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18 **IN THE UNITED STATES DISTRICT COURT**
19 **FOR THE DISTRICT OF ARIZONA**

20 Manuel de Jesus Ortega Melendres,
21 et al.,

22 Plaintiff(s),

23 v.

24 Joseph M. Arpaio, et al.,

25 Defendants(s).

26) CV-07-2513-PHX-GMS
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**PLAINTIFFS' MOTION TO ADMIT
CERTAIN EXHIBITS BASED ON
MICHAEL ZULLO'S
INVOCATION OF HIS FIFTH
AMENDMENT RIGHT NOT TO
TESTIFY**

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1 at 1-2; Zullo Motion for Extension of Time, Doc. 1501 at 2. Pursuant to a subpoena
2 served on defense counsel, Doc. 1482, and this Court's denial of Mr. Zullo's motion
3 for a protective order, Doc. 1527, Jones, Skelton & Hochuli also produced a number of
4 additional documents and audio files, logged at Doc. 1507-6.

5 In denying Mr. Zullo's motion, this Court held that Mr. Zullo, through his status
6 as a member of the MCSO Cold Case Posse as well as his status by means of the
7 "individual activation" pursuant to MCSO Posse Program guidelines GJ-27, was a
8 member of a collective entity, and further, that all of Mr. Zullo's involvement with the
9 Seattle Investigation was under the direction and control of the MCSO. Doc. 1527 at 6.
10 This Court also determined that MCSO constitutes an organization for the purposes of
11 the collective entity doctrine, and that documents that would be responsive to the
12 Court's subpoena are not Mr. Zullo's personal documents but rather are documents
13 created for the MCSO. *Id.* (citing *Bellis v. United States*, 417 U.S. 85, 92 (1974)).

14 Mr. Zullo was deposed briefly on October 23, 2015 (Doc. 1507-2) and, after
15 receiving additional time to seek independent representation, was deposed again on
16 November 9, 2015 (transcript attached as Exhibit B). Mr. Zullo was questioned about
17 the authenticity of a number of documents, most of which were emails sent to or from
18 his email address, 1tick@earthlink.net. Some documents are memoranda on Maricopa
19 County Sheriff's Office letterhead, apparently written by Mr. Zullo. Mr. Zullo was
20 similarly questioned about the authenticity of five audio files, each of which were
21 produced by the Jones Skelton firm in response to this Court's subpoena. Portions of
22 these audio files were played during the deposition for identification. The audio
23 recordings appear to record voices clearly recognizable as belonging to Sheriff Arpaio,
24 Detective Mackiewicz, Mr. Zullo, and others, including the confidential informant,
25 Dennis Montgomery. Mr. Zullo invoked the Fifth Amendment with respect to each of
26 these exhibits and refused to authenticate them.

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LEGAL STANDARDS

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2 In a criminal case, the Fifth Amendment “forbids either comment by the
3 prosecution on the accused’s silence or instructions by the court that such silence is
4 evidence of guilt.” *Griffin v. California*, 380 U.S. 609, 615 (1965). But in civil
5 proceedings, the Fifth Amendment does not forbid fact finders from drawing adverse
6 inferences against a party who refuses to testify in response to probative evidence
7 offered against it. *United States v. Solano–Godines*, 120 F.3d 957, 962 (9th Cir. 1997)
8 (cited in *S.E.C. v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998)); *see also Baxter v.*
9 *Palmigiano*, 425 U.S. 308, 318 (1976). This is because the constitutional purposes
10 served by the Fifth Amendment—including, principally, protecting criminal suspects
11 from governmental coercion—are not at issue in a civil action, where the government
12 lacks any opportunity for coercion, and cannot be said to be compelling any self-
13 incriminating disclosures. *Rosebud Sioux Tribe v. A and P Steel Inc.*, 733 F.2d 509,
14 521 (8th Cir. 1984) (citing *Baxter*, 425 U.S. at 335 (Brennan, J., dissenting)).

15 A non-party’s invocation of the Fifth Amendment privilege in a civil
16 proceeding implicates the constitutional purposes of the Fifth Amendment to an even
17 lesser degree than a party’s invocation of the privilege. Accordingly, several courts
18 have held that a non-party’s refusal to testify is competent and admissible evidence,
19 and can also give rise to adverse inferences against parties to a civil suit. *See, e.g.,*
20 *Brinks, Inc. v. City of New York*, 717 F.2d 700, 702-04 (2d Cir. 1983); *LiButti v.*
21 *United States*, 107 F.3d 110 (2d Cir. 1997); *RAD Servs., Inc. v Aetna Casualty & Sur.*
22 *Co.*, 808 F.2d 271, 275 (3d Cir. 1986); *Rosebud Sioux Tribe*, 733 F.2d at 522; *Cerro*
23 *Gordo Charity v. Fireman’s Fund Am. Life Ins. Co.*, 819 F.2d 1471, 1481 (8th Cir.
24 1987).²

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26 ² In *Brinks*, for example, Brinks ex-employees who had been arrested for stealing
27 money from parking meters invoked the Fifth Amendment in the civil suit between
28 New York City and Brinks. The trial court ruled that these witnesses’ refusals to
(continued...)

1 There are certain limits on when a court in a civil case may permit an adverse
2 inference from a witness's invocation of the Fifth Amendment. First, the invocation of
3 the privilege is limited to those circumstances in which the person invoking the
4 privilege reasonably believes that his disclosures could be used in a criminal
5 prosecution, or could lead to other evidence that could be used in that manner. *Doe ex*
6 *rel. Rudy–Glanzer v. Glanzer*, 232 F.3d 1258, 1263–65 (9th Cir. 2000) (cited in *S.E.C.*
7 *v. Jasper*, 678 F.3d 1116, 1125 (9th Cir. 2012)). Additionally, “no negative inference
8 can be drawn against a civil litigant's assertion of his privilege against self-
9 incrimination unless there is a substantial need for the information and there is not
10 another less burdensome way of obtaining that information.” *Id.* at 1265. Also, an
11 adverse inference can be drawn only “when silence is countered by independent
12 evidence of the fact being questioned.” *Id.* at 1264. Courts should “analyz[e] each
13 instance where the adverse inference [is requested] on a case-by-case basis under the
14 microscope of the circumstances of that particular civil litigation. . . . In each particular
15 circumstance, the competing interests of the party asserting the privilege, and the party
16 against whom the privilege is invoked must be carefully balanced.” *Id.* at 1265.

17 A district court has broad discretion in determining its response to a witness’s
18 invocation of the Fifth Amendment. *S.E.C. v. Colello*, 139 F.3d at 677. When
19 invocation of the privilege prejudices a party, the district court is free to fashion
20 whatever remedy is required to prevent unfairness. *Id.* For example, a court may
21 exclude evidence or preclude later contradictory testimony based on invocation of the
22 Fifth Amendment privilege during deposition. *Nationwide Life Ins. Co. v. Richards*,
23 541 F.3d 903, 910 (9th Cir. 2008) (affirming district court’s preclusion of defendant’s
24 testimony at trial based on defendant’s earlier invocation of Fifth Amendment

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26 answer on Fifth Amendment grounds was competent and admissible evidence, and
27 allowed the City to argue that the invocations constituted circumstantial evidence in
28 support of the City’s claim. 717 F.2d at 707.

1 privilege during deposition). One such remedy is to rule that documents are implicitly
2 authenticated and admissible, in light of the witness's invocation of the privilege and
3 the circumstances. *John Paul Mitchell Sys. v. Quality King Distributors, Inc.*, 106 F.
4 Supp. 2d 462 (S.D.N.Y. 2000) (documents produced by corporate custodian were
5 implicitly authenticated and admissible as business records or pursuant to the residual
6 hearsay exception, Fed. R. Evid. 803(6) and 807).

7 ARGUMENT

8 Plaintiffs' request for an adverse inference supporting the admissibility of
9 certain exhibits is supported by the circumstances of this case, including independent
10 evidence supporting these documents' authenticity.

11 First, Mr. Zullo asserts that he believes that his disclosures could be used in a
12 criminal prosecution against him, or could lead to other evidence that could be used in
13 that manner. *Glanzer*, 678 F.3d at 1125.

14 Second, there is a substantial need for the information in these exhibits, and
15 there is not another less burdensome way of obtaining that information. Several of the
16 documents are emails exchanged between Mr. Zullo and Dennis Montgomery, who
17 (upon information and belief) is outside the subpoena power of this Court. *See, e.g.*,
18 Ex. 2960, 2963, 2964, 2965, 2966, 2967, 2968, 2970, 2971, 2972. This correspondence
19 between Mr. Zullo and Mr. Montgomery illuminates the activity undertaken by Mr.
20 Montgomery and Mr. Zullo on behalf of MCSO and is relevant to Sheriff Arpaio's and
21 Chief Sheridan's states of mind and as a result to the appropriate remedies for their
22 admitted civil contempt. With respect to certain exhibits, Captain Skinner may be able
23 to provide the foundation for the documents' admissibility. *See, e.g.*, Ex. 2973, 2974
24 (memoranda, apparently written by Mr. Zullo, in response to Monitor requests for
25 information). However, in the event Plaintiffs are unable to admit these documents
26 through Captain Skinner, there is no less burdensome way of obtaining the information
27 in these documents, which is relevant to determining the scope and success of MCSO's
28 compliance efforts to date. With respect to other exhibits which Sheriff Arpaio or

1 Detective Mackiewicz may be able to authenticate, Plaintiffs' view is that it is not less
2 burdensome to recall these witnesses than to rely on the inference to support these
3 exhibits' admissibility, in light of the length of these proceedings, the burden on the
4 witnesses and the Court of repeated testimony, and the lack of genuine dispute as to
5 authenticity of the exhibits.

6 Third, ample independent evidence supports the admissibility of these
7 documents, including:

- 8 • the indication on the face of the email documents, of Mr. Zullo's
9 personal email address, 1tick@earthlink.net, and of Montgomery's
10 "David Webb" email alias, both of which have already been the subject
11 of testimony during these contempt proceedings (*see, e.g.*, Tr. 2831:25 -
12 2832:10);
- 13 • the MCSO letterhead on which Mr. Zullo's ITR responses appears in,
14 *e.g.*, Ex. 2973 and 2974;
- 15 • Sheriff Arpaio's image in Ex. 2982, a photograph;
- 16 • Sheriff Arpaio's voice in audio recordings labeled Ex. 2977 and 2978,
17 which were excerpted for identification during deposition, but will be
18 played in court to the extent Plaintiffs seek to have them admitted;
- 19 • Mr. Zullo's voice in all five audio recordings, which were excerpted for
20 identification at deposition but will also be played in court to the extent
21 Plaintiffs seek to have them admitted;
- 22 • Testimony already received in these proceedings, including testimony
23 regarding the conduct of the Seattle Investigation and the fact that
24 MCSO was still seeking information from Dennis Montgomery through
25 April 2015, Tr. 1307:11-17, and the existence of meetings and email
26 correspondence pursuant to that investigation, and testimony regarding
27 Sheriff Arpaio's use of a "threats unit" led by Det. Mackiewicz, *e.g.* at
28 644:18-25, 1305:9-15;

- 1 • Exemplars of Sheriff Arpaio’s handwriting, *e.g.*, Ex. 2074B (admitted;
2 compare to Ex. 2714, which Plaintiffs now seek to admit);
- 3 • The fact that these documents were produced pursuant to a subpoena
4 requesting, specifically, documents given to the Jones, Skelton firm by
5 Mr. Zullo and referenced in the Jones, Skelton firm’s Notice of Partial
6 Compliance.

7 And each of these documents is an MCSO document, because Mr. Zullo
8 participated in the “Seattle Investigation” under Sheriff Arpaio’s and MCSO’s control,
9 and all the documents produced by Jones Skelton pursuant to the Court’s subpoena, as
10 well as those produced by MCSO in response to the Court’s orders to produce
11 documents relating to the Seattle investigation, are MCSO documents. Thus, the
12 documents Plaintiffs move to admit are implicitly authenticated and admissible as
13 business records or, alternatively, under the residual hearsay exception. Fed. R. Evid.
14 803(6), 807. *See, e.g., John Paul Mitchell Systems*, 106 F. Supp. 2d at 472-73.

15 In *John Paul Mitchell Systems*, a defendant and custodian of corporate
16 documents (Mr. Siebel) invoked the Fifth Amendment and refused to testify to
17 authenticate certain documents plaintiffs sought to admit. Another defendant, Quality
18 King, objected that the documents were not authenticated. The court found that an
19 adverse inference could be drawn against a party based on another party’s invocation
20 of the Fifth Amendment, that testimony was not the *sine qua non* of authentication,
21 and circumstantial evidence such as a document’s appearance and content may serve to
22 demonstrate a document’s authenticity, and that the documents in question were
23 admissible as business records or, in the alternative, pursuant to the residual hearsay
24 exception. *Id.* The same conclusion is appropriate here.

25 Finally, the balance of Plaintiffs’ interests in obtaining a fair proceeding
26 outweigh Mr. Zullo’s interest in asserting the privilege. The “overarching concern”
27 that should guide the adverse inference inquiry with respect to a nonparty such as Mr.
28 Zullo “is fundamentally whether the adverse inference is trustworthy under all of the

1 circumstances and will advance the search for the truth.” *LiButti*, 107 F.3d at 124. An
2 inference supporting admissibility would be trustworthy under all the circumstances
3 here. Mr. Zullo was intimately involved with the Seattle Investigation, and had
4 conversations and communications with Montgomery to which no other witness can
5 testify. *See, e.g.*, Tr. 2880:18 - 2881:4 (describing that Sgt. Anglin and Det.
6 Mackiewicz would leave the room when Mr. Zullo discussed certain topics with Mr.
7 Montgomery). Mr. Zullo was and remains an agent of MCSO, through his current
8 relationship with Sheriff Arpaio and MCSO by virtue of his status as Commander of
9 the Cold Case Posse and/or through his “individual activation” for the Seattle
10 Investigation. And Mr. Zullo invoked the Fifth Amendment on a question-by-question
11 basis throughout his deposition, refusing to answer specific questions regarding
12 authenticity of each of the exhibits. *See* Exhibit B (deposition transcript).

13 On the other hand, Mr. Zullo is not a party to this case; at this time, no criminal
14 or civil charges are asserted against him (to Plaintiffs’ knowledge). The risk to Mr.
15 Zullo is purely speculative at this point. It would be unfair, under these circumstances,
16 to allow Defendants to profit from Mr. Zullo’s refusal to testify, while prejudicing
17 Plaintiffs’ ability to present relevant evidence regarding the activity and conversations
18 that occurred in relation to the Seattle Investigation.

19 For all these reasons, Plaintiffs ask that this Court find that an adverse inference
20 is appropriate in support of the authenticity of the exhibits listed in Exhibit A, and asks
21 that all these exhibits be admitted into evidence.

22
23 RESPECTFULLY SUBMITTED this 10th day of November, 2015.

24
25 By: /s/ Michelle L. Morin

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CERTIFICATE OF SERVICE

I hereby certify that on November 10, 2015 I electronically transmitted the attached document to the Clerk’s office using the CM/ECF System for filing and caused the attached document to be served via the CM/ECF System on all counsel of record.

/s/ Michelle L. Morin