

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

**PETER GAAL’S RESPONSE IN OPPOSITION TO
TRUSTEE’S EXPEDITED MOTION TO COMPEL
EXAMINATION TESTIMONY FROM AND FOR SANCTIONS
AGAINST PROCOM AMERICA, LLC, PETER GAAL, AND PROCOM TOURS, LLC**

Peter Gaal (“Gaal”), a citizen and resident of Hungary, by and through his undersigned counsel, specially appears¹ for the limited purpose of opposing the Trustee’s Expedited Motion to Compel Examination Testimony from and for Sanctions Against Procom America, LLC, Peter Gaal, and Procom Tours, LLC (Doc. 405) (the “Motion for Sanctions”), and states as follows:

INTRODUCTION

1. Since the inception of this involuntary Chapter 7 case, the Trustee has attempted to obtain substantive relief against Gaal without commencing an adversary proceeding and without any attempt to comply with Bankruptcy Rules 7001 or 9014. The Motion for Sanctions is yet another attempt by the Trustee to seek substantive relief against Gaal without complying with the clear mandate of the Bankruptcy Rules, and to intimidate Gaal and his counsel into submission by seeking sanctions against Gaal and his counsel and an *in camera* review of attorney client communications between Gaal and his counsel.

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

2. For tactical reasons, the Trustee has delayed filing his Avoidance Adversary Proceeding and serving the Complaint against Gaal (which has now been pending without any attempt at service of the Summons and Complaint since March 17, 2022) so that the Trustee can embark on a Rule 2004 fishing expedition, free of any constraints imposed by the Hague Evidence Convention², Hague Service Convention³, or applicable discovery rules relating to the scope and manner of obtaining discovery from foreign defendants.⁴

3. The Motion for Sanctions, like the many motions that have preceded it, continues to advance the false narrative that the Debtor's creditor body is largely composed of consumers (many of them elderly) that did not receive refunds when COVID forced the Debtor to shut down. In fact, the Debtor's credit card processor, Electronic Merchant Systems, LLC ("EMS"), asserts that it has paid refunds totaling approximately \$10.5 million, which exceeds the customer claims on the schedules.⁵ The only remaining creditors in this case are EMS, a sophisticated credit card processor that specializes in providing credit card processing services to merchants in travel and other high risk businesses, the Debtor's former landlord, banks with overdrawn accounts, and a few small trade vendor claims.

² Convention on Taking Evidence Abroad on Civil or Commercial Matters, 1123 U.S.T. 2555, T.I.A.S. No. 7444, 28 U.S.C. §1781.

³ Convention on the Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, 363 (1969).

⁴See, e.g. Fed. R. Bankr. P. 7028(b).

⁵ The Debtor's schedules list a total of \$13,493,628.25 in unsecured claims, which consist primarily of deposits paid by customers for future trips that were cancelled by the customer and could not be delivered due to the COVID-19 pandemic. (Doc. 70). EMS filed a proof of claim (Claim No. 528-1), which indicates actual credit card refunds paid to customers of \$9,730,299.48 as of the bar date, and estimated future credit card refunds to be paid to customers by EMS subsequent to the filing of the proof of claim in the amount of \$2,000,000.00. In related litigation that was filed by EMS against Gaal in the United States District Court for the Northern District of Ohio (Case No. 1:20-cv-01898), EMS filed an affidavit in opposition to Gaal's motion to dismiss the complaint, in which EMS asserts that it has paid 1,881 customer chargebacks totaling approximately \$10.5 million. (Affidavit of Daniel Moenich, ¶ 22 (Doc. 47-1).) Thus, it appears that the great majority, if not all customer claims have been paid by EMS through credit card chargebacks, and EMS is the largest creditor in the case.

4. The Motion for Sanctions also continues to falsely assert that Gaal has been uncooperative and the Trustee needs to examine Gaal in order to investigate assets of the estate. Gaal and the Debtor have provided extensive documents and information to the Trustee. Gaal's alleged lack of cooperation is based upon the fact that Gaal's counsel has specially appeared for purposes of asserting valid and non-frivolous objections to the Trustee's ongoing attempts to obtain assets, books, and records of Gaal and other non-debtors pursuant to motions "served" only by Case Management/Electronic Case Filing ("CM/ECF"), many of which have been resolved favorably to Gaal.

5. Most importantly, the Motion for Sanctions fails to mention the critical fact that on the eve of the scheduled Rule 2004 examinations, the Trustee unilaterally and materially altered the Rule 2004 procedure that was ordered by the Court. (Docs. 385, 364.) The Trustee's chosen process for taking the Rule 2004 examination was substantially different than the procedures ordered by the Court. Thus, there is no underlying violation of any order of the Court that might be the basis for sanction.

6. Like every motion that has been "served" by the Trustee in this case, the Motion for Sanctions was not served on either Gaal or Gaal's counsel (against whom sanctions are sought), as required by Bankruptcy Rule 9020 and 9014.

7. Boiled to its essence, the Motion for Sanctions seeks to punish Gaal and his counsel for raising valid, non-frivolous objections to the Trustee's ongoing violations of applicable Bankruptcy Rules, in an attempt to run roughshod over Gaal's rights under the Bankruptcy Code, Bankruptcy Rules, Hague Evidence Convention, and Hague Service Convention.

BACKGROUND

8. 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. 1).

9. On May 7, 2020, the Debtor filed its Consent to Order for Relief (Doc. 7) and, on May 8, 2020, the Bankruptcy Court entered the Order for Relief (Doc. 9) and the Notice of Chapter 7 Bankruptcy Case (Doc. 10), appointing Douglas N. Menchise as the chapter 7 trustee for the Debtor’s bankruptcy estate (the “Trustee”).

10. 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.

THE RULE 2004 ORDERS

11. On April 29, 2021, the Trustee filed an Omnibus Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. 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.

12. 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.

13. Instead, on June 1, 2021, the Trustee filed his Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. 263).

14. 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. 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, LLC⁶ and (ii) Gaal and the designated corporate 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.

15. On June 21, 2021, the Trustee filed his Renewed Notice of Rule 2004 Examination Duces Tecum of Gaal (Doc. 269).

16. On June 24, 2021, Gaal timely filed his Expedited Motion for Reconsideration of the Rule 2004 Order (Doc. 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 Bankruptcy 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 service procedures

⁶ The Rule 2004 Order required 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, the Debtor, or Procom Tours, LLC.

of the Hague Evidence Convention to obtain discovery from a non-party foreign national living abroad (such as Gaal).

17. On June 29, 2021, the Trustee filed his Response to the Motion for Reconsideration (Doc. 275), which the Trustee later supplemented with a Notice of Filing Supplementary Authority (Doc. 279) to which Gaal responded (Doc. 282).

18. On July 6, 2021, the Court held a hearing on the Motion for Reconsideration (Doc. 274), took the matter under advisement (Doc. 280), and requested the Trustee and Gaal to submit proposed competing orders (Doc. 283, 284).

19. 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 the 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”).

20. On March 17, 2022, the Court issued a Summons In An Adversary Proceeding (Adv. Doc. 2) (the “Summons”) in the Avoidance Adversary Proceeding. To date, the Trustee has not served the Summons and Complaint on Gaal.⁷

21. On March 21, 2022, the Court issued its Memorandum Opinion on Service of a Subpoena on a Foreign National (Doc. 354) (the “Service Opinion”), holding that (i) the Trustee’s

⁷ No plausible or good faith argument can be made that Gaal is evading service of the Summons and Complaint. The Trustee has known Gaal’s address in Hungary since June 2020 when Gaal provided it to the Trustee at the Debtor’s meeting of creditors. See Doc. 263-2, pp. 9, line 20 – 10, line 13. The Trustee even included Gaal’s Hungarian address in the Complaint itself. See Complaint, Adv. Doc. 1, ¶ 8. Simply put, any delay in properly effectuating service of the Summons and Complaint on Gaal in accordance with Fed. R. Civ. P. 4(f) is of the Trustee’s own making.

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.

22. 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. 357) (the "Reconsideration Order")⁸ denying the Motion for Reconsideration.

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

24. On April 4, 2022, Gaal timely filed a notice of appeal from the Foreign Discovery Orders. *See* Doc. 362. To the extent that the Foreign Discovery Orders might be considered to be non-final orders, Gaal also filed a motion for leave to appeal. (Doc. 363).

25. On April 5, 2022, the Trustee filed his Omnibus Third Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. 364) (the "Renewed Rule 2004 Exam"), unilaterally scheduling for May 3-4, 2022, the Rule 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 Debtor⁹ and requesting the production of documents on or before April 26, 2022.

26. On April 5, 2022, Gaal filed his Emergency Motion for Protective Order (Doc. 365) (the "Motion for Protective Order"), seeking the entry of a protective order preventing the Trustee

⁸ The Rule 2004 Order, Service Opinion and Reconsideration Order collectively the "Foreign Discovery Orders".

⁹ 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.

from conducting the Renewed Rule 2004 Exam pursuant to the pending proceeding rule because the Trustee has initiated the Avoidance Adversary Proceeding and must now wait and obtain discovery from Gaal in accordance with the discovery provisions of the Federal Rules of Civil Procedure.

27. On April 6, 2022, Gaal filed his Emergency Motion for Stay Pending Appeal (Doc. 368) (the “Motion for Stay”) with the Court, seeking a stay of the Foreign Discovery Orders pending his appeal.

28. On April 8, 2022, the Trustee filed a Cross Notice of Taking Depositions Duces Tecum in the Debtor’s bankruptcy case (Doc. 376), noticing depositions in the Avoidance Adversary Proceeding of Gaal, individually, and of Rule 30(b)(6) representatives of the Debtor and Procom Tours, LLC for the same time as the Rule 2004 Exams (May 3-4, 2022).

29. On April 14, 2022, the Court held a hearing on the Motion for Protective Order and held the Rule 2004 Exams could proceed.

30. At the April 14, 2022 hearing, Trustee’s counsel argued that the pending proceeding rule should not apply because: (a) the Trustee had not yet served Gaal with the Summons and Complaint and thus could not obtain discovery from Gaal currently in the Avoidance Adversary Proceeding; and (b) any delay in examining Gaal attendant to service of the Summons and Complaint under the Hague Service Convention would be prejudicial to the Trustee. The thrust of the Trustee’s argument was that Gaal could not have it both ways: Gaal could not assert that the Renewed Rule 2004 Exam was barred by the pending proceeding rule and, at the same time, argue that discovery in the Avoidance Adversary Proceeding was currently premature. At that hearing, the Court offered (at the Trustee’s suggestion) that the Court would grant the Motion for Protective Order and prohibit the Renewed Rule 2004 Exam of Gaal from moving forward if

counsel for Gaal would accept service of the Summons and Complaint in the Avoidance Adversary Proceeding (this offer was declined).

31. On April 14, 2022, the Trustee re-filed (and expanded) his Cross Notice of Taking Depositions Duces Tecum in the Avoidance Adversary Proceeding (Adv. Doc. 3), (a) noticing for the same time as the Renewed Rule 2004 Exam the depositions in the Avoidance Adversary Proceeding of Gaal, individually, of Rule 30(b)(6) representatives of the Debtor and Procom Tours, LLC, and of Rule 30(b)(6) representatives of Procom Consulting KFT and Procom Investments KFT and (b) requesting the production of documents from Gaal and the other defendants.

32. On April 18, 2022, Gaal filed his Emergency Motion for Protective Order and to Quash Trustee's Cross Notice of Taking Depositions Duces Tecum (Adv. Doc. 4) in the Avoidance Adversary Proceeding, arguing that discovery in the Avoidance Adversary Proceeding was not permitted until service of the Complaint and compliance with Rule 26. At a hearing held on April 20, 2022, the Court granted this motion for protective order prohibiting the Trustee from taking discovery in the Avoidance Adversary Proceeding prior to service of the Complaint, but reiterating that the Trustee was permitted to proceed with the Renewed Rule 2004 Exam in accordance with its prior orders entered in the main case. (Adv. Doc. 10.)

33. On April 29, 2022, Gaal's appeal was dismissed as premature and his motion for leave to appeal was denied based upon the District Court's conclusion that the Foreign Discovery Orders were non-final orders that may not be appealed unless and until a contempt order has been entered against Gaal.

34. After the hearings in April, and contrary to his arguments at those hearings that delaying examination of Gaal until service of the Complaint was accomplished under the Hague

Service Convention would be prejudicial to the Trustee, on April 25, 2022 the Trustee unilateral served his Omnibus Fourth Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. 386), re-noticing the Renewed Rule 2004 Exam from May 3-4, 2022 to July 11, 2022.

35. To date, despite Bankruptcy Local Rule 7001-1(d)'s directive to promptly file a proof of service, the Trustee has apparently made no concerted effort to serve the Summons and Complaint.

36. Instead, almost two months after filing the Complaint and initiating the Adversary Proceeding and successfully arguing at the April 14th hearing that the delay associated with service in accordance with the Hague Service Convention would be prejudicial, the Trustee filed his Motion to Permit Alternative Service on Defendants (Doc. 11) (the "Service Motion"), which seeks court approval and permission to effectuate service on (i) Gaal and (ii) Procom Tours LLC, Procom Consulting KFT a/k/a Procom Consulting Utuzasi Iroda KFT and Procom Investments KFT (the "Other Defendants")¹⁰ by serving the Summons and Complaint by email to Gaal's undersigned counsel.¹¹ Gaal objected to the Service Motion. The Trustee has sought and obtained two successive continuances of the hearing on the Service Motion. Presumably this is because the Trustee wants to delay serving the Complaint until after conducting the Renewed Rule 2004 Exam so that he can avoid compliance with Rule 28(b) and Hungarian law in conducting depositions in the Avoidance Adversary Proceeding.

¹⁰ Procom Consulting KFT a/k/a Procom Consulting Utuzasi Iroda KFT and Procom Investments KFT also defined as the "Hungarian Entities".

¹¹ The Trustee also seeks to bypass translating the Summons, Complaint and exhibits, as required by the Hague Service Convention.

ARGUMENT

I. GAAL HAS FULLY COOPERATED WITH THE TRUSTEE’S EFFORTS TO OBTAIN DEBTOR’S BOOKS AND RECORDS.

37. The Motion for Sanctions alleges that Gaal has obstructed the Trustee’s attempts to investigate the Debtor’s assets, liabilities, and business affairs. Nothing could be farther from the truth. Gaal has cooperated in full with the Trustee’s requests for the Debtor’s books and records. What Gaal has objected to are the Trustee’s ongoing attempts to obtain the assets, books and records of Gaal and the Hungarian Entities from Gaal through series of motions that were served only electronically by CM/ECF.

38. Immediately after the filing of the involuntary petition, the Trustee was provided with access to all of the Debtor’s paper and all electronic books and records (which included all of Debtor’s bank statements for the years 2015 through 2020, Debtor’s QuickBooks files in electronic format, Gaal’s personal 1040 NR and Schedule C which included the Debtor’s income and expenses, Debtor’s contracts with the Hungarian Entities, and financial statements for the Hungarian Entities for 2019).¹²

39. Subsequently, on May 14, 2020 (less than 2 weeks after the filing of the involuntary petition), the Trustee filed his Chapter 7 Trustee’s Emergency Motion to Compel Turnover of Estate Property (Doc. 19) (the “Turnover Motion”). In the Turnover Motion, the Trustee sought to compel (among other things) Gaal, individually, to turnover books, records, and assets of not only the Debtor, but of Gaal and the Hungarian Entities. The Turnover Motion was served by CM/ECF only. Despite the defects in both procedure and service, Gaal retained the undersigned

¹² See Notice of Filing Detailed Listing of Communications and Associated Files Related Thereto to Outside Parties from Renaissance Consulting & Development, LLC, Debtors CPA in Response to Chapter 7 Trustees Motion to Compel Turnover (Doc. 28) for a partial description of the documents provided to the Trustee by Debtor’s outside accountant, Kevin Riggs.

counsel for the purposes of specially appearing to contest the Turnover Motion to the limited extent that it sought to compel Gaal to turnover books, records, and assets of Gaal and non-debtor entities. The Turnover Motion was granted, in part, but only as it related to turnover of the Debtor's books and records and other undisputed items. (Doc. 33). Following the Turnover Motion, Debtor's counsel spent hours reproducing documents that had already been produced, and providing the Trustee with additional documents, including customer information, all available employee emails, passenger information, trip dates, and access to the proprietary "CRM" software owned by a non-debtor entity. Gaal's counsel also facilitated a several hour interview between Trustee's counsel and the Debtor's outside accountant, Kevin Riggs, who responded fully and completely to all questions posed to him by Trustee's counsel. At the June 11, 2020 continued hearing on the Turnover Motion, counsel for the Trustee acknowledged that the Debtor had fully complied with the Turnover Order. (Doc. 87.)

40. Complete Schedules consisting of 398 pages were filed on June 3, 2020 (Doc. 70). Gaal executed these schedules under penalty of perjury. The Trustee has not requested that the Debtor amend or supplement these schedules.

41. Gaal appeared at the telephonic Section 341 meeting on June 22, 2020, responded to all questions posed to him (with the exception of providing the personal cell phone number for an employee of one of the Hungarian Entities), and the meeting was concluded after more than one hour of questioning.

42. On July 7, 2020, the Trustee issued subpoenas to the Debtor's former managers and various banks identified in the Debtor's schedules seeking documents concerning the Debtor. Neither the Debtor nor Gaal objected to these subpoenas.

43. Later, while the Motion for Reconsideration was pending, on June 16, 2021, the Trustee filed his Motion to Compel Debtor's Production of Foreign Bank Records or, in the Alternative, Consent to Disclosure of Foreign Bank Records (Doc. 268) (the "Bank Account Motion"). The Bank Account Motion sought to compel Gaal to turnover bank statements for all accounts on which he was an authorized signatory and to further "execute a Consent Directive authorizing international banks and financial entities to produce complete records for any accounts on which Gaal, Watkins, or Montgomery are/were authorized signors or have/had the right of withdrawal therefrom including, but not limited to, those titled in the name(s) of any Procom Entity(ies) during the four year period preceding the Petition Date." (Doc. 268, ¶¶ 14, 15.) Despite the fact that the relief sought in the Bank Account Motion was in the nature of a mandatory injunction, the certificate of service of the Bank Account Motion reflects that it was served only by CM/ECF. Counsel for Gaal specially appeared for purposes of objecting to the Trustee's attempt to obtain the bank account records for accounts of non-debtors and to compel Gaal to execute the consent directive relating to those accounts. (Doc. 285.) After oral argument, extensive briefing by the parties, and the submission of proposed findings of fact and conclusions of law, the Court took the Bank Account Motion under advisement. By order dated March 31, 2022, the Bank Account Motion was denied without prejudice. (Doc. 359.)

44. Also while the Motion for Reconsideration was pending, on August 5, 2021 the Trustee served Rule 2004 subpoenas on Trustee's outside accountant, Kevin Riggs and his company Renaissance Consulting (collectively, "Riggs") (Docs. 293, 294). Because the Rule 2004 subpoena sought production of Riggs' files that related to accounting work performed by Riggs for Gaal, individually (relating to Gaal's personal tax returns and financial data to be submitted in connection with Gaal's U.S. visa application), Gaal's counsel specially appeared to

quash the subpoenas and seek a protective order as to Gaal's personal accounting files. (the "Riggs MPO") (Doc. 295).

45. Shortly thereafter, the Trustee filed his Emergency Motion to Compel Production of Documents and for Turnover of Tax Refund (the "Tax Refund Motion"), in which the Trustee sought to compel Gaal to turnover his personal 2019 tax refund. The Tax Refund Motion alleged that Gaal's personal tax refund was property of the Debtor's estate because that refund was based upon income reported on Debtor's Schedule C and the Debtor had made distributions to Gaal to make the estimated tax payments for 2019. The certificate of service on the Tax Refund Motion reflected that it too was served only by CM/ECF. Counsel for Gaal specially appeared to contest the relief requested in the Tax Refund Motion on the grounds that the Trustee is not entitled to use turnover to obtain Mr. Gaal's personal financial records, and the tax refund is not property of the bankruptcy estate. On December 14, 2021, the Court denied the Riggs MPO, ordered turnover of Riggs' files relating to the Debtor and Gaal's personal tax refund, and deferred ruling on that portion of the Tax Refund Motion that sought turnover of Gaal's personal tax refund because it was not properly before the Court (Doc. 338).

46. Most recently, on February 2, 2022, the Trustee also sought a blanket extension of his time for filing avoidance actions under 11 U.S.C. Section 546 (Doc. 348) (the "546 Motion") until January 23, 2023. The motion was based upon the false premise that the Trustee did not have sufficient information to frame avoidance actions. The 546 Motion was served by CM/ECF, except for mail service to the Debtor at a Tampa address that has been abandoned since before the involuntary petition was filed. Counsel for Gaal specially appeared for purposes of objecting to the requested extension as to Gaal. (Doc. 349). Specifically, Gaal argued that the Trustee had all the Debtor's books and records (as evidenced by the fact that the Trustee had sufficient information

to repeatedly accuse Gaal of absconding with more than \$10 million), and thus had sufficient information to frame an adversary complaint against Gaal. The Court granted the 546 Motion through March 15, 2023 as to all parties except Gaal, and through March 15, 2022 as to Gaal.

47. Thus, Gaal has fully cooperated with the Trustee's investigation into the Debtor's financial affairs. Where, however, the Trustee has attempted to overreach and obtain assets, books, and records of Gaal and non-debtor entities from Gaal, Gaal's counsel has made timely limited special appearances and raised non-frivolous objections, many of which have been sustained.

II. THE MOTION FOR CONTEMPT WAS NOT SERVED IN ACCORDANCE WITH RULE 9020 AND 9014.

48. Federal Rule of Bankruptcy Procedure 9020 specifically provides that “a motion for an order of contempt” is governed by Rule 9014, which relates to contested matters. Thus, “[g]enerally speaking, civil contempt sanctions . . . must be sought by contested matter rather than an adversary proceeding.” *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1323-24 (11th Cir. 2015).

49. The Trustee seeks civil contempt against Gaal and sanctions against Gaal and his counsel. The Motion for Sanctions, however, was not served in accordance with Rule 9014 on either Gaal or his counsel.

50. As such, the Motion for Sanctions should be denied or any hearing deferred until such time as the Motion for Sanctions has been properly served.

III. THE TRUSTEE'S LAST MINUTE CHANGES TO THE RULE 2004 PROCEDURES ORDER BY THE COURT PRECLUDE A FINDING OF CONTEMPT OR AN AWARD OF SANCTIONS BECAUSE THERE HAS BEEN NO VIOLATION OF ANY ORDERS OF THE COURT.

51. Neither sanctions nor contempt are warranted against Gaal because the examination noticed by the Trustee differed materially from the examination ordered by the Court and, therefore, there has been no violation of a court order.

52. Despite the fact that the Court order upon which the Motion for Sanctions is based compels Gaal to appear by Zoom for a Rule 2004 examination to be conducted entirely by Zoom (Docs. 364, 385), two business days prior to the rescheduled Renewed Rule 2004 Exam, the Trustee unilaterally served a flurry of amended omnibus notices of Rule 2004 examination. (Docs. 399, 402, and 403).

53. When the music stopped on July 8, 2022 (the Friday before the examination scheduled for 9 a.m. on Monday), the Trustee's most recent Rule 2004 notice (the "Final Rule 2004 Notice") (Doc. 403) provided for a materially different examination procedure than the one directed by the Court. Specifically, the Order compelling discovery contemplated a Rule 2004 examination to be conducted by Zoom, with Gaal, Gaal's counsel, and the Trustee all appearing by Zoom. The Final Rule 2004 Notice, however, directed Gaal to travel to and appear in person at the offices of the Trustee's newly retained Hungarian Counsel for the examination, with Gaal's counsel relegated to attending by Zoom. Like each of the prior notices, the Final Rule 2004 Notice provides that Gaal is responsible for engaging and paying for an interpreter if one is needed.

54. The Motion for Sanctions alleges that two Baker Mackenzie attorneys and two interpreters retained by the Trustee appeared in person at the examination on July 11, 2022, as well as U.S. Counsel for the Trustee by zoom, and an English speaking court reporter familiar with Hungarian accents (presumably by Zoom). It is unclear who would be administering the oath to

Gaal. Thus, the Trustee unilaterally orchestrated the conversion of the Rule 2004 process that was ordered by the Court into an inherently coercive scenario where a Hungarian citizen was compelled to travel in person to the law offices of Trustee's counsel in Hungary and be examined in the presence of two attorneys and two interpreters retained by the Trustee, without the physical presence of his own counsel.¹³

55. The failure of Gaal to appear for the Trustee's planned ambush is not sanctionable and may not be the basis for a finding of contempt because there was no order of the Court for the examination procedure selected by the Trustee on the eve of the examinations.

IV. RULE 37 SANCTIONS ARE NOT APPLICABLE TO AN ALLEGED FAILURE TO COMPLY WITH AN ORDER COMPELLING A RULE 2004 EXAMINATION OF A NON-DEBTOR.

56. The Trustee asserts that monetary sanctions are appropriate pursuant to Rule 37(a)(5). Rule 37, however, is not applicable to motions to compel compliance with subpoenas under Rule 45. *Bailey Industries, Inc. v. SLJP, Inc.*, 270 F.R.D. 662, 672 (N.D. Fla. 2010) (collecting cases). Moreover, to the extent that the Trustee seeks non-monetary relief in the form of striking defenses and entry of a default against Gaal as to the not-yet served Complaint in the Avoidance Adversary Proceeding, this relief is not available under Rule 45, and the Trustee has cited no authority for the proposition that a Court may impose Rule 37 sanctions against a party in a case where no service of process has occurred based upon an alleged failure to comply with a non-party subpoena issued in an entirely separate proceeding.

¹³ Presumably, the Trustee was attempting to use the Rule 2004 examination not for the stated purpose of locating assets of the estate, but to obtain testimony from Gaal that the Trustee intended to use as affirmative evidence against Gaal in the pending Avoidance Adversary Proceeding. Recognizing that the Zoom Rule 2004 examination originally requested by the Trustee and approved by the Court would likely be inadmissible in any subsequent proceedings, the Trustee changed the Court-ordered procedure at the eleventh hour. Because the Final Rule 2004 Notice compels Gaal to physically appear for examination in Hungary, any examination occurring on Hungarian soil must not violate Hungarian law, including any restrictions that may prohibit compelled testimony under oath by Hungarian citizens for use in foreign proceedings. Gaal reserves all rights to object to all procedural improprieties in any subsequently scheduled examination of Gaal.

V. SANCTIONS AGAINST GAAL’S COUNSEL ARE NOT WARRANTED UNDER 28 U.S.C. SECTION 1927 OR SECTION 105 OF THE BANKRUPTCY CODE BECAUSE THERE HAS BEEN NO BAD FAITH CONDUCT ON THE PART OF GAAL OR HIS COUNSEL.

57. 28 U.S.C. § 1927 provides: “[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys’ fees reasonably incurred because of such conduct.”

58. The standards for imposing sanctions against an attorney were explained in *Smith v. Psychiatric Solutions, Inc.*, 864 F. Supp. 2d 1241 (N.D. Fla. 2012):

Because the provisions of § 1927 are “penal in nature [they] must be strictly construed.” *Norelus v. Denny’s, Inc.*, 628 F.3d 1270, 1281 (11th Cir.2010) (citations and internal quotation marks omitted). Under the plain language of the statute three factors must be present in order to justify an imposition of sanctions: (1) an attorney must engage in “unreasonable and vexatious” conduct; (2) such “unreasonable and vexatious” conduct must “multipl[y] the proceedings”; and (3) the amount of the sanction cannot exceed the costs occasioned by the objectionable conduct. *Id.* An attorney multiplies the proceedings unreasonably and vexatiously only when his conduct is “so egregious that it is ‘tantamount to bad faith.’ ” *Amlong & Amlong, P.A. v. Denny’s, Inc.*, 500 F.3d 1230, 1239 (11th Cir.2007) (citation omitted). Bad faith is an objective standard which turns “not on the attorney’s subjective intent, but on the attorney’s objective conduct.” *Id.* The conduct at issue should be compared with how a reasonable attorney would have acted under the circumstances. More particularly, “[t]he term ‘unreasonably’ necessarily connotes that the district court must compare the attorney’s conduct against the conduct of a ‘reasonable’ attorney and make a judgment about whether the conduct was acceptable according to some objective standard. The term ‘vexatiously’ similarly requires an evaluation of the attorney’s objective conduct.” *Id.* at 1239–40; *see also Amlong*, 500 F.3d at 1240 (citing Black’s Law Dictionary, (8th ed.2004), for definition of “vexatious” (meaning “without reasonable or probable cause or excuse; harassing; annoying”)). Neither negligent conduct, standing alone, nor lack of merit will support a finding of bad faith. *Id.* at 1241–42. Rather, the “attorney must knowingly or recklessly pursue a frivolous claim” *Id.* at 1242. Recklessness is “a gross deviation from conduct that might be reasonable in the circumstances.” *Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1227 (11th Cir.2003). “[O]bjectively reckless conduct is enough to warrant sanctions even if the attorney does not act knowingly and malevolently.” *Amlong*, 500 F.3d at 1241. Nevertheless, the attorney’s purpose or intent regarding the multiplication of the proceedings is not irrelevant. *Id.* “Although the attorney’s objective conduct is the focus of the analysis, the attorney’s subjective state of mind is frequently an important piece of the calculus, because a given act is more likely to fall outside

the bounds of acceptable conduct and therefore be ‘unreasonabl[e] and vexatious[]’ if it is done with a malicious purpose or intent.” *Id.* The decision to impose sanctions pursuant to § 1927 is within the sound discretion of the court. *Peterson v. BMI Refractories*, 124 F.3d 1386, 1390 (11th Cir.1997).

Id. at 1267-68.

59. Similarly, the Court’s power to impose sanctions under 11 U.S.C. § 105 is limited to situations involving “bad faith.” *In re Moran Lake Convalescent Center, LLC*, No. 10-43405-MGD, 2012 WL 470433 *3 (Bankr. N.D. Ga. Jan. 5, 2012) (collecting cases). “Bad faith exists where an attorney ‘knowingly or recklessly raises a frivolous argument’ or ‘argues a meritorious claim for the purpose of harassing an opponent.’” *Id.*

60. Sanctions are not appropriate under either Section 105 or Section 1927 where, as here, a lawyer interposes non-frivolous objections to the opposing parties’ procedural improprieties consistent with his or her ethical obligations to zealously advocate for her client. Moreover, contrary to the Trustee’s argument, the mere fact that Gaal’s attempts to obtain leave to appeal the Foreign Discovery Orders and obtain a stay pending that appeal were not successful is not a basis for sanctions against counsel. *Id.* (“Bad faith filings must not be confused with losing arguments and positions.”).

61. Similarly, there is no “bad faith” and sanctions are not appropriate where, as here, the conduct of the person against whom sanctions are sought is not the cause of the multiplication of litigation. *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997) (reversing award of Section 1987 sanctions where there was no “causal connection between the objectionable conduct of counsel and multiplication of the proceedings”).

62. Gaal's exercise of his right to appeal the Foreign Discovery Orders and seek a stay pending that appeal is not "bad faith" and is not a valid basis for sanctions under either 11 U.S.C. § 105 or 28 U.S.C. § 1927.¹⁴

63. The Trustee, not Gaal and his counsel, is responsible for all of the disputed motion practice between Gaal and the Trustee in this case. If, in fact, the Trustee truly seeks to obtain discovery from Gaal concerning actionable pre-petition transfers of property of the bankruptcy estate, the Trustee is the master of his own destiny. The Trustee has had sufficient information to frame an adversary complaint against Gaal and the Hungarian Entities, as alleged initial transferees, since June of 2020. If the Trustee had simply filed that adversary proceeding and served Gaal in accordance with the Hague Service Convention, that adversary proceeding would likely have been resolved by now. Instead, the Trustee chose to defer filing the Avoidance Adversary Proceeding and serving the Summons and Complaint for almost two years, in the hopes of using Rule 2004 to shortcut the requirements of the Hague Evidence Convention, Hague Service Convention, and Federal Rules of Civil Procedure 4, 28(d), and 45.

¹⁴ In the Service Opinion, the Court acknowledged that it could not find any case law under Rule 45 specifically permitting a subpoena to be served on counsel for the witness. The Court's ruling on this issue conflicts with the reported decisions that expressly address this issue. 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) (service of subpoena on plaintiff's counsel, as opposed to plaintiff himself, renders such service a nullity under Rule 45); *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); *Weiss v. Allstate Ins. Co.*, 512 F. Supp. 2d 463, 466 (E.D. La. 2007) (quashing subpoenas served on witness' counsel rather than witness himself); *Rx.com, Inc. v. Medco Health Solutions, Inc.*, No. 5:04CV227, 2007 WL 9725101, at *2 (E.D. Tex. Jun. 8, 2007) (same); *United States v. Brennerman*, No. 17-cr-0155(LAK), 2017 WL 4513563, at *1 (S.D. N.Y. Sep. 1, 2017) (collecting cases); *Inland Waters Pollution Control, Inc. v. Jigawon, Inc.*, No. 05-74785, 2008 WL 11357838, at *1 (E.D. Mich. Feb. 21, 2008) (collecting cases) (denying motion to compel witness' attorney to accept service of a deposition subpoena for witness); *Fujikura Ltd. v. Finisar Corp.*, No. 15-mc-80110-HRL(JSC), 2015 WL 5782351, at *5-6 (N.D. Cal. May 14, 2015) (even if attorney was representing non-party "for all purposes, he would not be a sufficient conduit for service of a Rule 45 subpoena on the company.").

CONCLUSION

WHEREFORE, Peter Gaal respectfully request entry of an order (a) denying the Motion for Sanctions in its entirety; and (b) granting such other or further relief as the Court deems just and proper.

Dated: July 26, 2022.

/s/ Lynn Welter Sherman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 26, 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