UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

October 13, 2005

VIA FACSIMILE AND EXPRESS MAIL

Ashley Industries, LLC
c/o H. Campbell Zachry, Esquire
Jenkens & Gilchrist
1445 Ross Ave., Suite 3700
Dallas, TX 75202

Re: *Motion to Quash Civil Investigative Demands ("Motion to Quash") Filed by Steve Wingard, Ashley Industries, LLC, Ashley Industries, LP, and Ashley Industries GP, LLC, File No. 042-3127*[1]

Dear Mr. Zachry:

This letter advises you of the disposition of the Movants' Motion to Quash Civil Investigative Demands ("CIDs") for written interrogatories, documentary materials, and oral testimony in conjunction with an investigation by the Federal Trade Commission (hereinafter "FTC" or "Commission"). The Motion is denied in part and granted in part for the reasons hereinafter stated. Pursuant to 16 C.F.R. § 2.7(e), the new date for Steve Wingard to comply with the document production CID and for the Ashley entities to comply with the CIDs for document production and interrogatory answers is October 27, 2005, and the new date for Steve Wingard to comply with the CID for oral testimony is November 10, 2005.

This ruling was made by Commissioner Pamela Jones Harbour, acting as the Commission's delegate. *See* 16 C.F.R. § 2.7(d)(4). Petitioner has the right to request review of this matter by the full Commission. Such a request must be filed with the Secretary of the Commission within three days after service of this letter.[2]

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[1] Ashley Industries, LLC, Ashley Industries, LP, and Ashley Industries GP, LLC will be referred to herein as "the Ashley entities." The Ashley entities and Steve Wingard will be referred to herein as "Movants."

[2] This letter decision is being delivered by facsimile and express mail. The facsimile copy is being provided as a courtesy. Computation of the time for appeal, therefore, should be calculated from the date you received the original by express mail.

I. Background and Summary

The CIDs[3] were issued on June 30, 2005 – production of interrogatory answers and documents was required by July 25, 2005 and the investigational hearing was scheduled for August 8, 2005. On July 18, 2005 counsel for Movants spoke with Staff as required by Commission Rule § 2.7(d)(2), 16 C.F.R. § 2.7(d)(2). In particular, Staff were advised that Movants would only comply with the CIDs if Steve Wingard were granted immunity from prosecution. Staff advised Movants that the FTC had neither the authority to prosecute criminal claims nor the power to grant immunity from prosecution. On July 20, 2005, the Motion to Quash was filed.

II. Movants Are Only Entitled To Relief With Regard to One of the CIDs.

The factual basis for this Motion is the unsupported assertion of counsel that "Steve Wingard has always operated [the Ashley entities] as a sole proprietorship." Motion at 1. The Motion is not accompanied by any affidavits or other materials under oath. In substance, Movants claim that they are entitled to relief from the commandment of the CIDs because the business records of the Ashley entities "could be used against [Steve Wingard] in a future criminal proceeding." Motion at 2. Accordingly, it is claimed that the production of evidence required by the CIDs would violate Steve Wingard's Constitutional rights against self-incrimination secured by the Fifth Amendment. These claims, except those made by Steve Wingard with respect to the CID directing him to respond to interrogatories, are without merit.

A. The Ashley entities have provided no factual basis for their claims under the Fifth Amendment.

An individual is protected from the compelled provision of incriminating testimony by the Fifth Amendment under many circumstances. However, the Movants have demonstrated no factual support for their claim that such protection is available to the Ashley entities. In the first place, the privilege against compelled incriminating testimony does not extend to corporations or other collective entities. *Braswell v. United States*, 487 U.S. 99 (1988); and *Bellis v. United States*, 417 U.S. 85, 88-90 (1974). Public records of the State of Texas show that the Ashley entities are corporations or other collective entities within the meaning of the law.[4] As such, the

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[3] Five separate CIDs are involved in this matter. Three were issued to Steve Wingard – one for testimony, one for interrogatory answers and one for document production. Two were issued to the Ashley entities – one for interrogatory answers and one for document production.

[4] On April 12, 2002, Ashley Industries GP, LLC filed Articles of Organization with the Corporations Section of the Office of the Secretary of State of the State of Texas establishing itself as a Texas limited liability company. Article Four on the first page of that document names Steve Wingard as the company's initial registered agent. Article Five, beginning on the first page of that document, states that the company will be managed by its "members" and names Steve Wingard as its initial member. On that same date, Steve Wingard, "President and Sole Member" of Ashley Industries, LP filed its "Certificate of Limited Partnership" with the Corporations

Ashley entities have no rights against self-incrimination to assert. *Braswell*, 487 U.S. at 102. Additionally, the contents of the business records of the Ashley entities are not privileged. *Id.* Finally, service of the CIDs on the Ashley entities to respond to interrogatories and to produce documents also imposed on them the obligation to "find the means by which to comply because no Fifth Amendment defense is available to it." *Id.* at 116 (quoting *In re Sealed Case*, 832 F.2d 1268, 1282, n. 9 (DC Cir. 1987)).[5]

B. Steve Wingard has provided no factual basis for his claim under the Fifth Amendment regarding the production of the business records of the Ashley entities.

Movants, including Steve Wingard, claim that their business activities are "currently under investigation by the United States Attorney's Office for the Western District of Texas." Motion at 2. That fact does not by itself, however, excuse Steve Wingard from compliance with the CID for the production of documents directed to him as custodian of records for the Ashley entities.

The CID for document production only seeks the business records of the Ashley entities. Steve Wingard makes a general claim that the business records of the Ashley entities are purely private, but provides no support whatsoever for such claim. Further, Steve Wingard chose to incorporate and/or organize the Ashley entities as collective entities because of the legal advantages and protections that such organizational structures provided to him and them and may not now simply walk away from those choices in order to protect their business records from production. *United States v. Stone*, 976 F. 2d 909, 912 (4th Cir. 1992).

It is well established that "without regard to whether the subpoena is addressed to the corporation or, as here, to the individual in his capacity as a custodian, . . . a corporate custodian such as petitioner may not resist a subpoena for corporate records on Fifth Amendment grounds."

Section of the Office of Secretary of State of the State of Texas. On September 24, 2003, Steve Wingard filed a "Texas Franchise Tax Public Information Report" with the Texas Secretary of State on behalf of Ashley Industries LLC in which Steve Wingard was listed as the President, a Director, and the Registered Agent of that company.

[5] Movants claim an entitlement to be treated as sole proprietorships based on the assertion that "Steve Wingard has always operated Ashley Industries as a sole proprietorship." Motion at 1 & 4. It is unclear whether this assertion is intended to be a subtle distinction between a company "being" a sole proprietorship as opposed to a company being "operated" as a sole proprietorship. The claim fails nevertheless because Movants cite no authority upholding this apparent distinction nor do they provide any factual basis for either the fact of being sole proprietorships or for the fact that the companies are being operated as sole proprietorships. Further, even if the Ashley entities were sole proprietorships, Movants have not provided an adequate factual basis for quashing the CIDs issued to them. *See, e.g.*, Shapiro v. United States, 335 U.S. 1, 18 (1948) (holding that "required records" cannot be treated as private papers subject to the privilege).

Braswell, 487 U.S. 108-09 (citations omitted). Even if "the act of production may prove personally incriminating" to the custodian, the custodian is not entitled to claim protection from the Fifth Amendment. *Id*. at 111-12. The Supreme "Court has consistently recognized that the custodian of corporate or entity records holds those documents in a representative rather than a personal capacity. . . . Under those circumstances, the custodian's act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege." *Id*. at 110-11.

The *Braswell* Court held that the custodian of corporate records could not assert a Fifth Amendment privilege against the production of corporate records; however, that Court left "open the question whether the agency rationale supports compelling a custodian to produce corporate records when the custodian is able to establish, by showing for example that he is the sole employee and officer of the corporation, that the jury would inevitably conclude that he produced the records." *Id*. at 118, n. 11. That argument fails here because Movants have not provided any evidence to show that the Ashley entities are a sole proprietorship. Additionally, the Fourth Circuit has squarely rejected that claim in *United States v. Stone*[6] when it held that even if a company

> is a one-man operation, . . . it is still a corporation, a state law regulated entity that has a separate legal existence from [the individual] shielding him from its liabilities. The business could have been formed as an unincorporated sole proprietorship and production of its business records protected by the privilege against self-incrimination. . . . [The individual] chose the corporate form and gained its attendant benefits, and we hold, in accord with the decisions of sister circuits, that he cannot now disregard the corporate form to shield his business records from production.

Accordingly, we find that Steve Wingard is the custodian of the records of the Ashley entities. As such, he is not entitled to assert a claim of Fifth Amendment privilege with respect to either the production of such records or the provision of testimony "to identify or authenticate the documents for admission in evidence." *Braswell*, 487 U.S. at 114 (quoting *Curcio v. United States*, 354 U.S. 118, 125 (1957).

Further, since the contents of the business records of the Ashley entities were in all likelihood voluntarily prepared by them in the ordinary course of their business and not by reason of government commandment in furtherance of a criminal investigation, the contents of such documents are not likely to be entitled to any privilege, even if the Ashley entities were sole proprietorships – which they are not. *United States v. Fisher*, 425 U.S. 391, 410 (1976). This is especially true with respect to so-called "required records" which must be produced even if the privilege against compelled testimony might otherwise apply. *Shapiro*, 335 U.S. at 17.

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[6] 976 F.2d at 912 (citations omitted).

C. Steve Wingard may not make a blanket assertion of privilege under the Fifth Amendment with respect to the provision of oral testimony.

Steve Wingard has failed to provide any factual basis for his claims under the Fifth Amendment with respect to oral testimony. Steve Wingard must establish a factual basis for the Commission to believe that his compelled oral testimony would subject him to "substantial and real, and not merely trifling or imaginary, hazards of incrimination." *United States v. Apfelbaum*, 445 U.S. 115, 128 (1980) (quoting earlier Supreme Court cases – internal quotation marks omitted). Second, the privilege against compelled testimony cannot be asserted in a wholesale fashion. "A person may not make a 'blanket assertion' of the [Fifth Amendment] privilege." *United States v. Aeilts*, 855 F. Supp. 1114, 1116 (C.D. CA 1994) (citing *United States v. Brown*, 918 F.2d 82, 84 (9th Cir. 1990)). The Commission's Rules and general investigatory practice require privilege claims to be asserted in a more detailed manner to keep blanket claims of privilege from being used to sweep in unprivileged materials. *See, e.g.*, 16 C.F.R. §§ 2.7, 2.8A, and 2.9. The privilege must be asserted on a document-by-document basis, *Aeilts, supra*, and a "question-by-question basis."[7] *United States v. Bodewell*, 66 F.3d 1000, 1002 (9th Cir. 1995); and *Brown*, 918 F.2d at 84 ("A person must have the chance to present himself for questioning, and as to each question elect to raise or not to raise the defense.") (internal quotation marks omitted). Accordingly, Steve Wingard's blanket assertion of privilege under the Fifth Amendment with respect to the provision of oral testimony must be denied.

D. Steve Wingard has adequately asserted a claim of privilege under the Fifth Amendment with respect to the CID directing him to answer interrogatories.

Unlike the document production CID that was served on Steve Wingard, the CID for responses to interrogatories does not differentiate between the personal knowledge of Mr. Wingard and knowledge derived from the contents of the business records of the Ashley entities. Further, Mr. Wingard has asserted, albeit in a summary fashion, a separate, and plausible, claim

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[7] Because the privilege must be asserted by the witness at the time each question is propounded and in response to each such question where it can be asserted, there is no reason to excuse the attendance of Steve Wingard from the investigational hearing commanded by the CID. Further, as the Sixth Circuit pointed out in United States v. Mayes, et al, 512 F.2d 637, 649 (6th Cir. 1975):

> The Fifth Amendment privilege against self-incrimination is a privilege personal to the witness. United States v. Goldfarb, 328 F.2d 280 (6th Cir. 1964). . . . While the witness is entitled to the advice of counsel before determining whether he should invoke the privilege, United States v. Compton, 365 F.2d 1 (6th Cir. 1966), and while it is within the discretion of the trial judge to permit counsel for the witness to invoke the privilege on his behalf, 8 Wigmore, supra, § 2270, the nature of the privilege is such that in the final analysis the controlling decision is that of the witness himself. . . . There may be a constitutional privilege against testifying and at the same time be a powerful incentive to get on the stand and tell the truth. The alternatives for the witness are seldom easy.

of privilege under the Fifth Amendment as to each interrogatory that has been directed to him. Motion at 4-6.

As a general matter, a claim of privilege under the Fifth Amendment may be upheld as to an individual when that individual "reasonably believes that his testimony could 'furnish a link in the chain of evidence needed to prosecute' him for a crime." *Hoffman v. United States*, 485 U.S. 479, 486 (1951). "To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result." *Id*. at 486-87. There must be a real danger of self-incrimination, not merely one that is remote or speculative. *Zicarelli v. New Jersey State Comm'n of Investigation*, 406 U.S. 472, 478 (1972). "When the danger is not readily apparent from the implications of the question asked or the circumstances surrounding the inquiry, the burden of establishing its existence rests on the person claiming the privilege." *Estate of Fisher v. C.I.R.*, 905 F.2d 645, 649 (2nd Cir. 1990).

In this instance, counsel for Mr. Wingard has advised the Commission that Mr. Wingard's business activities are being investigated for possible criminal violations by the United States Attorney for the Western District of Texas. Further, the Commission has reason to believe that the subject of that inquiry may involve some of the same business conduct that is the subject of the Commission's investigation. A review of each of the seven interrogatories directed to Mr. Wingard shows that it is apparent from both the implications of the questions asked and the circumstances surrounding the Commission's investigation that Mr. Wingard's answers to the Commission's interrogatories may be self-incriminating to Mr. Wingard. Accordingly, his Motion to Quash must be granted, at least in part.

III. CONCLUSION AND ORDER

For all the foregoing reasons, **IT IS ORDERED THAT** Movants' Motion to Quash should be, and it hereby is, **DENIED** with respect to the CIDs directed to Steve Wingard and the Ashley entities for document production, the CID directed to the Ashley entities for responses to interrogatories, and the CID directed to Steve Wingard for oral testimony; and **IT IS FURTHER ORDERED THAT** Movants' Motion to Quash should be, and it hereby is, **GRANTED** with respect to the CID directed to Steve Wingard for answers to interrogatories. Pursuant to 16 C.F.R. § 2.7(e), the new date for Steve Wingard to comply with the document production CID and for the Ashley entities to comply with the CIDs for document production and interrogatory answers is October 27, 2005, and the new date for Steve Wingard to comply with the CID for oral testimony is November 10, 2005.

By direction of the Commission.

Donald S. Clark
Secretary