IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MARYLAND
at Baltimore

In re:	*	
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COLEMAN CRATEN, L.L.C.,	*	**Case No. 99-56381-SD**
	*	
Debtor,	*	
	*	
In re:	*	
	*	
MONICA LYNN COLEMAN,	*	**Case No. 99-56239-SD**
	*	**Chapter 7**
Debtor.	*	**Jointly administered under Case**
	*	**No. 99-56381-SD**
	*	
* * * * * * * *		

MEMORANDUM OPINION AND ORDER
GRANTING IN PART AND DENYING IN PART
TRUSTEE'S MOTION TO COMPEL

Before the court is the Trustee's Motion to Compel the Debtor to Answer Omnibus Examination Questions and a Response from the Debtor. For the reasons stated below, the Court will grant the Trustee's motion, with limited exceptions.

Coleman Craten, LLC ("Coleman Craten") is a limited liability company formed in 1998 for the asserted purpose of providing investment-related services. Monica Lynn Coleman ("Ms. Coleman") was the majority owner and senior officer of Coleman Craten. On May 7, 1999, Ms. Coleman filed a Voluntary Petition for relief under Chapter 7 of the Bankruptcy Code. On May 11, 1999, Coleman Craten filed a Voluntary Petition for relief under Chapter 11 of the Bankruptcy Code. On May 13, 1999, the court converted Coleman Craten's case to Chapter 7 because it was a stockbroker and not eligible to be a debtor under Chapter 11. 11 U.S.C. §109(d). The U.S. Trustee appointed Lori Simpson

to serve as the trustee in both cases. On May 24, 1999, the court ordered that the two cases be jointly administered under Case Number 99-5-6381.

On May 17, 1999 the Trustee filed emergency motions to examine Monica L. Coleman and Coleman Craten pursuant to Fed. R. Bankr. P. 2004 (99-5-6381-SD-P.24). At a hearing on January 20, 2000 the parties raised a number of issues, including the scope of discovery, whether the Trustee would be permitted to depose Ms. Coleman, and what questions the Trustee would be permitted to ask Ms. Coleman at that deposition. Ms. Coleman agreed to be deposed, but was initially concerned about the scope of the deposition – i.e., she did not want the deposition to be as broad as a typical Rule 2004 examination. (*Transcript of January 20, 2000 Proceedings* at 10.) The court first informed Ms. Coleman that the scope of discovery would not be limited to questions about the allegations in her Complaint, but that the Trustee could discover "anything likely to, or possibly leading to information that would be relevant to the subject of the Complaint." (*Id.* at 11.) The court acknowledged that the scope of the deposition would not be as broad as a typical Rule 2004 examination, but stated that the Trustee would be able to ask "questions about [Ms. Coleman's] behavior, or [her] knowledge of other people's behavior, as it relates to the allegations in [the] Complaint" and that the Trustee "could go into their defenses, which might be a failure of cooperation, they had to work harder, they had to do certain things, because they were being thwarted. . ." (*Id*.) Ms. Coleman stated for the record that she had no objection to such an examination. (*Id* at 12.)

At the beginning of the hearing, Ms. Coleman had indirectly indicated that she might raise the Fifth Amendment at her deposition. Trustees' counsel noted that there were "four pending matters" for which he had been attempting to schedule Ms. Coleman's deposition. (*Id*. at 14). In light of Ms. Coleman's indication that she would assert her Fifth Amendment privilege at these depositions, there

was some concern that it might be burdensome on the parties to hold multiple depositions. Therefore, the court decided to allow the Trustee to hold one mega-deposition ("omnibus examination") where the Trustee would be permitted to ask all the questions she had about "all the matters and the related matters and everything else." (*Id*. at 16). That is, the scope of the examination would go beyond the limits set for the examination on issues related to the present adversary proceeding. Ms. Coleman agreed to carve out up to a day and a half to allow the Trustee to ask "all the questions they want, regardless of whether it's 2004 or a deposition in this adversary proceeding, or a deposition against other motions, just let him take all his topics and just ask you questions for basically a day and a half." (*Id.* at 20). Ms. Coleman stated "Yes sir, We've already scheduled that." (*Id.*) Ms. Coleman received notice during the hearing to attend the omnibus examination at the offices of the Trustee's counsel.

Ms. Coleman appeared for her omnibus examination on March 21 and March 22; however, on each date she invoked her Fifth Amendment privilege against self-incrimination to almost every question asked by Trustee's counsel. As the transcript of the omnibus examination reflects, Ms. Coleman refused to answer even general background questions regarding such topics as her present address, employment, marital status, educational background, professional licenses, information about her family members, previous criminal history, previous deposition testimony, and information about her son, Richard Coleman, Jr. (See *Deposition of Monica Lynn Coleman*, Page 1206, Line 18 to Page 134, Line 13; Page 336, Line 15 to Page 337, Line 6; Page 346, Line 9 to Page 348, Line 19.)

In response to questions concerning her conduct regarding investors, Ms. Coleman also asserted her Fifth Amendment privilege to questions concerning her employment at Legg Mason, the existence of Coleman Craten Mussleman, complaints filed against her with the NASD, the existence and business

practices of Coleman Craten, names and nature of investments of investors, including specific names from creditor listings, and her relationship with Donald Federoll. (Id. at Page 134, Line 14 to Page 250, Line 19; Page 348, Line 20 to Page 371, Line 20; Page 385, Line 7 to Page 388, Line 14.)

Ms. Coleman also asserted her Fifth Amendment privilege when asked about her assets and liabilities, including but not limited to a potential loan from P.J. Curran, the filing of income tax returns; bank accounts, real estate, motor vehicles, stocks and securities, insurance policies, investments, trust funds, lawsuits, creditors, charitable contributions, payment for her son's birthday party, and deposits to her husband Richard Coleman's bank accounts. (Id. at Page 251, Line 3 to Page 290, Line 116; Page 328, Line 19 to Page 336, Line 14; Page 337, Line 7 to Page 346, Line 8; Page 371 Line 21 to Page 385, Line 2.)

Ms. Coleman also asserted her Fifth Amendment privilege in response to questions about what evidence she might possess tending to support her affirmative claims against the Trustee. (Id. at Page 8, Line 20 to Page 103 Line 19; Page 300 Line 3 to Page 328, Line 18.) She further asserted the Fifth Amendment privilege to questions seeking information regarding possible hindrance, delay or defrauding of a creditor by concealing, moving, destroying, transferring, or mutilating of property belonging to Ms. Coleman or Coleman Craten; possible concealment, destruction, mutilation, falsification, or omission of recorded information of the financial condition of Ms. Coleman or Coleman Craten; possible making of false statements or withholding of information regarding the estate from the Trustee; and a failure of Ms. Coleman to explain any loss of assets or deficiency of assets to meet her and Coleman Craten's liabilities. (Id. at Page 157, Line 1 to Page 260, Line 18: Page 273, Line 5 to Page 290, Line 16.)

As a result, the Trustee filed its Motion to Compel. The Trustee argues that Ms. Coleman improperly invoked her Fifth Amendment privilege at the omnibus examination by making a blanket claim. The Trustee further alleges that Ms. Coleman waived her Fifth Amendment Privilege with respect to certain information by filing her Voluntary Petition under Chapter 7 of the Bankruptcy Code on May 7, 1999 and by filing Coleman Craten's Voluntary Petition under Chapter 11 of the Bankruptcy Code on May 11, 1999.

As mentioned above, Ms. Coleman has filed a response to the Trustee's Motion to Compel. She asserts that the Trustee's motion violates the "pending proceeding" rule. She also disputes the Trustee's assertion that she filed a "blanket" Fifth Amendment privilege claim. Finally, Ms. Coleman alleges that the Trustee's motion violates her rights under 11 U.S.C. §344.

I. Pending Proceeding Rule

Ms. Coleman asserts that the Trustee's "request for the Court to Compel Monica Coleman to answer omnibus (2004) examination questions is improper as the request is moot because of the 'pending proceeding' rules under bankruptcy law." (*Debtor's Memorandum in Response to Trustee's Motion to Compel* at 3.) The general rule is that a party cannot obtain an order authorizing a Rule 2004 examination while an adversary proceeding or contested matter is pending. See Szadkowski v. Sweetland (In re Szadkowski), 198 B.R. 140 (Bankr.D.Md. 1996). The rule is intended to protect debtors from the broad and far-reaching scope of Rule 2004 examinations by requiring the parties to follow the more restrictive discovery rules under the Federal Rules of Civil Procedure. Id. As several adversary proceedings have already been filed in these consolidated cases, this rule would ordinarily apply. However, "[i]f otherwise proper under the circumstances, a discovery request made pursuant to Rule 2004 for the purpose of examining an entity or obtaining information that is unrelated to a pending

adversary proceeding or contested matter is not automatically precluded." In re Szadkowski, 198 B.R. at 142. Further, in pending adversary proceedings Ms. Coleman specifically consented to combining all matters into a two day deposition in order to avoid multiple appearances. The transcript of the January 20, 2000, hearing in this matter before the court reflects that Ms. Coleman consented to such an all-encompassing deposition:

THE COURT:	Okay. Now, on the issue of multiple times showing up, would it be acceptable to you to take, in effect, carve out a day or day and a half, which is roughly what he's saying, that you can agree on, and show up once, and let him ask all the questions they want, regardless of whether it's 2004 or a deposition in this adversary proceeding or a deposition against other motions, just let him take all his topics and just ask you questions for basically a day and a half?
MS. COLEMAN:	Yes, sir. We've already scheduled that.
THE COURT:	Okay. But it would be one session, but it would apply to all of the things they're after? Okay.

(*Transcript of January 20, 2000 Proceedings*, at 20). As a result of this agreement, the prior proceeding rule is inapplicable in this instance.

II. Fifth Amendment Privilege (Ms. Coleman and Coleman Craten, LLC)

The Fifth Amendment provides that "[n]o person shall be compelled in any criminal case to be a witness against himself." The privilege protects an individual against compulsion to make any disclosure that she or he "reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." Kastigar v. United States, 406 U.S. 441, 444-45 (1972). See also Hoffman v. United States, 341 U.S. 479, 486 (1951); U.S. v. Sharp, 920 F.2d 1167, 1170 (4th Cir. 1990). The Fifth Amendment "not only protects the individual against being involuntarily called as a witness against 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. . ." Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). An individual may assert this privilege against self-incrimination at

any state in a criminal or civil proceeding, including a bankruptcy proceeding. See McCarthy v. Arndstein, 266 U.S. 34, 40 (1924); Martin-Trigona v. Belford (In re Martin-Trigona), 732 F.2d 170, 175 (2d Cir. 1984).

Only an individual may assert a claim of privilege against self-incrimination. In re Marine Power & Equip. Co., 67 B.R. 643, 649 (Bankr.W.D.Wash. 1986). "[F]or purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals. . .[in that] a corporation has no Fifth Amendment privilege." Id. *citing* Curio v. United States, 354 U.S. 118 (1957); Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm'n, 221 U.S. 612 (1911); Hale v. Henkel, 201 U.S. 43 (1906); see also In re Toyota of Morristown, Inc., 120 B.R. 925, 927 (Bankr. E.D. Tenn. 1990)("It is well settled that corporations and various other collective entities are not entitled to assert any fifth amendment privilege since such a privilege is available only to natural individuals") *citing* Braswell v. United States, 487 U.S. 99 (1988); United States v. Doe, 465 U.S. 605 (1984); Fisher v. United States, 425 U.S. 391 (1976); Bellis v. United States, 417 U.S. 85 (1974); United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911). As a result, "a corporate officer cannot refuse to testify or produce corporate documents on the grounds that he may thereby incriminate the corporation." In re Marine Power & Equip. Co., 67 B.R. at 649, *citing* Curio v. United States, 354 U.S. 118 (1957); Baltimore & Ohio R.R. Co. v. Interstate Commerce Comm'n, 221 U.S. 612 (1911); Hale v. Henkel, 201 U.S. 43 (1906); see also In re Toyota of Morristown, Inc., 120 B.R. at 927 ("It is also settled that when the business records of a corporation are subpoenaed from the corporation or from the custodian of records of the corporation, the officers or the custodian of records of the corporation, in their representative capacity, cannot withhold production on fifth amendment

grounds.") *citing* Braswell v. United States, 487 U.S. 99 (1988); In re Grand Jury Proceedings (Morganstern), 771 F.2d 145 (6th Cir. 1985).

Therefore, Ms. Coleman cannot assert her Fifth Amendment privilege to refuse to answer questions on the grounds that her testimony might tend to incriminate Coleman Craten, LLC. Nor may she assert the privilege to withhold production of Coleman Craten's records or other subpoenaed documents.

A. Assertion of the Fifth Amendment Privilege

Although the Fifth Amendment privilege may be asserted in bankruptcy proceedings, it must still be properly asserted. A witness's "say-so does not of itself establish the hazard of incrimination." Hoffman v. United States, 341 U.S. at 486. See also In re Connelly, 59 B.R. 421, 433 (Bankr.N.D.Ill. 1986)("Debtor 'is not exonerated from answering merely because he declares in doing so he would incriminate himself.' . . .[citing Hoffman]"; In re Candor Diamond Corp., 21 B.R. 147, 152 (Bankr.S.D.N.Y. (1982). It is for the court to decide whether an invocation of the Fifth Amendment is justified, and if so, to what extent. Hoffman, 341 U.S. at 486; U.S. v. Sharp, 920 F.2d at 1170. Therefore, "it is incumbent on the court to [inquire] into the legitimacy and scope" of a party's assertion of the privilege." In re Connelly, 59 B.R. at 444, citing United States v. Goodwin, 625 F.2d 693, 701(5th Cir. 1980). In U.S. v. Sharp, the Court of Appeals for the Fourth Circuit explained the duty of the trial judge first pronounced in Hoffman:

> In making this determination, a court asks essentially two things. The first is whether the information is incriminating in nature. This may appear in either of two ways. It may be evident on its face, in light of the question asked and the circumstances of its asking. If it is so facially evident, that ends this inquiry. If it is not, the person asserting the privilege may yet demonstrate its incriminating potential by further contextual proof. If the incriminating nature of the information is established by either route, there remains the question whether criminal prosecution is sufficiently a possibility, all things considered, to trigger the need for constitutional protection. As to this, the proper test

> simply assesses the objective reasonableness of the target's claimed apprehension of prosecution. And on the better view of things here, the reasonableness of a claimed apprehension should simply be assumed once incriminating potential is found, unless there are genuine questions about the government's legal ability to prosecute. That is to say, once incriminating potential is found to exist, courts should not engage in raw speculation as to whether the government will actually prosecute, and should only pursue that inquiry when there are real questions concerning the government's ability to do so because of legal constraints such as statutes of limitation, double jeopardy, or immunity.

920 F.2d at 1170-71 (internal citations omitted).

The party asserting the privilege must provide a foundation for the assertion of the privilege so that the [court] may determine whether the privilege may be invoked. In In re Morganroth, 718 F.2d 161, 167 (6th Cir. 1983), the Court of Appeals for the Sixth Circuit noted that "a district court must be able to decide if assertion of the privilege is justified and should require the defendant to answer if it clearly appears to the court that the witness is mistaken in asserting the privilege." The district court must be able to balance the witness's or party's constitutional right to invoke the privilege against the litigant's right to information. Id. at

170.

Several courts, including the Court of Appeals for the Fourth Circuit, have discussed the proper procedure for invocation of the Fifth Amendment privilege. See North River Ins. Co. v. Stefanou, 831 F.2d 484, 486 (4th Cir. 1987); In re Morganroth, 718 F.2d at 167; Baker v. Limber, 647 F.2d 912, 916 (9th Cir. 1981). These decisions were shaped by the Supreme Court's determination that before the Fifth Amendment privilege applies, it must be evident to the court that the risk of prosecution must be "real and appreciable," not merely "remote and speculative." Zicarelli v. New Jersey State Comm'n of Investigation, 406 U.S. 472 (1972). To carry out its obligation to conduct a proper inquiry into the legitimacy and scope of Ms. Coleman's assertion of her Fifth Amendment privilege, the court must "go

beyond the threshold 'possibility of prosecution and into the realm of 'real danger of incrimination' if debtor were to respond to particular inquiries." In re Connelly, 59 B.R. 421, 433 (Bankr.N.D.Ill. 1986); see also United States v. Goodwin, 625 F.2d at 701.

In Morganroth, the court explained that the party asserting the privilege "must supply such additional statements under oath and other evidence to the District Court in response to each question propounded so as to enable the District Court to reasonably identify the nature of the criminal charge for which [the witness] fears prosecution, . . . and to discern a sound basis for the witness' reasonable fear of prosecution." 718 F.2d at 167. As interpreted by the Court of Appeals for the Fourth Circuit, ". . .for one to invoke [his Fifth Amendment] privilege the party claiming it must not only affirmatively assert it, he must do so with sufficient particularity to allow an informed ruling on the claim." North River Insurance Company v. Stefano, 831 F.2d at 487. The North River decision further stated that the privilege may be asserted and preserved in the course of discovery proceedings, "but in specifics sufficient to provide the court with a record upon which to decide whether the privilege has been properly asserted as to each question." Id.

In Baker v. Limber, the Court of Appeals for the Ninth Circuit found that a mere reference to pending criminal proceedings is not sufficient. The party asserting the privilege must demonstrate a "nexus" between the risk of criminal conviction and the information requested. 647 F.2d at 917. In Baker, although the defendant explained in a motion that he had been convicted in state court, he did not describe the subject matter of the state indictment and did not demonstrate its connection to the requested discovery. Further, the risk of the conviction was not evident from the implications of the questions and the defendant supplied no basis for his belief that the answers would incriminate him. Id.

Applying the guidelines and procedures described above, neither Ms. Coleman's responses to the examiner's questions in her omnibus examination nor the explanations she provided in her Response to the Trustee's Motion to Compel ("Response") amount to a sufficient invocation of the privilege. Ms. Coleman provided no explanation for her assertion of the privilege during the course of her omnibus examination. In her Response, however, Ms. Coleman asserts that "the facts strongly support a reasonable basis for the fear of incrimination" because: (1) Ms. Carolyn Henaman, Chief of the Criminal Division, Maryland Attorney General's Office was present at Ms. Coleman's May 13, 1999 hearing before this Court; (2) Ms. Julie Tewey "from the Attorney General's Office revealed during testimony that they were investigating allegations that had been made against Coleman of alleged wrongdoing. It was clear from the testimony that the types of allegations that promulgated the Attorney General's actions had criminal implications, even though their actions were civil actions at that point."; (*Response* at 4); [1] (3) "there is evidence that a grand jury convened"; (*Id.*) (4) the "Trustee has referred to criminal investigations within her pleadings"; and (5) criminal indictment could follow any successful adversary proceedings filed against Ms. Coleman. She also offered imprecise explanations as to why she asserted her Fifth Amendment privilege to seemingly innocuous questions such as her marital status and whether she went to law school. (See *Response* at 6).

Ms. Coleman's vague explanations do not provide a sufficient basis for her almost all-encompassing claim of privilege. Her assertion of the Fifth Amendment to virtually every question

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[1] Ms. Tewey testified that "And we issued [the cease and desist] order because of the – very powerful order because it shut down the business, it shut down Ms. Coleman from her activities, any kind of investment advisory or brokerage activities, which they would need to be registered with our office to engage in, in any event. But we had significant concerns regarding fraudulent activities, fraudulent investment advisory and brokerage activities." Hearing Transcript, May 13, 1999.

asked of her during the omnibus examination has not yet been adequately justified or supported. She has not adequately identified and explained, with respect to the questions asked by the examiner in the omnibus examination, the nature of what, if any, potential criminal charges or investigations may result from her answers. Until such information is supplied, the court is not able to determine whether there is a sound basis for Ms. Coleman's fear of prosecution.

As discussed above, in Baker v. Limber, the court emphasized that a mere reference to pending criminal proceedings is not sufficient. Unless the incriminating nature of the question is evident on its face[2], the party asserting the privilege must demonstrate a nexus between the risk of criminal conviction and the information requested. 647 F.2d at 917; U.S. v. Sharp, 920 F.2d at 1170; In re Connelly, 59 B.R. at 434 (holding that the debtor "must give at least some minimal explanation as to how his answers to [the questions] could potentially furnish a link in the chain of evidence needed to prosecute him for conduct under investigation.") Consequently, Ms. Coleman must establish a connection between the responses called for by the examiner and a real and appreciable danger of incrimination that would result from her response.

Because she has not presented an adequate foundation for her claim of privilege as to each line of questioning initiated by the Trustee, the court finds that Ms. Coleman's assertion of the Fifth Amendment privilege against self-incrimination was improper as to most questions posed to her at the omnibus examination.

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[2] For example, at least one question posed by the examiner so clearly called for Ms. Coleman to incriminate or perjure herself that no additional explanation or justification is necessary. At Page 82, Line 14 of the examination, Ms. Coleman was asked, "Did you participate in the theft of those assets."

The Trustee has challenged Ms. Coleman's assertion of the privilege. Therefore, for the court to sustain the claim of privilege, it must consider "the implications of the question, in the setting in which it is asked . . . ." Malloy v. Hogan, 378 U.S. 1, 14 (1964)(*quoting* Hoffman v. United States, 341 U.S. at 486. To sustain the privilege, it need only be evident that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence." Hoffman v. United States, 341 U.S. at 486-87; U.S. v. Sharp, 920 F.2d at 1170-71.

The Trustee has the ultimate burden of persuasion on the issue of whether Ms. Coleman's claim of Fifth Amendment privilege is invalid. Hoffman v. United States, 341 U.S. at 486-87.

B. Remedy for Ms. Coleman's Improper Assertion of Privilege

Since Ms. Coleman improperly invoked her Fifth Amendment privilege, the next issue is finding a proper remedy. Courts have approached the issue in several different ways. One court ordered the debtor to file with the court for in camera review written responses to questions posed to him at the Section 341 meeting of creditors. To the extent the debtor responded to any question posed with an asserted claim of Fifth Amendment privilege, he was ordered to file a sworn affidavit with the court for in camera review describing the nature of any pending or potential criminal charges he faced and other grounds for his reasonable fear. The court would then review the debtor's submissions and rule on his Fifth Amendment claims. See In re Connelly, supra.

Although the Connelly approach poses a comprehensive solution to the Fifth Amendment issue at hand, other courts have stated their concern that such an in camera procedure is unconstitutional. See In re U.S. Hoffman Can Corp., 373 F.2d 622 (3rd Cir. 1967); In re French, 127 B.R. 434, 439

(Bankr.D.Minn. 1991)(finding that the Connelly approach inadequately shields the witness against the risk of self-incrimination because revealing information, even in camera, would "surrender the very protection which the privilege is designed to guarantee").

In a case decided nineteen years before Connelly, U.S. Hoffman Can Corp, the Court of Appeals for the Third Circuit reversed a district court's ruling that required the president/director of the debtor's corporation to submit signed and verified schedules and statements to the court in a sealed envelope, along with any assertion of the Fifth Amendment privilege and the basis for it. The court would then make its determination based on the sealed papers and would reseal them. When the corporate officers refused to follow this procedure, the court held them in contempt.

The Court of Appeals for the Third Circuit overruled the lower court's procedure because it imposed too high a burden on the debtor and required too much disclosure. The court found that the district court's procedure ran contrary to the history of the Fifth Amendment and "is bound ultimately to beget a requirement of maximum disclosure to prove the right to the privilege." U.S. Hoffman Can Corp, 373 F.2d at 629. The court instead ordered the debtors to appear in open court "where the disclosure may be interrupted at the point where the right to the privilege becomes clear to the judge." Id.

The Third Circuit's approach in U.S. Hoffman is the only procedure that will efficiently resolve this dispute, uphold the court's duty to determine the validity of the asserted Fifth Amendment privilege, and adequately balance Ms. Coleman's rights under the Fifth Amendment against the rights of the Trustee to administer the estate and creditors to satisfy their claims. Therefore, Ms. Coleman will be directed to appear before the court to give her sworn testimony in open court to supplement her assertion that questions posed to her at the omnibus examination will reasonably cause her to apprehend

a danger of self-incrimination. Hoffman v. United States, 341 U.S. at 486; U.S. v. Sharp 920 F.2d at 1170-71. To the extent that Ms. Coleman fails to establish that she is entitled to the protections afforded by the Fifth Amendment, she will be ordered to reappear to give her sworn testimony at a continued omnibus examination to be scheduled by the Trustee.

III. Waiver of the Fifth Amendment Privilege

The Trustee further alleges that Ms. Coleman has waived her Fifth Amendment privilege by filing her Voluntary Petition under Chapter 7 of the Bankruptcy Code and Coleman Craten's Voluntary Petition under Chapter 11 of the Bankruptcy Code. The Trustee claims that the information supplied in these petitions constitutes "testimony" for purposes of the Fifth Amendment, and that her sworn signature on these statements operates "as a waiver of her Fifth Amendment privilege against self-incrimination with respect to all details concerning the matters averred to in the sworn statements."

The Trustee reaches too far. The Fourth Circuit cases cited by the Trustee in support of her waiver argument, In re Edmond, 934 F.2d 1304 (4th Cir. 1991) and Nutramax Laboratories, Inc. v. Twin Laboratories, Inc., 32 F.Supp. 2d 331 (D.Md. 1999), do not support her contention. They only stand for the proposition that the Fifth Amendment privilege is waived when a person testifies or offers testimony by affidavit. Ms. Coleman has neither testified nor offered an affidavit in these proceedings. She did not even file schedules or a statement of affairs.

An individual's privilege against self-incrimination is not waived by the mere filing of a voluntary petition, or even by the filing of sworn schedules of assets and liabilities, so long as the matters disclosed there are not directly incriminating. A contrary doctrine "would penalize the assertion of the Fifth Amendment privilege more than necessary and create, in effect a rule that any assertion of constitutional privilege would justify dismissal of the case." 3 COLLIER ON BANKRUPTCY P

344.03[2][B], pp. 344-10 (rev. 15th ed.2000). This would clash with both U.S. Supreme Court precedent and the Bankruptcy Code itself. See Lefkowitz v. Cunningham, 431 U.S. 801 (1977); cf. Arndstein v. McCarthy, 254 U.S. 71, 72 (1920)(holding that an involuntary bankruptcy did not waive Fifth Amendment privilege against answering questions about schedules he had filed by direction of the court, although debtor had not asserted privilege in the schedules, when filled-out schedules themselves were not facially incriminating); Lawrence P. King, Constitutional Rights and the Bankruptcy Act, 72 Comm'l L.J. 315, 316-17 (1967)(predicting that voluntary filing would not be held to waive Fifth Amendment privilege, under then-evolving trends in constitutional law).

For these reasons, the court finds that Ms. Coleman has not waived her Fifth Amendment privilege by filing her Chapter 7 petition and Coleman Craten's Chapter 11 petition. As discussed above, Coleman Craten LLC, as a corporate entity, has no Fifth Amendment privilege to waive.

IV. 11 U.S.C. §344

Ms. Coleman argues that the Trustee's request violates her rights under 11 U.S.C. §344. Section 344 provides that "[i]mmunity for persons required to submit to examination, to testify, or to provide information in a case under this title may be granted under part V of title 18." 11 U.S.C. §344. However, 11 U.S.C. §344 only applies once the debtor has properly claimed her privilege against self-incrimination and is still required to testify. As discussed above, Ms. Coleman has not properly asserted her Fifth Amendment privilege in this case.

In addition, bankruptcy courts lack any authority to issue Section 344 immunity. Immunity can only be granted by the United States District Court upon the request of the United States Attorney for the district in which the case is pending. 18 U.S.C. §6003(a); Turner v. Wlodarski (In re Minton Group,

Inc.), 43 B.R. 705 (Bankr. S.D.N.Y. 1984)(discussing the procedure for obtaining a grant of immunity under 11 U.S.C. §344.).

V. Conclusion

While Ms. Coleman is entitled to invoke her Fifth Amendment right to refuse to answer the questions posed in the omnibus examination, she should be aware that a discharge in bankruptcy is neither an inherent nor a constitutional right. In re McDonald, 25 B.R. 186, 189 (Bankr.N.D.Oh.1982); In re Save More Foods, Inc., 96 B.R. 1 (D.D.C. 1989); In re Connelly, 59 B.R. at 448. The bankruptcy court can dismiss, sua sponte, a petition that cannot be administered due to a debtor's refusal to provide information. Scarfia v. Holiday Bank, 129 B.R. 671, 675 (M.D.Fla. 1990). Courts have also found that "[r]equiring [the debtor] to choose between the benefits of discharge and the costs of self-incrimination does not necessitate forfeiture of one constitutional right to secure another since only the latter stems from the Constitution." Id., *citing* In re Connelly, 59 B.R. at 448. A debtor seeking relief from her obligations pursuant to the Bankruptcy Code and in a bankruptcy court "does so willingly and voluntarily and is not entitled to as much consideration in being compelled to testify as would be another witness who had no interest in the proceeding." Scarfia v. Holiday Bank, 129 B.R. at 675, (*citing* In re Larkham, 24 B.R. 70, 72 (Bankr. D.Vt. 1982).

Therefore, it is, this _____ day of November, 2000, by the United States Bankruptcy Court for the District of Maryland,

ORDERED, that Monica Lynn Coleman shall appear before this court on a date to be Noticed by the Clerk of the Bankruptcy Court to give her sworn testimony in open court to supplement her assertion that the questions posed to her at the omnibus examination will reasonably cause her to apprehend a danger of self-incrimination; and it is further

ORDERED, that to the extent that Ms. Coleman fails to establish that she is entitled to the protections afforded by the Fifth Amendment, she is ordered to reappear on at least ten (10) days' notice by the Trustee (or as otherwise agreed by Trustee's counsel and Ms. Coleman) to give her sworn testimony at a continued omnibus examination; and it is further

ORDERED, that the Trustee's motion is denied in all other respects.

_____

E. Stephen Derby
Judge

cc: Monica Lynn Coleman
442 Edgewater Road
Pasadena, Maryland 21122

Michael P. May, Esquire
7305 Harford Road
Baltimore, Maryland 21234

Cornelius J. Carmody, Esquire
P.O. Box 302
16940 York Road
Monkton, Maryland 2111

Office of the U.S. Trustee
300 West Pratt Street, Ste. 350
Baltimore, Maryland 21201

Lori Simpson, Trustee
2 N. Charles Street
Baltimore, Maryland 21202

Martin T. Fletcher, Esquire
Whiteford, Taylor & Preston
7 St. Paul Street
Baltimore, Maryland 21202