UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

IN RE:	:	CASE NO. G07-22331-REB
MARK EDWARD GRAY,	:	
Debtor.	:	
	:	CONTESTED MATTER
KLUGER, PERETZ, KAPLAN, & BERLIN, P.L.,	:	
Movant,	:	
v.	:	CHAPTER 7
MARK EDWARD GRAY,	:	
Respondent.	:	JUDGE BRIZENDINE

ORDER DENYING MOTION TO COMPEL DISCOVERY

Before the Court is the motion of Movant Kluger, Peretz, Kaplan, & Berlin, P.L., filed in this case on June 13, 2008, to compel discovery under Fed.R.Civ.P. 37, as incorporated herein through Fed.R.Bankr.P. 9014(c) and 7037, based on the alleged failure of Debtor-Respondent named above to abide by the terms of that certain court order authorizing Debtor's examination under Fed.R.Bankr.P. 2004.

Movant contends Debtor improperly failed to answer certain questions posed during an examination held on June 11, 2008, at which time Debtor asserted the privilege against self-incrimination as provided under the Fifth Amendment to the United States Constitution. Aside from his name, Debtor refused to answer any further questions, many of which concerned his responses in his bankruptcy schedules which were submitted under penalty of perjury, as well as

the veracity of certain documentation previously produced under penalty of perjury in response to examination under Bankruptcy Rule 2004. In support of its motion, Movant argues that Debtor waived his privilege insofar as the questions at issue concern matters already provided by Debtor. Citing *Scarfia v. Holiday Bank*, 129 B.R. 671, 675 (M.D.Fla. 1990) (cites omitted), Movant states that Debtor cannot voluntarily provide certain information under penalty of perjury, and then "refuse to answer any further questions on the subjects covered in his earlier testimony [as same] would allow Debtor to prematurely close the door which he freely opened."

In reply, Debtor counters that the Fifth Amendment protection he properly invoked in this case extends quite broadly to any responses that "would furnish a link in the chain of evidence needed to prosecute" him for a federal crime. *Hoffman v. United States*, 341 U.S. 479, 486-87, 71 S.Ct. 814, 95 L.Ed. 1118 (1951). Debtor states that he has been told by the U.S. Attorney's Office in this district that he is currently under criminal investigation by the Internal Revenue Service for unspecified financial matters, and that his failure to answer is based on his assertion of his Fifth Amendment rights as advised by counsel. Although a witness need not prove the hazard in issue, the witness must produce "credible reasons why his answers would incriminate him;" such burden is "minimal," however, to avoid "surrender of the very protection the privilege is intended to guarantee." *In re Keller Financial Services of Florida, Inc.*, 259 B.R. 391, 400 (Bankr. M.D.Fla. 2000), quoting *Scarfia*, 129 B.R. at 674, *In re Lindsey*, 229 B.R. 797, 801 (10th Cir. B.A.P. 1999), and *Hoffman*, 341 U.S. at 486.

Upon careful review of the motion and case authority, the Court finds that it is evident from the implications of the questions cited herein that an answer or answers by Debtor to same could lead to an "injurious disclosure" regarding Debtor's financial situation during the

time prior to and surrounding his bankruptcy filing. Compare *Keller*, 259 B.R. at 399, discussing *Hoffman*, 341 U.S. at 486-87. Admittedly, Debtor voluntarily produced the information in his schedules and the documents furnished in response to Movant's production request. Although Debtor's right under the Fifth Amendment might not extend to the contents of such papers, a reasonable possibility exists that the act of testifying in connection with those papers could form a link in an ultimately incriminating chain of evidence in the pending criminal investigation of Debtor by the federal government. As such, this Court concludes that Debtor is protected from answering any questions regarding such papers in this matter or concerning his bankruptcy schedules as filed herein.

Finally, the Court observes that the Chapter 7 Trustee has not joined in the motion and no indication has been suggested that the Debtor's refusal to answer has adversely affected administration of this no-asset case. Compare *In re Fekos*, 148 B.R. 10 (Bankr. W.D.Pa. 1992).

Accordingly, for the above reasons, it is

ORDERED that the motion of Kluger, Peretz, Kaplan, & Berlin, P.L. to compel discovery as to the Debtor herein be, and hereby is, **denied**.

The Clerk is directed to serve a copy of this Order upon counsel for Movant, Debtor's counsel, the Chapter 7 Trustee, and the United States Trustee.

IT IS SO ORDERED.

At Atlanta, Georgia this 9th day of October, 2008.

ROBERT E. BRIZENDINE
UNITED STATES BANKRUPTCY JUDGE