendment assertions in response would be unfairly prejudicial. Apart from the prejudicial effect of the individual questions, the cumulative effect of those questions can confuse and mislead the jury and prejudice the party against whom the adverse inferences are suggested. As one court has noted:

> [T]he permissibility of some adverse inferences against the . . . defendants, does not mean that [plaintiffs] are entitled to adverse inferences from the dozens of questions asked . . . in the deposition. In addition to being cumulative, there is a danger that at some point the jury will become deaf to the substance of the questions asked and unanswered, and as a result, the specific inferences that are

> appropriately drawn will blur into a single inference that the defendants have committed all the acts alleged . . . . To avoid this result, it is necessary to reduce the number of requested inferences to those few that relate to the heart of the alleged fraud, and which have the most reliable basis.

Custer Battles, LLC, 415 F. Supp. 2d at 636. This concern is especially pronounced where, as shown above, any adverse inferences Plaintiffs would seek lack any indicia of trustworthiness, and the only purpose of attempting to introduce such testimony would be to achieve precisely this prejudicial effect of confusing the jury into making a "global" adverse inference against State Farm.

The risk of prejudice from these "sharp practices" is amply illustrated by the questions posed to Ms. King and Ms. Wachter in their depositions. Plaintiffs' counsel was fully cognizant that Ms. King and Ms. Wachter would assert their Fifth Amendment privilege in response to any question asked. (King Dep. 88:24-89:1, Oct, 9, 2007) ("Well I'm going to ask the question. I don't expect the answer is going to be much different."). Nonetheless, Plaintiffs' counsel exploited that inability to respond and asked numerous questions, the only purpose of which could have been to manufacture the most untrustworthy and prejudicial adverse inference possible.[2] Likewise, the sum total of this litany of untrustworthy, leading and misleading questions asked by Plaintiffs' counsel would overwhelm and confuse the jury, misleading them into making an impermissible adverse inference that *every*

[2] (*See, e.g.*, King Dep. 60:6-7, Aug. 10, 2007 ("Did State Farm treat the McIntoshes like a good neighbor in this case?"); Wachter Dep., 56:15-16, Aug. 9, 2007 ("Do you think State Farm treated the McIntoshes like a good neighbor?").)

question not answered by Ms. King or Ms. Wachter would have been answered in a manner adverse to State Farm.[3]

Also strongly weighing against the use of this testimony and the drawing of any adverse inferences from it is the fact that it is now clear that Plaintiffs' own attorneys improperly attempted to influence the criminal investigation which prompted Ms. King and Ms. Wachter to invoke the Fifth Amendment privilege in the first place. In particular, the evidence is overwhelming that Plaintiffs' lawyers worked in tandem with Attorney General Hood to use on-going and threatened criminal proceedings as a means of improperly advancing the interests of Plaintiffs' counsel in civil litigation. For example, a document recently obtained from Plaintiffs' witness engineer Brian Ford states: "[Special Assistant Attorney General Courtney Schloemer] talked to Derek [Wyatt] – they agree that a criminal conviction could help civil cases." *See* State Farm's Reply Mem. in Support of Its Motion for Partial Summary Judgment as to Plaintiffs' Fraud Claims [950] at 13 n.5 and exhibits thereto. Ford further noted: "Courtney does not want Brian to be a paid consultant

[3] (*See* King Dep. 48:9-49:23, Aug. 10, 2007 ("From your experience working on this file you know that State Farm didn't provide the McIntoshes with a full fair adjustment and investigation of their claim; correct?"; "Your work on this file, you know that State Farm denied the McIntoshes' claim knowing that their damage was caused by wind; correct?"; "From your work on this file, you know that State Farm should have paid them in full for their hurricane loss?"; "In your work on this file, you also note that State Farm actively mislead [sic] the McIntoshes in adjusting their loss, correct?"; "You know that State Farm engaged in reckless disregard for the McIntoshes' rights as a State Farm insured, correct?"; "From your work on this file you know that State Farm didn't have a legitimate or arguable basis for denying this claim and still doesn't; correct?"; "From your work on this file, you know that State Farm has not dealt fair with the plaintiff; don't you?"); Wachter Dep. 46:19-48:13, Aug. 9, 2007 ("Isn't it true that State Farm didn't provide the McIntoshes with a full and fair adjustment of their claim?"; "And as a State Farm employee you believe that State Farm should have the McIntoshes in full for their hurricane losses, correct?"; "And you believe on behalf of State Farm that State Farm actively misled the McIntoshes in adjusting their loss, did you not?"; "And you believe that State Farm engaged in reckless disregard for the McIntoshes' rights and State Farm insureds, don't you?"; "State Farm didn't have a legitimate or arguable basis for denying this claim and still doesn't?"; "Do you think State Farm has acted in good faith with the Plaintiffs?")).

[for SKG] prior to testifying before grand jury." *Id.* Similarly, Mississippi Deputy Commissioner of Insurance David Lee Harrell recently testified that Attorney General Hood told him that "[i]f they [State Farm] don't settle with [him and SKG], I'm going to indict them all, from Ed Rust [State Farm's Chairman and CEO] down." *Id.* The impropriety of any attempt by Plaintiffs to use Ms. King's and Ms. Wachter's invocation of their Fifth Amendment rights is further underscored by the Plaintiffs' decision to forgo the deposition of State Farm employee Dave Randel after they learned he had given substantive testimony in other cases, rather than taking the Fifth. *Id.* at 13 n.6.

This Court has broad authority under Federal Rule of Evidence 403 to control the way in which the jury is made aware of a witness's invocation of her Fifth Amendment privilege. *See*, *e.g.*, *RAD Servs., Inc.*, 808 F.2d at 277; *In re WorldCom Sec. Litig.*, 2005 WL 375315, at *5. If this Court decides that the jury should be made aware of the fact that Ms. King and Ms. Wachter asserted their Fifth Amendment privilege, it must prevent Plaintiffs' counsel from exploiting that opportunity in any unfairly prejudicial and cumulative manner such as video recordings or deposition transcripts.

WHEREFORE, PREMISES CONSIDERED, State Farm prays that the Court enter an Order *in limine* precluding Plaintiff and her counsel from introducing or

making references to Ms. King or any testimony by her.

Dated: January 11, 2008

Respectfully submitted,

/s/ John A. Banahan

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CERTIFICATE OF SERVICE

I, **JOHN A. BANAHAN**, one of the attorneys for the Defendant, **STATE FARM FIRE & CASUALTY COMPANY**, do hereby certify that I have this date electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

DATED, this the 11th day of January, 2008.

/s/ John A. Banahan

JOHN A. BANAHAN

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