IT IS SO ORDERED.

Dated: May 28, 2013
04:20:15 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
MICHAEL J. MERCURE,	*	
Debtor.	*	**CASE NUMBER 11-40258**
* * * * * * * * * * * * * * * *	*	
ALLY FINANCIAL INC.,	*	
Plaintiff,	*	**ADVERSARY NUMBER 11-04145**
v.	*	
MICHAEL J. MERCURE,	*	
Defendant.	*	**HONORABLE KAY WOODS**

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MEMORANDUM OPINION REGARDING MOTION FOR COURT ORDER OR, IN THE ALTERNATIVE, MOTION IN LIMINE

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Before the Court is Defendant Michael J. Mercure's Motion for Order of Court Pursuant to 5 USC § 522a(b)(11) [sic] or, in

the Alternative, Motion in Limine ("Defendant's Motion") (Doc. # 60) filed by Defendant Michael J. Mercure ("Defendant" or "Mercure") on May 16, 2013. On May 23, 2013, Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. ("Plaintiff" or "Ally") filed Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc.'s Memorandum in Opposition to Defendant's Motion for Order of Court Pursuant to 5 U.S.C. § 522a(b)(11) [sic] or, in the Alternative, Motion in Limine ("Ally's Response") (Doc. # 65). Mercure 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 "documents and tape recordings that were mentioned and cross-referenced in the documents that the FBI has already provided" (Def. Mot. at 4) in connection with the deposition of Federal Bureau of Investigation ("FBI") Special Agent Wallace Sines, which occurred pursuant to this Court's Memorandum Opinion Regarding Court Order (Doc. # 51) and Order Granting Motion for Court Order (Doc. # 52) entered on January 11, 2013. In the alternative, Mercure seeks an order that "none of [Special Agent Sines's] testimony should be allowed into this case for any reason." (Def. Mot. at 4.)

For the reasons set forth below, this Court finds that the Defendant's Motion is not well taken and will be denied.

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 Motor Sales, Inc. ("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.

[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.

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 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 requested "[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 requested 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 summarized 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 set forth the Privacy Act's general prohibition against disclosure of an individual's personal information absent consent or court order. The DOJ Response concluded:

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[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.

> [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.)

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

[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.

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.)

All discovery in this adversary proceeding was to be completed by November 30, 2012. Notwithstanding this deadline, Mercure took limited discovery from Ally prior to the discovery cutoff, none of which appears to relate to his allegations concerning Ally's knowledge of the odometer tampering. He likewise did not send his own *Touhy* request to the FBI or otherwise attempt to obtain information from the FBI regarding his asserted defenses to Ally's Complaint.

On November 30, 2012, Ally filed 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). In the Motion for Court Order, Ally argued 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

[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.

Ct. Order at 1.) As a result, Ally requested this Court to authorize the FBI's disclosure of investigative materials and testimony regarding the odometer tampering. (*Id.* at 8.) In the alternative, Ally requested 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.)

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 to Motion for Court Order") (Doc. # 50). In the Response to Motion for Court Order, Mercure argued that the DOJ Response affirmatively indicated that the FBI had 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 argued 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 requested that the Court deny the Motion for Court Order.

On January 11, 2013, this Court granted the Motion for Court Order. (*See* Doc. ## 51 and 52.) At a telephonic status conference that same day, the Court extended the discovery period until April 12, 2013, for the limited purpose of allowing

Ally to seek documents from the FBI and depose Special Agent Sines.

On May 13, 2013, Ally filed Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc.'s Motion for Leave to File under Seal ("Motion for Leave") (Doc. # 58), which sought leave to file a motion for summary judgment under seal along with the transcript and exhibit from the deposition of Special Agent Sines because such documents "contain information and discovery documents regarding Mr. Mercure's knowledge and involvement in the odometer tampering fraud at issue in this matter, which has been designated 'Confidential' by the parties under the terms of their Agreed Protective Order." (Mot. for Leave at 1.) On May 14, 2013, the Court entered Order (Doc. # 59) granting the Motion for Leave. On May 20, 2013, the Court entered Order (Doc. # 63), which deemed the Motion for Leave, the Motion for Summary Judgment and attachments filed under seal to be filed as of May 20, 2013, and provided the Defendant with fourteen days to respond to the Motion for Summary Judgment, *i.e.*, by June 3, 2013.

II. LEGAL ANALYSIS

In its January 11, 2013 Memorandum Opinion and Order, this Court set forth a detailed legal analysis regarding (i) the Privacy Act; and (ii) the relevance standard, which the Court incorporates herein as if fully restated.

Mercure argues that he is entitled to a further order pursuant to 5 U.S.C. § 552a(b)(11) because the U.S. Attorney would not permit Special Agent Sines to answer certain questions at his deposition regarding the FBI's investigation into the odometer fraud at Midway, which matters include (i) "secret tapes" included in Special Agent Sines's report; (ii) what type of investigation the FBI conducted; (iii) any involvement of Gerry Galvin of Ally; and (iv) whether Mercure and Ally were ever "linked with or involved with each other." (Def. Mot. at 2-3.) Mercure contends that he is entitled to an order granting his Motion because "nothing in the law . . . should limit Michael Mercure [from] pursuing his defenses in this case." (Def. Mot. at 3.) The Defendant's arguments miss the mark; Mercure has not been limited in the pursuit of his defenses in this case.

The Court granted Ally's Motion for Court Order because Mercure invoked his Fifth Amendment right not to testify when Ally took his videotaped deposition during the course of discovery. Thereafter, Mercure refused to sign a waiver so that Ally could obtain information from the FBI regarding Mercure's involvement, if any, in the odometer tampering scheme, which is central to the causes of action set forth in this adversary proceeding.

Mercure, on the other hand, now argues that he is entitled to additional information from the FBI's investigation to prove his defenses that (i) Ally had knowledge of Midway's fraud (Answer ¶ 8); and (ii) Ally's claims are barred due to its own fraud (*id.* ¶ 22). One of the items that Mercure wants to pursue with Special Agent Sines is Mr. Sines's recollection that Mercure had told him that "one or more people at GMAC knew about certain activities that were going on in relation to the operation at Midway Motors and his relationship with the leases of vehicles to Modern Builder Supply." (Def. Mot. at 4.)

Based on Agent Sines's recollection from the FBI investigation, long before Ally filed this Complaint, Mercure believed that individuals at Ally either had knowledge of or participated in the odometer tampering because Mercure told Special Agent Sines about Ally's alleged involvement. In answering the Complaint, Mercure asserted that Ally had knowledge of or participated in the odometer tampering fraud. Mercure had a full and fair opportunity – from May 27, 2011 through the close of discovery more than a year and a half later on November 30, 2012 – to seek discovery from Ally in the way of document production, interrogatories, requests for admission or depositions to obtain evidence to support these defenses. It appears that Mercure failed to take discovery from Ally regarding these asserted defenses.

Additionally, as Ally points out in Ally's Response, Mercure also failed to submit a *Touhy* request to the FBI before seeking an order of this Court under the Privacy Act. Unlike Ally, which properly submitted the *Touhy* Request and accompanying Subpoena to the FBI before filing its Motion for Court Order, Mercure never formally petitioned the FBI for the additional requested information. Mercure was informed at the deposition of Agent Sines that he needed to submit a *Touhy* request to the FBI, which would then be reviewed for compliance with the *Touhy* regulations and the Privacy Act. (Ally Resp. at 4.) Despite this knowledge, Mercure wholly failed to submit a *Touhy* request to the FBI or seek additional time from this Court within which to do so. Without a *Touhy* request to and a corresponding response from the FBI, Mercure's request for an order authorizing the release of the requested information from Agent Sines is premature.

Ally sought discovery from Mercure regarding his involvement with the odometer tampering, but was thwarted by Mercure's Fifth Amendment posture. In juxtaposition, Mercure simply failed to seek discovery concerning his alleged defenses of fraud by Ally during the extended discovery period. He now seeks an order from this Court to obtain information from the FBI that he could have obtained directly from the Plaintiff. Having failed to take any discovery on this issue directly from

the Plaintiff during the extended discovery period or submit a *Touhy* request to the FBI, Mercure's asserted need for additional information from the FBI at this time is not well taken.

In the same way, Mercure's request for an order prohibiting Ally from using the testimony of Special Agent Sines for any purpose in this case has no basis. The Court has already ruled that discovery from the FBI regarding Mercure's involvement, if any, in the odometer tampering fraud is relevant. Ally complied with the Agreed Protective Order and filed the Motion for Summary Judgment and attachments under seal. There is no reason to prohibit Ally from using the information it obtained during discovery. To the extent Mercure does not have support for his asserted defenses, it is because he failed or refused to take discovery that he should have anticipated would be necessary to prove his case. Mercure's failure to diligently pursue discovery is not a basis to limit Ally's use of the information it obtained during discovery.

Finally, in Order Granting Motion for Court Order (Doc. # 52), this Court ruled that, if Ally could not obtain the deposition of Special Agent Sines, it was entitled to an adverse inference concerning Mercure's deposition testimony. If the Court were to grant Mercure's alternative request prohibiting Ally from using Special Agent Sines's testimony and/or the FBI documents for any purpose in this adversary proceeding, the

alternative ruling from this Court's Order regarding an adverse inference would become effective.

III. CONCLUSION

For the reasons set forth above, the Court finds no basis to grant the Defendant's Motion, which will be denied. An appropriate order will follow.

# # #

IT IS SO ORDERED.

Dated: May 28, 2013
04:20:15 PM

Kay Woods
Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
MICHAEL J. MERCURE,	*	**CASE NUMBER 11-40258**
Debtor.	*	
* * * * * * * * * * * * * * * *	*	
ALLY FINANCIAL INC.,	*	
Plaintiff,	*	**ADVERSARY NUMBER 11-04145**
v.	*	
MICHAEL J. MERCURE,	*	
Defendant.	*	**HONORABLE KAY WOODS**

****

ORDER DENYING MOTION FOR COURT ORDER OR,
IN THE ALTERNATIVE, MOTION IN LIMINE

****

Before the Court is Defendant Michael J. Mercure's Motion for Order of Court Pursuant to 5 USC § 522a(b)(11) [sic] or, in

the Alternative, Motion in Limine ("Defendant's Motion") (Doc. # 60) filed by Defendant Michael J. Mercure ("Defendant" or "Mercure") on May 16, 2013. On May 23, 2013, Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc. ("Plaintiff" or "Ally") filed Plaintiff GMAC LLC f/k/a General Motors Acceptance Corporation and n/k/a Ally Financial Inc.'s Memorandum in Opposition to Defendant's Motion for Order of Court Pursuant to 5 U.S.C. § 522a(b)(11) [sic] or, in the Alternative, Motion in Limine (Doc. # 65). Mercure 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 "documents and tape recordings that were mentioned and cross-referenced in the documents that the FBI has already provided" (Def. Mot. at 4) in connection with the deposition of Federal Bureau of Investigation ("FBI") Special Agent Wallace Sines, which occurred pursuant to this Court's Memorandum Opinion Regarding Court Order (Doc. # 51) and Order Granting Motion for Court Order (Doc. # 52) entered on January 11, 2013. In the alternative, Mercure seeks an order that "none of [Special Agent Sines's] testimony should be allowed into this case for any reason." (Def. Mot. at 4.)

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

1. Adopts the legal analysis set forth in this Court's January 11, 2013 Memorandum Opinion and Order regarding (i) the Privacy Act; and (ii) the relevance standard;
2. Finds that Mercure had a full and fair opportunity to seek discovery from both Ally and the FBI regarding his asserted defenses that (i) Ally had knowledge of Midway's fraud; and/or (ii) Ally's claims are barred due to its own fraud;
3. Finds, based on Mercure's failure (i) to obtain discovery directly from the Plaintiff; and/or (ii) to send a *Touhy* request to the FBI, that Mercure has not demonstrated a need for a court order under the Privacy Act to obtain additional information from the FBI at this time;
4. Finds no basis upon which to prohibit Ally from using the information it obtained from the FBI during discovery in this proceeding; and
5. Denies Defendant's Motion.

# # #