AMERICAN BANKRUPTCY INSTITUTE

Southwest Bankruptcy Conference

Consumer

Discovery Skills in Consumer Cases

Hon. Martin R. Barash
U.S. Bankruptcy Court (C.D. Cal.) | Woodland Hills

Jody A. Corrales
DeConcini McDonald Yetwin & Lacy, P.C. | Tucson, Ariz.

Lenard E. Schwartzer
Schwartzer & Imes Law Firm PC | Las Vegas

Summer M. Shaw
Shaw & Hanover PC | Palm Desert, Calif.

CONCURRENT SESSION

2022

DISCOVERY IN CONSUMER CASES

Acquiring the "Jackpot" of information efficiently and economically

A. Subpoenaing documents –

- FRBP 9016 makes FRCP 45 applicable in bankruptcy cases and only requires that a "subpoena must issue from the court where the *action is pending*."
- Do you need an order? *See* attached "*Effective and Efficient Discovery, or Running in to Roadblocks that Run up the Bill"*

B. 2004 Exams-

- Let the "Fishing expedition" begin- "The scope of a 2004 examination is 'unfettered and broad' and is akin to a fishing expedition." *In re Subpoena Duces Tecum*, 461 B.R. 823 (Bankr. C.D. Cal. 2011) citing *In re GHR Energy Corp.*, 33 B.R. 451, 453–54 (Bankr.D.Mass.1983). But "good cause" must exist.
- Steer clear of the "Pending Litigation Rule"- "If an adversary proceeding or contested matter is pending, the discovery rules in the rules of civil procedure should be used, rather than Rule 2004 examinations." *In re Blinder, Robinson & Co.*, 127 B.R. 267, 274 (D.Colo.1991), citing *In re Valley Forge Plaza Assocs*., 109 B.R. 669, 674–75 (Bankr.E.D.Pa.1990). *Cf. In re Sun Med. Mgmt., Inc*., 104 B.R. 522, 524 (Bankr.M.D.Ga.1989). *See* also *In re Wash. Mut., Inc.*, 408 B.R. 45, 53 (Bankr.D.Del.2009) ("The 'pending proceeding' rule is predicated on there actually being a pending action involving the two parties."); *Brooke Corp.*, 2013 WL 3948866, at *3 ("Where a party requests a Rule 2004 examination and an adversary proceeding or other litigation in another forum is pending between the parties, the relevant inquiry is whether the Rule 2004 examinations will lead to the discovery of evidence related to the pending proceeding or whether the requested examination seeks to discover evidence unrelated to the pending proceeding."). *See generally Wash. Mut*., 408 B.R. at 51 ("The primary concern of courts is the use of Rule 2004 examinations to circumvent the safeguards and protections of the Federal Rules of Civil Procedure [citation omitted]." *In re Roman*

Catholic Church of the Diocese of Gallup, 513 B.R. 761 (Bankr. N.M. 2014). *See* also *In re Wade* (Bankr. W.D. Tenn. 2014).

- “Consent Derivatives” - "…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..." *Rigby v. Mastro (In re Mastro)*, 585 B.R. 587 (B.A.P. 9th Cir. 2018).
- *See* attached sample of a Motion for 2004 Exam but check local rules as a motion and order are not always needed- Compare DNJ LBR 2004–1(b) as discussed in *In re Subpoena Duces Tecum* which does not require a motion and order, compared to CDCA LBR 2004-1 which does require a motion and order.

C. Trustee’s Powers-

- Document production requests pursuant to §§521 and 704
- Turnover Motions pursuant to §541 and the consequences of not complying with such a court order pursuant to §727(a)(5) or (6)
- Who holds the privilege?- *See* attached *“Who Controls the Attorney-Client Privilege in Consumer Bankruptcy Cases?”*

D. Alternative “cards” to use obtain what you need-

- Look to other Federal and State statutes to get what you need, especially those with monetary sanctions/fines for noncompliance
- *Examples:* RESPA, TILA, FDCPA, etc.
- *See* attached samples of a Request for Information for a mortgage claim and a debt in collections

E. Traditional Discovery-

- When Discovery rules are triggered (FRBP 7026-7037)
- Initial Disclosures pursuant to FRBP 7026 and the continuing requirement to disclose pursuant to 7026(E)- Fed. R. Civ. P. 37; *Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001)
- When to try your “luck”- Timing Considerations in Discovery-Can you wait for opposing party to go “all-in” first?

<u>Effective and Efficient Discovery, or Running in to Roadblocks that Run up the Bill</u>

With major hat tips to
Robert Atkinson, trustee and attorney in Las Vegas
Matt Zirzow of Larson & Zirzow in Las Vegas
Andrea Gandara, formerly with Holley Driggs in Las Vegas, and
Louis M. Bubala III with Kaempfer Crowell in Reno

Question:

Can an interested party issue a records subpoena without obtaining an order authorizing a subpoena under Bankruptcy Rule 2004? Conversely: Is a records subpoena issued without the order unenforceable?

Ultimately, do you need to take the time and expense of getting an order before issuing a records subpoena? Or if you proceed without an order, will you end up spending more time and money disputing the legitimacy of the records subpoena with the target and/or the court?

Answer:

There is no controlling federal law on this. In the District of Nevada, the issue was debated at the local rules committee. The court changes the local rules 2021 to address the issue. The rules now provide that an order is <u>not</u> necessary to issue a records subpoena if the propounding party (1) seeking only records at the time, and (2) respondent has more than 14 days to comply. But as discussed below, it may not be a complete resolution for enforcement against a non-compliant respondent.

Local Rule 9016(b) was added, stating:

> **(b)** When a party seeks documents, electronically stored information or tangible things from the debtor or others in a case under the Bankruptcy Code separately from a deposition or an examination, the attorney for the party may issue and serve a subpoena duces tecum using Official Form 2570 [Subpoena to Produce Documents … in a Bankruptcy Case (or Adversary Proceeding] as long as the date set for production is more than 14 days from the date of service of the subpoena; otherwise, the attorney for the party must proceed under LR 2004(d) and obtain a court order in advance. The attorney for the party serving the subpoena duces tecum must file a notice of the subpoena duces tecum on the docket of the case concurrently with the issuance and service of the subpoena. Nothing in this local rule precludes a recipient of a subpoena from exercising rights under Federal Rule 45(d)(2) and (3).

The new rule was adopted after the committee debated the merits of the competing positions. Those who believed a 2004 application is necessary even for documents only found support in the attached unpublished opinion, *In re Angaur, LLC*, No. 10-14331-MKN (Bankr. D. Nev. Dkt. 202, Sept. 13, 2010). Additional citation is in the attached excerpt from a motion to quash in *In re Metal Recovery Solutions, Inc.*, No. 20-50660 (Bankr. D. Nev. Dkt. 73, Dec. 7, 2020) (resolved by stipulation). The decision involving discovery issued before filing an adversary, largely focused on questions of pre-litigation discovery and Federal Rule of Civil Procedure 27, Depositions to Perpetuate Testimony. In quashing the subpoena, the court held: "Service of the subpoena duces tecum itself was improper since the production of documents was never sought in the 2004 application nor was it authorized by the 2004 examination order." *Id.* at 6:2-4.

The holding created a rub against the current version of Local Rule 2004(c): "Production of documents may not be obtained via an order under Fed. R. Bankr. P. 2004. Production of documents may, however, be obtained via subpoena as provided by Fed. R. Civ. P. 45(a)(1)(C), as adopted by Fed. R. Bankr. P. 9016." The local rule was in place before the 2021 changes that added L.R. 9016(b). It is not immediately clear to the author when Local Rule 2004(c) was adopted. But is well known to attorneys in the district that a request for a Rule 2004 order may not include a document request. The general concept is that the resulting would compel a third party to produce documents without giving it an opportunity to submit a written objection to the production under Federal Rule of Civil Procedure 45(d)(2)(B), adopted by Federal Rule of Bankruptcy Procedure 9016. The resolution for a combined subpoena for records and testimony, typically, is to request (and obtain) a Rule 2004 order without reference to the records, then issue the subpoena and include the records component. As a result, there is no prior ruling on the records request, thus preserving the right to a written objection.

The local rules committee went through various rules and decisions to evaluate the grounds for a records subpoena without a 2004 order.

- Bankruptcy Rule 9016 says that Civil Rule 45 applies to cases under the bankruptcy code.
- Civil Rule 45(a)(1)(A)(ii) requires a subpoena to "state the title of the action and its civil-action number."
- Bankruptcy Rule 9002(1) is the Meanings of Words in the Federal Rules of Civil Procedure When Applicable to Cases under the Code. Subsection (1) defines an "action" or "civil action" as "an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter."
- The sole exception is Bankruptcy Rule 2004, which subsection (c) permits the issuance of a subpoena to compel attendance and production of documents after the Court issues an order under subsection (a).

The quandary of these rules was summed up in *In re Patel*, No. 16-65074-LRC, 2017 WL 377943, *2 (Bankr. N.D. Ga. Jan. 26, 2017) (attached):

> Even in the absence of an adversary proceeding or contested matter, a party in interest may move the Court for an examination and, pursuant to Rule 2004(c), such party in interest may compel

> the attendance and production of documents as provided in Rule 9016 (i.e., through Federal Rule 45). Fed. R. Bankr. P. 2004(c). Therefore, under a plain reading of Federal Rule 45 and Rules 9002(1), 9016, and 2004, to obtain a subpoena for production of documents, a party in interest must either be a party to an adversary proceeding, contested petition, or contested matter, or, when there is no litigation pending, have obtained a Rule 2004 order.

Thus, a records subpoena issued without a Rule 2004 order—also referred to as a bare subpoena—may get results. But it is instantly quashable, making them "use at your own peril." *Patel* stated that generally, a court would grant the motion quash and require the proponent to obtain a 2004 order. [The court also cited *Polo Bldg Group, Inc. v. Rakita (In re Shubov)*, 253 B.R. 540 (B.A.P. 9th Cir. 2000), in which a creditor's attorney issued a bare subpoena, got no response, and then filed a motion to compel compliance. *Shubov* found sufficient "subpoena abuse" to warrant sanctions against the creditor for filing a motion to compel compliance with subpoenas that should never have been issued.]

Patel, however, noted that local rules <u>**can**</u> enable bare subpoenas. Local Bankruptcy Rule 2004–1(b) for the District of New Jersey stated at the time:

> Any party in interest seeking to compel an examination or production of documents shall serve a subpoena pursuant to [Rule] 2004(c) without filing a motion or obtaining an order authorizing such examination or document production.

D.N.J. L.R. 2004-1(b) has been re-worded, but it still very much enables attorneys to freely issue them without court order (with emphasis added):

> <u>**D.N.J. LBR 2004-1. Examination**</u>
>
> (a) **Examination on parties' agreement**. A motion under Bankruptcy Rule 2004(a) is not required if the party from whom an examination or document production is sought agrees to voluntarily appear or produce documents.
>
> (b) **Examination on subpoena**. <u>An attorney for a party in interest seeking to compel an examination or production of documents under Bankruptcy Rule 2004 may serve national Director's Form 2540 Subpoena for Rule 2004 Examination; a motion is not required</u>. A self-represented party seeking to compel an examination or production of documents must file an application for an order compelling discovery.
>
> (c) **Date and place of examination**. A subpoena issued under subdivision (b) must set the examination or document production not earlier than 14 days after service of the subpoena. The examination or document production must take place at the location set by the party issuing the subpoena, provided that the location complies with Federal Rule 45(c). The parties may agree to modify these requirements.

> (d) **Quashing or modifying subpoena**. On motion of the examinee or a party in interest, the court may quash or modify a subpoena issued under subdivision (b). The filing of the motion prior to the date set for examination or document production stays the subpoena until the court rules on the motion.
>
> (e) **Compelling attendance and production of documents**. If the examinee fails to comply with a subpoena issued under subdivision (b) and fails to file a motion under subdivision (d), the party issuing the subpoena may file a motion for an order directing an examination or document production under Bankruptcy Rule 2004.

The net effect: An attorney can issue the subpoena without an order, but if no compliance, then they have to go get a Rule 2004 order, and then if still no compliance, only then they can file a motion to compel, sanctions, or the like. It speeds up normal subpoenas but slows down non-compliance situations.

So, two conclusions:

- Without a local rule like New Jersey's, bare subpoenas would be use-at-your-own-risk in court. Any motion to quash would be instantly granted.
- Even with a local rule, it still would be a Rule 2004 subpoena (standard form B2540), not one of the other three official bankruptcy form subpoenas (B2550, B2560, B2570).

Entered on Docket
September 13, 2010

Hon. Mike K. Nakagawa
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

* * * * * *

In re: ANGAUR, LLC, Debtor.	Case No. 10-14331-MKN (Angaur, LLC) Case No. 10-14336-MKN (Balaji Properties Investment, LLC) **[Jointly Administered in Case No. 10-14331-MKN]**
In re: BALAJI PROPERTIES INVESTMENT, LLC, Debtor.	Chapter 11 Date: September 10, 2010 Time: 1:30 p.m.

ORDER ON MOTION TO QUASH ISSUANCE OF ORDER RE EX PARTE MOTION FOR ORDER AUTHORIZING EXAMINATION OF U.S. BANK PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE RULE 2004[1]

On March 17, 2010, Angaur, LLC ("Angaur") filed a voluntary Chapter 11 petition. The same day, Balaji Properties Investment, LLC ("Balaji") also filed a voluntary Chapter 11 petition. Angaur and Balaji (collectively "Debtors") jointly own a commercial "strip" mall located at 6530 S. Decatur Boulevard, Las Vegas, Nevada ("the Property"). Debtors were formed in 2005 and borrowed the funds to finance the acquisition and construction of the Property. The funds were borrowed from PFF Bank & Trust ("PFF"). The loan to acquire the Property was paid off and the

[1] In this Order, all references to "Section" are to the provisions of the Bankruptcy Code, 11 U.S.C. section 101 et seq. All references to "BR" are to the Federal Rules of Bankruptcy Procedure. All references to "Local Rule" are to the Local Bankruptcy Rules for the United States Bankruptcy Court for the District of Nevada.

Debtors took a subsequent construction loan from PFF that was secured by a deed of trust against the Property. An assignment of rents also secures the obligation. A construction deed of trust in favor of PFF was recorded in Clark County, Nevada, on November 29, 2006. The Federal Deposit Insurance Corporation ("FDIC") subsequently took control over PFF. The interest in the construction loan and deed of trust were acquired from the FDIC by creditor U.S. Bank ("USB") on or about November 21, 2008.

On March 25, 2010, Debtors filed various motions that initially were heard on April 1, 2010, pursuant to an order shortening time. Objections were filed by USB. A request to permit joint administration of the two cases was heard and granted.[2] A motion to authorize use of cash collateral ("Cash Collateral Motion") was heard. A motion to authorize the Debtors to borrow ("Financing Motion") up to $250,000 from the principal of Angaur, Gaurang Parikh ("Parikh"), also was heard. The Cash Collateral Motion was granted on an interim basis and continued to April 14, 2010 for a further hearing.[3] The Financing Motion was denied without prejudice to the filing of a supplemental motion to be heard on the same date as the Cash Collateral Motion. Debtors were permitted to file a separate motion ("Critical Vendor Motion") to be heard on the same date, requesting authorization to continue a servicing relationship with Milestone Construction ("Milestone") and to pay related prepetition obligations. Milestone is the contractor that performed the tenant improvements at the Property for the two existing tenants, Cash Back Title Loans, and Chicken Bonz.

At the hearing on April 14, 2010, USB continued its objection to the Cash Collateral Motion as well as the Financing Motion, and also objected to the Critical Vendor Motion. USB also objected to the written evidence submitted by the Debtors in support of the motions. All three

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[2] An order granting the request for joint administration was entered on April 27, 2010. Both Debtors remain as a debtor-in-possession ("DIP") in these jointly administered cases.

[3] An interim order authorizing use of cash collateral was entered on May 4, 2010.

motions were continued to May 6, 2010, for an evidentiary hearing. The evidentiary hearing was conducted as scheduled, and testimony was presented by Parikh as well as Rajwinder Dhaliwal, the principal of Milestone. Both witnesses were subject to cross-examination, including a review of several documents.

Based on the evidence presented, the court concluded that the Debtors had met their burden of proof and granted the relief requested. Orders were entered on May 11, 2010, granting the Cash Collateral Motion, Financing Motion and Critical Vendor Motion.

On July 12, 2010, the Debtors filed a motion to approve a compromise that it had reached with USB in the form of a forbearance agreement. Under the agreement, the Debtors are allowed to use the rents generated by the Property, subject to various conditions, including the establishment of an interest reserve and the filing of a proposed plan of reorganization containing various payment terms. The forbearance agreement specifically provides that the Debtors cause the proposed plan to be confirmed within 120 days of the effective date of the compromise. A hearing was conducted on July 26, 2010, before Judge Bruce A. Markell. An objection had been filed by creditors Byrd Underground, LLC ("Byrd") and Wells Cargo, Inc. ("Wells").[4] Judge Markell overruled the objection and granted the Debtors' motion.

On August 6, 2010, an order was entered approving the compromise. In addition to approving the forbearance agreement, the order provides that "the Forbearance Agreement shall be binding only upon the parties to such Agreement and shall not preclude any other creditor from contesting the enforceability, priority or other aspect of US Bank's claim in the Bankruptcy Estates of each Debtor." It also provides that "the approval of the Forbearance Agreement shall not affect the right of any party to object to the terms of any proposed disclosure statement or plan of reorganization."

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[4] After the hearing, Byrd filed two proofs of claim on July 27, 2010 in the amounts of $270,372.54 and $188,294.35. Wells had filed a proof of claim on May 21, 2010, in the amount of $178,580.

On August 10, 2010, Byrd and Wells ("Byrd/Wells") filed ex parte motions to take examinations of USB and the Debtors pursuant to BR 2004(a) ("2004 examinations"). None of the motions included a request for production of documents and therefore the Clerk of the Court was authorized to sign orders on the motions pursuant to Local Rule 5075(a)(2)(L). On August 11, 2010, USB filed a motion to quash ("USB MTQ") issuance of an order on the ex parte motion, but orders granting the motions already had been signed by the Clerk and entered earlier that afternoon. On August 19, 2010 and August 20, 2010, Byrd/Wells filed notices and amended notices scheduling 2004 examinations of the persons most knowledgeable for USB and the Debtors, all to take place on September 20, 2010, in Las Vegas, Nevada at the office of Byrd/Wells' bankruptcy counsel. Each of the notices is accompanied by a subpoena duces tecum commanding the production of a variety of documents, even though the subpoenas were not authorized by the orders signed by the Court Clerk and were not sought in the ex parte motions.

On August 17, 2010, Debtors filed their proposed plan ("Plan") and proposed disclosure statement ("Disclosure Statement). The Disclosure Statement indicates that on or about November 8, 2006, the Debtors contracted with Atlas Construction, Ltd. ("Atlas") to be the general contractor for the construction on the Property and that no work on the Property commenced until March 2007 or later. It further indicates that after March 2007, Atlas entered into subcontracts with numerous subcontractors, including Byrd and Wells.

On August 18, 2010, Debtors filed an ex parte application for an order conditionally approving the disclosure statement and setting a combined hearing on final disclosure statement approval and plan confirmation pursuant to BR 3017 and Local Rule 3017(c) ("3017 Motion"). On the same day, Byrd/Wells filed opposition to the 3017 Motion, asserting that they had performed construction work on the Property before the recordation of the deed of trust securing USB's claim. As such, Byrd/Wells alleged that they have mechanics liens against the Property with priority ahead of the USB claim.

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On August 20, 2010, Debtors filed a motion to quash the subpoenas for the 2004 examinations ("DIP MTQ"). Opposition to this motion was filed by Byrd/Wells and a reply was filed by the Debtors.

Orders shortening time were entered scheduling a hearing on the USB MTQ, the DIP MTQ and the 3017 Motion for September 10, 2010. The hearing was conducted and the appearances of counsel were noted on the record. After oral arguments were presented, all of the matters were taken under submission.[5]

For a variety of reasons, USB seeks to quash the subpoena as it seeks to compel production of six broad categories of documents relating to the loan it acquired from PFF. It contends that a 2004 examination is inappropriate between non-debtor parties, that the scope of the examination and documents sought is excessive, that the documents requested are located in Southern California beyond the subpoena power of the court, that some of the information requested is confidential, and that Byrd/Wells must already possess information on when they began construction on the Property. In response, Byrd/Wells maintain that use of the 2004 examination process is justified as a precursor to commencing an adversary proceeding under BR 7001(2) to determine the validity or priority of USB's lien.[6]

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[5] The DIP MTQ and 3017 Motion are the subjects of separate orders entered concurrently with this Order.

[6] In their opposition to the DIP Quash Motion, Byrd/Wells argue that they are "comfortable" proceeding with an adversary proceeding disputing the priority of USB's lien even without the information sought, but are conducting the investigation to comply with BR 9011. The argument is strained at best since Byrd/Wells obviously are in the best position to know precisely when they commenced work on the Property. Moreover, the two proofs of claim filed by Byrd include as attachments a copy of an Order Granting Plaintiff's Motion for Partial Summary Judgment issued by the state court. The state court mechanics lien action is described in the Disclosure Statement. That summary judgment order was prepared by Byrd's counsel and entered by the state court in Byrd's mechanic's lien action. According to the findings in that order, Byrd performed services on the Property pursuant to three different subcontracts dated July 18, 2007, October 2, 2007, and December 5, 2007. All of those subcontracts are dated well after the recordation of the construction deed of trust in favor of PFF. In spite of the apparent bravado regarding their comfort level filing the adversary proceeding, no declarations or affidavits from representatives of Byrd or Wells were filed stating under

Having considered the respective arguments of the parties, the court concludes that the motion should be granted. First, service of the subpoena duces tecum itself was improper since the production of documents was never sought in the 2004 application nor was it authorized by the 2004 examination order. Whether Byrd/Wells should be sanctioned for circumventing the language of Local Rule 5075(a)(2)(L), either knowingly or out of ignorance, is not before the court. Second, the ex parte application requesting the 2004 examination was wholly unsupported by any declaration or affidavit supporting issuance of the order. This magnifies the impropriety of serving a subpoena duces tecum in such a situation: it imposes a possibly substantial burden on a non-debtor party without court supervision. Third, "pre-litigation" discovery is authorized only under limited circumstances, see State of Nevada v. O'Leary, 63 F.3d 932, 936 (9th Cir. 1995).[7] BR 2004 should not be used to circumvent the showing otherwise required to permit such discovery. Finally, the natural source of the information sought by Byrd/Wells appears to be parties other than USB. There

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penalty of perjury that either entity commenced work at the Property prior to the recordation of the construction deed of trust. At the hearing, counsel for Byrd/Wells could offer no explanation for failing to present such evidence.

[7] A proceeding to determine the validity, priority or extent of a lien is an adversary proceeding under BR 7001(2). BR 7027 incorporates by reference Federal Rule of Civil Procedure ("FRCP") 27 which permits a deposition to be taken in advance of commencement of litigation in order to preserve testimony. FRCP 27(a) requires the party seeking a pre-litigation deposition to file a detailed petition, on no less than 20 days notice of hearing, setting forth five requirements. The first requirement is that the petitioning party establish that it expects to be a party to an action but cannot presently bring it or cause it to be brought. Byrd/Wells have conceded that this requirement does not apply to them. It is well-established that a deposition under this provision is not available for investigating whether a lawsuit should be filed, see Application of Deiulemar Compagnia Di Navigazione S.p.A. v. M/V Allegra, 198 F.3d 473, 485-86 (4th Cir. 1999) and In re I-35W Bridge Collapse Site Inspection, 243 F.R.D. 349, 352-53 (D.Minn. 2007), nor should it be employed as a means to satisfy the requirements of FRCP 11 before filing the lawsuit. See Petition of Ford, 170 F.R.D. 505, 507 (M.D.Ala. 1997); but see Petition of Alpha Industries, Inc., 159 F.R.D. 456, 457 (S.D.N.Y. 1995). Under BR 9014(a), "contested matters" are those proceedings not otherwise governed by the Bankruptcy Rules. Under BR 9014(c), parties in contested matters seeking to perpetuate testimony may proceed in the same manner as provided in BR 7027 for the taking of a deposition. Whether there is a contested matter pending or not, the standards for a pre-litigation deposition under FRCP 27 must be met.

is no dispute that the construction loan transaction was initiated between PFF and the Debtors rather than by USB. Nor is there any dispute that USB acquired the rights to the construction loan from the FDIC in November 2008. Thus, the pertinent information regarding the initiation of the construction loan likely would be obtained from the FDIC, PFF or the Debtors; the pertinent information regarding the performance of services on the Property prior to recordation of the construction deed of trust likely would be obtained from the FDIC, PFF, the Debtors, Atlas, or Byrd/Wells.

Under these circumstances, the court concludes that relief from the 2004 examination order is appropriate and the unauthorized subpoena duces tecum should be quashed.[8]

IT IS THEREFORE ORDERED that the Motion to Quash Issuance of Order Re ex Parte Motion for Order Authorizing Examination of U.S. Bank Pursuant to Federal Rule of Bankruptcy Procedure Rule 2004, Docket No. 148, be, and the same hereby is, **GRANTED**.

IT IS FURTHER ORDERED that the subpoena duces tecum served upon U.S. Bank by Byrd Underground, LLC and Wells Cargo, Inc., is quashed.

Copies noticed through ECF to:

CRAIG S. DUNLAP cdunlap@fclaw.com, cdunlap7@gmail.com;mhurtado@fclaw.com
J ALEXANDRA RHIM arhim@buchalter.com, smartin@buchalter.com
M NELSON SEGEL nelson@nelsonsegellaw.com, diana@nelsonsegellaw.com
U.S. TRUSTEE - LV -11 USTPRegion17.lv.ecf@usdoj.gov

and sent to BNC to:

All parties on BNC mailing list

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[8] As previously mentioned, USB also argues that the subpoena duces tecum should be quashed since USB keeps its records regarding the subject loan at its offices in Rancho Cucamonga, California. It maintains that the documents are beyond the effective reach of a subpoena issued out of this judicial district. It also does not dispute that it maintains offices in the Las Vegas area. Because USB has filed a proof of claim that is based on the same loan, it does not seem unreasonable to require a claimant in appropriate circumstances to produce the documents supporting the claim. The subpoena duces tecum served by Byrd/Wells in this matter, however, was never authorized.

LEE HIGH, LTD.
Cecilia Lee, Esq.
Nevada Bar No. 3344
Elizabeth High, Esq.
Nevada Bar No. 10082
448 Ridge Street
Reno, Nevada 89501
Telephone: 775.324.1011
Email: c.lee@lee-high.com
Email: e.high@lee-high.com

Attorneys for Thom and Jette Seal

UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF NEVADA

In re: METAL RECOVERY SOLUTIONS, INC., Debtor.	Case No.: 20-50660-BTB Chapter 7 Case **MOTION TO QUASH SUBPOENAS TO PRODUCE DOCUMENTS OR, IN THE ALTERNATIVE, MOTION FOR PROTECTIVE ORDERS** Hearing Date: January 6, 2021 Hearing Time: 10:00 a.m.

Thom and Jette Seal (the "Movants" or the "Seals"), by and through their counsel, Cecilia Lee, Esq. and Elizabeth High, Esq., LEE HIGH, LTD., hereby file this Motion to Quash Subpoenas to Produce Documents or, in the Alternative, Motion for Protective Orders (the "Motion"). In support of this Motion, Movants submit the following memorandum of points and authorities, the attached exhibits, the supporting Declaration of Thom Seal ("Seal Declaration"), any evidence or oral argument presented at the time of hearing on this Motion, and the papers and pleadings on file in this case, of which Movants request that this Court take judicial notice pursuant to Fed. R. Evid. 201.

Movants further request that the Court take judicial notice of the papers and pleadings on file in Geo-Logic Associates, Inc. v. Metal Recovery Solutions, Inc. et al., case number 3:17-cv-

III. LEGAL ARGUMENT

A. Legal Authority

The relevant sections of Fed. R. Bankr. P. 2004 state:

> (a) Examination on motion. On motion of any party in interest, the court may order the examination of any entity.
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> (b) Scope of examination. The examination of an entity under this rule or of the debtor under § 343 of the Code may relate only to 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. …
>
> (c) Compelling attendance and production of documents or electronically stored information. The attendance of an entity for examination and for the production of documents or electronically stored information, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial. …

Federal Rule of Bankruptcy Procedure 9016 makes Fed. R. Civ. P. 45 applicable to bankruptcy cases. The relevant portions of Fed. R. Civ. P. 45 state:

> **(a) In General.**
>
> …
>
> (2) Issuing Court. A subpoena must issue from the court where the action is pending.
>
> …
>
> **(d) Protecting a Person Subject to a Subpoena; Enforcement.**
>
> …
>
> (3) *Quashing or Modifying a Subpoena.*
>
> (A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
>
> (i) fails to allow a reasonable time to comply;
>
> (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
>
> (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

LEE HIGH, LTD.
448 Ridge Street
Reno, Nevada 89501
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(iv) subjects a person to undue burden.

In order for a subpoena to be valid and enforceable, an order under Fed. R. Bankr. P. 2004 must be obtained authorizing the requesting party to obtain the documents from the subpoenaed party. In re Murray, No. 20-46882, 2020 Bankr. LEXIS 2726 at *1 (Bankr. E.D. Mich. Oct. 2, 2020) (citing Hunter v. Hickman (In re Hickman), 151 B.R. 125, 128 (Bankr. N.D. Ohio 1993) (explaining that "[a]lthough a subpoena issued by the clerk under seal is sufficient to compel the attendance of witnesses under Rule 2004, it must be preceded by an order of court allowing the Rule 2004 Examination to commence"); In re Patel, No. 16-65074-LRC, 2017 Bankr. LEXIS 216, at *2 (Bankr. N.D. Ga. Jan. 26, 2017) ("[U]nder a plain reading of Federal Rule 45 and Rules 9002(1), 9016, and 2004, to obtain a subpoena for production of documents, a party in interest must either be a party to an adversary proceeding, contested petition, or contested matter, or, when there is no litigation pending, have obtained a Rule 2004 order."); In re Rochester Drug Coop., Inc., No. BR 20-20230-PRW, 2020 Bankr. LEXIS 2397, at *2 (Bankr. W.D.N.Y. Sept. 11, 2020) (citation omitted) (holding that "because no adversary proceeding or litigated contested matter was pending, and no order authorizing an examination . . . was granted by this Court under Rule 2004," subpoenas issued for the production of documents "were improper and invalid")). The Patel court explains:

> Rule 9016 provides that Federal Rule 45 applies in "cases under the Code." Fed. R. Bankr. P. 9016. Federal Rule 45, in turn, permits a "party" to obtain a subpoena commanding the production of documents. Fed. R. Bankr. P. 9016; Fed. R. Civ. P. 45(a)(1)(C); 45(a)(3). Federal Rule 45(a)(2) requires that every subpoena must "issue from the court where the action is pending." Fed. R. Civ. P. 45(a)(2). Under Federal Rule 45(a)(2), therefore, there must be an "action" pending in order for a subpoena to be issued. See Application of Royal Bank of Canada, 33 F.R.D. 296 (1963).
>
> Rule 9002 provides that certain words used in the Federal Rules have specific meanings when a Federal Rule is made applicable to "cases under the Code," unless that meaning "is inconsistent with the context." Fed. R. Bankr. P. 9002. Relevant to this issue, Rule 9002(1) defines the word "action" to mean "an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other

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> contested matter." Fed. R. Bankr. P. 9002(1).
>
> Thus, when reading Federal Rule 45 in a bankruptcy case, the Court substitutes "adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter" for the word "action." Accordingly, a subpoena must issue from the court where the adversary proceeding, contested petition, or proceedings to vacate an order for relief or to determine any other contested matter is pending.
>
> There is an exception. When no proceedings are yet pending in a bankruptcy case, Rule 2004 provides a discovery tool for parties in interest to gather information from "any entity" about the "acts, conduct, or property" or the "liabilities and financial condition of the debtor," or regarding the "administration of the debtor's estate" or the "debtor's right to a discharge." Fed. R. Bankr. P. 2004(a) [and (b)]. Even in the absence of an adversary proceeding or contested matter, a party in interest may move the Court for an examination and, pursuant to Rule 2004(c), such party in interest may compel the attendance and production of documents as provided in Rule 9016 (i.e., through Federal Rule 45). Fed. R. Bankr. P. 2004(c). ***Therefore, under a plain reading of Federal Rule 45 and Rules 9002(1), 9016, and 2004, to obtain a subpoena for production of documents, a party in interest must either be a party to an adversary proceeding, contested petition, or contested matter, or, when there is no litigation pending, have obtained a Rule 2004 order***.

Patel, 2017 Bankr. LEXIS 216 at *5-6 (emphasis added).

B. GLA Improperly Issued the Seal Bankruptcy Subpoenas

The Seal Bankruptcy Subpoenas were issued on or about October 27, 2020. Exs. B and C. At that time, there was no pending matter, contested matter, or adversary proceeding. See generally Bankruptcy Court Docket. The discovery rules incorporated into Fed. R. Bankr. P. 9014 or Fed. R. Bankr. P. 7026 are thus inapplicable. See In re Subpoena Duces Tecum & Ad Testificandum Pursuant to Fed. R. Bankr. P. 2004, 461 B.R. 823 (Bankr. C.D. Cal. 2001), citing In re Dinublio, 177 B.R. 932, 941 (E.D. Cal. 1993) (discovery with respect to specific claims pending in a contested matter or adversary proceeding should proceed under Fed. R. Bankr. P. 9014(c) or Fed. R. Bankr. P. 7026 through 7037). Given that no adversary proceeding or contested matter exists to invoke Rule 9016 and Fed. R. Civ. P. 45, the Seal Bankruptcy Subpoenas are procedurally defective, and the Movants have no obligation to respond. There is no provision in

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Rule 2004 for the production of documents without an examination. In re Sunridge Associates, 202 B.R. 761 (Bankr. E.D. Cal. 1996). Indeed, nothing in Rule 2004 authorizes a party to compel the production of documents unless that production is in connection with and at the same time as the examination that is the subject of the Rule 2004 order. Id.; Local Rule 2004(c).

As such, the Seal Bankruptcy Subpoenas must be quashed as improperly issued.

C. The Seal Bankruptcy Subpoenas Impose an Undue Burden on Movants

When issuing a subpoena, GLA "must take reasonable steps to avoid imposing undue burden or expense" on the Movants. Fed. R. Bankr. P. 9016; Fed. R. Civ. P. 45(d)(1). The Court must quash or modify a subpoena that "subjects a person to undue burden." Fed. R. Bankr. P. 9016; Fed. R. Civ. P. 45(d)(3)(A)(iv). Factors to determine whether an undue burden exists include relevance, the need of the party for the documents, the breadth of the document request, the time period covered by it, the particularity with which the documents are described, and the burden imposed. Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 49 (S.D.N.Y. 1996). The status of the witness as a non-party to the underlying litigation also entitles the witness to consideration regarding expense and inconvenience. Id.

GLA had the opportunity to question the Debtor at two §341 meeting of creditors. Docket Nos. 40 and 61. GLA also issued a subpoena to the Debtor.[1] See Ex. D. GLA seeks to obtain the same information from the Debtor as it seeks from Movants. In fact, Requests for Production Nos. 14, 15, 16, 17, and 22 of the Debtor Subpoena are exactly the same as Requests for Production Nos. 1, 2, 3, 4, and 5 of the Thom Bankruptcy Subpoena. *Compare* Ex. D *with* Ex. B. Requests for Production Nos. 18, 19, 20, 21, and 23 of the Debtor Subpoena are exactly the same as Requests for Production Nos. 1, 2, 3, 4, and 5 of the Jette Bankruptcy Subpoena. *Compare* Ex. D *with* Ex. C. GLA should be required to review the document production from the Debtor before subpoenaing the same information from non-debtor Movants.

Moreover, prior discovery has already been conducted between the parties. Documents requested in the Seal Bankruptcy Subpoenas have been previously turned over by Movants to GLA

[1] GLA's subpoena to the Debtor was issued without a Rule 2004 order and is likewise defective.

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448 Ridge Street
Reno, Nevada 89501
(775) 324-1011

2017 WL 377943
Only the Westlaw citation is currently available.
United States Bankruptcy Court,
N.D. Georgia, Atlanta Division.

In re: Rajesh C. Patel, aka RC Patel,
aka Rajesh Chandubai Patel, Debtor.

CASE NO. 16–65074–LRC
|
Signed January 26, 2017

Attorneys and Law Firms

Howard P. Slomka, Slomka Law Firm, Atlanta, GA, for Debtor.

ORDER

Lisa Ritchey Craig, U.S. Bankruptcy Court Judge

***1** Before the Court is the Motion for Reconsideration of Order Quashing Subpoenas (the "Motion"), filed by RL BB–GA RMH, LLC ("Movant").

Procedural History

On August 30, 2016, Rajesh C. Patel ("Debtor") filed a voluntary petition under Chapter 7 of the Bankruptcy Code (the "Code"). On November 4, 2016, Movant filed a Notice of Subpoenas regarding sixteen subpoenas sent to various individuals and entities (the "Sixteen Subpoenas") (Doc. 19). Prior to a hearing on the Motion, Movant had not requested a Rule 2004 examination of Debtor or any other entity; nor had Movant filed an adversary proceeding or contested matter related to the Sixteen Subpoenas. [1] Debtor filed his Motion to Quash the Sixteen Subpoenas on November 15, 2016 (Doc. 22). Hall H2 Atlanta, LLC ("Hall H2") and State Bank and Trust Company also each filed a Motion to Quash shortly thereafter (Doc. 28 and Doc. 31, respectively). On the morning of the scheduled hearing, Rishi Patel and Hasmita Patel jointly filed a Motion to Quash (Doc. 47).

On December 2, 2016, the Court quashed the Sixteen Subpoenas. Both at the hearing and in its Motion to Quash, Hall H2 argued that, where no adversary proceeding or contested matter is pending, a party may not issue a subpoena out of a bankruptcy case without first seeking and obtaining an order authorizing examination under Rule 2004 of the Federal Rules of Bankruptcy Procedure (the "Rules").

The Court agreed and granted Hall H2's Motion to Quash. In doing so, the Court considered the plain language of Federal Rule of Civil Procedure 45 (the "Federal Rules"). Federal Rule 45 permits a party to issue a subpoena and states that "[a] subpoena must issue from the court where the action is pending." Fed. R. Civ. P. 45(a)(2). Rule 9002 defines "action" as "an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter." Fed. R. Bankr. P. 9002(1). As Movant had not initiated an adversary proceeding or contested matter to which the Sixteen Subpoenas related and had not sought and been granted a Rule 2004 examination, the Court determined that the subpoena issued against Hall H2 was not properly issued under Rule 9016 and should be quashed. *See Application of Royal Bank of Canada*, 33 F.R.D. 296 (1963) (quashing subpoena issued because no "action" was pending). As this defect also applied equally to each of the other Sixteen Subpoenas, the Court issued an oral ruling, *sua sponte* quashing the remainder of the Sixteen Subpoenas on that basis only. [2] On December 2, 2016, Movant filed the Motion. [3] On December 6, 2016, the Court entered its Order quashing the Sixteen Subpoenas (the "Order") (Doc. 54).

Legal Standard for Motions to Reconsider

***2** Movant asks the Court to reconsider the Order. Rule 9023 makes applicable Federal Rule 59 in cases under the Code. Although Federal Rule 59(e) permits a court to alter or amend an order or judgment, it " 'may not be used to re-litigate old matters or to raise arguments or present evidence that could have been raised prior to the entry of judgment.' " *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 486, n.5 (2008) (citing 11 C. Wright & A. Miller, Fed. Prac. & Proc. § 2810.1, pp. 127–128 (2nd ed. 1995)). For this reason, Bankruptcy Local Rule 9023–1 provides that "[m]otions for reconsideration shall not be filed as a matter of routine practice. [And should only be filed] [w]henever a party or attorney for a party believes it is absolutely necessary to file a motion to reconsider an order or judgment." BLR 9023–1 (Bankr. N.D. Ga.).

To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact. A 'manifest error' is the "wholesale disregard, misapplication, or failure to recognize controlling precedent." *Oto v. Metro Life Ins. Co.*, 224 F.3d 601, 606 (7th Cir. 2000) (citations omitted). It is not demonstrated merely because the losing party is disappointed. *See In re Murff*, 2016 WL 5118280, *2 (Bankr. N.D. Ga. Sept. 16, 2016) (Hagenau, J.).

Discussion

Movant's sole basis for seeking reconsideration is its contention that the Court's quashing of the Sixteen Subpoenas resulted from a manifest error of law. Movant asserts that the Court misinterpreted Rule 9016 and failed to follow controlling precedent that establishes the permissibility of Movant's issuance of the Sixteen Subpoenas outside of a related adversary proceeding or contested matter and without an order authorizing a Rule 2004 examination. To the contrary, there is no controlling precedent in the Eleventh Circuit.

The Court based its ruling on the plain language of Federal Rule 45 and Rules 9002(1), 9016, and 2004. Rule 9016 provides that Federal Rule 45 applies in "cases under the Code." Fed. R. Bankr. P. 9016. Federal Rule 45, in turn, permits a "party" to obtain a subpoena commanding the production of documents. Fed. R. Bankr. P. 9016; Fed. R. Civ. P. 45(a)(1)(C); 45(a)(3). Federal Rule 45(a)(2) requires that every subpoena must "issue from the court where the action is pending." Fed. R. Civ. P. 45(a)(2). Under Federal Rule 45(a)(2), therefore, there must be an "action" pending in order for a subpoena to be issued. *See Application of Royal Bank of Canada*, 33 F.R.D. 296 (1963).

Rule 9002 provides that certain words used in the Federal Rules have specific meanings when a Federal Rule is made applicable to "cases under the Code," unless that meaning "is inconsistent with the context." Fed. R. Bankr. P. 9002. Relevant to this issue, Rule 9002(1) defines the word "action" to mean "an adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter." Fed. R. Bankr. P. 9002(1).

Thus, when reading Federal Rule 45 in a bankruptcy case, the Court substitutes "adversary proceeding or, when appropriate, a contested petition, or proceedings to vacate an order for relief or to determine any other contested matter" for the word "action." Accordingly, a subpoena must issue from the court where the adversary proceeding, contested petition, or proceedings to vacate an order for relief or to determine any other contested matter is pending.

There is an exception. When no proceedings are yet pending in a bankruptcy case, Rule 2004 provides a discovery tool for parties in interest to gather information from "any entity" about the "acts, conduct, or property" or the "liabilities and financial condition of the debtor," or regarding the "administration of the debtor's estate" or the "debtor's right to a discharge." Fed. R. Bankr. P. 2004(a). Even in the absence of an adversary proceeding or contested matter, a party in interest may move the Court for an examination and, pursuant to Rule 2004(c), such party in interest may compel the attendance and production of documents as provided in Rule 9016 (*i.e.*, through Federal Rule 45). Fed. R. Bankr. P. 2004(c). Therefore, under a plain reading of Federal Rule 45 and Rules 9002(1), 9016, and 2004, to obtain a subpoena for production of documents, a party in interest must either be a party to an adversary proceeding, contested petition, or contested matter, or, when there is no litigation pending, have obtained a Rule 2004 order.

***3** Movant argues that the Rule 9002(1) definition should not be applied to define "action" for purposes of Federal Rule 45 because defining "action" as provided in Rule 9002(1) is "inconsistent with the context." According to Movant, Rule 9016 makes Federal Rule 45 applicable in "cases under the Code," which signals the intent that Federal Rule 45 applies in the bankruptcy case in general, regardless of whether any disputed issues are being litigated in an adversary proceeding or contested matter.

The Court notes that Rule 9002 gives no guidance as to whether the "context" the Court is supposed to consider is the context of the Rule incorporating the Federal Rule, the context of the Federal Rule being incorporated by the Rule, or both. If the context to be analyzed is the context of the Rule being incorporated, defining "action" to include only adversary proceedings or contested matters is consistent with the context of Federal Rule 45. Federal Rule 45 addresses the use of the subpoena power once litigation has commenced. It does not allow parties to use the subpoena power to gather information to determine whether they should file a lawsuit. Rather, if a party in interest has a legitimate need to perpetuate testimony prior to filing suit, the party in interest must file a verified petition in the district court and obtain an order authorizing the examination. Fed. R. Civ. P. 27.

If the Court should also consider whether the definition is consistent with the context of the Rule incorporating the Federal Rule, the Court rejects Movant's argument that the Rule 9002(1) definition of "action" is not consistent with the context of Rule 9016. Movant essentially argues that, by making Federal Rule 45 applicable in "cases under the Code," the drafters of Rule 9016 intended to somehow trump the very definition included in Rule 9002 that is to apply to "cases under the Code." This interpretation makes little sense. In Part IX of the Rules, eleven Rules incorporate a Federal Rule that contains the word "action."[4] All of these Rules use the same language as Rule 9016—the Federal Rule "applies in cases under the Code" or "applies in cases and proceedings." It is a stretch to suggest that a specific definition of "action" was included, but never intended to apply in eleven of the Rules that would otherwise be affected. Surely a more direct approach would have been taken if that had been the intent.

In short, the Court rejects Movant's argument that Rule 9016 made Federal Rule 45 applicable in "cases under the Code" with the intention of permitting the issuance of a subpoena when no dispute or litigation is pending and no order authorizing a Rule 2004 examination has been entered. Interpreting Rule 9016 to allow interested parties to have the unfettered, unilateral right to engage in pre-litigation discovery without moving for an examination under Rule 2004 would seem to render Rule 2004 itself unnecessary.

Contrary to Movant's argument, the Court's interpretation is consistent with the context of both Federal Rule 45 and Rule 9016. It is also consistent with the Court's understanding of general practice and the common understanding of courts and commentators as to how and when a subpoena may issue when no litigation is pending in the bankruptcy case. *See In re Hickman*, 151 B.R. 125 (Bankr. N.D. Ohio 1993) ("Although a subpoena issued by the clerk under seal is sufficient to compel the attendance of witnesses under Rule 2004, it must be preceded by an order of court allowing the Rule 2004 Examination to commence. The subpoena issued by Plaintiff in this case is not equivalent to the motion contemplated in Rule 2004(a)."); *Polo Bldg Group, Inc. v. Rakita (In re Shubov)*, 253 B.R. 540 (B.A.P. 9th Cir. 2000) (upholding sanctions awarded against an attorney who issued a subpoena and prosecuted a motion to compel "with knowledge that [the subpoena] was not tied to an action as to which [the creditor] had standing and with knowledge that it was not tied to any legitimate discovery"); Drake, Bonapfel, & Goodman, Chapter 13 Practice and Procedure § 23:9 ("Under [Federal Rule] 45, a subpoena may also require the production of designated documents ... in an adversary proceeding or contested matter. ... A party in interest in a bankruptcy case may also obtain testimony and the production of documents from any person under Bankruptcy Rule 2004, even if no litigation is pending. *When the court orders an examination or the production of documents under Rule 2004,* a subpoena may be issued and served 'as provided in Rule 9016' ... to compel a person other than the debtor to appear and testify at the Rule 2004 examination and to produce documents.").

***4** None of the parties have cited, nor has the court found, any controlling precedent on this issue.[5] Therefore, the Court considered persuasive authority and *dicta* that support the Court's reading of the plain language of the Rules and Federal Rules. Contrary to Movant's argument, it was not manifest error for the Court to do so. *See City of Birmingham Ret. & Relief Sys. v. Metlife, Inc*., 2015 U.S. Dist. LEXIS 94776, *12 n.5 (Bankr. N.D. Ala. Mar. 31, 2015) (acknowledging that the court was relying on " 'considered' *dictum*" and exploring the history of reliance on *dicta*, particularly Supreme Court *dicta*, in the Eleventh Circuit); *Medical Educ. & Health Servs. v. Independent Municipality of Mayagiez (In re Medical Educ. & Health Servs.)*, 2015 Bankr. LEXIS 479 *17–18 (Bankr. D.P.R. Feb. 12, 2015) (rejecting the argument that its reliance on *dictum* constituted manifest error because "courts often, quite properly, give considerable weight to dictum—particularly to dictum that seems considered as opposed to casual"); *Am. Gen. Fin., Inc. v. Paschen (In re Paschen)*, 296 F.3d 1203, 1209 (11th Cir. 2002) (agreeing with the "great weight of persuasive authority" that "§ 1322(c)(2) permits the modification of claims").

In addition to the cases relied upon by the Court at the hearing, the Court finds further support for its ruling in *Shubov*. There, the Bankruptcy Appellate Panel for the Ninth Circuit upheld sanctions awarded by the bankruptcy court against an attorney who issued a subpoena and prosecuted a motion to compel "with knowledge that [the subpoena] was not tied to an action as to which [the creditor] had standing and with knowledge that it was not tied to any legitimate discovery." *Shubov*, 253 B.R. at 544 The creditor in *Shubov* issued subpoenas under Federal Rule 45 to a third party seeking bank account records of an individual and three corporations that the creditor suspected of hiding the debtor's assets. Just as here, the creditor did not obtain "court permission for an examination under [Rule] 2004. [The creditor] was not party to any adversary proceeding or contested matter with respect to which the subpoena was within the scope of discovery under [Federal Rule] 26(b).” *Id.* at 543. Under facts strikingly similar to those in this case, the *Shubhov* court found sufficient “subpoena abuse” to warrant sanctions against the creditor for filing a motion to compel compliance with subpoenas that the court stated should never have been issued. *Id.* at 544. Here, the Court has merely quashed the subpoenas and required Movant to take the step of obtaining an order authorizing a Rule 2004 examination.

Movant acknowledges that Rule 2004 permits and governs the ability of an interested party to issue subpoenas when no “action” is pending in the bankruptcy case, but argues that neither Rule 2004 nor Bankruptcy Local Rule 2004–1 requires Movant to first seek and obtain an order authorizing examination under Rule 2004 before issuing a subpoena for documents. In other words, Movant asserts that a motion and order authorizing a Rule 2004 examination is required only when an entity is to be examined and not when an entity is subpoenaed to produce documents. In support of this argument, Movant relies upon *In re Subpoena Duces Tecum*, 461 B.R. 823 (Bankr. C.D. Cal. 2011).

***5** In *In re Subpoena Duces Tecum*, a California bankruptcy court considered whether a motion and order for a 2004 examination were necessary before a subpoena could issue under Local Bankruptcy Rule 2004–1(b) for the District of New Jersey (the “N.J. Local Rule”). At that time, the N.J. Local Rule provided that

> Any party in interest seeking to compel an examination or production of documents shall serve a subpoena pursuant to [Rule] 2004(c) without filing a motion or obtaining an order authorizing such examination or document production.

D.N.J. LBR 2004–1(b).[6] The court determined that, under the N.J. Local Rule, the “service of the subpoena was sufficient” and no motion or order was required. *In re Subpoena Duces Tecum*, 461 B.R. at 830. Movant erroneously takes this to mean that no Rule 2004 motion or order is required before issuing a subpoena in the main case, even in the absence of a similar local rule.

The N.J. Local Rule allows for a Rule 2004 examination or production of documents to be initiated by the service of the subpoena rather than a motion.[7] In essence, the N.J. Local Rule allows a party in interest to invoke the authority of Rule 2004 without filing a motion. However, it does not eliminate the requirement that Rule 2004 be invoked before a subpoena can issue. Unlike New Jersey, this jurisdiction does not have a local rule that allows a party in interest to invoke Rule 2004 without filing a motion and obtaining an order. For that reason, *In re Subpoena Duces Tecum* is distinguishable from this case.

Finally, Movant asserts that the Court's ruling is contrary to public policy, as it will hamper the United States trustee and case trustees in their ability to investigate estate property and the debtor's financial circumstances in an expeditious and cost effective manner. While this issue is not before the Court, when a case trustee wishes to investigate the debtor's property and financial affairs, she is free to start with a simple request to the debtor or a third party to cooperate in turning over the debtor's books and records, as required by the Code and Rules.[8] If the recorded information is not property of the estate, the trustee can request the court order, after notice and a hearing, the holder to turnover “books, documents, records, and papers, relating to the debtor's property or financial affairs” to the trustee. 11 U.S.C. § 542(e). Alternatively, the trustee can simply file a motion for a Rule 2004 examination and, in most cases, obtain an order within a number of days authorizing the examination of the debtor and other entities, including the production of documents. The Court sees no great prejudice that will result from following this established practice. Rather, requiring a motion for Rule 2004 examination provides a relatively expeditious process, while still allowing for sufficient oversight by the Court as to discovery when litigation has not yet been commenced.

Conclusion

***6** For the reasons stated above, the Court concludes that Movant has presented no new arguments or evidence to demonstrate that the Court's decision to quash the Sixteen Subpoenas was the result of manifest error. Accordingly,

IT IS ORDERED that Movant's Motion for Reconsideration of Order Quashing Subpoenas be, and hereby is, **DENIED**.

All Citations

Slip Copy, 2017 WL 377943

Footnotes

1 Movant initiated an unrelated adversary proceeding against Debtor, certain other individuals, and Carnegie Hotel Manager, LLC (AP No. 16–05307) (Doc. 20) on November 8, 2016. Movant did not issue the Sixteen Subpoenas in that adversary proceeding.

2 In its response to Debtor's Motion to Quash, Movant argued that Debtor lacked standing to object to the Sixteen Subpoenas, which were issued to parties other than the Debtor, on the basis of undue burden and scope. The Court agreed with Movant that Debtor lacked standing to object on those grounds. A party may only move to quash a subpoena issued against a third party if that party is seeking to protect a personal privilege or right. *Windsor v. Martindale*, 175 F.R.D. 665 (D. Colo. 1997). Absent that, a court cannot quash a subpoena sent to a non-party on the motion of a party. *Id*. Accordingly, the Court acknowledges that, because Debtor did not assert that the documents to be produced are privileged or otherwise contain private or confidential matter, Debtor lacked standing to move the Court to quash the Sixteen Subpoenas.

3 On January 20, 2017, Movant filed a motion for authorization of Rule 2004 examination and for permission to issue subpoenas.

4 *See* Fed. R. Bankr. P. 9005, 9005.1, 9015, 9016, 9017, 9022, 9023, 9024, 9026, 9028, and 9029. Rule 9031 states that Federal Rule 53 “does not apply in cases under the Code.”

5 Movant argues that *In re Symington*, 209 B.R. 678 (1997), is controlling precedent and stands for the proposition that Federal Rule 45 applies in “adversary proceedings, contested matters, contested or involuntary petitions, Rule 2004 examinations, and all other matters in a bankruptcy case in which testimony may be compelled.” First, as a bankruptcy court decision from the District of Maryland, it is not binding on the Court. Second, in *Symington*, a motion for production of documents pursuant to Rule 2004 had been filed, and the issue before the court was not whether or not Federal Rule 45 applied in the absence of a Rule 2004 examination order.

6 The current text of D.N.J. LBR 2004–1(b) provides that “An attorney for a party in interest seeking to compel an examination or production of documents under Bankruptcy Rule 2004 may serve national Director's Form 2540 Subpoena for Rule 2004 Examination; a motion is not required. A self-represented party seeking to compel an examination or production of documents must file an application for an order compelling discovery.”

7 The validity of D.N.J. LBR 2004–1 is not before the Court.

8 *See* 11 U.S.C. § 521(a)(3); § 521(a)(4); § 542(a); Fed. R. Bankr. P. 4002(a).

End of Document

B2560 (Form 2560 – Subpoena to Testify at a Deposition in a Bankruptcy Case or Adversary Proceeding) (12/15)

UNITED STATES BANKRUPTCY COURT

____ District of ____

In re ______________________________________
Debtor

(Complete if issued in an adversary proceeding)

____
Plaintiff
v.
____
Defendant

Case No. ____________________

Chapter __________

Adv. Proc. No. ________________

SUBPOENA TO TESTIFY AT A DEPOSITION IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: ____
(Name of person to whom the subpoena is directed)

☐ *Testimony*: **YOU ARE COMMANDED** to appear at the time, date, and place set forth below to testify at a deposition to be taken in this bankruptcy case (or adversary proceeding). If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

PLACE	DATE AND TIME

The deposition will be recorded by this method:

☐ *Production*: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: _____________

CLERK OF COURT

OR

________________________ ________________________
Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, email address, and telephone number of the attorney representing *(name of party)* ____________________________ , who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

PROOF OF SERVICE
(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)*: ____
on *(date)* __________ .

☐ I served the subpoena by delivering a copy to the named person as follows: ___________________________________
____
_________________________________ on (*date*) __________________ ; or

☐ I returned the subpoena unexecuted because: ____
____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ ______________________ .

My fees are $ _________ for travel and $_________ for services, for a total of $_________ .

I declare under penalty of perjury that this information is true and correct.

Date: _______________

____
Server's signature

____
Printed name and title

____
Server's address

Additional information concerning attempted service, etc.:

Federal Rule of Civil Procedure 45(c), (d), (e), and (g) (Effective 12/1/13)
(made applicable in bankruptcy cases by Rule 9016, Federal Rules of Bankruptcy Procedure)

(c) Place of compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
(i) is a party or a party's officer; or
(ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:
(A) production of documents, or electronically stored information, or things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
(B) inspection of premises, at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.
(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.
(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
(i) fails to allow a reasonable time to comply;
(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
(iv) subjects a person to undue burden.
(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
(i) disclosing a trade secret or other confidential research, development, or commercial information; or
(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.
(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:
(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.
(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.
(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
(i) expressly make the claim; and
(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.
…
(g) Contempt. The court for the district where compliance is required – and also, after a motion is transferred, the issuing court – may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013)

B2550 (Form 2550 – Subpoena to Appear and Testify at a Hearing or Trial in a Bankruptcy Case or Adversary Proceeding) (12/15)

UNITED STATES BANKRUPTCY COURT

_______________________ District of _______________________

In re ______________________________
Debtor

(Complete if issued in an adversary proceeding)

____
Plaintiff
v.
____
Defendant

Case No. ____________

Chapter ______

Adv. Proc. No. ________

SUBPOENA TO APPEAR AND TESTIFY AT A HEARING OR TRIAL IN A BANKRUPTCY CASE (OR ADVERSARY PROCEEDING)

To: ____
(Name of person to whom the subpoena is directed)

☐ **YOU ARE COMMANDED** to appear in the United States Bankruptcy Court at the time, date, and place set forth below to testify at a hearing or trial in this bankruptcy case (or adversary proceeding). When you arrive, you must remain at the court until the judge or a court official allows you to leave.

PLACE	COURTROOM
	DATE AND TIME

You must also bring with you the following documents, electronically stored information, or objects *(leave blank if not applicable)*:

The following provisions of Fed. R. Civ. P. 45, made applicable in bankruptcy cases by Fed. R. Bankr. P. 9016, are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and 45(g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: ________

CLERK OF COURT

OR

________________________ ________________________
Signature of Clerk or Deputy Clerk *Attorney's signature*

The name, address, email address, and telephone number of the attorney representing *(name of party)* ________________________ , who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things, or the inspection of premises before trial, a notice and a copy of this subpoena must be served on each party before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)*: ____
on *(date)* __________ .

☐ I served the subpoena by delivering a copy to the named person as follows: ____________________________________
____
__________________________________ on (*date*) ___________________ ; or

☐ I returned the subpoena unexecuted because: ____
____

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of $ _______________________ .

My fees are $ _________ for travel and $_________ for services, for a total of $_________ .

I declare under penalty of perjury that this information is true and correct.

Date: _______________

____
Server's signature

____
Printed name and title

____
Server's address

Additional information concerning attempted service, etc.:

Federal Rule of Civil Procedure 45(c), (d), (e), and (g) (Effective 12/1/13)
(made applicable in bankruptcy cases by Rule 9016, Federal Rules of Bankruptcy Procedure)

(c) Place of compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:
(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
(B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
(i) is a party or a party's officer; or
(ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:
(A) production of documents, or electronically stored information, or things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
(B) inspection of premises, at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.
(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:
(i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.
(A) When Required. On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:
(i) fails to allow a reasonable time to comply;
(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
(iv) subjects a person to undue burden.
(B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
(i) disclosing a trade secret or other confidential research, development, or commercial information; or
(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.
(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:
(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
(ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:
(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.
(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.
(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.
(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.
(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:
(i) expressly make the claim; and
(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.
(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.
…
(g) Contempt. The court for the district where compliance is required – and also, after a motion is transferred, the issuing court – may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

For access to subpoena materials, see Fed. R. Civ. P. 45(a) Committee Note (2013)

Summer Shaw, Esq. (SBN 283598)
SHAW & HANOVER, PC
42-600 Cook Street, Suite 210
Palm Desert, CA 92211
Telephone No:(760) 610-0000
Facsimile No: (760) 687-2800
Email: ss@shaw.law
Counsel for Chapter 7 Trustee,

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA – RIVERSIDE DIVISION

In re: , Debtor.	Case No.: Chapter: 7 **NOTICE OF MOTION AND MOTION FOR ORDER AUTHORIZING RULE 2004 EXAMINATION OF ****; MEMORANDUM OF POINTS AND AUTHORITIES; AND DECLARATION OF ***** IN SUPPORT** [No Hearing Required- LBR 9013-1(o)]

TO THE HONORABLE ****, UNITED STATES BANKRUPTCY JUDGE; UNITED STATES TRUSTEE; AND ALL INTERESTED PARTIES AND/OR THEIR RESPECTIVE COUNSEL OF RECORD:**

PLEASE TAKE NOTICE that *****, in his capacity as Chapter 7 Trustee ("Trustee") for the bankruptcy estate ("Estate") of ******* ("Debtor"), respectfully files this Motion requesting that the Court require ****, Debtor's ex-spouse, ***** ("******"), to produce the documents identified in **Exhibit 1** no later than ******, and to appear for examination on ******, at ***** **a.m.**, or any other mutually agreeable date within three weeks after entry of the order granting this motion. The examination is requested pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure and Rule 2004-1 of the Local Bankruptcy Rules.

******* is to produce original documents for inspection and copying at the law offices of Shaw & Hanover, PC, 42-600 Cook Street, Ste. 210, Palm Desert, CA 92211. The Examination also will take place at the same location. The documents and the examination sought relate to Trustee's investigation of acts, conduct, or property, or to the liabilities and financial condition of Debtor and this bankruptcy estate, or to any matter which may affect the administration of the case. This motion is based upon the accompanying Memorandum of Points and Authorities, Declaration of ****, and all documents on file in this case.

Pursuant to Rules 2004-1 and 9013-1 of the Local Bankruptcy Rules, any response to this motion must be filed and served no later than 14 days after service (plus three if service is by mail). The failure to timely file a response may be deemed consent to the requested relief pursuant to Rule 9013-1(h).

Date: ____________ Respectfully submitted,

By: ______________________________
SUMMER SHAW
Attorneys for Chapter 7 Trustee,

MEMORANDUM OF POINTS AND AUTHORITIES

1. Introduction

Courts may order the examination of any entity regarding matters that relate to 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. In this case, ******. Despite requests, **** has refused to produce a copy of **** to the Trustee notwithstanding that the agreement likely affects valuable assets of the Estate. The Trustee must review the ***** and examine Ms./Mr. ****** in order to administer this case and obtain critical information regarding the property of the Estate and the disposition of assets.

2. Factual Background

A. The Underlying Dispute*****

B. The **** Claim

C. The Bankruptcy Case

On ****, Debtor filed a voluntary petition under Chapter 7 of Title 11 of the United States Code in the Central District of California, commencing Bankruptcy Case No. *****. *****, was appointed the Chapter 7 Trustee of the Estate.

In her Schedule A/B, Debtor lists an ownership interest in: (1) *****; and (2) the ***** with a scheduled value of $****.

The Trustee sought to ******.

D. Remaining Dispute

3. Argument

A. Scope of Examination Rule 2004(b) of the FRBP

Rule 2004(b) of the FRBP provides that the scope of examination must relate to "acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration or the debtor's estate, or to the debtor's right to a discharge."

At this juncture, the Trustee has no idea regarding whether or when to expect that ***** will produce a copy of the documents requested to the Trustee. As such, the Trustee needs to examine ****** regarding the *****, including to what extent the ***** implicates property of the Estate. Good cause thus exists for the Court to enter an order compelling ***** to appear for examination.

B. Location of Examination

FRBP 2004(e) provides that "An entity other than a debtor shall not be required to attend as a witness unless lawful mileage and witness fee for one day's attendance shall be first tendered." Upon entry of an order authorizing the Trustee to take the examination of ******, a check made out to ****** for lawful mileage and witness fee for one day's attendance will be delivered *via* overnight mail to ***** at her address of record, or to any other address specified by ***** in any response to this Motion.[1]

The Trustee proposes that examination take place on **********, at ***** a.m., or any other mutually agreeable date within three weeks after entry of the order granting this Motion. The examination will take place at the offices of Shaw & Hanover, PC, 42-600 Cook Street, Ste. 210, Palm Desert, CA 92211. The examination of documents may take place, at ***** option, by producing original documents for inspection and copying at the offices of Shaw & Hanover, PC, 42-600 Cook Street, Ste. 210, Palm Desert, CA 92211, or by mailing copies of the documents to Shaw & Hanover, PC such that they are received by ******. To the best of Trustee's knowledge, ****** resides within 100 miles of Palm Desert, California.

C. Compliance with LBR 2004-1

Local Bankruptcy Rule ("LBR") 2004-1 provides that:

> **(a) Conference Required.** Prior to filing a motion for examination or for production of documents under FRBP 2004, the moving party must attempt to confer (in person or telephonically) with the entity to be examined, or its counsel, to arrange for a mutually agreeable date, time, place, and scope of an examination or production.
>
> **(b) Motion.** A motion for examination under FRBP 2004 must be filed stating the name, place of residence, and the place of employment of the entity to be examined, if known. The motion must include a declaration of counsel stating whether the required conference was held and the efforts made to obtain an agreeable date, time, place, and scope of an examination or production. The motion must also explain why the examination cannot proceed under FRBP 7030 or 9014.

LBR 2004-1(a-b).

[1] Upon entry of an order on this motion, the Trustee requests that ****'s counsel immediately provide the Trustee with her current address to ensure that the proper mileage fee is tendered.

As set forth in the attached Declaration of Summer Shaw, counsel for Trustee attempted to contact telephonically and exchanged numerous written correspondence with ****, ******'s counsel of record, between ******, and ******, to meet and confer regarding scheduling the requested production and examination. During the meet and confer process, *****'s counsel stated repeatedly that ******* was no longer involved in this bankruptcy case and refused to agree to the requested production and examination. As such, this Motion requests that the Court order the requested production and examination on the dates set forth above, or any other mutually agreeable date within three weeks after entry of the order granting this Motion.

4. Conclusion

The Trustee respectfully requests that the Court grant this Motion and order the requested production and examination.

Date: _____________ Respectfully submitted,

By: ________________________________
Summer Shaw
Attorneys for Chapter 7 Trustee,

DECLARATION OF SUMMER SHAW

I, Summer M Shaw, hereby declare as follows:

1. I am an attorney duly admitted to practice in the State of California and to the Bar of this Court. I am also the managing attorney of SHAW & HANOVER, PC (the "Firm" or "S&H"). attorneys of record for ******, in his capacity as Chapter 7 Trustee ("Trustee") for the bankruptcy estate ("Estate") of *******.
2. If called upon to testify as to the matters set forth herein, I could and would competently testify thereto.
3. The examination of ***** ("*******") under Rule 2004 of the Federal Rules of Bankruptcy Procedure is necessary for Trustee to obtain critical information regarding property of the Estate and the disposition of assets.

I declare under penalty of perjury under the laws of the United States of America and the State of California that the foregoing is true and correct.

Executed this ______ day of *** 2022 at Palm Desert, California.

____
SUMMER SHAW

EXHIBIT 1

I. Rule 2004 Examination Definitions and Instructions

A. Definitions

As used in these Requests, the following terms shall be defined as follows:

1. "YOU" and "YOUR" shall mean and refer to ******.

2. "DEBTOR" shall mean and refer to ******.

3. "ESTATE" shall mean the bankruptcy estate created pursuant to the commencement of United States Bankruptcy Case No. *******.

4. "DOCUMENT" or "DOCUMENTS" mean and refer to any written, recorded (electronically or otherwise), printed, or graphic matter, however produced or reproduced, whether existing in paper format, as electronically stored information, or otherwise, of any kind or description, including originals, copies, non-identical copies, and drafts and both sides thereof. DOCUMENTS include but are not limited to sound recordings, electronic memoranda, and files with meta data intact (including e-mail or similar electronic messages or memos and word processing, database, and spreadsheet files), photographs, and all other tangible things in which words, figures, notations, or sounds are recorded in writing or by any other means, however denominated, and any such material underlying, supporting, or used in the preparation thereof.

5. "COMMUNICATION" means any transmission, relation, or delivery of things, facts, thoughts or ideas by any means, method, or medium on or by which intelligence or information can be delivered, transported, recorded, maintained or retrieved, including telephonic face to face conversation, without limitation, any handwritten, typed, printed, graphic, electric, magnetic, or illustrative material of any kind or description, including drafts and final versions, originals and reproductions, signed and unsigned versions, however produced or reproduced, and regardless of whether approved, signed, sent, received, redrafted, prepared by or for, or in the possession, custody or control of the party to whom this discovery is propounded or any other PERSON acting or purporting to act on behalf of such party.

6. "ELECTRONICALLY STORED INFORMATION" shall include, without limitation, the following:

a. Information that is generated, received, processed, and recorded by computers and other electronic devices;

b. Internal or external web sites;

c. Output resulting from the use of any software program, whether said electronic data exists in an active file, specifying all files that are accessible and stored in a readily usable format (e.g., active, online data; near-line data; offline storage; and archives) and that do not need to be restored or otherwise manipulated to be useable;

d. Activity listings of e-mail receipts and transmittals; and

e. All items stored on computer memories, hard disks, floppy disks, CD-ROM, magnetic tape, microfiche, or on any other media for digital data storage or transmittal (e.g., a personal digital assistant such as a Palm Pilot or Blackberry), and file folder tabs or containers and labels appended or relating to any physical storage device associated with each original or copy of all Documents requested herein.

7. "RELATING TO" shall have the same meaning as "RELATE," "REFER," "REFERRING TO," "RELATED TO," "EVIDENCE," "EVIDENCING," and "CONSTITUTE" and includes referring to, recording, reflecting, supporting, interpreting, prepared in connection with, used in preparation for, pertaining to, mentioning, having any relationship to, or being in any way legally, logically, or factually connected with the matter discussed, in whole or in part.

B. Instructions

1. Documents Withheld

If any DOCUMENT is withheld under a claim of privilege or other protection, so as to aid the Court and the parties hereto to determine the validity of the claim of privilege or other protection, please provide the following information with respect to any such DOCUMENT:

The DOCUMENT'S title, if any;

The identity of the person(s) who prepared the DOCUMENT, who signed it, and over whose name it was sent or issued;

The identity of each person(s) to whom the DOCUMENT was directed;

The nature and substance of the DOCUMENT with sufficient particularity to enable the Court and parties to this ACTION to identify the DOCUMENT;

The date the DOCUMENT was first prepared;

The identity of each person(s) who has custody of or control over the DOCUMENT and each copy thereof;

The identity of each person to whom copies of the DOCUMENT were furnished;

The number of pages comprising the DOCUMENT;

The basis on which any privilege or other protection is claimed;

Whether any non-privileged or non-protected matter is included in the DOCUMENT;

The identity of each person who has seen or reviewed or is likely to have seen or reviewed the document; and a description of the subject matter of the document YOU consider adequate to support the claim of privilege.

2. Partial Production

Whenever YOU object to a particular request, or portion thereof, YOU must produce all documents called for which are not subject to that objection. Similarly, wherever a document is not produced in full, please state with particularity the reason or reasons it is not being produced in full, and describe, to the best of YOUR knowledge, information and belief and with as much particularity as possible, those portions of the DOCUMENT which are not produced.

3. Orderly Response

Wherever it is reasonably practicable, please produce DOCUMENTS in such manner as will facilitate their identification with the particular request or category of requests to which they are responsive, producing DOCUMENTS as they are kept in the usual course of business, or organizing and labeling them to correspond with each Request.

4. Construction of "And" and "Or"

As used herein, the words "and" and "or" shall be construed both conjunctively and disjunctively, and each shall include the other wherever such dual construction will serve to bring within the scope of this request any documents which would otherwise not be brought within its scope.

5. Construction of the Singular and Plural Forms

As used herein, the singular form shall include the plural and vice versa whenever such dual construction will serve to bring within the scope of this request any documents which would otherwise not be brought within its scope.

6. Form of Production

YOU are to produce the requested DOCUMENTS for inspection, copying, or photographing in their original form or reasonable electronic reproduction thereof. DOCUMENTS may be produced electronically at YOUR option.

With regard to electronically-stored information, please produce Microsoft PowerPoint presentations containing audio, Microsoft Excel documents containing macros, and Microsoft Access databases in native format. Please produce all other documents produced electronically in native format with metadata intact or in PDF format with metadata intact. Alternatively, DOCUMENTS produced electronically may be produced in TIFF format with standard load files, including .opt image load files and .dat metadata load files.

Electronically-stored information may be provided via CD, DVD, File Transfer Protocol site, portable hard or flash drive, or other reasonably accessible media format. When practicable, please produce hard copy or physical documents in scanned OCR'd PDF format with metadata intact or scanned TIFF format with standard load files, including .opt image load files and .dat metadata load files. Data files should not be zipped, encrypted, or otherwise restricted or proprietarily protected for specific use. If the native file format is derived from software not accessible with Microsoft Office applications (or other common applications), please so state in response to the particular Request.

If the Document or information requested is in a computer-readable form and not produced in PDF or TIFF format, please specify the software (including the versions and release) used to create the information. Also, specify any other software, hardware, or other information such as passwords or user-supplied files that are required or desirable in order to examine and use the information. Specify the exact configuration of the hardware on which the information was created, including the memory size (and graphics control board in the event the information contains or requires graphics). Please give the exact name, release, and version of the operating system used on the hardware.

II. Documents Required to be Produced

REQUEST FOR PRODUCTION NO. 1):

All unredacted agreements entered into between YOU and the ****** affecting, referencing, implicating, or RELATING TO property of the ESTATE.

REQUEST FOR PRODUCTION NO. 2):

REQUEST FOR PRODUCTION NO. 3):

REQUEST FOR PRODUCTION NO. 4):

REQUEST FOR PRODUCTION NO. 5):

REQUEST FOR PRODUCTION NO. 6):

REQUEST FOR PRODUCTION NO. 7):

REQUEST FOR PRODUCTION NO. 8):

REQUEST FOR PRODUCTION NO. 9):

REQUEST FOR PRODUCTION NO. 10):

REQUEST FOR PRODUCTION NO. 11):

REQUEST FOR PRODUCTION NO. 12):

REQUEST FOR PRODUCTION NO. 13):

REQUEST FOR PRODUCTION NO. 14):

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is: **42-600 Cook Street, Suite 210, Palm Desert, CA 92211**

A true and correct copy of the foregoing document entitled (*specify*): _________________will be served or was served **(a)** on the judge in chambers in the form and manner required by LBR 5005-2(d); and **(b)** in the manner stated below:

1. **TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF)**: Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) __________, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☐ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:
On (*date*) ______, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

JUDGE'S COPY

☒ Service information continued on attached page **13**

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (state method for each person or entity served): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _______________, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date	Printed Name	Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

June 2012 **F 9013-3.1.PROOF.SERVICE**

585 B.R. 587

IN RE: Michael R. MASTRO, Debtor.

James F. Rigby, Jr., Chapter 7 Trustee, Appellant,
v.
Michael R. Mastro, Appellee.

BAP No. WW–17–1226–TaSKu
Bk. No. 2:09–bk–16841–MLB

United States Bankruptcy Appellate Panel of the Ninth Circuit.

Argued and Submitted March 22, 2018
Filed June 5, 2018

Rick Rein of Horwood Marcus & Berk Chartered argued for appellant James F. Rigby, Jr.;

C. James Frush of Corr Cronin Michelson Baumgardner Fogg & Moore argued for appellee Michael R. Mastro.

Before: TAYLOR, SPRAKER, and KURTZ, Bankruptcy Judges.

OPINION

TAYLOR, Bankruptcy Judge:

INTRODUCTION

Extraordinary cases may require unusual measures; and this case certainly qualifies

[585 B.R. 590]

as extraordinary. Chief among the atypical events is debtor Michael Mastro's flight from the United States to avoid turning potentially significant assets over to chapter 7[1] trustee James F. Rigby, Jr. Debtor and his wife are now resident in France, and extradition efforts in a related criminal proceeding have failed.

As a result of this extraordinary lack of cooperation, the Trustee seeks unusual assistance in his attempt to identify and collect assets of the estate: He requests an order compelling Mastro to sign a consent directive, a rara avis in the bankruptcy world. He intends to send the executed document to international banks and financial entities in an attempt to identify undisclosed Mastro accounts.

Mastro opposed issuance of the consent directive with vehemence, and his opposition was successful. The bankruptcy court, while sympathetic to the Trustee's dilemma, declined to compel execution of the document because, it reasoned, it lacked any authority to do so.

The Trustee appealed, and he now asks us to rule that a bankruptcy court may issue a consent directive. As we agree that the bankruptcy court had discretion to do so, we REVERSE and REMAND.

FACTS[2]

The parties provide little background information about this 2009 involuntary bankruptcy case. As already noted, however, Mastro was not a cooperative involuntary debtor; he and his wife fled to France with estate assets. Their legal troubles include pending criminal charges. See generally Mastro v. Rigby, 764 F.3d 1090, 1092 (9th Cir. 2014) ("[A] French Court of Appeal has denied U.S. requests to extradite Linda and Michael."). The Trustee appears confident that estate assets outside his control exist.

In May 2017 (and nearly 4,000 docket entries after case initiation), the Trustee moved for an order under Rule 2004 and § 521(a)(3) and (4) allowing the "issuance for execution by the Debtor, Michael R. Mastro, of a Consent Directive."[3]

The bankruptcy court denied the request. It expressed concern that the consent directive was a form of injunctive relief and concluded: "I still have to follow the law. I only have the authority, under Rule 2004, to do what Rule 2004 blesses. I don't see that it blesses consent directives, even if it does bless, as it does, issuance of subpoenas under [Civil] Rule 45."

[585 B.R. 591]

The bankruptcy court entered a separate order denying the motion. That same day, the Trustee moved for reconsideration; treating it as a Rule 9023 motion, the bankruptcy court denied the motion.

The Trustee timely appealed. Because a Rule 2004 examination decision may be interlocutory, we granted leave to appeal under 28 U.S.C. § 158(a)(3).

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A). We have jurisdiction under 28 U.S.C. § 158.

ISSUES

Did the bankruptcy court abuse its discretion in denying the Trustee's request for an order compelling a consent directive and the Trustee's reconsideration motion?

STANDARDS OF REVIEW

We review the bankruptcy court's legal conclusions de novo. Los Angeles Cnty. Treasurer & Tax Collector v. Mainline Equip., Inc. (In re Mainline Equip., Inc.), 539 B.R. 165, 167 (9th Cir. BAP 2015). We otherwise review for an abuse of discretion a bankruptcy court's: (1) Rule 2004 decision, In re Dinubilo, 177 B.R. 932, 939 (E.D. Cal. 1993) ; Motor Coach Indus., Inc. v. Drewes (In re Rosenberg), 303 B.R. 172, 175 (8th Cir. BAP 2004) ; and (2) denial of a motion for reconsideration, Weiner v. Perry, Settles & Lawson, Inc. (In re Weiner), 161 F.3d 1216, 1217 (9th Cir. 1998).

A bankruptcy court abuses its discretion if it applies the wrong legal standard, misapplies the correct legal standard, or makes factual findings that are illogical, implausible, or without support in inferences that may be drawn from the facts in the record. See TrafficSchool.com, Inc. v. Edriver Inc., 653 F.3d 820, 832 (9th Cir. 2011) (citing United States v. Hinkson, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc)).

In considering whether the bankruptcy court applied or rested its conclusion on an erroneous legal standard, we review legal conclusions de novo. See Pom Wonderful LLC v. Hubbard, 775 F.3d 1118, 1123 (9th Cir. 2014).

DISCUSSION

The Trustee advanced several theories supporting his request that the bankruptcy court compel Mastro to sign the consent directive. He initially invoked Rule 2004 in connection with Mastro's duties under § 521(a)(3) and (4); then he argued that Civil Rule 45, as applied by Rule 2004(c), authorizes consent directives; next, he argued that Civil Rule 26, as applied to Rule 2004 by Rule 9014, authorizes consent directives; and last, in his reconsideration motion, he directly invoked § 105.

On appeal, the Trustee abandoned his Civil Rule 45 argument; we do not consider it further.

A. Consent directives are investigatory tools.

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.

[585 B.R. 592]

1. The Supreme Court found a consent directive permissible in Doe v. United States, 487 U.S. 201, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988).

Consent directives began to receive judicial scrutiny in reported decisions in the early 1980s. United States v. Ghidoni involved Lawrence Ghidoni's indictment for tax evasion and the government's issuance of a records subpoena to the Florida branch of the Bank of Nova Scotia. 732 F.2d 814, 816 (11th Cir. 1984). Bank officials, concerned about bank employees' exposure to criminal liability under Cayman Islands Law, suggested that Ghidoni sign a consent directive. Id. The district court then ordered him to sign one, Ghidoni refused to do so, and the district court found him in contempt. Id.

The Eleventh Circuit affirmed. Id. It held, over a dissent, that compelling Ghidoni to sign the consent directive did not violate his Fifth Amendment privilege against self-incrimination because the directive was not testimonial in nature. Id. at 819. In resolving the question, the Eleventh Circuit highlighted that the directive spoke in the hypothetical. E.g., id. at 818 ("Rather, the directive states that **if** the accounts exist ....") (emphasis in original); id. ("Rather, the directive merely permits the bank to disclose information relating to any accounts with respect to which the **bank records** indicate Ghidoni's authority to draw (i.e., any accounts with respect to which the bank **thinks** Ghidoni has authority).") (emphasis in original).

Other circuits followed suit. United States v. Davis, 767 F.2d 1025, 1040 (2d Cir. 1985) ; United States v. Cid–Molina, 767 F.2d 1131, 1133 (5th Cir. 1985).[4] But opinions were not unanimous: The First Circuit, over a dissent by then-Judge Breyer, held that compelling a signature on a consent directive would be testimonial. In re Grand Jury Proceedings (Ranauro), 814 F.2d 791, 795–96 (1st Cir. 1987). See also United States v. Pedro, 662 F.Supp. 47 (W.D. Ky. 1987), vacated, 889 F.2d 1089 (6th Cir. 1989) ; Senate Select Comm. on Secret Military Assistance to Iran v. Secord, 664 F.Supp. 562, 565 (D.D.C.), vacated, 933 F.Supp. 1 (D.D.C. 1987) ; United States v. Cook, 678 F.Supp. 1292 (N.D. Ohio 1987) ; In re Grand Jury Investigation (Doe), 599 F.Supp. 746 (S.D. Tex. 1984).

As a result, issues related to the constitutionality of a consent directive worked their way up to the Supreme Court, which concluded in Doe v. United States that a consent directive was not testimonial in nature and, thus, did not violate the signer's Fifth Amendment privilege. 487 U.S. 201, 214–19, 108 S.Ct. 2341, 101 L.Ed.2d 184 (1988). Only Justice Stevens dissented. Id. at 219, 108 S.Ct. 2341 (Stevens, J., dissenting).

2. Doe controls our evaluation of Mastro's constitutionality argument.

Mastro does not question the Trustee's proposed form of consent directive. Instead, he asserts that recent developments in the act-of-production doctrine undercut Doe's holding and make Justice Stevens's dissent the better view.

But vague allusion to developments in the law and a half-hearted, paragraph-long discussion do not rise to the level of a cognizable argument justifying deviation

[585 B.R. 593]

from Supreme Court authority. We appreciate that Mastro wants to preserve his constitutionality argument for appeal. But we are bound by Doe, and Mastro cites no case that even suggests that Doe is no longer good law. Cf. In re Various Grand Jury Subpoenas, 248 F.Supp.3d 525, 527–29 (S.D.N.Y. 2017) (concluding that the "Consent Directive Does Not Violate the Fifth Amendment" and citing Doe, 487 U.S. at 215, 108 S.Ct. 2341). Accordingly, because Doe holds that consent directives are not testimonial, we reject Mastro's argument that an order compelling execution of a consent directive would violate his Fifth Amendment privilege against self-incrimination.

3. Courts in non-bankruptcy cases rely on various sources of authority to issue consent directives.

In Doe, the Fifth Circuit held that the All Writs Act (28 U.S.C. § 1651) allowed the district court to issue the consent directive. 487 U.S. at 205 n.3, 108 S.Ct. 2341. Because the petitioner did not challenge that conclusion on appeal, the Supreme Court did not address it. Id.

After Doe, reported decisions began to define the authority for issuance of consent directives with more precision. Some courts relied on the All Writs Act, but many were reluctant to rely on it exclusively because the All Writs Act is not an independent source of jurisdiction: to invoke it, the court must have some other jurisdictional basis. E.g., In re Grand Jury Proceedings, Yanagihara Grand Jury, 709 F.Supp. 192, 194 (C.D. Cal. 1989) ("The court agrees that jurisdiction may not rest on the All Writs Act alone."). See United States v. Denedo, 556 U.S. 904, 913, 129 S.Ct. 2213, 173 L.Ed.2d 1235 (2009) ("[T]he All Writs Act and the extraordinary relief the statute authorizes are not a source of subject-matter jurisdiction."); Doe v. INS, 120 F.3d 200, 204–05 (9th Cir. 1997).

In the context of criminal proceedings, the recalcitrant witness statute, 28 U.S.C. § 1826, which governs grand jury witnesses, emerged as the primary jurisdictional hook.[5] Both the Ninth and Second Circuits held that the recalcitrant witness statute vested the district court with authority to compel and enforce a consent directive. In re Grand Jury Proceedings (Shams), 873 F.2d 238 (9th Cir. 1989) ; In re Doe, 860 F.2d 40, 49 (2d Cir. 1988).[6] As a result, both circuits declined to consider if the All Writs Act, in isolation, was sufficient. Shams, 873 F.2d at 239 n.1 ; In re Doe, 860 F.2d at 49.

The Second Circuit additionally held that the district court's inherent supervisory power over a grand jury provided the district court with the power to enforce a consent directive. In re Doe, 860 F.2d at 49.

Reported cases discuss the appropriateness of consent directives outside situations involving a grand jury less frequently, but government agencies such as the Commodity Futures Trading Commission, the Federal Trade Commission, the Consumer Financial Protection Bureau, the

[585 B.R. 594]

Securities and Exchange Commission, and the Internal Revenue Service use them. Each of these agencies is vested by statute with investigatory powers, including the ability to issue subpoenas and compel testimony of witnesses.[7] And each can rely on such powers in requesting and obtaining a consent directive.

The Internal Revenue Service's use of a consent directive was discussed and limited in United States v. Kao, 81 F.3d 114, 115–16 (9th Cir. 1996). The Ninth Circuit held that the IRS could not compel signature of a consent directive under 26 U.S.C. § 7602 because so doing could allow the IRS to obtain records from domestic financial institutions without notifying the Kaos, thus circumventing 26 U.S.C. § 7609, which establishes special procedures that the IRS must use to summon a domestic, third-party record keeper. Id. at 116–17. Notwithstanding this decision, the IRS continues to request consent directives where it seeks information from financial institutions outside the United States. E.g., United States v. Norwood, 420 F.3d 888 (8th Cir. 2005) ; United States v. Brayshaw, No. 2:14-MC-00088-MCE-KJN, 2016 WL 7048033, 2016 U.S. Dist. LEXIS 171003 (E.D. Cal. Oct. 20, 2016) ; United States v. Plath, No. 0:03–cv–60439–KAM, 2003 WL 23138778, 2003–2 U.S. Tax Cas. (CCH) P50,729 (S.D. Fla. Oct. 29, 2003).[8]

[585 B.R. 595]

In the ordinary civil context, courts have also authorized consent directives based on their "broad discretion" to supervise discovery. See Bank of Crete v. Koskotas, No. 88-CIV-8412-KMW, 1989 WL 46587, at *1, 1989 U.S. Dist. LEXIS 4289, at *2–*3 (S.D.N.Y. Apr. 21, 1989) ("I hold that the issuance of an order compelling defendant to sign a consent form is within the court's broad discretion to supervise discovery and issue appropriate orders, provided that the form of the consent does not abrogate defendants' Fifth Amendment or due process rights."); see also SEC v. Coll. Bound, Inc., 155 F.R.D. 1, 2

(D.D.C. 1994) ("District courts have broad discretion in supervising discovery. An order to compel defendants to sign a consent form is a permissible method of obtaining that discoverable information in a civil context, provided that the form of the consent does not abrogate defendants' Fifth Amendment or due process rights."). And at least one court required signature of a consent directive in concert with the granting of a motion to compel under Civil Rule 37. See Hansel 'N Gretel Brand, Inc. v. Savitsky, No. 1:94-cv-04027-CSH-HBP, 1997 U.S. Dist. LEXIS 17615, at *1–*2, 1997 WL 698179, at *1 (S.D.N.Y. Nov. 10, 1997). The Bank of Crete and Hansel 'N Gretel Brand, Inc. cases are noteworthy because they do not involve a government agency.

B. Bankruptcy courts may compel a debtor to sign a consent directive on the request of a chapter 7 trustee.

When we consider the obligations and enforcement mechanisms created by the Code and the investigatory tools available to the Trustee, we conclude that the bankruptcy court had discretion to authorize and enforce a consent directive at the request of the Trustee.

1. The Code imposes statutory investigatory duties on trustees and statutory disclosure obligations on debtors.

A chapter 7 trustee is under a statutory duty to, among other things, collect "the property of the estate" and "investigate the financial affairs of the debtor ...." 11 U.S.C. § 704(a)(1)&(4). Property of the estate includes a debtor's foreign bank accounts. See Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon), 153 F.3d 991, 996 (9th Cir. 1998).

A chapter 7 debtor also has various, Code-imposed duties. 11 U.S.C. § 521(a). A debtor must "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 ...." 11 U.S.C. § 521(a)(4). That includes bank accounts, even foreign accounts. And in the § 521(a)(4) context, a debtor's disclosure obligations are heightened: she must surrender information to the trustee even if she has not been granted immunity under § 344. Id. [9] In addition, a debtor has a duty to cooperate with the chapter 7 trustee "as necessary to enable the trustee to perform the trustee's duties under this title ...." 11 U.S.C. § 521(a)(3).

[585 B.R. 596]

Thus, the Trustee's investigatory powers resemble those of the governmental agencies that utilize consent directives. Like those agencies, the Trustee has a statutory authorization to require production of documents in the furtherance of an investigatory duty also created by statute.

And a debtor's duty to provide information and to cooperate in this investigation is at least as clear as that of a party subject to regulation by a governmental agency.

2. Section 105 and Rule 2004 provide broad authority to a bankruptcy court and allow it to enter orders carrying out Code-imposed obligations.

The Code and Rules provide powers and tools that allow a trustee to meet her responsibilities to investigate a debtor's financial affairs and to collect and liquidate a debtor's estate.

Section 105. Section 105(a) vests bankruptcy courts with broad residual power: "The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). And bankruptcy courts have "broad authority" under § 105(a)"to take any action that is necessary or appropriate to prevent an abuse of process ...." Marrama v. Citizens Bank of Mass., 549 U.S. 365, 375, 127 S.Ct. 1105, 166 L.Ed.2d 956 (2007) (internal quotation marks omitted). Section 105(a) thus "confers authority to ‘carry out’ the provisions of the Code ...." Law v. Siegel, 571 U.S. 415, 134 S.Ct. 1188, 1194, 188 L.Ed.2d 146 (2014).

We long ago held that § 105(a) encompassed the powers of the All Writs Act in bankruptcy proceedings. Ad Hoc Protective Comm. for 10½% Debenture Holders v. Itel Corp. (In re Itel Corp.), 17 B.R. 942, 945 (9th Cir. BAP 1982). Indeed, both § 105(a) and the All Writs Act serve similar purposes.[10]

Although we recognize the breadth of § 105, we conclude, by analogy to those cases rejecting use of the All Writs Act as the sole basis for issuance of a consent directive, that it cannot justify issuance of a consent directive in isolation. Despite its broad language, § 105(a) is not a "roving commission to do equity." Saxman v. Educ. Credit Mgmt. Corp. (In re Saxman), 325 F.3d 1168, 1175 (9th Cir. 2003) (internal quotation marks omitted). It cannot be used to take "action that the Code prohibits." Law, 134 S.Ct. at 1194.

But § 105 does not operate in isolation when a trustee requests a consent directive; instead, it operates in concert with the Code's investigatory and disclosure requirements. 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.

In short, bankruptcy courts may use § 105(a) to issue a consent directive and carry out the provisions of §§ 704 and 521.

Rule 2004. Rule 2004 is the basic discovery device in bankruptcy cases. In re Subpoena Duces Tecum, 461 B.R. 823, 829 (Bankr. C.D. Cal. 2011).[11] It allows broad examination relating to "the acts, conduct, or property or to the liabilities and financial

[585 B.R. 597]

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." Fed. R. Bankr. P. 2004(b) ; see also id. (discussing scope of examination in chapter 11, 12, and 13 cases).

As the Rule's text makes clear, the scope of a Rule 2004 examination is "unfettered and broad"; the rule essentially permits a "fishing expedition." In re Subpoena Duces Tecum, 461 B.R. at 829 (quoting and citing In re GHR Energy Corp., 33 B.R. 451, 453–54 (Bankr. D. Mass 1983)). And the examination may "extend to third parties who have had dealings with the debtor." In re Fin. Corp. of Am., 119 B.R. 728, 733 (Bankr. C.D. Cal. 1990).

We acknowledge that Rule 2004 is not without limits. It should not be used "to abuse or harass ...." In re Enron Corp., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) ; cf. Fed. R. Bankr. P. 9011(b)(1). Nor should it "stray into matters which are not relevant to the basic inquiry." In re Mittco, Inc., 44 B.R. 35, 36 (Bankr. E.D. Wis. 1984).[12] Thus, we stop short of a determination that Rule 2004, in isolation, would justify issuance of a consent directive to anyone other than a chapter 7 trustee.[13] But where, as here, it enables the financial affairs investigation required by the Code, it is firmly tethered to the Trustee's § 704 statutory duties. Thus, 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.

3. Case law allowing use of consent directives in other contexts supports our determination that they are appropriate in a bankruptcy context.

Our view that the statutory rights and duties created by the Code provide a basis for issuance of a consent directive is bolstered by our review of regulatory agencies' use of consent directives. Various statutes provide these agencies with investigatory obligations and authority and the ability to summon persons and to obtain production of documents and data. Based on this authority, even without a tool such as a Rule 2004 examination, the agencies use consent directives to conduct statutorily required investigation.[14]

A chapter 7 trustee, similarly, is statutorily tasked with investigating financial affairs and collecting estate property, and Rule 2004 allows a trustee to compel the production of documents. Thus, a trustee uses a consent directive in the same manner as the agencies discussed above.

Our conclusion is similarly supported when we consider that debtors' disclosure obligations are analogous to the obligations of witnesses under subpoena. As we noted

[585 B.R. 598]

above, the Code requires a debtor to surrender to a trustee "any recorded information, including books, documents, records, and papers, relating to property of the estate ...." 11 U.S.C. § 521(a)(4). This statutory text mirrors language that the Ninth Circuit has already used to justify a consent directive when it held that the recalcitrant witness statute, 28 U.S.C. § 1826, authorizes a district court to hold a grand jury witness who refuses to sign a consent directive in contempt. Shams, 873 F.2d at 239. That section, in turn, refers to a witness who "refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material ...." 28 U.S.C. § 1826(a). Refusing to sign a consent directive, then, must be contemptuous because it is refusal to "provide other information," as plainly required by statute.

The statutory texts are similar. Both statutes' illustrative, "including" list refer to "books," "documents," "records," and "papers." The recalcitrant witness statute goes a little further and references "recording" and "other material" in its illustrative list. And we acknowledge a slight wording difference between the two: § 521(a)(4) refers to "recorded information" while 28 U.S.C. § 1826(a) refers to "other information." But the account information sought by a consent directive falls under each term; it is both recorded information and other information. Thus, to the extent 28 U.S.C. § 1826(a) authorizes the use of a consent directive, so would § 521(a)(4).

Rule 2004 serves as an additional bridge between §§ 521 and 704, as it provides trustees a mechanism to require debtors to produce. And, again, to the extent Rule 2004 is not sufficiently broad, § 105 would allow issuance of a consent directive to require a debtor to fulfill a statutory duty. Section 105(a) is not being used as an independent basis for the consent directive; it is, rather, being used in concert with §§ 521 and 704.[15]

Accordingly, we hold 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.[16]

4. On remand, the bankruptcy court may exercise discretion.

The bankruptcy court decided that it lacked the authority to issue a consent directive. The Trustee asks us to reverse that decision and to order Mastro to execute the consent directive. But our conclusion

[585 B.R. 599]

that the bankruptcy court could compel Mastro to sign a consent directive does not mean that a consent directive should issue under the present facts. We leave that decision in the first instance to the bankruptcy court's discretion.

The bankruptcy court's discretion is at least two-fold: (1) should the Rule 2004 consent directive order issue?; and (2) how should it issue? The underlying bankruptcy case has a decidedly international bent; the consent directive involves international institutions, so consideration of international comity may be involved in answering the first question. See, e.g., Shams, 873 F.2d at 239–40 (considering Swiss law) ; Marsoner, 40 F.3d at 964 (considering Austrian law).

The second question matters because a Rule 2004 examination "does not offer the procedural safeguards available under the Federal Rules of

Civil Procedure ...." In re Dinubilo, 177 B.R. at 939. See id. at 939–40 and 940 n.12 (comparing procedures); Simon v. FIA Card Servs., N.A., 732 F.3d 259, 268 n.6 (3d Cir. 2013) (" Rule 2004 examinations ... are subject to few of the procedural safeguards normally applicable to discovery under the Federal Rules of Civil Procedure." (internal quotation marks omitted)). So in some circumstances it may be appropriate for the bankruptcy court to "borrow" procedural protections from the Civil Rules and apply them to Rule 2004 examinations. In re Valley Forge Plaza Assocs., 109 B.R. 669, 675 (Bankr. E.D. Pa. 1990).

We do not have the bankruptcy court's familiarity with the case. It may yet, exercising its discretion, appropriately deny the consent directive request. We conclude here only that it wrongly ruled that it lacked any discretion.

C. The bankruptcy court erred when it denied the Trustee's reconsideration motion.

Based on the above, we also conclude that the bankruptcy court erred in denying the Trustee's reconsideration motion.[17]

CONCLUSION

The bankruptcy court denied the Trustee's motion because it thought that it lacked the authority to compel a debtor to sign a consent directive. This was legal error; bankruptcy courts have that power. This conclusion, however, does not mean that the bankruptcy court must compel Mastro to do so. Accordingly, we REVERSE the bankruptcy court's order and REMAND for further proceedings consistent with this opinion.

Notes:

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101 –1532. All "Rule" references are to the Federal Rules of Bankruptcy Procedure. All "Civil Rule" references are to the Federal Rules of Civil Procedure.

[2] We exercise our discretion to take judicial notice of documents electronically filed in the underlying bankruptcy case. See Atwood v. Chase Manhattan Mortg. Co. (In re Atwood), 293 B.R. 227, 233 n.9 (9th Cir. BAP 2003).

[3] The Trustee's proposed consent directive reads in part:

> 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 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.

[4] See also Two Grand Jury Contemnors v. United States (In re Grand Jury Subpoena), 826 F.2d 1166, 1171 (2d Cir. 1987) ; United States v. A Grand Jury Witness (In re N.D.N.Y Grand Jury Subpoena # 86–0351–S), 811 F.2d 114 (2d Cir. 1987) (disapproving use of consent directive that did not expressly say it was executed under court order); United States v. Lehder–Rivas, 827 F.2d 682 (11th Cir. 1987).

[5] See In re Grand Jury Proceedings, 709 F.Supp. at 194 ("Exercise of this court's jurisdiction is

nonetheless permissible under 28 U.S.C. § 1826 (1982). Through this statute, Congress authorized courts to compel a recalcitrant witness to testify in front of a grand jury and to provide necessary documents. The order in this case is intended to produce just that result." (footnote omitted)).

[6] Marsoner v. United States (In re Grand Jury Proceedings), 40 F.3d 959, 966 (9th Cir. 1994) ("Marsoner's challenges to the district court's order compelling him to sign the directive do not constitute just cause for his refusal to do so. See 28 U.S.C. § 1826(a). Accordingly, the district court did not abuse its discretion by holding Marsoner in contempt.").

[7] The Commodity Futures Trading Commission and the Federal Trade Commission request and receive restraining orders that also direct individuals to sign a "Consent to Release of Financial Records" forms; the Consumer Financial Protection Bureau has done so as well. E.g., Fed. Trade Comm'n v. Bunzai Media Grp., Inc., No. CV 15–4527–GW(PLAx), 2015 WL 5305243, 2015 U.S. Dist. LEXIS 123139 (C.D. Cal. Sept. 9, 2015) ; Consumer Fin. Prot. Bureau v. Morgan Drexen, Inc., No. SACV 13–01267–JLS (JEMx), 2015 WL 12745793, 2015 U.S. Dist. LEXIS 186915 (C.D. Cal. Apr. 30, 2015) ; U.S. Commodity Futures Trading Comm'n v. Capital Blu Mgmt., LLC, No. 6:09-CV-508-ORL-28DAB, 2010 WL 11508133, 2010 U.S. Dist. LEXIS 149233 (M.D. Fla. Apr. 20, 2010).

The Commodity Futures Trading Commission likely bases its use of consent directives on 7 U.S.C. § 9, which provides that it may: "subpoena witnesses, compel their attendance, take evidence, and require the production of any books, papers, correspondence, memoranda, or other records that the Commission deems relevant or material to the inquiry[ ]"; and require the "attendance of witnesses and the production of any such records ...." 7 U.S.C. § 9(5) &(6).

Similarly, the Federal Trade Commission likely grounds its use of consent directives in 15 U.S.C. § 49, which provides it with the power "to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation." 15 U.S.C. § 49.

And the Internal Revenue Service relies on 26 U.S.C. § 7602 for using consent directives directed at foreign financial institutions. That section allows the IRS to summon persons and have them produce "such books, papers, records, or other data ... as may be relevant or material ...." 26 U.S.C. § 7602(a)(2).

Other agencies where case law identifies use of consent directives have similar statutorily-based investigative powers. The Consumer Financial Protection Bureau may "issue subpoenas for the ... production of relevant papers, books, documents, or other material ...." 12 U.S.C. § 5562(b)(1). The Securities and Exchange Commission may "subpena witnesses ... and require the production of any books, papers, correspondence, memoranda, or other records which the Commission deems relevant or material to the inquiry." 15 U.S.C. § 78u(b).

[8] The IRS's Internal Revenue Manual provides some guidance on its use of consent directives. IRM 5.21.2.4 (2018) ("A consent directive, also known as a disclosure directive, is a document signed by the taxpayer that authorizes a third party to release to a U.S. court information regarding that taxpayer that is held by a foreign bank or a third party custodian."). The manual also explains how the IRS uses judicial process to compel a taxpayer to sign one. IRM 25.5.4.5.9 (2015) ("A summons cannot be used to directly compel a taxpayer to sign a consent directive. However, if a summons for the foreign records is served on the taxpayer while in the United States, a federal district court can enforce the summons by directly ordering the taxpayer to produce the documents in his or her custody or control. Moreover, the Service can seek an order under IRC 7402(b) compelling a taxpayer to sign a consent directive authorizing the foreign institution to produce its records.").

[9] Section 344, in turn, provides that "[i]mmunity for persons required to submit to examination ... or to provide information in a case under this title

may be granted under part V of title 18." 11 U.S.C. § 344.

[10] Consider the relevant texts: Section 105(a) allows the bankruptcy court to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). The All Writs Act permits "all courts established by Act of Congress" to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

[11] Indeed, the "sweeping general examination" of debtors is "traceable to the first bankruptcy statute enacted by the English Parliament more than 450 years ago." In re Symington, 209 B.R. 678, 683 (Bankr. D. Md. 1997). Bankruptcy examinations thus predate modern federal civil procedure. Id. at 684.

[12] E.g., In re Wilcher, 56 B.R. 428, 434 (Bankr. N.D. Ill. 1985) ("It is clear that Rule 2004 may not be used as a device to launch into a wholesale investigation of a non-debtor's private business affairs."); In re Fin. Corp. of Am., 119 B.R. at 733 ("Matters having no relationship to the debtor's affairs, or the administration of the bankruptcy estate are not proper subjects of a Rule 2004 examination.").

[13] Or other trustee vested with similar responsibilities by the Code.

[14] We acknowledge the limitations the Ninth Circuit placed on the IRS in Kao. But the Code does not contain any restriction analogous to 26 U.S.C. § 7609 or applicable to discovery in relation to foreign bank accounts.

[15] As a result, the Ninth Circuit's decision to not decide whether the All Writs Act independently authorizes a consent directive does not worry us. The Code affirmatively requires disclosure of the information the Trustee seeks by way of consent directive; so using § 105(a) to compel a debtor to sign a consent directive for a trustee would not be an untethered use of the section.

[16] Having concluded that a bankruptcy court has the discretion to issue a consent directive, we briefly reject the Trustee's Civil Rule 26 theory. He seeks to import civil discovery processes to Rule 2004 by arguing that a Rule 2004 motion is a Rule 9014 contested matter.

A Rule 2004 motion is only sometimes—and not always—a contested matter, and a contested matter is not required before a bankruptcy court authorizes a Rule 2004 examination. In re Subpoena Duces Tecum, 461 B.R. at 831. As a result, when the Trustee filed his motion, he did not necessarily have Civil Rule 26 at his disposal; it thus did not support issuance of the consent directive when the motion was filed.

And in any event, the contest in an opposed Rule 2004 examination involves the right to the examination itself, not the particular tool used for examination.

[17] Whether an order denying a Rule 2004 examination is a final order is unclear. Lynch v. Malloy (In re Lynch), 544 B.R. 444, 448 (10th Cir. BAP 2016) ("Appellate courts have reached different conclusions on whether an order for a Rule 2004 examination is a discrete dispute that sufficiently concludes a 'proceeding.' ") (gathering cases). So a case-by-case analysis is warranted. Cf. id. at 449. Here, at the hearing, the bankruptcy court suggested the order was interlocutory: it invited the Trustee to submit additional authority and indicated that it might reconsider the ruling.

The Trustee submitted additional authority with his reconsideration motion; the bankruptcy court, however, interpreted and denied the motion as a Civil Rule 59(e) motion. But courts "have inherent power to modify their interlocutory orders before entering a final judgment." Balla v. Idaho State Bd. of Corr., 869 F.2d 461, 465 (9th Cir. 1989). So, to the extent the order was interlocutory, the bankruptcy court erred when it applied Civil Rule 59(e). Cf. Balla, 869 F.2d at 466 ("Rule 59(e) clearly contemplates entry of judgment as a predicate to any motion." (internal quotation marks omitted)).

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461 B.R. 823

In re SUBPOENA DUCES TECUM and ad Testificandum Pursuant to Fed. R. Bankr. P. 2004,Regarding the Chapter 13 casesPedro J. Luna & Tanisha M. Luna;John Shine;Valentine T. Soltys & Christina E. Soltys;Hector Luis Ramos & Christina Ramirez–Ramos;William F. Keller & Ann Keller;Lenore R. Francis, Debtor(s).

Misc. Nos. 1:10–MP–00101–MT

1:10–MP–00102–MT

1:10–MP–00103–MT

1:10–MP–00104–MT

1:10–MP–00105–MT

1:10–MP–00106–MT.

United States Bankruptcy Court,C.D. California.San Fernando Valley Division.

Jan. 28, 2011.

[461 B.R. 825]

MEMORANDUM OF DECISION RE; BAC HOME LOANS SERVICING, L.P.'S MOTIONS TO QUASH SUBPOENAS MAUREEN A. TIGHE, Bankruptcy Judge.

In recent months, the United States Trustee ("UST") has begun a nationwide review of bankruptcy filings by mortgage servicers, including BAC Home Loans Servicing LP ("BAC"). As part of its review, the UST [1] sought discovery from BAC regarding

[461 B.R. 826]

its proofs of claim in the above-referenced bankruptcy cases currently pending in the United States Bankruptcy Court for the District of New Jersey. To that end, the UST sought to examine a BAC representative about the preparation of BAC's proofs of claim and to produce various documents in connection with that process.

Each of the cases is substantially similar, such that only a single comprehensive discussion is necessary. Each involves individual debtor(s) with home mortgages serviced by BAC.[2] In each of the cases, BAC has filed a proof of claim, signed by its attorney of record, and listing arrearages (or riders) consisting of various charges, including "escrow shortages, property inspection fees, previous bankruptcy fees, attorney's foreclosure fees, attorney's foreclosure costs, and post-petition pre-confirmation attorney's fees." The proofs of claim did not contain certain details, such as the dates on which these alleged charges were incurred.

A. The UST's Subpoena:

The UST has issued a subpoena *duces tecum* and *ad testificandum* to BAC, requesting that the latter produce a corporate representative to appear at a 2004 examination at the UST office in Woodland Hills, California, and discuss the following:

a. The internal processes and procedures that BAC uses in ensuring that proofs of claim are prepared and filed on its behalf in the District of New Jersey;

b. The documents, records and information provided by BAC to its counsel [3] in each of the respective cases in order to allow them to prepare, verify, and file its proofs of claim;

c. The relationship between BAC and its counsel in each case;

d. The retention of BAC's counsel to provide services concerning or relating to the loan referenced in the proof of claim;

e. Certain documents produced in response to the subpoena.

In addition, the UST requested that BAC produce certain documents to its Newark, New

Jersey office including, but not limited to, copies of the relevant notes and mortgages and any assignments and endorsements thereof, payment histories for the various debtors' loans with respect to the mortgages, correspondence referencing the debtors' loans, documentary evidence of BAC's payment of all amounts claimed due in the proofs of claim, documentary evidence that BAC is the servicer or holder of the notes and mortgages, and documents related to BAC's policies and procedures for verifying and filing proofs of claim.

In each of the cases, the UST served copies of the subpoena on each of the debtors, their attorneys, and the Chapter 13 Trustee. BAC, has filed an opposition to the subpoenas and the 2004 examination.

B. BAC's Motion to Quash:

On December 22, 2010, BAC filed six separate motions to quash the subpoenas in this Court. BAC argues that the subpoenas should be quashed because: (1) the subpoenas are procedurally improper for a number of reasons, including: (a) the UST has failed to show "good cause" for a 2004 examination; (b) the UST failed to secure an order authorizing a 2004 examination;

[461 B.R. 827]

(c) the time and location designated in the subpoenas for the examinations and document production are improper, inconvenient, and unduly burdensome under Federal Rules of Bankruptcy Procedure 2004 and 9016; and (d) the UST failed to obtain the release required by the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3401, et seq. ("RFPA"); and (2) the UST lacks standing under 11 U.S.C. § 307 and 28 U.S.C. § 586 to obtain a 2004 examination. In addition, BAC objects to the requests for individual documents on specific grounds, such as vagueness, overbreadth, confidentiality, and privileges.

DISCUSSION

A. UST's Standing to Issue the Subpoenas:

Rule 2004 of the Federal Rules of Bankruptcy Procedure provides that a motion for the examination of any entity may be brought by "any party in interest." Fed. R. Bankr.P.2004(a). The term "party in interest" is not defined in the Bankruptcy Code.

The UST is an official of the United States Department of Justice charged with responsibility to "supervise the administration of cases and trustees in cases under chapter 7, 11, 12, 13 or 15 of title 11 ...." 28 U.S.C. § 586(a)(3). Generally, the UST has standing to "raise [,] ...appear and be heard *on any issue in any case or proceeding* " under the Bankruptcy Code, but may not file a plan. 11 U.S.C. § 307 (emphasis added). BAC argues that, in spite of section 307's broad language, the UST is not a "party in interest" with authority to request 2004 examinations. BAC argues that the UST's powers and duties are enumerated in 28 U.S.C. § 586(a) and in specific sections within the Bankruptcy Code,[4] and points to the different treatment and separate references provided to the United States Trustee and "party in interest." Essentially, BAC argues that section 586 and the numerous sections in which the UST's specific powers and duties are mentioned operate as a "ceiling" of the UST's power to act in bankruptcy proceedings, with section 307 serving as an "enabling provision" to grant the UST the standing necessary to perform those duties.

BAC's argument fails. As a preliminary matter, it should be noted that several courts encountering this precise issue have already held that the UST does have standing to seek 2004 examinations. *See, e.g., In re Countrywide Home Loans, Inc.,* 384 B.R. 373, 385 n. 12, 391 (Bankr.W.D.Pa.2008); *Dean v. McDow,* 299 B.R. 133, 135 (E.D.Va.2003); *Gache v. Balaber–Strauss,* 198 B.R. 662, 663 (S.D.N.Y.1996). The court in *In re Countrywide* read section 307 as ensuring "that the UST has the ability to act in areas where Congress did not specifically foresee and provide an explicit provision for the UST to do so." 384 B.R. at 386. The court concluded that sections 586 and 307 could be "harmonized" such that one does not render the other superfluous. *Id.* at 385–86; *see also TRW Inc. v. Andrews,* 534 U.S. 19, 31, 122 S.Ct. 441, 151 L.Ed.2d 339 (2001) ("It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' ").

Section 307 is written in extremely broad language: it allows the UST to raise, appear, and be heard on any issue in any bankruptcy case or proceeding. Under the plain meaning of the statute, this includes the ability to seek and conduct

[461 B.R. 828]

Rule 2004 examinations. Section 307— *not* section 586 and the enumerated provisions in the Code to which BAC refers—is the "ceiling" of the UST's powers and duties. Those provisions serve to shed light on how Congress intended the UST to exercise the broad powers conferred upon it by section 307. *See Countrywide,* 384 B.R. at 386.

The legislative history of section 307—to which BAC itself cites—supports the conclusion that the UST has standing to seek and obtain a 2004 examination:

The U.S. Trustee is given standing to raise, appear, and be heard on any issue or any case or proceeding under title 11, U.S. Code—except that the U.S. Trustee may not file a plan in a chapter 11 case. In this manner, the U.S. Trustee is given the same right to be heard *as a party in interest,* but retains the discretion to decide when a matter of concern to the proper administration of the bankruptcy laws should be raised. By not designating the U.S. Trustee as a party in interest, the legislation ensures that there is no confusion over the U.S. Trustee's role in a case. A party in interest normally has a pecuniary interest in a case; the U.S. Trustee has no pecuniary interest in any case, and functions only as an impartial administrator.

H. Rep. No. 99–764, at 27 (1986), *reprinted in,* 1986 U.S.C.C.A.N. 5227, 5240 (emphasis added). The legislative history thus makes it clear that the UST is not a party in interest, yet has standing to participate in a bankruptcy case to a similar extent as a party in interest. An example of this can be found in section 1112, which governs conversion or dismissal of chapter 11 cases. *See generally* 11 U.S.C. § 1112. Section 1112(b) provides that a "party in interest" can move for conversion or dismissal of a chapter 11 case, with no specific reference to the UST. Section 586(a)(8), however, provides that the UST may seek conversion or dismissal "in any case in which the United States trustee finds *material grounds for any relief* under section 1112 of title 11 ...." 28 U.S.C. § 586(a)(8). Clearly, the UST can be accorded "party in interest" standing without being called a "party in interest."

When applied in the context of the UST's "watchdog" role in the administration of bankruptcy cases, this makes perfect sense. *See* H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 1, 88 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6049 ("[USTs] ... will serve as bankruptcy watch-dogs to prevent fraud, dishonesty, and overreaching in the bankruptcy arena."). While the UST does not have a pecuniary interest in a case and therefore lacks the usual incentive of a "party in interest" to conduct Rule 2004 examinations, section 307's broad language nonetheless serves to ensure that the UST possesses the flexibility necessary to carry out its "watchdog" responsibilities in bankruptcy cases, including the ability to conduct 2004 examinations in an effort to prevent abuse.

To the extent that *Countrywide* reads section 307, Rule 2004, and the applicable case law as conferring upon the UST the power and ability to seek 2004 examinations, the Court adopts its reasoning. It would make no sense to confer investigative powers on the UST and give them the same rights as a party in interest and not to afford rights to utilize Rule 2004 examinations. BAC's reading of section 307 would render it superfluous. The nature of this inquiry is precisely the type of issue where the UST, as both impartial administrator and "watchdog" of bankruptcy administration, should be afforded investigative powers. The fees and costs included in the secured lenders' claims have been an area of great contention between debtors and those secured lenders for some time. An individual debtor facing foreclosure is unlikely to have the ability or the resources to seek discovery of this complicated

[461 B.R. 829]

area, yet similar issues are raised in multiple cases. At the same time, the UST is an independent party and can evaluate any information it receives without a pecuniary interest in the claims objection process.

In addition, BAC's argument that the "Court should not accept the UST's invitation to expand [UST's] authority without check" is without merit and is rejected. There are safeguards—including Rule 9011 and the limitations contained in Rule 2004—that serve to ensure that the UST utilizes its discretion in a limited and responsible fashion. As many 2004 examinations cause the UST or parties to conclude further action is *not* warranted, denying access to this tool could actually result in a less informed use of the UST's oversight powers.

Accordingly, the UST has standing in all six of the instant cases to seek 2004 examinations of BAC representatives.

B. The Subpoenas' Alleged Procedural Defects:

1. Good Cause:

BAC argues that UST's subpoenas should be quashed because they are procedurally improper. One of the procedural defects that BAC alleges is the UST's lack of "good cause." Rule 2004 is the basic discovery device in bankruptcy cases, which allows for the examination of any entity regarding "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." Fed. R. Bankr.P.2004(b). The scope of a 2004 examination is "unfettered and broad" and is akin to a fishing expedition. *In re GHR Energy Corp.,* 33 B.R. 451, 453–54 (Bankr.D.Mass.1983).

When a party seeks to conduct a 2004 examination, and the party to be examined objects, the former must show that it has "good cause" to conduct the examination. *In re W & S Investments, Inc.,* 985 F.2d 577, 1993 WL 18272, at *2 (9th Cir. Jan. 28, 1993) (citing *In re Wilcher,* 56 B.R. 428, 434 (Bankr.N.D.Ill.1985)). "Generally, good cause is shown if the [Rule 2004] examination is necessary to establish the claim of the party seeking the examination, or if denial of such request would cause the examiner undue hardship or injustice." *In re Metiom, Inc.,* 318 B.R. 263, 268 (S.D.N.Y.2004) (quoting *In re Dinubilo,* 177 B.R. 932, 943 (E.D.Cal.1993)). Once the examiner establishes the existence of "good cause," the burden shifts back to the objecting party to show that examination would be oppressive or burdensome. *Wilcher,* 56 B.R. at 434 (citing *Freeman v. Seligson,* 405 F.2d 1326, 1337 (D.C.Cir.1968)).

The UST has properly established that she has good cause for requesting the 2004 examinations of BAC representatives. The subject matter of the examinations—the basis for the validity of BAC's various proofs of claim—is pretty clearly related to the debtors' liabilities and the amounts to be paid under their chapter 13 plans. The UST has more than mere "curiosity" about potential abuse. Rather, the UST's concerns stem from a foundation suggesting the possible existence of abuse in the proof of claim process.[5] BAC's argument—that some of the undocumented charges about which the UST seeks to inquire are "de minimis"—fails to acknowledge that such charges may potentially be part of a systemic problem.[6] Where complaints are made about common abuses in bankruptcy cases that are not unique to the facts and

[461 B.R. 830]

issues of just or two cases, the UST has cause to inquire further to determine if there any basis for the complaints received. The UST correctly points out that her “watchdog” role in bankruptcy cases not only justifies allowing the UST to conduct these examinations, but also mandates it.

While the UST is not a mortgage regulator, the UST is empowered to monitor and investigate issues relating to the filing of proofs of claim in bankruptcy cases. The UST is not seeking to regulate any mortgage or banking issues outside of the bankruptcy context.

BAC argues that it is the debtors' responsibility to examine proofs of claim in their individual cases. Relying on consumer debtors—many of whom are struggling to make their plan payments—to expend extra hard-to-come-by funds to litigate the propriety of what BAC terms “de minimis” charges reveals the disingenuousness of BAC's argument. This argument also ignores the fact that the UST is the only party able to address and investigate concerns about nationwide systemic abuse. The UST's fundamental duty—to help safeguard the integrity of the bankruptcy process—coupled with allegations of nationwide abuse in the proof of claim process, establishes the existence of “good cause” to conduct the Rule 2004 examinations.

2. Failure to Secure an Order Authorizing a 2004 Examination:

BAC argues that the UST failed to file a motion under Rule 2004 and to secure an order authorizing a 2004 examination. While it is true that an examination under Rule 2004 is initiated by motion, some courts' local rules often alter this procedure. *See* 9 Lawrence P. King, Collier on Bankruptcy ¶ 2004.01[4]. Here, the local bankruptcy rules for the District of New Jersey apply to the UST's request for a 2004 examination. The relevant rule provides that, “[a]ny party in interest seeking to compel an examination or production of documents shall serve a subpoena pursuant to Fed. R. Bankr.P.2004(c) without filing a motion or obtaining an order authorizing such examination or document production.” D.N.J. LBR 2004–1(b). The UST's service of the subpoena was sufficient and no motion was required. In any event, BAC has had the opportunity to be heard and oppose the 2004 examination and the issuance of the subpoena by virtue of its motions to quash. In essence, BAC wants—and has obtained—judicial review of the subpoena prior to its compliance.

3. Time and Location of the Examination as “Unduly Burdensome”:

BAC objects to the subpoena on the grounds that the time and location of the examination and document production are inconvenient and unduly burdensome. A search of the California Secretary of State website reveals that BAC is headquartered in Calabasas, California, only several miles from the UST's office in Woodland Hills, California. Furthermore, BAC has not shown why any *one particular* subpoena is unduly burdensome. While it may be true that the UST's national effort may be keeping BAC busy, this does not, by itself, make every subpoena issued by the UST an undue burden on BAC. The UST has indicated that she is working with BAC representatives to reduce

[461 B.R. 831]

any burden, and BAC has cited no specific problem other than a generalized burden.

4. UST's Compliance with the Right to Financial Privacy Act (“RFPA”):

BAC states, without being specific, that the UST has failed to obtain the release required by the RFPA, 12 U.S.C. §§ 3401 *et seq*. The UST has filed a certificate of compliance with the RFPA in each of the relevant cases. The only evidence before the Court is the record that RFPA releases were obtained. BAC's conclusory objection that the UST has failed to comply with the RFPA is overruled.

C. BAC's Individual Objections to the Document Requests:

Each of BAC's six individual motions to quash raised the same objections to the same requests for production of documents as well as topics for individual examination. The first of BAC's objections is that the UST's requests are "vague and ambiguous" because they do not specify a document format. The definitions clause in the subpoenas clearly provides that "documents" encompass any format appearing in that definition (e.g. writings, electronic transmission, email, etc.).

BAC also objects to the requests on the grounds that they call for information protected by the attorney-client and/or work product privileges. However, as the UST correctly points out, the subpoenas' instructions clearly provide that BAC is not to produce any privileged documents, but to create a "privilege log" instead. This is the usual and customary practice and prevents the disclosure of any privileged communications. Moreover to the extent that BAC regards certain documents as "confidential" and "trade secrets," it is free to seek a protective order.

BAC objects to nearly all of the UST's requests for production of documents as "overly broad and unduly burdensome." That conclusory statement, without an elaboration, is insufficient to defeat the UST's request for discovery. *See, e.g., Walker v. Lakewood Condominium Owners Ass'n,* 186 F.R.D. 584, 587 (C.D.Cal.1999) ("Boilerplate, generalized objections are inadequate and tantamount to not making any objection at all."). Should BAC feel it necessary to elaborate on its objection and provide a more detailed reason for it, it can move for a protective order. Otherwise, all of these boilerplate objections border on the frivolous and are a waste of this Court's limited resources. Furthermore, the Court finds it curious that BAC regards as "burdensome" the production of documents relating to individual loans when those documents are supposed to be reviewed by BAC before it files its proofs of claim.

BAC objects to nearly all of the UST's requests for production of documents on the grounds that "there is no pending objection to claim or other contested matter upon which [each request] is grounded, accordingly [each request] is neither relevant to a contested issue in [each relevant case] nor reasonably calculated to lead to the discovery of admissible evidence." BAC's implication that a contested matter is required prior to the issuance of the subpoena under Rule 2004 is clearly incorrect. *See Dinubilo,* 177 B.R. at 941 ("... a Rule 2004 examination is normally employed at the pre-litigation stage of a bankruptcy case. Once a contested matter is pending, discovery requests are granted under Rule 9014 ..."); Collier on Bankruptcy ¶ 2004.01 [1]. The 2004 examination procedure clearly contemplates the absence of litigation. This has been accentuated as a result of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and

[461 B.R. 832]

Ashcroft v. Iqbal, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), because any complaint that might be filed would be required to contain specific allegations potentially only discoverable through 2004 examinations.[7] In addition, to the extent that BAC objects on relevancy grounds, this argument can be rejected because discovery under a 2004 examination need not be measured by the standards of ordinary discovery mechanisms.

CONCLUSION

For the foregoing reasons, each of BAC's six motions to quash is DENIED and its objections are overruled. The UST should lodge orders in accordance with this Memorandum.

Notes:

[1.] Roberta A. DeAngelis, United States Trustee for Region 3 in Newark, New Jersey.

[2.] Some of the BAC mortgages were junior mortgages as to which the debtors obtained a "lien strip."

3. BAC retained separate counsel for each case, including “Frankel Lambert,” “Fein, Such, Kahn & Shepard PC,” and “Prober & Raphael.”

4. *See, e.g.,* 11 U.S.C. §§ 110(j); 111; 303(g); 327(c); 330(a); 707; 727; 1102; 1104; 1112(c), etc.

5. *See Campbell v. Countrywide Home Loans, Inc.,* 545 F.3d 348 (5th Cir.2008) (examining Countrywide's proof of claim process with respect to pre-petition escrow payments); *In re Rodriguez,* 629 F.3d 136 (3d Cir.2010) (same).

6. BAC also argues that, because the fees and charges relate to junior mortgages to be “stripped” pursuant to the debtors' chapter 13 plans. these fees are insignificant and would likely be discharged anyway. However, BAC ignores the fact that the “lien stripping” is not complete until the court makes a valuation determination. The fees may also be paid in part if unsecured debt is being paid pursuant to the plan. In this sense, the fees remain relevant.

7. *See* Robert J. Keach et al., *Rule 2004 as a Pre–Litigation Tool in a Post–*Twombly/Iqbal *World: Part 1,* ABI Journal, Oct. 2010, at 28.

SCHWARTZER & IMES LAW FIRM PC
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

Lenard E. Schwartzer†
Jason A. Imes*†

*Also admitted in California
† Board Certified
Business Bankruptcy Law
American Board of Certification

2850 SOUTH JONES BOULEVARD, SUITE 1
LAS VEGAS, NEVADA 89146-5640
TELEPHONE: (702) 228-7590 FACSIMILE: (702) 892-0122
WEBSITE: WWW.S-MLAW.COM

September 5, 2022

I. Who Controls the Attorney-Client Privilege in Consumer Bankruptcy Cases?

Bankruptcy attorneys are familiar with *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 105 S.Ct. 1986 (1985), in which a unanimous Supreme Court held that "the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications," 471 U.S. at 358, 105 S.Ct. at 1996, "[b]ecause the attorney-client privilege is controlled, outside of bankruptcy, by a corporation's management, the actor whose duties most closely resemble those of management should control the privilege in bankruptcy, unless such a result interferes with policies underlying the bankruptcy laws." 471 U.S. at 351-52, 105 S.Ct. at 1992.

The Court rested its holding on the reasoning of *Butner v. United States*, 440 U.S. 48, 99 S.Ct. 914, 59 L.Ed.2d 136 (1979), that bankruptcy problems should be analyzed by the same principles that would govern analogous non-bankruptcy situations. Although the *Weintraub* Court expressly declined to extend its holding to individual debtors,[1] the Court did not state definitively that individual debtors retain their attorney-client privilege in bankruptcy. The Court left open the possibility that an individual debtor could lose his privilege to the trustee, stating

[1] *Weintraub* warns that its holding "has no bearing on the problem of individual bankruptcy":

> Under our holiday today, [the attorney-client privilege] passes to the trustee because the trustee's functions are more closely analogous to those of management outside of bankruptcy than are the functions of the debtor's directors. *An individual, in contrast, can act for himself; there is no "management" that controls a solvent individual's attorney-client privilege. If control over that privilege passes to a trustee, it must be under some theory different from the one that we embrace in this case.*

Weintraub, 471 U.S. at 356-57, 105 S.Ct. at 1995 (emphasis added).

that if "control over that privilege passes to the trustee, it must be under some theory different from the once we embrace in this case. Bankruptcy Courts are divided on their approach to this issue. There appear to be three different approaches to this issue.

Approach 1: A Trustee Can Always Waive Privilege

In re Smith, 24 B.R. 3 (Bankr. S.D. Fla. 1982) (citing O.P.M. Leasing Services, Inc., 13 B.R. 64 (S.D.N.Y.1981); *Citibank, N.A. v. Andros*, 666 F.2d 1192 (8th Cir.1981); and *In re Blier Cedar Co., Inc.*, 10 B.R. 993 (Bkrtcy.Me.1981). The Court held that the trustee has power to waive individual debtor's privilege. This court relied on two rationales in reaching its decision: first, that privilege is property of the estate that passes to the trustee along with debtor's other assets, and second, that the trustee must have the power to waive the privilege in order to fulfill his duties as a representative of the estate. The Trustee was requesting the files of attorneys who represented the debtor in wrongful death action, which resulted in a $4,000,000 judgment against him that precipitated his bankruptcy. The Court in *Smith* failed to differentiate the treatment of individuals and corporations.

Approach 2: A Trustee Can Never Waive Privilege

In re Butcher, 38 B.R. 796, 801 n.9 (Bankr. E.D. Tenn. 1984) (trustee may not waive individual debtor's privilege)

In re Hunt, 153 B.R. 445 (Bankr. N.D. Tex. 1992) ("Because allowing the Independent Trustees to waive the Hunts' privileges contradicts the purposes and expectation interests behind the attorney-client privilege, as well as the dicta and underlying logic of *Weintraub*, this Court holds that only the Hunts may waive whatever attorney-client privileges they hold regarding pre-bankruptcy communications.")

McClarty v. Gudenau, 166 B.R. 101 (E.D. Mich. 1994) ("fundamental purpose of the privilege could be eroded" if a trustee was allowed to waive a debtor's privilege). Following *Hunt*, the Court denied the trustee access to the debtor's pre-bankruptcy attorney's personal injury defense file which the trustee wanted to use to sue the attorney.

In re Ginzburg, 517 B.R. 175 (Bankr. C.D. Cal. 2014) (*citing Swidler & Berlin v. United States*, 524 U.S. 399, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998)) The Court held that "[a] careful reading of *Swidler* dictates that the balancing of interests urged by the Trustee is not to be recognized as an exception to "one of the oldest, recognized privileges in the law." The Trustee had filed a complaint objecting to the transfer of property by the debtor to his ex-wife and was seeking to obtain all information surrounding the Marital Agreement and the characterization of the

Subject Property. The Trustee had served a deposition subpoena on the Debtor's divorce attorneys.

Approach 3: The Balancing Approach

In re Fairbanks, 135 B.R. 717 (Bankr.D.N.H.1991) (finding "extraordinary circumstances" existed where the debtor had fled the jurisdiction and allowed the Chapter 7 trustee to exercise the attorney-client privilege). It held: "This Court concludes that, with regard to the Trustee's recovery of Estate assets in the nature of the Debtor's pre-petition civil actions, the attorney-client privilege asserted by the individual Chapter 7 Debtor does not bar the Trustee from access to and use of the documents held by Debtor's counsel."

Moore v. Eason (In re Bazemore), 216 B.R. 1020 (Bankr. S.D. Ga. 1998) (the court balanced the harm to the defendant-debtor as a result of waiving privilege, against the benefit to the bankruptcy estate). The trustee in a Chapter 7 individual bankruptcy had the authority to waive the attorney-client privilege of the debtor and require the debtor's insurance company selected attorney to be deposed regarding his representation of the debtor in the state court action. The examination would aid the trustee in determining whether the bankruptcy estate of the debtor had a cause of action against the attorney and the insurance company for malpractice or bad faith.

Foster v. Hill (In re Foster), 217 B.R. 631 (Bkrtcy.Colo.1997) *partially overruled*, 188 F.3d 1259 (10th Cir. 1999) ("the right to assert, or to waive, the attorney-client privilege, passes from the debtor to a bankruptcy trustee where ... it involves recovery of assets of the estate in the nature of pre-petition civil action."). The trustee was requesting the turnover of recorded information relating to the debtor's property and financial affairs in order to pursue causes of actions for breach of promissory note, breach of consulting agreement, breach of personal guarantee, fraud in the inducement and general fraud. On appeal, the 10th Circuit remanded the case to the bankruptcy court "to allow the bankruptcy court to review the disputed documents *in camera*. That court must determine whether any of the documents are attorney-client privileged. If so, it must further determine (a) whether the Fifth Amendment barred it from compelling Reinhart's act of producing the document, and (b) whether the trustee's need for the information in this case outweighed any harm to Foster and to the interests served by the attorney-client privilege."

In re Rice, 224 B.R. 464 (Bkrtcy.D.Or.1998) (finding the debtor's attorney-client privilege related to a personal injury lawsuit, which may be exempt property, did not pass to the trustee but recognizing that the decision must be made on the equities of the particular facts and circumstances of each case). The Court required the debtor's counsel to prepared very detailed privilege logs of records and work-product documents not turned over to the trustee for later consideration of turnover.

In re Miller, 247 B.R. 704 (Bankr.N.D.Ohio 2000) (using the balancing approach and not allowing the trustee access to debtor's counsel file when the trustee is seeking to revoke discharge).

In re Courtney, 372 B.R. 519 (Bankr. M.D. Fla. 2007) (a trustee could waive an individual debtor's attorney-client privilege based on balancing of benefits and harms). After balancing the harms and benefits, the court allowed the trustee to waive the privilege, holding that the benefits to the debtor's estate outweighed any harm to the debtor. The records requested were the files of a law firm representing the debtor in connection in an automobile accident case which the debtor lost at pre-bankruptcy trial. The examination would have aided the trustee in determining whether the bankruptcy estate of the debtor had a cause of action against the attorney and insurance company for bad faith or malpractice.

In re Pearlman, 381 B.R. 903 (Bankr. M.D. Fla. 2007) (Chapter 11 Trustee given ability, under balancing test, to waive the debtor's attorney-client privilege because the information was requested to assist the trustee in the performance of his duties to locate and administer assets).

II. Documents provided to attorney to prepare petition and schedules

Several courts have dealt with documents provided by a debtor to bankruptcy counsel for preparation of the debtor's petition and schedules based on the fact that these documents were provided in order to properly disclose information to the trustee and creditors.

In re Wolbert, No. 09-30765, 2010 WL 8971772, at *3 (Bankr. W.D.N.C. Feb. 17, 2010):

> Those few courts that have considered this question have generally concluded that the attorney-client privilege does not extend to information disclosed by a prospective debtor to an attorney for inclusion in their bankruptcy petition and schedules. See Hon. Barry Russell, *Bankruptcy Evidence Manual*, Article V: Privileges, Rule 501: General Rule, BKRMANUAL § 501:18 (citing *In re Eddy*, 304 B.R. 591, 596 (Bankr.D.Mass.2004); *U.S. v. White*, 950 F.2d 426, 430 (7th Cir.1991); *In re French*, 162 B.R. 541, 548 (Bankr.D.S.D.1994)). Nor does it shelter advice given in reply by the attorney.

In re French, 162 B.R. 541, 548 (Bankr.D.S.D.1994) ("[t]here is no expectation that information disclosed for the purpose of assembling a bankruptcy petition and supporting schedules will be held confidential.") *In re Stoutamire*, 201 B.R. 592, 596 (Bankr. S.D. Ga. 1996)

In re Eddy, 304 B.R. 581 596 (Bankr.D.Mass. 2004) ("A debtor has no reasonable expectation that information will be kept confidential if it must be disclosed in bankruptcy filings.")

U.S. v. Naegele, 468 F.Supp.2d. 165, 171 (D.D.C.2007) (draft bankruptcy filings are non-privileged)

In re Wilkerson, 393 B.R. 734, 743 (Bankr.D.Colo. 2007) (completed pre-bankruptcy questionnaire prior to bankruptcy filing is non-privileged)

In re Myers, 382 B.R. 304, 310–11 (Bankr. S.D. Miss. 2008) ("When information is disclosed by a debtor to his bankruptcy attorney for the purpose of preparing and assembling the schedules and supporting documents, there is no reasonable expectation that the attorney will keep the information confidential because it will be disclosed on documents publicly filed with the bankruptcy court.")

In re Tarkington, 10–cv–00012–8, 2010 WL 1416813, at *3 (Bankr.E.D.N.C. Apr. 2, 2010) ("Attorney-client privilege does not extend to information disclosed during the preparation of a bankruptcy petition or schedules.")

In re McDowell, 483 B.R. 471, 489 (Bankr. S.D. Tex. 2012) ("this Court adopts the reasoning of *Stoutamire* in holding that the attorney-client privilege *may* attach to intake interview communications, intake questionnaires, and draft bankruptcy schedules.")

III. Debtor in Possession Communications and Documents

The courts are more likely to require production of a portion of the individual debtor's attorney's files to a trustee when the debtor previously was a debtor in possession.

Whyte v. Williams (In re Williams), 152 B.R. 123 (Bankr.N.D.Tex.1992), *Ramette v. Bame* (*In re Bame*), 251 B.R. 367 (Bankr.D.Minn.2000) (holding that the Chapter 7 trustee succeeded to privilege regarding all communications that were in regards to bankruptcy estate and is empowered to waive, any attorney-client privilege that attaches to **post petition** communications between the Debtor, while a debtor in possession in the Chapter 11 case, and his Chapter 11 counsel)

In re Eddy, 304 B.R. 591 (Bankr.D.Mass. 2004) ("Chapter 7 trustee holds, and is empowered to waive, any attorney-client privilege that attaches to **post petition** communications between the Debtor, while a debtor in possession in the Chapter

11 case,"). This is based on the fact that an individual as a debtor in possession is a fiduciary to the bankruptcy estate and its creditors.

IV. Non-Bankruptcy Exceptions to Attorney Client Privilege

As in non-bankruptcy cases, the communications with counsel can lose their privilege when the client consults an attorney to further a continuing or contemplated criminal or fraudulent scheme. *United States v. Zolin*, 491 U.S. 554, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989); *In re International Systems and Controls Corporation Securities Litigation*, 693 F.2d 1235 (5th Cir.1982); In re Hunt, 153 B.R. 445 (Bankr.N.D.Tex.1992); *In re Warner*, 87 B.R. 199, 201-2 (Bankr.M.D.Fla.1988); *In re Campbell*, 248 B.R. 435, 439-440 (Bankr.M.D.Fla. 2000). This could apply to bankruptcy fraud.

V. Resources

For a review of the law as of 1985 see Neil E. Herman, *Who Controls the Attorney-Client Privilege in Bankruptcy?*, 13 Hofstra L.Rev. 549 (Spring, 1985); and William R. Mitchelson, Jr., Comment, *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy*, 51 U. Chi. L.Rev. 1230 (1984). More recent cases are described in Rebecca Leaf, *Trustee's Ability to Waive Individual Debtor's Attorney-Client Privilege*, St. John's Bankruptcy Research Library, No. 18 (2009).

IV. Question:

Is the refusal of a debtor to waive the attorney-client privilege grounds for objecting to discharge based on concealing documents from the trustee? [Bankruptcy Code 727(a)(2)]

Shaw & Hanover PC
Bankruptcy, Creditor Rights & Related Litigation

SERVING ALL OF SOUTHERN CALIFORNIA
42-600 Cook Street, Ste. 210
Palm Desert, CA 92211
Telephone: (760) 610-0000
Fax: (760) 687-2800
www.shaw.law

[Date]

SENT VIA U.S. PRIORITY MAIL
ABC Lender ("Lender/Servicer")
Attn: Requests for Information
123 Lane
Palm Desert, CA 92211
Priority No. (ALWAYS TRACK IT)

ABC Lender ("Lender/Servicer")
Attn: Agent for Service Process
123 Lane
Palm Desert, CA 92211
Priority No. (ALWAYS TRACK IT)

RE: Request for Information Pursuant to 12 C.F.R. § 1024.36 of Regulation X
Borrower(s):
Property Address ("Property"):
Mortgage Loan No. ("Loan"):
Trustee Sale No. ("TSN") *(If applicable*):

Dear *(Lender)*:

This is a Request for Information ("RFI") related to your servicing of the mortgage loan/Loan of the above-named Borrower(s) who I presently represent. This RFI is sent pursuant to the Real Estate Settlement Procedures Act ("RESPA"), subject to the response period set out in Regulation X, 12 C.F.R.§ 1024.36(d)(2)((i)(A), and a request under § 1641(f)(2) of the Truth in Lending Act ("TILA"). All references herein are to Regulation X of the Mortgage Servicing Act as amended by the Consumer Financial Protection Bureau pursuant to the Dodd Frank Act.

The written authority of the Borrower(s) to my law firm for this RFI is attached hereto and incorporated herein by this reference. *See* attached Power of Attorney ("POA") signed by the Borrower(s).

Please produce a complete copy of the mortgage servicing file relating to the above Loan. For the purposes of this RFI, the term "Mortgage Servicing File" means all loan documents and information (including all document images) received or obtained through and as a result of your servicing of this mortgage loan, which may be maintained in writing or by other electronic means. To the extent available, each "Mortgage Servicing File" should include the following:

a. The original Note;
b. Mortgage or Deed of Trust;
c. All documentation relating to the original Note and Mortgage or Deed of Trust;

d. Any indorsements and transfers of the Note and Assignments of the Mortgage or Deed of Trust;
e. Any correspondence by letter, email or telephonic means (including transcripts of telephone calls) between any servicer of the Loan and Borrower(s);
f. A complete life of loan history that includes all transactions regarding this Loan (payments, advances, fees, charges, inspections, etc.);
g. Copies of invoices and other proof of advances, costs, inspections, etc., paid to a third party;
h. Collection letters and notices to the Borrower(s);
i. All foreclosure correspondence or form notices to the Borrower(s);
j. All collection notes related to the servicing of the mortgage loan;
k. All Loan Modification and Loss Mitigation Options made available to/communicated to the Borrower(s) including the qualification criteria for each such program;
l. A current itemized payoff statement for the Loan;
m. The full name and address and contact information for the current owner of the Note;
n. Any and all estimates of value for the mortgaged real estate/Property produced by you or any third-party within the past 18 months;
o. If a separate ledger was kept for this Loan for bankruptcy purposes, an itemized list of all payments and with an explanation of how all payments were applied.

Pursuant to 12 C.F.R. § 1024.36(c) of Regulation X, ***you must within five (5) days*** (excluding legal public holidays, Saturdays and Sundays) provide our office with a response to this RFI acknowledging receipt of this information request. Pursuant to 12 C.F.R. § 1026.36(c)(3), you "must provide an accurate statement of the total outstanding balance that would be required to pay the consumer's obligation in full as of a specified date" ***within a reasonable time*** after receipt of this request, yet under no circumstances are you to fail to provide the requested payoff statement ***within seven (7) business days of receipt*** of this request.

Pursuant to 12 C.F.R. § 1024.36(d)(ii)(2)(A), ***not later than ten (10) days*** (excluding public holidays, Saturdays and Sundays) after you receive this RFI you must provide us with the identify of, and address or other relevant contact information for the owner of the mortgage loan identified herein.

For all of the other information requested herein and pursuant to 12 C.F.R. § 1024.36(d)(ii)(2)(B), ***you must respond not later than thirty (30) days*** (excluding legal public holidays, Saturdays and Sundays) after you receive this RFI.

Thank you for your immediate time and attention to this matter.

Sincerely,
SHAW & HANOVER, PC

/s/Summer Shaw

Summer Shaw, Esq.

Enclosures: POA
Cc: Client
SMS/jb

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[DATE]

SENT VIA U.S. PRIORITY MAIL
ABC Creditor ("Debt Collector")
Attn: Requests for Information
123 Lane
Palm Desert, CA 92211
Priority No. (ALWAYS TRACK IT)

ABC Creditor ("Debt Collector")
Attn: Agent for Service Process
123 Lane
Palm Desert, CA 92211
Priority No. (ALWAYS TRACK IT)

RE: - Request for Information Pursuant to the Federal Fair Debt Collection Practices Act ("FDCPA")
- My Client, [*client's name*]

Dear [Debt collector name]:

I am responding to your contact to my client, **[*client's name*]** ("Client"), about a debt you are trying to collect. The written authority of the Borrower(s) to my law firm for this RFI is attached hereto and incorporated herein by this reference. *See* attached Power of Attorney ("POA") signed by the Borrower(s).

You contacted my Client by [***phone/mail***], on [***date***] and identified the debt as [***any information given about the debt***]. Please supply the information below so that we can be fully informed:

A. Why you think Client owes the debt and to whom Client owes it to, including:

1. The name and address of the creditor to whom the debt is currently owed, the account number used by that creditor, and the amount owed;
2. If this debt started with a different creditor, provide the name and address of the original creditor, the account number used by that creditor, and the amount owed to that creditor at the time it was transferred. When you identify the original creditor, please provide any other name by which my Client might know them, if that is different from the official name;
3. In addition, tell me when the current creditor obtained the debt and who the current creditor obtained it from and provide any assignment/document showing the current creditor lawfully and properly obtained the debt from the original creditor;

4. Provide verification and documentation that there is a valid basis for claiming that my client is required to pay the debt to the current creditor. For example, can you provide a copy of the written agreement that created my Client's original requirement to pay?;
5. If you are asking that my Client pay a debt that somebody else is or was required to pay, identify that person; and
6. Provide verification and documentation about why this is a debt that my Client is required to pay.

B. <u>The amount and age of the debt, including:</u>

1. A copy of the last billing statement sent to my Client by the original creditor;
2. State the amount of the debt when you obtained it, and when that was;
3. If there have been any additional interest, fees or charges added since the last billing statement from the original creditor, provide an itemization showing the dates and amount of each added amount;
4. In addition, explain how the added interest, fees or other charges are expressly authorized by the agreement creating the debt or are permitted by law;
5. If there have been any payments or other reductions since the last billing statement from the original creditor, provide an itemization showing the dates and amount of each of them;
6. If there have been any other changes or adjustments since the last billing statement from the original creditor, please provide full verification and documentation of the amount you are trying to collect;
7. Explain how that amount(s) above were calculated;
8. In addition, explain how the other changes or adjustments are expressly authorized by the agreement creating the debt or permitted by law;
9. Tell me when the creditor claims this debt became due and when it became delinquent;
10. Identify the date of the last payment made on this account;
11. Have you made a determination that this debt is within the statute of limitations applicable to it?; and
12. Tell me when you think the statute of limitations expires for this debt, and how you determined that.

C. <u>Details about your authority to collect this debt.</u>

1. Does your firm have a debt collection license from my Client's state? If not, say why not. If so, provide the date of the license, the name on the license, the license number, and the name, address and telephone number of the state agency issuing the license.
2. If you are contacting my Client from a place outside my Client's state, does your firm have a debt collection license from that place? If so, provide the date of the license, the name on the license, the license number, and the name, address and telephone number of the state agency issuing the license.

We need to hear from you to make an informed decision about your claim that my Client owes you/your client money. I am open to communicating with you for this purpose. So that my Client is not put at any disadvantage, in the meantime, please treat this debt as being in dispute and under discussion between us.

In addition to providing the information requested above, please let me know whether you are prepared to accept less than the balance you are claiming is owed. If so, please tell me in writing your offer with the amount you will accept to fully resolve the account.

Thank you for your cooperation and immediate time and attention to this matter.

Sincerely,
SHAW & HANOVER, PC

/s/Summer Shaw

Summer Shaw, Esq.

Enclosures: POA
Cc: Client
SMS/jb

Faculty

Hon. Martin R. Barash is a U.S. Bankruptcy Judge for the Central District of California in Woodland Hills and Santa Barbara, sworn in on March 26, 2015. He brings more than 20 years of legal experience to the bench. Prior to his appointment, Judge Barash had been a partner at Klee, Tuchin, Bogdanoff & Stern LLP in Los Angeles since 2001, where he represented debtors and other parties in chapter 11 cases and bankruptcy litigation. He first joined the firm as an associate in 1999. Earlier in his career, Judge Barash worked as an associate of Stutman, Treister & Glatt P.C. in Los Angeles. He also has served as an adjunct professor of law at California State University, Northridge. Following law school, Judge Barash clerked for Hon. Procter R. Hug, Jr. of the U.S. Court of Appeals for the Ninth Circuit from 1992-93. He is a former ABI Board member, for which he served on its Education Committee and currently serves on its Committee for Diversity, Equity, and Inclusion, and he is a former member of the Board of Governors of the Financial Lawyers Conference. In addition, he is a judicial director of the Los Angeles Bankruptcy Forum and a frequent panelist and lecturer on bankruptcy law. He also is a co-author of the national edition of the *Rutter Group Practice Guide: Bankruptcy*. Judge Barash received his A.B. *magna cum laude* in 1989 from Princeton University and his J.D. in 1992 from the UCLA School of Law, where he served as member, editor, business manager and symposium editor of the *UCLA Law Review*.

Jody A. Corrales is a shareholder in the Tucson, Ariz., office of DeConcini McDonald Yetwin & Lacy, P.C. where she focuses her practice on bankruptcy and creditors' rights. She has extensive experience in bankruptcy law and has been appointed to serve as a subchapter V panel trustee for the District of Arizona. Ms. Corrales is Board Certified in Consumer Bankruptcy Law by the American Board of Certification and is certified as a Bankruptcy Specialist by the Arizona Board of Legal Specialization. She was named to the 2020 Class of ABI's "40 Under 40" and has been recognized as a "Rising Star" in the Bankruptcy and Creditor-Debtor Rights Law category of *Southwest Super Lawyers* since 2013, when she was nominated to participate in the National Conference of Bankruptcy Judges (NCBJ) Next Generation Program. She currently serves on the Ninth Circuit Conference Executive Committee following a stint as co-chair of the Arizona delegation of Ninth Circuit Lawyer Representatives. Ms. Corrales devotes considerable time to *pro bono* endeavors, frequently assisting self-represented litigants in bankruptcy court and federal district court. In 2014, she was awarded the inaugural Hon. Eileen W. Hollowell *Pro Bono* Attorney of the Year Award from the U.S. Bankruptcy Court for the District of Arizona. Ms. Corrales received her J.D. from the University of Arizona James E. Rogers College of Law.

Lenard E. Schwartzer is a senior partner with Schwartzer & Imes Law Firm PC in Las Vegas and has more than 40 years of experience representing bankruptcy trustees, debtors, debtors in possession and creditors in bankruptcy cases in Nevada, California and New York. He also has been a chapter 7 panel trustee since 2005 and has been appointed in thousands of cases, and he has represented receivers in Nevada District Court and U.S. District Court. Mr. Schwartzer has taught numerous seminars on bankruptcy and bankruptcy litigation. He served on the Local Bankruptcy Rules Committee for the U.S. District Court for Nevada, and he founded and co-chaired the Southern Nevada Association of Bankruptcy Attorneys. Previously, Mr. Schwartzer was a senior partner of Schwartzer & McPherson Law Firm, a member of Mangels, Butler Marmaro & O'Reilly LLC, and a partner and chairman of the bankruptcy department of Hale, Lane, Peek, Dennison, Howard & Anderson, a statewide Nevada law firm (now part of Holland & Hart). He is admitted to practice in Nevada and California, and before the U.S. Tax Court, the U.S. Court of Appeals for the Ninth Circuit and the U.S. Supreme Court. Mr. Schwartzer received his B.S. in banking and finance from New York University School of Commerce in 1971 and his J.D. from Union University Albany Law School in 1974, where he was a member of the Order of the Coif and notes editor of the *Albany Law Review*.

Summer M. Shaw is the managing attorney at Shaw & Hanover PC, a bankruptcy boutique law firm serving Southern California with its main office located in Palm Desert, Calif. She is a Bankruptcy Specialist certified by the State Bar of California and represents debtors, creditors and trustees in chapter 7, 11, 12 and 13 bankruptcy proceedings and enjoys litigating matters before the U.S. Bankruptcy Courts in the Central District of California. Ms. Shaw is a very active member of the bankruptcy bar and has served as a professor of bankruptcy law at the California Desert Trial Academy (CDTA). She also served as co-chair of ABI's first Consumer Practice Extravaganza in 2021, and she served as an education co-chair for the Consumer Education Programs at the Annual California Bankruptcy Forum Conferences for 2016 and 2019. In addition, she has been invited to speak at various education programs covering secured debt litigation, small business bankruptcies, individual chapter 11s, and bankruptcy law and crossover issues with civil litigation, family law, probate law and criminal law. Ms. Shaw is admitted to practice in all state and federal courts in California as well before the Ninth and Tenth Circuit Court of Appeals, and before the U.S. District Court for the Central District of California. She enjoys volunteering her time as often as possible through her local bar association's "Lawyer in the Library" program, assisting veterans through the Veterans Legal Institute, and volunteering her time to help educate new attorneys in the bankruptcy community whenever possible. Ms. Shaw was a selected as a member of the inaugural class of ABI's "40 Under 40" in 2017, and in 2018, she received the National Association of Consumer Bankruptcy Attorney's National Distinguished Service Award. She has also been named one of *Palm Springs Life Magazine*'s Top Bankruptcy Lawyers and was honored to be a part of the 2015 and 2016 Central District of California Bankruptcy Court's *Pro Bono* Honor Roll. Ms. Shaw received her B.S. in political science with a minor in law and society from the University of California, Riverside and her J.D. from Western State College of Law.