THE FIFTH AMENDMENT PRIVILEGE

I. INTRODUCTION

This report explores the invocation of the Fifth Amendment of the United States Constitution in civil and criminal cases. The report is focused on federal cases, as New York State cases do not diverge from, and are consistent with, the principles set forth in federal authority.[1]

Part II of the Report provides an overview of the Fifth Amendment privilege, who can invoke the privilege, when the privilege can be invoked, how to properly invoke the privilege, and what information the privilege protects.

Part III of the Report provides an analysis of the consequences of invoking the Fifth Amendment privilege so that the reader can properly advise his or her client. Part III includes a discussion of the effects of invocation in a criminal case versus a civil case, what an adverse inference is, when it will be applied, the role of an adverse inference in the context of a summary judgment motion, the need for corroboration in order to prove liability, and what happens when a civil and criminal case is pending at the same time. Part III also provides examples of how adverse inferences apply to different factual scenarios such as when a non-party, employee, or individual in a separate proceeding invokes his or her Fifth Amendment privilege. Lastly, Part IIII discusses how and when a Court will allow a party to revoke his or her Fifth Amendment privilege.

II. OVERVIEW

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall be compelled in any criminal case to be a witness against himself" thereby protecting an individual from being compelled to give self-incriminating testimony whether in a criminal or civil proceeding. While this privilege was originally conceived as a right deemed so important that it warranted constitutional protection,[2] the privilege is not limitless. Thus, when a person invokes his or her Fifth Amendment privilege during a civil proceeding, it is important for all interested counsel to understand certain key concepts, including who can invoke the privilege, when the privilege can be invoked, how to properly invoke the privilege and the scope of the privilege.

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[1] *See Carver Fed. Savings Bank v. Shaker Gardens, Inc.*, 167 A.D.3d 1337, 1340-41 (3d Dep't. 2018) (discussing the required records exception and citing to federal decisions); *Kuriansky v. Bed-Stuy Health Care Corp.*, 135 A.D.2d 160, 179 (2d Dep't 1988), *aff'd*, 73 N.Y.2d 875 (1988) (requirement that defendant in a civil forfeiture proceeding be required to disclose financial information to oppose forfeiture order did not violate the Fifth Amendment) (citing to *Baxter v. Palmigiano*, 425 U.S. 308, 331 (1976)), and *United States v. White*, 589 F.2d 1283, 1286) (5th Cir. 1979). New York cases often discuss the assertion of the Fifth Amendment privilege in the context of oral testimony, and hold that the Fifth Amendment "does not relieve the party of the usual evidentiary burden attendant upon a civil proceeding; nor does it afford any protection against the consequences of failing to submit competent evidence," *Access Capital, Inc. v. DeCicco*, 302 A.D.2d 48, 51 (1st Dep't 2002), *citing United States v. Rylander*, 460 U.S. 752, 761 (1983). This principle was recently affirmed by the New York Court of Appeals in *Andrew Carothers, M.D. P.C. v. Progressive Ins. Co.*, 33 N.Y.3d 389, 407 (2019) (a witness who asserts the Fifth Amendment privilege in a civil trial is not necessarily protected from consequences in the same manner as in a criminal trial) (*citing Baxter, supra*).

[2] *See generally*, Gray, *Evidentiary Privileges* (6th Ed. 2015) at 135-137.

A. Persons Who Can Invoke The Privilege

"[F]or purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals."[3] Pursuant to the "collective entity doctrine,"[4] the Fifth Amendment privilege only extends to natural persons. Juridical entities, such as corporations,[5] partnerships,[6] and unincorporated associations,[7] cannot assert the privilege.

Importantly, the collective entity rule does not depend on the entity's size.[8] Thus, courts throughout the United States have consistently held that a custodian who is the sole shareholder, officer, member, manager, or employee of a company cannot properly invoke their Fifth Amendment privilege to shield the production of corporate documents, even if that person is served with a subpoena in their individual capacity.[9] This is because the custodian is deemed to be producing documents in his or her representative, and not individual, capacity, and therefore, "no evidentiary use of the 'individual act' of production [can be used] against the individual."[10] Additionally, while custodians must produce records held in a representative capacity, they may assert the Fifth Amendment privilege to avoid disclosure of information which is within their personal knowledge and is of testimonial rather than a documentary or corporate nature.[11]

To determine whether a custodian is entitled to protection under the Fifth Amendment, courts assess whether the entity in question has an "established institutional identity" independent of the individuals behind it, whether the entity maintains a "distinct set of organizational records," and whether the subpoenaed records are in fact organizational records held by an individual merely in a representative capacity, "such that it is 'fair to say that the records demanded are the records of the organization rather than those of the individual.'"[12] Thus, the collective entity doctrine does not apply to a sole proprietorship because there is no difference between the business and the owner.[13]

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[3] *Braswell v. United States*, 487 U.S. 99, 104, 108-109 (1988) ("...without regard to whether the subpoena is addressed to the corporation, or…to the individual in his capacity as custodian,… a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds…").

[4] *Id*.

[5] *Id*.; *see also Curcio v. United States*, 354 U.S. 118 (1957) (*citing Hale v. Henkel*, 201 U.S. 43 (1906)).

[6] *Bellis v. United States*, 417 U.S. 85, 88 (1974) (holding partner could not assert Fifth Amendment protection to thwart production of partnership records).

[7] *United States v. White*, 322 U.S. 694, 699 (1944) (holding labor union officer could not claim his privilege against compulsory self-incrimination to justify refusal to produce the union's records pursuant to a grand jury subpoena).

[8] *Bellis*, *supra*, at 100 ("It is well settled that no privilege can be claimed by the custodian of corporate records, regardless of how small the corporation may be")

[9] *See, e.g.*, *Amato v. United States*, 450 F.3d 46, 51 (1st Cir. 2006) ("…the act-of-production doctrine is not an exception to the collective-entity doctrine even when the corporate custodian is the corporation's sole shareholder, officer and employee."); *Account Servs. Corp. v. U.S. (In re U.S.)*, 593 F.3d 155, 158 (2d Cir. 2010) (concluding that a one-person corporation cannot avail itself of the Fifth Amendment privilege); and *Reamer v. Beall*, 506 F.2d 1345, 1346 (4th Cir. 1974) (sole shareholder and employee of corporation could not invoke the Fifth Amendment privilege). The act of production doctrine is discussed in greater detail, *infra* II (D).

[10] *Braswell*, 487 U.S. at 100, and *infra* II (D).

[11] *Curcio*, *supra*, 354 U.S. at 1149-52 (custodian could not be compelled to testify as to the whereabouts of non-produced records of an association)

[12] *In re Grand Jury Empaneled on May 9, 2014*, 786 F.3d 255, 258-60 (3d Cir. 2015) (quoting *Bellis*, *supra*); *see also United States v. B & D Vending, Inc.*, 398 F.3d 728, 734 (6th Cir. 2004).

[13] *Braswell*, 487 U.S. at 104.

There is, however, a disagreement among the Circuits as to whether the Fifth Amendment can be asserted by former employees served with a request for the production of corporate records that remain in their possession after their employment has been terminated. While some Circuits have permitted the assertion of the Fifth Amendment by former employees in that situation,[14] others have rejected it.[15]

Because companies can only act through their individual representatives, situations invariably arise where a corporate official or employee has information responsive to discovery demands served upon their employers which may implicate those individuals in criminal conduct if that information is personal but may relate to corporate documents, including the location of such corporate documents.[16] Therefore, those corporate officials or employees will typically seek to invoke their Fifth Amendment privilege and refuse to testify as corporate representatives in the civil proceeding to avoid potential self-incrimination in a criminal proceeding.

This was the case in *United States v. Kordel*,[17] where two corporate officers sought to appeal their criminal convictions, arguing that the government had improperly used their interrogatory responses in a civil proceeding to obtain incriminating evidence in parallel criminal proceedings. On appeal, the Sixth Circuit reversed the lower court's verdict and held that the officers' interrogatory responses submitted on behalf of the organization were obtained involuntarily in violation of the Fifth Amendment. However, the Supreme Court reversed the Sixth Circuit, holding that the Fifth Amendment had not been invoked by either officer and the government's conduct was proper. In issuing its ruling, the Supreme Court held that if a corporation is presented with interrogatories, it must appoint an agent who can furnish the requested information without fear of self-incrimination.[18] This obligation cannot be satisfied by appointing agents who invoke their Fifth Amendment, as that would in effect "…secure for the corporation the benefits of a privilege it does not have."[19]

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[14] *See, e.g., In re Three Grand Jury Subpoenas Duces Tecum Dated January 29, 1999*, 191 F.3d 173, 183-184 (2d Cir. 1999) (holding that former employees were no longer custodians of their former employer and thus could assert the Fifth Amendment privilege in response to subpoenas served after the employees' resignation seeking to compel the production of corporate property that remained in the former employees' possession); *United States v. McLaughlin*, 126 F.3d 130, 133 n. 2 (3d Cir. 1997) (observing in dicta that "a former employee, for example, who produces purloined corporate documents is obviously not within the scope of the *Braswell* rule"); *In re Grand Jury Proceedings*, 71 F.3d 723, 724 (9th Cir. 1995) (holding that the collective entity rule does not apply to a former employee of a collective entity who is no longer acting on behalf of that entity).

[15] *See, e.g., In re Grand Jury Subpoena Dated Nov. 12, 1991, FGJ 91-5 (MIA)*, 957 F.2d 807, 812 (11th Cir. 1992) ("We hold that a custodian of corporate records continues to hold them in a representative capacity even after his employment is terminated."); *In re Sealed Case (Government Records)*, 950 F.2d 736, 740 (D.C. Cir. 1991) ("Just as corporate records belong to the corporation and are held for the entity by the custodian in an agency capacity, … so government records do not belong to the custodian, in this case the [former employee], but to the government agency. Their production thus falls outside the Fifth Amendment Privilege.")

[16] For example, an employee may refuse to testify about the location of corporate documents not in the witness' possession where the testimony would result in the witness' self-incrimination. *Grand Jury Subpoena Dated April 9, 1996 v. Smith*, 87 F.3d 1198, 1203 (11th Cir. 1996) (citing *Curcio, supra*.)

[17] 397 U.S. 1, 90 S. Ct. 763, 25 L. Ed. 2d 1 (1970).

[18] *Id.*, at 767

[19] *Id.*, at 767-68

While it should not be difficult for larger organizations to appoint a representative who does not fear self-incrimination, this can represent a challenge for smaller entities, where all officers or employees may be directly implicated in wrongful conduct. Accordingly, the Supreme Court in *Kordel* recognized that there may be situations in which no individual is able to respond or testify on behalf of a corporation due to fear of self-incrimination. While the Court refused to rule on this "troublesome question," it nevertheless noted that the appropriate remedy in such a case would be a protective order under Fed. R. Civ. P. 30(b) or a stay of civil discovery pending resolution of the criminal proceedings.[20]

In practice, however, this situation rarely arises. A corporation has broad discretion to appoint an agent of its choice to comply with discovery requests and may rely on outside parties where its own officers or employees are likely to invoke the Fifth Amendment.[21] Indeed, a corporation's failure to designate a representative who is able to testify without fear of self-incrimination may be sanctionable.[22] Nevertheless, based on a case-by-case analysis, the courts do occasionally grant stays or issue protective orders where a corporate party cannot appoint an agent to testify on its behalf without being subjected to a real and appreciable risk of self-incrimination.[23]

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[20] *Id.*, at 767-68; *see also* Section 3(C)(iii) of this Report.

[21] *See, e.g., General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1210, fn1 (8th Cir. 1973) ("…the case is unlikely ever to arise since Rule 33(a) allows any agent of the corporation, even its attorney, to answer interrogatories on behalf of a corporation.") (quoting Wright & Miller, 8 Fed. Prac. & Proc. Civ. § 2018); *United States v. Barth*, 745 F.2d 184, 189 (2d Cir. 1984) ("… a corporation may be required to supply a new agent should all existing employees refuse to testify on self-incrimination grounds."); *U.S. S.E.C. v. First Jersey Sec., Inc*., 843 F.2d 74, 77 (2d Cir. 1988) ("We previously have approved of the practice […] of compelling the corporation to designate someone who can produce the requested records without risk of self-incrimination. If necessary, the corporation must appoint an agent especially for the purpose of producing the materials."); *Central States v. Carstensen Freight Lines, Inc*., No. 96 C 6252, 1998 WL 413490, at *4 (N.D. Ill. July 17, 1998) (ordering corporate party to appoint an individual other than the sole shareholder, employee and officer to verify the corporate party's responses to interrogatories); *eBay, Inc. v. Digital Point Solutions, Inc.*, No. C 08-4052 JF (PVT), 2010 WL 147967 (N.D. Cal. Jan. 12, 2010) (rejecting argument that discovery may not be compelled if a corporation could not appoint an individual with sufficient knowledge since any agent, irrespective of first-hand personal knowledge, may be appointed); and *U.S. S.E.C. v. A Chicago Convention Ctr., LLC*, No. 13 C 982, 2013 WL 4010585 (N.D. Ill. Aug. 5, 2013) (denying request for protective order where a corporate defendant's officers invoked the Fifth Amendment and directing it to appoint an agent, such as its corporate counsel, to respond to interrogatories, based on a review of the corporate records).

[22] *See, e.g., Worthington Pump Corp. (U.S.A.) v. Hoffert Marine, Inc.*, No. A 79–3531, 1982 WL 308871 (D.N.J. Feb.19, 1982) (imposing sanctions on corporation for discovery failures following officers' assertion of the Fifth Amendment privilege); *Commodity Futures Trading Comm'n v. Noble Metals Int'l, Inc.*, 67 F.3d 766 (9th Cir. 1995) (affirming Rule 37(b)(2) sanction where corporate party had willfully violated the court's orders by failing to make a good faith attempt to designate a representative who could testify on corporation's behalf without asserting the Fifth Amendment); *Bank of Am., N.A. v. First Mut. Bancorp of Ill.*, No. 09 C 5108, 2010 WL 2364916 (N.D. Ill. June 14, 2010) (awarding costs and attorneys' fees where corporate party failed to appoint a Rule 30(b)(6) witness who would not invoke the Fifth Amendment).

[23] *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1207 (Fed. Cir. 1987) (vacating order denying stay and remanding to assess *inter alia* corporate party's ability to appoint an agent to respond to interrogatories); *Cole v. Am. Capital Partners Ltd., Inc.*, No. 06-80525-CIV, 2007 WL 9706176 (S.D. Fla. Nov. 8, 2007*), report and recommendation adopted*, No. 06-80525-CIV, 2007 WL 9706177 (S.D. Fla. Dec. 3, 2007) (recommending protective order where, despite a good faith attempt, no individual could be located to represent the corporation without the risk of self-incrimination); *State Farm Mut. Auto. Ins. Co. v. Grafman*, No. 04-CV-2609 (NG) (SMG), 2007 WL 4285378 (E.D.N.Y. Dec. 1, 2007) (staying corporate parties' obligation to respond to interrogatories or produce Rule 30(b)(6) witnesses so long as they could certify that no one aside from individuals with pending

B. When Can An Individual Invoke The Privilege

The Fifth Amendment privilege can be invoked in a criminal or a civil litigation[24] to protect against actions or testimony that are considered "testimonial" in nature. The Fifth Amendment privilege cannot be invoked to protect non-testimonial acts, such as trying on clothing, providing a blood sample, or providing a handwriting example.[25] To be considered testimonial, the action or testimony must itself "explicitly or implicitly, relate [to] a factual assertion or disclose information that incriminates."[26]

To come within the confines of the Fifth Amendment privilege, the action or testimony sought to be protected does not necessarily need to directly incriminate the individual. If the action or testimony "would furnish a link in the chain of evidence needed to prosecute,"[27] the individual being questioned can assert his or her Fifth Amendment privilege. The Fifth Amendment privilege applies when appearing for a hearing, deposition, trial, or interview but may also apply in responding to document demands or interrogatories.[28]

C. How Is The Privilege Invoked By An Individual

While there is no specific language that needs to be used to invoke the Fifth Amendment privilege, it must be raised in a timely manner so that it is not waived. Moreover, the Fifth Amendment privilege must be asserted in response to each question posed. In other words, blanket refusals are not recognized and are ineffective.[29]

While a waiver must be knowing and voluntary,[30] it does not have to be express or written and can occur where an individual voluntarily answers incriminating questions. In those types of instances, a court may require an individual to answer additional questions on matters he or she is deemed to have waived, the subject matter of the case, or to ensure that the facts have not been

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indictments were available); *Taylor, Bean & Whitaker Mortg. Corp. v. Triduanum Fin., Inc*., No. 2:09-CV-0954 FCD EFB, 2009 WL 2136986, at *3 (E.D. Cal. July 15, 2009) (stay was warranted where the Fifth Amendment rights of every director or officer of a corporate defendant were implicated and the latter was "…likely to be greatly prejudiced in its ability to meaningfully defend itself"); *Medical Inv. Co. v. International Portfolio, Inc.*, No. Civ. 12-3569, 2014 WL 2452193 (E.D. Pa. May 30, 2014) (granting stay where the only individual who could speak on corporate defendant's behalf would be subjected to "real and appreciable risk of self-incrimination"); and *State Farm Mut. Auto. Ins. Co. v. Healthcare Chiropractic Clinic, Inc.*, No. 15-CV-2527 (SRN/HB), 2016 WL 9307608 (D. Minn. Apr. 26, 2016) (granting motion to stay Fed. R. Civ. P. 30(b) (6) deposition where it was difficult to conclude whether an individual other than a corporate party's sole owner could testify without risk of self-incrimination).

[24] *See* Sections 3(A) and 3(B) of this Report which discusses how the consequences of invoking the Fifth Amendment privilege varies based upon whether the invocation is during a criminal or civil trial.

[25] *United States v. Hubbell*, 530 U.S. 27, 34-35 (2000).

[26] *United States v. Sweets*, 526 F.3d 122, 127 (4th Cir. 2007) (*quoting Doe v. U.S.*, 487 U.S. 201, 210 (1988)).

[27] *Hoffman v. U.S.*, 341 U.S. 479, 486 (1951).

[28] The Fifth Amendment privilege will only apply if the act of production doctrine is applicable **and** the foregone conclusion doctrine and/or the required records doctrines do not apply. *See infra* II (D). This list is not exclusive.

[29] *See North River Ins. Co. v. Stefanou*, 831 F.2d 484, 486-87 (4th Cir. 1987); *Matter of Grand Jury Subpoena*, 739 F.2d 1354, 1359 (8th Cir. 1984).

[30] *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).

distorted by the individual making a strategic decision as to when to stop testifying.[31] In evaluating whether an individual has waived his or her right to refuse to answer further questions, courts have considered whether answering additional questions would increase the possibility that the individual would be prosecuted or convicted.[32]

D. Types Of Information Protected By The Privilege

The Fifth Amendment privilege does not attach to the voluntary creation of documents, whether corporate[33] or personal, because they are not created under compulsion.[34] The fact that the records are in a party's possession is irrelevant to the determination of whether the creation of the records was compelled. As the Supreme Court noted in *Fisher v. United States*, 425 U.S. 391 (1971), a sole proprietorship situation, the Fifth Amendment protects the person asserting the privilege only from *compelled* self-incrimination.[35] Where the preparation of business records is voluntary, no compulsion is present. A subpoena that demands production of documents does not compel oral testimony; nor would it ordinarily compel the taxpayer to restate, repeat, or affirm the truth of the contents of the documents sought.[36] "[T]he privilege protects a person only against being incriminated by his own compelled testimonial communications."[37] Thus, tax returns containing incriminating evidence cannot be withheld.

However, the "act of production doctrine" may apply in cases where the very act of producing such documents may constitute a compulsory authentication of incriminating documents.
The act of production doctrine has been explained as follows:

> Although the contents of documents are not privileged, the mere act of producing them may be if production provides link[s] in the chain of evidence needed to prosecute that individual. Production may tacitly concede the existence of the item, the producer's possession or control over the item, and might serve to authenticate the item. Accordingly, the act of producing documents may require

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[31] *See United States v. Monia*, 317 U.S. 424, 427 (1943); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313 (2d Cir. 1979). "There is no doubt that a waiver of the fifth amendment's privilege against self-incrimination may, in an appropriate case, be inferred from a witness' prior statements with respect to the subject matter of the case, without any inquiry into whether the witness, when he made the statements, actually knew of the existence of the privilege and consciously chose to waive it." *Klein v. Harris*, 667 F.2d 274, 287 (2d Cir. 1981).

[32] Courts are hesitant to rule that an individual waived their Fifth Amendment privilege implicitly. For example, in order to conclude that an individual waived their Fifth Amendment privilege, the Second Circuit requires that "the witnesses' prior statements [must] have created a significant likelihood that the finder of fact will be left with and prone to rely on a distorted view of the truth" and "the witness [must have] had reason to know that his prior statements would be interpreted as a waiver." *Cartier, a Div. of Richemont N. Am., Inc. v. Micha, Inc.*, No. 06 Civ. 4699 (D.C.), 2008 WL 2061386, at *2 (S.D.N.Y. May 12, 2008) (*quoting Klein v. Harris*, 667 F.2d 274, 287 (2d. Cir. 1981)).

[33] As further explained in Section 2(A) of this Report, corporations cannot assert the Fifth Amendment privilege; therefore, the Fifth Amendment privilege does not extend to their corporate records.

[34] *United States v. Doe*, 465 U.S. 605, 610-611(1984) (no compulsion present where voluntarily created documents do not compel person to "restate, repeat, or affirm the truth of the contents of the documents sought"); *In re Grand Jury Subpoena Duces Tecum dated Oct. 29, 1992*, 1 F.3d 87, 90 (2nd Cir. 1993).

[35] *Fisher v. United States*, 425 U.S. 391, 396 (1971).

[36] *Id*. at 409.

[37] *Id.*

> incriminating testimony if the existence or location of the documents is unknown to the government, or the act of producing the documents implicitly authenticates them, *and* in so doing, provides a link in the chain of incrimination.[38]

Whether the act of production doctrine applies requires a two-step inquiry. The court must first determine whether the production of documents is testimonial in nature, and, if it is, the party asserting the privilege in a non-representative capacity must show that the production would be incriminating.[39]

Even if the act of production doctrine applies, if either the foregone conclusion doctrine or the required records doctrine applies, the Fifth Amendment privilege will not apply. The foregone conclusion doctrine applies to the production of records if the existence, location, or authenticity of the records is a foregone conclusion, such that the act of production does not supply a necessary link in the chain of incriminating evidence.[40] The required records doctrine applies if the documents to be produced (i) are legally required for a regulatory purpose; (ii) are of the kind that the regulated party customarily keeps; and (iii) have assumed "public aspects" that render it analogous to public documents.[41]

III. CONSEQUENCES OF INVOKING THE FIFTH AMENDMENT PRIVILEGE

This section of the Report focuses on the consequences of invoking the Fifth Amendment privilege, which varies by whether the privilege is invoked in a criminal or civil proceeding and whether it is invoked by a party or non-party witness.

A. Criminal Cases

The Supreme Court has held:

> The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . [A] witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the

[38] *In re Schick*, 215 B.R. 4, 9 (Bankr. S.D.N.Y. 1997) (internal citations omitted); *United States v. Fox*, 721 F.2d 32, 36 & 40 (2d Cir. 1983).

[39] *Id*. Of course, the act of production doctrine does not apply to documents held in a representative capacity. *Supra* at II (D).

[40] "Specifically, the act of production communicates at least four different statements. It testifies to the fact that: i) documents responsive to a given subpoena exist; ii) they are in the possession or control of the subpoenaed party; iii) the documents provided in response to the subpoena are authentic; and iv) the responding party believes that the documents produced are those described in the subpoena." *U.S. v. Hubbell*, 167 F.3d 552, 567-68 (D.C. Cir. 1999) (*citing Fisher v. U.S.*, 425 U.S. 391, 410 (1976) (footnotes omitted).

[41] *AAOT Foreign Economic Ass'n (VO) Technostroyexport v. International Dev. and Trade Servs., Inc.* No. 96 CIV. 9056 (JAK)(ATP), 1999 WL 970402, *7 (S.D.N.Y. Oct. 25, 1999), *see generally In re Grand Jury Subpoena dated February 2, 2012*, 741 F.3d 339, 342-352 (2nd Cir. 2013) (discussing extensively the requirements needed to invoke "required records exception" in the context of the Bank Secrecy Act).

> innocent who otherwise might be ensnared by ambiguous circumstances.[42]

Thus, in criminal cases, the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt,"[43] and prohibits the finding of any adverse inferences.[44]

B. Civil Cases

Civil cases are more complicated. Thus, in the landmark case, *Baxter v. Palmigiano*,[45] the Supreme Court recognized that the Constitution does not prohibit a fact-finder from drawing an adverse inference from a prison inmate's silence during prison disciplinary proceedings. In its decision, the Court referenced 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."[46] Since *Baxter*, lower courts as well as the Supreme Court have regularly cited *Baxter* to support the imposition of an adverse inference in civil cases where a party invokes the Fifth Amendment privilege.[47]

It is well settled in the Second Circuit that an adverse inference may be drawn against a civil litigant who asserts the Fifth Amendment privilege when called to testify in a civil proceeding. In *Brink's Inc. v. City of New York*,[48] the Second Circuit affirmed the district court's holding that the invocation of the Fifth Amendment privilege by the corporate defendant's employee was "admissible and competent evidence" and the instruction to the jury was appropriate that a "witness ha[s] a constitutional right to decline to answer on the ground that it may tend to incriminate him. However, you may, but need not, infer by such refusal that the answers would have been adverse to the witness' interest." Since *Brink's*, federal courts in the Second Circuit have continued to permit adverse inferences against litigants asserting their Fifth Amendment rights in all manner of civil proceedings.[49]

A court evaluating whether to permit the fact-finder to consider a party's refusal to testify must ensure that the probative value of the witness's invocation of the Fifth Amendment privilege is not "substantially outweighed by the danger of unfair prejudice" under Federal Rule of Evidence 403.[50] The balancing of probative value against unfair prejudice is largely left to the discretion of trial judges, but courts in the Second Circuit have consistently held that prejudice in the sense

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[42] *Slochower v. Board of Higher Ed. of City of New York*, 350 U.S. 551, 557–58 (1956).
[43] *Griffin v. California*, 380 U.S. 609, 615 (1965); *see also Baxter v. Palmigiano*, 425 U.S. 308, 317 (1976) (holding that "it is constitutional error under the Fifth Amendment to instruct a jury in a criminal case that it may draw an inference of guilt from a defendant's failure to testify about facts relevant to his case"); *Mitchell v. United States*, 526 U.S. 314, 317 (1999) (holding that a sentencing court may not draw an adverse inference from a criminal defendant's silence).
[44] *Wechsler v. Hunt Health Sys., Ltd*., No. 94 Civ. 8294 (PKL), 2003 WL 21998980, at *2 (S.D.N.Y. Aug. 22, 2003).
[45] 425 U.S. 308, 320 (1976).
[46] *Id*. at 318 (*citing* 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961))
[47] *See e.g., McKune v. Lile*, 536 U.S. 24 (2002), and *Morales v. Turman*, 430 U.S. 322 (1977).
[48] 717 F.2d 700, 707–10 (2d Cir. 1983).
[49] *See* Section 3(B)(2) of this Report.
[50] *See Brink's*, 717 F.2d at 710.

of being "damning" to a party's case or bolstering the opposing party's position is not "unfair" within the meaning of Rule 403. To be "unfair," the prejudice resulting from a jury considering the Fifth Amendment invocation must be "inflammatory."[51]

The Second Circuit has also made clear that there are no "hard and fast rule[s]" governing when and how an adverse inference should be applied in the wake of a Fifth Amendment invocation, and that "how [the court] should react to any motion precipitated by a litigant's assertion of the Fifth Amendment in a civil proceeding . . . necessarily depends on the precise facts and circumstances of each case."[52] Thus, the Second Circuit has held that devising an appropriate remedy for a Fifth Amendment assertion should be left to the discretion of the trial court.[53]

1. Imposition Of An Adverse Inference

If a court determines that an individual's invocation of the Fifth Amendment privilege may be admitted into evidence and considered by the trier of fact, the question becomes what is the permissible inference to be drawn. New York federal courts have given some guidance on this issue. First, an adverse inference must relate to a specific question asked and not answered on Fifth Amendment grounds.[54] Second, the inference, if permitted, is limited to the answer to the specific question asked that, had it been answered, would have been unfavorable to the witness. Third, the inference is permissive, not mandatory, and it must be left to the discretion of the fact-finder -- both whether to draw the inference, and, if so, how much weight to give it based on the facts and circumstances of the case.[55]

2. When Is An Adverse Inference Appropriate

At what procedural stage or stages may an adverse inference be applied based on an invocation of the Fifth Amendment privilege? The short answer is: whenever a factual determination is necessary or permitted, whether by a court or a jury. Federal courts in the Second Circuit have permitted an adverse inference in the context of a motion for a preliminary injunction,[56] a motion for the appointment of a receiver,[57] contempt motions,[58] motions to amend a complaint,[59] motions to dismiss,[60] bench trials,[61] and jury trials.[62]

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[51] *See, e.g., Brink's*, 717 F.2d at 710; *United States v. Jimenez*, 789 F.2d 167, 171 (2d Cir. 1986) ("What 'prejudice' as used in Rule 403 means is that the admission is, as the rule itself literally requires, 'unfair' rather than 'harmful.'"); *United States v. Muyet*, 958 F. Supp. 136, 141 (S.D.N.Y. 1997) ("All evidence that tends to incriminate a defendant is prejudicial, in the sense that it is harmful to his case, but Rule 403 only precludes the admission of evidence that is unfairly prejudicial.").

[52] *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Ave., Brooklyn, N.Y.*, 55 F.3d 78, 85 (2d Cir. 1995).

[53] *Id.*

[54] As described above in Section 2(C) of this Report, blanket or nonspecific invocations are not sufficient and therefore nonspecific adverse inferences are not permitted.

[55] *LiButti v. United States*, 107 F.3d 110, 120-25 (2d Cir. 1997)

[56] *S.E.C. v. McGinn, Smith & Co.*, 752 F. Supp. 2d 194, 209 (N.D.N.Y. 2010), *order vacated in part on reconsideration sub nom. S.E.C. v. Wojeski*, 752 F. Supp. 2d 220 (N.D.N.Y. 2010), and *aff'd sub nom. Smith v. S.E.C.*, 432 F. App'x 10 (2d Cir. 2011), and *aff'd sub nom. Smith v. S.E.C.*, 432 F. App'x 10 (2d Cir. 2011); *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000); *S.E.C. v. Musella*, 578 F. Supp. 425, 430 (S.D.N.Y. 1984).

[57] *United States v. Ianniello*, 646 F. Supp. 1289, 1300 (S.D.N.Y. 1986), *aff'd,* 824 F.2d 203 (2d Cir. 1987).

3. Application Of An Adverse Inferences In A Motion For Summary Judgment

Summary judgment motions present special circumstances due to the well-settled rule that a party opposing summary judgment is entitled to the benefit of all reasonable inferences in his or her favor.[63] Federal courts in New York have interpreted that rule as prohibiting an adverse inference based on an invocation of Fifth Amendment rights against the non-movant on summary judgment. In a series of three opinions since 2005, the Second Circuit has articulated a view that no adverse inferences are available on summary judgment against the non-movant.

In *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*,[64] a group of former shareholders of Dutch company Saybolt sued the company's former outside counsel Philippe Schreiber, alleging that he was negligent in advising the company that payment of a bribe would not violate U.S. law. Saybolt paid the bribe and shortly thereafter it and two of its principals, Frerik Pluimers and David Mead, were indicted.

Schreiber moved for summary judgment, arguing that no genuine issue of fact had been raised as to Saybolt's reliance on Schreiber's advice. Among other things, Schreiber argued that the court should draw an adverse inference in his favor from the fact that Pluimers had invoked his Fifth Amendment rights in response to deposition questions about his reliance on Schreiber's advice. The Second Circuit affirmed the district court's denial of Schreiber's summary judgment motion. Addressing Schreiber's contention that Pluimers' invocation of his Fifth Amendment privilege supported an adverse inference on summary judgment, the Second Circuit held:

> [T]o the extent that [Pluimers'] deposition is offered into evidence at trial, the defendants may be entitled to an instruction that the jury may draw adverse inferences against Pluimers on each question as to which he asserted his Fifth Amendment privilege during the deposition. *Cf. LiButti v. United States*, 107 F.3d 110, 123–24 (2d Cir.1997) (setting forth factors relevant to a determination of whether an adverse inference may be drawn on the basis of a non-party's invocation of his or her Fifth Amendment privilege). Even assuming that a *jury* might draw such inferences, however, *we* are required at summary judgment to draw all reasonable inferences in favor of the non-moving party [].

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[58] *S.E.C. v. Durante*, No. 01 Civ. 9056 (DAB) (AJP), 2013 WL 6800226, at *10 (S.D.N.Y. Dec. 19, 2013), *report and recommendation adopted*, No. 01 Civ. 9056 (DAB), 2014 WL 5041843 (S.D.N.Y. Sept. 25, 2014), *aff'd,* 641 F. App'x 73 (2d Cir. 2016).

[59] *In re Bernard L. Madoff Inv. Sec. LLC*, 560 B.R. 208, 227 (Bankr. S.D.N.Y. 2016).

[60] *In re Bernard L. Madoff Inv. Sec. LLC*, 560 B.R. at 227; *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Sec. LLC*, No. 12 Civ. 115 (JSR), 2013 WL 1609154, *6 & n.4 (S.D.N.Y. Apr. 15, 2013); *In re Alstom SA*, 454 F. Supp. 2d 187, 208 & n.17 (S.D.N.Y. 2006).

[61] *LiButti*, 107 F.3d at 124.

[62] *Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983).

[63] *See, e.g., Scott v. Harris*, 550 U.S. 372, 378 (2007).

[64] 407 F.3d 34 (2d Cir. 2005).

> Doing so, we cannot conclude that Pluimers's silence resolves all genuine issues of fact on the question of Saybolt's reliance on Schreiber's advice.[65]

The extent of *Stichting*'s holding is not entirely clear. While the quoted language suggests a broad rule against drawing any adverse inferences against a non-movant on summary judgment, the court did not explicitly state such a rule. Nor did it explain which "reasonable inferences" it drew in the plaintiff's favor or state that *no* evidentiary weight should be given to Pluimers' refusal to testify. To the contrary, the language above suggests that the court at least considered Pluimers' silence but could not "conclude that [it] resolve[d] all genuine issues of fact."

In any event, despite the questions left unanswered by *Stichting*, the Second Circuit subsequently referenced in *dicta* a broad rule prohibiting adverse inferences on summary judgment against a non-movant based on an invocation of the Fifth Amendment privilege by the non-movant or another witness. In a footnote to its opinion in *In re 650 Fifth Ave. & Related Properties*, the Second Circuit "t[ook] exception to [the district court's] suggestion that it could draw adverse inferences at summary judgment based on individuals' invocation of their Fifth Amendment privilege" and characterized *Stichting* as holding that "a court may not draw negative inferences against a nonmoving party on a summary judgment motion" based on individuals' invocation of their Fifth Amendment rights.[66] The court did not rule on the issue, however, "because, ultimately, the lack of testimony from those witnesses meant that there was no record evidence to dispute the overwhelming evidence" in the movant's favor.[67]

Similarly, in its summary opinion in *Amusement Industry, Inc. v. Stern*,[68] the Second Circuit, citing *In re 650 Fifth Avenue and Related Properties*, stated in *dicta* that "adverse inferences cannot be drawn against a non-moving party at summary judgment based on an invocation of the Fifth Amendment privilege."[69]

In light of *In re 650 Fifth Avenue and Related Properties* and *Amusement Industry*, it would seem fairly clear that adverse inferences against non-movants based on Fifth Amendment invocations may not be drawn by federal courts in the Second Circuit. Several decisions by lower federal courts in New York have adopted this view.[70] Nevertheless, some New York

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[65] *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34, 55 (2d Cir. 2005) (emphasis in original).

[66] 830 F.3d 66, 93 n.25 (2d Cir. 2016).

[67] *Id*.

[68] 721 F. App'x. 9 (2d Cir. 2018)

[69] *Id.* at 11. The quoted language can fairly be characterized as *dicta* because, as in *In re 650 Fifth Avenue and Related Properties*, the court affirmed summary judgment on the separate ground that the defendant's refusal to testify meant that he was not able to offer proof contradicting the evidence submitted by plaintiff on summary judgment.

[70] *See, e.g.*, *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, Apprenticeship, Journeyman, Retraining, Educ., & Indus. Fund v. James Dean Contracting Corp.*, No. 11 Civ. 5879 (JMF), 2013 WL 6569911, at *1 (S.D.N.Y. Dec. 13, 2013) ("Plaintiffs may well have a strong case at trial given Donnarumma's and Perretti's invocation, but it is not a basis to grant summary judgment here as the Court is required to draw all reasonable inferences in the nonmoving parties' favor."); *S.E.C. v. Aronson*, No. 11 Civ. 7033 (JSR), 2013 WL 4082900, at *12 (S.D.N.Y. Aug. 6, 2013) (quoting *Stichting* for proposition that "while 'a *jury* might draw such inferences ... [the Court is] required at summary judgment to draw all inferences in

federal judges have continued to permit such adverse inferences on summary judgment[71] at least where such adverse inferences are supported by other evidence.[72] With one exception[73], these

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favor of the non-moving party'" (alteration in original)), *on reconsideration in part on other grounds*, No. 11 Civ. 7033 (JSR), 2013 WL 6501324 (S.D.N.Y. Dec. 11, 2013); *Franco v. Ideal Mortg. Bankers, Ltd.*, No. 07-CV-3956 (JS) (AKT), 2011 WL 317971, at *4 (E.D.N.Y. Jan. 28, 2011) ("[O]n summary judgment, the Court cannot draw reasonable inferences against a non-moving party, even when those inferences stem from that party invoking the Fifth Amendment."); *Fendi Adele S.R.L. v. Ashley Reed Trading, Inc.*, No. 06 Civ. 243 (RMB) (MHD), 2010 WL 571804, at *11 (S.D.N.Y. Feb. 16, 2010) ("While it is settled law that a trier of fact may draw an adverse inference in a civil action against a party who invokes the Fifth Amendment privilege, the court in deciding this summary judgment motion has not drawn any inference from James Ressler's invocation of his right against self-incrimination."); *Parsons & Whittemore Enters. v. Schwartz*, 387 F. Supp. 2d 368, 372 (S.D.N.Y. 2005) ("Plaintiffs may ultimately be entitled to an instruction that the jury may draw adverse inferences against the Defendant on each issue as to which he has asserted his Fifth Amendment privilege. . . . But even assuming that a jury might draw such inferences, the court is still required at *summary judgment* to draw all reasonable inferences in favor of the non-moving party."); *In re Allou Distributors Inc.*, Adv. No. 04-08369-ess, 2012 WL 6012149, at *15 (Bankr. E.D.N.Y. Dec. 3, 2012) (declining to draw adverse inference against non-movant on summary judgment); *In re Jacobs*, 394 B.R. 646, 664 (Bankr. E.D.N.Y. 2008) (declining to draw adverse inference against non-movant on summary judgment); *In re WorldCom, Inc.*, 377 B.R. 77, 109 (Bankr. S.D.N.Y. 2007) ("[I]t must be remembered that at summary judgment, the Court is required to draw all reasonable inferences in favor of the non-moving party, despite potential for the ultimate trier of fact to draw an adverse inference from the assertion of Fifth Amendment privileges.").

[71] *See, e.g.*, *Bank of Am., N.A. v. Fischer*, 927 F. Supp. 2d 15, 26 (E.D.N.Y. 2013) (drawing adverse inference against non-movant on summary judgment, but noting that "a motion for summary judgment cannot be granted on an adverse inference alone"); *Ball v. Cook*, No. 11 Civ. 5926 (RJS), 2012 WL 4841735, at *5 (S.D.N.Y. Oct. 9, 2012) (applying adverse inference against non-movant defendant where defendant's "repeated invocations of his Fifth Amendment privilege" caused "Plaintiff's inability to obtain information to which he is otherwise entitled"); *Armstrong v. Collins*, Nos. 01 Civ. 2437 (PAC), 02 Civ. 2796 (PAC), 02 Civ. 3620 (PAC), 2010 WL 1141158, *33 (S.D.N.Y. Mar. 24, 2010) (acknowledging split among district courts but holding that "[o]n the facts and circumstances here, the Court finds that it is appropriate to draw an adverse inference against [defendant]"); *U.S. S.E.C. v. Suman*, 684 F. Supp. 2d 378, 387 (S.D.N.Y. 2010) (drawing adverse inference against non-movant on summary judgment, but holding that "summary judgment cannot be granted on an adverse inference alone; rather, the inference must be weighed with other evidence in the matter in determining whether genuine issues of fact exist"), *aff'd,* 421 F. App'x 86 (2d Cir. 2011); *New York Dist. Council of Carpenters Pension Fund*, 2009 WL 362640, at *4 (drawing adverse inference against non-movant on summary judgment, though stating that, under *Stichting*, "even assuming that a jury might draw [adverse] inferences, [the court is] required at summary judgment to draw all reasonable inferences in favor of the non-moving party" (second alteration in original)); *S.E.C. v. Pittsford Capital Income Partners, L.L.C.*, No. 06 Civ. 6353T (P), 2007 WL 2455124, at *15 (W.D.N.Y. Aug. 23, 2007) (drawing negative inference against non-movant defendants), *aff'd in part, appeal dismissed in part sub nom. S.E.C. v. Pittsford Capital Income Partners, LLC*, 305 F. App'x 694 (2d Cir. 2008); *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 452 (N.D.N.Y. 2006) (applying adverse inference against defendant on plaintiff's summary judgment motion, but denying the motion); *JSC Foreign Econ. Ass'n Technostroyexport v. International Dev. & Trade Servs., Inc.*, 386 F. Supp. 2d 461, 464 (S.D.N.Y. 2005) (drawing adverse inferences against non-movants and holding that, "[w]hile the court is required to draw all reasonable inferences in favor of the non-moving party on a motion for summary judgment, a negative inference may be drawn against the non-moving party if the non-moving party asserts the Fifth Amendment privilege against self-incrimination in response to probative evidence provided by the moving party"). Even those courts that have permitted adverse inferences on summary judgment hold that a summary judgment motion cannot be granted on the basis of an adverse inference alone. *See, e.g.*, *Bank of Am., N.A. v. Fischer*, 927 F. Supp. 2d 15, 26 (E.D.N.Y. 2013); *Ball v. Cook*, No. 11 Civ. 5926 (RJS), 2012 WL 4841735, at *5 (S.D.N.Y. Oct. 9, 2012); *Armstrong v. Collins*, 2010 WL 1141158, at *34 (S.D.N.Y. Mar. 24, 2010); *U.S. S.E.C. v. Suman*, 684 F. Supp. 2d 378, 386–87 (S.D.N.Y. 2010); *In re Inflight Newspapers, Inc.*, 423 B.R. 6, 18 (Bankr. E.D.N.Y. 2010); *see also Fidelity Funding of California, Inc. v. Reinhold*, 79 F. Supp. 2d 110, 116 (E.D.N.Y. 1997); *Centennial Life Ins. Co. v. Nappi*, 956 F. Supp. 222, 228 (N.D.N.Y. 1997).

[72] *See In re Inflight Newspapers, Inc.*, 423 B.R. 6, 17-18 (describing split among lower courts).

[73] *See New York Dist. Council of Carpenters Pension Fund*, 2009 WL 362640 at *4.

decisions which preceded the decisions in *650 Fifth Avenue and Related Properties* and *Amusement Industries*, did not cite *Stichting*.

4. Drawing An Adverse Inference On Summary Judgment Requires Corroboration

While the application of an adverse inference to a non-moving party on summary judgment is not entirely clear, what seems clear is that an adverse inference, in and of itself, is insufficient to support a finding of liability. Instead, there must be independent and corroborating evidence of wrongdoing.[74] Specifically, the Seventh Circuit has stated "defendant's silence [should] be weighed *in light of other evidence* rather than leading directly and without more to the conclusion of guilt or liability."[75]

The Second Circuit also suggested this result in *LiButti*, where the defendant argued on appeal that the district court during its bench trial weighted the adverse inference against her too heavily. In rejecting the defendant's argument, the Second Circuit noted that "the district court did not rely solely upon the adverse inference" in rendering judgment against the defendant but instead "tested the persuasiveness of the adverse inference against other evidence, and having done so, accorded considerable weight to the adverse inference" because it was consistent with other evidence.[76]

Nevertheless, dismissal has resulted from the mere invocation of the privilege when the invocation is regarding facts that are crucial to a defendant's ability to mount a defense and are uniquely in plaintiff's control. In *Serafino v. Hasbro, Inc.*,[77] the court dismissed the plaintiff's action stating that although plaintiff had an absolute constitutional right not to reveal any potentially incriminating material, his invocation of his Fifth Amendment privilege placed defendants at a significant disadvantage and hindered their ability to mount a defense, because the facts were uniquely in control of plaintiff himself.

IV. FACTORS TO CONSIDER WHEN DETERMINING WHETHER A CIVIL CASE SHOULD BE STAYED PENDING THE OUTCOME OF A CRIMINAL TRIAL

What happens when a civil and criminal case are pending at the same time? In order to ensure that testimony in the civil case does not affect the criminal trial, courts will, in certain instances, impose a stay of the civil case pending a determination of the criminal trial. District courts have set forth six or seven factors (depending on the jurisdiction) that a court will consider in deciding

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[74] *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466, at *5 (E.D. Ill. May 11, 2000) ("an adverse inference drawn against a party invoking the Fifth Amendment privilege is ordinarily insufficient to support summary judgment in the absence of other independent, material and probative evidence…Nor is an adverse inference based on a Fifth Amendment invocation alone sufficient evidence to defeat summary judgment."); *Sebastian v. City of Chicago*, No. 05 C 2077, 2008 WL 2875255, at *34 (N.D. Ill. July 24, 2008) ("Before an adverse inference may be drawn from a party's refusal to testify in a civil case, there must be independent corroborative evidence to support the negative inference beyond the invocation of the privilege.") (internal citations omitted).

[75] *See, LaSalle Bank Lake View v. Seguban*, 54 F.3d 387, 391 (7th Cir. 1995) [emphasis in original].

[76] *LiButti v. United States*, 178 F.3d 114, 120 (2d Cir. 1999).

[77] 82 F.3d 515, 519 (1st Cir. 1996). The district court found that there were "no company records or other Hasbro employees whose information could effectively substitute for responses from George Serafino himself." The Court of Appeals agreed.

whether a stay is warranted. Although the factors may vary, courts will consider the same general concepts as follows:

> (i) [T]he interests of the civil plaintiff in proceeding expeditiously with the civil litigation, including the avoidance of any prejudice to the plaintiff should a delay transpire; (ii) the hardship to the defendant, including the burden placed upon him should the cases go forward in tandem; (iii) the convenience of both the civil and criminal courts; (iv) the interests of third parties; and (v) the public interest … (vi) the good faith of the litigants (or the absence of it) and (vii) the status of the cases.[78]

The Second Circuit uses a six-factor test: (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; and (6) the public interest. *Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 99 (2d Cir. 2012).

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[78] *Green v. Cosby*, 177 F. Supp. 3d 673, 678 (D. Mass. 2016) (*citing Microfinancial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 77 (1st Cir. 2004)); *Sokol v. Brent Clark, M.D., P.C.*, No. 16-1477, 2018 WL 1089620, at *1 (W.D. Pa. Feb. 23, 2018) (same); *Duncan v. Banks*, No. SA-15-CV-148-XR, 2017 WL 4805111, at *2 (W.D. Tex. Oct. 24, 2017) (same); *Blanda v. Martin & Seibert, L.C.*, No. 2:16-0957, 2017 WL 63027, at *3 (S.D. W.Va. Jan. 5, 2017) (setting forth the following six factors (1) the interest of the plaintiff's in proceeding expeditiously with the litigation or any particular aspect of it, and the potential prejudice to plaintiffs of delay, (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; (5) the interest of the public in the pending civil and criminal investigation; (6) the relatedness of the criminal and civil proceedings (whether they involve substantially similar issues)); *Superior Home Mortg., LLC v. Marbury*, No. 1:19-cv-01056-STA-jay, 2020 WL 1878861, at *1 (W.D. Tenn. April 15, 2020) (*citing FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 627 (6th Cir. 2014) (setting forth the following seven factors (1) the extent to which the issues in the criminal case overlap with those presented in the civil case; (2) the status of the case, including whether the defendants have been indicted; (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay; (4) the private interests of and burden on the defendants; (5) the interests of the courts; (6) the public interest (7) the extent to which the defendant's fifth amendment rights are implicated.)); *United States v. Brown*, No. 1:12-cv-00394-SEB-DKL, 2013 WL 1221982, at *3-4 (S.D. Ind. March 25, 2013) (setting forth the following six factors (1) the posture of the criminal proceedings; (2) the overlap of the criminal and civil proceedings; (3) whether the government entity initiating the criminal action is also a party in the civil matter; (4) the burden on the defendants if the civil case is not stayed; (5) the prejudice to the civil plaintiff if the civil case is stayed; and (6) the effect of a stay on the public interest.); *Ruszczyk v. Noor*, 349 F. Supp. 3d 754, 759-760 (D. Minn. 2018) (setting forth the following six factors - (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation; (6) the extent to which the defendant's fifth amendment rights are implicated.); *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324-325 (9th Cir. 1995)(same); *Fine v. Tumpkin*, No. 17-cv-02140, 2018 WL 317466, at *3-4 (D. Colo. Jan. 8, 2018) (same); *S.W. v. Clayton Cnty., Pub. Sch.*, 185 F. Supp. 3d 1366, 1372-1372 (D. Georgia, 2016) (same).

At least one district court in the Eleventh Circuit has stated that "[t]he similarity of the issues in the underlying civil and criminal actions is considered the most important threshold issue in determining whether to grant a stay."[79]

As set forth by a district court in the Seventh Circuit, the "Constitution does not require a stay of civil proceedings pending the outcome of criminal proceedings … The ultimate question, therefore, is whether the court should exercise its discretion in order to avoid placing the defendants in a position of having to choose between risking a loss in their civil cases by invoking their Fifth Amendment rights, or risking conviction in their criminal cases by waiving their Fifth Amendment rights and testifying in the civil proceedings."[80]

Where one of the parties to the civil litigation is the government, a court is more likely to grant a stay pending the determination of the criminal proceeding. This is because "[i]f the governmental entity that initiated the parallel criminal prosecution or investigation is a party in the civil case, there is a concern that it may use the civil discovery process to circumvent limitations on discovery in criminal proceedings"[81] and "might seek to misuse the civil discovery process in order to further its interests in [a] criminal prosecution."[82] Conversely, the potential for prejudice is diminished where a private party, not the government, is the plaintiff, because it is less likely that civil discovery will be "used as a cloak to conduct criminal discovery."[83]

At least one court has held that where the Government brings a civil lawsuit simultaneously with a criminal proceeding and *the Government* is seeking a stay, a stay is improper absent a specific showing of prejudice that cannot be remedied by anything other than a complete stay of the civil proceeding.[84]

V. USE OF ALTERNATIVE REMEDIES, SUCH AS A RULE 26(C) PROTECTIVE ORDER

There has been some suggestion that courts should use the power presented in Rule 26(c) and simply issue a protective order as a way to limit prosecutorial access to testimony. Proponents argue that issuing a protective order will foreclose the possibility of future use of civil testimony in a criminal proceeding, thereby removing the need for the invocation of a Fifth Amendment privilege. The Second Circuit and at least one district court in the Fifth Circuit have held that the protections of a Rule 26(c) protective order are insufficient to protect civil testimony from future

[79] *S.W. v. Clayton Cnty., Pub. Sch.*, 185 F. Supp. 3d 1366, 1372-1372 (D. Georgia, 2016).
[80] *United States v. Brown*, 2013 WL 1221982, at *3 *(internal citations omitted).*
[81] *See Chagolla v. City of Chicago*, 529 F. Supp. 2d 941, 946 (N.D. Ill. 2008).
[82] *See In re Scrap Metal Antitrust Litig.*, No. 1:02-CV-0844, 2002 WL 31988168, at *4 (N.D. Ohio, Nov. 7, 2002).
[83] *Citibank, N.A. v. Hakim*, No. 92 Civ. 6233, 1993 WL 481335, at *2 (S.D.N.Y. Nov. 17, 1993); *see also State Farm Mut. Auto. Ins. Co. v. Mittal*, No. 16-CV-4989(FB)(SMG), 2018 WL 3127155, at *3 (E.D.N.Y. June 25, 2018); *JHW Greentree Capital, L.P., Whittier Trust Co.*, No. 05 Civ. 2985 (HB), 2005 WL 1705244, at *2 (S.D.N.Y. July 22, 2005); *Bernard v. Lombardo*, No.16 Cv. 863 (RMB), 2017 WL 2984022, at *4 (S.D.N.Y. June 9, 2017); *Citibank, N.A. v. Super Sayin' Publ'g, LLC*, 86 F. Supp. 3d 244, 248 (S.D.N.Y. 2015); *Karimona Invs. LLC v. Weinreb*, No. 02 CV 1792 (WHP) (THK), 2003 WL 941404, at *4 (S.D.N.Y. Mar. 7, 2003).
[84] *S.E.C. v. Fraser*, No. CV-09-00443-PHX-GMS, 2009 WL 1531854, at *3 (D. Ariz. June 1, 2009); *see also S.E.C. v. Sandifur*, No. C05-1631C, 2006 WL 3692611, at *3 (W.D. Wash. Dec. 11, 2006); *FTC v. Johnson*, No. 2:10-cv-02203-MMD-GWF, 2013 WL 3155311, at *3 (D. Nev. June 19, 2013).

use in a criminal prosecution, and therefore a witness cannot be forced to testify based upon the presence of a Rule 26(c) protective order.

In *Andover Data Services, Div. of Players Computer, Inc. v. Statistical Tabulating Corp.*,[85] the Second Circuit stated that "the protections of a Rule 26(c) order simply are not as certain as the protections of either the fifth amendment or a statutory grant of use immunity… [N]o matter how broad its reach, [it] provides no guarantee that compelled testimony will not somehow find its way into the government's hands for use in a subsequent criminal prosecution." Further, in *Odeh v. City of Baton Rouge/E. Baton Rouge*,[86] the court denied Defendant's motion to compel "[b]ecause district courts are precluded from compelling testimony in a civil [action] over a valid assertion of the Fifth Amendment privilege, absent a specific assurance of immunity for such testimony…" and "a protective order cannot adequately protect Plaintiff's interests…".[87]

VI. ADVERSE INFERENCES IN DIFFERENT FACTUAL SCENARIOS

A. Invocation Of The Fifth Amendment Privilege By A Non-Party

Under certain circumstances, an adverse inference will be applied to a party in a civil litigation where a non-party witness invokes his or her Fifth Amendment privilege.[88] In *LiButti v. United States*,[89] the daughter ("Edith") of a delinquent taxpayer ("Robert") brought an action for wrongful levy against the U.S. government. Among other things, Edith sought to enjoin the IRS from enforcing a tax levy on a certain race horse as part of its effort to collect unpaid taxes from Robert. After a bench trial at which Robert invoked his Fifth Amendment privilege when questioned about whether his funds were used to purchase the horse, the district court found that Edith was the sole owner of the horse and that the IRS had failed to establish a sufficient nexus between the horse and Robert to enforce the levy.

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[85] 876 F.2d 1080, 1082-1085 (2d Cir. 1989)

[86] No. 14-793-JJB-RLB, 2016 WL 1069663, at *3 (M.D. La. March 17, 2016).

[87] "The term 'use immunity' refers to a limited grant of immunity where, in exchange for a witness' self-incriminating testimony, the government is barred from using that testimony against the witness in a future prosecution. *See* L. TAYLOR, WITNESS IMMUNITY 79 (1983)." Murphy, *Use Immunity and the Fifth Amendment: Maybe the Second Circuit Should Have Stayed Silent,* 63 St. John's L. Rev. 585, 586, n.4 (No. 3 Spring 1989) "Transactional immunity provides broader protection to the witness than use immunity because it bars forever a prosecution for anything incriminating which the witness mentions. *See* L. TAYLOR, *supra* , note 4, at 75." *Id*, n. 5.

[88] *Gil Ramirez Grp., L.L.C. v. Hous. Indep. Sch. Dist.*, No. 4:10-CV-04872, 2017 WL 3236110, at *15 (S.D. Tex. July 31, 2017) (holding that a non-party's silence in a civil proceeding implicates Fifth Amendment concerns to a lesser degree than a party's silence.); *Rad Servs., Inc. v. Aetna Casualty & Surety Co.*, 808 F.2d 271, 274-277 (3d Cir. 1986) (drawing an adverse inference against plaintiff, a corporation, since "the mere fact that the witness no longer works for the corporate party should not preclude as evidence his invocation of the *Fifth Amendment*."); *F.D.I.C. v. Fidelity & Deposit Co.*, 45 F.3d 969, 978 (5th Cir. 1995) (drawing an adverse inference from invocation of the Fifth Amendment privilege by "non-part[ies] who [were] neither [] agent[s] nor [] employee[s], officer[s], director[s] or voting member[s] of the party,…"); *Cerro Gordo Charity v. Fireman's Fund Amer. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir. 1987) (imposing adverse inference against party due to the invocation of the Fifth Amendment privilege by non-party witness, since it was unlikely that the non-party witness would invoke the privilege solely for the purpose of harming the party, the invocation of the privilege was not the sole evidence implicating liability, and the non-party witness was a key figure in the lawsuit.).

[89] 107 F.3d 110, 123-124 (2d Cir. 1997).

On appeal, the government argued that the district court erred in refusing to draw any adverse inference from Robert's invocation of the Fifth Amendment privilege. Under the circumstances presented, the court held Robert's invocation of his Fifth Amendment privilege "struck directly at the only issue before the court," i.e., whether he or his daughter was the effective owner of the horse, and therefore should have been admitted in evidence and an adverse inference permitted. The court then remanded for the district court to consider the weight to be accorded Robert's invocations and whether any issues of unfair prejudice existed under Rule 403.

The court stated that "the circumstances of a given case, rather than the status of a particular non-party witness," determines the admissibility of any given witness's refusal to answer questions on Fifth Amendment grounds. Noting the "undeveloped posture of the law pertaining to adverse inferences when non-party witnesses invoke the Fifth Amendment in civil litigation," the court then surveyed the state of the law in other circuits on this issue and found that "the evolving case law and its underlying rationale . . . suggest a number of non-exclusive factors which should guide the trial court in making these determinations."

The Second Circuit set forth the following four-factor test to determine the admissibility of a non-party's invocation of the Fifth Amendment privilege against self-incrimination in the course of a civil litigation and the concomitant imposition of an adverse inference:

> 1. *The Nature of the Relevant Relationships:* While no particular relationship governs, the nature of the relationship will invariably be the most significant circumstance. It should be examined, however, from the perspective of a non-party witness' loyalty to the plaintiff or defendant, as the case may be. The closer the bond, whether by reason of blood, friendship or business, the less likely the non-party witness would be to render testimony in order to damage the relationship.[90]
>
> 2. *The Degree of Control of the Party Over the Non-Party Witness:* The degree of control which the party has vested in the non-party witness in regard to the key facts and general subject matter of the litigation will likely inform the trial court whether the assertion of the privilege should be viewed as akin to testimony approaching admissibility under Fed. R. Evid. 801(d)(2), and may accordingly be viewed, [] as a vicarious admission.
>
> 3. *The Compatibility of the Interests of the Party and Non-Party Witness in the Outcome of the Litigation:* The trial court should evaluate whether the non-party witness is pragmatically a noncaptioned party in interest and whether the assertion of the privilege advances the interests of both the non-party witness and the affected party in the outcome of the litigation.

[90] At least two courts in the Seventh Circuit have held that in order to apply an adverse inference to a party based upon a non-party's invocation of the Fifth Amendment privilege; the party seeking to use the invocation must establish a "relationship of loyalty." *Malibu Media, LLC v. Tashiro,* No. 1:13-CV-00205, 2015 WL 2371597, at *25-26 (S.D. Ind. May 18, 2015); *Sebastian v. City of Chicago,* No. 05 C 2077, 2008 WL 2875255, at *33-34 (N.D. Ill. July 24, 2008). These cases have defined a relationship of loyalty as a close family or business relationship between the person who exercised the Fifth Amendment right and the individual against whom an adverse inference is drawn or where the interests of the parties in question are closely aligned. *Id.*

4. *The Role of the Non-Party Witness in the Litigation:* Whether the non-party witness was a key figure in the litigation and played a controlling role in respect to any of its underlying aspects also logically merits consideration by the trial court.[91]

Although the Supreme Court has not directly ruled on this issue, the four-factor test enumerated in *LiButti* has become well recognized and applied in each of the 11 Circuits.[92] In analyzing these four factors, the overarching concern remains whether applying the adverse inference is trustworthy and will advance the search for truth.[93] Courts apply this same analysis when determining whether an adverse inference should be applied against a litigant based on a Fifth Amendment invocation by another party to the same litigation.[94]

In applying *LiButti*, federal courts in New York have consistently followed the Second Circuit's admonition to evaluate the permissibility of adverse inferences by scrutinizing the particular facts. It is therefore difficult to draw generalizations about how particular types of third parties are treated.[95] Since *LiButti*, courts have permitted adverse inferences in the following types of cases:

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[91] *LiButti*, 107 F.3d at 123-124.

[92] *See e.g. Coquina Invs. v. TD Bank*, N.A., 760 F.3d 1300, 1310-1313 (11th Cir. 2014); *Rad Services, Inc.*, 808 F.2d at 274-277; *Cargill, Inc. v. WDS, Inc.*, No. 3:16-cv-00848, 2018 WL 1525352, at *12 (W.D. N.C. Mar. 28, 2018); *Securities and Exchange Comm'n v. Avent*, No. 1:16-CV-2459-SCJ, 2017 WL 6460243, at *4 (D. Ga. Dec. 15, 2017); *Schoenmann v. Salevouris*, No. 15-cv-05193-JSC, 2016 U.S. Dist. LEXIS 147089, at *7-10 (N.D. Cal. Oct. 24, 2016); *Malibu Media, LLC v. Tashiro*, No. 1:13-CV-00205, 2015 WL 2371597, at *25-26 (S.D. Ind. May 18, 2015); *United States v. 62,552.00 in United States Currency*, No. 03-10153-RBC, 2015 WL 251242, at *7 (D. Mass. Jan. 20, 2015); *Lighthouse List Co., LLC v. Cross Hatch Ventures Corp.*, No. 13-60524, 2014 WL 11531800, at *11 (S.D. Fla. June 12, 2014); *Cotton v. City of Eureka*, No. C-08-04386 SBA, 22010 WL 2889498, at *4 (N.D. Cal. July 22, 2010); *United States v. Zerjav*, No. 4:08CV00207 ERW, 2009 WL 912821, at *33 (E.D. Mo. Mar. 31, 2009); *Miller v. Pilgrim's Pride Corp.*, No. 5:05CV00064, 2008 WL 178473, at *8 (W.D. Va. Jan. 16, 2008); *Emerson v. Wembley United States, Inc.*, 433 F. Supp. 2d 1200, 1211-1214 (D. Colo. 2006); *Parker v. Olympus Health Care, Inc.*, 264 F. Supp. 2d 998, 1001 (D. Utah, 2003); *Garrish v. UAW*, 284 F. Supp. 2d 782, 797-798 (E.D. Mich. 2003); *State Farm Mut. Auto. Ins. Co. v. Abrams*, No. 96 C 6365, 2000 WL 574466, at *5 (E.D. Ill. May 11, 2000).

[93] *LiButti*, 107 F.3d at 124; *see also Coquina Invs.*, 760 F.3d at *1311; *Cargill, Inc.*, 2018 WL 1525352, at *12; *Zertuche v. United States*, No. 2:15-cv-02284-JPM-dkv, 2017 WL 6811994, at *13 (W.D. Tenn. Sept. 13, 2017); *Rigby v. Corliss (In re Mastro)*, No. 09-16841-MLB, 2017 WL 2889659, at *12 (Bankr. W.D. Wash. July 6, 2017); *United States v. 62,552.00 in United States Currency*, 2015 WL 251242, at *7; *Malibu Media LLC*, 2015 WL 2371597, at *10; *United States v. Zerjav*, 2009 WL 912821, at *33; *In re Urethane Antitrust Litig.*, No. 04-1616-JWL, 2013 WL 100250, at *2-3 (D. Kan. Jan. 8, 2013).

[94] *See, e.g., John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000) (relying on *LiButti* factors to draw adverse inference against invoker's co-defendants); *Willingham v. Cty. of Albany*, 593 F. Supp. 2d 446, 452–53 (N.D.N.Y. 2006) ("*LiButti* concerned the invocation of the privilege by a non-party witness where the court found that such invocation merited an adverse inference against a party. However, the rationale and analysis of *LiButti* have equal application to a case, as here, where a party invokes the privilege and the question presented is whether the party's invocation merits application of an adverse inference against other parties.").

[95] *Banks v. Yokemick*, 144 F. Supp. 2d 272, 289 (S.D.N.Y. 2001) ("The courts in these cases have declined to enunciate a blanket rule governing the drawing of adverse inferences from a non-party witness' invocation of the privilege against self-incrimination, preferring instead a case-by-case approach." (citing *LiButti*)); *In re WorldCom, Inc.*, 377 B.R. 77, 109 (Bankr. S.D.N.Y. 2007) ("There are no bright line rules governing the drawing of an adverse inference from a non-party's invocation of the privilege against self-incrimination.").

- On plaintiff's summary judgment motion, adverse inference was drawn against defendant CEO of real estate investment firm as a result of invocation by the firm's outside counsel, a non-party to the litigation, where counsel represented defendant on an allegedly fraudulent transaction and served as point of contact between plaintiff and defendant with respect to the transaction.[96]

- On plaintiff SEC's motion for civil contempt for failure to pay previously ordered disgorgement, an adverse inference was permitted against defendant husband as a result of non-party wife's invocation.[97]

- On cross-motions for summary judgment, an invocation by a defendant employee of the Albany Housing Authority ("AHA") was used as the basis for an adverse inference against a co-defendant employee of AHA.[98]

- On a motion for a preliminary injunction in an action by the manufacturer of hair-care products against distributors, the court permitted an adverse inference against the downstream American distributor based on Fifth Amendment invocations by co-defendant upstream Chinese distributors, where all defendants were alleged to have participated in joint fraudulent scheme against manufacturer and therefore all defendants' interests in avoiding a fraud finding were aligned.[99]

- On motion *in limine,* the bankruptcy court permitted an adverse inference in a trustee's favor based on Fifth Amendment invocations by non-party former individual brokers of debtor's introducing broker.[100]

On the other hand, federal courts in New York have declined to permit adverse inferences in the following cases:

- In a bench trial, the court declined to draw adverse inference based on Fifth Amendment invocations by defendant's employee and friend, where there was no evidence that defendant personally participated in the alleged wrongful activity.[101]

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[96] *Amusement Indus., Inc. v. Stern*, 01 Civ. 11586 (LAK) (GWG), 2016 WL 4249965, at *7–*8 (S.D.N.Y. Aug. 11, 2016), *report and recommendation adopted,* 2016 WL 6820744 (S.D.N.Y. Nov. 10, 2016), *aff'd,* 721 F. App'x. 9 (2d Cir., 2018). On appeal, the Second Circuit noted that the District Court found there was other evidence that itself supported summary judgment, and that the adverse inferences drawn were corroborative of such other evidence. 721 F. App'x at *11.

[97] *S.E.C. v. Durante*, No. 01 Civ. 9056 (DAB) (AJP), 2013 WL 6800226, at *10 (S.D.N.Y. Dec. 19, 2013), *report and recommendation adopted,* No. 01 CIV. 9056 DAB, 2014 WL 5041843 (S.D.N.Y. Sept. 25, 2014), *aff'd,* 641 F. App'x 73 (2d Cir. 2016).

[98] *Willingham v. County of Albany*, 593 F. Supp. 2d 446, 452–53 (N.D.N.Y. 2006).

[99] *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F. Supp. 2d 462, 471 (S.D.N.Y. 2000).

[100] *In re Adler, Coleman Clearing Corp.*, No. 95-08203 (JLG), 1998 WL 182808, at *7-*9 (Bankr. S.D.N.Y. Apr. 17, 1998).

[101] *Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp, LLC*, 813 F. Supp. 2d 489, 555 (S.D.N.Y. 2011).

- An adverse inference was rejected against a subordinate employee from the invocation of the Fifth Amendment by a former supervising employee.[102]

- In a civil rights case, an adverse inference was rejected against the police officer defendant based on the Fifth Amendment invocations by defendant's patrol partner and the ranking officer at the scene of the alleged misconduct.[103]

- The Second Circuit affirmed a district court's refusal to charge the jury that it could draw an adverse inference against the U.S. Customs and Border Patrol ("CBP") based on Fifth Amendment invocation by a non-party witness who was a "very low level employee" of CBP, where the witness "had no control over the key facts and issues in the litigation," there was "no showing that the witness was 'pragmatically a noncaptioned party in interest,'" and there was "insufficient information to determine that an adverse inference against CBP would have been 'trustworthy under all of the circumstances.'"[104]

- On defendant's motion *in limine*, the court rejected an application for a jury instruction permitting an adverse inference against the plaintiff administrative trustee overseeing a company's assets from invocation of the Fifth Amendment by the company's former senior vice present and general counsel.[105]

- On cross-motions for summary judgment, a bankruptcy court denied an adverse inference against the debtor based on invocations by the debtor's former officers.[106]

B. Invocation Of The Fifth Amendment Privilege By An Employee

Although an employee's invocation of the Fifth Amendment privilege is an inherently personal decision and right, the refusal to testify may nonetheless result in the imposition of an adverse inference against that employee's employer. Indeed, the majority of Circuits have recognized that adverse inferences can be imputed to a corporate party if the witness asserting the privilege is either a current or former employee, officer, or agent of that corporation, and the question that they refuse to answer concerns activities carried out by the corporation.[107]

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[102] *Securities & Exch. Comm'n v. Adelphia Commc'ns Corp.*, No. 02 Civ. 776 (PKC), 2006 WL 8406833, *12 (S.D.N.Y. Nov. 16, 2006).

[103] *Banks v. Yokemick*, 144 F. Supp. 2d 272, 289 (S.D.N.Y. 2001).

[104] *Akinyemi v. Napolitano*, 347 F. App'x 604, 607 (2d Cir. 2009) (quoting *LiButti*, 107 F.3d at 123–24).

[105] *Wechsler v. Hunt Health Sys., Ltd.*, No. 94 Civ. 8294 (PKL), 2003 WL 21998980, *2–*3 (S.D.N.Y. Aug. 22, 2003).

[106] *In re WorldCom, Inc.*, 377 B.R. 77, 110 (Bankr. S.D.N.Y. 2007)

[107] *See, e.g., Brink's Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983) (holding that refusal by former and current employees of corporation to answer on Fifth Amendment grounds questions about their knowledge and participation in alleged thefts carried out in the course of their employment was competent and admissible evidence in negligence action against employer corporation); *RAD Servs., Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271 (3d Cir. 1986) (holding that district court properly admitted the Fifth Amendment assertions of directors allegedly involved in planning of unlawful dumping by employer corporation); *Curtis v. M&S Petroleum, Inc*., 174 F.3d 661 (5th Cir. 1999) (holding that district court abused its discretion in excluding evidence of the assertion, by the employer corporation's president, of his Fifth Amendment privilege during his deposition as corporate representative); *Davis v. Mutual Life Ins. Co. of New York*, 6 F.3d 367, 385 (6th Cir. 1993) ("…where the witness invoking the privilege is a former employee of the civil defendant, and where the questions that the witness refuses

The Second Circuit emphasizes a case-by-case consideration of factors pursuant to Federal Rules of Evidence 403 and 501, although issues of loyalty to the corporation predominate. As discussed above, the court in *LiButti v. United States*[108] identified the following "non- exclusive" factors:

(1) The nature of the relevant relationships; (2) the degree of control of the party over the non-party witness; (3) the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and; (4) the role of the non-party witness in the litigation.

The *LiButti* court noted that "the overarching concern is fundamentally whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth."[109]

The First Circuit has pointed out, however, that an adverse inference cannot be derived automatically from the mere existence of an employment relationship. Thus, in *Veranda Beach Club Ltd. Partnership v. Western. Sur. Co.*, the First Circuit recognized that "…an individual's invocation of a personal privilege against self-incrimination cannot, without more, be held against his corporate employer."[110] *Veranda Beach* concerned an action brought against a surety company's agent and his corporate employer based on the agent's alleged forgery of bond documentation. The plaintiff sought an adverse inference against the agent's employer based on the agent's assertion of the Fifth Amendment privilege when responding, as corporate representative, to requests for admissions served on the employer. The First Circuit upheld the district court's decision to exclude from evidence the requests for admission which prompted the agent's assertion of the Fifth Amendment privilege and rejected plaintiff's request for an adverse inference, since there was little evidence to show that the employer was closely involved in the disputed transaction or that it was even aware of or benefited from the agent's wrongdoing.[111]

The First Circuit subsequently issued a decision in *Iantosca v. Benistar*, which clarified its prior decision in *Veranda Beach*, holding that there is no *per se* rule insulating a corporate employer from adverse inferences based on an employee's assertion of the Fifth Amendment.[112] Thus, it found that the district court had properly instructed the jury that a negative inference was permissible against two corporations based on their common employee's invocation of the Fifth

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to answer concern the witness's activities undertaken on behalf of the employer and during the period of employment, it is proper to allow the jury to impute the witness's guilt to the defendant."); *Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481-82 (8th Cir. 1987) (holding that non-party former director of charity could be called to the stand to assert his Fifth Amendment privilege in an action involving the charity where his actions as a director were directly relevant to the case); and *Coquina Investments v. TD Bank, N.A.*, 760 F.3d 1300, 1312 (11th Cir. 2014) (permitting jury to draw adverse inference against defendant bank based on former employee's assertion of the Fifth Amendment privilege, where there was evidence of the former employee's knowledge of and involvement in the alleged fraudulent acts asserted against the defendant bank).

[108] *LiButti v. United States*, 107 F.2d 110, 123-24 (2d Cir. 1997)

[109] *Id. See also Progressive Cas. Ins. Co. v. Monaco*, No. 16-cv-823 (VAB), 2017 WL 2873051, at *10 (D. Conn. July 5, 2017).

[110] *Veranda Beach Club Ltd. Partnership v. Western. Sur. Co*, 936 F.2d 1364, 1374 (1st Cir. 1991)

[111] *Id.*, at 1373-75

[112] *Iantosca v. Benistar Admin. Servs., Inc.*, 567 F. App'x 1, 6 (1st Cir. 2014) (quoting *Data Gen. Corp. v. Grumman Sys. Support Corp.*, 825 F. Supp. 340, 352 (D. Mass. 1993))

Amendment.[113] The First Circuit noted that "…there was more than a simple employment relationship" since the corporate parties to which the employee's silence was imputed were, in fact, his alter egos, and that another officer, the employee's brother-in-law, had also invoked the Fifth Amendment.[114]

As these decisions illustrate, the effect of an employee's silence on his or her employer are addressed on a case-by-case basis. The case law reflects that the trustworthiness of an adverse inference based on a non-party assertion of the Fifth Amendment must generally be determined by taking into account the factors set forth in *LiButti*.[115]

C. Invocation Of The Fifth Amendment Privilege In A Separate Proceeding

With the exception of one narrow set of circumstances, it appears that no federal court in the Second Circuit has permitted an adverse inference to be taken from an invocation of the Fifth Amendment privilege in a separate proceeding. This is consistent with the rule that testimonial waiver of an individual's Fifth Amendment rights may only be inferred where the individual gave prior voluntary testimony "in the context of the same judicial proceeding."[116]

The narrow circumstance in which courts in the Second Circuit have permitted invocations of the Fifth Amendment to result in adverse inferences in separate proceedings is in the context of civil enforcement proceedings by the Securities & Exchange Commission. In several cases, courts in the Southern District of New York and the District of Connecticut have permitted adverse inferences to be drawn where a defendant in an enforcement action in federal court invoked his or her Fifth Amendment privilege in a prior SEC administrative investigation.

In *S.E.C. v. Dibella*, the court considered a motion by the SEC to admit evidence of defendant's Fifth Amendment invocations.[117] Defendant had asserted his Fifth Amendment rights when questioned at two SEC depositions in the summer of 2000, when the U.S. Attorney's Office was investigating the same conduct.[118] In 2004, the SEC initiated a federal action against defendant.[119] In 2006, after the threat of criminal prosecution passed, defendant waived his Fifth Amendment rights and submitted to a deposition but acknowledged that his recollection of relevant events had faded.[120] The court granted the SEC's motion *in limine* seeking to admit defendant's prior invocation of his Fifth Amendment privilege, holding that the SEC had been hamstrung in proving its case by defendant's invocations and that defendant had been properly apprised by the SEC at every stage of the investigation that the SEC would seek adverse inferences based on his refusal to testify.[121]

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[113] *Id.*, at 6-7
[114] *Id.*
[115] *See* Section 3(D)(i) of this Report.
[116] *See, e.g.*, *Klein v. Harris*, 667 F.2d 274, 288 (2d Cir. 1981).
[117] *S.E.C. v. DiBella*, No. 3:04-cv-1342 (EBB), 2007 WL 1395105 (D. Conn. May 8, 2007).
[118] *Id.* at *1.
[119] *Id.* at *2.
[120] *Id.*
[121] *Id.*; *see also S.E.C. v. PacketPort.com Inc.*, No. 3:05-cv-1747 (JCH), 2006 WL 2349452 (D. Conn. July 28, 2006); *S.E.C. v. Herman*, No. 00 Civ. 5575 (PKC) (MHD), 2004 WL 964104 (S.D.N.Y. May 5, 2004); *S.E.C. v. Cassano*, No. 99 Civ. 3822 (LAK), 2000 WL 1512617 (S.D.N.Y. Oct. 11, 2000).

VII. REVOCATION OF THE FIFTH AMENDMENT PRIVILEGE

While a party can revoke their previously asserted Fifth Amendment privilege and then testify at trial,[122] this is not an absolute right. Whether the invocation may be subsequently withdrawn is a fact-sensitive matter. It generally depends on the stage of the proceedings at which the withdrawal of the privilege is attempted and whether the adversary would be prejudiced.[123]

In *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Avenue, Brooklyn, NY*,[124] the leading Second Circuit authority on this subject, the Court discussed the circumstances under which a court could permit a litigant to withdraw a prior invocation of the privilege against self-incrimination, noting that care must be given to ensure that such a litigant does not thereby gain a tactical advantage over his or her adversary:

> In some instances, however, a litigant in a civil proceeding who has invoked the Fifth Amendment may not seek any accommodation from the district court, and may instead simply ask to withdraw the privilege and testify. In other cases, a litigant may ask to give up the privilege rather than accept the accommodation that the court has offered. The district court should, in general, take a liberal view towards such applications, for withdrawal of the privilege allows adjudication based on consideration of all the material facts to occur. The court should be especially inclined to permit withdrawal of the privilege if there are no grounds for believing that opposing parties suffered undue prejudice from a litigant's later-regretted decision to invoke the Fifth Amendment. *See [Sec. Exch. Comm'n v.] Graystone Nash, Inc.*, 25 F.3d [187,] 190-94 [3d Cir. 1994]; *see also FTC v. Sharp*, 782 F.Supp. 1445, 1452-53 (D. Nev. 1991) (refusing to bar a litigant's later testimony, since "it does not appear that the [opposing party] has been unfairly prejudiced" by prior assertion of Fifth Amendment); *FTC v. Kitco of Nevada, Inc.*, 612 F.Supp. 1282, 1291 (D. Minn. 1985) (admitting a litigant's testimony, since opposing party "has not been unfairly surprised or prejudiced by the [litigant's] assertion of the privilege and subsequent decision to testify at trial").
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> This does not mean that withdrawal of the claim of privilege should be permitted carelessly. Courts need to pay particular attention to how and when the privilege was originally invoked.

[122] *City of New York v. Golden Feather Smoke Shop*, No. 08-CV-3966 (CBA), 2010 WL 2653369, *3-4 (E.D.N.Y. June 10, 2010).

[123] In determining whether a party will be entitled to revoke the prior assertion of privilege, a court will consider "the nature of the proceeding, how and when the privilege was invoked, and the potential harm or prejudice to the opposing parties." *Bourgal v. Robco Contracting Enterprises, Ltd.*, 969 F. Supp. 854, 861 (E.D.N.Y. 1997); *In re Adler, Coleman Clearing Corp.*, No. 95-08203 (JLG), 1998 WL 182808, *5 (Bankr. S.D.N.Y. April 17, 1998).

[124] 55 F.3d 78 (2d Cir. 1995).

> Since an assertion of the Fifth Amendment is an effective way to hinder discovery and provides a convenient method for obstructing a proceeding, trial courts must be especially alert to the danger that the litigant might have invoked the privilege primarily to abuse, manipulate or gain an unfair strategy advantage over opposing parties. *See Graystone Nash*, 25 F.3d at 190 (discussing "the potential for exploration" through abusive assertions of the Fifth Amendment in civil actions). If it appears that a litigant has sought to use the Fifth Amendment to abuse or obstruct the discovery process, trial courts, to prevent prejudice to opposing parties, may adopt remedial procedures or impose sanctions. *See id*, at 190-94; *see also Wehling [v. Columbia Broad. Sys.*] 608 F.2d [1084,] 1089 [(5th Cir. 1979)] (stressing that courts must be "free to fashion whatever remedy is required to prevent unfairness"). In such circumstances, particularly if the litigant's request to waive comes only at the "eleventh hour" and appears to be part of a manipulative, "cat-and-mouse approach" to the litigation, a trial court may be fully entitled, for example, to bar a litigant from testifying later about matters previously hidden from discovery through an invocation of the privilege. *See In re Edmond*, 934 F.2d 1304, 1308-09 (4th Cir. 1991); *United States v. Parcels of Land*, 903 F.2d 36, 42-46 (1st Cir. 1990); *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 576-77 (1st Cir. 1989); *United States v. Talco Contractors Inc.*, 153 F.R.D. 501, 505-12 (W.D.N.Y. 1994); *United States v. Sixty Thousand Dollars*, 763 F.Supp. 909, 913-14 (E.D.Mich. 1991).
>
> In the end, exactly how a trial court should respond to a request to withdraw the privilege—or indeed, more generally, how it should react to any motion precipitated by a litigant's assertion of the Fifth Amendment in a civil proceeding—necessarily depends on the precise facts and circumstances of each case. And it is not the province of appellate courts to try "to set down a hard and fast rule … when, typically, the District court is in a better position to know what means will accomplish the end of accommodating [all] interests." [*United States v.*] *United States Currency*, 626 F.2d [11,] 16 [(6th Cir.], *cert. denied*, 449 U.S. 993 (1980)], *see also Graystone Nash*, 25 F.3d at 192-94 (stressing "the circumstances of the particular litigation" and that devising an "appropriate remedy is within the discretion of the trial court"). [125]

District courts in the Second Circuit and outside the Second Circuit are in accord with the view set forth in *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Avenue, Brooklyn, NY*, and have held that it is important for a Court evaluating whether an invocation of

[125] *Certain Real Prop. & Premises*, 55 F.3d at 84-85 (2d Cir. 1995) (footnote omitted).

the Fifth Amendment privilege can subsequently be revoked to balance the competing interests of an attempted withdrawal with the resultant prejudice to be incurred by the other party.[126]

Conclusion

The Fifth Amendment provides a constitutional protection whereby an individual cannot be compelled to be a witness against himself. As set forth above, this constitutional privilege is not absolute and even when a party properly invokes the privilege, particularly in a civil case, that invocation is not without consequences. Being aware of the basic principles of invocation, the effects of same, and the parameters for revocation are essential to understanding the implications concerning invocation of the Fifth Amendment Privilege.

[126] *See e.g. United States v. The Incorporated Village of Island Park*, 888 F. Supp. 419 (E.D.N.Y. 1995) (refusing to permit the submission of affidavits opposing summary judgment when the defendants had previously blocked testimony during their depositions by invoking the Fifth Amendment); *Bourgal*, 969 F. Supp. 854, 861 (considering "the nature of the proceeding, how and when the privilege was invoked, and the potential harm or prejudice to the opposing parties."); *City of New York v. Golden Feather Smoke Shop*, No. 08-CV-3966 (CBA), 2010 WL 2653369 (E.D.N.Y. June 25, 2010) (refusing to permit a witness to submit a declaration opposing a motion to find him in civil contempt because he had previously stymied attempts to depose him by repeatedly invoking the Fifth Amendment and holding that the witness' gamesmanship created significant prejudice to the opposing party and was an abuse of the discovery process); *Church & Dwight Co. v. Kaloti Enters. of Michigan, LLC*, 697 F. Supp. 2d 287 (E.D.N.Y. 2009) (analyzing each defendant differently and holding that some defendants could submit affidavits in opposition to a summary judgment motion but requiring those defendants to submit to a new deposition and testify freely about the issue in order to reduce prejudice to the plaintiff) *vacated in part on other grounds by* 2011 WL 4529605 (E.D.N.Y. Sept. 28, 2011); *see United States v. Sixty Thousand Dollars in United States Currency*, 763 F.Supp. 909, 913-914 (E.D. Mich. 1991) (passenger whose currency was seized and who refused to answer questions during discovery based on the Fifth Amendment could not factually oppose motions for summary judgment or testify at trial); *Dunkin Donuts Inc. v. Taseski*, 47 F. Supp. 2d 867, 872-873 (E.D. Mich. 1999) (striking affidavit in opposition to motion for summary judgment that concerned facts shielded from discovery by privilege); *In re National Audit Defense Network*, 367 B.R. 207, 216-218 (Bankr. D. Nev. 2007) (court empowered to draw negative inference from assertion of privilege and to strike counterclaim and affirmative defenses – privilege must be asserted on a question-by-question basis to ensure any corrective measures are narrowly tailored); *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir. 1991) (Fifth Amendment cannot be sword and a shield – affidavit disregarded for summary judgment purposes when issues discussed were blocked during discovery).