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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Manuel de Jesus Ortega Melendres, on behalf of himself and all others similarly situated; et al.

Plaintiffs,

and

United States of America,

Plaintiff-Intervenor,

v.

Joseph M. Arpaio, in his official capacity as Sheriff of Maricopa County, Arizona; et al.

Defendants.

No. CV-07-2513-PHX-GMS

ORDER

Pending before the Court is the Motion for Protective Order of Michael Zullo. (Docs. 1501, 1508.) Also pending before the Court is Mr. Zullo’s Motion to Stay Court Orders Requiring Testimony and Notice of Intent to Appeal. (Doc. 1510.) For the following reasons, the Court denies these motions.

BACKGROUND

Michael Zullo, a member of the Maricopa County Sheriff’s Office (MCSO) Cold Case Posse (a volunteer group that acts under the aegis of the MCSO), participated in the “Seattle Investigation” as an “individual activation” pursuant to MCSO Posse Program guidelines GJ-27. (Doc. 1507-7 at 4.) Zullo acted under the direction and authority of

1 MCSO Detective Mackiewicz and was subject to MCSO Sheriff Arpaio's control. (Oct.
2 28, 2015 Tr. At 37; Apr. 23, 2015 Tr. At 652:14-15.)

3 The Court issued a subpoena ordering the production of various documents,
4 including some related to Zullo's work for the MCSO on the Seattle Investigation.
5 Defense counsel at Jones, Skelton, & Hochuli has possession of these documents because
6 Zullo had turned them over to such counsel in the belief, he asserts, that they were
7 representing him. (Doc. 1501 at 2.) Zullo has since learned that the attorneys at Jones,
8 Skelton, & Hochuli take the position that they do not represent him and never have
9 represented him. (Doc. 1501 at 1-2; Doc. 1508 at 1.) Relying on his Fifth Amendment
10 privilege against compelled self-incrimination,¹ Zullo seeks a protective order that Joseph
11 Popolizio and the other attorneys at Jones, Skelton, & Hochuli not produce documents
12 that Zullo provided them that are responsive to the subpoena. (Doc. 1501 at 2; Doc. 1508
13 at 1; Doc 1510 at 5.)

14 DISCUSSION

15 **I. Mr. Zullo is not being compelled to produce the documents, and as such, his** 16 **Fifth Amendment rights are not implicated.**

17 The Fifth Amendment of the United States Constitution provides that “[n]o person
18 . . . shall be compelled in any criminal case to be a witness against himself.” U.S. Const.
19 amend. V. The Fifth Amendment “protects against compelled self-incrimination, not the
20 disclosure of private information.” *Fisher v. United States*, 425 U.S. 391, 401 (1976).
21 Compelled self-incrimination is protected by the Fifth Amendment only when it is
22 “testimonial” in character. *United States v. Hubbell*, 530 U.S. 27, 34 (2000). It is well-
23 settled law that “a person may be required to produce specific documents even though
24 they contain incriminating assertions of fact or belief because the creation of those

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26 ¹ Zullo maintains that his “Fourth, Fifth, and Sixth Amendment rights have been
27 compromised by counsel for the County.” (Doc. 1501 at 2). However, Zullo provides
28 legal argument regarding his Fourth or Sixth Amendment rights and cites only one case,
discussing the Fifth Amendment protection against compelled self-incrimination, *United*
States v. Hubbell, 530 U.S. 27 (2000).

1 documents was not ‘compelled’ within the meaning of the privilege.” *Id.* at 35-36.
2 Where documents are “voluntarily prepared prior to the issuance of [a court order to
3 produce them],” such papers cannot be “said to contain compelled testimonial evidence.”
4 *Id.* at 36 (quoting *Fisher*, 425 U.S. at 409-10). A person cannot “avoid compliance with
5 [a] subpoena served on him merely because the demanded documents contain[]
6 incriminating evidence, whether written by others or voluntarily prepared by himself.”
7 *Id.*

8 Nevertheless, “the act of producing documents in response to a subpoena may
9 have a compelled testimonial aspect.” *Id.* “[P]roducing the documents tacitly admits
10 their existence and their location in the hands of their possessor,” facts which may have
11 “some minimal testimonial significance.” *Fisher*, 425 U.S. at 411-12. “Compelled
12 testimony that communicates information that may ‘lead to incriminating evidence’ is
13 privileged even if the information itself is not inculpatory.” *Hubbell*, 530 U.S. at 38.
14 Thus, if a person’s *own compelled act of producing documents* (not the *contents* of the
15 documents) communicates information not otherwise known that could lead to
16 incriminating evidence, that person cannot be compelled to produce the documents
17 without a grant of immunity. *Id.* at 44-45.

18 Nevertheless, a person has no Fifth Amendment privilege in preventing *someone*
19 *else* from producing documents that incriminate him. *Couch v. United States*, 409 U.S.
20 322, 328 (1973) (“[T]he Fifth Amendment privilege is a personal privilege: it adheres
21 basically to the person, not to information that may incriminate him.”). The Supreme
22 Court “has held repeatedly that the Fifth Amendment is limited to prohibiting the use of
23 physical or moral compulsion exerted on the person asserting the privilege.” *Fisher*, 425
24 U.S. at 397. Thus, if a client’s lawyer is compelled to produce documents that
25 incriminate the client, this “would not ‘compel’ the [client] to do anything and certainly
26 would not compel him to be a ‘witness’ against himself.” *Id.* The Fifth Amendment does
27 not apply where “the ingredient of personal compulsion against an accused is lacking.”
28 *Id.* (quoting *Couch*, 409 U.S. at 329).

1 Here, Mr. Zullo is not being compelled to do anything. Zullo drafted the
2 documents at issue voluntarily, prior to the issuance of the subpoena, and he was not
3 under compulsion when he delivered the documents to the attorneys at Jones, Skelton, &
4 Hochuli.² Those attorneys are now compelled to produce the documents; Zullo is not
5 compelled to do so. As such, Zullo has no Fifth Amendment claim regarding the
6 production of these documents. *Id.* at 398-99; *see also Johnson v. United States*, 228
7 U.S. 457, 458 (1913) (“A party is privileged from producing evidence but not from its
8 production.”).

9 **II. Mr. Zullo possessed the documents in a representative capacity for a**
10 **collective entity, and thus he never had a Fifth Amendment privilege against**
11 **producing them.**

12 Even if the documents had remained in Mr. Zullo’s sole possession, he would
13 nonetheless fail in asserting a Fifth Amendment privilege against compelled self-
14 incrimination because “an individual cannot rely upon the privilege to avoid producing
15 the records of a collective entity which are in his possession in a representative capacity,
16 even if these records might incriminate him personally.” *Bellis v. United States*, 417 U.S.
17 85, 88 (1974). “In view of the inescapable fact that an artificial entity can only act to
18 produce its records through its individual officers or agents, recognition of the
19 individual’s claim of privilege with respect to the . . . records of the organization would
20 substantially undermine the unchallenged rule that the organization itself is not entitled to
21 claim any Fifth Amendment privilege, and largely frustrate legitimate governmental
22 regulation of such organizations.” *Id.* at 90.

23 To qualify under the collective entity doctrine, an organization must be “an
24 independent entity apart from its individual members[,] . . . relatively well organized and
25 structured and not merely a loose, informal association of individuals,” with a “distinct

26 ² The fact that the attorneys at Jones, Skelton, & Hochuli never represented Mr. Zullo is
27 irrelevant to the Fifth Amendment analysis. Whether the attorneys represented him or
28 not, “by reason of the transfer of the documents to the attorneys, those papers may be
subpoenaed without compulsion on” Zullo. *Fisher*, 425 U.S. at 398-99. “The protection
of the Fifth Amendment is therefore not available.” *Id.*

1 set of organizational records” and members who have “control and access to” those
2 records. *Id.* at 92-93. It is therefore “fair to say that the records demanded are the
3 records of the organization rather than those of the individual.” *Id.* at 93. The custodian
4 of such records holds them “in a representative capacity.” *Id.* at 97.

5 In 1984, the Ninth Circuit held it to be “well established that an individual may not
6 assert the [F]ifth [A]mendment privilege to avoid producing the records of a collective
7 organization where he possesses such records in a representative capacity.” *United States*
8 *v. Malis*, 737 F.2d 1511, 1512 (9th Cir. 1984). Other circuits disagreed,³ and the
9 Supreme Court, in *Braswell v. United States*, 487 U.S. 99, 100 (1988), dealt squarely
10 with the issue of “whether the custodian of corporate⁴ records may resist a subpoena for
11 such records on the ground that the act of production would incriminate him in violation
12 of the Fifth Amendment.” The Court concluded that “he may not.” *Id.* “[W]ithout
13 regard to whether the subpoena is addressed to the corporation, or . . . to the individual in
14 his capacity as a custodian, a corporate custodian . . . may not resist a subpoena for
15 corporate records on Fifth Amendment grounds.” *Id.* at 108-09.

16 The Supreme Court noted that the “act of production” line of cases (*i.e.*, *Fisher*)
17 did not undermine the collective entity rule. *Id.* at 109. Where a member of an
18 organization possesses documents of the organization, “the custodian’s act of production
19 is not deemed a personal act, but rather an act of the [organization].” *Id.* “[T]he
20 custodian of corporate records may not interpose a Fifth Amendment objection to the
21 compelled production of corporate records, even though the act of production may prove
22 personally incriminating.” *Id.* at 111-12.

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25 ³ *Braswell v. United States*, 487 U.S. 99, 102 n.2 (1988) (listing cases establishing a
26 circuit split and citing *Malis* as one of the cases on the winning side of the split).

27 ⁴ A collective entity need not be a corporation, but rather can be any organization, and the
28 *Braswell* decision applies equally to non-corporate collective entities. *Braswell*, 487 U.S.
at 104 (“[W]e have long recognized that, for purposes of the Fifth Amendment,
corporations and other collective entities are treated differently from individuals. This
doctrine—known as the collective entity rule—has a lengthy and distinguished
pedigree.”).

