UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

RICHARD G. CONVERTINO Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, et al. Defendants.	Case No. 07-CV-13842 Assigned to: Hon. Robert H. Cleland

PLAINTIFF RICHARD G. CONVERTINO'S MOTION FOR SANCTIONS

Pursuant to Fed. R. Civ. P. 26 and 37, Plaintiff Richard G. Convertino hereby motions for this Court to sanction David Ashenfelter and his counsel and award Mr. Convertino reasonable attorney's fees and costs for all expenses incurred during the enforcement of his April 30, 2008 subpoena *duces tecum*. In the alternative, Mr. Convertino respectfully requests that this Court review the conduct of Mr. Ashenfelter and his counsel for possible violations of Fed. R. Civ. P. 11 and/or E.D. Mich. L.R. 11.1. If such violations are found, Mr. Convertino respectfully requests that the Court order Mr. Ashenfelter and his counsel to show cause why they should not be sanctioned and, if they fail to do so, to award Mr. Convertino reasonable attorney's fees and costs for all expenses incurred as the result of their sanctionable conduct, less any expenses that the Court awards pursuant to Rule 37. These expenses include, but are not limited to, all expenses related to the preparation and filing of Mr. Convertino's motion to compel, all oppositions to Mr. Ashenfelter's two motions for protective order, and all other related filings. This also includes all expenses related to counsel for Mr. Convertino's two trips to Michigan to attend depositions of Mr. Ashenfelter.

Pursuant to Mich. L.Civ.R. 7.1, on November 20, 2008, and again on December 22, 2008, counsel for Mr. Convertino spoke with counsel for Mr. Ashenfelter in a good faith attempt to resolve this matter without court action. Counsel for Mr. Convertino was unsuccessful. *See* Certification of Compliance.

Respectfully submitted,

_____/s/ Stephen M. Kohn_____
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Dated: December 23, 2008

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RICHARD G. CONVERTINO Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, et al. Defendants.	Case No. 07-CV-13842 Assigned to: Hon. Robert H. Cleland

MEMORANDUM IN SUPPORT OF PLAINTIFF RICHARD G. CONVERTINO'S MOTION FOR SANCTIONS

ISSUES PRESENTED

Where:

1. Plaintiff Richard G. Convertino has successfully litigated his motion to compel and defended against David Ashenfelter's motion for protective order; and
2. Mr. Ashenfelter and his attorney have, from the outset of this dispute, engaged in purely dilatory litigation designed to waste the time and resources of Mr. Convertino and the Court;

Should the Court sanction Mr. Ashenfelter and his attorney under Fed. R. Civ. P. 26 and 37 and award Mr. Convertino attorney's fees and costs for all expenses that he incurred during the enforcement of his April 30, 2007 subpoena *duces tecum* and/or, in the alternative, sanction Mr. Ashenfelter and his attorney under Fed. R. Civ. P. 11?

CONTROLLING/MOST APPROPRIATE AUTHORITY

Fed. R. Civ. P. 37(a)(5)

Fed. R. Civ. P. 26(c)(3)

Fed. R. Civ. P. 11(c)(3)

Doe v. Lexington-Fayette Urban County Gov't, 407 F.3d 755 (6th Cir. 2005)

Pierce v. Underwood, 487 U.S. 552 (1988)

Ridder v. City of Springfield, 109 F.3d 288 (6th Cir. 1997)

INTRODUCTION

Pursuant to Fed. R. Civ. P. 26 and 37, Plaintiff Richard G. Convertino is automatically entitled to an award of fees and costs for expenses associated with his successful motion to compel, as well as for expenses associated with non-party David Ashenfelter's failed motion for protective order. In the alternative, because Mr. Ashenfelter and his attorney knowingly abused the local and federal rules of civil procedure and knowingly made repeated filings that were unwarranted and intended solely for the improper purpose of prolonging this dispute and driving up costs, Mr. Convertino respectfully requests that this Court review the conduct of Mr. Ashenfelter and his counsel for possible violations of Fed. R. Civ. P. 11 and/or E.D. Mich. L.R. 11.1. Accordingly, Mr. Convertino respectfully requests that the Court sanction Mr. Ashenfelter and his counsel and award Mr. Convertino attorney's fees and costs for all expenses incurred during the enforcement of his April 30, 2007 subpoena *duces tecum*. These expenses include, but are not limited to, all expenses related to the preparation and filing of Mr. Convertino's motion to compel, all oppositions to Mr. Ashenfelter's two motions for protective order, and all other related filings. This also includes all expenses related to counsel for Mr. Convertino's two trips to Michigan to attend depositions of Mr. Ashenfelter.

Pursuant to Mich. L.Civ.R. 7.1, on November 20, 2008, and again on December 22, 2008, counsel for Mr. Convertino spoke with counsel for Mr. Ashenfelter in a good faith attempt to resolve this matter without court action. Counsel for Mr. Convertino was unsuccessful. *See* Certification of Compliance.

SUMMARY OF ARGUMENT

On April 30, 2007, Plaintiff Richard G. Convertino served non-party David Ashenfelter with a subpoena *duces tecum* that required him to appear for deposition and produce, *inter alia*,

"[a]ll documents which directly or indirectly identify any confidential source of information about Mr. Convertino." *See* Dkt # 30 Ex. 6, subpoena *duces tecum*. Since that date, it has become abundantly clear that Mr. Ashenfelter never intended to comply with Mr. Convertino's subpoena. Indeed, there is ample evidence that Mr. Ashenfelter has, from the very beginning, intended to oppose the subpoena until held in contempt. However, rather than stating this intention from the start, he has instead deliberately wasted the limited time and resources of both Mr. Convertino and the Court by engaging in a more than eighteen month campaign to "sandbag" the subpoena's enforcement. Mr. Ashenfelter has publicly stated that he will not answer Mr. Convertino's questions, yet he continues to delay in order to prolong this litigation and drive up costs. *See*, *e.g.*, Dkt # 30 Ex. 3, Article by Associate Press, dated October 16, 2008 (Mr. Ashenfelter informed the local newspaper that he would not attend the scheduled deposition and, even if he did, "he will refuse to reveal his sources."); 04-CV-236 (D.D.C.), Dkt # 92, Motion for Protective Order, at 8 ("Absent action by this Court, Ashenfelter, when deposed, will refuse to answer, likely leading to a contempt citation")

From the beginning of Mr. Convertino's efforts to enforce his subpoena, Mr. Ashenfelter has striven to delay and confuse these proceedings with unfounded and misleading assertions about Sixth Circuit case law that mischaracterize or ignore controlling precedent. That Mr. Ashenfelter has continued to raise these arguments after this Court has repeatedly rejected them dispels any pretenses that his opposition to Mr. Convertino's subpoena, either of his motions for protective order, or any of his other filings were "substantially justified" as required by Rule 37, or indeed were made for any legitimate purpose whatsoever as required by Rule 11. In fact, a review of Mr. Ashenfelter's motion for protective order (Dkt # 28) and reconsideration (Dkt #

32)[1] reveals that he did not even state the legal standards for granting either motion, clearly showing that he knew they lacked merit and filed them solely to prolong the litigation and drive up costs. Similarly, because Mr. Ashenfelter's motion for protective order (Dkt # 28) was filed a mere three days before the scheduled October 16, 2008 deposition, yet did not contain a request for a stay of this Court's August 28, 2008 Order compelling him to comply with Mr. Convertino's subpoena, it could not have been intended to accomplish its stated purpose of postponing the deposition, implying that its true purpose was to confuse the litigation and drive up costs.

Mr. Ashenfelter and his counsel have also repeatedly failed to follow the local rules of civil procedure. As discussed in previous filings, Mr. Ashenfelter has repeatedly failed to properly "meet and confer" with opposing counsel as required by E.D. Mich. L.R. 7.1. In fact, since these enforcement proceedings began, counsel for Mr. Ashenfelter has not once properly contacted counsel for Mr. Convertino before filing a motion with the Court.

Mr. Ashenfelter further revealed his dilatory purpose with his conduct leading up to each deposition. After the Court issued its August 28, 2008 Order granting Mr. Convertino's motion to compel, Mr. Ashenfelter and his counsel proposed and agreed to a date-certain for Mr. Ashenfelter's deposition and, for four weeks, gave every indication that they intended to appear at the scheduled time. Then, just three days before the agreed-upon date, after being informed that counsel for Mr. Convertino had purchased a plane ticket to Michigan, Mr. Ashenfelter's counsel informed counsel for Mr. Convertino that Mr. Ashenfelter would not appear and would instead seek a protective order.

[1] Mr. Convertino is aware that the local rules of this Court do not permit him to file a response to Mr. Ashenfelter's motion for reconsideration. To the extent that Mr. Convertino discusses that motion in his instant filing, he does so only to highlight how that motion further exemplifies the dissembling and dilatory nature of Mr. Ashenfelter's conduct.

Approximately one month later, counsel for Mr. Convertino spoke with counsel for Mr. Ashenfelter in an attempt to reach an accord on the instant motion without Court involvement. After that meeting, counsel for Mr. Convertino agreed to delay filing motions for contempt and sanctions so as to give Mr. Ashenfelter a second opportunity to appear for deposition and avoid unnecessary litigation. Mr. Ashenfelter responded by waiting until just days before the scheduled deposition, then requesting another protective order from this Court and petitioning the D.C. District Court to stay the deposition.

When these motions were denied, Mr. Ashenfelter did appear at the scheduled December 8, 2008 deposition, but refused to answer any of Mr. Convertino's questions, citing a variety of privileges that the Court had already rejected, including the First Amendment and various provisions of Michigan state law. Mr. Ashenfelter also, for the first time, invoked the Fifth Amendment. He claimed that these privileges protected, not only his sources, but also his street address, his knowledge of this Court's August 28, 2008 Order granting Mr. Convertino's motion to compel, his knowledge of any foundational elements that would support his assertion of Fifth Amendment privilege, and a variety of other, completely inappropriate matters. Also at the December 8, 2008 deposition, Mr. Ashenfelter produced, for the first time, a privilege log identifying 108 documents responsive to Mr. Convertino's subpoena. However, none of these documents were described with sufficient detail to allow Mr. Convertino to assess the merits of each claim of privilege, likely requiring further unnecessary litigation.

While each of these instances of dilatory conduct, viewed in isolation, might be merely improper and unwarranted, together they show a clear intent to sandbag enforcement of Mr. Convertino's subpoena. Indeed, it is now obvious that Mr. Ashenfelter never intended to comply with Mr. Convertino's subpoena, and will continue his dilatory campaign absent a strong

sanction from this Court. As such, pursuant to Fed. R. Civ. P. 26 and 37, and/or Fed. R. Civ. P. 11 and E.D. Mich. L.R. 11.1, this Court should sanction Mr. Ashenfelter and his attorney and award fees and costs to Mr. Convertino for all expenses associated with the enforcement of his subpoena *duces tecum*.

ARGUMENT

It is uncontestable that Mr. Ashenfelter had no substantial justification for his motion for protective order, or for any of his other conduct in opposition to Mr. Convertino's subpoena *duces tecum*, especially in light of the overwhelming evidence that Mr. Ashenfelter has pursued this opposition solely to sandbag enforcement of that subpoena. Moreover, given Mr. Ashenfelter's dilatory purpose and repeated violations of the local rules, Mr. Convertino respectfully requests that the Court review Mr. Ashenfelter's conduct for possible violations of Fed. R. Civ. P. 11 and E.D. Mich. L.R. 11.1.

I. PURSUANT TO FED. R. CIV. P. 26 AND 37, THE COURT SHOULD AWARD FEES AND COSTS TO MR. CONVERTINO FOR ALL EXPENSES INCURRED DURING THE ENFORCEMENT OF HIS SUBPOENA *DUCES TECUM*

Fed. R. Civ. P. 37(a)(5)(A) provides that, if a motion to compel is granted, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Similarly, Rule 37(a)(5)(B) provides that if a motion to compel is denied, the Court must award fees and costs to the party that successfully opposed it. However, in either case "the court must not order this payment if: (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action; (ii) the opposing party's nondisclosure, response, or

objection was substantially justified; or (iii) other circumstances make an award of expenses unjust." *Id*. Fed. R. Civ. P. 26(c)(3) provides that the same procedure applies to the grant/denial of a protective order.

Mr. Convertino undeniably attempted in good faith to obtain the requested disclosures without court action. *See* Dkt # 1, Certificate of Attempt to Resolve Dispute Without Court Action. Accordingly, because Mr. Ashenfelter had no substantially justified reason to object to the subpoena or request a protective order, and because awarding expenses would not be unjust, the Court must award attorney's fees and costs to Mr. Convertino for the expenses associated with filing his motion to compel and opposing Mr. Ashenfelter's two motions for protective order.

"A motion [or objection to a discovery request] is 'substantially justified' if it raises an issue about which 'there is a genuine dispute, or if reasonable people could differ as to the appropriateness of the contested action.'" *Doe v. Lexington-Fayette Urban County Gov't*, 407 F.3d 755, 765 (6th Cir. 2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)). However, "[t]o be 'substantially justified' means, of course, more than merely undeserving of sanctions for frivolousness; that is assuredly not the standard for Government litigation of which a reasonable person would approve." *Pierce*, 487 U.S. at 566. In *Doe*, the lower court awarded attorney's fees and costs to the defendants because it found that the plaintiffs had no substantial justification for filing their motion to compel. *Doe*, 407 F.3d at 766. The Sixth Circuit reversed, finding that the plaintiffs had substantial justification because they had acted in good faith and cited to at least one on-point opinion, published by a foreign jurisdiction, that directly supported

their arguments.[2] *Id*. The same cannot be said of Mr. Ashenfelter's motion for protective order, or his opposition to Mr. Convertino's subpoena.

A. Mr. Ashenfelter's Motion for Protective Order (Dkt # 28) Lacked Substantial Justification Because it Failed to Provide Supporting Authority or Raise Any Genuine Disputes

As described in previous filings, Mr. Ashenfelter's motion for protective order simply reiterated the arguments he had made in his opposition to Mr. Convertino's motion to compel. *See, e.g.,* Dkt # 32, Motion for Reconsideration, at 8 (admitting that "Ashenfelter [raised] all of the arguments that now support his protective order request in response to Convertino's motion to compel."). However, the Court rejected each of these arguments in its Order granting Mr. Convertino's motion to compel, thus resolving any "genuine disputes" that they might have raised. *See* Dkt # 27, Order. Mr. Ashenfelter has provided no authority to support his contention that, having already lost these arguments on the merits, it was procedurally appropriate for him to raise them again in a motion for protective order Accordingly, even if these arguments raised any "genuine disputes" to substantially justify Mr. Ashenfelter's opposition to Mr. Convertino's subpoena (which as described below they did not), they could not substantially justify Mr. Ashenfelter's motion for protective order.

Mr. Ashenfelter's motion for protective order further lacked substantial justification because this Court had already ruled that such a motion was unwarranted. *See* Dkt # 27, Order, at 20 ("there is no indication that Ashenfelter is entitled to a protective order under Rule 26(c)."). In light of this finding, no reasonable person could dispute that the motion was inappropriate. Similarly, as set forth in Mr. Convertino's opposition to it, Mr. Ashenfelter had no substantial

[2] Given the context, it is presumed that, unlike in the present case, there was no contrary Sixth Circuit authority that controlled the decision, since then there certainly could not have been any "genuine dispute."

justification for requesting a protective order because he had already waived his right to make the motion and utterly failed to state any "good cause" that would allow the Court to grant it. As such, unlike the movants in *Doe*, Mr. Ashenfelter provided no basis that would allow a reasonable person to conclude that his motion was appropriate. His motion for protective order thus utterly lacked substantial justification and Rule 37 requires the Court to award reasonable fees and costs for the expenses related to opposing it.

B. Mr. Ashenfelter's Opposition to Mr. Convertino's Subpoena *Duces Tecum* Lacked Substantial Justification Because it Failed to Provide Supporting Authority or Raise Any Genuine Disputes, and/or Because No Reasonable Person Could Believe that it was Appropriate

On May 14, 2007, Mr. Ashenfelter responded to Mr. Convertino's subpoena with a letter in which he objected to the subpoena on grounds that the requested materials "are privileged by reason of the First Amendment…; federal common law; the laws of the State of Michigan, including the reporter's privilege and the Michigan Shield Law, MCL § 767.5a; and the laws of other relevant jurisdictions." He also asserted that the subpoena imposed an "undue burden." *Id*. As set forth in Mr. Convertino's motion to compel and his reply to Mr. Ashenfelter's response to that motion (summarized briefly below), no reasonable person could agree with these positions and it is now apparent that they were made solely to delay the enforcement of Mr. Convertino's subpoena.

This lack of substantial justification was amply displayed by the duplicitous arguments Mr. Ashenfelter made in his response to Mr. Convertino's motion to compel. For example, Mr. Ashenfelter's reliance on *NLRB v. Midland Daily News*, 151 F.3d 472 (6th Cir. 1998) and the state laws of Michigan was totally unfounded and raise no genuine dispute, as both are wholly irrelevant to this proceeding. *See id*. at 8-10. The three unpublished opinions Mr.

Ashenfelter cited in his response likewise raised no genuine dispute, since they are unquestionably trumped by the contrary, published opinions by this Court. *See id*. at 6-8. Mr. Ashenfelter's argument that the merits of Mr. Convertino's Privacy Act case are relevant to the instant discovery proceeding also raised no genuine dispute, since he has yet to provide any on-point authority supporting this assertion.

Mr. Ashenfelter's reliance on the Western District of Michigan case *Southwell v. Southern Poverty Law Ctr.*, 949 F.Supp. 1303 (W.D. Mich. 1996) was similarly unfounded, as was his improper characterization of it as the "leading case within this Circuit." No reasonable person could argue that *Southwell* is the "leading case" when every other district court in the Sixth Circuit to address the issue of a reporter's privilege (including two opinions by this Court) not only held the opposite, but also explicitly rejected the *Southwell* analysis. *See* Dkt # 25, Reply to Respondents' Response to Motion to Compel, at 3-6. Mr. Ashenfelter's reliance on *Southwell* is thus distinguishable from the circumstances of *Doe* because, in context with the unfounded arguments that fill the rest of his brief, Mr. Ashenfelter's willful mischaracterization of the contrary local authority demonstrates that, unlike the *Doe* plaintiffs who acted in good faith, Mr. Ashenfelter's true purpose for opposing Mr. Convertino's subpoena was purely dilatory. *See Doe*, 407 F.3d at 766 (finding that a "party's failure to cooperate in discovery [because of] willfulness, bad faith, or fault," is one factor that undermines the "substantial justification" of his conduct). As such, no reasonable person could believe that Mr. Ashenfelter's opposition to Mr. Convertino's subpoena was appropriate.

Accordingly, because Mr. Ashenfelter's objections to Mr. Convertino's subpoena were premised entirely on the mischaracterization and obfuscation of case law, he presented no "genuine dispute" and thus had no substantial justification for opposing it. As such, the Court

must award Mr. Convertino reasonable fees and costs for the expenses related to enforcing his subpoena. Moreover, even if this Court finds that Mr. Ashenfelter raised at least one "genuine dispute," his conduct nonetheless lacked substantial justification because it was knowingly undertaken for the sole and improper purpose of causing unnecessary delay and expense. As such, because his motion for protective order and opposition to Mr. Convertino's subpoena was not motivated by any proper purpose, "reasonable people" could not "differ as to the appropriateness" of these filings.

C. All of Mr. Ashenfelter's Actions Throughout these Proceedings Lacked Substantial Justification Because they were Motivated by a Desire to Sandbag Enforcement of Mr. Convertino's Subpoena and Increase Costs

In addition to the lack of merit of Mr. Ashenfelter's arguments in his motion for protective order and opposition to Mr. Convertino's subpoena, these filings, as well as lacked substantial justification because their sole purpose was to sandbag the enforcement of that subpoena and drive up costs. In fact, as his continued repetition of rejected arguments and repeated frivolous filings makes abundantly clear, Mr. Ashenfelter never had any intention of complying with Mr. Convertino's subpoena, absent a strong sanction from this Court. As such, no reasonable person could argue that Mr. Ashenfelter's conduct throughout these proceedings was appropriate.

As set forth above and in previous filings, Mr. Ashenfelter's arguments against the enforcement of Mr. Convertino's subpoena were unfounded from the start, and his repetition of these arguments demonstrates that his motivation for making them was purely dilatory. Mr. Ashenfelter opposed Mr. Convertino's motion to compel on grounds that Mr. Convertino had not overcome a qualified First Amendment privilege and/or might lose a hypothetical motion to dismiss or for summary judgment. As discussed previously, these arguments were at best

misleading, and the Court rejected each of them in its August 28, 2008 Order granting Mr. Convertino's motion to compel. *See* Dkt # 30, Plaintiff's Response to Motion for Protective Order, at 6. Undeterred, Mr. Ashenfelter raised these arguments again in his motion for protective order, even though he now knew that they were untenable. The Court rejected these arguments again on November 7, 2008. *See* Dkt # 31, Order. Despite this second rejection, Mr. Ashenfelter filed a motion for reconsideration, once again arguing that the merits of Mr. Convertino's underlying Privacy Act suit are relevant to this discovery dispute. *See* Dkt # 32, Motion for Reconsideration. No reasonable person could believe that this repetition of rejected arguments was anything but inappropriate and dilatory.

Equally inappropriate was Mr. Ashenfelter's decision, only days after this Court stated that "[t]his court certainly did *not* rely on the analysis discussed in [footnote 16 of its August 28, 2008 Order] for its decision," to boldly reiterate his position that "this Court… [in footnote 16 of its August 28, 2008 Order] decided that it did not have jurisdiction to decide some of Ashenfelter's key arguments…." *See* Dkt # 31, Order, at 4 (emphasis in original); Dkt # 32, Motion for Reconsideration at 3. This continued willful mischaracterization of the Court's orders only further demonstrates the extraordinary lengths to which Mr. Ashenfelter will go to frustrate and delay enforcement of the subpoena.

Another example of Mr. Ashenfelter's unwillingness to litigate in good faith came at his December 8, 2008 deposition. During that proceeding, Mr. Ashenfelter declined to answer any of Mr. Convertino's questions, even those as basic as asking him to state his address for the record. Mr. Ashenfelter claimed a "reporter's privilege" pursuant to the First Amendment and Michigan state law. He also claimed that his testimony was protected by the Fifth Amendment's privilege against self-incrimination. Mr. Ashenfelter knew that this Court had

already ruled that the First Amendment and Michigan state law did not protect his testimony, and his assertion of Fifth Amendment protection is absolutely unfounded and clearly designed solely to confuse and prolong this litigation.

However, Mr. Ashenfelter not only refused to answer Mr. Convertino's substantive questions, he refused to answer any questions at all. In fact, Mr. Ashenfelter even refused to answer the questions that would allow him to establish a foundation for invoking the Fifth Amendment. At the December 8, 2008 deposition, after Mr. Ashenfelter invoked the Fifth Amendment, counsel for Mr. Convertino asked Mr. Ashenfelter a series of questions designed to establish whether Mr. Ashenfelter had a proper basis to assert the privilege, *i.e.* whether Mr. Ashenfelter had "reasonable cause to apprehend a real danger of incrimination… and not a mere imaginary, remote or speculative possibility of prosecution." *See In re Morganroth*, 718 F.2d 161, 167 (6th Cir. 1983) (citing *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980)).

Counsel for Mr. Convertino inquired whether Mr. Ashenfelter was aware of any pending criminal investigations against him, or whether he had been contacted by any government officials regarding his involvement in the leak that is the basis of Mr. Convertino's Privacy Act suit. Counsel for Mr. Convertino also asked Mr. Ashenfelter what facts he was relying on to assert the privilege, what crime(s) he thought he could be prosecuted for, whether he had heard of other reporters that had been prosecuted for giving similar testimony, and other similar foundational questions. Counsel for Mr. Convertino then asked Mr. Ashenfelter if he personally feared prosecution on the basis of any of the questions he might be asked.

In order to establish that he was entitled to assert the Fifth Amendment, Mr. Ashenfelter was obligated to answer at least *some* of these questions, since the Sixth Circuit requires that a witness claiming Fifth Amendment privilege "must supply personal statements under oath or

provide evidence with respect to *each question* propounded to him to *indicate the nature of the criminal charge which provides the basis for his fear of prosecution*…." *In re Morganroth*, 718 F.2d at 169. That Mr. Ashenfelter made no attempt to meet his obligation to establish a foundation for his assertion of Fifth Amendment privilege shows that his claim was not based on any real belief that he was in danger of prosecution,[3] but was rather another spurious attempt to evade and delay enforcement of Mr. Convertino's subpoena.

Had Mr. Ashenfelter truly believed that his testimony was protected by the Fifth Amendment, he could have and indeed *should* have raised it in any one of his numerous filings during the eighteen months since he was served with Mr. Convertino's subpoena *duces tecum*. However, Mr. Ashenfelter did not raise the Fifth Amendment in response to Mr. Convertino's subpoena, nor in response to Mr. Convertino's motion to compel, nor in either of his motions for protective order or reconsideration, or any of his filings in the District of Columbia. That he waited until now, when all of his other arguments have been resoundingly rejected, only further highlights that Mr. Ashenfelter has no interest in engaging in good faith litigation and is motivated solely by a desire to evade Mr. Convertino's subpoena by any means necessary.

The many procedural defects in Mr. Ashenfelter's filings also highlight his dilatory purpose. In his motion for protective order, Mr. Ashenfelter failed to even state the standard for granting a protective order and made no attempt to demonstrate that the motion was based on

[3] Indeed, Mr. Ashenfelter can have no reasonable fear of prosecution, since criminal liability under the Privacy Act is reserved almost exclusively for government officials who disclose information in violation of the Act. *See* 5 U.S.C. § 552a(i). A non-government employee, like Mr. Ashenfelter, who merely obtains information protected by the Act, can only face criminal sanctions under the Privacy Act if he "knowingly and willfully requests or obtains any record concerning an individual from an agency under false pretenses." 5 U.S.C. § 552a(i)(3). There is no indication that Mr. Ashenfelter obtained the Privacy Act protected information about Mr. Convertino by fraud, trickery, or any other such tactics, so Mr. Ashenfelter has no reasonable cause to fear prosecution for revealing the identities of his sources.

"good cause" as required by Fed. R. Civ. P. 26. Such an omission demonstrates that Mr. Ashenfelter knew his motion was unwarranted by law and implies that his true purpose for filing it was to delay and drive up costs. Similarly, in his most recent filing, Mr. Ashenfelter made no attempt to set out the standard for granting a motion for reconsideration, and raised no arguments that could be construed as supporting one. This only further confirms the purely dilatory purpose of his filings, this time by demonstrating that he is willing to waste the Court's limited resources by once again asserting the same tired arguments.

Likewise, Mr. Ashenfelter's failure to request that this Court stay its August 28, 2008 Order compelling him to comply with Mr. Convertino's subpoena makes it apparent that he did not actually intend for his motion for protective order to protect him from contempt. Indeed, since Mr. Ashenfelter likely always intended to litigate until held in contempt, the only other possible motivation for making such an motion is to further prolong these proceedings and drive up costs.

Mr. Ashenfelter compounded his procedural transgressions by attempting to appeal this Court's Order granting Mr. Convertino's motion to compel in the District of Columbia. Had Mr. Ashenfelter desired to litigate this matter under D.C. laws, he should have consented to Mr. Convertino's original subpoena, which issued from that jurisdiction. By refusing to consent to the D.C. subpoena and demanding a subpoena issued by this Court, Mr. Ashenfelter stated his preference for the laws of this Circuit. As such, no reasonable person could argue that, after this Court rejected his arguments on the merits, it was in any way appropriate for Mr. Ashenfelter to seek a protective order on identical grounds in D.C. Having no proper purpose for this filing, it is clear that it was yet another part of Mr. Ashenfelter's campaign to sandbag the enforcement of Mr. Convertino's subpoena.

Indeed, this dilatory agenda is further apparent in Mr. Ashenfelter's disregard for the requirements of E.D. Mich. L.R. 7.1. As set forth in Mr. Convertino's opposition to Mr. Ashenfelter's motion for protective order, Herschel Fink, counsel for Mr. Ashenfelter, failed to confer with any attorney representing Mr. Convertino before filing his motion for protective order. He instead, on October 13, 2008, spoke with Erik Snyder, a recent law school graduate who was awaiting his bar results.[4] In that conversation, Mr. Snyder told Mr. Fink that he could not comment one way or the other on Mr. Convertino's position, but that Stephen Kohn, counsel for Mr. Convertino, was planning to be at the deposition as scheduled. Mr. Fink filed his motions for protective order shortly thereafter, representing that he had spoken with "Attorney Eric Snyder, counsel for plaintiff, to seek concurrence in this motion, and that concurrence was refused." *See* Dkt # 29, Errata, at i.

Mr. Snyder has at no time represented himself as an attorney and has not put in an appearance on this case. While Mr. Snyder does not recall whether he specifically informed Mr. Fink of his status during their very brief conversation on October 13, 2008, Mr. Fink had been informed on several occasions that Mr. Snyder was not yet a licensed attorney, including in an email less than 24 hours previously. *See*, *e.g.*, Dkt # 30 Ex. 7, various emails. In fact, Mr. Kohn even sent Mr. Fink an email informing him of the mistake and requesting that he correct it. *See* Dkt # 30 Ex. 3, email dated October 14, 2008 at 18:58. Nevertheless, Mr. Fink did not correct or withdraw the filing.[5] Accordingly, as Mr. Ashenfelter's counsel never actually spoke with one of Mr. Convertino's attorneys before filing his motion, he cannot in good faith state that there

[4] On November 10, 2008, Mr. Snyder received official notification that he had passed the Maryland Bar Exam. He was sworn in to the Maryland Bar on December 18, 2008.

[5] Mr. Fink did correct the motion insofar as he filed an errata changing the phrase "he spoke with Attorney Eric Snyder, counsel for plaintiff, to seek concurrence in this motion, and that concurrence was not refused" to omit the word "not". Mr. Fink did not, however, correct his mischaracterization of Mr. Snyder as an attorney.

was a pre-filing "conference between attorneys" as required by E.D. Mich. L.R. 7.1(a)(2)(A). Similarly, because Mr. Fink knew that Mr. Snyder was not an attorney, he cannot argue that he made "reasonable efforts" to schedule a conference as required by E.D. Mich. L.R. 7.1(a)(2)(B), since he made no attempt to contact any of Mr. Convertino's actual attorneys. The fact that Mr. Kohn subsequently sent an email to Mr. Fink stating his opposition to the motion cannot cure Mr. Fink's failure to comply with the local rules, as Mr. Kohn's email was sent after Mr. Ashenfelter's motion was filed. *See* Dkt # 30 Ex. 9, email re: ECF Notice of Activity, dated October 13, 2008 at 15:49; Dkt # 30 Ex. 10, email dated October 13, 2008 at 16:12.

Mr. Ashenfelter further violated E.D. Mich. L.R. 7.1 by filing his motion for reconsideration without making *any* attempt to contact counsel for Mr. Convertino. The local rules state that "The movant must ascertain whether the contemplated motion… will be opposed." E.D. Mich. L.R. 7.1(a)(1). While the local rules do not permit an opposing party to file a response to a motion for reconsideration, E.D. Mich. L.R. 59.1, neither do they exempt such a motion from E.D. Mich. L.R. 7.1. This further failure to comply with the local rules confirms that Mr. Ashenfelter and his counsel have no interest in litigating in good faith and are continuing this litigation solely to improperly delay the enforcement of Mr. Convertino's subpoena.

Mr. Ashenfelter and his counsel violated E.D. Mich. L.R. 7.1 a third time by filing his emergency motion for stay without contacting Mr. Convertino's counsel. Mr. Fink then represented that he had "contacted Stephen Kohn in an effort to resolve the dispute without court action, and was not successful." This statement creates an ambiguity as to what actually occurred, as Mr. Fink did not actually contact Mr. Kohn. Instead, at approximately 11:14am on December 1, 2008, Herschel Fink, counsel for Mr. Ashenfelter, called Mr. Kohn's office and

asked to speak with Mr. Kohn. Mr. Fink was informed that Mr. Kohn was in a meeting, and that Mr. Kohn would return his call as soon as possible.

Mr. Kohn completed his meetings at approximately 4:00pm, whereupon he returned to his office and learned of Mr. Fink's call. At this time he also discovered that Mr. Fink had elected to file his motion for protective order, as well as an emergency motion for stay before the D.C. District Court, without conducting the required "meet and confer." This violation of E.D. Mich. L.R. 7.1 was particularly egregious, as had Mr. Fink contacted Mr. Kohn, Mr. Kohn would have consented to the requested relief (foregoing use of a videographer and holding the deposition somewhere besides Mr. Convertino's offices), thus avoiding the need for Court involvement. The continued violations of Mr. Ashenfelter and his counsel of this rule shows that they have no interest in litigating in good faith and are instead motivated by a desire to delay enforcement of Mr. Convertino's subpoena and drive up costs by any means necessary.

Mr. Ashenfelter's public statements also make it apparent that he never intended to comply with Mr. Convertino's subpoena, and was instead litigating solely to delay enforcement. For example, on the day he had agreed to produce Mr. Ashenfelter for deposition, Mr. Ashenfelter's counsel was publicly quoted as saying that, even if Mr. Ashenfelter had attended the deposition, he would not have produced the required information. Dkt # 30 Ex. 3, Article by Associate Press, dated October 16, 2008; 04-CV-236 (D.D.C.), Dkt # 92, Motion for Protective Order, at 8 ("Absent action by this Court, Ashenfelter, when deposed, *will refuse to answer*, likely leading to a contempt citation") (emphasis added). In that same article, counsel for Mr. Ashenfelter represented that "I told Mr. Kohn [counsel for Mr. Convertino] in writing twice — three times — we would not appear until and unless a judge specifically ordered us to." Dkt # 30 Ex. 3, Article by Associate Press, dated October 16, 2008. This quite untrue; until the filing of

Mr. Ashenfelter's motion for protective order, counsel for Mr. Convertino had no notice whatsoever that Mr. Ashenfelter did not plan to attend the scheduled deposition.

Finally, and perhaps most glaringly, Mr. Ashenfelter revealed his dilatory purpose by proposing and agreeing to a deposition date of October 16, 2008, then waiting until just three days before that date to inform Mr. Convertino that he did not intend to appear and would instead be filing a motion for protective order. Mr. Ashenfelter could have informed Mr. Convertino of his intention not to appear for deposition at any time during the forty-six days that elapsed between the Court's August 28, 2008 Order and October 13, 2008, the date Mr. Ashenfelter filed his motion for protective order. Instead, Mr. Ashenfelter and his counsel chose to give every impression that the deposition would go forward as scheduled, even going so far as to propose and agree to a date certain for it to take place. *See* Dkt # 30 Ex. 1, emails dated September 12, 2008, at 16:05 and 8:01 pm; Dkt # 30 Ex. 2, email dated September 15, 2008 at 5:25pm.

In fact, counsel for Mr. Convertino had called Mr. Fink's office repeatedly during the week of October 5, 2008 to repeat his request for the documents described in his subpoena, but received no response.[6] On October 9 and 10, 2008, Mr. Kohn's office called and left messages at Mr. Fink's office, informing him that, since Mr. Kohn had not heard otherwise, he was going to purchase plane tickets and attend the deposition as scheduled. Mr. Kohn then purchased those tickets on October 10, 2008.[7] Later that day, Mr. Fink did finally contact Mr. Kohn via email, but gave no indication that Mr. Ashenfelter did not plan to appear at the scheduled deposition.

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[6] Counsel for Mr. Convertino was aware of the health problems faced by Mr. Ashenfelter's counsel's wife and, as a professional courtesy, offered to postpone the deposition if necessary. Counsel for Mr. Ashenfelter did not take him up on that offer.

[7] On October 14 and 15, 2008, Mr. Kohn did attend an unrelated deposition in Grand Rapids, Michigan. However, he did so primarily because he was planning to attend Mr. Ashenfelter's deposition later that week, as the deposition was being conducted by the DOJ and Mr. Kohn's appearance was primarily observational. But for Mr. Ashenfelter's deposition, Mr. Kohn would have attended the Grand Rapids deposition via telephone.

Dkt # 30 Ex. 7, page 2, email dated 10 Oct 2008 at 16:58. In fact, counsel for Mr. Convertino had no notice whatsoever that Mr. Ashenfelter intended to skip the deposition and seek a protective order until minutes before he filed it, when Mr. Fink called Mr. Kohn's law clerk to seek concurrence.

In light of these repeated transgressions, it is now abundantly clear that Mr. Ashenfelter never had any intention of complying with Mr. Convertino's subpoena and was at all times engaged in a dissembling campaign to sandbag that subpoena's enforcement. Given this blatantly improper purpose, which as described below is sufficiently egregious as to violate Fed. R. Civ. P. 11, no reasonable person could dispute that Mr. Ashenfelter's actions were wholly inappropriate and thus lacking in substantial justification. Because Mr. Convertino was thus prejudiced by the time and expense that he spent opposing them, Fed. R. Civ. P. 37 requires this Court to award Mr. Convertino attorney's fees and costs for all of the expenses he incurred during the enforcement of his subpoena *duces tecum*.

II. THIS COURT SHOULD REVIEW THE CONDUCT OF MR. ASHENFELTER AND HIS COUNSEL AND CONSIDER ORDERING THEM TO SHOW CAUSE WHY THEY SHOULD NOT BE SANCTIONED PURSUANT TO FED. R. CIV. P. 11(c)(3)

Fed. R. Civ. P. 11(c)(3) authorizes the Court to impose sanctions on its own initiative for violations of Fed. R. Civ. P. 11(b), which states in relevant part that "[b]y presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

> (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law…"

Accordingly, "Rule 11 sanctions are appropriate when the district court determines that an attorney's conduct is not reasonable under the circumstances." *Mann v. G & G Mfg., Inc.*, 900 F.2d 953, 958 (6th Cir. 1990). As such, "litigants may be sanctioned under the amended rule [11] for continuing to insist upon a position that is no longer tenable." *Ridder v. City of Springfield*, 109 F.3d 288, 293 (6th Cir. 1997); *see also* Fed. R. Civ. P. 11, Advisory Committee Notes (1993 Amendments) ("If evidentiary support is not obtained after a reasonable opportunity for further investigation or discovery, the party has a duty under the rule not to persist with that contention."). Finally, because the standard is one of objective reasonableness, "[a] good faith belief in the merits of a case [or argument] is insufficient to avoid sanctions." *Tahfs v. Proctor*, 316 F.3d 584, 594 (6th Cir. 2003).

As described above, it is abundantly clear that Mr. Ashenfelter has at all times behaved unreasonably. Despite this Court's repeated rejection of his arguments, he has continued "to insist upon a position that is no longer tenable." He has also, at all times, presented his filings for the improper purpose of causing "unnecessary delay" and "needlessly increase[ing] the cost of litigation." Similarly, none of the arguments Mr. Ashenfelter has advanced were "warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law." If the Court, in its discretion and after reviewing review Mr. Ashenfelter's conduct, decides to sanction him and his attorney under Fed. R. Civ. P. 11(c)(3), Mr. Convertino respectfully requests that it award him reasonable attorney's fees and costs for the expenses that he incurred as the result of their sanctionable conduct, less any expenses that the Court awards him pursuant to Rule 37.

III. CONCLUSION

Mr. Ashenfelter's unwarranted and improper dilatory conduct and filings forced Mr. Convertino to incur substantial and unnecessary expenses to oppose them. For the reasons stated above, Mr. Ashenfelter had no substantial justification for his opposition to Mr. Convertino's subpoena *duces tecum*, nor did he have substantial justification to file his motions for protective order, or engage in any of the other dilatory conduct that he has displayed throughout these proceedings. Accordingly, the Court must sanction Mr. Ashenfelter and his attorney and award attorney's fees and costs to Mr. Convertino for the expenses necessitated by those filings (including expenses for the preparation and filing of this motion).

Respectfully submitted,

/s/ Stephen M. Kohn
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Attorney for Mr. Convertino

Dated: December 23, 2008

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

RICHARD G. CONVERTINO Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, et al. Defendants.	)	Case No. 07-CV-13842 Assigned to: Hon. Robert H. Cleland

ORDER

Upon consideration of Plaintiff Richard G. Convertino's Motion for Sanctions is hereby **GRANTED**. It is hereby

ORDERED that Non-Party David Ashenfelter and/or his attorney shall pay Mr. Convertino attorneys' fees and costs for all of the expenses he sustained in the course of enforcing his April 30, 2007 subpoena *duces tecum*. These costs include, but are not limited to, all expenses related to the preparation and filing of Mr. Convertino's motion to compel, all oppositions to Mr. Ashenfelter's two motions for protective order, and all other related filings. This also includes all expenses related to counsel for Mr. Convertino's two trips to Michigan to attend depositions of Mr. Ashenfelter. It is further

ORDERED that Mr. Ashenfelter and his counsel shall be joint and severally liable for these fees.

_____ _____

Dated

Hon. Robert H. Cleland
U.S. District Court Judge

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2008, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system, which shall send notice to all counsel of record.

/s/ Stephen M. Kohn

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Attorney for Mr. Convertino

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

RICHARD G. CONVERTINO Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, et al. Defendants.	Case No. 07-CV-13842 Assigned to: Hon. Robert H. Cleland

CERTIFICATE OF COMPLIANCE WITH E.D. MICH. L.R. 7.1

Pursuant to E.D. Mich. L.R. 7.1(a)(2)(A), counsel for Plaintiff Richard G. Convertino hereby certifies that on or about November 20, 2008, and again on December 22, 2008, Mr. Convertino, through counsel, conferred in good faith with counsel for Mr. Ashenfelter. During that conference, counsel for Mr. Convertino explained the nature and basis for his motion for sanctions, and attempted to secure the compliance with the request without court action. Counsel for Mr. Convertino was unsuccessful.

Respectfully submitted,

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Dated: December 23, 2008