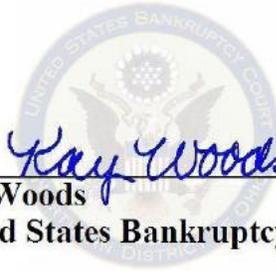


IT IS SO ORDERED.

Dated: January 11, 2013
11:27:03 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MICHAEL J. MERCURE,

Debtor.

* * * * *

ALLY FINANCIAL INC.,

Plaintiff,

v.

MICHAEL J. MERCURE,

Defendant.

CASE NUMBER 11-40258

ADVERSARY NUMBER 11-04145

HONORABLE KAY WOODS

MEMORANDUM OPINION REGARDING MOTION FOR COURT ORDER

Before the Court is Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc.'s Motion

for Order of Court Pursuant to 5 U.S.C. § 552a(b)(11) ("Motion for Court Order") (Doc. # 47) filed by Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. ("Ally") on November 30, 2012. Ally requests the Court to enter an order pursuant to The Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act"), authorizing disclosure by the U.S. Department of Justice ("DOJ") of all materials and testimony related to the Federal Bureau of Investigation's ("FBI") inquiry into odometer tampering at Midway Motor Sales, Inc. ("Midway") by Defendant Michael J. Mercure ("Mercure") and Midway. On December 17, 2012, Mercure filed Defendant Michael J. Mercure's Response to the Plaintiff's Motion for Order of Court Pursuant to 5 USC § 522a(b)(11) [sic] ("Response") (Doc. # 50). For the reasons set forth herein, the Court will grant the Motion for Court Order.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and the general orders of reference (General Order Nos. 84 and 2012-7) entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(I). The following constitutes the Court's findings of fact and conclusions of law pursuant to FED. R. BANKR. P. 7052.

I. FACTUAL AND PROCEDURAL BACKGROUND

Mercure filed a voluntary petition pursuant to chapter 7 of Title 11, United States Code, on February 1, 2011.

On May 27, 2011, Ally filed Complaint (Doc. # 1) against Mercure, which commenced the instant adversary proceeding. The Complaint includes the following allegations:

1. Mercure served as President and Owner of Midway, a now-defunct auto dealership. (Compl. ¶ 1.)
2. On September 30, 1993, Mercure executed a guaranty in which he guaranteed all indebtedness of Midway to Ally ("Guaranty"). (*Id.* ¶¶ 32-33.)
3. Midway engaged in odometer tampering and misrepresented the odometer readings of vehicles, which were subsequently sold by Ally at auction. (*Id.* ¶¶ 14-15.)
4. Upon discovering the odometer tampering in early 2004, Ally compensated the purchasers of the vehicles with altered odometers, thereby incurring losses and expenses. (*Id.* ¶ 20.)
5. On August 3, 2004, Ally initiated a lawsuit in the Cuyahoga County Court of Common Pleas (Ohio) ("State Court") against Mercure seeking recovery pursuant to the Guaranty, which proceeding was denominated Case No. CV 04 542097 ("State Court Action"). (*Id.* ¶ 34.)

6. On December 23, 2005, the State Court entered partial summary judgment with respect to liability in favor of Ally. (*Id.* ¶ 35.)

7. On October 5, 2006, the State Court awarded Ally damages in excess of \$1.7 million ("Judgment"), specifically finding that the Judgment included "\$1,055,397.50 as and for damages related to Midway Motor Sales' Odometer Tampering." (*Id.* ¶ 36.)¹

Ally alleges that the Judgment is nondischargeable under 11 U.S.C. § 523(a)(2), (4) and/or (6) based upon Mercure's alleged fraud, misrepresentation and/or embezzlement in connection with the odometer tampering.

On March 19, 2012, Mercure filed Defendant Michael J. Mercure's Motion for Summary Judgment ("Motion for Summary Judgment") (Doc. # 29). The Motion for Summary Judgment argued that Ally may not seek a determination that the Judgment is nondischargeable under the fraud provisions of 11 U.S.C. § 523 because Ally did not allege fraud against Mercure in the State Court Action. According to Mercure, the Judgment arises solely from Mercure's breach of the Guaranty and not from any fraudulent or tortious conduct with respect to the odometer

¹ The Eighth Appellate District Court of Appeals of Ohio affirmed the Judgment on October 25, 2007 in *General Motors Acceptance Corp. v. Mercure*, 8th Dist. No. 88963, 2007-Ohio-5708.

tampering. Thus, the Judgment may not be excepted from discharge under 11 U.S.C § 523 as a matter of law.

On June 7, 2012, this Court issued Memorandum Opinion Regarding Mercure's Motion for Summary Judgment (Doc. # 34) and Order Denying Mercure's Motion for Summary Judgment (Doc. # 35). In denying summary judgment, the Court held that it need not confine its review to the State Court Action to determine whether the Judgment is nondischargeable. (Mem. Op. at 10.) The Court further concluded that "genuine issues of material fact remain regarding Mercure's alleged participation in odometer tampering or other fraudulent activity." (Summ. J. Order, ¶ 3.)

In an effort to obtain evidence regarding Mercure's personal involvement in the odometer tampering, on October 3, 2012, Ally sent a written request ("Touhy Request") to Agent Wallace Sines of the FBI seeking "the production of materials, information, and testimony relating to the FBI's investigation of odometer tampering by Michael Mercure and Midway Motor Sales, Inc." (Touhy Req. at 1.) The Touhy Request was accompanied by Subpoena in an Adversary Proceeding ("Subpoena"), which formally requests "[a]ny and all documents relating to the investigation of odometer tampering that occurred at Midway Motor Sales, Inc., including but not limited to any documents establishing Michael

Mercure's involvement and knowledge of the odometer tampering."² The Subpoena further requests Agent Sines to appear and testify at a videotaped deposition regarding his investigation.

On November 14, 2012, the DOJ, on behalf of the FBI, responded to the *Touhy* Request and Subpoena in a letter to Ally's attorney ("DOJ Response").³ The DOJ Response summarizes the DOJ's regulations and procedures for the disclosure of requested information pursuant to *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951) ("*Touhy* Regulations"). It further sets forth the Privacy Act's general prohibition against disclosure of an individual's personal information absent consent or court order. The DOJ Response concludes:

[T]he FBI reviewed it [sic] files to determine if there were any documents responsive to your request that could be released in compliance with the Touhy Regulations and other statutory provisions. The FBI has not identified any documents that are responsive to your request and that fit within federal statutory and regulatory provisions; therefore, the FBI cannot honor the Touhy request at this time. Should you wish to obtain and submit Privacy Act waivers, the FBI would be happy to review its records again to determine, what, if any, documents it may have that are responsive to your request and that comply with all federal statutes and regulations.

(DOJ Resp. at 2.)

² Copies of the *Touhy* Request and Subpoena are attached as Exhibit A to Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc.'s Notice of Service of Subpoena Duces Tecum and Request Pursuant to 28 C.F.R. § 16.21 et seq (Doc. # 41), which was filed by Ally on October 3, 2012.

³ A copy of the DOJ Response is attached as Exhibit B to the Motion for Court Order.

On November 15, 2012, Ally took a videotaped deposition of Mercure.⁴ During the deposition, Mercure affirmatively indicated on numerous occasions that he did not intend to answer any questions regarding Midway's operations, his role at Midway or the odometer tampering that occurred at Midway based on his Fifth Amendment privilege against self-incrimination. (See, e.g., Tr. 7:22-8:1; 11:11-24; 21:5-11.) Additionally, Mercure read the following prepared statement ("Statement") in response to at least 25 questions posed by Ally: "Because the issue of odometer rollbacks and related matters at Midway Motors is still an open file with the Federal Bureau of Investigation, I must respectfully decline to answer the question and invoke my Fifth Amendment rights."⁵ Ally concluded the deposition by asking Mercure to sign a Certification of Identity waiving his Privacy Act protections and authorizing the FBI's release of its investigative files.⁶ (Tr. 21:13-22:21; Mot. for Ct. Order, Ex. A, ¶ 6.) Although Mercure agreed to consider Ally's request, he ultimately declined to authorize disclosure. (Mot. for Ct. Order, Ex. A, ¶ 6.)

⁴ A copy of the Deposition Transcript of Michael J. Mercure ("Transcript") is attached as Exhibit A to Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc.'s Notice of Filing Deposition of Michael J. Mercure (Doc. # 46), which was filed by Ally on November 30, 2012.

⁵ A copy of the Statement is attached as Deposition Exhibit A to the Transcript.

⁶ A copy of the Certification of Identity is attached as Exhibit C to the Motion for Court Order.

Ally subsequently filed its Motion for Court Order on November 30, 2012. In the Motion for Court Order, Ally argues that it may obtain the FBI's files because Mercure has placed his involvement in the odometer tampering directly at issue in this bankruptcy case. (Mot. for Ct. Order at 1.) As a result, Ally requests this Court to authorize the FBI's disclosure of investigative materials and testimony regarding the odometer tampering. (*Id.* at 8.) In the alternative, Ally requests an adverse inference that Mercure's deposition testimony with respect to his role in the odometer tampering would have been unfavorable to him. (*Id.* at 8-9.)

In the Response, Mercure argues that the DOJ Response affirmatively indicates that the FBI has no information establishing his personal involvement in the odometer tampering at Midway. (Resp. at 3.) Absent any documents responsive to the *Touhy* Request and Subpoena, Mercure argues that the Motion for Court Order is "not only superfluous and a waste of judicial resources, but it is no longer a proper discovery request" under FED. R. CIV. P. 26(b). (*Id.* at 2-3.) Mercure thus requests that the Court deny the Motion for Court Order.

II. LEGAL ANALYSIS

A. The Privacy Act

The Privacy Act generally prohibits a federal agency from disclosing an individual's personal information without a

request by or the consent of the individual to whom the information pertains. See 5 U.S.C. § 552a(b) (West 2013). However, § 552a(b)(11) expressly permits disclosure of information, absent consent, pursuant to a court order. 5 U.S.C. § 552a(b). Specifically, § 552a(b)(11) provides:

(b) Conditions of disclosure. No agency shall disclose any record . . . by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be -

(11) pursuant to the order of a court of competent jurisdiction[.]

Id. Federal district courts, including bankruptcy courts, are courts of competent jurisdiction for purposes of § 552a(b)(11). See *Barrett v. Educ. Credit Mgmt. Corp. (In re Barrett)*, 487 F.3d 353, 363 (6th Cir. 2007) (noting that a creditor may subpoena a debtor's protected medical records pursuant to § 552a(b)(11) in an adversary proceeding), and *Cekic-Torres v. Access Group, Inc. (In re Cekic-Torres)*, 431 B.R. 785, 794 (Bankr. N.D. Ohio 2010) (same).

While the Privacy Act does not specify the applicable standard for evaluating a motion for court order under § 552a(b)(11), the majority of courts to address this issue have applied the general relevance standard of FED. R. CIV. P. 26(b)(1). *E.g.*, *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C.

Cir. 1987) (“[T]he test of discoverability is the relevance standard of Rule 26(b)(1) of the FRCP.”); see also *Stiward v. United States*, Case No. 05-1926, 2007 U.S. Dist. LEXIS 62772, *4 (E.D. La. Aug. 24, 2007) (collecting cases). In so doing, these courts have recognized that the Privacy Act does not create a statutory privilege against disclosure and may not serve as a mechanism to circumvent the discovery process. *Laxalt*, 809 F.2d at 888; *Clavir v. United States*, 84 F.R.D. 612, 614 (S.D.N.Y. 1979).

For example, in *Clavir*, the court ordered discovery of certain FBI memoranda that were subject to the Privacy Act, finding them “relevant and discoverable unless some recognized privilege applies.” 84 F.R.D. at 614. The court declined to view the Privacy Act’s protections as the equivalent of a privilege, stating:

[I]t has never been suggested that the Privacy Act was intended to serve as a limiting amendment to Part V of the Federal Rules of Civil Procedure, and exception (11) to § 552a(b) makes it completely clear that the Act cannot be used to block the normal course of court proceedings, including court-ordered discovery.

Id. (emphasis added).

Likewise, in *Laxalt*, a newspaper defending a libel action sought a court order permitting discovery of certain FBI files, which the newspaper claimed contained information supporting its allegedly libelous publication. 809 F.2d at 886. The court

ordered disclosure of the documents pursuant to § 552a(b)(11), holding that "a party can invoke discovery of materials protected by the Privacy Act through the normal discovery process and according to the usual discovery standards," *Id.* at 889. Thus, if information protected by the Privacy Act is relevant to the court proceeding under FED. R. CIV. P. 26(b)(1), a court may order disclosure of the requested information pursuant to § 552a(b)(11).

B. Relevance Standard

FED. R. CIV. P. 26(b)(1), made applicable to this proceeding by FED. R. BANKR. P. 7026, permits discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense" FED. R. CIV. P. 26(b)(1) (West 2013). The relevance burden is satisfied if a party shows that the discovery sought "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*; *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (holding that relevance "encompass[es] any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.") Relevance for discovery purposes under FED. R. CIV. P. 26(b)(1) is extremely broad, and courts have ample discretion to determine relevancy when establishing the scope of discovery. See *Invacare Corp. v. Respironics, Inc.*, Case No.

1:04 CV 1580, 2006 U.S. Dist. LEXIS 7602, *9-10 (N.D. Ohio Feb. 28, 2006).

Mercure's personal involvement in the odometer tampering at Midway is a relevant - and, in fact, central - issue in the instant adversary proceeding. Ally alleges in the Complaint that (i) Mercure caused Ally damages as set forth in the Judgment (Compl. ¶ 49); (ii) the Judgment "levied against Mercure resulted from his embezzlement and fraudulent activity" (*id.* ¶ 50); (iii) Mercure's conduct was "malicious, deliberate, gross and egregious" (*id.* ¶ 51); and (iv) the Judgment is nondischargeable pursuant to 11 U.S.C. § 523(a)(2), (4) and/or (6) (*id.* ¶¶ 49, 51). This Court previously determined that genuine issues of fact remain regarding "whether Mercure participated in odometer tampering or other fraudulent activity" at Midway. (Mem. Op. at 14.) Thus, the question of Mercure's personal involvement in the odometer tampering goes directly to the heart of whether the Judgment is dischargeable.

Based on the foregoing, Ally has established that the requested information is relevant to this adversary proceeding. The FBI files may contain or lead to information regarding Mercure's personal involvement in the odometer tampering that occurred at Midway. Construing Ally's Motion for Court Order pursuant to the liberal discovery principles espoused in FED. R. Civ. P. 26(b)(1), the Court finds that the requested information

is reasonably calculated to lead to the discovery of admissible evidence. Accordingly, Ally is entitled to the FBI's investigative materials relating to the odometer tampering at Midway.

In the Response, Mercure argues that a court order permitting disclosure pursuant to § 522a(b)(11) is superfluous because the DOJ Response affirmatively indicates the absence of any FBI documents responsive to Ally's request. Mercure's argument is unpersuasive. Mercure relies heavily on the following sentence in the DOJ Response to suggest that the FBI has no documents establishing his involvement in the odometer fraud: "The FBI has not identified any documents that are responsive to your request and that fit within federal statutory and regulatory provisions." (Resp. at 1.) When properly read in the conjunctive, however, the DOJ's statement merely indicates that the FBI cannot presently disclose any documents that both respond to Ally's request and comply with applicable federal law.

Moreover, Mercure's contention in the Response that Ally's request wastes time and resources is unavailing. If Mercure is correct that the FBI has no information establishing his personal involvement in the odometer fraud, then Mercure has nothing to lose from the FBI's disclosure of the requested information to Ally. In fact, Mercure potentially stands to

bolster his position in this adversary proceeding if that is the case. At the very least, any information - or lack thereof - from the FBI may materially bear on Mercure's personal involvement in the odometer tampering, which is unquestionably relevant to the resolution of this adversary proceeding.

Finally, even accepting Mercure's contention that the FBI's case against him is ongoing, the likelihood that Mercure will be harmed by disclosure of the FBI's materials is minimal. From 2005 through 2007, the Ohio Attorney General maintained an action against Ally and Midway for the odometer tampering; however, Mercure maintains that he "has never been charged with any odometer-related crime at the federal, state, or local levels." (Resp. at 2 n.2.) While it is conceivable that information contained in the FBI's files could be used against Mercure in a subsequent action, the Court questions the likelihood that federal, state or local authorities will initiate any proceedings against Mercure years after discovering the odometer tampering at Midway.

The Court further notes that the statutes of limitations for a private cause of action against Mercure for odometer tampering have run. Both the federal Motor Vehicle Cost Information Act and Ohio's Odometer Rollback and Disclosure Act impose two-year statutes of limitations for a civil cause of action for odometer tampering. 49 U.S.C. § 32710(b) (West

2013); OHIO REV. CODE ANN. § 4549.49(B) (West 2013). According to the Complaint, Midway's odometer tampering was discovered in early 2004, whereupon Ally "immediately took action" to notify the end purchasers of the altered vehicles. (Compl. ¶ 20.) Under these circumstances, and coupled with the FBI and Ohio Attorney General's investigations into Midway's conduct, most - if not all - entities affected by the odometer tampering knew or should have known of their injury as early as 2004. Any civil action that might be commenced in the aftermath of the FBI's disclosure thus stands to be untimely, mitigating the risk of harm to Mercure. Accordingly, the Court will permit disclosure of the FBI's investigative files regarding the odometer tampering at Midway.

C. Protective Order

While the Privacy Act does not automatically preclude disclosure of information within its scope, the applicability of the Privacy Act to the requested materials is nevertheless relevant to determining the appropriate scope of discovery. The interests protected by the Privacy Act "reflect a congressional judgment that certain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment." See *Laxalt v. McClatchy*, 809 F.2d 885, 889 (D.C. Cir. 1987) (quoting *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1344 (D.C. Cir. 1984)). In this

regard, FED. R. CIV. P. 26(c) provides that a "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense" related to a discovery request. FED. R. CIV. P. 26(c) (West 2013). A protective order under FED. R. CIV. P. 26(c) is a proper procedural device to balance "the need for disclosure against potential harm to the subject of the disclosure" as contemplated by the Privacy Act. *Lohrenz v. Donnelly*, 187 F.R.D. 1, 8 (D.D.C. May 10, 1999).

While Ally is entitled to discover the contents of the FBI's files regarding the odometer tampering at Midway, the Court is mindful that the FBI's materials may contain personal - and potentially incriminating - information about Mercure. In light of the foregoing, the Court believes that any disclosure of the FBI's information should be made pursuant to a protective order under FED. R. CIV. P. 26(c). An appropriate protective order will permit the parties to access and use information relevant to this adversary proceeding without undermining the legitimate privacy concerns embodied in the Privacy Act. Accordingly, as set forth, *infra* at 20, the Court will enter a protective order regarding disclosure of the FBI's information.

D. Adverse Inference

As an alternative, Ally requests an adverse inference, *i.e.* that Mercure's testimony regarding his personal involvement in

the odometer tampering would be unfavorable to him, based on Mercure's repeated assertion of the Fifth Amendment privilege during his deposition. While a debtor may assert a Fifth Amendment privilege against self-incrimination in bankruptcy proceedings, the debtor may not use the privilege to circumvent discovery. See, e.g., *General Motors Acceptance Corp. v. Bartlett (In re Bartlett)*, 162 B.R. 73 (Bankr. D.N.H. 1993); *In re Lederman*, 140 B.R. 49 (Bankr. E.D.N.Y. 1992); *Chase Manhattan Bank, N.A. v. Frenville*, 67 B.R. 858 (Bankr. D.N.J. 1986).

A voluntary chapter 7 debtor must produce documents relevant to an objection to discharge under 11 U.S.C. § 523, notwithstanding any incriminating effect of such production, if the debtor wishes to pursue and obtain a discharge of such debt. *In re Bartlett*, 162 B.R. at 79. The debtor cannot seek to discharge a specific debt while simultaneously withholding information that justifies its discharge. See *Bertelt v. United States (In re Bertelt)*, 213 B.R. 173, 178 (Bankr. M.D. Fla. 1997) (citing *Frenville*, 67 B.R. at 862).

By filing for chapter 7 bankruptcy protection, a debtor necessarily places his assets, liabilities, income and expenses at issue for creditors and the court to review. *In re Wisler*, Case No. 00-5546-FJO-13, 2000 Bankr. LEXIS 1971, *8 (Bankr. S.D. Ind. Nov. 30, 2000). A creditor has the right to inquire into these matters, particularly when the debtor seeks to discharge a

debt that the creditor asserts is nondischargeable. See *id.* To hold otherwise "would allow the debtor to use the Fifth Amendment as a shield, while impermissibly using the Bankruptcy Code as a sword with which to take an unfair advantage of creditors." *In re Bartlett*, 162 B.R. at 79 (quoting *In re Lederman*, 140 B.R. at 53). Thus, courts may draw an adverse inference from the debtor's assertion of the Fifth Amendment privilege in an adversary proceeding pursuant to 11 U.S.C. § 523. See *Blakeman v. United States (In re Blakeman)*, 244 B.R. 100, 103-104 (Bankr. N.D. Ohio 1999); *In re Brandenburg*, Case No. 06-30709, 2007 Bankr. LEXIS 230, *11 (Bankr. E.D. Tenn. Jan. 10, 2007).

Based on Mercure's repeated refusal to answer Ally's inquiries about the odometer tampering that occurred at Midway, the Court finds an adverse inference regarding his testimony to be appropriate. Mercure is attempting to obtain a discharge of the Judgment debt in his chapter 7 case while withholding all information justifying - or as Ally suggests, negating - his entitlement to such relief in this adversary proceeding.

Mercure may not enjoy the benefits of the bankruptcy process without fully complying with its requirements. Mercure voluntarily filed his chapter 7 petition, thereby affirmatively seeking all of the protections of bankruptcy, including discharge of the Judgment debt. In so doing, Mercure placed his

involvement in the odometer tampering squarely before the Court because such issue materially bears on the dischargeability of the Judgment debt. By invoking the Fifth Amendment privilege in refusing to provide information to Ally regarding the odometer tampering, Mercure impermissibly "turn[ed] the shield of the Fifth Amendment into a sword to cut his way to a discharge." *In re Blakeman*, 244 B.R. at 104. The Court is thus free to draw an adverse inference from Mercure's assertion of the Fifth Amendment privilege.

III. CONCLUSION

For the reasons set forth above, the Court finds Ally's Motion for Court Order pursuant to § 552a(b)(11) of the Privacy Act well-taken. The requested information satisfies the relevance standard imposed by FED. R. CIV. P. 26(b)(1). The FBI's investigative files may contain or lead to discoverable information regarding Mercure's personal involvement in the odometer tampering, which is central to the resolution of this adversary proceeding. Moreover, by voluntarily filing for chapter 7 bankruptcy protection, Mercure placed his involvement in the odometer tampering directly at issue before the Court. Thus, Mercure may not rely on the Fifth Amendment privilege to foreclose discovery of relevant information.

As a consequence, the Court will grant the Motion for Court Order. Ally is entitled to one of the following: (i) an order

under § 552a(b)(11) of the Privacy Act permitting disclosure, subject to an appropriate protective order, by the FBI of all materials related to its investigation of odometer tampering by Mercure and Midway; or (ii) an adverse inference regarding Mercure's personal involvement in the odometer tampering based on Mercure's repeated assertion in his deposition testimony of the Fifth Amendment privilege against self-incrimination.

Accordingly, the Court will order Mercure to waive the protections of the Privacy Act by executing a form substantially similar to the Certification of Identity attached as Exhibit C to the Motion for Court Order within fourteen (14) days after entry of this Memorandum and accompanying Order.

The Court will order the parties to meet and confer regarding the terms of an appropriate protective order for the contemplated disclosure. If, within fourteen (14) days after entry of this Memorandum and accompanying Order, the parties are unable to agree on the terms of a protective order, either party may file an application for protective order ("Application") and submit a proposed protective order. The Court will review and consider the Application(s) and will enter an appropriate protective order.

If Mercure fails to comply with the terms of this Memorandum and accompanying Order by executing the Certification of Identity as set forth herein, Ally will be entitled to an

adverse interest as a matter of law that Mercure's deposition testimony regarding his personal involvement in the odometer tampering and fraud at Midway would have been unfavorable to him.

An appropriate order will follow.

#

IT IS SO ORDERED.

Dated: January 11, 2013
11:27:03 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:

MICHAEL J. MERCURE,

Debtor.

* * * * *

ALLY FINANCIAL INC.,

Plaintiff,

v.

MICHAEL J. MERCURE,

Defendant.

CASE NUMBER 11-40258

ADVERSARY NUMBER 11-04145

HONORABLE KAY WOODS

ORDER GRANTING MOTION FOR COURT ORDER

Before the Court is Plaintiff GMAC LLC f/k/a General Motors
Acceptance Corporation and n/k/a Ally Financial Inc.'s Motion

for Order of Court Pursuant to 5 U.S.C. § 552a(b)(11) ("Motion for Court Order") (Doc. # 47) filed by Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. ("Ally") on November 30, 2012. Ally requests the Court to enter an order pursuant to The Privacy Act of 1974, 5 U.S.C. § 552a ("Privacy Act"), authorizing disclosure by the U.S. Department of Justice of all materials and testimony related to the Federal Bureau of Investigation's ("FBI") inquiry into odometer tampering at Midway Motor Sales, Inc. ("Midway") by Defendant Michael J. Mercure ("Mercure") and Midway. On December 17, 2012, Mercure filed Defendant Michael J. Mercure's Response to the Plaintiff's Motion for Order of Court Pursuant to 5 USC § 522a(b)(11) [sic] (Doc. # 50).

For the reasons set forth in this Court's Memorandum Opinion Regarding Motion for Court Order entered on this date, the Court hereby:

1. Finds that the general relevance standard of FED. R. Civ. P. 26(b)(1) applies to a motion for court order pursuant to § 552a(b)(11) of the Privacy Act;
2. Finds that the information requested by Ally in the Motion for Court Order is relevant to the instant adversary proceeding;

3. Finds that Mercure may not rely on the Fifth Amendment privilege against self-incrimination to foreclose discovery of relevant information;
4. Finds that Ally is entitled to one of the following:
 - (i) an order under § 552a(b)(11) of the Privacy Act authorizing disclosure, subject to an appropriate protective order, by the FBI of all materials related to its investigation of odometer tampering by Mercure and Midway; or
 - (ii) an adverse inference regarding Mercure's personal involvement in the odometer tampering based on Mercure's repeated assertion in his deposition testimony of the Fifth Amendment privilege against self-incrimination;
5. Grants Ally's Motion for Court Order;
6. Orders Mercure to waive the protections of the Privacy Act by executing a form substantially similar to the Certification of Identity attached as Exhibit C to the Motion for Court Order within fourteen (14) days after entry of this Order;
7. Orders the parties to meet and confer regarding the terms of an appropriate protective order for the contemplated disclosure. If, within fourteen (14) days after entry of this Order, the parties are unable to agree on the terms of a protective order, either

party may file an application for protective order ("Application") and submit a proposed protective order. The Court will review and consider the Application(s) and will enter an appropriate order; and

8. Orders that, if Mercure fails to comply with the terms of this Order by executing the Certification of Identity as set forth herein, Ally is entitled to an adverse interest as a matter of law that Mercure's deposition testimony regarding his personal involvement in the odometer tampering and fraud at Midway would have been unfavorable to him.

#