UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS
Release No. 1537/June 18, 2014

ADMINISTRATIVE PROCEEDING
File No. 3-15613

In the Matter of JULIEANN PALMER MARTIN	ORDER ON MOTION IN LIMINE REGARDING JULIEANN PALMER MARTIN'S TRIAL TESTIMONY AND MOTION TO SUBSTITUTE EXHIBIT

On November 13, 2013, the Securities and Exchange Commission (Commission) issued an Order Instituting Administrative and Cease-and-Desist Proceedings (OIP) against Julieann Palmer Martin (Martin). Martin was served with the OIP on December 6, 2013, and filed an Answer on December 27, 2013. I stayed the proceeding on March 7, 2014, based on a representation by the parties that they had reached an agreement in principle to a settlement on all major terms. Julieann Palmer Martin, Admin. Proc. Rulings Release No. 1290, 2014 SEC LEXIS 848. After learning that settlement negotiations were unsuccessful, I held a prehearing conference and ordered a procedural schedule for a hearing to begin on August 25, 2014. Julieann Palmer Martin, Admin. Proc. Rulings Release No. 1483, 2014 SEC LEXIS 1892 (June 3, 2014).

Pending before me is the Division of Enforcement's (Division) Motion in Limine Regarding Martin's Trial Testimony (Motion to Compel), with three exhibits, filed on March 4, 2014, in which the Division moves to compel Martin's testimony at the hearing.[1] On March 5, 2014, this Office received Martin's Response to the Motion (Response), with one exhibit, in which Martin asserts the U.S. Constitution's Fifth Amendment privilege against self-incrimination as grounds for her refusal to testify.[2] On June 5, 2014, the Division filed a Motion to Substitute Exhibit (Motion to Substitute), requesting that its original Exhibit B, filed with the Motion to Compel, be substituted with the redacted version attached to the Motion to Substitute, because the original Exhibit B contained personally identifiable information regarding Martin.

[1] Exhibit A is an SEC Form 1662; Exhibit B is Martin's investigative testimony given on May 8, 2013; and Exhibit C is Martin's Answer to the OIP filed on December 27, 2013.

[2] Exhibit A is a letter from the U.S. Attorney for the District of Utah to Julie Palmer in care of her former counsel Daniel B. Garriott. Palmer is Martin's maiden name.

Background and Arguments

The OIP's allegations against Martin relate to her conduct in connection with her employment at National Note of Utah, LC (National Note), a company that allegedly orchestrated a real-estate based Ponzi scheme. OIP 1-5. In pertinent part, the OIP alleges that Martin acted as an unregistered broker by conducting broker-related activity with respect to National Note's unregistered securities, such as soliciting investors, providing copies of National Note's private placement memorandum and other substantive information, facilitating IRA transfers, and receiving transaction-based compensation. Id. at 1-2, 4. The OIP further alleges that Martin, acting with scienter, made material misrepresentations to investors that National Note's 12% return was guaranteed and that National Note was paying investor returns, despite knowing that National Note could not repay investors' principal, fell behind in investor interest payments, could not cover its operating expenses, and was using new investor funds to pay returns to existing investors, and without disclosing National Note's financial problems to investors. Id. at 2-4. The OIP alleges that as a result of such conduct, Martin willfully violated Section 17(a) of the Securities Act of 1933 (Securities Act), and Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act) and Exchange Act Rule 10b-5; Securities Act Section 5(a) and (c); and Exchange Act Section 15(a). Id. at 5.

On May 8, 2013, Martin testified pursuant to a subpoena in a Commission investigation, in the matter of National Note. See Motion to Compel, Ex. B at 1, 5-7. Martin does not dispute that before testifying, the Division supplied her with a Form 1662, Supplemental Information for Persons Requested to Supply Information Voluntarily or Directed to Supply Information Pursuant to a Commission Subpoena (the form). Motion to Compel at 2; Response at 1-2. The form advised that: "[i]nformation you give may be used against you in any federal, state, local or foreign administrative, civil or criminal proceeding brought by the Commission or any other agency"; and "[y]ou may refuse, in accordance with the rights guaranteed to you by the Fifth Amendment . . . , to give any information that may tend to incriminate you . . . ." Motion to Compel, Ex. A at 1-2. The form did not state that submitting to examination operates as a waiver of the Fifth Amendment privilege against self-incrimination in any proceeding. During her investigative testimony, Martin confirmed that she had received the form and did not have any questions regarding it. Id., Ex. B at 6.

In its Motion to Compel, the Division argues that Martin cannot invoke the Fifth Amendment privilege against self-incrimination because: (1) she waived the privilege due to her investigative testimony in the National Note investigation and by filing an Answer in this proceeding; and (2) she has not shown a real and substantial risk of incrimination, and, even if Martin were allowed to invoke the privilege, I should draw an adverse inference against her and find her silence to be persuasive evidence of her liability. Motion to Compel at 1-10.

In her Response, Martin contends that: (1) she has a real and substantial risk of incrimination in light of a July 2013 "target letter" from the U.S. Attorney for the District of Utah (U.S. Attorney); (2) the Division's line of inquiry in this proceeding will be related to the subject matter of the criminal investigation against her; and (3) the Division has failed to establish a testimonial waiver of the privilege. Response at 3-8. Martin does not dispute that the

Division may rely on statements she made in her prior investigative testimony in establishing its case. Id. at 7.

Discussion

A. Fifth Amendment Privilege Against Self-Incrimination

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. As construed by the Supreme Court, the Fifth Amendment "not only protects the individual against being involuntarily called as a witness against [her]self in a criminal prosecution but also privileges [her] not to answer official questions put to [her] in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate [her] in future criminal proceedings." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973); see also McCarthy v. Arndstein, 266 U.S. 34, 40 (1924). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimination." Marchetti v. United States, 390 U.S. 39, 53 (1968).

Nevertheless, "[t]he Supreme Court has 'broadly construed' the protection afforded by the Fifth Amendment privilege." United States v. Rivas-Macias, 537 F.3d 1271, 1278 (10th Cir. 2008) (quoting Maness v. Meyers, 419 U.S. 449, 461 (1975), and citing Hoffman v. United States, 341 U.S. 479, 486 (1951)). "As a result, the constitutional guarantee against testimonial compulsion extends not only to answers that would in themselves support a conviction, but also to information that would furnish a link in the chain of evidence that could lead to prosecution." Id. (internal quotation marks and citations omitted). "Not much is required, therefore, to show an individual faces some authentic danger of self-incrimination, as the privilege extends to admissions that may only tend to incriminate." Id. (internal quotation marks and citations omitted) (emphasis added in part). An individual's invocation of the Fifth Amendment privilege must be upheld "unless it is 'perfectly clear, from a careful consideration of all the circumstances in the case,' that the witness 'is mistaken' and [her] answers could not 'possibly have' a 'tendency to incriminate.'" Id. at 1278-79 (quoting Hoffman, 341 U.S. at 488); see Burke v. Bd. of Governors of Fed. Reserve Sys., 940 F.2d 1360, 1367 (10th Cir. 1991) ("In an agency hearing, an individual has a privilege not to answer questions by the agency when the answers might incriminate [her] in any future criminal proceeding.").

The Division argues that Martin has not shown a real and substantial risk of incrimination because she already created the risk of incrimination by testifying in the National Note investigation, and because she cannot show that answering the Division's questions will incriminate her. Motion to Compel at 7. The Division emphasizes that Martin has not been indicted and no one employed by National Note has been criminally charged. Id. at 7-8. The Fifth Amendment privilege, however, is not so narrow, but extends to testimony that "would furnish a link in the chain of evidence that could lead to prosecution." Rivas-Macias, 537 F.3d at 1278 (emphasis added); accord Maness, 419 U.S. at 461; Hoffman, 341 U.S. at 486-87.

The target letter Martin received in July 2013 informed her:

> You are advised that the Federal Bureau of Investigation (FBI) and Internal Revenue Service Criminal Investigations (IRS-CI) are investigating possible violations of federal criminal laws involving, but not necessarily limit[ed] to, allegations that National Note of Utah, LC has engaged in investment frauds and money laundering. You are further advised that you are a target of this investigation.

Response, Ex. A. At the May 30, 2014, prehearing conference, Martin's counsel represented that the criminal investigation is ongoing and that counsel has had meetings with the U.S. Attorney's Office, which is pursuing a grand jury investigation and assured counsel that the matter will lead to an indictment against Martin and others. Tr. 25.[3] The Division did not dispute these representations and confirmed that it has shared its investigative file with the U.S. Attorney's Office. Tr. 25-26.

Given the case law on the Fifth Amendment, I disagree with the Division's contention that Martin has not established that she faces a real and substantial risk of incrimination if she submits to questioning at the hearing, particularly as she received the target letter after her investigative testimony and has been advised that she faces criminal indictment. It would be premature to rule that Martin cannot show that the Division's questions will incriminate her before she even takes the stand and is subject to questioning.

Under these circumstances and given the apparent relatedness of the criminal investigation and allegations in this proceeding, I do not preclude Martin from invoking the Fifth Amendment privilege in response to questions posed to her at the hearing. I defer a determination whether Martin may invoke the privilege in response to the Division's lines of inquiry and the scope of the privilege's applicability until the hearing, when the privilege is actually invoked. See Burke, 940 F.2d at 1367 ("To invoke this protection against self-incrimination in an agency hearing, a witness must take the stand, be sworn in, and assert the privilege in response to each allegedly incriminating question as it is asked."); see also United States v. McAllister, 693 F.3d 572, 583 (6th Cir. 2012) ("There is a presumption against blanket assertions of Fifth Amendment privilege . . . ."); United States v. Ortiz, 82 F.3d 1066, 1073 (D.C. Cir. 1996) (recognizing that "[i]n unusual cases," a judge "may sustain a blanket assertion of [the Fifth Amendment] privilege after determining that there is a reasonable basis for believing a danger to the witness might exist in answering any relevant question" (quoting United States v. Thornton, 733 F.2d 121, 125-26 (D.C. Cir. 1984)) (alterations in original)).

B. Martin Has Not Waived the Privilege

A waiver of the Fifth Amendment privilege "is not lightly to be inferred," and "courts must indulge every reasonable presumption against waiver of fundamental constitutional rights." Emspak v. United States, 349 U.S. 190, 196, 198 (1955) (internal quotation marks omitted). "[A]n individual may lose the right to claim the privilege if, in a single proceeding, [s]he voluntarily testifies about a subject and then invokes the privilege when asked to disclose the details." Rivas-Macias, 537 F.3d at 1280. "A witness' testimonial waiver of the privilege is

[3] Citation is to the May 30, 2014, prehearing conference transcript.

only effective, however, if it occurs in the same proceeding in which a party desires to compel the witness to testify." Id.; accord id. at 1280 n.14 (collecting cases); 8 Wigmore, Evidence § 2276, at 470 (McNaughton rev. 1961) & 1472 (2013-3 Suppl.); 1 McCormick on Evidence § 133, at 564 (Kenneth S. Broun ed., 6th ed. 2006). The National Note investigation is certainly related to this proceeding, however, in a strict sense it is not the same proceeding for any purported waiver to be effective. Thus, contrary to the Division's argument, Martin did not waive the privilege in this proceeding by testifying in the National Note investigation.

The Division's argument that Martin waived the Fifth Amendment privilege because she filed an Answer is also unpersuasive. It cites no authority for the proposition that denying allegations or asserting affirmative defenses in an Answer effectuates a waiver.[4] See Arndstein v. McCarthy, 254 U.S. 71 (1920) (filing of non-incriminating bankruptcy schedules did not waive privilege); United States v. 47 Bottles, More or Less, Each Containing 30 Capsules of Jenasol R.J. Formula '60', 26 F.R.D. 4 (D.N.J. 1960) (assertion of affirmative defenses did not waive privilege); 10-Dix Bldg. Corp. v. McDannel, 480 N.E.2d 1212, 1216-17 (Ill. App. Ct. 1985) (civil defendant's answer to complaint did not waive privilege). Although answering allegations might implicate the privilege, a respondent who seeks to claim the privilege in response to questions at a hearing does not lose her right to a defense. The Commission's Rules of Practice required Martin to "specifically admit, deny, or state that [she] d[id] not have, and [was] unable to obtain, sufficient information to admit or deny each allegation in the [OIP]"; Martin cannot be faulted for following this procedure, as "[a]ny allegation not denied shall be deemed admitted." 17 C.F.R. § 201.220(c).

Case law teaches that the privilege must be timely asserted, that is, when the allegedly incriminating information is sought unless such disclosure was compelled within the meaning of the Fifth Amendment, and the privilege assertion must be brought to the attention of the tribunal that must pass on it. See Minnesota v. Murphy, 465 U.S. 420, 428-29, 440 (1984); Roberts v. United States, 445 U.S. 552, 559-60 & n.6 (1980). A significant delay in asserting the privilege in the course of a proceeding, where a party is aware of potential criminal implications, may cause a court to deem the privilege lost. See, e.g., Davis v. Fendler, 650 F.2d 1154, 1160-61 (9th Cir. 1981) (upholding rejection of privilege claim where party first mentioned privilege fifteen months after interrogatories were propounded, despite knowledge of criminal proceedings, and past the time due for objection under the Federal Rules of Civil Procedure). But it does not follow that the privilege must be asserted at the earliest possible time, i.e., in the Answer. Moreover, a ruling that a respondent who seeks to invoke the privilege cannot respond to

[4] The Division cites United States v. Sperl, 3:06-cv-175, 2008 WL 2699402 (M.D. Tenn. June 30, 2008) (unpublished), for the proposition that "[a] party cannot participate in a proceeding by testifying and filing an answer and subsequently asserting her Fifth Amendment rights." Motion to Compel at 4. Sperl does not support such a broad rule. Rather, in denying a stay in civil tax case despite a parallel criminal tax fraud action against the defendant, the Sperl court suggested, at most, that the defendant likely waived the privilege as she "ha[d] fully participated in th[e] litigation by filing an Answer, responding in detail to the Government's Motion for Summary Judgment, filing a 22-page response with attachments to the Government's motion for an injunction, filing assorted other documents, and testifying freely on her own behalf at the evidentiary hearing." 2008 WL 2699402, at *7.

allegations is inconsistent with the presumption against blanket assertions of the privilege and that the privilege must be asserted on a question-by-question basis at the hearing. See Burke, 940 F.2d at 1367-68.

C. Adverse Inference

In a Commission proceeding, an adverse inference may be drawn from a respondent's refusal to testify on Fifth Amendment grounds. See Guy P. Riordan, Exchange Act Release No. 61153 (Dec. 11, 2009), 97 SEC Docket 23445, 23472; Daniel R. Lehl, 55 S.E.C. 843, 861 n.33 (2002); see also Baxter v. Palmigiano, 425 U.S. 308, 318-19 (1976). "The fact finder has discretion in determining whether an adverse inference is proper. Due consideration should be given to the nature of the proceeding, how and when the privilege was invoked, and the potential harm or prejudice to opposing parties." Guy P. Riordan, 97 SEC Docket at 23472 (internal quotation marks and footnote omitted). "Because the assertion of the Fifth Amendment is an effective way to hinder discovery, the fact finder must be especially alert to the danger that the litigant might have invoked the privilege primarily to . . . gain an unfair strategic advantage over opposing parties." Id. at 23472-73 (internal quotation marks omitted). An adverse inference, however, may be unnecessary when the evidence against the respondent is persuasive and more than sufficient to support findings of violations. See id. at 23473.

Although there is no dispute that an adverse inference against Martin is permissible if she refuses to testify, I decline to rule, at this stage of the proceeding, whether an adverse inference is appropriate.

Order

I DENY the Motion to Compel insofar as the Division seeks to compel Martin's testimony on questions that fall within the scope of the Fifth Amendment privilege against self-incrimination or a ruling that Martin has waived the privilege. I DEFER RULING whether Martin may invoke the privilege in response to questions and the scope of the privilege's applicability until the hearing, and, if the privilege is invoked, whether an adverse inference is appropriate.

I GRANT the Motion to Substitute. The original Exhibit B, filed by the Division on March 4, 2014, is removed from the public record of this proceeding, and replaced with the Exhibit B attached to the Motion to Substitute.

_____

Brenda P. Murray
Chief Administrative Law Judge