

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 11-CV-01430-PAB-MEH

UNITED STATES OF AMERICA,

Plaintiff,

v.

KENNETH SCOTT and
JO ANN SCOTT,

Defendants.

**PLAINTIFF UNITED STATES' MOTION TO COMPEL
DEFENDANT TO PRODUCE DOCUMENTS**

Plaintiff, the United States of America (the "United States"), through its undersigned attorneys, submits this motion pursuant to Federal Rule of Civil Procedure 37(a) for an Order compelling Defendant Kenneth Scott ("Defendant") to produce documents in response to the United States' First Request for the Production of Documents. Defendant improperly invoked his Fifth Amendment privilege in response to document requests served by the United States, and his attempt to evade production through this obstructionist tactic must not be condoned.

CERTIFICATION PURSUANT TO D.C.COLO.LCivR 7.1.A

The United States certifies that it has in good faith conferred with counsel for Defendant, who does not consent to this Motion.

FACTUAL BACKGROUND¹

Since the Complaint in this case was filed in June 2011, Defendant has consistently attempted to thwart any progress with numerous delaying tactics.² Defendant's latest actions continue this trend. After Defendant failed to stay discovery through two requests for protective orders, Dkts. 111 and 124, Defendant has now obstructed discovery by improperly invoking the Fifth Amendment in response to requests for production of documents. Defendant's obstructionist tactics persist despite the fact that the Court has emphasized the importance of discovery proceeding in earnest, especially as the United States prepares for the January 26, 2012 hearing on its motion for a preliminary injunction. See Dkt. 121 (“[I]t would be unjust to restrict [the United States’] ability to obtain discovery at this point and would unduly prejudice the Plaintiff”).

On November 2, the United States served on Defendant, via first class mail, its First Request for Production of Documents. See Exh. 2. Defendant's responses were due on December 2. At a hearing on November 30, the Court denied Defendant's Motion for a Protective Order Staying Discovery and ordered Defendant to respond to all of the United States' discovery requests by Friday, December 9. [Dkt. 133.] This date was critical, for at the same hearing, the Court ordered that Defendant's deposition would occur on Tuesday, December 13,

¹ Pursuant to D.C.Colo.LCivR 37.1, because this motion is directed to Defendant's responses to requests for production, those responses are attached as Exhibit 1.

² See, for example, Dkt. 20 (“Defendant Kenneth Scott's Renewed Motion for Extension of Time to File Responses to the Complaint and Motion for Preliminary Injunction”); Dkt. 36 (“Defendant Kenneth Scott's Motion for Enlargement of Time to File F.R.C.P. Rule 26(a)(1) Disclosures”); Dkt. 111 (“Kenneth Scott's Motion for Entry of Protective Order Staying Discovery Until After Case is ‘At Issue’”); Dkt. 124 (“Kenneth Scott's Motion for Entry of Protective Order Staying Discovery Pending Court's Resolution of Objections to Magistrate's Order”).

so production of documents on December 9 would give the United States the weekend to review the discovery in preparation for the deposition. Id.

The United States received no responses to its discovery requests on December 9. Instead, during a hearing on Monday, December 12 – in Colorado - defense counsel informed the Court and counsel for the United States that she had mailed the discovery responses on Friday, December 9 – to Washington, DC -- when she knew that counsel would be travelling and would therefore not receive the discovery requests prior to the deposition scheduled for December 13 in Colorado. Clearly, defense counsel could have served the responses by email on December 9, but chose to flout the Court’s Order by ensuring that the United States would not actually have the responses in hand on the date they were due. Notably, the December 9 due date already represented an additional seven day extension in which to respond, as the responses were originally due on December 2.

When counsel for the United States finally had the opportunity to review Defendant’s discovery responses, after Defendant provided hard copies at depositions on December 12, it became clear that Defendant had responded to all but one request for production by invoking his Fifth Amendment privilege against self-incrimination (the sole exception being the request for any documents “that you intend to rely upon in defense of the United States’ case against you,” to which Defendant responded that such documents had been “previously disclosed under Rule 26.”). See Exh. 1.

ARGUMENT

In order to invoke the Fifth Amendment, a litigant “must demonstrate that they have a reasonable cause to apprehend danger upon giving a responsive answer that would support a conviction, or would furnish a link in the chain of evidence needed to prosecute them for a

violation of the criminal statutes. . . [T]he risks of incrimination resulting from their compelled testimonial communications [must] be substantial and real, not merely trifling or imaginary, hazards of incrimination.” United States v. Schmidt, 816 F.2d 1477, 1481 (10th Cir. 1987) (quotations and citations omitted). While civil litigants can properly invoke the Fifth Amendment, they must not do so “as an obstructionist tactic, and thus a party that relies on the privilege as a discovery shield must establish that a truthful answer to an inquiry would have some tendency to subject the person being asked the question to criminal liability.” Pansier v. Wisc. Dept. of Revenue, 417 Fed. Appx. 565, 568 (7th Cir. April 6, 2011) (quotations and citations omitted).

For the Fifth Amendment privilege to be applicable in a response to a document request, it must be shown that the *act itself* of producing the documents—not their contents—involves a substantial and real risk of testimonial self-incrimination. See Schmidt, 816 F.2d 1480-81 (citing United States v. Doe, 465 U.S. 605 (1984) (explaining that Fifth Amendment privilege protects only *compelled* testimonial communications, so it would not apply to documents where documents were prepared voluntarily)).

Here, Defendant invoked the Fifth Amendment in response to the following document requests:

Request #1: Produce any documents, including, but not limited to, photographs, video recordings, audio recordings or drawings referring to, relating to, concerning and/or depicting activities, whether by you and/or others, at or in the vicinity of PPRM since August 1, 2009.

Request #3: Produce all documents, including, but not limited to, video and/or audio recordings, internet postings, blog postings, radio show appearances, transcripts, or any other

document that refers to, relates to, concerns and/or depicts your views on abortion and access to abortion since August 1, 2009.

Request #4: Produce all documents, including, but not limited to, video and/or audio recordings, internet postings, blog postings, radio show appearances, transcripts, e-mails, letters, correspondence, or any other document that refers to, relates to, concerns and/or depicts your views on the United States' case against you in the above-captioned matter.

Request #5: Produce all documents, including, but not limited to, video and/or audio recordings, internet postings, blog postings, radio show appearances, transcripts, e-mails, letters, correspondence, or any other document that refers to, relates to, concerns and/or depicts local or national strategies, procedures, trainings, efforts, meetings, conferences, or gatherings to prevent abortions.

It is unclear how the act of producing documents responsive to the above requests could itself subject Defendant to criminal liability, and Defendant has not offered any specific basis for so asserting. As such, Defendant should be compelled to produce documents responsive to the above requests.

CONCLUSION

For the foregoing reasons, the United States requests that the Court order Defendant to produce documents in response to the United States' First Request for the Production of Documents

A proposed Order is attached.

Dated: December 21, 2011

Respectfully submitted,

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Defendants.

**ORDER GRANTING UNITED STATES' MOTION TO COMPEL DEFENDANT TO
PRODUCE DOCUMENTS**

The Court, having reviewed the United States' Motion to Compel Defendant to Produce Documents, and sufficient cause appearing, hereby GRANTS the motion.

It is ORDERED that Defendant shall produce documents responsive to the United States' First Request for the Production of Documents by _____.

Dated this ____ day of _____, _____.

BY THE COURT:

United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was filed electronically using the CM/ECF system, which will provide notice of such filing to all registered parties.

/s/ Aaron S. Fleisher
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