

1 Lohan from testifying at trial that she did not use or possess cocaine on the night of the incident or
2 to claim that she did not ingest or possess cocaine on the night of the incident.

3 **A. EVIDENCE ABOUT DEFENDANT LOHAN'S COCAINE USE AND POSSESSION ON**
4 **THE NIGHT OF THE INCIDENT ARE CENTRAL TO THE ISSUES OF THIS CASE**

5 The issue of Defendant Lohan's cocaine use and possession the night of the incident goes
6 directly to the heart of Plaintiff Rice's legal claims that Defendant Lohan assaulted her, behaved
7 negligently in causing her serious danger and emotional harm, intentionally inflicted emotional
8 distress on her, and seriously interfered with her rights to move freely and be safe from violence.
9 Lohan's use and possession of cocaine make it more likely that Ms. Lohan acted recklessly and
10 dangerously toward Plaintiff in becoming intoxicated on illegal drugs and deciding to not only
11 drive but also chase Plaintiff at high speeds until Plaintiff managed to flee and escape to the Santa
12 Monica Police Station. Furthermore, this issue is core to Plaintiff's claim of punitive damages, as
13 the use and possession shed light on Defendant Lohan's mental state of being intoxicated on
14 cocaine at the time of the incident and make it more likely that she acted towards Plaintiff with
15 fraud, malice, and oppression.

16
17 **B. AS A CIVIL DEFENDANT, LOHAN MUST EITHER WAIVE HER FIFTH**
18 **AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION OR ACCEPT THE**
19 **CONSEQUENCES OF HER SILENCE.**

20
21 California law provides for evidentiary sanctions to prevent a party to a civil lawsuit
22 from obstructing a fair trial or use of the Fifth Amendment privilege to gain an advantage in
23 litigation. In a civil proceeding, a witness or party may be required to waive the privilege or
24 accept the civil consequences of silence. *Brown v. United States* 356 U.S. 148, 155-156 (1958);
25 *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 116. Furthermore, "the fact that a man is
26 indicted cannot give him a blank check to block all civil litigation on the same or related
27 underlying subject matter." *Avant! Corp. v. Superior Court*, (20June 21, 201000) 79 Cal. App. 4th
28 876, 882 (quoting *People v. Coleman* (1975) 13 Cal. 3d 876, 886). Defendant Lohan is attempting

1 to use her own criminal acts as just such a blank check in order to avoid admitting prejudicial but
2 relevant information about her drug use and possession on the night of the incident.

3 Should Ms. Lohan not answer these questions, an adverse inference may be drawn from her
4 claim of the self-incrimination privilege in a civil case. *Fross v. Wotton* (1935) 3 Cal.2d 384, 395;
5 *Save A Lot v. Workers' Compensation Appeals Bd.*, 69 Cal. Comp. Cas 337 (Cal. App. 5th Dist.
6 2004); *Fuller v. Superior Court*, 87 Cal. App. 4th 229, 306 (Cal. App. 2d Dist. 2001); *Klein v.*
7 *Superior Court*, 198 Cal. App. 3d 894, 915 (Cal. App. 6th Dist. 1988). This is also the rule
8 generally established by the Supreme Court and in other jurisdictions in cases stating that the Fifth
9 Amendment does not forbid adverse inferences against parties to civil actions when they refuse to
10 testify. *Baxter v. Palmigiano*, 425 U.S. 308, 318, (1976); *Mitchell v. U.S.* 526 U.S. 314 (1999);
11 *S.E.C. v. Caramadre*, 2010 WL 2380734, 3 (D.R.I. 2010); *In re Alstom SA*
12 454 F.Supp.2d 187, 208 n. 17 (S.D.N.Y. 2006); *S.E.C. v. Merrill Scott & Associates, Ltd.*, 505
13 F.Supp.2d 1193, 1212 n. 15 (D.Utah 2007) citing *Baxter v. Palmigiano*, 425 U.S. 308, 96 S.Ct.
14 1551, 47 L.Ed.2d 810, (1976); *Antonio v. Security Services of America, LLC* 2010 WL 1266729, 27
15 (D.Md.,2010.); McCormick on Evidence, Title 6. Privilege: Constitutional Chapter 13. The
16 Privilege Against Self-Incrimination § 136; 91 YLJ 1062, 1111, Yale Law Journal, "The
17 Conjuror's Circle--The Fifth Amendment Privilege in Civil Cases (1982).

18
19 Should Ms. Lohan continue to assert the Fifth Amendment to avoid answer questions about
20 her drug use and possession on the night of the incident, then findings of fact should be entered in
21 this case that (1). Ms. Lohan was under the influence of cocaine on the night of the incident; (2).
22 Ms. Lohan admits that the cocaine in her jeans on the night of the incident did not belong to Tarin
23 Graham or any other third party; (3). Ms. Lohan was found with cocaine in her jeans when arrested
24 by the police; (4). the substance found in a packet in Ms. Lohan's jeans was discovered to be
25 cocaine by the LA Sheriff's Department Science Laboratory; (5). Ms. Lohan's urine sample taken
26 on the night of the incident was analyzed by the LA Sheriff's Department Science Laboratory and
27 found to contain two types of cocaine.

28

**MOTION IN LIMINE TO ESTABLISH FINDINGS OF FACT ABOUT COCAINE USE AND
POSSESSION BY DEFENDANT LOHAN ON THE NIGHT OF THE INCIDENT**

1 In the alternative, Defendant Lohan should be precluded from testifying at trial that she did
2 not use or possess cocaine on the night of the incident and Plaintiff should be permitted to argue to
3 the jury that she has not denied cocaine use or possession. She should be precluded from
4 "blow[ing] hot and cold" by first claiming the constitutional privilege against self-incrimination,
5 and then testifying at trial on these matters. *A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554,
6 566. (1977). The Court is also entitled to strike her previous testimony on this issue. *Alvarez v.*
7 *Sanchez* (1984) 158 Cal.App.3d 709, 713.

8
9 **CONCLUSION**

10 Based on the foregoing, Plaintiff Tracie Rice respectfully requests that this Court enter an
11 order establishing findings of fact that (1). Ms. Lohan was under the influence of cocaine on the
12 night of the incident; (2). the substance found in a packet in Ms. Lohan's jeans was discovered to
13 be cocaine by the LA Sheriff's Department Science Laboratory; (3). Ms. Lohan admits that the
14 cocaine in her jeans on the night of the incident did not belong to Tarin Graham or any other
15 person besides Ms. Lohan herself; (4). Ms. Lohan's urine sample taken on the night of the incident
16 was analyzed by the LA Sheriff's Department Science Laboratory and found to contain two types
17 of cocaine or, in the alternative, preclude Defendant Lohan from testifying on this issue or denying
18 that she ingested or possessed cocaine on the night in question and strike her previous testimony on
19 this issue.

20 DATED: June 21, 2010

21
22 

23 Victoria Don

24 Attorney for Plaintiff Tracie Rice

1
2 **PROOF OF SERVICE**

3 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

4 I am a resident of the aforesaid county, State of California; I am over the age of 18 years
5 and not a party to the within action; my business address is 723 Ocean Front Walk, Venice,
6 California 90291.

7 On June 21, 2010, I served the foregoing document described as:

8 **MOTION IN LIMINE TO ESTABLISH FINDINGS OF FACT ABOUT COCAINE USE**
9 **AND POSSESSION BY DEFENDANT LOHAN ON THE NIGHT OF THE INCIDENT OR**
10 **IN THE ALTERNATIVE PRECLUDE DEFENDANT FROM TESTIFYING ABOUT**
11 **DRUG USE AND POSSESSION ON THE NIGHT OF THE INCIDENT AND STRIKE**
12 **HER PREVIOUS TESTIMONY ON THIS ISSUE**

13 on all interested parties in this action by placing ___ an original or X a true copy thereof
14 enclosed in sealed envelopes addressed as follows:

15 Edwin F. McPherson
16 McPherson Rane LLP
17 1801 Century Park East
18 24th Floor
19 Los Angeles, CA 90067
20 Fax: (310) 553-9233

21 Randall Billington
22 17100 Gillette Avenue, Suite 137
23 Irvine, CA 92614
24 (951) 544-6560 tel
25 (951) 346-5588 fax

26 X **[PERSONAL DELIVERY]** I caused the foregoing document to be
27 personally served on the interested party.

28 X **[BY FAX]** I transmitted said document to the above fax number(s).
(To Randall Billington Only)

X **[STATE]** I declare under penalty of perjury under the laws of the State of
California that the foregoing is true and correct.

Executed on June 21, 2010, at Venice, California.


Jonathan A. Cotton