IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

W.L. GORE & ASSOCIATES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. 4387-VCP
	)	
DARRELL LONG and BHA GROUP, INC. (d/b/a GE ENERGY),	)	
	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Submitted: September 16, 2011
Decided: December 28, 2011

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PARSONS, Vice Chancellor.

This matter is before the Court on Plaintiff, W.L. Gore & Associates, Inc.'s ("Gore"), motion to disregard the testimony of Defendant Darrell Long on certain subjects (the "Motion"). When called as an adverse witness during Gore's case-in-chief, Long invoked his constitutional rights against self-incrimination under the Fifth Amendment to the U.S. Constitution and Article 1, Section 7 of the Delaware Constitution and refused to answer various questions concerning, among other things, allegations that he downloaded confidential data to USB devices in the final weeks of his employment at Gore and retained those devices and data after his employment ended. During friendly cross-examination conducted by his own counsel, Long then testified as to why he had legitimate reasons to access that confidential information while employed by Gore and denied communicating, disclosing, or using any such confidential information while employed by Defendant BHA Group, Inc. ("GE Energy").

In its Motion, Gore contends that the scope of Long's testimony on cross-examination was sufficiently broad to encompass the questions he refused to answer on direct, thereby constituting a waiver of privilege. To remedy that allegedly selective invocation of privilege, Gore requests that the Court disregard all of Long's friendly cross-examination testimony relating to the questions he refused to answer on Plaintiff's hostile direct examination. For their part, Defendants deny that any waiver occurred and assert that, even if one had, the procedurally proper remedy would have been for Gore to conduct a redirect at trial within the scope of the purported waiver.

For the reasons stated in this Memorandum Opinion, I conclude that Long's testimony on cross-examination did extend into certain subjects he refused to address on

direct, albeit not as broadly as Gore contends. Therefore, I hold that Long's invocation of his privilege against self-incrimination requires that I disregard his testimony as to those subjects and, to that limited extent, grant Gore's Motion.[1]

I. BACKGROUND

Gore's Amended Complaint asserts various claims against Defendants Long and GE Energy arising out of Long's alleged misappropriation of Gore's proprietary, confidential information. In particular, Count VI asserts a cause of action for unauthorized access to and misuse of computer system information under 11 *Del. C.* §§ 932 and 935. Although § 941 enables Gore to bring civil claims for violations of §§ 932 and 935 in the Court of Chancery, such violations also are punishable as crimes.[2] Hence, any of Long's testimony concerning unauthorized access to or misuse of computer system information reasonably could be used to incriminate him.

The privilege against self-incrimination under both the U.S. and Delaware Constitutions continues to apply in civil actions such as this.[3] Because this is a civil

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[1] In a letter to the Court dated September 21, 2011, counsel for Long expressed a preference for having Long's disputed testimony disregarded rather than having a finding of waiver at trial. Letter from Samuel T. Hirzel, Esq. to V.C. Parsons, Docket Item ("D.I.") No. 440, at 4 (Sept. 21, 2011) [hereinafter Surreply]. Gore did not object to that approach.

All citations in this Memorandum Opinion to docket item numbers refer to the docket in this action, *W.L. Gore & Assocs., Inc. v. Darrell Long and BHA Gp., Inc. (d/b/a GE Energy)*, C.A. No. 4387-VCP.

[2] 11 *Del. C.* § 939.

[3] *Baxter v. Palmigiano*, 425 U.S. 308, 316 (1976) ("[T]he Fifth Amendment 'not only protects the individual against being involuntarily called as a witness against

action, however, Gore was entitled to call Long as an adverse witness during its case-in-chief under Court of Chancery Rule 43(b),[4] and Long could not "avoid interrogation, *in vacuuo*, by merely stating that his answers may tend to incriminate him."[5] Rather, in a civil setting, invocation of the privilege "must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer."[6] That is, assertions of privilege must be made on a question-by-question basis where the *particular* answer either would support a conviction or "furnish a link in the chain of evidence needed to prosecute" the witness.[7]

In light of these principles and to expedite the orderly presentation of evidence at trial, Long's counsel provided advance notice (the "Jennings Letter") to all parties and the Court of five specific topics about which, if questioned, Long intended to invoke his

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himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'" (quoting *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973)); *Mumford v. Croft*, 93 A.2d 506, 508 (Del. 1952) ("[T]he privilege against self-incrimination, as granted by Article I, Section 7 of the Delaware Constitution, is not dependent upon the nature of the proceedings in which the testimony is sought or is to be used.").

4 Rule 43(b) provides, in pertinent part, that a "party to the record in any action or judicial proceeding . . . may call an adverse party or person for whose immediate benefit any action or judicial proceeding is prosecuted or defended . . . ."

5 *Steigler v. Ins. Co. of N. Am.*, 306 A.2d 742, 743 (Del. 1973).

6 *Hoffman v. United States*, 341 U.S. 479, 486-87 (1951).

7 *Id.* at 486; *see also Bentley v. State*, 930 A.2d 866, 873 n.12 (Del. 2007) (citing *Hoffman*, 341 U.S. at 486).

constitutional rights against self-incrimination.[8] Among those five topics, the following three are relevant to this Motion:

> - Downloading of Gore documents by Mr. Long to external information storage devices between May 29, 2008 and June 13, 2008;
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> - Possession of an AIGO USB device containing Gore documents after 5/28/08 by Mr. Long; [and]
>
> - Retention of Gore documents by Mr. Long after June 13, 2008, including files that Gore contends Mr. Long had on an AIGO USB device . . . .[9]

Because Long's apprehension of prosecution primarily relates to §§ 932 and 935, it is not surprising that all three topics are limited to access, possession, or retention of Gore documents on electronic data storage devices. The Court further notes that all three topics are limited in scope to specific time periods.

As anticipated, Gore called Long to testify during its case-in-chief. Also as anticipated, Long exercised his constitutional rights against self-incrimination to refuse to answer approximately forty questions posed to him by both Gore's counsel and the Court. Illustrative examples of those questions include the following:

> - "[P]rior to the time that you left Gore, did you download any Gore confidential information on to one or more portable electronic storage or USB devices?"[10]

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8 Letter from Kathleen M. Jennings, Esq. to V.C. Parsons, D.I. No. 378 (June 16, 2011) [hereinafter Jennings Letter].

9 *Id.* at 3.

10 Tr. 237.

- "THE COURT: . . . [I]f it turns out that Gore presents evidence that during this month or so before you left that you downloaded on to your computer at Gore much more information than you typically downloaded in a month, do you have any explanation for that?"[11]

- "At any time in December of 2008 did you share any information with Martin Hatfield [a GE employee] on a USB device that came from Gore?"[12]

- "After the time you left your employment at Gore, did you keep in your possession any USB data storage device you used while at Gore?"[13]

As to many of the approximately forty questions, however, Defendants' counsel made clear that they would not advise Long to exercise his constitutional rights if Plaintiff's counsel would rephrase the question so that Long could respond without needing to discuss external data storage devices or events that may have occurred during the time periods specified in the Jennings Letter.[14] Thus, for example, although Long refused to answer whether he "review[ed] any Gore documents" after his employment ended—perhaps because the question was unlimited as to the means by which he would

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11 Tr. 248.

12 Tr. 259.

13 Tr. 370-71.

14 *See, e.g.*, Tr. 228 ("I think if you rephrase the question, you might be able to get an answer."), 239 ("I advise my client to assert his constitutional rights to the question *as phrased*." (emphasis added)), 240 (objecting as phrased), 250 ("If it could be narrowed down a little bit more . . . , I think he can provide a lot of answers."), 259 (objecting as phrased), 260 (objecting as phrased), 270 (reiterating that Long will invoke his constitutional rights "[i]f the question assumes something about USB devices and continue [sic] to be in possession of them . . .").

have reviewed them and, thus, a blanket denial necessarily would encompass denying having reviewed documents on a USB device—Long did respond to the question whether he "review[ed] any Gore documents *in paper format*?"[15]

Similarly, when the Court asked if Long had any explanation for downloading more documents than usual in "the month or so before you left," a response necessarily would have encompassed events ranging from approximately May 12 to June 12, 2008, the day Gore terminated Long's employment. Although Long might have answered the Court's question if it had referred only to his conduct between May 12 and 28, the phrasing of the question, in retrospect, necessarily also inquired into "[d]ownloading of Gore documents by Mr. Long to external information storage devices *between May 29, 2008 and June 13, 2008*."[16] If Long wanted to invoke his constitutional rights with respect to downloading documents during the two-week period before he left Gore, then he could not answer questions about downloading documents during the entire month before he left.

Finally, although Long refused to answer various questions regarding whether he "reviewed" Gore documents after his employment ended in mid-June 2008, he did answer certain questions regarding whether he "communicated" any Gore information to

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15 Tr. 370-71 (emphasis added).

16 Jennings Letter at 3 (emphasis added). In this regard, the Court notes that Long's counsel advised her client to assert his constitutional rights "out of an abundance of caution" only "to that *specific* question." Tr. 248 (emphasis added).

anyone at GE Energy.[17] As to that latter line of questioning, Long testified specifically that he did not communicate any Gore confidential information orally, verbally, or in writing,[18] but he also affirmatively denied Gore's general and unlimited question whether he "communicate[d] any Gore confidential information to anyone at GE?"[19] Similarly, Long categorically denied "us[ing] any Gore confidential information in the performance of [his] work for GE."[20] He then continued to refuse to answer any questions regarding whether he remained in possession of any USB or other external data storage devices.[21]

Immediately after Gore's hostile direct, Long remained on the stand for a friendly cross-examination conducted by his own counsel. At one point during that cross-examination, Long testified generally about the work he performed at Gore from January to May 2008 and why he accessed a Gore database for legitimate business reasons.[22] As a threshold matter, while Long testified to traveling a significant amount during that time period, he did not say that he downloaded any Gore documents to a USB or other external data storage device. Rather, he testified only that he "accessed" a company

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17 *See* Tr. 371-73.

18 Tr. 373.

19 Tr. 372. During friendly cross-examination conducted by Defendants' counsel, Long also denied "disclos[ing] any confidential or proprietary information of Gore to anyone while employed by GE." Tr. 597.

20 Tr. 373.

21 Tr. 373-74.

22 *See* Tr. 490-96.

database.[23] Moreover, the most recent work that he discussed in his answers was preparation for a meeting scheduled to take place on or about May 17.[24] Similarly, Defendants' counsel asked Long "whether you would have needed to access those documents [*i.e.*, PX 68 and 69] in connection with your Gore employment in April and May 2008 and generally why?"[25] Immediately before posing that question, however, counsel stated "I'm going to restrict your testimony to prior to May 28th," and then reiterated that restriction just two questions later.[26] In short, Long did not discuss downloading Gore documents at all and, in any event, restricted his testimony in this regard to the period before May 28, 2008. Shortly thereafter, Long testified further that, at his exit interview from Gore, he returned his company Blackberry but not his personal cell phone, even though it contained some business-related contact information.[27]

Before adjourning for the evening on June 21, 2011, the Court heard argument on several outstanding procedural matters. Among them, Gore's counsel raised for the first time its belief that Long had waived his Fifth Amendment rights by answering questions during the friendly cross on subjects that he refused to answer on Gore's hostile direct. Plaintiff requested either that it be permitted to reexamine Long without being subject to

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23 Tr. 491.

24 Tr. 493.

25 Tr. 495.

26 Tr. 495-96.

27 Tr. 504-05.

the privilege or that the relevant testimony from his friendly cross be stricken from the record. Without ruling, the Court noted that any waiver was not obvious, and it granted Gore's request to make a formal application in writing specifying which of his answers during the friendly cross overlapped with questions he had refused to answer on the hostile direct.[28] Gore conducted a redirect examination of Long the following morning, but none of Gore's questions on that redirect referred to access, possession, or retention of Gore documents on external data storage devices.[29] At that point, the waiver issue remained unresolved.

II. PARTIES' CONTENTIONS

Gore contends that Long waived privilege on three distinct subjects. First, Plaintiff argues that Long's testimony regarding access to Gore documents for legitimate business reasons overlaps with its questions regarding whether and why he downloaded "a massive amount of data"[30] to his personal USB and other data storage devices ("Waiver Subject 1"). Second, to the extent that Long testified that he did not use or communicate any Gore confidential information while employed by GE Energy, Gore claims that it should have been permitted to inquire into the related issue of what happened to his personal USB and other storage devices containing Gore documents after he left Gore ("Waiver Subject 2"). Third, Gore avers that Blackberries and cell phones

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28 *See* Tr. 529-32.

29 Tr. 598.

30 Mot. at 4.

are data storage devices and, therefore, Long waived privilege regarding retention of storage devices containing Gore information to the extent that: (1) returning his company Blackberry supports an inference that Long did not retain any of the data that previously had been stored on that device once he returned it; or (2) retaining his cell phone, including the business contacts stored on it, supports a finding that Long retained Gore customer and supplier information ("Waiver Subject 3").

In response, Defendants maintain that: (1) Long did not waive privilege as to any of the three Waiver Subjects; (2) even if such a waiver occurred, Gore should have sought to reexamine Long within the scope of the purported waiver, which it failed to do; and (3) essentially, Gore's Motion "is nothing more than a request for an adverse inference by another name."[31]

III. DISCUSSION

Delaware courts analyze the waiver of constitutional privileges under a totality of the circumstances test.[32] As to the privilege against self-incrimination specifically, "a defendant who takes the stand in his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct

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[31] Defs.' Resp. at 10. Although, as a matter of federal law, courts presiding over civil actions may draw an adverse inference against a party who invokes the privilege against self-incrimination without violating the U.S. Constitution, *see Baxter v. Palmigiano*, 425 U.S. 308, 320 (1976), Delaware law prohibits courts in this State from doing so. D.R.E. 512(a) ("The claim of a privilege . . . is not a proper subject of comment by the judge or counsel. No inference may be drawn therefrom.").

[32] *Davis v. State*, 809 A.2d 565, 569 (Del. 2002).

examination."[33] In civil proceedings, however, some Delaware courts have held that "when a witness testifies as to a fact or incident without invoking his privilege against self-incrimination, he thereby waives that privilege with respect to the *details and particulars* of the fact or incident."[34] The parties disagree as to which of these standards—"reasonably related" or "details and particulars"—applies here. From the Court's perspective, however, the standards appear more similar than disparate. Indeed, as a general matter, both standards advance the same truth-finding goal of the adversarial process in that, to the extent a witness testifies to a matter by choice, the witness invites his or her adversary to attempt through an adverse examination to undermine the inferences to be drawn from that testimony.[35]

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[33] *Lawrence v. State*, 1992 WL 279114, at *2 (Del. Sept. 3, 1992) (quoting *McGautha v. California*, 402 U.S. 183, 215 (1971)) (ORDER). Furthermore, although a witness's credibility generally is within the scope of cross-examination, "[t]he giving of testimony . . . does not operate as a waiver of . . . the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility." D.R.E. 608(b).

[34] *Ratsep v. Mrs. Smith's Pie Co.*, 221 A.2d 598, 599 (Del. Super. 1966) (emphasis added) (quoting *Carey v. Bryan*, 105 A.2d 201, 203 (Del. Super. 1954)); *see also Eden v. Oblates of St. Francis de Sales*, 2007 WL 4722830, at *3 (Del. Super. Dec. 14, 2007) (quoting *Ratsep*, 221 A.2d at 599).

[35] *Compare* 28 Charles Alan Wright & Victor James Gold, *Federal Practice & Procedure: Evidence* § 6166 (1st ed. 2009) ("The weight of federal judicial authority seems to favor the ['reasonably related'] approach. . . . The policy behind recognizing a waiver is to protect the truth by subjecting the story the accused has told on direct examination to the test of cross-examination.") *with Carey*, 105 A.2d at 203 ("[I]n the interest of justice, the trier of fact is entitled to a full statement of the witness' knowledge of matters concerning which he testifies. Thus, when a witness has sworn to tell the whole truth and has commenced to testify as to a fact or incident within his knowledge, he cannot be permitted to

Perhaps the clearest indication of the similarities between the two standards is the fact that both Plaintiff and Defendants rely on *Brown v. United States*[36] to support their respective positions. In *Brown*, the defendant in a civil denaturalization proceeding was called as an adverse witness by the Government and, while admitting that she had once belonged to the Young Communist League, refused to answer any questions about her political affiliations that were either unlimited in time or pertained to any time after 1946. Although defense counsel did not cross-examine her at that time, the defendant later took the stand again on her own behalf and, during that second, friendly direct examination, testified that she had never belonged to any organization that advocated the overthrow of the U.S. government. The Government's first question on its cross-examination was whether she was then or had ever been a member of the Communist Party. Despite the defendant's attempt to claim the privilege against self-incrimination, the district court ruled that she had waived the privilege, required her to answer, and held her in contempt of court when she refused to do so.[37] The U.S. Supreme Court upheld the finding of contempt, noting that the defendant had waived her privilege not merely by taking the stand, but by what she testified to when questioned by her own counsel. That is, her testimony during the second, friendly direct examination introduced issues that had not

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withhold particulars thereof under a claim of privilege made for the first time upon cross-examination.").

[36] 356 U.S. 148 (1958).

[37] *Id.* at 150-52 & n.4.

been addressed the first time she testified. During the second direct she testified without any limitation that she had never been a Communist, and the Court held that, in fairness, the Government could cross-examine her as to that issue.[38]

Both Gore and Defendants in this action rely on *Brown*, seizing upon certain differences in the way the *Brown* Court stated its holding at different points in its opinion. At one point, the Court held that, "by her direct testimony [the defendant] had opened herself to cross-examination on the matters relevantly raised by that testimony."[39] Plaintiff suggests this "relevantly raised" language equates to the "reasonably related" standard. Elsewhere in the opinion, however, the Court stated that a witness who elects to testify cannot claim "an immunity from cross-examination on the matters that he has himself put in dispute."[40] Defendants contend this "put in dispute" language is narrower than the "reasonably related" standard and more in line with its preferred "details and particulars" standard.

The reasoning in *Brown* suggests that either standard at least requires that any testimonial evidence voluntarily provided by Long be subjected to some degree to the truth-testing process of an adverse examination. Moreover, as demonstrated *infra*, to the extent that the competing standards may be differentiated in any meaningful respect, application of either standard produces the same result under the facts of this case. Thus,

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38 *Id.* at 157.

39 *Id.*

40 *Id.* at 156.

I need not attempt to resolve this question of the governing standard under constitutional law and, instead, inquire whether the questions Long refused to answer were both "reasonably related" to *and* among the "details and particulars" of the testimony he gave in response to Defendants' counsel's friendly cross-examination.

A. Did Long Waive His Privilege Against Self-Incrimination?

As to Waiver Subject 1—*i.e.*, whether "questions about whether and why Long downloaded documents from his personal drive onto a USB device are 'reasonably related' to his testimony that he saved these documents for . . . legitimate business reasons"[41]—I conclude that no waiver occurred. Long did not testify that he "downloaded" any documents whatsoever, regardless of his purpose. Rather, Long testified that he had "access" to certain documents via a Gore database. Thus, even if there may be other evidence in the record that he downloaded documents to external data storage devices, Long's testimony did not address that topic and cannot slant the truth in that regard. Furthermore, because Long limited his testimony related to his purpose for accessing Gore documents to the period before May 28, 2008, he has *not* testified that he had any legitimate purpose for even accessing Gore documents between May 28 and June 12, 2008. While this Court cannot draw an adverse inference that Long, therefore, must not have had any legitimate purpose, it also cannot rely on his testimony to support an inference that, after May 28, 2008, any access he may have had was incidental to legitimate Gore business. In sum, because Long did not testify that he downloaded Gore

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[41] Mot. at 5.

documents for legitimate reasons, especially not for the period after May 28, 2008, questions about why he downloaded documents to a USB device are neither "reasonably related" to nor among "the details and particulars" of the testimony he voluntarily gave regarding Waiver Subject 1.

Turning to Waiver Subject 2—*i.e.*, whether "what Mr. Long actually did with the thousands of Gore documents he downloaded to his USB devices in his final days at Gore is 'reasonably related' to his testimony that he did not communicate or use that same information at GE"[42]—the facts concerning this aspect of Long's testimony are similar to the problematic testimony in *Brown*. In *Brown*, the defendant waived privilege regarding whether she had ever belonged to the Communist Party by asserting a blanket denial, unlimited as to time period, that she had ever belonged to an organization that advocated the overthrow of the U.S. government.[43] In this case, Long testified, both on direct and cross, that he did not use at GE Energy or communicate or disclose to anyone at GE Energy any Gore confidential information.[44] One means by which a person could "communicate" or "disclose" a document would be by delivering to a third person an

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42 Mot. at 6.

43 356 U.S. at 151 n.4, 157.

44 Tr. 372 (hostile direct) ("Q. Did you communicate any Gore confidential information to anybody at GE? A. No."), 373 (hostile direct) ("Q. Did you use any Gore confidential information in the performance of your work for GE? A. No."), 597 (friendly cross) ("Q. Did you disclose any confidential or proprietary information of Gore to anyone while employed by GE? A. No, I did not.").

external data storage device on which the document is saved. By testifying that he never communicated or disclosed Gore documents to anyone at GE Energy, Long necessarily testified that he never physically delivered a USB device containing such documents to anyone at GE Energy. Having himself opened the door to questions concerning any possible way in which he might have communicated or disclosed Gore documents, Long then could not deny Gore, or the trier of fact, the benefit of subjecting his testimony to the truth-testing process of adverse examination.

Plaintiff further argues that, "if Long were to admit that he had a USB device with thousands of Gore documents available to him while at GE . . . [,] it would certainly render less credible his testimony that he nevertheless did not share those documents."[45] I agree with Gore that possession of such a USB device could support a reasonable inference contrary to Long's testimony that he did not "use" Gore information while employed by GE. That is, one's possession of a competitor's confidential data naturally raises the question of why that person possesses that data if not to use it. After asking whether Long "use[d] any Gore confidential information in the performance of [his] work for GE," and receiving a negative reply, Gore's very next question was whether he "remain[ed] in possession of an Aigo . . . electronic storage device on December 23, 2008?"[46] Long, however, refused to answer that question. But, once Long testified that he did not disclose or use Gore information in any way, Gore should have been permitted

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[45] Pl.'s Reply at 8-9.

[46] Tr. 373.

to inquire into what documents, if any, Long possessed after leaving Gore and the relative ease with which he would have been able to disclose or use them while employed at GE Energy. Such questions are "reasonably related" to and among the "details and particulars" of Long's blanket denials that he disclosed or used Gore documents. In retrospect, therefore, Gore should have been permitted the opportunity to ask those questions.[47]

Lastly, I consider Waiver Subject 3—*i.e.*, whether Long's testimony that he returned his company Blackberry and retained his personal cell phone, both mobile devices capable of storing electronic data, waived privilege regarding whether he retained any external data storage devices containing confidential information after he left Gore. Under the totality of the circumstances, I find that no such waiver occurred. Defense counsel examined Long in this regard not in the context of attempting to demonstrate that he, in fact, returned all external data storage devices containing Gore documents upon leaving Gore, but rather in relation to questions about his general lack of experience with, and the specific circumstances of, his exit interview, including the fact that he returned his Blackberry.[48] In other words, Long's testimony concerning the Blackberry is limited

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[47] I address the proper remedy for this error in Section III.B, *infra*, but I note at this point that Long's refusal to answer questions relevant to his testimony that he did not communicate or disclose Gore documents does not affect the admissibility of other witnesses' testimony that Long did not communicate or disclose such information to them.

[48] Tr. 504 ("Did you have any experience in dealing with exit interviews when leaving a business for a competitor? A. No, I had none. Q. Did you have a Gore BlackBerry? A. Yes. Q. Did you return it before you left Gore? A. Yes.").

to the return of a physical device belonging to Gore. The fact that he so testified, however, does not preclude an inference based on other evidence that Long retained the electronic data that may have been stored on the Blackberry. As to Long's cell phone, Plaintiff's questions on this subject were limited to whether Long printed out any customer or supplier information from the Lotus Notes program on his Gore computer.[49] The fact that Long retained his personal cell phone, including the business contacts stored in it, simply does not overlap with Plaintiff's narrow questions.

B. Did Gore Properly Raise the Issue of Waiver and, If So, What is the Appropriate Remedy?

Defendants argue that, "[i]f there was any waiver of Mr. Long's rights against self-incrimination based on the scope of his testimony, it was during his friendly cross" and, therefore, "Gore could have sought to examine Mr. Long within the scope of the purported waiver."[50] Because "Gore chose not to conduct any significant hostile redirect," Defendants continue, Gore is not entitled to strike any portion of Long's testimony.[51] As Defendants point out, Long's testimony during the friendly cross did not retroactively make his earlier testimony during the hostile direct, including any invocation of his privilege against self-incrimination, impermissible. In *Brown*, for example, the Court recognized the defendant's ability to assert her constitutional rights during the Government's hostile direct and, thereafter, waive those rights during a

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49 Tr. 250-51.

50 Surreply at 1-2.

51 *Id.* at 2.

second, friendly direct conducted by her own counsel. What she could not do, however, was *then* resume refusing to answer questions on a third, hostile cross conducted by the Government.[52] Thus, as in *Brown*, had the Court during trial found a waiver here, the proper procedure would have been for Gore to conduct a redirect examination on the matters in issue.

Considering all the circumstances of this case, however, Defendants' argument is untenable because Gore did raise the question of waiver at trial and requested permission, "if Your Honor rules that [there was] a waiver . . . to ask Mr. Long further questions without [being] subject to his Fifth Amendment rights."[53] Because this was a bench trial and the waiver issues presented were relatively complex, the Court expressed a preference for addressing the matter in writing. In addition, Defendants' counsel requested that Gore "please be specific as to which questions and answers [Gore] believe[s] constitute a waiver" so that they could address the issue with greater precision.[54] In other words, Gore did not sit on its rights by failing to conduct at trial a meaningful redirect probing the scope of the purported waiver. Rather, the parties and the Court tacitly agreed to proceed by way of a written request, such as this Motion later

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52 356 U.S. at 157.

53 Tr. 530.

54 Tr. 531-32. After hearing the Court's initial skepticism about whether a waiver had occurred, Gore's counsel similarly stated, "I don't want to make that argument right now." Tr. 531.

filed by Gore. Plaintiff cannot be faulted for accommodating the Court's preference in that regard.

Thus, although Long's subsequent testimony, on its own, does not render his earlier invocations of the privilege against self-incrimination improper, it does subject his answers to further review by the Court for a possible waiver. Here, I have found that allowing the full extent of Long's testimony regarding Waiver Subject 2 might create a waiver. Although both sides made a diligent effort to elicit Long's testimony while respecting his constitutional rights against self-incrimination, I find that certain portions of Long's testimony nevertheless evaded a searching, adverse examination. Some sort of sanction, therefore, is necessary to correct the prejudice suffered by Gore. That sanction, however, should "be tailored to provide equitable treatment to the adversary, as well as accommodating the Fifth Amendment rights of the party invoking the privilege."[55]

In this case, an equitable balancing of the prejudice suffered by Gore against the detriment to Long does not require an express finding of waiver. There is authority permitting a trial court, in its discretion, to strike a witness's self-serving testimony to remedy his or her refusal to answer questions properly within the scope of adverse examination.[56] Although that authority would not necessarily apply where, as here, the

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[55] *McMullen v. Bay Ship Mgmt.*, 335 F.3d 215, 218 (3d Cir. 2003) (citing *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994)).

[56] *See, e.g., Byrne v. Calastro*, 205 Fed. Appx. 10, 14 (3d Cir. 2006) (affirming trial court's decision based "on the undisputed facts presented" where defendants' invocation "of their Fifth Amendment privileges against self-incrimination has resulted in their version of the facts being stricken from the record"); *Carey v.*

witness's refusal occurred *before* the alleged waiver, I am convinced that such a remedy is appropriate for two reasons. First, Defendants stipulated that they would consent to such a remedy if necessary to preserve Long's constitutional rights.[57] Second, the only aspects of Long's self-serving testimony that encompassed questions he previously refused to answer were his statements that he did not communicate, disclose, or use Gore confidential information in *any* form. Therefore, I will admit Long's testimony on direct examination in response to whether he communicated or disclosed confidential information orally, verbally, or in writing. Additionally, to the extent Defendants contend that Long's testimony is consistent with the testimony of other trial witnesses,[58] nothing in this Memorandum Opinion precludes reliance on those other witnesses' testimony to support an argument—or an ultimate finding of fact—that Long did not communicate, disclose, or use Gore confidential information after he left Gore. Thus, I

Bryan & Rollins, 105 A.2d 201, 204 (Del. Super. 1954) ("If, upon rehearing, the claimant persists in his refusal to answer material questions regarding the issue of intoxication, the Board may strike all of the claimant's testimony regarding the accident, with the result that his claim for compensation would be unsupported and, therefore, would be denied.").

[57] Surreply at 4. In particular, I have found that Waiver Subject 2 reasonably related to, and is among the details and particulars of, Long's testimony that he did not communicate or use Gore confidential information in his work at GE. In the Surreply, Long's counsel stated that Long would prefer to have that aspect of his testimony disregarded rather than "to have had a finding of waiver at trial and to have been ordered to respond to additional questioning at trial." *Id.* Long's counsel further stated that, if necessary "to preserve his Constitutional rights, Mr. Long will consent to having the [disputed] testimony . . . disregarded." *Id.*

[58] *See* Defs.' Resp. at 8-9.

will disregard certain portions of Long's testimony, but the scope of the precluded testimony will be relatively narrow.

IV. CONCLUSION

For the reasons stated in this Memorandum Opinion, Gore's Motion to Disregard Mr. Long's Testimony on Certain Subjects is granted in part such that Long's testimony denying that he communicated, disclosed, or used any Gore confidential information after leaving Gore shall be stricken from the record, except to the extent such testimony is limited to communications or disclosures orally, verbally, or in paper format. In all other respects, the Motion is denied.

IT IS SO ORDERED.