

**UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**
www.flmb.uscourts.gov

In re:

Procom America, LLC,

Debtor.

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

**HUNGARIAN COMPANIES' RESPONSE IN OPPOSITION TO
TRUSTEE'S MOTION FOR CIVIL CONTEMPT AND SANCTIONS**

Procom Consulting KFT a/k/a Procom Consulting Utuzasi Iroda KFT, a Hungarian limited liability company, and Procom Investments KFT, a Hungarian limited liability company (collectively, the "**Hungarian Companies**"), by and through undersigned counsel, specially appear¹ for the limited purpose of opposing the Trustee's Motion for Civil Contempt and Sanctions (Doc. No. 427) (the "**Motion for Sanctions**"), and state as follows:

INTRODUCTION²

1. For more than a year, the Trustee abandoned all efforts to seek discovery from the Hungarian Companies. The Hungarian Companies were included in the initial Rule 2004 Subpoena issued on April 29, 2021, but were omitted from the all of the subsequent notices, until the most recent Rule 2004 notice issued on August 16, 2022. The Hungarian Companies were not even named in the Trustee's Expedited Motion to Compel Examination Testimony and for Sanctions Against Procom America, LLC, Peter Gaal, and Procom Tours, LLC (Doc. No. 405) (the "**Prior Sanctions Motion**"). Indeed, the Trustee did not resurrect his request to seek

¹ The Hungarian Companies reserve all rights to contest jurisdiction of the Bankruptcy Court and personal jurisdiction and are appearing specially for the sole purpose of objecting to the Motion for Sanctions.

² All capitalized terms not specifically defined in the Introduction shall have the meaning ascribed to them elsewhere in this response (the "**Response**").

discovery from the Hungarian Companies until oral argument on the Prior Sanctions Motions at the hearing on July 28-29, 2022.

2. Until the Trustee's counsel indicated at the July 28-29, 2022 hearings that the Hungarian Companies had been "dropped" from the notices due to an oversight, the Hungarian Companies had no reason to believe that the Trustee intended to proceed as to the Hungarian Companies. Thus, there was not a knowing or willful violation of any order of the Court that might be the basis for sanction. The current Motion for Sanctions fails to mention the fact that the Order Granting, in Part, Trustee's Expedited Motion to Compel Rule 2004 Examinations (Doc. No. 426) had not been entered before the date of the rescheduled Rule 2004 examinations.

3. The Motion for Sanctions³ is an attempt by the Trustee to seek substantive relief against the Hungarian Companies without complying with the clear mandate of the Bankruptcy Rules,⁴ and to intimidate the Hungarian Companies and their counsel into submission by seeking sanctions against the Hungarian Companies and their counsel and an *in camera* review of attorney client communications between the Hungarian Companies and their counsel.

4. For obvious tactical reasons, the Trustee delayed filing his Avoidance Adversary Proceeding and serving the Complaint against the Hungarian Companies (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 Bankruptcy Rule 2004 fishing expedition, free of any constraints

³ The Motion for Sanctions is largely the same as the Trustee's Prior Sanctions Motion, although, significantly, the Prior Sanctions Motion was not even directed to the Hungarian Companies.

⁴ All references to the "Bankruptcy Code" are to the applicable section of Title 11 of the United States Code, 11 U.S.C. §§ 101 *et seq.* All references to a "Bankruptcy Rule" or "Bankruptcy Rules" are to the applicable Federal Rules of Bankruptcy Procedure. All references to a "Federal Rule" or the "Federal Rules" are to the applicable Federal Rules of Civil Procedure.

imposed by the Hague Evidence Convention⁵, Hague Service Convention⁶, or applicable discovery rules relating to the scope and manner of obtaining discovery from foreign defendants.⁷

5. The Motion for Sanctions 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.⁸ 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.

6. Like every motion that has been "served" by the Trustee in this case, the Motion for Sanctions was not served on either the Hungarian Companies or their counsel (against whom sanctions are sought), as required by Bankruptcy Rule 9020 and 9014. Simply stated, the Motion for Sanctions seeks to run roughshod over the Hungarian Companies' rights under the Bankruptcy Code, Bankruptcy Rules, Hague Evidence Convention, and Hague Service Convention.

⁵ 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.

⁶ Convention on the Service Abroad of Judicial and Extrajudicial Documents, 20 U.S.T. 361, 363 (1969).

⁷ *See, e.g.*, Fed. R. Bankr. P. 7028(b).

⁸ 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.

BACKGROUND

7. On May 1, 2020, 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).

8. On May 7, 2020, the Debtor filed its Consent to Order for Relief (Doc. No. 7) and, on May 8, 2020, the Bankruptcy 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**”).

THE RULE 2004 ORDERS

9. 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 Peter Gaal, individually (“**Gaal**”) 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.

10. Also on April 29, 2021, the Trustee purported to effectuate service of the Rule 2004 Subpoena on Gaal under Federal Rule 45 by emailing the Rule 2004 Subpoena to Gaal’s domestic counsel—who was not and is not domestic counsel for the Hungarian Companies. Gaal’s counsel advised the 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.

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

12. 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, LLC⁹ 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.

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

14. 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 Federal Rule 45, (ii) the Bankruptcy Court's subpoena power under Federal Rule 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 of the Hague Evidence Convention to obtain discovery from a non-party foreign national living abroad (such as Gaal).

⁹ The Rule 2004 Order required Gaal's counsel, Ms. Sherman, 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.

15. 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).

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

17. 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, the Hungarian Companies, 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**”).

18. On March 17, 2022, the Court issued a Summons in an Adversary Proceeding (Adv. Doc. No. 2) (the “**Summons**”) in the Avoidance Adversary Proceeding. To date, the Trustee has not served the Summons and Complaint on the Hungarian Companies.¹⁰

19. 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**”).

20. 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

¹⁰ No plausible or good faith argument can be made that the Hungarian Companies are evading service of the Summons and Complaint. The Hungarian Companies’ address are publicly available or ascertainable. Simply put, any delay in properly effectuating service of the Summons and Complaint on the Hungarian Companies in accordance with Federal Rule 4(f) is of the Trustee’s own making.

Motion to Compel Rule 2004 Examinations Duces Tecum (Doc. No. 357) (the “**Reconsideration Order**”)¹¹ denying the Motion for Reconsideration.

21. The Service Opinion compels “Gaal to appear—via Zoom—for a Rule 2004 examination within forty-five days.” The Service Opinion does not address the Hungarian Companies.

22. On April 5, 2022, the Trustee filed his Omnibus Third Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. No. 364) (the “**Renewed Rule 2004 Exam**”), unilaterally scheduling for May 3-4, 2022, the Bankruptcy 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 Debtor¹² and requesting the production of documents on or before April 26, 2022. *The Renewed Rule 2004 Exam was not directed to the Hungarian Companies.*

23. On April 5, 2022, Gaal filed his Emergency Motion for Protective Order (Doc. No. 365) (the “**Motion for Protective Order**”), seeking the entry of a protective order preventing the Trustee 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.

24. 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.

¹¹ The Rule 2004 Order, Service Opinion and Reconsideration Order shall be referred to collectively as the “**Foreign Discovery Orders**”.

¹² 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.

25. On April 8, 2022, the Trustee filed a Cross Notice of Taking Depositions Duces Tecum in the Debtor's bankruptcy case (Doc. No. 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). ***The Cross Notice did not include the Hungarian Companies.***

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

27. 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, including the Hungarian Companies.

28. 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. No. 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. No. 10.)

29. 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.

30. 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 unilaterally served his Omnibus Fourth Notice of Taking Rule 2004 Examinations Duces Tecum (Doc. No. 386), re-noticing the Renewed Rule 2004 Exam from May 3-4, 2022 to July 11, 2022. ***The notice was not directed to the Hungarian Companies.***

31. Notably, 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 which has now been pending for more than six months.

32. 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 (Adv. No. Doc. 11) (the "**Service Motion**"), which seeks court approval and permission to effectuate service on Gaal and the Hungarian Companies by serving the Summons and Complaint by email to Gaal's undersigned counsel.¹³ Gaal and the Hungarian Companies objected to the Service Motion. The Trustee then sought and obtained two successive continuances of the hearing on the Service Motion. Presumably this was because the Trustee wanted to delay serving the Complaint until after conducting the Renewed

¹³ The Trustee also sought to bypass translating the Summons, Complaint and exhibits, as required by the Hague Service Convention.

Rule 2004 Exam so that he could avoid compliance with Federal Rule 28(b) and Hungarian law in conducting depositions in the Avoidance Adversary Proceeding.

33. 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. (Doc. Nos. 399, 402, and 403). ***None of the notices were directed to the Hungarian Companies.***

34. Gaal did not attend the Rule 2004 examination on July 11, 2022, and the Trustee filed his Prior Sanctions Motion,¹⁴ with Gaal filing his response in opposition (Doc. No. 410).

35. On July 28 and 29, 2022, this Court held a hearing on the Prior Sanctions Motion as well as the Service Motion. The Court orally granted in part, denied in part and deferred in part the Prior Sanctions Motion, directing Gaal to sit for a Rule 2004 examination. As to the Service Motion, the Court advised that it would not approve alternative service unless the Trustee was unable to serve the Summons and Complaint in accordance with the Hague Service Convention.

36. On August 16, 2022, the Trustee issued his Fifth Notice of Rule 2004 Examination to Gaal (Doc. No. 420) for September 12-13, 2022, which notice the Trustee subsequently amended on August 23, 2022 (Doc. No. 422). ***These notices included the Hungarian Companies for the first time since April 2021.***

37. On September 2, 2022, counsel for the Hungarian Companies provided email notice to Trustee's counsel that representatives of the Hungarian Companies would not be appearing for

¹⁴ The Prior Sanctions Motion alleged 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). 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.

the rescheduled Rule 2004 Examination. Representatives of the Hungarian Companies did not appear for their Rule 2004 examinations on September 12, 2022.¹⁵

38. On September 14, 2022, the Court entered its Order Granting in Part and Deferring in Part Trustee's Motion to Compel Rule 2004 Examinations (Doc. No. 426) (the "**September Order**"), which memorialized the Court's oral ruling from July 29, 2022.

39. On September 16, 2022, the Trustee filed his current Motion for Sanctions.

ARGUMENT

I. THE TRUSTEE ABANDONED THE BANKRUPTCY RULE 2004 EXAMINATION AS TO THE HUNGARIAN COMPANIES.

40. For more than a year, the Hungarian Companies were not included in any of the Rule 2004 notices or subpoenas filed by the Trustee. The Hungarian Companies reasonably assumed that the Trustee had abandoned the 2004 examination as to the Hungarian Companies, particularly after the Avoidance Adversary Proceeding was commenced and had no reason to seek further relief from the Court, until the Trustee announced at the hearings on July 28-29, 2022, that the Hungarian Companies had been inadvertently omitted from the Rule 2004 notices and subpoenas (for more than a year).

41. During the many months that passed from the initial Rule 2004 Subpoena to the most recent Rule 2004 notice, the facts and circumstances have changed, including but not limited to the initiation of the Avoidance Adversary Proceeding and the Trustee's failure to diligently pursue discovery as to the Hungarian Companies, creating additional appellate arguments for the Hungarian Companies.

¹⁵ Gaal was not designated as a Rule 30(b)(6) representative by any of the entity examinees.

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

42. 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.”¹⁶

43. The Trustee seeks civil contempt against the Hungarian Companies and sanctions against the Hungarian Companies and their counsel. The Motion for Sanctions, however, was not served in accordance with Bankruptcy Rule 9014 on either the Hungarian Companies or their counsel. 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 HUNGARIAN COMPANIES ARE MERELY DOING WHAT THE LAW REQUIRES OF THEM IN ORDER TO APPEAL THE FOREIGN DISCOVERY ORDERS.

44. The Hungarian Companies have meritorious objections to the Trustee’s “service” of a Rule 2004 subpoena on the Hungarian Companies by email on Gaal’s domestic counsel (not even domestic counsel for the Hungarian Companies), and the Foreign Discovery Orders and the September Order that uphold this service.

45. Given that Gaal attempted to appeal the Foreign Discovery Orders and obtain a stay pending appeal, but unfortunately, the District Court dismissed Gaal’s appeal of the Foreign Discovery Orders as premature, the Hungarian Companies recognized that the September Order was not an appealable order either. As explained by the Eleventh Circuit, “[o]rdinarily, a litigant seeking to overturn a discovery order has (only) two choices. Either he can comply with the order and challenge it at the conclusion of the case or he can refuse to comply with the order and contest

¹⁶ *Green Point Credit, LLC v. McLean (In re McLean)*, 794 F.3d 1313, 1323-24 (11th Cir. 2015).

its validity if subsequently cited for contempt for his refusal to obey.”¹⁷ Thus, the Hungarian Companies are unable to obtain appellate review of the Foreign Discovery Orders or the September Order until a contempt order has been entered.

46. As such, the Hungarian Companies’ refusal to attend the rescheduled Rule 2004 examination on September 12-13, 2022, was in furtherance of what the law requires before they may appeal one or more of the Foreign Discovery Orders or the September Order. It is critically important here to understand the Hungarian Companies have not and are not refusing to respond to proper discovery requests propounded by the Trustee in the Avoidance Adversary Proceeding, which the Trustee has never attempted to serve under the Hague Service Convention. These facts weigh in favor of this Court only issuing limited monetary civil contempt sanctions against Hungarian Companies.

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.

47. 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 45.¹⁸ Moreover, to the extent that the Trustee seeks non-monetary relief in the form of striking defenses and entry of a default against the Hungarian Companies 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

¹⁷ *Matter of Int’l Horizons, Inc.*, 689 F. 2d 996, 1001 (11th Cir. 1982) (quoting *Rouse Constr. Int’l, Inc. v. Rouse Constr. Corp.*, 680 F. 2d 743, 745 (11th Cir. 1982)); see also *U.S. Catholic Conference v. Abortion Rights Mobilization, Inc.*, 487 U.S. 72, 76 (1988) (order finding nonparty witness in contempt is appealable); *In re Stasz*, 387 B.R. 271, 275-76 (9th Cir. BAP 2008) (order granting sanctions on a motion for an order of contempt for debtor’s failure to appear for Rule 2004 examination is a final, appealable order); *In re Norrie*, 2016 WL 6407839, at *7-8 (9th Cir. BAP Oct. 26, 2016) (same).

¹⁸ *Bailey Industries, Inc. v. SLJP, Inc.*, 270 F.R.D. 662, 672 (N.D. Fla. 2010) (collecting cases).

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.

48. While the Court should whole-heartedly reject the Trustee's invitation to impose Federal Rule 37 sanctions, the sanctions sought by the Trustee are draconian and excessive under the circumstances. Sanctions under Federal Rule 37 are progressive and cumulative in nature—the striking of pleadings or terminal sanctions are only awarded as a last resort. Indeed, “a default judgment is appropriate only as a last resort, when less drastic sanctions would not ensure compliance with the court's orders.”¹⁹

V. SANCTIONS AGAINST THE HUNGARIAN COMPANIES' 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 THE HUNGARIAN COMPANIES OR THEIR COUNSEL.

49. Despite the fact that the Court denied the request for sanctions against Gaal's counsel in the Prior Sanctions Motion, the Motion for Sanctions seeks sanctions against both Gaal's counsel and the Hungarian Companies' counsel.²⁰

50. 28 U.S.C. § 1927 (“**Section 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.”

51. The standards for imposing sanctions against an attorney were explained in *Smith v. Psychiatric Solutions, Inc.*:²¹

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

¹⁹ *Maus v. Ennis*, 513 Fed. Appx. 872, 878 (11th Cir. 2013); *Roca Labs, Inc. v. Consumer Opinion Corp.*, Case No. 8:14-CV-2096-T-33EAJ, 2015 WL 12915721, at *2 (M.D. Fla. Oct. 21, 2015).

²⁰ It is unclear whether the request for sanctions against counsel was included inadvertently or intentionally.

²¹ 864 F. Supp. 2d 1241 (N.D. Fla. 2012).

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).²²

²² *Id.* at 1267-68. It is also unclear in the Eleventh Circuit whether a bankruptcy court has the ability to issue sanctions under 28 U.S.C. § 1927. *See Wizenberg v. Wizenberg*, 612 B.R. 454, 457-59 (S.D. Fla. 2020) (holding bankruptcy court is not a “court of the United States” for purposes of Title 28 and lacks the authority to issue sanctions under 28 U.S.C. § 1927 and treating bankruptcy court’s section 1927 sanctions order as a report and recommendation); *In re Wizenberg*, 838 Fed. Appx. 406, 412 n. 1 (11th Cir. 2020) (“We acknowledge, as the district court pointed out, that bankruptcy courts within the Eleventh Circuit, as well as the other Circuits, have split on the question whether bankruptcy courts may impose sanctions under 28 U.S.C. § 1927. But we do not address this issue because [appellant] has not raised it on appeal.”); *In re Lauber*, 179 B.R. 712, 715 (Bankr. M.D. Fla. 1995) (bankruptcy court was not “courts of the United States,” and thus it lacked authority to impose sanctions under excessive costs statute).

52. Similarly, the Court's power to impose sanctions under section 105 of the Bankruptcy Code is limited to situations involving "bad faith."²³ "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.'"²⁴

53. Sanctions are not appropriate under either section 105 of the Bankruptcy Code 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 clients.

54. 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.²⁵

55. The Trustee is responsible for the multiplication of litigation in this case. If, in fact, the Trustee truly seeks to obtain discovery from the Hungarian Companies 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 Companies, as alleged initial transferees, since June of 2020. If the Trustee had then simply filed the Avoidance Adversary Proceeding and served the summons and complaint on the Hungarian Companies in accordance with the Hague Service Convention, the Avoidance 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

²³ *In re Moran Lake Convalescent Center, LLC*, No. 10-43405-MGD, 2012 WL 470433 *3 (Bankr. N.D. Ga. Jan. 5, 2012) (collecting cases).

²⁴ *Id.*

²⁵ *Peterson v. BMI Refractories*, 124 F.3d 1386 (11th Cir. 1997) (reversing award of Section 1927 sanctions where there was no "causal connection between the objectionable conduct of counsel and multiplication of the proceedings").

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.

56. Finally, the Trustee's request for this Court to conduct an in camera review of the Hungarian Companies' communications with his counsel should be denied.²⁶ The Trustee provides no authority to support this request and invasion of the attorney-client privilege. Presumably because there is none.²⁷

CONCLUSION

The Hungarian Companies have not simply ignored the Rule 2004 subpoenas, but believed the Trustee had abandoned the 2004 examinations as to the Hungarian Companies, given the Trustee's inconsistent efforts to enforce the subpoenas as to the Hungarian Companies. Given that the Trustee now intends to pursue a 2004 examination of the Hungarian Companies, a contempt order is also necessary for the Hungarian Companies to perfect their appellate rights as to the Foreign Discovery Orders. Accordingly, any sanctions that are ordered should be minimal.

WHEREFORE, the Hungarian Companies respectfully request entry of an order (a) granting the Motion for Sanctions on a limited basis solely to impose limited monetary sanctions

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²⁶ See Motion for Sanctions, ¶ 40.

²⁷ While the Trustee has sought discovery pursuant to Bankruptcy Rule 2004 and not under Federal Rule 34, even the case law involving sanctions under Federal Rule 34 acknowledges that the "waiver of privilege is the most extreme sanction that a court can impose for failure to follow required procedure and courts should reserve it for cases of unjustifiable delay, inexcusable conduct, and bad faith in responding to discovery requests." *Jones v. American General Life & Accident Ins. Co.*, No. CV 101-003, 2002 WL 32073037, at *6 (S.D. Ga. Dec. 4, 2002) (quoting *RDM Holdings, Inc. v. Equitex, Inc. (In RDM Sports Group, Inc.)*, 277 B.R. 415, 424 (N.D. Ga. 2002)). The facts of this case simply do not evidence unjustifiable delay, inexcusable conduct, or bad faith that would warrant the imposition of such a severe sanction.

against the Hungarian Companies, (b) denying the remainder of the Motion for Sanctions in its entirety; and (c) granting such other or further relief as the Court deems just and proper.

Dated: Tampa, Florida
October 2, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 2, 2022, I electronically filed a true and correct copy of the foregoing *Hungarian Companies' Response in Opposition to Trustee's Motion for Civil Contempt and Sanctions* with the Clerk of the United States Bankruptcy Court for the Middle District of Florida by using the CM/ECF system, and I furnished a copy of the foregoing document(s) to the following parties in the manner of service indicated below:

/s/ Kathleen L. DiSanto
ATTORNEY

Via the CM/ECF system which will send a Notice of Electronic Filing to:

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