



# SHOW ME THE MONEY:

## Obtaining Disclosure of Foreign Bank Account Records

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**Y**ou've been appointed as chapter 7 trustee in a case involving a well-known, high-flying debtor whose schedules reflect substantial unsecured liabilities, nominal non-exempt assets, and potential avoidance claims. Although creditor recoveries appear distant and doubtful, you are keenly aware of your duties to "collect and reduce to money the property of the estate" and to "investigate the financial affairs of the debtor".<sup>1</sup> These tall tasks are

always easier to accomplish when a debtor discharges his own duties to "cooperate with the trustee as necessary to enable the trustee to perform the trustee's duties under this title" and to "surrender to the trustee all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under [the bankruptcy code]".<sup>2</sup> But what tools can you use to gather information about overseas bank accounts

when the debtor is uncooperative, given many international bank secrecy laws?

Of course, the primary investigatory tool to aid in the fulfillment of your statutory duties is an examination pursuant to Bankruptcy Rule 2004.<sup>3</sup> This rule authorizes an examination concerning “the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or to the debtor’s right to a discharge....”<sup>4</sup> Indeed, a Rule 2004 examination is commonly understood as a tool “to quickly ascertain the extent and location of the estate’s assets.”<sup>5</sup> In addition to discovering assets, the examinations are often used to “unearth frauds.”<sup>6</sup> This is because the scope of a Rule 2004 examination is “unfettered and broad” and courts sometimes describe Rule 2004 examinations as legitimate “fishing expedition[s].”<sup>7</sup>

Typically, Rule 2004 is used to examine the debtor. However, this examination is not limited to the debtor or his agents, “but may properly extend to creditors and third parties who have had dealings with the debtor.”<sup>8</sup> Summed up, “an inquiry pursuant to Rule 2004 may ‘cut a broad swath’ through the debtor’s affairs, those associated with him, and those who might have had business dealings with him.”<sup>9</sup> There are limits, however. “Rule 2004 may not be used as a device to launch into a wholesale investigation of a non-debtor’s private business affairs.”<sup>10</sup>

Despite the powerful tool of a Rule 2004 examination, this case presents significant challenges. Take for example the problems arising when the debtor has moved to a foreign jurisdiction and refuses to cooperate in locating missing assets because he is the subject of a criminal proceeding and intends to invoke his Fifth Amendment privilege against self-incrimination. Understandably, you may be tempted to file a Report of No Distribution and quickly close this case. However, creditors are outraged because they claim to have been defrauded by the debtor and insist that you conduct an appropriate investigation.

The case *Rigby v. Mastro (In re Mastro)*, 585 B.R. 587 (B.A.P. 9<sup>th</sup> Cir. 2018) involved a similar fact pattern. There, the debtor and his wife were uncooperative, fled the United States to France in order to evade the trustee’s efforts to obtain turnover of significant assets, and successfully opposed a request for their extradition in connection with a criminal proceeding. Unfazed, the trustee filed a motion to compel the debtor to sign a so-called “consent directive,” authorizing foreign banks to identify any accounts the debtor had or formerly had at such bank. A consent directive enables a trustee to locate assets around the world despite bank secrecy laws, because it ostensibly comes from the debtor and thereby waives secrecy. Despite the name, the Ninth Circuit BAP wrote,

A consent directive is not necessarily or even often consensual: reported decisions involve cases where a court compels a person to sign the document. The signatory identifies neither the contemplated recipients nor accounts in the consent directive. Instead, the document generally directs any bank or other financial institution that receives the consent directive to disclose any accounts held by the signatory. As a result, the signatory does not admit the existence of any account at any particular financial institution.<sup>11</sup>

The court found that since the consent directive was not testimonial, an order compelling its execution would not violate the debtor’s right against self-incrimination under the Fifth Amendment. Instead, a consent directive merely authorizes a foreign bank to disclose information relating to any account that the bank believes the debtor had the authority to draw upon in the past or present, based upon its own bank records. As a result, the trustee could obtain records of foreign bank accounts on which the debtor was an authorized signer, principal, or beneficiary, regardless of whether the accounts were formally titled in the name of the debtor.

In analyzing the issues, the Ninth Circuit BAP reasoned that the “issuance of a consent directive in connection with a Rule 2004 examination request is entirely consistent with the broad inquiry into a debtor’s financial affairs authorized by the Code.”<sup>12</sup> Importantly, “[a] consent directive order under § 105 would enable the trustee’s § 704 investigation of the debtor’s financial affairs; and it is consistent with a debtor’s § 521 obligation to cooperate with this investigation.”<sup>13</sup> Thus, the court held that “a bankruptcy court may use § 105(a) and Rule 2004 to compel a debtor to sign a consent directive in furtherance of the debtor’s § 521(a)(4) obligation to provide recorded information to the trustee and in furtherance of a trustee’s § 704 duties to investigate a debtor’s affairs.”<sup>14</sup>

Although consent directives have their origin in criminal proceedings, courts in civil matters have also authorized consent directives based on their “broad discretion” to supervise discovery.<sup>15</sup>

## CONCLUSION

The old adage “where there’s a will, there’s a way” is particularly apropos to a trustee’s ability to obtain and utilize consent directives to secure a debtor’s foreign bank account records. Of course, it is important to tailor your proposed consent directive to fit the particular facts of your case. Several court-approved samples follow.

## SAMPLE # 1

I, Michael R. Mastro, a United States citizen, do hereby direct any bank, trust company, financial services company, brokerage entity, and other financial institution or branch thereof, and its officers, employees and agents (“Financial Institution”), located outside the territorial United States, at which I may have or may have had a bank or brokerage account of any kind however described upon which I am or was authorized to draw (“Accounts”), to disclose all information and deliver copies of all  
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### About the Authors

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documents of every interest in the Financial Institution's possession or control which relate to the Accounts, together with a certificate attesting to the authenticity of any and all such documents, to any agent or attorney of James F. Rigby, Jr., Trustee of the bankruptcy estate of Michael R. Mastro, who presents a copy of this Consent Directive.<sup>16</sup>

### **SAMPLE #2**

I, Stewart Savitsky, of the state of New York in the United States of America, in compliance with this Court's Order, do hereby authorize and direct any bank, trust company, other financial institution or branch thereof located outside of the territorial United States at which I may have or may have had an account of any kind upon which I may be or may have been authorized to draw, to disclose all information and deliver copies of all documents of every nature in the possession or control of such bank, trust company, other financial institution or branch thereof which relate to any such accounts, together with a certificate attesting to the authenticity of any and all such documents, to any agent or employee of Muller's Meats Limited, or their counsel, Paul, Weiss, Rifkind, Wharton & Garrison who presents a copy of this Consent Directive which has been certified by the Clerk of the United States District Court for the Southern District of New York to such bank, trust company, financial institution or branch thereof, and this Consent Directive shall be irrevocable authority for doing so. This authorization is intended to apply to any and all bank confidentiality laws of any state or nation and shall be construed as consent with respect thereto as the same may apply to any accounts for which I may be or may have been a relevant principal, signatory or beneficiary.<sup>17</sup>

### **SAMPLE #3**

I, \_\_\_\_\_, of the State of Texas in the United States of America, do hereby direct any bank or trust company at which I may have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to said bank account to Grand Jury 84-2, empaneled May 7, 1984 and sitting in the Southern District of Texas, or to any attorney of the District of Texas, or to any attorney of the United States Department of Justice assisting said Grand Jury, and to give evidence relevant thereto, in the investigation conducted by Grand Jury 84-2 in the Southern District of Texas, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Southern District of Texas issued in connection with the aforesaid investigation, dated \_\_\_\_\_. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and to any implied contract of confidentiality between Bermuda banks and their customers which may be imposed by Bermuda common law, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.<sup>18</sup>

### **SAMPLE #4**

I, LAWRENCE L. GHIDONI, of the State of Florida in the United States of America, do hereby direct any bank or trust company at which I have a bank account of any kind or at which a corporation has a bank account of any kind upon which I am authorized to draw, specifically including The Bank of Nova Scotia and The Bank of Nova Scotia Trust Company (Cayman) Limited, and its officers, employees and agents, to disclose all information and deliver copies of all documents of every nature in your possession or control which relate to the said bank accounts to any attorney of the United States Department of Justice, and to give evidence relevant thereto, in the case of the *United States of America v. Lawrence L. Ghidoni*, Case No. TCR 83-07016, now pending in the United States District Court for the Northern District of Florida, and this shall be irrevocable authority for so doing. This direction has been executed pursuant to that certain order of the United States District Court for the Northern District of Florida in the aforesaid case, dated December 30, 1983. This direction is intended to apply to the Confidential Relationships (Preservation) Law of the Cayman Islands, and shall be construed as consent with respect thereto as the same shall apply to any of the bank accounts for which I may be a relevant principal.<sup>19</sup>

### **SAMPLE #5**

I \_\_\_\_\_ a resident of \_\_\_\_\_ do hereby direct any bank, trust, or other financial company, as well as any of its officers, employees, and agents, at which I have or had a bank account or other financial account of any kind operated under my name or any other name (including any corporation or other entity) for which I am or was authorized to draw on the account, to disclose all information and deliver copies of all documents of every nature in the bank's, trust's, or other financial company's possession or control which relate to said bank or other financial accounts to any attorney or investigator of the United States Commodity Futures Trading Commission or to the Temporary Receiver or his representatives, and to give evidence relevant thereto, in the matter of *United States Commodity Futures Trading Commission v. Capital Blu Management, LLC*, et al., Case No. \_\_\_\_\_, now pending before the United States District Court for the Middle District of Florida, and this shall be irrevocable authority for so doing. This direction is intended to apply to not only the laws of the United States, but also to the law of countries other than the United States which restrict or prohibit the disclosure of bank information without the consent of the holder of the account, and shall be construed as consent with respect thereto, and the same shall apply to any of the bank accounts or other financial accounts for which I may be a relevant principal.<sup>20</sup> 🏠

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#### ENDNOTES:

- <sup>1</sup> 11 U.S.C. §§ 704(a)(1) and (a)(4).
- <sup>2</sup> 11 U.S.C. §§ 521(a)(3) and (a)(4).
- <sup>3</sup> Fed. R. Bankr. P. 2004.
- <sup>4</sup> Fed. R. Bankr. P. 2004(b).
- <sup>5</sup> *In re Fearn*, 96 B.R. 135 (Bankr. S.D. Ohio 1989); *In re Martin*,

## Policy for Approving the Filing of Amicus Briefs by NABT

### Requests for an Amicus Brief

A request for an amicus brief should be made to the chair of the amicus committee, who will then circulate the request to all members of the committee. A request will not be considered unless it contains the following information:

1. The style of the case, and the state, district, and circuit involved.
2. The name of the trustee involved.
3. A brief description of the underlying facts of the case.
4. The legal issue to be briefed by NABT.
5. The national significance of this issue to all trustees.
6. The name and address of the person who will be preparing the brief, if an author has been identified.
7. The nature and amount of any fees or expenses to be paid to the author, if any, and the proposed source of those funds. (An author is expected to provide services on a pro bono basis. NABT will reimburse authors for reasonable and necessary expenses, including the printing, filing, and service of briefs and related pleadings.)
8. The timetable for the filing of briefs.

### Consideration by the Committee

The amicus committee shall consider all proper requests as soon as practicable. The committee will make one of three decisions:

1. Approve the request, by consensus.
2. Deny the request, by consensus.
3. Refer the matter to the executive board or full board for its consideration and comment, after which the request shall be returned to the amicus committee for its final approval or denial by consensus.

### Factors to be Considered by the Committee

In its consideration of each request, the amicus committee shall consider, among all relevant factors, including (but not limited to) the following:

1. Whether the requesting party is a member in good standing with NABT.
2. Whether the issue involved is legal, or whether it is fact-sensitive.
3. Whether the pleadings are “clean” and whether there are any procedural impediments to a determination of the legal issue.
4. Whether the legal issue is of national significance to all trustees.
5. Whether the decision will hinge on state law, or other matters which may only be relevant to trustees in certain districts.
6. Whether the fees and costs being requested, if any, are appropriate.

403 B.R. 359, 362 (Bankr. D.S.C. 2009); *In re Roman Catholic Church of Diocese of Gallup*, 513 B.R. 761, 764 (Bankr. D.N.M. 2014) (citing *In re Hammond*, 140 B.R. 197, 201 (S.D. Ohio 1992)).

<sup>6</sup> *In re Table Talk, Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985); see also *Martin*, 403 B.R. at 362 (“The broad general examination of debtors and others to recover assets and uncover fraudulent conduct is a traditional feature of bankruptcy jurisprudence traceable to the first bankruptcy statute enacted...in 1542.”); *In re Symington*, 209 B.R. 678, 683 (Bankr. D. Md. 1997).

<sup>7</sup> *Table Talk*, 51 B.R. at 145; *Fearn*, 96 B.R. at 135; *Hammond*, 140 B.R. at 201 (citing *In re GHR Energy Corp.*, 33 B.R. 451, 453 (Bankr. D. Mass. 1983)); *In re French*, 145 B.R. 991, 992 (Bankr. D.S.D. 1992); *In re Handy Andy Home Improvement Centers, Inc.*, 199 B.R. 376, 378 (Bankr. N.D. Ill. 1996).

<sup>8</sup> *Fearn*, 96 B.R. at 138; *In re Platinum Partners Value Arbitrage Fund L.P.*, 583 B.R. 803, 810-11 (Bankr. S.D.N.Y. 2018) (“[I]n the proper context the Court may authorize the examination of third parties that possess knowledge of the debtor’s acts, conduct, liabilities, or financial condition which relate to the administration of the bankruptcy estate.”) (quoting *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002)).

<sup>9</sup> *Fearn*, *supra* at 138 (quoting *In re Mantolesky*, 14 B.R. 973, 976 (Bankr. D. Mass. 1981) (emphasis deleted)).

<sup>10</sup> *In re Wilcher*, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985); *In re Yellowstone Mountain Club, LLC*, 2009 WL 982233 (Bankr. D. Mont. 2009) (same); *In re Mezvinsky*, 2000 WL 33950697 (Bankr. E.D. Pa. 2000) (same); *In re Gay*, 2016 WL 1612942, at \*2 (Bankr. W.D. Okla. 2016) (same); *In re Continental Forge Co., Inc.*, 73 B.R. 1005 (Bankr. W.D. Pa. 1987) (same); *In re Countrywide Home Loans, Inc.*, 384 B.R. 373 (Bankr. W.D. Pa. 2008) (same).

<sup>11</sup> *In re Mastro*, 585 B.R. at 591.

<sup>12</sup> *Id.* at 597.

<sup>13</sup> *Id.* at 596.

<sup>14</sup> *Id.* at 598.

<sup>15</sup> See *Bank of Crete v. Koskotas*, 1989 WL 46587 (S.D.N.Y. Apr. 21, 1989); see also, *Odyssey Reinsurance Co. v. Nagby*, 2019 WL 2717223 (S.D. Cal. June 27, 2019); *Hansel ‘N Gretel Brand, Inc. v. Savitsky*, 1997 WL 698179 (S.D.N.Y. Nov. 10, 1997); *SEC v. College Bound, Inc.*, 155 F.R.D. 1 (D.D.C. 1994).

<sup>16</sup> *In re Mastro*, 585 B.R. 590 at n. 3.

<sup>17</sup> *Hansel ‘N Gretel Brand, Inc. v. Savitsky*, 1997 WL 698179 (S.D.N.Y. Nov. 10, 1997).

<sup>18</sup> *Doe v. United States*, 487 U.S. 201, 204 at n. 2, 108 S. Ct. 2341, 101 L. Ed. 2d 184 (1988).

<sup>19</sup> *United States v. Ghidoni*, 732 F.2d 814, 815 at n. 1, *cert. denied*, 469 U.S. 932, 105 S. Ct. 328, 83 L. Ed. 2d 264 (1984).

<sup>20</sup> *CFTC v. Capital Blu Management, LLC*, 2010 WL 11508134, at \* 3 (M.D. Fla. Jun. 21, 2010).