IT IS ORDERED as set forth below:

Date: January 6, 2012

James E. Massey
U.S. Bankruptcy Court Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:	CASE NO. 09-82915
Hindu Temple and Community Center of Georgia, Inc.,	CHAPTER 11
Debtor.	JUDGE MASSEY
Lloyd T. Whitaker, Trustee,	
Plaintiff,	
v.	ADVERSARY NO. 09-9080
Annamalai Annamalai, et al.,	
Defendants.	

ORDER DENYING MOTION TO "UNDEEM" ADMISSIONS

On May 9, 2011, Defendants Annamalai Annamalai and Parvanti Sivanadiyan filed through counsel a motion "to undeem admissions" that the Court, in orders entered on November 1 and 3, 2010, deemed those Defendants to have made by reason of their failure to

respond to requests for admissions. (The motion might be read to name two other Defendants as movants, but nothing in the record shows that those persons were ever served with requests for admissions). To put the motion in context, the events leading up to its filing are set out below.

Background

In this adversary proceeding, Plaintiff Lloyd T. Whitaker, as Chapter 11 Trustee of Debtor Hindu Temple and Community Center of Georgia, Inc., seeks, among other demands for relief, a judgment against various Defendants, including Defendant Annamalai Annamalai, to recover alleged prepetition fraudulent transfers and unauthorized postpetition transfers and to declare that Mr. Annamalai is the alter ego of the Debtor such that he should be liable for the debts owed by the Debtor.

In August 2010, Plaintiff served interrogatories, document requests and requests for admissions on Defendant Annamalai. Each of these discovery requests contained numerous separate questions, requests describing different types of documents and requests to admit several different statements of fact. Motion to Compel, Exhibits A and B, pp. 9-29, Doc. No. 75.

Mr. Annamalai filed responses to the discovery requests on September 22, 2010 and October 6, 2010 in which he did not respond to specific requests for information, documents or admissions but instead made this statement:

> On advice of counsel, I assert my privilege under the Fifth Amendment to the United States Constitution against being compelled to give any testimony that might be used against me, and therefore respectfully decline to answer.

Response To Plaintiff's First Continuing Interrogatories And Request For Production Of Documents, Doc. No. 70; Response To Plaintiff's First Request For Admissions, Doc. No. 71.

On October 14, 2010, the Trustee moved for an order compelling Mr. Annamalai to respond to discovery requests or, alternatively, drawing adverse inferences from his failure to

respond, including that the unanswered requests for admissions be deemed admitted. The Trustee filed a similar motion on October 15, 2010, seeking the same relief with respect to several Defendants, one of whom was Parvanti Sivanadiyan. That motion pointed out that Parvanti Sivanadiyan had not responded to any discovery requests. The Court held a hearing on the motions on October 27, 2010, and neither Mr. Annamalai nor Parvanti Sivanadiyan appeared.

The Court granted that motion in part in an order entered on November 1, 2010, by determining that the requests for admissions served on Mr. Annamalai were deemed admitted due to his failure to respond to such requests and by requiring him either to answer the interrogatories and respond to the document requests or to show how he is entitled to Fifth Amendment protection with respect to each interrogatory and document request.[1] The record does not show that Mr. Annamalai ever responded to the interrogatories or requests to produce documents.

On November 3, 2010, the Court entered an order granting the motion to compel Parvanti Sivanadiyan to provide discovery but deeming the requested admissions to have been admitted. On January 13, 2011, Parvanti Sivanadiyan, who is Mr. Annamalai's spouse, filed, for the first time, responses to interrogatories, requests to produce documents and requests for admissions in which she refused to respond on Fifth Amendment grounds using the same language used by Mr. Annamalai quoted above.

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[1] Fed. R. Civ. P. 37(a) addresses motions to compel discovery under Rules 33 (interrogatories) and 34 (requests to inspect and produce). Rule 37 does not address a failure to admit except in subsection (c)(2) dealing recovery of fees and costs incurred in successfully proving a matter that the opposing party did not admit. Fed. R. Civ. P. 36 provides in subsection (a)(3) that a matter is admitted unless denied within the time frame provided and in subsection (b) that the matter admitted is conclusively established unless the court permits withdrawal of the admission, which would have to be made by the party otherwise bound by the admission.

On April 15, 2011, Plaintiff moved for partial summary judgment against Mr. Annamalai based on the deemed admissions. Mr. Annamalai filed no response to the motion as such but instead filed the motion to undeem admissions on May 9, 2011.

ANALYSIS

In the motion to undeem admissions, Movants contend that holding them to the deemed admissions would infringe on their right under the Fifth Amendment of the U.S. Constitution not to incriminate themselves. This argument is without merit.

Mr. Annamalai made a blanket claim that under the Fifth Amendment, he was not required to respond to any request to admit. Parvanti Sivanadiyan did not respond to the requests for admission until two months after the entry of the order that confirmed her admissions based on a failure to answer. Her belated response mirrored that of Mr. Annamalai in making a blanket claim that she did not have to answer, citing the Fifth Amendment. The law is to the contrary – a claim of Constitutional privilege must be asserted separately as to each request to admit.

In *Anglada v. Sprague,* 822 F.2d 1035 (11th Cir. 1987), the defendants contended that the lower court erred in entering a judgment against them after a jury trial, which they did not attend, on the ground that forcing them to answer questions would have infringed their Fifth Amendment rights. In affirming the judgment, the Court of Appeals opined that "a defendant's 'blanket' refusal to answer all questions is unacceptable since it forces the reviewing court to speculate as to which questions would tend to incriminate. *United States v. Malnik*, 489 F.2d 682, 685 (5th Cir.), cert. denied, 419 U.S. 826, 95 S.Ct. 44, 42 L.Ed.2d 50." *Id.* at 1037. *See also, Baxter v. Palmigiano,* 425 U.S. 308, 318, 96 S.Ct. 1551, 1558 (1976) ("the prevailing rule [is] that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they

refuse to testify in response to probative evidence offered against them: the Amendment "does not preclude the inference where the privilege is claimed by a party to a Civil cause." 8 J. Wigmore, Evidence 439 (McNaughton rev. 1961).")

Movants have made no showing that responding to any of the requests to produce or other discovery requests would tend to incriminate either one of them. They have not filed amended responses to each separate request with any explanation that would require an *in camera* meeting with the Court to explain their position. Instead, without offering any amendment to their responses, they insist that the Court was obligated to first offer them an opportunity to discuss *in camera* their blanket refusal to respond, relying on *Estate of Fisher v. C.I.R.*, 905 F.2d 645 (2nd Cir. 1990). (Brief in Support of Motion to Undeem Admissions, pp. 5-6, Doc. No. 165.) That reliance is misplaced because in that case, the person claiming the privilege did so with respect to specific questions, as the Second Circuit pointed out:

> Although Fisher refused on Fifth Amendment grounds to respond to the majority of the discovery questions posed, he did not make an impermissible blanket claim of Constitutional privilege. *United States v. Malnik*, 489 F.2d 682, 686 (5th Cir.), cert. denied, 419 U.S. 826, 95 S.Ct. 44, 42 L.Ed.2d 50 (1974) (judges cannot speculate "that any response to all possible questions would or would not tend to incriminate the witness.").

Id. at 649.

Rule 36(b) of the Federal Rules of Civil Procedure, made applicable by Rule 7036 of the Federal Rules of Bankruptcy Procedure, provides;

> (b) Effect of an Admission; Withdrawing or Amending It. A matter admitted under this rule is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended. Subject to Rule 16(e), the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits. An admission under this rule is not an admission for any other purpose and cannot be used against the party in any other proceeding.

Rule 36(b) requires a showing of two factors as a basis for permitting the withdrawal of an admission.

First, the court must conclude that permitting the withdrawal "would promote the presentation of the merits of the action." The primary objective of this factor is to encourage resolution of disputes over material facts on the merits, rather than by default. *Smith v. First Nat. Bank of Atlanta*, 837 F2d. 1575, 1577. Movants did not address this factor in their motion. They did not show in the motion or supporting brief how permitting withdrawal could or would result in the presentation of the merits from their viewpoint. They did not provide responses to each one of the deemed admissions that could enable the Court to reach different factual conclusions than it would otherwise reach based on the admission. Alternatively, they did not show how responding to any particular request to admit would tend to incriminate either one or both of them. Neither Mr. Annamalai nor Parvanti Sivanadiyan entered an appearance at a hearing on the motion held on December 15, 2011 or otherwise made an argument on their motion at that hearing.

In *Smith*, the failure to respond to requests for admissions was inadvertent. Here, Plaintiff informed Mr. Annamalai in his motion to compel filed in October 2010 that a blanket claim of privilege against self-incrimination was not viable and that he had to respond to each discovery request. Motion to Compel, p. 5, Doc. No. 75. Mr. Annamalai chose to ignore that admonition. He did not appear at the hearing held on October 27, 2010 in opposition to Plaintiff's motion to compel and has not otherwise attempted in good faith to comply with Rule 36(b). Even the attorney who represented Movants on this motion made it clear in the supporting brief that discovery requests had to be addressed individually. But consistent with a pattern seeking to

avoid a decision on the merits, Movants made no effort to emerge from their hiding place behind a blanket refusal to respond. In short, Movants have made no effort to reach the merits of the claims made by Plaintiff in complaint, as amended.

The second factor under Rule 36(b) that a court must consider in ruling on a motion to withdraw an admission is whether the requesting party would be prejudiced in maintaining or defending the action on the merits. Movants did not address this factor in their motion other than pointing out that prejudice must be "real," citing *Perez v. Miami-Dade County*, 297 F.3d 1255 (11th Cir. 2002). The facts in *Perez* have no similarity to the facts here. In that case, Perez, the plaintiff, was an undercover police officer who joined a chase for robbery suspects. Another police officer, mistaking Perez and his partner as the suspects, drove his car into the car in which Perez was riding, thereby injuring Perez. Perez sued his employer, Miami-Dade County, on various counts, including having a policy that alleged permitted officers to use unnecessary force, negligence and violation of state and federal statutes. The County failed to respond to admissions and moved to withdraw them, which the district court denied with no analysis under Rule 36(b). The Court of Appeals vacated the district court's order. In rejecting Perez's contention that he would be prejudiced if the withdrawal were permitted, the Court of Appeals noted:

> . . . Perez knew from the very beginning-and continued to be made aware-that he would have to prove many of the elements of his case now deemed admitted, he would have suffered no prejudice had the court allowed a withdrawal. In fact, Perez had been engaging in discovery all along, albeit with some resistance by the County, and had only relied on the admissions for six days . . . .

Id. at 1267-1268. Here by contrast, Movants have provided no discovery despite being ordered to do so.

Their motion to undeem admissions does not seek to permit them to make appropriate responses to the requests for admissions. Instead, the motion, if granted, would in effect validate their refusals to respond based on a blanket claim of Constitutional privilege, shifting to Plaintiff the burden of compelling them to respond to each individual request. This would stand Rule 36 on its head. Plaintiff in his response to the motion relies on the pattern of conduct of Movants, including their failure to provide any discovery requests, and the passage of time as evidencing the prejudice Plaintiff would suffer.

The motion provides no basis for supposing that Plaintiff would not be prejudiced by permitting a withdrawal of admissions where Movants have failed to provide any discovery at all in over a year of litigation. The Court agrees with Plaintiff and is persuaded that permitting withdrawal of the admissions would prejudice Plaintiff in maintaining the action on the merits.

Both factors must be present to warrant permission to withdraw admissions. Neither factor is present here.

For these reasons, Movants' motion to undeem admissions is DENIED. The Clerk is directed to serve a copy of this order on counsel for Plaintiff, on Movants, on counsel for all other Defendants and on other Defendants not represented by counsel.

END OF ORDER