UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION
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In re:

Procom America, LLC,

Debtor.
_____/

Case No.: 8:20-bk-03522-MGW
Chapter 7

Emergency Relief Requested

PETER GAAL'S EMERGENCY MOTION FOR STAY PENDING APPEAL

Peter Gaal ("Gaal"), a citizen and resident of Hungary, by and through his undersigned counsel and pursuant to Fed. R. Bankr. P. 8007, specially appears[1] for the limited purpose of seeking a stay of the Foreign Discovery Orders (defined below) pending appeal and, in support thereof, states as follows:

Factual and Procedural Background

1. On May 1, 2020 (the "Petition Date"), three creditors filed an involuntary petition for relief under Chapter 7 of the Bankruptcy Code against Procom America, LLC d/b/a Beyond Band of Brothers d/b/a BBOB (the "Debtor") (Doc. No. 1).

2. On May 7, 2020, the Debtor filed its Consent to Order for Relief (Doc. No. 7) and, on May 8, 2020, the Court entered the Order for Relief (Doc. No. 9) and the Notice of Chapter 7 Bankruptcy Case (Doc. No. 10), appointing Douglas N. Menchise as the chapter 7 trustee for the Debtor's bankruptcy estate (the "Trustee").

3. Gaal is the manager and sole member of the Debtor. Gaal is not a United States national or resident but rather is a citizen and resident of Hungary.

[1] Gaal reserves all rights to contest jurisdiction of the Bankruptcy Court and personal jurisdiction and is appearing specially for the sole purpose of the Motion.

4. On April 29, 2021, the Trustee filed an Omnibus Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. No. 260) (the "Rule 2004 Subpoena") seeking documents from and the examination via Zoom on May 28, 2021, of Gaal individually and in his capacity as corporate representative for (i) the Debtor, (ii) Procom Investments KFT, (iii) Procom Consulting KFT, (iv) Procom Consulting Utazasi Iroda KFT, and (v) Procom Tours, LLC.

5. Also on April 29, 2021, the Trustee purported to effectuate service of the Rule 2004 Subpoena on Gaal under Fed. R. Civ. P. 45 by emailing the Rule 2004 Subpoena to Gaal's domestic counsel. Gaal's counsel advised Trustee's counsel that she was not authorized to accept service of the Rule 2004 Subpoena and directed Trustee's counsel to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Service Convention") and the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (the "Hague Evidence Convention"). The Trustee made no further effort to effectuate service of the Rule 2004 Subpoena by other means.

6. On June 1, 2021, the Trustee filed his Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. No. 263).

7. On June 10, 2021, the Court, without a hearing, entered its Order Granting Chapter 7 Trustee, Douglas N. Menchise's Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. No. 265) (the "Rule 2004 Order"), directing (i) counsel for Gaal and counsel for Debtor to coordinate with Trustee's counsel the scheduling of the examinations of Gaal and the corporate representative(s) of the Debtor, Procom Investments KFT, Procom Consulting KFT, Procom Consulting Utazasi Iroda KFT, and Procom Tours, LLC[2] and (ii) Gaal and the designated corporate

[2] The Rule 2004 Order erroneously requires Gaal's counsel to coordinate the scheduling of examinations for companies she does not represent; Gaal's counsel only represents Gaal individually and does not represent Procom Investments KFT, Procom Consulting KFT, Procom Consulting Utazasi Iroda KFT and Procom Tours, LLC

representative(s) to produce non-privileged documents responsive to the Rule 2004 Subpoena's duces tecum requests and appear via Zoom for a Rule 2004 examination to provide sworn testimony within forty-five days.

8. On June 21, 2021, the Trustee filed his Renewed Notice of Rule 2004 Examination Duces Tecum of Gaal (Doc. No. 269).

9. On June 24, 2021, Gaal timely filed his Expedited Motion for Reconsideration of the Rule 2004 Order (Doc. No. 272) (the "Motion for Reconsideration") asserting, among other things, (i) email delivery of a subpoena to a witness's counsel is not an authorized method of service under Fed. R. Civ. P. 45, (ii) the Court's subpoena power under Fed. R. Civ. P. 45 [made applicable by Bankruptcy Rule 9016] does not extend extraterritorially to foreign nationals living outside the United States (such as Gaal) and (iii) the Trustee must follow the procedures of the Hague Evidence Convention to obtain discovery from a non-party foreign national living abroad (such as Gaal).

10. On June 29, 2021, the Trustee filed his Response to the Motion for Reconsideration (Doc. No. 275), which the Trustee later supplemented with a Notice of Filing Supplementary Authority (Doc. No. 279) to which Gaal responded (Doc. No. 282).

11. On July 6, 2021, the Court held a hearing on the Motion for Reconsideration (Doc. No. 274), took the matter under advisement (Doc. No. 280), and requested the Trustee and Gaal to submit proposed competing orders (Doc. Nos. 283, 284).

12. On March 15, 2022, the Trustee filed his Complaint For Declaratory Relief, Substantive Consolidation and to Avoid and Recover Preferential or Other Actual or Constructive Fraudulent Transfers and Other Damages (the "Complaint") against Gaal and other related defendants, initiating an adversary proceeding before this Court titled *Menchise v. Peter Gaal,*

Procom Tours, LLC, Procom Consulting KFT a/k/a Procom Consulting Utuzasi Iroda KFT and Procom Investments KFT, Case No. 8:22-ap-00041-MGW (the "Avoidance Adversary Proceeding").

13. On March 21, 2022, the Court issued its Memorandum Opinion on Service of a Subpoena on a Foreign National (Doc. No. 354) (the "Service Opinion"), holding that (i) the Trustee's service of the Rule 2004 Subpoena on Gaal's counsel by email was effective service of the Rule 2004 Subpoena on Gaal under Fed. R. Civ. P. 45, (ii) Gaal is subject to the Court's subpoena power because substitute service of the Rule 2004 Subpoena on his domestic counsel constituted service within (rather than outside) the United States, and (iii) the Trustee is not required to comply with the Hague Evidence Convention to obtain documents and testimony from non-party Gaal.

14. On March 22, 2022, the Court entered its Order Denying Peter Gaal's Expedited Motion for Reconsideration of the Order Granting Chapter 7 Trustee, Douglas N. Menchise's Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. No. 357) (the "Reconsideration Order")[3] denying the Motion for Reconsideration.

15. The Service Opinion compels "Gaal to appear—via Zoom—for a Rule 2004 examination within forty-five days."

16. On April 4, 2022, Gaal timely filed a notice of appeal from the Foreign Discovery Orders. See Doc. No. 362.

17. On April 5, 2022, the Trustee filed his Omnibus Third Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. No. 364), unilaterally scheduling for May 3-4, 2022, the Rule

[3] The Rule 2004 Order, Service Opinion and Reconsideration Order collectively the "Foreign Discovery Orders".

2004 examinations of Gaal, individually, and of Rule 30(b)(6) representatives of the Debtor and Procom Tours, LLC, a wholly owned subsidiary of the Debtor.[4]

18. Also on April 5, 2022, Gaal filed his Emergency Motion for Protective Order (the "Motion for Protective Order"), seeking the entry of a protective order preventing the examination of Gaal under Rule 2004 pursuant to the pending proceeding rule.[5]

Legal Standard

19. Rule 8007 of the Federal Rules of Bankruptcy Procedure provides for a stay pending appeal of a bankruptcy court order when the movant can establish: (i) a likelihood of success on the merits; (ii) that the movant will suffer irreparable injury if the stay is not granted; (iii) that granting of the stay will not substantially harm the other parties; and (iv) that the stay would serve the public interest. *Tooke v. Sunshine Trust Mortgage Trust,* 149 B.R. 687, 689 (M.D. Fla. 1992); *see also In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 274-75 (D. Colo. 1991) (granting motion to stay Rule 2004 examinations pending appeal).

Basis for Relief

20. Gaal seeks entry of an order staying the Foreign Discovery Orders pending his appeal. Gaal is raising multiple issues in his appeal of the Foreign Discovery Orders, including:

(a) Did the Bankruptcy Court err in holding that Fed. R. Civ. P. 45(b)(1) does not require service of the Rule 2004 Subpoena on Gaal by personal delivery?

(b) Did the Bankruptcy Court err in holding that service of the Rule 2004 Subpoena on Gaal's counsel by email is a permissible form of substitute service on Gaal under Fed. R. Civ. P. 45(b)(1)?

[4] The Service Opinion addresses only the issue of service on Gaal, individually, and concludes that the Rule 2004 Subpoena was properly served on Gaal within the United States through service of Gaal's personal counsel. Counsel for Gaal does not represent the Debtor or Procom Tours, LLC.

[5] To the extent that the Motion for Protective Order is granted, in whole or in part, the relief requested in this Motion may be moot.

(c) Did the Bankruptcy Court err in holding that Gaal (a non-party foreign national living abroad) is subject to the Bankruptcy Court's subpoena power, absent personal service of the subpoena on Gaal within the United States?

(d) Did the Bankruptcy Court err in holding that the Trustee is not required to comply with the Hague Evidence Convention in order to obtain discovery from Gaal (a non-party foreign national living abroad)?

Substantial Likelihood of Success

21. There is a substantial likelihood that Gaal will be successful on the issues being raised in his appeal of the Foreign Discovery Orders.

Ineffective Service of the Rule 2004 Subpoena

22. The Service Opinion incorrectly held that the Trustee's service of the Rule 2004 Subpoena by email on Gaal's domestic counsel was valid substitute service of the Rule 2004 Subpoena on Gaal. In so holding, the Court not only departed from well-established law regarding the limits of its subpoena power over foreign nationals living abroad but also adopted (and expanded) a minority position on substitute service of subpoenas under Fed. R. Civ. P. 45 while improperly relying on cases interpreting service of process under Fed. R. Civ. P. 4.

23. First, the majority position (both within the Eleventh Circuit and in other circuits) is that Fed. R. Civ. P. 45(b)(1) requires personal delivery of a subpoena. *See Green v. Pickens County School System*, No. 2:19-cv-00008-RWS-JCF, 2021 WL 2559453, at *4-5 (N.D. Ga. Apr. 26, 2021) (collecting and discussing cases from within and outside the Eleventh Circuit and following majority position that personal delivery is required and quashing subpoena served by mail); *Monex Financial Services Ltd. v. Nova Information Systems, Inc.*, No. 6:08-mc-Orl-31KRS, 2008 WL 5235135, at *2 (M.D. Fla. Dec. 15, 2008) (finding that "in absence of controlling authority holding that a Rule 45 … subpoena is effectively delivered via a Federal Express delivery … Plaintiffs have failed to establish effective delivery of the subpoena."). In the Service Opinion

(pp. 7-9 and fn 25), the Court adopted the minority position permitting substitute service of a subpoena within the United States by means other than personal delivery. This was in error.

24. Second, not only did the Court erroneously adopt the minority position permitting substitute service of a subpoena under Fed. R. Civ. P. 45, it expanded that minority position to include substitute service of a subpoena on a witness' counsel even though such service appears to conflict with other decisions[6] and where the Court conceded there is no other case so permitting.[7]

25. Third, the Service Opinion improperly relies on case law interpreting effective service of process under Fed. R. Civ. P. 4. *See SiteLock, LLC v. GoDaddy.com, LLC*, 338 F.R.D. 146, 153-54 (D. Or. 2021) (collecting competing cases and holding methods for service of a subpoena under Fed. R. Civ. P. 45 are more restricted than the methods for service of a summons and complaint under Fed. R. Civ. P. 4). The significant distinction between service of a complaint intended to provide notice and service of a subpoena intended to confer personal jurisdiction and compel a response when the witness is not a citizen or resident of the United States is explained by the Court in *F.T.C. v. Compagnie De Saint-Goban-Pont-a-Mousson*, 636 F.2d 1300 (D. D.C. 1980) as follows:

> The distinction between notice and compulsory process, and the implications of that distinction for permissible modes of service, is well illustrated in the context of civil litigation. Federal Rule of Civil Procedure 4, which governs service of process, is primarily concerned with effectuating notice. To that end, the rule provides for a wide range of alternative methods of service, including registered mail, each designed to ensure the receipt of actual notice of the pendency of the action by the defendant. By contrast, Federal Rule 45(c)[8],

[6] *See Monex Financial Services*, 2008 WL 5235135, at *2 ("binding precedent in this jurisdiction holds that service of a subpoena upon a witness's attorney, instead of the witness himself, is ineffective") (*citing Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968)); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 262 F.R.D. 293, 304 (S.D.N.Y. 2009) (collecting cases); *Lehman v. Kornblau*, 206 F.R.D. 345, 346-47 (E.D.N.Y. 2001) (plaintiff's service of subpoenas by certified mail on counsel of non-parties was improper).

[7] In the Service Opinion, the Court stated "the Court is unaware of any cases upholding service of a subpoena, under Rule 45, on a witness' lawyer." Service Opinion, p. 10.

[8] Now Fed. R. Civ. P. 45(b).

> governing subpoena service, does not permit any form of mail service, nor does it allow service of the subpoena merely by delivery to a witness' dwelling place. Thus, under the Federal Rules, compulsory process may be served upon an unwilling witness only in person. Even within the United States, and even upon a United States citizen, service by registered U.S. mail is never a valid means of delivering compulsory process, although it may be a valid means of serving a summons and a complaint.
>
> When the individual being served is not an American on U.S. soil but a foreign subject on foreign soil, the distinction between the service of notice and the service of compulsory process takes on added significance. When process in the form of summons and complaint is served overseas, the informational nature of that process renders the act of service relatively benign. When compulsory process is served, however, the act of service itself constitutes an exercise of one nation's sovereignty within the territory of another sovereign. Such an exercise constitutes a violation of international law.

Id. at 1312-13.

26. Assuming arguendo it was proper for the Court to rely on Fed. R. Civ. P. 4(f)(3) in determining proper service of a subpoena under Fed. R. Civ. P. 45(b), service of a summons by alternative means under Fed. R. Civ. P. 4(f)(3) is only permitted after obtaining prior court authorization (which the Trustee did not obtain here).[9] Furthermore, courts are split on the issue of whether Fed. R. Civ. P. 4(f)(3) in fact permits effecting service of a summons on a foreign individual or entity by serving the foreign defendant's domestic counsel. *See Codigo Music, LLC v. Televisa S.A. de C.V.*, No. 15-CIV-21737-Williams/Simonton, 2017 WL 4346968, at *13 (S.D. Fla. Sep. 29, 2017) ("Rule 4(f) is entitled "Serving an Individual in a Foreign Country." Fed. R. Civ. P. 4(f). That Rule and its subparts deal only with service by other means for purposes of service outside of the United States. Although some Courts have permitted alternative service

[9] Fed. R. Civ. P. 4(f)(3) states: "Unless federal law provides otherwise, an individual – other than a minor, incompetent person, or a person whose waiver has been filed – may be served at a place not within any district of the United States: (3) by other means not prohibited by international agreement, as the court orders." *See De Gazelle Group, Inc. v. Tamaz Trading Establishment*, 817 F.3d 747, 750 (11th Cir. 2016) ("On appeal, Tamaz argues that the district court erred in concluding that De Gazelle effected good service on September 21, 2013, because De Gazelle failed to comply with Fed. R. Civ. P. 4(f)(3) by seeking prior court authorization for service via FedEx. We agree.").

pursuant to Rule 4(f)(3) even if the service sought was only going to be performed within a United States judicial district, at least two courts have observed that the plain language of Rule 4(f)(3) seemingly would preclude such service."); *Convergen Energy LLC v. Brooks*, No. 20-cv-3746(LJL), 2020 WL 4038353, at *7 (S.D.N.Y. Jul. 17, 2020) (collecting cases and holding "[t]his Court joins those that have held that Rule 4(f) refers to the "place" of service and not the location of the individual or entity to be served and that, accordingly, the court cannot enter a Rule 4(f)(3) order permitting service on a foreign individual at a place not within a judicial district of the United States when the person to whom the complaint and summons is to be delivered and as to which service is deemed to be effective is at a place within the United States); *In re Fairfield Sentry Limited*, No. 10-13164(SMB), 2020 WL 7345988, at *12 (S.D.N.Y. Dec. 14, 2020) (collecting cases, noting "[c]ourts are split on the issue of whether domestic service on a foreign defendant's U.S. counsel can constitute service "at a place not within" the U.S. under Rule 4(f)(3), and holding service on U.S. based counsel is a permissible method under Rule 4(f)(3)); *In re Cathode Ray Tube (CRT) Antitrust Litigation*, 27 F. Supp. 3d 1002, 1010 (N.D. Cal. 2014) (noting that transmission of service papers to a foreign defendant via domestic conduct like a law firm or agent ultimately results in the foreign individual being served and thereby provides notice outside a United States judicial district, in accordance with Rule 4(f)(3)'s plain language).

27. Fourth, the Service Opinion's legal conclusion that the Court's subpoena power extended to Gaal (a foreign national living abroad) simply by Trustee's counsel emailing the Rule 2004 Subpoena to Gaal's domestic counsel (see Service Opinion, pp. 15-17) is at odds with courts holding that foreign nationals living abroad are not subject to subpoena service outside the United States. *KLP Indus., LLC v. Pelaez*, No. 06-22379-CIV-KING/Garber, 2006 WL 8434699, at *5 (S.D. Fla. Dec. 19, 2006) ("[a]liens residing abroad cannot be compelled to respond to a subpoena

from a U.S. court because they owe no allegiance to the United States") (citing *Gillars v. United States*, 182 F.2d 962, 978 (D.C. Cir. 1950)); *Maid of the Mist Corp. v. Alcatraz Media, LLC*, 2006 U.S. Dist. LEXIS 79872, at *5 (W.D.N.Y. Nov. 1, 2006) ("[T]hese individuals are Canadian citizens who reside and work in Canada. The Subpoenas, were served upon them outside of the United States and are therefore unenforceable because this Court has no subpoena power or jurisdiction outside of the United States over these individuals."); *see also Air Turbine Tech., Inc. v. Atlas Copco AB*, 217 F.R.D. 545, 546 (S.D. Fla. 2003) ("[T]here appears to be no authority which permits the court to circumvent the procedures required to compel testimony from non-United States citizens residing in foreign countries.").

28. Importantly here, the cases relied upon by the Court for extending subpoena power over non-party foreign nationals (see Service Opinion, Sec. II.B., pp. 15-17) are readily distinguishable as all involve circumstances where the non-party foreign national was personally served with the subpoena while he or she was temporarily present in the United States. In this case, Gaal was not physically present in the United States at the time of service.

29. The practical effect of the Service Opinion (and permitting service of a subpoena on a foreign national's domestic counsel) means there are less stringent limitations on serving a subpoena on a foreign national living abroad than there are on serving a subpoena directed to a United States national or resident who is in a foreign country. See Fed. R. Civ. P. 45(b)(3) and 28 U.S.C. § 1783; *see also Balk v. New York Institute of Technology*, 974 F. Supp. 2d 147, 160-62 (E.D.N.Y. 2013) (denying request to effectuate service of subpoena on United States citizen living in Egypt by serving purported domestic agent; service of subpoena required to be made in accordance with the Hague Service Convention); *Estate of Ungar v. Palestinian Authority*, 412 F. Supp. 2d 328, 334-35 (S.D.N.Y. 2006) (requiring service of subpoena directed to United States

citizen living in Egypt be made in accordance with Articles 5 and 6 of the Hague Service Convention as Egypt had objected to Article 10 and service by mail); *GMA Accessories, Inc. v. BOP, LLC*, No. 07 Civ. 3219(LTS)(DF), 2008 WL 4974430, at *2 (S.D.N.Y. Nov. 19, 2008) (denying request to effectuate service of subpoena on United States citizen living in Argentina by serving his domestic counsel and requiring subpoena be served in compliance with Fed. R. Civ. P. 4(f)(1)).

30. Such a situation is counterintuitive and not supported by case law. *See Aristocrat Leisure*, 262 F.R.D. at 305 ("It is unclear what, if any, provision of the Federal Rules Aristocrat believes controls the service of subpoenas directed at foreign nationals living abroad. If Aristocrat were correct, and 45(b)(3) was not relevant to the service of subpoenas on foreign nationals living abroad, it strains credulity to believe that this apparent silence in the Rules would result in the unlimited ability of litigants to serve trial subpoenas on any foreign national anywhere in the world, especially considering the more stringent limitations on serving United States nationals living abroad.").

31. For the foregoing reasons, Gaal has a substantial likelihood of success to prevail on the issue that the Court erred in holding the Trustee's service of the Rule 2004 Subpoena by email on Gaal's domestic counsel was valid substitute service of the Rule 2004 Subpoena on Gaal, a foreign national living abroad at the time of service.

Pending Proceeding Rule

32. Additionally, assuming *arguendo* the Court correctly determined in the Foreign Discovery Orders that the Trustee properly effectuated service of the Rule 2004 Subpoena on Gaal, the Trustee is now precluded by his own intervening actions (i.e. filing the Complaint and commencing the Avoidance Adversary Proceeding against Gaal) and the pending proceeding rule

from using a Rule 2004 examination of Gaal to conduct discovery because of the Avoidance Adversary Proceeding.

33. The pending proceeding rule precludes the use of Bankruptcy Rule 2004 to obtain documents and testimony from another party or a witness on an issue that is the subject of a pending action.[10] *In re Blinder, Robinson & Co., Inc.*, 127 B.R. 267, 274-75 (D. Colo. 1991) (trustee's commencement of adversary proceeding precluded trustee from continuing to examine parties to that proceeding via pre-existing orders granting Bankruptcy Rule 2004 examinations, but instead trustee was limited to discovery under Federal Rules of Civil Procedure); *Bennett Funding Group, Inc.*, 203 B.R. at 26-30 (same); *In re Blackjewel, L.L.C.*, No. 3:19-BK-30289, 2020 WL 6948815, at *6 (S.D. W. Va. Jul. 14, 2020) (granting bank's motion to discontinue responses to debtor's pending Bankruptcy Rule 2004 requests because debtor had initiated adversary proceeding against bank).

34. Here, a comparison of the areas of inquiry and document requests in the Rule 2004 Subpoena with the allegations in the Complaint makes abundantly clear that all the documents and testimony sought by the Trustee from Gaal in the Rule 2004 Subpoena are now subsumed in and intertwined with the issues raised by the Trustee in the Avoidance Adversary Proceeding.[11] As such, the pending proceeding rule bars the Trustee from continuing his efforts to obtain this

[10] Bankruptcy Rule 2004 permits significantly broader and more liberal discovery (i.e. "fishing expeditions"), and provides examinees less procedural safeguards, than the discovery rules in the Federal Rules of Civil Procedure. *See In re Bennett Funding Group, Inc.*, 203 B.R. 24, 28 (N.D.N.Y. 1996) ("As Fed. R. Bankr. P. 2004 is meant to give the inquiring party broad power to investigate the estate, it does not provide the procedural safeguards offered by Fed. R. Bankr. P. 7026. For example, under a Fed. R. Bankr. P. 2004 examination, a witness has no general right to representation by counsel, and the right to object to immaterial or improper questions is limited.")(internal citations omitted); *In re Defoor Centre, LLC*, 634 B.R. 630, 639 (Bankr. M.D. Fla. 2021) ("Unlike Rule 26 of the Federal Rules of Civil Procedure, which generally prohibits "fishing expeditions," Rule 2004 is often described as being in the nature of a fishing expedition.")

[11] Additionally, Gaal is also a defendant in pending litigation related to the Debtor's operations commenced by the creditor Electronic Merchant Systems LLC in the Northern District of Ohio (Case No. 1:20-cv-01898) (the "EMS Case") and certain of the information sought in the Rule 2004 Subpoena overlaps with issues raised in the EMS Case.

discovery from Gaal under Rule 2004. The court in *Bennett Funding Group* addressed the same issue as follows:

> After review of the ninety-seven page Amended Complaint, it is clear that the Trustee has alleged the creation by the defendants of what can rightfully be described as a financial superweb. As such it is difficult at this point, if not impossible, to determine whether and to what extent information gleaned from a Fed. R. Bankr. P. 2004 examination of G. Bennett will not be related to the parties and subject matter covered by the Amended Complaint. In fact, it appears highly unlikely that even a carefully crafted examination of G. Bennett by the Trustee could not avoid delving into issues regarding the other defendants and subject matter covered in the extensive Amended Complaint, and thus examination of the issues requested would not be "in addition to or beyond the scope" of the Trustee's pending adversary proceeding. *See Buick,* 174 B.R. at 306. It appears then that G. Bennett and the parties and subject matter of the Amended Complaint are not easily separable because of the complex relationship between them, and the Court recognizes that use of a Fed. R. Bankr. P. 2004 examination would unavoidably and unintentionally create a back door through which the Trustee could circumvent the limitations of Fed. R. Bankr. P. 7026 *et seq.,* which are properly applied in this instance.

203 B.R. at 29-30; *see also Blinder, Robinson*, 127 B.R. at 275 ("As noted above, the Trustee must make a tactical decision on how to proceed with discovery. Having elected to file an adversary proceeding against Intercontinental before examining it under Rule 2004, it is now limited to discovery under the Federal Rules.").

35. Here, because the Trustee initiated the Avoidance Adversary Proceeding against Gaal before the Court issued its Service Opinion and entered its Reconsideration Order denying Gaal's Motion for Reconsideration of the Rule 2004 Order, the Trustee is now precluded from using the Foreign Discovery Orders and Bankruptcy Rule 2004 to obtain documents and testimony from Gaal and is required to obtain such discovery in the Avoidance Adversary Proceeding (which is governed by the more restrictive discovery process in the Federal Rules of Civil Procedure).

Gaal Will Suffer Irreparable Injury

36. If the stay is not granted, Gaal will suffer irreparable injury by being compelled to sit for a Rule 2004 "fishing expedition" (which provides less procedural safeguards than the discovery rules in the Federal Rules of Civil Procedure) when the Trustee has a pending action against him (i.e. the Avoidance Adversary Proceeding). *See Blinder, Robinson*, 127 B.R. at 275.

37. The court in *Blinder, Robinson* succinctly summarized the irreparable injury suffered by an examinee when a bankruptcy trustee uses Rule 2004 after initiating an adversary proceeding:

> There is a strong argument that Intercontinental will be irreparably injured if the Trustee is given unfettered authority to use Rule 2004 examination to discover information relevant to the pending adversary proceeding. The Trustee argues that Intercontinental's remedy is to seek suppression of the fruits of any improper discovery in the collateral litigation. However, by that time, the damage will already have been done. As noted above, the Trustee must make a tactical decision on how to proceed with discovery. Having elected to file an adversary proceeding against Intercontinental before examining it under Rule 2004, it is now limited to discovery under the Federal Rules.

Id. The same irreparable injury will confront Gaal if he is forced to comply with the Foreign Discovery Orders and sit for a Rule 2004 examination as the areas of inquiry in, and documents requested by, the Rule 2004 Subpoena are all subsumed by and intertwined with the wide ranging and extensive allegations made by the Trustee in the Complaint (which is 55 pages long sans exhibits with 265 paragraphs and twelve counts).

38. Additionally, permitting the Trustee to conduct a Rule 2004 exam of Gaal now may ultimately cause confusion and delay as testimony obtained from Gaal under Rule 2004 and the Foreign Discovery Orders may be inadmissible in the Avoidance Adversary Proceeding. Courts are split on whether documents and testimony obtained during a Rule 2004 examination are admissible in an adversary proceeding governed by the Federal Rules of Evidence. *See In re*

Southeastern Materials, No. 09-52606, 2010 WL 5128608, at *5 (M.D. N.C. Dec. 10, 2010) (containing string citation noting conflicting opinions); *see also In re Oliver*, 414 B.R. 361, 369-71 (Bankr. E.D. Tenn. 2009) and *In re Young*, No. 17-14065-NPO, 2018 WL 6060338, at *4-5 (Bankr. N.D. Miss. Nov. 19, 2018) (each holding Rule 2004 examination transcripts could not be admitted in summary judgment proceedings in the respective adversaries because a Rule 2004 examination is not a "deposition" taken under Rule 7030 that can be used as evidence in an adversary proceeding under Rule 7056(c)(1)(A)).[12]

No Substantial Harm to Other Parties

39. The Trustee cannot point to any harm that would occur to him as the result of a stay of the Foreign Discover Orders pending appeal. Once the Trustee properly effectuates service of process of the Complaint on Gaal in accordance with Fed. R. Civ. P. 4(f), discovery from Gaal can properly be obtained in the Avoidance Adversary Proceeding at the appropriate time in accordance with the discovery process in the Federal Rules of Civil Procedure and Bankruptcy Local Rule 7001-1. Any delay inherent in requiring the Trustee to comply with the Federal Rules of Civil Procedure does not constitute substantial harm. *See Blinder, Robinson*, 127 B.R. at 275 ("Furthermore, the bankruptcy court's conclusions that the third and fourth elements weigh against Intercontinental are clearly erroneous. The bankruptcy court opined that the delay in conducting Rule 2004 examinations would prevent the Trustee from carrying out his statutorily mandated duty to investigate the debtor's affairs and to locate hidden assets, and that this was, in turn, prejudicial to the public interest. The bankruptcy court erred in ignoring the fact that the Trustee is not prevented from conducting any discovery, he must simply comply with the Federal Rules.").

[12] Other courts disagree with *Oliver's* per se exclusion of Rule 2004 examination transcripts. *See St. Clair v. Cadles of Grassy Meadows II, L.L.C.*, 550 B.R. 655, 667-69 (E.D.N.Y. 2016).

The Public Interest Will be Served by a Stay.

40. The public interest in the proper use / availability of applicable discovery methods for bankruptcy trustees to obtain documents and testimony from foreign nationals living abroad and the orderly progression of litigation will be served by the stay.

41. Insofar as all factors favor a stay of the Foreign Discovery Orders pending resolution of the issues on appeal, the Court should grant this motion and enter a stay.

WHEREFORE, Gaal requests that this Court enter an order staying the Foreign Discovery Orders pending the appeal and grant such other and further relief as is just and proper.

Dated: April 6, 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 6, 2022 a true and correct copy of the above and foregoing has been electronically filed with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing to all CM/ECF registered recipients.

/s/ Lynn Welter Sherman
Lynn Welter Sherman