

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-35451

DEER PATH VACATIONS, L.P.

Debtor

MEMORANDUM ON MOTION TO COMPEL

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**RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE**

The matter before the court is a Motion to Compel filed on February 12, 2003, by Michael H. Fitzpatrick, trustee in this Chapter 7 bankruptcy case. In the Motion to Compel, the Trustee requests that the court compel the Debtor's representative, Daniel Stetson, to answer certain questions propounded to him at the meeting of creditors held pursuant to 11 U.S.C.A. § 341 (West 1993 & Supp. 2002) on January 24, 2003. Mr. Stetson filed his Response to Motion to Compel on March 27, 2003, asking the court to deny the Motion to Compel, based upon his Fifth Amendment assertions against self-incrimination. In the alternative, if compelled to answer the Trustee's questions, Mr. Stetson requests that he be allowed to answer in writing so that he may provide justification for asserting his Fifth Amendment rights.

This is a core proceeding. 28 U.S.C.A. § 157(b)(2)(A), (O) (West 1993).

I

The Debtor filed a Voluntary Petition under Chapter 7 of the Bankruptcy Code on October 17, 2002. By Order of the court entered on December 5, 2002, Mr. Stetson was designated as the representative of the Debtor, and he was ordered to appear at the meeting of creditors originally scheduled for November 27, 2002, on behalf of the Debtor.¹ On January 14, 2003, Mr. Stetson filed a Motion for Protective Order or for Order Continuing 11 U.S.C. § 341

¹ The meeting of creditors was continued from November 27, 2002, to December 13, 2002. It was then continued from December 13, 2002, to January 17, 2003. It was again continued from January 17, 2003, until January 24, 2003. After the meeting of creditors was conducted on January 24, 2003, the Trustee adjourned it to March 14, 2003. On March 14, 2003, the meeting of creditors was once again adjourned to April 24, 2003.

Hearings and for an Expedited Hearing on this Motion (Motion for Protective Order).² In the Motion for Protective Order, Mr. Stetson, in essence, sought a protective order allowing him to give a blanket assertion of his Fifth Amendment rights against self-incrimination. The court delivered its opinion on January 15, 2003, in which it ruled as follows:

[A] protective order will not issue excusing Mr. Stetson's appearance at the § 341 Creditors' Meeting for his individual case or for Deer Path Vacations, L.P., Stetson & Associates of Tennessee, Inc., and Stetson & Associates of Florida, Inc. These creditors' meetings will proceed at their presently scheduled time. Clearly, Mr. Stetson may invoke his Fifth Amendment privilege as to specific, potentially incriminating questions, but not generally by way of a blanket assertion of the privilege. The parties will need to determine the practicality of this, and this is not to say the court will be sitting, waiting for you to come to me with each individual question asked - I will not. If he chooses to assert his privilege, which he has indicated he will, and the proceedings are transcribed, any party desiring to question the propriety of Mr. Stetson's response to questions propounded to him may do so by an appropriate motion. I suspect that a lengthy examination of Mr. Stetson is not going to be particularly productive.

In re Stetson, No. 02-36399, Memo. Op. at 10 (Bankr. E.D. Tenn. Jan. 15, 2003). Thereafter, in accordance with the court's directive, the Trustee conducted the Debtor's meeting of creditors on January 24, 2003, whereby Mr. Stetson appeared and invoked his Fifth Amendment rights against self-incrimination as to every question asked by the Trustee and the Debtor's creditors who appeared and examined him at the § 341 meeting.³

² The Motion for Protective Order was filed in Mr. Stetson's individual Chapter 7 bankruptcy case, number 02-36399; however, in the Motion for Protective Order, he sought to be excused from appearing not only at his individual meeting of creditors, but also at those scheduled for his three related business cases for which he had been designated as representative pursuant to the court's December 5, 2002 Order: (1) the Debtor herein; (2) Stetson & Associates of Tennessee, Inc., case number 02-35452; and (3) Stetson & Associates of Florida, Inc., case number 02-36290.

³ In compliance with the court's January 15, 2003 opinion, Shelly Wilson, Michael Smith, Dave Gotwalt, Alana Buhrkuhl, and Patricia C. Foster on behalf of the United States Trustee also asked questions of Mr. Stetson, to which he invoked his Fifth Amendment rights. Other parties appearing but not asking questions were J. Michael Winchester, William L. Cooper, Brenda Norris, and William T. Hendon, Chapter 7 Trustee for Mr. Stetson's individual bankruptcy case.

On February 12, 2003, pursuant to the court's January 15, 2003 opinion, the Trustee filed his Motion to Compel, and, on the basis that they "are not and will not in material or reasonable manner expose the witness to the risk of criminal prosecution of giving evidence against his penal interest," requested that the court order Mr. Stetson to answer the following questions asked by the Trustee at the Debtor's meeting of creditors:

- 1: What is your residential address?
- 2: At the time that the Chapter 11 was commenced with Deer Path Vacations, L.P., what was your position with the debtor?
- 3: What was your position with Stetson and Associates of Tennessee, Inc., at the time it began its Chapter 11 case?
- 4: What type of legal entity is Deer Path Vacations, L.P.?
- 5: What is the ownership structure of Deer Path Vacations, L.P.?
- 6: What is the stock structure of Stetson and Associates of Tennessee, Inc.?
- 7: What was the nature of Deer Path Vacations, L.P.'s business?
- 8: What was the nature of Stetson and Associates of Tennessee, Inc.'s business?
- 9: At the beginning of Deer Path Vacations, L.P., how did the business intend to raise cash?
- 10: How were the businesses of Deer Path Vacations, L.P., and Stetson and Associates of Tennessee, Inc., interrelated?
- 11: What was the initial method of capitalizing Stetson and Associates of Tennessee, Inc.?
- 12: Where within the office complex of these debtors were the records of capitalization or initial capital of either company located?
- 13: In respect to the real property owned by Deer Path Vacations, L.P., when it began its Chapter 11, where within the office complex are the records of ownership of real property located?

14: Has Deer Path Vacations, L.P., ever owned an interest in another company, domestic or foreign?

15: Has Stetson and Associates of Tennessee, Inc., ever owned an interest in another company, domestic or foreign?

16: Has either of these debtors ever owned any asset of any type or nature, which was located outside the United States?

17: Where has either debtor had any bank account in its name or for its direct or indirect benefit in the last two years?

18: How was the water distributed on the Douglas Lake project?

19: What type of entity is the entity that distributes water on the Douglas Lake project?

20: Who, to your knowledge, knows how the water distribution system works for the Douglas Lake project?

21: Who are the individuals who know how the different software computer systems of either debtor work?

22: To your knowledge, what is the location of all cabin keys for the Eagle Springs project?

In re Deer Path Vacations, L.P., No. 02-35451, *In re Stetson & Assocs. of Tenn., Inc.*, No. 02-35452, Tr. of § 341 Meeting of Creditors (Jan. 24, 2003) at p. 7, ll. 5 - 22; p. 8, ll. 21 - 25; p. 9, ll. 1 - 20; p. 10, ll. 20 - 25; p. 11, ll. 1 - 25; p. 12, ll. 1 - 25; p. 13, ll. 1 - 20; p. 14, ll. 14 - 25.⁴

Mr. Stetson filed his Response to Motion to Compel on March 27, 2003. In support of his Response, Mr. Stetson attached a copy of a Subpoena to Testify Before Grand Jury in the United

⁴ The Trustee is also the Chapter 7 Trustee for Stetson & Associates of Tennessee, Inc. Pursuant to an Order entered November 15, 2002, the two cases are being jointly administered by the Trustee. Accordingly, on January 24, 2003, the Trustee conducted a joint meeting of creditors for both Debtors.

States District Court for the Middle District of Florida dated November 25, 2002, calling him to testify on December 19, 2002, regarding "an investigation of possible violations of criminal laws involving conspiracy to commit securities fraud, mail fraud, and/or wire fraud, and related offenses." Additionally, Mr. Stetson attached a copy of a letter dated March 27, 2003, from Anthony J. LaSpada, Esq., in Tampa, Florida, to Mr. Stetson's Tennessee attorneys, confirming that he "was advised by representatives of the government that Dan Stetson is currently a target of a Grand Jury Investigation ongoing in the Middle District of Florida, Tampa Division, and possibly elsewhere." Mr. Stetson maintains that any testimony or statements that he gives may later be used against him in the ongoing criminal investigation, and that the subpoena and letter confirm that he has a real fear of incrimination. Accordingly, he requests that the court deny the Motion to Compel. Additionally, in the event that he is required to answer questions, Mr. Stetson requests that he be allowed to provide his answers in writing in order that he may provide "clarification or reasons justifying the assertion of his Fifth Amendment rights."⁵

II

The Fifth Amendment of the United States Constitution provides, in part, that "[n]o person shall be . . . compelled in any . . . case to be a witness against himself." U.S. CONST. AMEND. V. The privilege applies in both criminal and civil cases to protect any witness from being compelled to disclose information that he "reasonably believes could be used in a criminal prosecution [against him] or could lead to other evidence that might be so used." *Bank One of Cleveland, N.A. v.*

⁵ For unexplained reasons, Mr. Stetson offered no "clarification or reasons" in his Response to Motion to Compel to justify his Fifth Amendment assertions to the twenty-two specific questions to which the Trustee seeks answers.

Abbe, 916 F.2d 1067, 1074 (6th Cir. 1990) (quoting *Kastigar v. United States*, 92 S. Ct. 1653, 1656 (1972)). “[T]he Fifth Amendment proscribes only self-incrimination obtained by a genuine compulsion of testimony.” *United States v. Washington*, 97 S. Ct. 1814, 1818 (1977) (quoting *Michigan v. Tucker*, 94 S. Ct. 2357, 2362 (1974)). “Absent some officially coerced self[-]accusation, the Fifth Amendment privilege is not violated by even the most damning admissions. Accordingly, unless the record reveals some compulsion, [a witness’s] incriminating testimony cannot conflict with any constitutional guarantees of the privilege.” *Washington*, 97 S. Ct. at 1818-19.

In order to invoke the privilege, the witness must make a “valid assertion” of his Fifth Amendment rights. *Donovan v. Fitzsimmons (In re Morganroth)*, 718 F.2d 161, 167 (6th Cir. 1983). “A valid assertion of [this] privilege exists where a witness has reasonable cause to apprehend a real danger of incrimination.” *Morganroth*, 718 F.2d at 167 (citing *Hoffman v. United States*, 71 S. Ct. 814, 818 (1951)). He must show “a ‘real danger,’ [of incrimination] and not a mere imaginary, remote or speculative possibility of prosecution.” *Morganroth*, 718 F.2d at 167 (citing *United States v. Apfelbaum*, 100 S. Ct. 948, 955-56 (1980)). It is then for the court to decide if his silence is justified. *See Morganroth*, 718 F.2d at 167; *Abbe*, 916 F.2d at 1076 (“[T]he privilege claimant does not initiate [a hearing to determine whether the alleged fears of self-incrimination are legitimate]; rather, it is ‘incumbent upon the trial court . . . to conduct a particularized inquiry.’”) (emphasis in original) (citations omitted). The court has “broad discretion to determine whether or not the claim to the privilege has merit.” *United States v. Gibbs*, 182 F.3d 408, 431 (6th Cir. 1999).

A witness may not make a blanket assertion, nor may he invoke the privilege before being sworn in and asked questions. *Morganroth*, 718 F.2d at 167; see also *Gibbs*, 182 F.3d at 431; *United States v. Mahar*, 801 F.2d 1477, 1495 (6th Cir. 1986). He must “object with specificity to the information sought [in order] to permit the court to rule on the validity of the claim of privilege.” *Sec. & Exch. Comm’n v. First Fin. Group of Tex., Inc.*, 659 F.2d 660, 668 (5th Cir. 1981). “The privilege must be asserted . . . with respect to particular questions, and in each instance, the court must determine the propriety of the refusal to testify.” *Morganroth*, 718 F.2d at 167. “[S]ufficient evidence is presented . . . if [the] court can, by the use of reasonable inference or judicial imagination, conceive a sound basis for a reasonable fear of prosecution.” *Morganroth*, 718 F.2d at 169. The court will then conduct a particularized inquiry and decide “in connection with each specific area that the questioning party seeks to explore, whether or not the privilege is well-founded.” *First Fin. Group of Tex., Inc.*, 659 F.2d at 668 (quoting *United States v. Melchor Moreno*, 536 F.2d 1042, 1049 (5th Cir. 1976)).

“The privilege against self-incrimination is wholly personal and cannot be utilized by or on behalf of any organization, such as a corporation[.]” *In re Lufkin*, 255 B.R. 204, 210 (Bankr. E.D. Tenn. 2000) (quoting *United States v. White*, 64 S. Ct. 1248, 1251 (1944)). Additionally, “[a] corporate officer may not withhold testimony or documents on the ground that his corporation would be incriminated[, n]or may the custodian of corporate books or records withhold them on the ground that he personally might be incriminated by their production.” *Curcio v. United States*, 77 S. Ct. 1145, 1148 (1957). On the other hand, a witness cannot be compelled to give testimony that will incriminate himself personally, even if the information sought concerns a corporation or

business entity, as agents of such entities do retain their Fifth Amendment privilege against self-incrimination. *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 316 (2d Cir. 1979) (citing *Curcio*, 77 S. Ct. at 1148-49; *Wilson v. United States*, 31 S. Ct. 538, 546 (1911)). "[F]orcing [a business's] custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind[, and h]e might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." *Curcio*, 77 S. Ct. at 1148-49.

As in this case, a debtor may assert his Fifth Amendment rights at a § 341 meeting of creditors. See, e.g., *In re French*, 127 B.R. 434, 436 (Bankr. D. Minn. 1991); *In re Hulon*, 92 B.R. 670, 674 (Bankr. N.D. Tex. 1988). However, because a debtor is "entitled to invoke the privilege only to genuinely threatening questions[, he is] therefore . . . required to take the oath and listen to each question propounded by the trustee." *Hulon*, 92 B.R. at 675. If a debtor wishes to assert the Fifth Amendment at a meeting of creditors, he must make the assertion "to each question which would require a potentially self-incriminating answer." *French*, 127 B.R. at 435.

III

Mr. Stetson has clearly shown that he can reasonably fear the possibility of incrimination by testifying, in that there is actually an ongoing criminal investigation against him being conducted in Florida. The court agrees that Mr. Stetson may not be compelled to give damaging testimony against himself, nor may he be compelled to give testimony that could lead those investigating him to additional damaging or incriminating evidence. *See Abbe*, 916 F.2d at 1074. On the other hand, the Trustee has not requested that Mr. Stetson be compelled to answer every question propounded to him at the meeting of creditors, but instead, has designated twenty-two specific questions to which he desires Mr. Stetson be required to answer. The court will, as it must, determine whether each individual question is incriminatory and whether Mr. Stetson must answer accordingly.

First, with regards to Question 1, seeking Mr. Stetson's residential address, the court does not believe that Mr. Stetson will incriminate himself by giving his residential address. Accordingly, Mr. Stetson shall answer this question and provide the Trustee with his address.

Second, as to Questions 2 and 3, regarding Mr. Stetson's positions with the Debtor and Stetson & Associates of Tennessee, Inc. (Stetson & Associates), this information is available to the public through the Tennessee Secretary of State. The Fifth Amendment privilege is a personal privilege, and it does not govern businesses and/or business records. Because this information is otherwise ascertainable as a matter of public record, and because the court does not believe that his answering these questions poses a danger of self-incrimination, Mr. Stetson shall be required

to answer Questions 2 and 3. However, Mr. Stetson shall not be required to elaborate upon any duties regarding his position(s) held with these business entities, as that information could potentially be incriminating.

Similarly, Question 4 deals with what type of legal entity the Debtor is classified as, presumably with the Tennessee Secretary of State. This question is not personal regarding Mr. Stetson, but instead, is personal as to the Debtor, a business entity. Because business entities cannot invoke the privilege, Mr. Stetson shall be required to answer this question. Likewise, Questions 5 and 6 concern the ownership structure of the Debtor and the stock structure of Stetson & Associates. These questions do not request any personal information from Mr. Stetson, nor do they pose a threat of self-incrimination. Mr. Stetson shall be required to answer these questions; however, Mr. Stetson shall not be required to provide any sort of elaboration regarding his ownership interest in either of these entities, nor shall he be required to provide names of the various owners and/or stockholders.

Questions 7 and 8 concern the nature of business for the Debtor and Stetson & Associates. In as much as this information does not personally concern Mr. Stetson, and it can be ascertained by obtaining documents from the Tennessee Secretary of State, Mr. Stetson shall be required to answer these questions. On the other hand, Mr. Stetson shall not be required to provide any clarification and/or elaboration regarding his duties personally for either of these business entities so that he will not risk any self-incrimination.

Question 9 involves how the Debtor intended to raise cash at the beginning of its operations, and similarly, Question 11 concerns the initial method of capitalization for Stetson & Associates. Mr. Stetson shall be required to answer these questions to the extent that this information can be ascertained by obtaining records for the Debtor and Stetson & Associates with the Tennessee Secretary of State. However, Mr. Stetson shall not be required to provide any information concerning any role that he might have undertaken to raise cash for the Debtor and/or to provide capitalization for Stetson & Associates.

Question 10 inquires how the Debtor and Stetson & Associates are interrelated. This information is entirely business-related, posing no threat of self-incrimination upon Mr. Stetson by his answering. Accordingly, Mr. Stetson shall be required to answer this question.

In Question 12, the Trustee seeks the locations within the offices of the Debtor and Stetson & Associates of their records regarding capitalization and/or the initial capital. Mr. Stetson cannot be forced to testify as to the location of documents, as such information would be testimonial and subject to a valid Fifth Amendment assertion. *See Curcio*, 77 S. Ct. at 1148-49. Mr. Stetson shall not be required to answer this question. Likewise, for these reasons, Mr. Stetson shall not be required to answer Question 13, seeking the location of the Debtor's records regarding any ownership in real property.

As for Questions 14 and 15, involving whether the Debtor and Stetson & Associates have ever owned an interest in other companies, domestic or foreign, Mr. Stetson shall be required to answer these questions to the extent that this information can be ascertained by obtaining records

for the Debtor and Stetson & Associates with the Tennessee Secretary of State. However, Mr. Stetson shall not be required to provide any information concerning any ownership interest that he personally has or had in any other companies, foreign or domestic.

Question 16 seeks confirmation of whether either the Debtor and/or Stetson & Associates has ever owned any assets outside of the United States. The court believes that this information is testimonial in nature, in that it requests authentication of the fact, which could lead to incriminating evidence against Mr. Stetson. *See Curcio*, 77 S. Ct. at 1148; *O'Henry's Film Works, Inc.*, 598 F.2d at 316. Accordingly, Mr. Stetson shall not be required to answer this question. For the same reason, Mr. Stetson shall not be required to answer Question 17 regarding where the Debtor and/or Stetson & Associates maintained or maintains their bank accounts.

Questions 18, 19, and 20 concern information regarding the Douglas Lake project, including how water is distributed, the entity distributing the water, what type of entity distributes the water, and who knows how the water distribution system on the project works. The court believes that this information could be ascertained by obtaining records from the Sevier County Register of Deeds, the utility service providing water for Sevier County, and other governmental and utility bodies. Accordingly, Mr. Stetson shall be required to answer these questions to the extent that this information is available from other sources. He shall not, however, be required to provide any personal information concerning his role in the project.

As for Question 21, the Trustee seeks the name of the individuals who know how to operate the different software computer systems of the Debtor and/or Stetson & Associates. The

court believes that this information falls within the scope of testimonial knowledge of Mr. Stetson, whereby he could possibly open himself up to self-incrimination. *See Curcio*, 77 S. Ct. at 1148; *O'Henry's Film Works, Inc.*, 598 F.2d at 316. Correspondingly, Mr. Stetson shall not be required to answer this question. In like manner, Mr. Stetson shall not be required to answer Question 22, regarding the location of the cabin keys for the Eagle Springs project.

IV

As for Mr. Stetson's request that he be allowed to answer the Trustee's questions in writing so that he may provide clarification and/or reasons justifying his Fifth Amendment assertions, the court reminds Mr. Stetson and his attorneys that in the January 15, 2003 opinion, the court expressly ruled that Mr. Stetson must offer more than a mere blanket assertion of his Fifth Amendment privilege.⁶ Additionally, the court directed counsel for all parties that it would not entertain these motions to compel piecemeal, i.e., all parties seeking information from Mr. Stetson must expressly ask him the questions, and at that time, Mr. Stetson must provide adequate reasons for invoking his Fifth Amendment rights such that the court may make its determination in the whole.

The court will direct Mr. Stetson to appear at the April 24, 2003 adjourned meeting of creditors at which time he will respond to the twenty-two questions propounded by the Trustee to the extent directed by the court in this Memorandum. Mr. Stetson may not, however, refuse to

⁶ *See supra* n.5.

answer any of the designated questions to which the court has directed he respond by offering clarifications and/or reasons to justify his Fifth Amendment assertions.

An order consistent with this Memorandum will be entered.

FILED: April 9, 2003

BY THE COURT

/s/ RICHARD STAIR, JR.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
EASTERN DISTRICT OF TENNESSEE**

In re

Case No. 02-35451

DEER PATH VACATIONS, L.P.

Debtor

ORDER

For the reasons stated in the Memorandum on Motion to Compel filed this date, the court directs the following:

1. The Motion to Compel filed February 12, 2003, by Michael H. Fitzpatrick, Trustee, is GRANTED in part and DENIED in part.

2. Daniel Stetson shall appear at the April 24, 2003 adjourned meeting of creditors at which time he shall respond to the questions propounded to him by the Trustee that are the subject of the Motion to Compel. His responses shall be in the manner and to the extent directed by the court in the Memorandum on Motion to Compel.

SO ORDERED.

ENTER: April 9, 2003

BY THE COURT

/s/ RICHARD STAIR, JR.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE