

**UNITED STATES BANKRUPTCY COURT  
DISTRICT OF RHODE ISLAND**

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In re: Casey Roberts,  
Debtor

BK No: 16-10682  
Chapter 7

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**MEMORANDUM OF ORDER DENYING MOTION TO RECONSIDER**  
**(this relates to Doc. ## 69, 72, 82)**

This matter came before the Court on the Motion of Garret Roberts to Reconsider this Court's Order Granting Trustee's Motion to Compel Production of Documents ("Reconsideration Motion," Doc. #82). By way of background, on March 10, 2017, the Trustee filed a Motion to Compel Production of Documents Pursuant to Assented to Expedited Motion to Conduct an Examination of Garret Roberts under Federal Rule of Bankruptcy Procedure 2004 and to Request the Production of Documents ("Motion to Compel," Doc. #69).<sup>1</sup> Mr. Roberts objected to the production of documents ("Objection," Doc. #72), on the grounds that to do so would violate his Fifth Amendment privilege against self-incrimination. The matter was scheduled for hearing on April 19, 2017, and only the Trustee's counsel was present; counsel for Mr. Roberts failed to appear despite attempts to contact him after the matter was called on the calendar. For the reasons stated on the record, the Court overruled the Objection and granted the Motion to Compel.

The following day, Mr. Roberts filed the Reconsideration Motion explaining that his counsel failed to appear at the hearing because of an incorrect diary entry of the hearing date, taking full responsibility for this error. The Trustee has consented to the Motion to Reconsider, but is still pressing the Motion to Compel. After review, the Court concludes that it did not err in

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<sup>1</sup> The assented-to-motion for Mr. Roberts' examination and production of documents (Doc. #53) was granted on January 9, 2017 (Doc. #58).

overruling the Objection and granting of the Motion to Compel. The Reconsideration Motion is DENIED.

Standards Applicable to Motions to Reconsider

In the first instance, the motion fails to cite to the underlying legal framework upon which it is based, to set forth the standards of review for such motion, and to discuss how Mr. Roberts has satisfied such standards. Thus, Mr. Roberts has failed to meet his burden to establish that the Court's ruling should be altered or vacated. The Court notes,

While a motion for reconsideration is not one that is recognized by the Federal Rules of Civil Procedure, it is well-settled policy that courts can treat a motion which asks the trial court to modify a prior ruling as a motion to alter or amend the judgment under Fed. R. Civ. P. 59(e), made applicable by Fed. R. Bankr. P. 9023, or as a motion for relief from judgment under Fed. R. Civ. P. 60, made applicable by Fed. R. Bankr. P. 9024.

*In re Rowbotham*, 359 B.R. 356 (B.A.P. 1st Cir. 2007) (citations omitted). When a party fails to specify under which of these rules the request is being made, courts will look to the period of time that has elapsed from the date of the order sought to be altered or amended. *See In re Dodson*, No. 00-10464-JMD, 2003 WL 22056650, at \* 2 (Bankr. D.N.H. Aug. 28, 2003). Rule 59(e) will be deemed the applicable rule if the motion is filed within 14 days<sup>2</sup> after “entry of judgment that questions the correctness of a judgment.” *Aybar v. Crispin-Reyes*, 118 F.3d 10, 14 n.3 (1st Cir. 1997); *see In re Garcia*, 532 B.R. 173, 180 (B.A.P. 1st Cir. 2015). As Mr. Roberts filed the Reconsideration Motion one day after the Court overruled the Objection, the Court will apply the standards under Rule 59(e).

“In order to be successful on a Rule 59(e) motion, the moving party must establish ‘a manifest error of law or present newly discovered evidence.’” *Rosado*, 561 B.R. 598, 608 (B.A.P. 1st Cir. 2017) (quoting *Landrau-Romero v. Banco Popular de P.R.*, 212 F.3d 607, 612

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<sup>2</sup> Federal Bankruptcy Rule 9023 expressly modifies the time period under Federal Rule of Civil Procedure 59(e) for filing such motions to 14 days.

(1st Cir. 2000)) (citation omitted). The First Circuit also recognizes “manifest injustice, and an intervening change in controlling law” as additional grounds to warrant Rule 59(e) relief. *Marie v. Allied Home Mortg. Corp.*, 402 F.3d 1, 7 n.2 (1st Cir. 2005) (citing 11 C. Wright et al., *Federal Practice & Procedure* § 2810.1 (2d ed.1995)); see *In re Roblex Aviation Inc.*, No. 12-06341 BKT, 2012 WL 5879135, at \*3 (Bankr. D.P.R. Nov. 21, 2012). But, granting Rule 59(e) motions is considered “an extraordinary remedy that must be used sparingly because of interest in finality and conservation of scarce judicial resources.” *Rosado*, 561 B.R. at 607 (citation omitted).

Mr. Roberts’ presented grounds, non-appearance of his counsel due to his own clerical error, does not qualify for this extraordinary remedy. See *In re Schwartz*, 409 B.R. 240, 250 (B.A.P. 1st Cir. 2008) (citing *Lopez Jimenez v. Pabon Rodriguez (In re Pabon Rodriguez)*, 233 B.R. 212, 219 (Bankr. D.P.R. 1999), *aff’d*, 17 Fed. Appx. 5 (1st Cir. 2001)) (“The moving party cannot use a Rule 59(e) motion to cure its procedural defects . . .”). Nor did the Court overrule the Objection simply because counsel failed to appear at the hearing; it considered the Motion to Compel and the Objection on their merits and gave clear reasons why the Objection did not satisfy the burden Mr. Roberts must meet to be shielded from the Trustee’s document production requests on Fifth Amendment grounds.

#### Invoking the Fifth Amendment Privilege

The Court is well aware that “[t]he Fifth Amendment privilege against self-incrimination is a fundamental constitutional right that must be rigorously protected.” *In re Standard Fin. Mgmt. Corp.*, 76 B.R. 864, 865 (Bankr. D. Mass. 1987).”It protects against any disclosures which the witness 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)

(citations omitted). It may be invoked by a “non-party witness at any stage.” *Boston Children’s Heart Found., Inc. v. Nadal-Ginard*, No. C.A. 93-12539-REK, 1994 WL 129648, at \*3 (D. Mass. Mar. 31, 1994) (citations omitted). It may also be invoked in bankruptcy proceedings. *In re Vision Adventures, LLC*, 544 B.R. 277, 284 (Bankr. D.R.I. 2016) (citation omitted).

But, the privilege is not unlimited. As may be applicable here, it “does not extend to the contents of a voluntarily created document. . . . [and the claimant] may be compelled to produce the document even though it may contain incriminating information.” *In re Welsh*, No. 13-02457-8-SWH, 2013 WL 5952030, at \*5 (Bankr. E.D.N.C. Nov. 7, 2013) (citations omitted). This is because “a voluntarily created document cannot be said ‘to contain compelled testimonial evidence.’” *Id.* (quoting *United States v. Hubbell*, 530 U.S. 27, 36 (2000)); *United States v. Feldman*, 83 F.3d 9, 14 (1st Cir. 1996) (citations omitted) (“The law is clear that, though the Fifth Amendment protects against . . . the compelled production of private documents when the act of production itself is incriminating, the Amendment does not act as a general bar to the production of private information voluntarily prepared.”). This includes any voluntarily prepared personal or business records. *See In re Keller Fin. Servs. of Florida, Inc.*, 259 B.R. 391, 402-03 (Bankr. M.D. Fla. 2000) (citations omitted).

The Supreme Court has long recognized that “an individual may assert the Fifth Amendment to prevent the compelled production of documents in his possession if the act of production is both testimonial and self-incriminating.” *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 69 (1st Cir. 2011) (citing *Fisher v. United States*, 425 U.S. 391, 408 (1976)). “Such a case may arise when an individual’s compelled production of documents would amount to a tacit concession that the documents exist, are authentic, and are in his custody or control.” *Id.* at 73 (citations omitted).

“Testimonial privilege does not attach where ‘[t]he existence and location of the [materials] are a foregone conclusion,’ and the claimant’s production ‘adds little or nothing to the sum total of the [requesting party’s] information by conceding that he in fact has the [materials].’” *Burt Hill, Inc. v. Hassan*, No. CIV.A. 09-1285, 2010 WL 55715, at \*2 (W.D. Pa. Jan. 4, 2010) (quoting *United States v. Ponds*, 454 F.3d 313, 319-20 (D.C. Cir. 2006)); see *In re Sambrano Corp.*, 441 B.R. 562, 566 (Bankr. W.D. Tex. 2010) (quoting *Fisher*, 425 U.S. at 411) (“Therefore, if the ‘existence and location of the [subpoenaed] papers are a foregone conclusion and the [subpoenaed party] adds little or nothing to the sum total of the [requesting party’s] information by conceding that he in fact has the papers[,]’ then ‘no constitutional rights are touched’ by enforcement of the subpoena.”). Furthermore, “[d]ocuments prepared by a third party are not generally testimonial.” *United States v. Nugyen*, No. MISC. A. H-11-MC-83, H-11-MC-85, 2011 WL 1740256, at \*3 (S.D. Tex. May 5, 2011) (citations omitted).

There may be other exceptions to the privilege that may be implicated by the Trustee’s document request. For instance, the required records doctrine may apply to some of the documents the Trustee seeks. *In re Sambrano Corp.*, 441 B.R. at 568 (citations omitted) (“a person whose records are required to be maintained by law has no Fifth Amendment against self-incrimination when those records are ordered to be produced.”). The privilege also does not apply to corporate records, and some of the requested documents are records of a corporation with which Mr. Roberts apparently has some connection. See *Amato v. United States*, 450 F.3d 46, 49 (1st Cir. 2006) (citations omitted) (“A corporation does not enjoy the privilege against self-incrimination guaranteed by the Fifth Amendment, as the privilege is a personal privilege enjoyed by natural individuals.”). This is because “the custodian of corporate or entity records

holds those documents in a representative rather than a personal capacity.” *Id.* at 51 (quoting *Braswell v. United States*, 487 U.S. 99, 109-10 (1988)).

Because of the in-depth inquiry that the Court must conduct to determine if a document is subject to the Fifth Amendment privilege, it is insufficient to merely assert a *blanket privilege* for all documents sought in a discovery request. *See United States v. Castro*, 129 F.3d 226, 229 (1st Cir. 1997) (citation omitted) (“The privilege cannot be invoked on a blanket basis.”). “The burden of proving the existence of a valid Fifth Amendment privilege is on the person claiming that privilege.” *United States v. Chen*, 952 F. Supp. 2d 321, 328-29 (D. Mass. 2013), *aff’d sub nom. United States v. Zhong H. Chen*, 815 F.3d 72 (1st Cir. 2016) (citations omitted). “[T]he party asserting the privilege must demonstrate a ‘real and substantial risk’ that answers may tend to incriminate.” *In re Sambrano Corp.*, 441 B.R. at 566-67 (quoting *In re Gilbore*, 699 F.2d 71, 74-75 (2d Cir. 1983)); *see Castro*, 129 F.3d at 229 (citations omitted) (“[The prospective witness must show at the very least that he is faced with some authentic danger of incrimination.”).

This is where Mr. Roberts’ Objection falls far short of what is required and fails to satisfy the burden he must meet to invoke the privilege for any document within the scope of the Trustee’s request. He categorizes the Trustee’s 14 document requests as (1) banking transactions, (2) wire transfers, and (3) documents relating to the sale of real estate, which he collectively refers to as “The Requested Documents.” In conclusory fashion he argues, “[t]he testimonial and incriminating nature of Mr. Roberts’ possession of The Requested Documents is obvious from the memorandum filed by the Trustee in support of her motion.” Doc. #72-1 at 2. He vaguely refers to the Trustee’s implication “that The Requested Documents are inconsistent with, inter

alia, representations concerning insider loans contained in the Disclosure Statements and Plans of Reorganization.” *Id.*

To the contrary, it is not at all “obvious” to the Court that each and every requested document squarely falls within the Fifth Amendment privilege or outside of an exception to the privilege. “[T]he mere fact that the requested materials contain information that may be incriminating is not a legitimate basis for withholding production.” *Burt Hill, Inc. v. Hassan*, No. CIV.A. 09-1285, 2010 WL 55715, at \*2 (W.D. Pa. Jan. 4, 2010). The act-of-production privilege “applies only on a document-by-document basis.” *Bayview Loan Servicing, LLC v. McNaughton*, No. 2:05CV254, 2007 WL 2433996, at \*3 (W.D. Mich. Aug. 22, 2007) (citing *United States v. Dean*, 23 Fed. Appx. 448, 450 (6th Cir. 2001)). “It operates question by question. Thus, the district court must conduct a ‘particularized inquiry.’” *United States v. Castro*, 129 F.3d at 229 (citing *United States v. Pratt*, 913 F.2d 982, 990 (1st Cir. 1990)); see *S.E.C. v. Caramadre*, 717 F. Supp. 2d 217, 223 (D.R.I. 2010). Based on Mr. Roberts’ bare allegations, the Court cannot conduct such an inquiry without “a meaningful, articulation of the reasons why particular requested documents would tend to incriminate him.” *In re Bartlett*, 162 B.R. 73, 79 (Bankr. D.N.H. 1993) (citations omitted); see *In re Vrusho*, 321 B.R. 607, 612-13 (Bankr. D.N.H. 2005). In short, much more is required than was set forth in the Objection for Mr. Roberts to invoke the Fifth Amendment privilege to all of the documents requested by the Trustee.

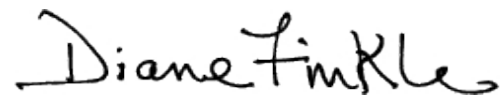
#### Necessary Steps to Invoke the Privilege

Should Mr. Roberts seek to file a renewed objection to the Trustee’s document request, the case law provides him ample guidance as to what he must do to establish the applicability of the Fifth Amendment privilege to each document that falls within the production request. The appropriate procedure is for Mr. Roberts to “‘elect to raise or not to raise the defense’ with

respect to each document responsive to the [Motion to Compel]. . . . by cataloguing any documents [he] hope[s] to withhold in a privilege log.” *Caramadre*, 717 F. Supp. 2d at 224. Along with any such privilege log, he must submit to the Court any documents he seeks to withhold based on the privilege for in camera inspection by delivering the documents to the Deputy Clerk marked to correspond to the privilege log and accompanied by a clear and specific explanation of why the privilege applies, with citation to appropriate legal authorities. This procedure is consistent with the necessary inquiry the Court must undertake. *See In re Fustolo*, 563 B.R. 85, 111 (Bankr. D. Mass. 2017) (citations omitted) (“The United States Supreme Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection.”). When claiming a privilege, the party invoking it ‘must establish the elements of privilege as to each record sought and each question asked so that . . . the court can rule with specificity.’ *See United States v. Dean*, 23 Fed. Appx. at 450 (denying the claimant’s Fifth Amendment privilege when he “submitted to the district court what it characterized as a ‘disorganized array of documents,’ along with only a general blanket assertion of fifth amendment privilege.”).

Date: May 10, 2017

By the Court,

A handwritten signature in black ink that reads "Diane Finkle". The signature is written in a cursive style with a horizontal line underneath the name.

Diane Finkle  
U.S. Bankruptcy Judge