

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF SOUTH CAROLINA**

IN RE:

C/A No. 05-15042-JW

Derivium Capital, LLC,

Chapter 7

Debtor(s).

**ORDER DIRECTING U.S. MARSHAL
TO BRING CHARLES CATHCART
BEFORE THE COURT**

This matter comes before the Court pursuant to an Order Requiring Debtor to Appear for Examination by the Court entered on June 30, 2010 (“Examination Order”), which designated Charles Cathcart (“Cathcart”) as the representative of Derivium Capital, LLC, (“Debtor”) pursuant to Federal Rule of Bankruptcy Procedure 9001(5) and ordered him to appear on behalf of Debtor and submit to examination by the Court on July 12, 2010 at 10:30 a.m. at the United States Bankruptcy Court in Charleston, South Carolina.¹ Cathcart failed to appear as directed by the Examination Order. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157. Based on the record in this case, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

Debtor is a limited liability company organized under and pursuant to the laws of the State of South Carolina, which was engaged in the business of the marketing and administration of a stock loan program whereby borrowers pledged publicly traded stock to Debtor in exchange for a loan in the amount of 90% of the value of the stock. Upon maturity of the loan, the borrowers had the option of tendering principal and interest and recovering their collateral, electing to surrender the stock to Debtor in satisfaction of the

¹ By separate order entered on July 2, 2010, the Court ordered the Chapter 7 Trustee to appear for a status hearing to be held at the same time to answer the Court’s questions regarding the current status of the administration of the case.

loan with no further obligation, or refinancing the transaction for an additional term. The stock loan program ultimately failed and following the maturity of some of the stock-loans, Debtor was unable to satisfy its obligation to return the pledged stock. Debtor filed this bankruptcy case as a case under Chapter 11 of the Bankruptcy Code on September 1, 2005, in the United States Bankruptcy Court for the Southern District of New York. The Bankruptcy Court in New York subsequently converted the case to a case under Chapter 7² and transferred venue to this District by order entered November 4, 2005. All proceedings since that time have been in the Charleston Division. Debtor did not seek relief from the order transferring venue to this District; therefore, it is a final order that is binding on Debtor.

Debtor's case is a complex bankruptcy case involving significant litigation related to its operation of the stock loan program, which has been alleged to be a Ponzi scheme. This case has been pending for over four years and many details regarding this complicated litigation have been previously set forth in numerous orders issued by this Court.

Cathcart is the Managing Member of Debtor and owns 50% of the company. Prior to the filing of this case, Cathcart operated and controlled Debtor. By Resolution of Board of Directors of Derivium Capital, LLC, dated September 1, 2005, Cathcart was authorized to execute and deliver all documents necessary to perfect the filing of the bankruptcy case and was directed to appear in all bankruptcy proceedings on behalf of the Company. By virtue of his role as Managing Member of Debtor and his involvement in Debtor's operations, Cathcart possesses knowledge concerning the acts, conduct, and

² One of the grounds for the conversion of the case to a case under Chapter 7 was "the debtor's principal [Cathcart] making the decision to not appear at the initial Section 341(a) meeting without seeking Court approval."

property of Debtor and concerning its liabilities and financial condition as of the filing of the petition.³ This information is of critical importance in this case and in its related adversary proceedings.

The Court has a number of matters before it requiring it to make factual and legal determinations regarding how the business of the Debtor operated, and therefore has questions regarding the affairs of the Debtor and the administration of the estate. For this reason, the Court issued *sua sponte* the Examination Order requiring Cathcart to appear and an order requesting the Chapter 7 Trustee to appear and be prepared to answer questions regarding the current status of the administration of the case.⁴

The record reflects that Cathcart is receiving all notices issued by the Court. Notices have been sent to a Post Office Box in Tuxedo Park, NY, which is listed as the address of Debtor and which has been provided on all correspondence received by the Court from Cathcart relating to this case and its related adversary proceedings. Notices have also been sent to an e-mail address from which the Court has received the majority of Cathcart's correspondence to the Court. The record not only indicates that Cathcart has received such notices, but that he has been able to respond to such notices in an immediate fashion. Cathcart has made a number of requests in connection with this matter. On July 1, 2010, in response to the entry of the Examination Order, Cathcart submitted an Objection to and Urgent Request to Withdraw Ex Parte Order for Charles

³ Cathcart appeared as Debtor's representative to testify at the § 341 meeting of creditors and a 2004 examination in this case.

⁴ The Court recognizes that it has been asked by Grayson Consulting, Inc., the Plaintiff in related Adv. Pro. No. 07-80019, to hold Cathcart in contempt and order his apprehension by the U.S. Marshal in connection with Cathcart's failure to comply with orders entered in that adversary proceeding. On June 1, 2010, the Court issued an order directing the U.S. Marshal to bring Cathcart before the Court, but subsequently discovered that an objection to the entry of such order by Cathcart had been received by the Clerk's Office but had not been delivered to chambers for review. Accordingly, the Court vacated and withdrew its order in order to consider the arguments raised in Cathcart's objection.

Cathcart to Appear. By Order entered July 1, 2010, the Court overruled Cathcart's Objection and denied his request for withdrawal of the Examination Order and his request for sanctions.

On July 6, 2010, in accordance with the Examination Order, Cathcart identified a location of the United States Bankruptcy Court in Pocatello, Idaho as the most convenient location to accommodate his appearance. He asserted that an examination at this location was necessary due to his impecunious and itinerant circumstances. In response to Cathcart's request for the allowance of this alternate site for his examination, the Court issued an order on July 7, 2010, which required Cathcart to provide certain general information to determine whether his personal and financial circumstances justify Cathcart's assertions that his itinerant and impecunious status would preclude his appearance in Charleston and would justify his request for a telephonic or video examination from an alternate site. On July 8, 2010, Cathcart submitted a response to the July 7, 2010 Order. Based on the evasive nature of Cathcart's response,⁵ the posturing and additional assertions, the Court concluded that his examination should be made in person in Charleston, South Carolina, as ordered on June 30, 2010, and thus denied his request for an alternate site for examination and for examination by alternate means.

The Court conducted a hearing pursuant to the Examination Order on July 12, 2010. The Examination Order made it clear that Cathcart was to attend the hearing in Charleston unless otherwise ordered by the Court. By virtue of the Examination Order being issued on June 30, 2010, the Court finds that Cathcart could have reasonably made

⁵ Cathcart indicated in his response that he could not recall his locations during the past thirty days and has no specific plans for his locations from one day to the next. It appears that his response was sent via FedEx from Twin Falls, Idaho. He did indicate that he received a limited retirement income but did not disclose its source or how he received it.

arrangements to be present in Charleston, South Carolina at the hearing on July 12, 2010. Cathcart's mere assertions of itinerant status and limited resources are insufficient to excuse his failure to comply with the Examination Order. He has failed to provide even the barest of information that would allow the court to verify those assertions. The Court is convinced that any effective examination of Debtor through Cathcart would need to be in person so the Court could judge his credibility and respond to the information provided and any accusations made during the examination. The Court expected him to be present and he has failed to appear.⁶

CONCLUSIONS OF LAW

The Court has the authority to designate Cathcart as the representative of Debtor pursuant to Fed. R. Bankr. P. 9001(5), to order his examination pursuant to Fed. R. Bankr. P. 4002(a)(1) and 11 U.S.C. § 105, and to require his attendance at such examination. The Court observes that Cathcart, as the designee of Debtor, has the obligation to cooperate and assist the Court and the Trustee in the administration of the case under 11 U.S.C. § 521(a)(3). The Trustee has a duty under 11 U.S.C. § 704 to collect and liquidate the property of the estate and to investigate the financial affairs of Debtor. The Court must have sufficient information to make determinations related to the business and financial affairs of Debtor prepetition. Because Cathcart possesses information regarding the financial affairs of Debtor, he must be available to the Trustee in order to fulfill his obligation to cooperate. Moreover, Rule 4002 provides that "[i]n addition to performing other duties prescribed by the Code and rules, the debtor shall... attend and submit to an examination at the times ordered by the court." As Debtor's

⁶ Cathcart submitted correspondence by e-mail to the Court on July 11, 2010, wherein he indicated that he did not plan to attend the hearing on July 12, 2010, because he was more than 2,000 miles away from Charleston and the cost of a round-trip flight (\$1,350) is far beyond his ability to afford.

designated representative, Cathcart must perform any act Debtor is required to perform by the Bankruptcy Code, Rules, and orders of this Court pursuant to Fed. R. Bankr. P. 9001(5), which provides:

When any act is required to be performed by a debtor or when it is necessary to compel attendance of a debtor for examination and the debtor is not a natural person... if the debtor is a corporation, ‘debtor’ includes, if designated by the court, any or all of its officers, members of its board of directors or trustees or of a similar controlling body, a controlling stockholder or member, or any other person in control.”

The Court finds that Cathcart has willfully disobeyed an order to attend an examination that has been duly served. For the reasons that follow, this Court concludes that it has both the authority and ample cause to require and order the U.S. Marshal to locate and apprehend Cathcart for the purpose of bringing him before the Court for examination.

I. Federal Rule of Bankruptcy Procedure 2005

Fed. R. Bankr. P. 2005 allows a party in interest to move for an order to be issued by the Court to the marshal, or some other officer authorized by law, directing the officer to bring the debtor before the court without unnecessary delay, where such motion is supported by an affidavit alleging (1) that the examination of the debtor is necessary for the proper administration of the estate and that there is reasonable cause to believe that the debtor is about to leave or has left the debtor’s residence or principal place of business to avoid examination, or (2) that the debtor has evaded service of a subpoena or of an order to attend for examination, or (3) that the debtor has willfully disobeyed a subpoena or order to attend for examination, duly served. The Court finds that it may issue such an order *sua sponte* pursuant to 11 U.S.C. § 105, which provides that “[n]o provision of this title providing for the raising of an issue by a party in interest shall be

construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.” It further waives the requirement for an affidavit, finding that the record is replete with evidence that the examination of Cathcart is needed by the Trustee, the parties, the creditors, and the Court for the proper administration of the estate, that Cathcart has left his residence and principal place of business and has proclaimed no immediate intention of establishing a new residence or principal place of business, that Cathcart has evaded service of process of a subpoena in a related adversary proceeding, and that Cathcart has willfully disobeyed an order to attend for examination that was duly served. See In re TAAF, LLC, No. 10-00171-8-RDD, 2010 WL 670003 (Bankr. E.D.N.C. Feb. 19, 2010) (ordering the apprehension of the member-manager of the debtor pursuant to Fed. R. Civ. P. 2005 and waiving the requirement for written affidavits). Rule 2005 also provides the Court with the authority to “fix conditions for further examination and for the debtor’s obedience to all orders made in reference thereto.” Fed. R. Bankr. P. 2005.

III. Recalcitrant Witness Under 28 U.S.C. § 1826

The Court further finds that Cathcart appears to be a recalcitrant witness under 28 U.S.C. § 1826 based on his failure to comply with the Examination Order. 28 U.S.C. § 1826 provides:

Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or
(2) the term of the grand jury, including extensions,
before which such refusal to comply with the court order occurred, but in
no event shall such confinement exceed eighteen months.

This statute has been previously been applied in bankruptcy proceedings. See Matter of Younger, 986 F.2d 1376, 1377 (11th Cir. 1993) (holding that 28 U.S.C. § 1826 is applicable to civil contempt orders in bankruptcy cases); In re Martin-Trigona, 732 F.2d 170, 174 (2d Cir. 1984) (“The use of the word “any” indicates that Congress intended this section to apply to bankruptcy proceedings.”); In re TAAF, LLC, No. 10-00171-8-RDD, 2010 WL 964240 (Bankr. E.D.N.C. Mar. 12, 2010) (ordering the continued confinement of the member-manager of debtor by the U.S. Marshal pursuant to 28 U.S.C. § 1826 and Fed. R. Bankr. P. 2005 based on his failure to comply with orders and instructions of the court); In re Continuum Care Services, Inc., 375 B.R. 692, 695 (Bankr. S.D. Fla. 2007) (recognizing the applicability of 28 U.S.C. § 1826 in bankruptcy proceedings). Cathcart’s failure to appear constitutes a refusal to testify. In re TAAF, LLC, 2010 WL 964240, at *11. In his July 11, 2010 correspondence to the Court advising that he would not attend the examination on July 12, 2010, Cathcart asserted that he could not attend because he was more than 2,000 miles away from Charleston and the cost of the round-trip flight was far beyond his ability to afford. As previously stated herein, the Court is not satisfied with Cathcart’s claims that he is an itinerant and lacks the financial resources to comply with the orders of this Court.⁷ Cathcart has offered nothing to substantiate these claims, despite being required to do so by order of this Court entered on July 7, 2010. Since Cathcart has not shown just cause for his refusal to testify, an order of confinement under 28 U.S.C. § 1826 appears warranted.

⁷ He has repeatedly asserted that he lacks resources to travel to Charleston, SC, yet he apparently travels constantly.

Based on the foregoing, it is hereby

ORDERED that the U.S. Marshal shall take Charles Cathcart into custody without unnecessary delay. Upon the apprehension of Cathcart, the U.S. Marshal shall so advise the Bankruptcy Court and thereafter, present Cathcart to the undersigned at the time and location directed by the Court; and it is further

ORDERED that should Cathcart be taken into custody at a place 100 miles or more from the place of issue of the order, Cathcart shall be brought without unnecessary delay before the nearest available United States magistrate judge, bankruptcy judge, or district judge; and it is further

ORDERED that, prior to being apprehended, Cathcart may give at least seven (7) days notice of his intent to voluntarily appear at the Court's location in either Columbia or Charleston, South Carolina, where he will agree to appear for examination to the Court; and if he provides such notice and appears at the location on the designated date, the Court will advise the U.S. Marshal to cease efforts to apprehend him; and it is further

ORDERED that in the event that the District Court issues an order directing the U.S. Marshal or other law enforcement officer to locate Cathcart and take him into custody, this Court will defer to that proceeding, but requests that this Court be advised and Cathcart be made available for an examination by this Court; and it is further

ORDERED that the Court will allow the Trustee and parties in interest to participate in the examination to the extent that their questions seek information relating to the acts, conduct, or property or to the liabilities and financial condition of Debtor, or to any matter which may affect the administration of Debtor's estate.

AND IT IS SO ORDERED.

**FILED BY THE COURT
07/19/2010**



Entered: 07/19/2010

A handwritten signature in cursive script, reading "John E. Waites". The signature is written in dark ink and is positioned above a horizontal line.

Chief US Bankruptcy Judge
District of South Carolina