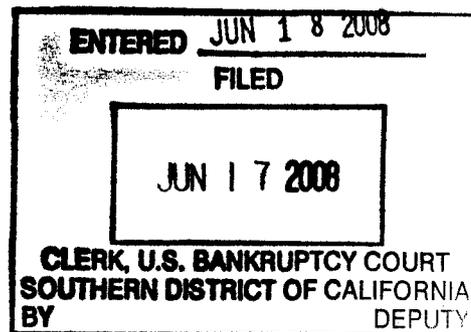


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



8 UNITED STATES BANKRUPTCY COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10

11 In re: Donald A. Yates,

12 Debtor.

11 } BK. No. 04-05619-LT7

12 } MEMORANDUM DECISION

13 }

14 }

15

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16

17 INTRODUCTION

18

19 On February 21, 2008, Chapter 7 Trustee Gregory A. Akers ("Trustee") promulgated

20 written interrogatories to Debtor Donald A. Yates ("Debtor") (the "Interrogatories")

21 pursuant to order of this Court entered on February 27, 2008 (the "Contempt Order"). The

22 Interrogatories were intended to provide the Trustee with limited information in order to

23 streamline and shorten the 2004 examination also ordered in the Contempt Order. The

24 Debtor informally responded to the Interrogatories by email response on March 30, 2008,

25 addressed each question specifically, but asserted the Fifth Amendment privilege against

26 self-incrimination in connection with Interrogatories 1, 2, 3, 11, 12, 13, 14, and 15.

27 Thereafter, the Trustee supplemented a previously filed motion to compel interrogatory

28 responses (the "Supplemental Motion to Compel") and requested that the Court compel the

1 Debtor to answer the Interrogatories in a formal writing to be signed by Debtor under oath  
2 and to provide Interrogatory responses to all questions notwithstanding assertion of the Fifth  
3 Amendment privilege against self incrimination. The parties fully briefed this matter, and  
4 the Court heard extensive oral argument on May 21, 2008. The matter is now ready for  
5 decision.

6  
7 This Court has jurisdiction to determine this matter pursuant to 28 U.S.C. §§ 1334  
8 and 157(b)(1) and General Order No. 312-D of the United States District Court for the  
9 Southern District of California. This is a core proceeding pursuant to 28 U.S.C.  
10 § 157(b)(2)(A).

11  
12 BACKGROUND

13  
14 Debtor filed a chapter 7 petition on June 24, 2004 and initiated bankruptcy case  
15 No. 04-05619 (the "Bankruptcy Case"). Debtor appeared at the initial 341(a) meeting of  
16 creditors on July 23, 2004 and, in connection therewith, completed a 341(a) questionnaire  
17 (the "341(a) Questionnaire"). (Ex. "A")<sup>1</sup> Question 10 on the 341(a) Questionnaire asks:  
18 "Do you now or have you had in the past, any interests in offshore accounts, *i.e.* accounts  
19 outside the borders of the United States?" ("Question 10"). Debtor answered Question 10  
20 by checking the "No" box and signed the 341(a) Questionnaire under penalty of perjury.  
21 Debtor received his discharge in the Bankruptcy Case on September 22, 2004.

22  
23 Thereafter, things became significantly more complicated.

24  
25 In December of 2004, the Trustee initiated two adversary proceedings against the  
26 Debtor and others seeking to avoid post-petition transfers, to recover estate property, and to

27  
28 <sup>1</sup> References herein to "Ex." are to the exhibits filed with the Declaration of Nannette Farina in support of the Supplemental Motion to Compel. (Docket #240)

1 obtain related declaratory relief. These adversary proceedings were consolidated by  
2 stipulated order on March 17, 2005, and thereafter proceeded as a single action (the  
3 "Recovery Action").<sup>2</sup> On August 16, 2005, the Trustee obtained a partial summary  
4 judgment in the Recovery Action allowing the Trustee to avoid certain post-petition  
5 transfers not authorized by court order, to sell certain real property (the "Condo"), and to  
6 evict the Debtor from the Condo.

7  
8 Perhaps in response to the pressure from the Recovery Action, the Debtor filed a  
9 motion seeking to convert his Chapter 7 case to a case under Chapter 13 in August of 2005.  
10 The Court granted conversion over the opposition of the Trustee by order entered on  
11 October 5, 2005. Almost immediately thereafter, on November 1, 2005, the Trustee moved  
12 to reconvert the Bankruptcy Case. In his brief in support of reconversion ("Reconversion  
13 Brief"- Docket #53), the Trustee outlined a litany of alleged problems with the Bankruptcy  
14 Case and Debtor's actions therein and in the introduction stated: "In filing, [Debtor] lied  
15 under oath in his bankruptcy schedules and concealed estate assets from the Chapter 7  
16 Trustee." (Reconversion Brief 2:6-7)

17  
18 The Trustee's concerns were repeated in Trustee's reply brief in support of  
19 reconversion ("Reconversion Reply Brief" – Docket #66), wherein the Trustee stated: "Not  
20 only is the Debtor concealing financial information and monies, but his overwhelming  
21 **bankruptcy fraud** and concealments are of an ever increasing and egregious nature."  
22 [Reconversion Reply Brief 3:7-8 (emphasis in original)]

23  
24 The Court granted reconversion by order entered on December 15, 2005. The  
25 Trustee then filed a motion seeking sanctions to compensate the estate for expenses incurred  
26 by the Trustee and "caused by bad faith conversion to Chapter 13" ("Sanctions Motion" -  
27 Docket # 97) The Court, by Memorandum Decision dated January 26, 2007 ("1/26/07

28  

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<sup>2</sup> Adv. Proc. #04-90530.

1 Memorandum" – Docket #171), denied the Sanctions Motion, but therein also detailed the  
2 Trustee's assertions regarding the Debtor's conduct in the Bankruptcy Case:

3 The Chapter 7 Trustee alleged that the "bad faith of this debtor is  
4 extreme." The debtor's alleged bad faith included, *inter alia*,  
5 concealment of estate assets from this Court and the Chapter 7  
6 Trustee, lying under oath, misrepresentations, inaccuracies and  
7 omissions in the debtor's schedules, filing of the original  
8 chapter 7 petition to avoid a state court judgment against him,  
9 pre-bankruptcy transfer of his property interests, unauthorized  
10 transfer of his real property post-petition, non-cooperation with  
the Chapter 7 Trustee, lying under oath in his pleadings, illegal  
conduct involving wholesale automobile purchasing and selling  
of vehicles without a license, apparent tax evasion, and a history  
of dishonest and contentious litigation conduct.

11 (1/26/07 Memorandum 3:12-24)

12  
13 On August 21, 2007, the Court granted the Trustee summary judgment on the then  
14 remaining claims in the Recovery Action. The Court avoided a trust deed lien held by  
15 Thomas Durisoe that had been recorded against the Condo. The Court further required  
16 turnover to the Estate of the proceeds of the previously authorized Trustee's sale of the  
17 Condo.

18  
19 Eventually, and not surprisingly given the Trustee's clear and often articulated views  
20 regarding Debtor's improper conduct, the Trustee determined that the Debtor's discharge  
21 must be reconsidered. On September 28, 2007, the Trustee initiated Adversary Proceeding  
22 No. 07-90596 (the "Discharge Action") seeking to revoke Debtor's discharge and to recover  
23 certain assets. In his First Amended Complaint in the Discharge Action ("First Amended  
24 Complaint" – Discharge Action Docket #6), the Trustee alleges that revocation of Debtor's  
25 discharge is appropriate because Debtor has engaged in the following wrongful acts:  
26 acquiring and knowingly and fraudulently failing to report the acquisition or entitlement to  
27 property or failing to deliver or surrender such property of the estate to the Trustee,  
28 destroying and failing to deliver and surrender records constituting property of the estate,

1 refusing to obey Court orders, converting assets, fraudulently concealing assets, and  
2 committing other acts of fraud.

3  
4 On January 21, 2008, the Trustee filed an ex parte application for Rule 2004  
5 examination ("2004 Application" – Docket #199), which stated in relevant part as follows:  
6

7 3. The Debtor swore under oath in his written questionnaire  
8 given at his July 23, 2004, 341A Creditors' Meeting that he did  
9 not have and had never had an offshore account . . .

10 9. Recently, in response to a records subpoena, Thomas  
11 Durisoe's wife, Lurnie Jackman (Durisoe), produced copies of  
12 certain cancelled checks payable to the Debtor.

13 10. Ms. Jackman/Durisoe's records included a July 2004 check  
14 she wrote to the Debtor in payment of pre-petition legal services.  
15 (citation omitted).

16 11. Funds of this check appear to unquestionably constitute  
17 property of this bankruptcy estate that the Debtor did not  
18 disclose or turn over to the Trustee. (citation omitted).

19 12. The back of the *cancelled check* evidences a Debtor deposit  
20 and 'offshore account' relationship with a Swiss bank,  
21 "**Leu Bank ltd Zurich.**"

22 13. The check evidences the Debtor did not deposit these legal  
23 fees belonging to the bankruptcy estate in his local general  
24 business account. He did not deposit them in his local attorney  
25 client trust account. Rather it evidences that he deposited and  
26 negotiated the check through the correspondence services of  
27 American Express Bank (New York) on behalf of its  
28 international bank client, Leu Bank Ltd. (Zurich). It also shows  
that Leu Bank Ltd. (Zurich) provided an endorsement guaranty  
of Debtor's signature.

1           14. In essence the recent documentation evidences the Debtor's  
2           apparent use of the Swiss bank account to conceal and convert  
3           the accounts receivable belonging to this estate.

4 [2004 Application (emphasis in original)]

5           By order entered January 24, 2008, the Court ordered the Debtor to appear for  
6           2004 examination and to produce certain writings related to offshore accounts (the  
7           "2004 Exam Order"). Litigation regarding the 2004 Exam Order followed, and, on  
8           February 27, 2008, the Court entered the Contempt Order (Docket #218), which found  
9           Debtor in contempt and ordered Debtor to appear for 2004 examination and produce  
10          documents, to cooperate in obtaining documents from third parties, in particular, Leu Bank,  
11          and to respond to limited interrogatories to expedite the 2004 examination.

12  
13          Debtor, claiming confusion, failed to respond in a timely fashion to the  
14          15 interrogatories promulgated on February 21, 2008 by the Trustee pursuant to the  
15          Contempt Order (the "Interrogatories"). When Debtor ultimately responded, he did so in an  
16          informal email. (Ex. "S") The response was written, but was not signed by Debtor under  
17          oath or otherwise. In these informal interrogatory responses (the "Responses"), Debtor  
18          answered questions 4-10, but asserted the Fifth Amendment in relation to questions 1-3 and  
19          11-15. Question 1 asks if Debtor had offshore accounts during the period June 24, 2001 to  
20          the present. (Ex. "Q" at Q-2) Questions 2 and 3 ask for the account number of any account  
21          Debtor held at Leu Bank and for confirmation that the Lurnie Durisoe check<sup>3</sup> was  
22          deposited into a Leu Bank account in which: ". . . you had an interest or were an account  
23          holder" or if it was otherwise negotiated by Debtor. (Ex. "Q" at Q-2) Questions 11-15  
24          follow the caption "Interrogatories Regarding Former Offshore Accounts" and request  
25          specific information regarding offshore accounts such as bank name, account number, and  
26          opening or closing date. (Ex. "Q" at Q-3)

27 \_\_\_\_\_  
28 <sup>3</sup> Trustee learned about the Lurnie Durisoe check through discovery propounded upon a third  
party – not from the Debtor. (Ex. N)

1 The Trustee, understandably unsatisfied with these responses, then brought the  
2 Supplemental Motion to Compel and requested that Debtor be required to respond to the  
3 Interrogatories in writing under oath and that Debtor be compelled to respond to all  
4 questions notwithstanding assertion of the Fifth Amendment. The Trustee argues that  
5 Debtor's invocation of the Fifth Amendment privilege should not be upheld by this Court for  
6 various reasons including Trustee's assertions that Debtor failed to meet his burden of  
7 establishing that he has any reasonable basis to fear prosecution or incrimination based on  
8 his answers to the questions at issue and that Debtor previously waived the privilege in  
9 connection with the questions at issue.

10  
11 In summary, the Trustee has aggressively pursued Debtor and others to recover  
12 improperly transferred or hidden assets. In the course of these efforts, the Trustee engaged  
13 in significant discovery efforts. The Trustee clearly has concluded that Debtor has not been  
14 candid with the Trustee in many respects. In particular, the Trustee now asserts that the  
15 Debtor, based on the "Leu Bank check," lied about his interest in offshore accounts in the  
16 341(a) Questionnaire. The Court understands that the Trustee requests information  
17 regarding offshore accounts primarily, if not exclusively, to aid in his asset recovery efforts.

#### 18 19 DECISION

20  
21 The Court has carefully considered the documents filed in connection with this  
22 matter, the additional arguments of counsel at the hearing held on May 21, 2008, and  
23 relevant case law. The Court's conclusions are as followings:

#### 24 25 A. Debtor Must Sign The Responses Under Oath.

26  
27 Federal Rule of Civil Procedure 33, made applicable to bankruptcy proceedings by  
28 Federal Rule of Bankruptcy Procedure 7033, provides that an interrogatory: ". . . must be

1 answered separately and fully in writing **under oath**, unless it is objected to, in which event  
2 the objecting party shall state the reasons for objection and shall answer to the extent the  
3 interrogatory is not objected to." Fed. R. Civ. P. 33 (emphasis added). The Debtor's  
4 Responses were in writing, but were not given under oath. Further, Federal Rule of Civil  
5 Procedure 33(b)(2) provides that the answers and objections must be signed by the person  
6 making them. The Responses, provided in an email document, were not formally "signed."  
7 The Responses, therefore, did not comply with the relevant rules.

8  
9 The Court notes, however, that Debtor subsequently remedied these defects at the  
10 time of the hearing on the Supplemental Motion to Compel by signing a copy of the  
11 Responses under penalty of perjury under the laws of the United States and handing the  
12 same to the Trustee's counsel. The Debtor also made verifying statements on the record.  
13 Thus, the Court need not further address the Supplemental Motion to Compel to the extent it  
14 requests that this defect be cured, as the request is now moot.

15  
16 B. Debtor Is Entitled To Assert The Fifth Amendment Privilege Against Incrimination  
17 As A Bar To Answering Interrogatories 1, 2, 3, 11, 12, 13, 14 And 15.

18  
19 Next, the Court must determine whether Debtor's assertion of the Fifth Amendment  
20 privilege is appropriate under the circumstances here and if so whether, notwithstanding the  
21 Fifth Amendment, the Supplemental Motion to Compel should be granted based on  
22 Trustee's argument that Debtor has waived the privilege. The Court after consideration  
23 determines that the Debtor retains the right to assert the Fifth Amendment privilege and that  
24 the Supplemental Motion to Compel must be denied to the extent it requests an order  
25 compelling Interrogatory responses notwithstanding assertion of the Fifth Amendment.

1           1.       The Fifth Amendment Privilege Is Available To A Chapter 7 Debtor.

2  
3           The Fifth Amendment provides in part that: "no person . . . shall be compelled in any  
4 criminal case to be a witness against himself." *Hoffman v. United States*, 341 U.S. 479, 485  
5 (1951). A court must afford this privilege against self-incrimination a liberal construction in  
6 favor of the right it was intended to secure. *Id.* The Fifth Amendment applies in civil and  
7 administrative cases as well as criminal cases. *Kastigar v. United States*, 406 U.S. 441, 444  
8 (1972); *In re DG Acquisition Corp.* 151 F.3d 75, 79 (9<sup>th</sup> Cir. 1998). And, in particular, the  
9 Fifth Amendment privilege may be asserted in a bankruptcy proceeding. *McCarthy v.*  
10 *Arndstein*, 266 U.S. 34, 41 (1924); *In re Boughton*, 243 B.R. 830, 835-836 (Bankr. M.D.  
11 Fla. 2000); *In re Mudd*, 95 B.R. 426, 429 (Bankr. N.D. Tex. 1989). Indeed, the Fifth  
12 Amendment privilege may be correctly asserted any time a party is asked to give testimony  
13 that is incriminating or could lead to incriminating evidence. *Hoffman*, 341 U.S. at 486;  
14 *DG Acquisition*, 151 F.3d at 79.

15  
16           2.       The Debtor Establishes A Right To Assert The Privilege.

17  
18           The Fifth Amendment privilege may not be asserted frivolously. The testimony  
19 requested, as noted above, must be incriminating or provide a link to incriminating  
20 evidence. Further, the party asserting the Fifth Amendment must also reasonably believe  
21 that this incriminating evidence could in fact be used in a criminal proceeding.<sup>4</sup> *Hoffman*,  
22 341 U.S. at 486. A court must evaluate the facts of each case to determine whether the  
23 above referenced test is met and should order disclosure notwithstanding assertion of the  
24 Fifth Amendment privilege only if it concludes that the evidence does not have a tendency  
25 to incriminate, taking into consideration the implications of the questions in the setting in  
26

27  
28           <sup>4</sup> For example, if immunity from prosecution is provided, the witness cannot reasonably fear  
prosecution and cannot appropriately assert the Privilege.

1 which asked. *Id.* at 486-488. The Debtor bears the burden of proof on this issue. *See*  
2 *Piperi v. Gutierrez (In re Piperi)*, 137 B.R. 644, 646 (Bankr. S.D. Tex. 1991).

3  
4 The Trustee argues that Debtor fails to meet his burden of proof in establishing that  
5 the testimony as to which he asserts the Fifth Amendment privilege could be incriminating  
6 or could lead to incriminating testimony and that it reasonably could be used against him.  
7 The Court does not agree.

8  
9 a. It Is Reasonable To Assume That Debtor's Testimony Regarding Past  
10 Ownership Of Offshore Accounts Would Be Incriminating.

11  
12 Federal law includes the following provisions setting forth the elements of crimes in  
13 the bankruptcy context for which a person may be subject to fine or imprisonment of up to  
14 five years or both:

15 A person who—

16 (1) knowingly and fraudulently conceals from a  
17 custodian, trustee, marshal, or other officer of the court charged  
18 with the control or custody of property, or, in connection with a  
19 case under title 11, from the creditors or the United States  
Trustee, any property belonging to the estate of a debtor.

20 (2) knowingly and fraudulently make a false oath or  
21 account in or in relation to any case under title 11;

22 (3) knowingly and fraudulently makes a false declaration,  
23 certificate, verification, or statement under penalty of perjury as  
24 permitted under section 1746 of title 28, in or in relation of any  
case under title 11; . . .

25 (7) in a personal capacity or as an agent or officer of any  
26 person or corporation, in contemplation of a case under title 11  
27 by or against the person or any other person or corporation, or  
28 with intent to defeat the provisions of title 11, knowingly and  
fraudulently transfers or conceals any of his property or the  
property of such other person or corporation;

1 (8) after the filing of a case under title 11 or in  
2 contemplation thereof, knowingly and fraudulently conceals,  
3 destroys, mutilates, falsifies, or makes a false entry in any  
4 recorded information (including books, documents, records, and  
papers) relating to the property or financial affairs of a debtor; or

5 (9) after the filing of a case under title 11, knowingly and  
6 fraudulently withholds from a custodian, trustee, marshal, or  
7 other officer of the court or a United States Trustee entitled to its  
8 possession, any recorded information (including books,  
documents, records, and papers) relating to the property or  
financial affairs of a debtor.

9 18 U.S.C. § 152.  
10

11 The Debtor asserts the Fifth Amendment privilege and refuses to answer questions  
12 about utilization of offshore accounts at any time in the past. Previously, in Question 10 in  
13 the 341(a) Questionnaire, he testified under oath that he had never had any such accounts.  
14 Under the facts of this case, the Court can conclude that the testimony sought to be  
15 compelled here by the Trustee could "conceivably" tend to incriminate the Debtor.  
16

17 If the Debtor now testifies that, in fact, he did have such accounts, he in effect admits  
18 criminal conduct under 11 U.S.C. § 152. Indeed, the Trustee's brief in support of the  
19 Supplemental Motion to Compel ("Supplemental Brief" – Docket #239) makes clear the  
20 Trustee's belief that Debtor committed acts which could support such charges, as Trustee  
21 states: "Funds of [the Durisoe] check appear to unquestionably constitute property of this  
22 bankruptcy estate that the Debtor did not disclose or turnover to the Trustee." (Supplemental  
23 Brief 8:26-27)  
24

25 The Trustee further states that: "In essence, the recent documentation evidences the  
26 Debtor's apparent use of a Swiss Bank account to conceal and convert accounts receivable  
27 belonging to this estate." (Supplemental Brief 9:11-12) These assertions are merely the  
28 latest in the Trustee's recitation of alleged bad acts. The examples set forth in the

1 Background section of this Memorandum Opinion are but a few of the Trustee's many prior  
2 recitations of the Debtor's allegedly improper conduct. The Court has no reason to discount  
3 the Trustee's concerns and no reason to dismiss his claims of improprieties. Most, if not all,  
4 of these alleged bad acts fall within the proscribed conduct set forth in section 152 of  
5 Title 18.

6  
7 b. There Is A Reasonable Possibility Of Prosecution.

8  
9 To the knowledge of the Court, the Trustee has never threatened or suggested  
10 criminal prosecution, his focus has been on asset recover and discharge revocation.  
11 However, overt threat of prosecution is not necessary. Debtor's right to assert the privilege  
12 does not depend on the likelihood of prosecution; the reasonable possibility of prosecution  
13 is enough. *Hoffman*, 341 U.S. at 486-487; *In re Master Key Litigation*, 507 F.2d 292, 293  
14 (9<sup>th</sup> Cir. 1974). Thus, the pendency of a criminal investigation or prosecution is not  
15 required. *In re Master Key Litigation*, 507 F.2d at 293. Here the Court is unaware of any  
16 offer of immunity to the Debtor or any bar to prosecution such as the running of a statute of  
17 limitations. As a result, the Court concludes that there is a reasonable possibility of  
18 prosecution sufficient to justify Debtor's assertion of the Fifth Amendment privilege.

19  
20 c. Debtor's Limited Evidence And Argument Meet His Burden Under The  
21 Facts Of This Case.

22  
23 The Court acknowledges that Debtor did not advance much in the way of specific  
24 discussion as to the basis for his concerns regarding incrimination. Further, his counsel  
25 overstated fact at the hearing when she stated that the Trustee has threatened criminal  
26 action. The Trustee strongly denies this assertion and to the best of the Court's knowledge,  
27 the denial is well-founded. Notwithstanding, the Trustee has repeatedly and recently  
28

1 accused the Debtor of conduct that justifies both the civil remedy of revocation of discharge  
2 and the assertion of criminal charges under 18 U.S.C. § 152.

3  
4 As the Supreme Court noted in *Hoffman*:

5 To sustain the privilege, it need only be evident from the  
6 implications of the question, in the setting in which it is asked,  
7 that a responsive answer to the question or an explanation of  
8 why it cannot be answered might be dangerous because injurious  
disclosure could result.

9 341 U.S. at 486-487.

10  
11 Under the facts of this case, the risks to the Debtor of answering the Interrogatories  
12 regarding offshore accounts or of providing a detailed explanation as to why he cannot  
13 answer are clear.

14  
15 Indeed, the Interrogatories relating to past ownership of offshore accounts and the  
16 identity of such accounts could be restated in a way that makes the risk of incrimination  
17 even more obvious. Contrary to Trustee's argument that the Interrogatories merely seek  
18 details about testimony previously given by the Debtor, in fact, the Trustee is actually  
19 asking: "Did you testify falsely when you previously stated under oath that you had no  
20 offshore accounts?" It is reasonable to assume that a positive answer to Interrogatory 1 and  
21 follow up answers to any of Interrogatories 2-3 or 11-15 would require Debtor to admit  
22 criminal activity under some or all of 11 U.S.C. § 152.

23  
24 d. The Trustee's Case Law Does Not Provide The Support He Suggests.

25  
26 The Trustee cites numerous cases and claims that they provide strong support for his  
27 position. The Trustee is incorrect.

1 Trustee relies in part on cases where a debtor's Fifth Amendment assertion was  
2 extremely broad and not tailored as is the case here. Thus, these cases provide little, if any,  
3 support. *See, Scarfia v. Holiday Bank*, 129 B.R. 671, (M.D. Fla. 1990) (debtor made  
4 blanket Fifth Amendment privilege assertion in response to interrogatories, requests for  
5 admission, and request for production of documents after having given 350 pages of  
6 testimony covering virtually every segment of discovery requests at issue); *In re Hulon*,  
7 92 B.R. 670, 675 (Bankr. N.D. Tex. 1988) (debtor refused to take oath and to respond to any  
8 questions at 2004 examination based on Fifth Amendment privilege assertion).

9  
10 As the *Hulon* Court noted:

11 In any [situation other than a criminal trial], the privilege  
12 does not permit a person to avoid being sworn as a witness or  
13 being asked questions. Rather the person must listen to the  
14 questions and specifically invoke the privilege rather than  
answer the questions. (citations omitted)

15 The debtor should be required to object with specificity to  
16 the information sought to permit the court to rule on the validity  
of the claim of privilege.

17  
18 *In re Hulon*, 92 B.R. at 675.

19  
20 Debtor's assertion of the privilege was on a question by question basis, and he  
21 asserted the privilege only when questioned about past ownership of offshore accounts.  
22 This is the appropriate method for asserting the Fifth Amendment privilege.  
23 *United States v. Bodwell*, 66 F.3d 1000, 1001 (9<sup>th</sup> Cir. 1995). Here, a blanket objection was  
24 not made; the Fifth Amendment privilege was specifically and properly asserted in areas  
25 where the Court can discern risk of incrimination.

26  
27 The Trustee also relies on bankruptcy cases involving document production requests,  
28 as to which the Fifth Amendment provides limited, if any protection, in the bankruptcy

1 context. See *In the Matter of Fuller*, 262 U.S. 91 (1923) (Fifth Amendment does not shield  
2 a debtor from the obligation to turn over his books and records to the bankruptcy trustee,  
3 who by legal process obtained the right to their custody and control); *In re Ross*, 156 B.R.  
4 272, 275-281 (Bankr. D. Idaho 1993) (records of a debtor in bankruptcy are not protected  
5 under Fifth Amendment and compliance with turnover order would not, on facts of the case,  
6 infringe debtor's right to refuse to testify against himself). Such cases are clearly  
7 distinguishable from the facts here, because the requested information is testimony in the  
8 form of interrogatory responses, not documents.<sup>5</sup>

9  
10 Similarly, the Trustee's citation to cases involving a refusal to turn over assets after  
11 initiation of a bankruptcy case is not helpful to the analysis required here as to interrogatory  
12 testimony. See *In re Ross*, 156 B.R. at 281 (turnover order as to property of the estate does  
13 not infringe the debtor's Fifth Amendment rights); and *In re Devereaux*, 48 B.R. 644, 645  
14 (Bankr. S.D. Cal. 1985) (requiring a turnover of all assets to trustee post-bankruptcy is not  
15 the equivalent of testimony protected by the Fifth Amendment).

16  
17 Finally, Trustee relies on other cases that while reciting a general rule do not advance  
18 his cause as each is factually distinct. E.g., *In re Piperi*, 137 B.R. 644 (Fifth Amendment is  
19 inappropriate basis for stay of adversary proceedings in relation to Debtor's discharge); and  
20 *Mason v. United States*, 244 U.S. 362, 367 (1917) (witnesses not relieved from answering  
21 Grand Jury questions about their presence at a table where cards were being played where  
22 there was no suggestion that such presence, or even joining in the game, was criminal unless  
23 played for something of value).

24  
25 Here, Debtor was asked to provide written testimony in the form of interrogatory  
26 responses. He then asserted the Fifth Amendment privilege only in response to questions  
27 relating to his ownership of offshore accounts in the past. The Court is able easily to discern

28  

---

<sup>5</sup> Debtor has claimed that no documents exist.

1 a nexus between this limited and specific assertion of the Fifth Amendment privilege and  
2 the crimes that would be admitted if he now gives testimony at odds with his prior sworn  
3 341(a) Questionnaire testimony. Trustee provides no case law support for a contrary view.  
4

5 e. The Court Does Not Require Debtor's Disclosure Of Specific Fear Of  
6 Prosecution To Establish His Right To Assert The Privilege.  
7

8 The Court, focusing on the peculiarities of this case and the facts actually in evidence  
9 herein, concludes that the Debtor's answers to Interrogatories 1-3 and 11-15 might establish  
10 that he committed bankruptcy crimes and that he reasonably could fear prosecution in  
11 connection therewith. To the best of the Court's knowledge, the Debtor has not been offered  
12 immunity and the statute of limitations does not bar prosecution. As a result, while the  
13 Debtor has not spelled out with specificity the particular crimes possibly at issue, common  
14 sense enables the Court to determine that there is more than a remote possibility that the  
15 Debtor's testimony might be incriminating and that he might be prosecuted in connection  
16 therewith.  
17

18 3. Debtor Has Not Waived His Right To Assert The Privilege.  
19

20 Trustee asserts, in the alternative, that Debtor waived the Fifth Amendment through  
21 prior testimony and actions in this case. Because the Fifth Amendment privilege may be  
22 waived affirmatively or by failure to properly assert it in connection with previous  
23 questioning, the Court must analyze waiver on a question by question basis.  
24

25 a. Waiver Must Be In The Same Proceeding.  
26

27 In analyzing issues of waiver, the Court must first determine whether the previous  
28 testimony allegedly constituting waiver was given in the same "proceeding." *Slutzker v.*

1 *Johnson*, 393 F.3d 373, 389 (3<sup>rd</sup> Cir. 2004) (witness may invoke the Fifth Amendment in  
2 criminal proceeding notwithstanding prior testimony at coroner's inquest); *United States v.*  
3 *Licavoli*, 604 F.2d 613, 623 (9<sup>th</sup> Cir. 1979) (testimony before a grand jury does not waive  
4 assertion of the Fifth Amendment at trial). At least one court has suggested that in a  
5 bankruptcy case, testimony given at a 341(a) meeting may not be asserted as a waiver in  
6 certain adversary proceedings. *In re Gi Yeong Nam*, 245 B.R. 216, 233 (Bankr. E.D. Pa.  
7 2000). Here, the Trustee alleges that Debtor's testimony given in 341(a) meetings and other  
8 "main case" proceedings and testimony given in the Recovery Action<sup>6</sup> effected a waiver of  
9 the Fifth Amendment privilege in connection with the Interrogatories (propounded in the  
10 main case).

11  
12 The Court believes that the testimony requested through the Interrogatories is a  
13 continuation of the 341(a) meeting testimony and other main case discovery utilized by the  
14 Trustee to locate and identify assets. As such, if a waiver occurred in the 341(a) testimony  
15 or main case discovery, the Court easily would find that waiver occurred in the same  
16 proceeding as the Interrogatories.

17  
18 The discovery taken and testimony given in the Recovery Action raises more issues,  
19 but ultimately the Court reaches the same conclusion. As discussed below, such testimony,  
20 if incriminating, would not justify finding that Debtor waived the Fifth Amendment  
21 privilege as to questions in the unrelated area of offshore accounts. If it were both  
22 incriminating and more directly related to Debtor's ownership of offshore accounts,  
23 however, the Court would find that the Recovery Action was not a separate and distinct  
24 proceeding for purposes of analyzing waiver. The main goal of the testimony taken at the  
25 341(a) meeting and in the main case discovery is the identification and recovery of assets.  
26 The Recovery Action discovery was merely a focused subset of this discovery. The

27  
28 <sup>6</sup> All such "testimony" is contained in Exhibits to Declaration of Nannette Farina filed in support of  
the Supplemental Motion to Compel. (Docket #240).

1 circumstances here are unlike a grand jury proceeding or a coroner's inquest where, the  
2 proceeding is not directly supervised by a Court, the activity is purely investigatory, the  
3 purpose is to determine whether any further action will be required, and the action if taken  
4 will commence court involvement and end involvement of the investigatory entity. Here,  
5 the Court is directly overseeing all aspects of the Bankruptcy Case and there is a close and  
6 direct relationship between the main case identification and asset recovery discovery and the  
7 Recovery Action. Thus, this Court finds that the Interrogatories and the Recovery Action  
8 are two phases of a single proceeding.

9  
10 b. Waiver Requires Prior Incriminating Testimony.

11  
12 Where incriminating facts have been voluntarily revealed, the Fifth Amendment  
13 privilege cannot be invoked to avoid disclosure of related details. *Rogers v. United States*,  
14 340 U.S. 367, 373 (1951). In *Rogers*, the Supreme Court held that Ms. Rogers could not  
15 assert the Fifth Amendment to protect her from supplying the name of the person to whom  
16 she transferred a list of names and addresses of communist party members when she had  
17 already provided the then incriminating evidence that she was an officer of the Denver  
18 Communist Party. *Id.* at 374. The *Rogers* Court emphasized that as each subsequent  
19 question is asked, the Court must determine whether the question "presented a reasonable  
20 danger of further incrimination in light of all the circumstances, including any previous  
21 disclosures." *Id.* Thus, to prevail on a claim of waiver, the Trustee must establish that  
22 Debtor previously made "criminating" statements and that the newly requested information  
23 simply requests that the Debtor provide "details" regarding those statements.

24  
25 In this case, Trustee provides ample evidence that Debtor on numerous previous  
26 occasions discussed his financial condition and his domestic bank accounts, received  
27 document subpoenas, provided tax returns, and stated that he does not have any offshore  
28

1 accounts. (Ex. "A" through "H"). The Trustee argues that all and perhaps any part of this  
2 constitutes waiver. The Court disagrees.

3  
4 For a court to find waiver of the Fifth Amendment privilege, it is not enough that a  
5 party generally testifies as to a topic. Instead, the party must have already provided  
6 testimony that in and of itself is incriminating and that is specific to the topic where the  
7 questioner wants additional detail. *Rogers*, 340 U.S. at 373; *In re Mudd*, 95 B.R. at 429.  
8 The Court has carefully reviewed the various transcripts, document requests, the  
9 341(a) Questionnaire and other evidence offered by the Trustee<sup>7</sup> and finds nothing that  
10 constitutes incriminating testimony sufficient to support a claim that Debtor waived the  
11 Fifth Amendment privilege as to the information at issue.

12  
13 The most relevant "testimony" previously given by Debtor is the response to  
14 Question 10 where Debtor stated that he had never had any offshore accounts. A statement  
15 that a person does not own offshore accounts is not incriminating. Trustee also supplies a  
16 check obtained through bank record subpoena written to the "Sovereign Society" and  
17 bearing the reference "Panama Seminar." Trustee claims that this is evidence of offshore  
18 accounts as his search of the Sovereign Society website shows that it specializes in "asset  
19 protection" through Panamanian accounts. Although the Trustee is free to make this  
20 assertion, the Court does not find the writing of this check to be an incriminating act.  
21 Trustee also makes much of the fact that Debtor previously testified extensively regarding  
22 certain bank accounts. Again, there is nothing incriminating in providing information on  
23 bank accounts, and no indication that any of this information otherwise provided evidence  
24 of a crime.

25  
26 <sup>7</sup> Trustee's case authority does not suggest a different analysis. See *In re Lederman*, 140 B.R. 49  
27 (Bankr. E.D.N.Y. 1992) (waiver as to production of writings effected where debtor made implied  
28 admissions by his disclosure statement that his books, records and files had been disclosed in their  
entirety); *In re Shamsiev*, 172 B.R. 144 (Bankr. ND Ga. 1994) (where debtor voluntarily submitted  
an affidavit, he waived the privilege under the Fifth Amendment with regard to any actual issue  
raised in the affidavit); *U.S. v St. Pierre*, 132 F.2d 837 (2<sup>nd</sup> Cir. 1942) (where the witness has

1           The Trustee does provide evidence that the Trustee argues is proof that Debtor has  
2 not acted appropriately in the Bankruptcy Case. The incriminating character of the  
3 evidence, however, is not as clear as Trustee claims because the Debtor claims mistake,  
4 confusion, or inability to comply and does not admit "knowing – intentional – fraudulent  
5 conduct." Further, none of the Trustee's proffered evidence of Debtor's statements involves  
6 an admission regarding offshore accounts. Even if the Court found such unrelated  
7 statements incriminating, it is too much of a reach for this Court to find that a tenuously  
8 incriminating statement, regarding destruction of records, for example, provides the  
9 necessary nexus to preclude the Debtor from asserting the Fifth Amendment privilege as to  
10 questions regarding offshore accounts. For example, the existence of offshore accounts is  
11 not reasonably seen as a mere detail relevant to the destruction of documents.

12  
13           Moreover, even if such statements were incriminating, the Debtor would still retain  
14 the right to assert the Fifth Amendment privilege if answers to the Interrogatories could tend  
15 to further incriminate him. *In re Master Key Litigation*, 507 F.2d at 294; *Shendel v. United*  
16 *States*, 312 F.2d 564, 566 (9<sup>th</sup> Cir. 1963); *Hoffman*, 341 U.S. at 486. No matter what  
17 Debtor previously admitted, he has never admitted ownership of offshore accounts, that he  
18 previously lied about such accounts, or that he improperly utilized such accounts to secrete  
19 estate assets. Similarly, the Court finds that Debtor's offhand comment, that there is an easy  
20 explanation for the Leu Bank check, is not an incriminating statement.

21  
22           The fact that no prior incriminating statements exist is hardly surprising. The  
23 Trustee's real argument is that Debtor previously lied. Under the Trustee's scenario, the  
24 statement is not incriminating – the statement is the crime. The Trustee now strongly  
25 desires that the Debtor be required to give testimony that the Trustee assumes will be  
26 contrary to his previous testimony. To do so would, in fact, require Debtor to admit that he  
27 previously lied in disclosing his assets to the Trustee and that he secreted assets. Clearly

28 \_\_\_\_\_  
confessed all elements of a crime he may not then withhold the details).

1 this could subject him to criminal prosecution. It is worth noting again that the Fifth  
2 Amendment privilege must be construed liberally by the Court to assure protection of the  
3 rights as intended. *Hoffman*, 341 U.S. at 486. The Court must also make every reasonable  
4 assumption against waiver. *DG Acquisitions*, 151 F.3d at 80. Given this standard and given  
5 the discussion above, the Court cannot conclude that Debtor previously waived the  
6 privilege. Debtor is not required to admit that he perjured himself.<sup>8</sup>  
7

8 Trustee cited several bankruptcy court decisions to support his assertion that Fifth  
9 Amendment privilege waiver has been found in cases with facts "less compelling than the  
10 present case." (Supplemental Motion to Compel Brief 15:7-8) In each of the allegedly "less  
11 compelling cases" cited by Trustee there had been extensive prior incriminating testimony  
12 on the specific issues in question and the facts suggesting waiver were much more  
13 compelling than here. See *Teitelman v. Dale Petroleum Corp. (In re A&L Oil Co.)*,  
14 200 B.R. 21 (Bankr. D. N.J. 1996) (Privilege waived as to incriminating matters discussed  
15 during several hours of prior testimony); *In re Mudd*, 95 B.R. at 426 (Privilege waiver found  
16 as to questions related to a Liquid Asset Fund where Debtor had appeared and testified  
17 extensively at five 2004 examinations and more than one 341(a) meeting regarding the  
18 Liquid Asset Fund); *United States v. St. Pierre*, 132 F.2d at 840 (witness had confessed all  
19 elements of a crime before invoking the Fifth Amendment to withhold details); *In re*  
20 *Scarfia*, 129 B.R. 671, 673 (MD Fla. 1990) (privilege was waived as to creditors'  
21 interrogatories, requests for admissions and requests for documents where the Debtor had  
22 previously volunteered 350 pages of testimony covering virtually every segment of the  
23 creditors' inquiries); *In re Shamsiev*, 172 B.R. at 145 (voluntary submission of an affidavit  
24 waived the Fifth Amendment privilege as to any factual issue raised in the affidavit).  
25  
26

---

27 <sup>8</sup> Under the Trustee's theory, perjurers would have no right to assert the Fifth Amendment because  
28 by making an untrue statement they would be required to admit their transgression at a later date  
and in light of further evidence discovered.

1 In summary, the Court finds that Debtor's prior statements regarding non-ownership  
2 of offshore accounts, and his writing of a check in relation to a "Panama Seminar" are not  
3 incriminating and that his statements regarding the existence of certain other accounts are  
4 not incriminating. Potentially incriminating statements do exist, however the nexus between  
5 such statements and the Interrogatory questions regarding offshore accounts is not direct,  
6 and certainly Debtor would be entitled to assert the Fifth Amendment privilege if the nexus  
7 were established, on the ground that further incrimination may follow. For example, while  
8 the evidence supplied by the Trustee regarding "admissions" of document production is not  
9 as clear as the Trustee suggests, generalized statements that the Debtor has destroyed  
10 documents related to his law practice (or more correctly cannot identify them or lost them  
11 when he was evicted from the Condo) is not clearly incriminating and, even if it is, does not  
12 bear such a direct nexus to the ownership of offshore accounts that the Debtor would not be  
13 entitled to reassert the Fifth Amendment privilege at this time. In short, the evidence of  
14 Fifth Amendment privilege waiver as to questions regarding offshore accounts is virtually  
15 non-existent. There is no evidence that Debtor ever discussed them except to deny their  
16 existence, and while circumstantial evidence suggests that this statement may be untrue, this  
17 evidence, primarily the Leu Bank check, was provided by a third party and cannot be  
18 deemed an incriminating statement by Debtor. As the Fifth Amendment privilege is  
19 personal, it cannot be waived by a third party. *Rogers*, 340 U.S. at 441.

20  
21 c. The Trustee's Improper Inference Argument Does Not Justify a Finding  
22 That Waiver Occurred.

23  
24 The Trustee relies on *Klein v. Harris, supra* and argues that the Court must,  
25 notwithstanding the above discussion of the law, find waiver because otherwise the Debtor's  
26 "misstatements" will leave an improper inference in the Court's mind. The Trustee's  
27 reliance on *Klein* is misplaced, however, as the "test" articulated in *Klein* still requires a  
28 prior incriminating statement. In the absence of prior incriminating statement, waiver does

1 not occur even under *Klein*, and one never reaches the "improper inference" prong of the  
2 *Klein* "test". Further, the validity of the *Klein* "test" is highly questionable if one read *Klein*  
3 as creating requirements beyond those set forth in *Rogers*. See *A&L Oil*, 200 B.R. at 25.  
4 Hence, *Klein* is best read as a case illustrating the reasons why a prior incriminating  
5 statement operates as a waiver of the Fifth Amendment privilege. As discussed below,  
6 when viewed in this fashion, a comparison between the facts in *Klein* and the facts the Court  
7 confronts in the Bankruptcy Case underscores the appropriateness of a determination that  
8 Debtor did not waive the privilege against self-incrimination.

9  
10 In *Klein*, Mr. Rabinowitz took the stand in Mr. Klein's murder trial and testified that  
11 he held the victim while Mr. Klein stabbed him. 667 F.2d at 279. Later, however,  
12 Mr. Rabinowitz advised Mr. Klein's attorney that he had testified under pressure and that, in  
13 fact, he was the stabber. *Id.* Rabinowitz was recalled as a witness, but successfully asserted  
14 the Fifth Amendment privilege, and Mr. Klein was convicted of the murder. 667 F.2d at  
15 280. Ultimately the Second Circuit Court concluded that Mr. Rabinowitz waived the Fifth  
16 Amendment protection, that the trial judge should have compelled his testimony, and that  
17 Mr. Klein was entitled to a new trial. 667 F.2d at 291. Clearly, the *Klein* Court's emphasis  
18 on fact finder confusion arose from the unique facts of this case; facts that are not similar to  
19 those in the case at hand.

20  
21 In *Klein*, the testimony was given in a murder trial in front of a jury, a jury that had  
22 no access to any information regarding Mr. Rabinowitz's inconsistent stories. Mr. Klein  
23 was, in fact, convicted of second degree murder, and Mr. Rabinowitz's testimony as an  
24 alleged eye witness to and participation in the murder was, no doubt, a key feature of that  
25 conviction. In this case, there is no jury, and the Court considers itself capable of sifting  
26 through surrounding facts, including Debtor's entire conduct in this case, if and when it  
27 becomes necessary to determine whether the Court should accept without question prior  
28

1 statements Debtor has given regarding offshore accounts. The risk of confusion is not  
2 remotely the same in this case.

3  
4 The Court also has carefully reviewed the Trustee's cases. His emphasis on fact  
5 finder confusion misses the mark entirely, because he fails to acknowledge that in each case  
6 where such confusion is discussed it is only as an explanation for the appropriateness of a  
7 finding of waiver in relation to questions asking for details regarding a previously admitted  
8 crime. *See e.g., In re Mudd*, 95 B.R. at 430-431; *In re Hulon*, 92 B.R. at 674. Thus, the  
9 Trustee's improper inference argument provides no support for his cause.

10  
11 d. The Particularities Of A Claim Of Privilege In A Bankruptcy Case Do Not  
12 Justify A Finding Of Waiver.

13  
14 The Trustee also asks that this Court give special consideration to the unique goals of  
15 a bankruptcy case when determining whether to require responses notwithstanding Debtor's  
16 Fifth Amendment privilege assertion. In oral argument, the Trustee bemoaned the negative  
17 effect on asset recovery options if a debtor can use the Fifth Amendment to avoid questions  
18 regarding asset identification and location. The Court, however, finds no case law support  
19 for the argument that asset recovery goals in a bankruptcy diminish a debtor's right to  
20 invoke the Fifth Amendment and finds clear statutory authority to the contrary.

21  
22 Under the former Bankruptcy Act, a debtor enjoyed broad immunity as his testimony  
23 in the bankruptcy case could not be offered in evidence against him in a criminal case. *See*  
24 Bankruptcy Act § 7(a)(10) (formerly at 11 U.S.C. § 25(a)(10)). Thus, a debtor under the  
25 Bankruptcy Act could not assert the Fifth Amendment privilege as a bar to testimony  
26 regarding his assets as he had no reasonable basis to fear prosecution based on such  
27  
28

1 testimony.<sup>9</sup> Presumably, the drafters of the Act placed the importance of asset identification  
2 above the desire to discover and prosecute criminal activity.

3  
4 The priorities under the Bankruptcy Code are different. Immunity is no longer  
5 automatic. *See* 11 U.S.C. § 344. Further, the Bankruptcy Code provides that appropriate  
6 assertion of the Fifth Amendment is not a basis for denial of discharge unless the debtor has  
7 been granted immunity and continues to refuse to respond to a material question based on  
8 assertion of the Fifth Amendment. 11 U.S.C. § 727(a)(6)(B) and (C). Thus, under the  
9 Bankruptcy Code, Congress required a weighing of the relative merits of criminal  
10 prosecution versus asset maximization on a case by case basis, and clearly did not, limit the  
11 applicability of Fifth Amendment protections.

12  
13 The Trustee is not without remedy in this case. The Trustee can seek a grant of  
14 immunity. Alternatively, the Trustee can continue his investigation without benefit of  
15 Debtor testimony in these areas. Similarly, the Debtor has significant risk, as his ability to  
16 defend the Discharge Action is weakened because he cannot provide full explanation in  
17 areas where he claims an "easy explanation" is available without waiving the Fifth  
18 Amendment privilege.<sup>10</sup> This state of affairs may not create the most appropriate balance of  
19 priorities from the Trustee or Debtor's perspectives, but it is exactly the balance Congress  
20 apparently envisioned.

21  
22 3. Adverse Inference Is A Matter For Another Day.

23  
24 Debtor spent significant time in his pleading arguing not just that the Fifth  
25 Amendment could be asserted, but also advancing arguments as to the consequences or non-

26  
27 <sup>9</sup> The exception to this rule was that such testimony had to be true. Even under the Act, a debtor  
could be prosecuted for perjury. *See In re Glickstein*, 222 U.S. 139, 142 (1911).

28 <sup>10</sup> The Trustee's assertions regarding offshore accounts are not the only or even main sources of the  
attack on Debtor's discharge.

1 consequences of his assertion of that privilege. In particular, he makes generalized  
2 arguments regarding conclusions the Court can and cannot draw. In addition, he argues that  
3 the Court can make no adverse inferences from Debtor's reliance on the Fifth Amendment.  
4 These issues are not squarely before the Court and will not be addressed at this time.

5  
6 CONCLUSION  
7

8 The Court is aware that recognizing Debtor's right to assert the Fifth Amendment  
9 privilege places another obstacle in the already obstacle ridden path of the Chapter 7 Trustee  
10 in this case. Unfortunately for the Trustee, constitutional case law is clear – Debtor has the  
11 right to assert this privilege in connection with specific Interrogatory responses. The  
12 Trustee is not without remedy in this case. Debtor's attorney correctly argued at the hearing  
13 on the Supplemental Motion to Compel that there are procedures for obtaining information  
14 regarding the Leu Bank account. Both Debtor's counsel and the Court acknowledge that  
15 these proceedings are difficult and expensive, but they do exist and there is no case law that  
16 suggests that difficulty in obtaining evidence is a factor that trumps a properly asserted Fifth  
17 Amendment privilege.<sup>11</sup> Similarly, the Trustee may choose to focus on the Discharge  
18 Action which is supported by conduct relative to the Recovery Action among other Debtor  
19 mis-steps additional to the offshore bank account allegations that are the focus here.

20  
21 Accordingly, the Supplemental Motion to Compel is DENIED. Counsel for the  
22 Debtor must prepare and lodge an appropriate order.

23 DATED: June 17, 2008

24   
25 LAURA S. TAYLOR, JUDGE  
26 United States Bankruptcy Court

27 <sup>11</sup> While this may lead to difficulties in recovery of estate assets, the Courts believes that this is  
28 unlikely to be the case. Debtor has testified that he does not have any offshore accounts at this time.  
See Ex. "S", Responses 4-10. While the Court's willingness to believe Debtor's statements is  
limited, his decision not to assert the Fifth Amendment privilege in this area, does lead the Court to  
believe that the Leu Bank account currently holds no Debtor funds.