Dated: July 31, 2014
The following is SO ORDERED:

David S. Kennedy
UNITED STATES CHIEF BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re

B. J. Wade, **Case No. 13-21432-K**

Debtor. **Chapter 7**

S.S. No. xxx – xx – 2004

MEMORANDUM AND ORDER RE MR. B.J. WADE'S "RENEWED MOTION FOR PROTECTIVE ORDER REGARDING TRUSTEE'S 2004 EXAMINATION OF DEBTOR" COMBINED WITH NOTICE OF THE ENTRY THEREOF

Mr. B. J. Wade, the above-named Chapter 7 debtor ("Mr. Wade"), filed the instant motion styled "Renewed Motion for Protective Order Regarding Trustee's 2004 Examination of Debtor." This motion seeks, among other things, to prohibit Glassman, Edwards, Wyatt, Tuttle & Cox, P.C. (the "Law Firm"), a party in interest, from participating in Ms. Lynda F. Teems' (the Chapter 7 "Trustee") FED. R. BANKR. P. 2004 examination of Mr. Wade (the "2004 Exam"). Additionally, the motion seeks to prohibit the Trustee from furnishing requested information, documents, and transcripts produced from the 2004 Exam

to the Law Firm as ordinarily directed under 11 U.S.C. § 704(a)(7). The Law Firm objects to Mr. Wade's renewed motion.

Previously, both the Law Firm and the Trustee filed motions seeking Rule 2004 examinations of Mr. Wade. Mr. Wade sought to quash the Law Firm's Rule 2004 motion and obtain a protective order regarding the Trustee's motion. The Law Firm has filed two civil action lawsuits, a removed pre-bankruptcy state court complaint[1] and a post-bankruptcy dischargeability complaint,[2] naming Mr. Wade as the defendant in both actions. The basis for Mr. Wade's prior responses to the two motions for Rule 2004 examinations focused on limiting the Law Firm's discovery regarding the two adversary proceedings to the traditional discovery process applicable in adversary proceedings. See FED. R. BANKR. P. 7026 – 7037. Mr. Wade strongly believes that the court should compel arbitration regarding the removed complaint and that the Law Firm's discovery at this time should be limited to the question of arbitration and not the merits of the complaint.

The court, upon notice to all parties in interest, previously heard and determined all matters that related to both motions for the Rule 2004 examinations. By a prior order entered on August 13, 2013,[3] the court, attempting to balance the competing and countervailing interests of Mr. Wade, the Law Firm, and the Trustee, fashioned a procedure that allowed the Trustee to conduct her 2004 Exam of Mr. Wade with the Law Firm essentially piggybacking off it.[4] The Law Firm is allowed to attend and observe the 2004 Exam(s) and review all documents produced at the examination(s), but is prohibited from directly examining Mr. Wade pursuant to Rule 2004. Compare 11 U.S.C. § 704(a)(7). The Trustee's 2004 Exam is not limited by the court's prior order, and the Trustee is permitted, among other things, to examine Mr. Wade concerning matters that relate to both the removed state court complaint and the bankruptcy

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[1] See Adversary Proceeding No. 13-00197 herein.

[2] See Adversary Proceeding No. 13-00208 herein.

[3] See Docket # 91.

[4] The United States Trustee also was allowed to piggyback off the Trustee's 2004 Exam. No other parties were allowed to participate at the 2004 Exam without the court's authorization.

dischargeability complaint. The Law Firm's observation of the examination and review of all documents produced at the examination, likewise, is not limited. However, the court's prior order did quash the Law Firm's motion to conduct its own, independent Rule 2004 examination. If the Law Firm desires to pursue its own discovery, independent of the Trustee's 2004 Exam, it is required to pursue such discovery by means of the ordinary, traditional discovery rules governing adversary proceedings and not through its own, independent Rule 2004 examination. Again, and it is emphasized, the court is attempting to balance the competing and countervailing interests of these parties while fostering a discovery process aimed to secure the just, speedy, and inexpensive determination of this case and the related adversary proceedings as contemplated in FED. R. BANKR. P. 1001.

On May 22, 2014, the Trustee began her 2004 Exam of Mr. Wade with the Law Firm also being present. Prior to the examination, Mr. Wade furnished the Trustee "thousands" of documents. At the 2004 Exam, an extensive transcript of 148 pages was made covering numerous matters related to Mr. Wade's Chapter 7 bankruptcy case. However, once the Trustee began to question Mr. Wade regarding matters that may be associated with the removed state court complaint, Mr. Wade, by counsel, objected to the Trustee's questioning while the Law Firm was observing. This objection could not be resolved by the parties and is now presented to the court by Mr. Wade's instant motion.

The court's prior order dated August 13, 2013, resolved the requests for relief that are presented in Mr. Wade's renewed motion. The August 13, 2013 order was timely appealed by Mr. Wade and is currently pending before the United States District Court for the Western District of Tennessee. Mr. Wade's notice of appeal[5] listed the issues for appeal concerning matters involving abstention, remand, and relief from the automatic stay.[6]

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[5] Docket # 21 in Adversary Proceeding No. 13-00197.

[6] "The Bankruptcy Court set forth the issues for appeal on page 2 in the first, second, and fifth bullet points." (A.P. No. 13-00197 # 91 at 2). The courts referenced bullet points (7 total) are listed in this footnote below:

"[1.] Motion of the above-named chapter 7 debtor/defendant, B.J. Wade ("Mr. Wade"), in Adv. Proc. No. 13-00197 for mandatory proceeding abstention under 28 U.S.C. § 1334(c)(2) or alternatively for permissive proceeding abstention under 28 U.S.C. § 1334(c)(1) and FED. R. BANKR. P. 5011(b), for remand of Adv. Proc. No. 13-00197

Upon sifting through Mr. Wade's renewed motion and the case record as a whole, the court believes his renewed motion essentially seeks to reconsider the court's prior August 13, 2013 order and, thereby, is in the nature of a FED. R. BANKR. P. 9024 (i.e., FED. R. CIV. P. 60) motion seeking relief from the court's August 13, 2013 order. *See* FED. R. BANKR. P. 9024 and FED. R. CIV. P. 60. Under a Rule 9024 (i.e., Rule 60) analysis, the court believes that there are no reasonable grounds to grant relief from its prior order. There is no mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, fraud, misrepresentation, or misconduct. *See* FED. R. CIV. P. 60(b)(1)-(3). The prior order is not void. *See* FED. R. CIV. P. 60(b)(4). Furthermore, there appears to be no cause, equity, or reason under FED. R. CIV. P. 60(b)(5)-(6). As facts and circumstances have not changed, the court's August 13, 2013 order is controlling regarding the Trustee's 2004 Exam. As noted earlier, an appeal on this prior order taken as to the matters concerning abstention, remand, and relief from the automatic stay. For sake of clarity, the court has reviewed its prior order and the case record as a whole and offers the following further discussion.

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regarding the removed Shelby County Tennessee Chancery Court ("Chancery Court") under 28 U.S.C. § 1452(b) and FED. R. BANKR. P. 9027(d), and the objections thereto filed by the plaintiff, Glassman, Edwards, Wyatt, Tuttle, & Cox, P.C. ("Law Firm");

[2.] Motion of Mr. Wade in Adv. Proc. No. 13-00208 seeking permissive proceeding abstention under 28 U.S.C. § 1334(c)(1) and the Law Firm's objection thereto regarding the Law Firm's non-dischargeability complaint under 11 U.S.C. § 523(a)(2), (4), and (6);

[3.] Motion of Mr. Wade to quash the Rule 2004 examination order previously obtained by the Law Firm in accordance with Local Bankruptcy Rule ("LBR") 2004(a)(1) and to abstain from discovery issues involving the Law Firm and the objection thereto filed by the Law Firm;

[4.] Bifurcated hearing on Mr. Wade's motion to amend the Rule 2004 examination order previously obtained by the Chapter 7 Trustee in accordance with LBR 2004(a)(1) and for protective order and the objection thereto filed by the Law Firm;

[5.] Bifurcated hearing on Mr. Wade's motion to modify the § 362(a) automatic stay, the objection thereto filed by the Law Firm, and Mr. Wade's response to the Law Firm's objection;

[6.] Motion of the United States Trustee for Region 8 ("U.S. Trustee") seeking to extend the time to object to Mr. Wade's discharge under 11 U.S.C. § 727(a) and FED. R. BANKR. P. 4004(b)(1); and

[7.] Pretrial conferences on the Law Firm's two above-referenced complaints filed by the Law Firm against Mr. Wade, being Adv. Proc. Nos. 13-00197 and 13-00208." (Case No. 13-21432 #91 at 2-3) (unnumbered bullets replaced by number bullets).

Further Discussion on Rule 2004 Examinations

Rule 2004 allows an examination of any entity including the debtor by any party in interest. This 2004 exam "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." This Rule 2004 exam procedure is nothing new, and, indeed, time and rule promulgating under 28 U.S.C. § 2075 actually have broadened its application. Section 21(a) of the Bankruptcy Act of 1898 (the "1898 Act") provided "any designated person, including the bankrupt, … to be examined concerning the acts, conduct, or property of a bankruptcy whose estate is in process of administration under this Act." This prior examination procedure is the basis for the modern/current Rule 2004 exam. Examining the "acts, conduct, or property" pursuant to Rule 2004 arises directly from Section 21(a) of the 1898 Act. Expanding upon the former Section 21(a), the modern Rule 2004 exam allows further examination of the "liabilities and financial condition of the debtor" and concerns not only the "administration" but also the "debtor's right to a discharge." Therefore, this court finds that the rules and procedures governing examinations under the former Section 21(a) of the 1898 Act apply under the modern Rule 2004 exam, and those rules and procedures are even broader today than originally provided under the 1898 Act.

This finding is helpful because the Sixth Circuit Court of Appeals provided extensive discussion on the 1898 Act examination procedures. The Sixth Circuit previously articulated the following scope of examination:

> The examination is in the nature of a discovery proceeding. It provides the means for a thorough investigation into the affairs of the bankrupt calculated to lead to the discovery and recovery of his assets and a determination of the amount of his indebtedness. The relevancy of questions propounded is not to be determined by standards applied to the trial of issues, but by the broader test of relevancy applied under Rule 26 of the Federal Rules of Civil Procedure. The trustee may inquire at large and without limit except in cases of plain abuse, to be determined in the Court's discretion. The inquiry may even be a fishing expedition. It is no objection that it leads to the prosecution of an action against the witness. … the examination … may be exploratory and groping; and it may be as searching as to him appears proper.

Chereton v. U.S., 286 F.2d 409, 413 (6th Cir. 1961), cert denied 366 U.S. 924 (1961), (citations omitted); *see also Ulmer v. U.S.*, 219 F. 641, 645 (6th Cir. 1915). "The object of the examination of the bankrupt and other witnesses to show the condition of the estate is to enable the court to discover its extent and whereabouts, and to come into possession of it, that the rights of creditors may be preserved." *Cameron v. U.S.*, 231 U.S. 710, 717 (1914).

Here, no party disputes that the Chapter 7 Trustee may exercise this broad Rule 2004 exam right; however, the Mr. Wade objects to the Law Firm exercising the same rights or piggybacking off the Chapter 7 Trustee's rights because he believes the pending adversary proceeding totally restricts the Law Firm to conducting discovery through the traditional discovery rules found and incorporated by, for example, Part VII of the FED. R. BANKR. P., 7026 through 7037. Some courts call this limitation the "Pending Proceeding Rule" or "Pending Litigation Rule." *See*, *for example, In re Glitnir banki hf.*, 2011 WL 3652764, *4 - *5 (Bankr. S. D. N. Y. 2011). Furthermore, Mr. Wade additionally seeks to prevent the Law Firm's discovery under the adversary proceeding rules because he believes the litigation is subject to arbitration and the Tennessee Supreme Court has previously limited discovery in this case to questions of arbitrability and not the case at large.

The text of Rule 2004 provides no basis for a Pending Proceeding Rule, rather it is a court created doctrine. A Rule 2004 exam serves a standalone purpose apart from pending adversary proceedings or other litigation because it allows parties in interest to investigate the debtor and discovery information and/or assets that will further the administration of the case or lead to objections or exceptions to the debtor's discharge. Ultimately, the court holds discretion on whether to permit a Rule 2004 exam under the circumstances. *See, for example, In re International Fibercom, Inc.*, 283 B.R. 290, 292-93 (Bankr. D. Ariz. 2002); *In re M4 Enters., Inc.*, 190 B.R. 471 (Bankr. N.D. Ga. 1995). There is no bright line prohibition against Rule 2004 exams being conducted concurrently with pending litigation. Instead, the bankruptcy court is tasked with weighing the facts and circumstances of each case to discretionarily determine the appropriate discovery mechanisms that will secure a just, speedy, and inexpensive determination of the overall case and proceedings. Duplicitous (and otherwise expensive) discovery

should be avoided where possible. "The court should deny the examination, however, 'if the cost and disruption to the examinee attendant to a requested examination outweigh the benefits to the examiner.' " Docket #91 at 17 (quoting *In re Express One Int'l*, 217 B.R. 215, 217 (in return citing *In re Eagle-Picher Indus., Inc.*, 169 B.R. 130, 134 (Bankr. S.D. Ohio 1994))).

> It is noted that when an adversary proceeding is pending, a request for a FED R. BANKR. P. 2004 examination may be viewed [] by some as an [attempted] "end run" around normal discovery rules. Some courts have said it is improper for a party to use a Rule 2004 examination as a substitute for, or in addition to, discovery under Bankruptcy Rules 7026 to 7037 concerning pending or contemplated litigation. *In re Enron Corp*., 281 B.R. 836, 840-41 (Bankr. S.D.N.Y. 2002); *In re Szadkowski*, 198 B.R. 140, 142 (Bankr. D. Md. 1996). Using Rule 2004 in pending litigation may be an attempt to gain an advantage by bypassing the procedural safeguards provided by the discovery rules of the Federal Rules of Civil Procedure. *Intercontinental Enters., Inc. v. Keller* (*In re Blinder, Robinson & Co*.), 127 B.R. 267, 274 (D. Colo. 1991), aff'd on other grounds sub nom. *Secs. Inv. Protection Corp. v. Blinder, Robinson & Co.*, 962 F.2d 960 (10th Cir. 1992*); In re Bennett Funding Grp., Inc.*, 203 B.R. at 28-29; *First Fin. Sav. Ass'n v. Kipp* (*In re Kipp*), 86 B.R. 490, 491 (Bankr. W.D. Tex. 1988); *In re Silverman*, 36 B.R. 254, 259 (Bankr. S.D.N.Y. 1984); *In re GHR Energy Corp.*, 35 B.R. 451, 538 (Bankr. D. Mass. 1983).
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> Rule 2004 may be used to investigate matters unrelated to the pending litigation, *In re Bennett Funding Grp., Inc.*, 203 B.R. at 29; *see also In re M4 Enters*., 190 B.R. 471, 475 (Bankr. N.D. Ga. 1995); and entities that are not party to the litigation are still subject to a Rule 2004 examination because they fall outside the Civil Rules' safeguards. *In re Blinder, Robinson & Co*., 127 B.R. at 275; *In re Buick*, 174 B.R. 299, 305 (Bankr. D. Colo. 1994).

Docket #91 at 17-18

In the present case, the Law Firm, as noted earlier, is not permitted to conduct its own separate Rule 2004 examination and instead must abide by the court's imposed Pending Proceeding Rule to conduct its own, independent discovery. However, the Pending Proceeding Rule does not prohibit the Trustee from conducting her own 2004 Exam that may include information and documents that relate to the removed state court lawsuit. Furthermore, the Trustee is duty bound under § 704(a)(7) to furnish information to parties in interest upon their request unless the court orders otherwise. Here, the Law Firm, indeed, is a party in interest and entitled to request and receive certain information from the Trustee under the existing facts and circumstances.

Mr. Wade's renewed motion has the effect of subverting the Law Firm's interest in obtaining information relating to his financial affairs that may, for example, relate to the removed state court

complaint. He asserts that the arbitration clause trumps the Law Firm's ability to gain information about the bankruptcy estate itself. The filing of a bankruptcy petition is not without recourse. One of the fundamental principles of bankruptcy is that the debtor's financial affairs are opened to all parties in interest. The filing of a voluntary bankruptcy case is a so-called "game changer." This openness may expose the debtor to potential liability if his or her prior actions merit such scrutiny and liability. Bankruptcy cannot be used as both a sword and a shield. Rule 2004 and § 704(a)(7) provide parties in interest a mechanism to thoroughly investigate the financial affairs of the debtor. This investigation is designed to further the administration of the estate and determine whether the debtor is entitled to a full or partial discharge. Here, the court previously limited, for cause, the Law Firm's ability to directly conduct its own, independent 2004 Exam, but the court upheld the Law Firm's indirect rights under § 704(a)(7) to request information from the Chapter 7 Trustee and piggyback on the Chapter 7 Trustee's 2004 Exam. This order maintains the status quo from the court's August 13, 2013 order.

Privileged Documents and Information

As an additional concern, the court acknowledges that Mr. Wade may attempt to assert that certain documents and information are entitled to a privilege, either an attorney-client privilege or a work-product privilege. *See* FED. R. BANKR. 7026 and FED R. CIV. P. 26(b)(5). In order to heed off any problems that may arise in this connection, the court supplements its prior order by protecting any privileged information that Mr. Wade turns over to the Trustee.

It is the debtor's duty (here, Mr. Wade) to surrender to the case trustee "all property of the estate and any recorded information, including books, documents, records, and papers, relating to property of the estate, ***whether or not immunity is granted*** under section 344 of this title." 11 U.S.C. § 521(a)(4) (emphasis added). Section 344 concerns the constitutional privilege against self-incrimination. 11 U.S.C. § 344. Therefore, if the § 521(a)(4) nullifies a constitutionally protected privilege then, certainly, judicially created privileges (i.e. attorney-client privilege and work-product privilege) are also nullified by this section. The debtor is required to surrender all documents and information concerning "property of the estate" to the trustee.

Unlike a trustee in the case of an artificial entity like a corporation, a trustee in an individual debtor's case may not exercise a debtor's privileges. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 356-57 (1985). An individual debtor retains its/his/her privileges. *See, for example, In re Miller*, 247, B.R. 704 (Bankr. N. D. Ohio 2000). However, a debtor's retention of privileges disappears where those privileges relate to § 541 property of the estate and come at the case trustee's request. *See* 11 U.S.C. §§ 521(a)(4). A case trustee serves a unique role in the bankruptcy case because the trustee becomes the real party in interest to claims of the bankruptcy estate against third parties. *Stephenson v. Malloy*, 700 F.3d 265 (6th Cir. 2012). The court notes that this required turnover does not extend to all of a debtor's recorded information but only recorded information that relates to property of the estate.

Furthermore, simply because the Trustee is entitled to § 521(a)(4) recorded information that would otherwise be privileged does not mean that third parties are entitled to the same recorded information. The Trustee has statutory duties concerning property of the estate; whereas, third parties do not. *See* 11 U.S.C. § 704. Thus, the public policy that supports the case trustee's § 521(a)(4) powers does not extend to third parties. A third party does not have a right to a debtor's privileged information. A Rule 2004 exam is broad and groping and can concern property of the estate, administration of the estate, and the debtor's discharge; whereas, the turnover of privileged documents and information to the trustee under § 521(a)(4) is limited to matters relating only to property of the estate.

The court notes that any otherwise privileged documents and recorded information produced by Mr. Wade in accordance with § 521(a)(4) shall be protected from the Law Firm and all third parties. If a party makes a § 704(a)(7) request of privileged documents or other recorded information, the Trustee is authorized to withhold such documents and information from that requesting party, absent Mr. Wade's full waiver. Furthermore, if the Trustee determines it necessary to examine Mr. Wade concerning matters that are privileged, the Trustee is authorized to conduct the examination without the Law Firm observing but maintain a transcript of the examination. The court notes that the existence of a privilege does not necessarily, and ipso facto, imply its use. Privileges may be waived and often times should be waived, if such waiver will benefit the administration of the case and the party holding the privilege.

The court reminds the parties that privileged documents and information are distinct from documents and information that relate to ongoing litigation and that are ordinarily discoverable. The latter class of documents and information exists independent of the litigation and is not protected; whereas, the former class would not exist if the litigation had not been commenced and is protected. Therefore, the Trustee, through the 2004 Exam, is allowed to seek documents and information from Mr. Wade concerning, among other things, the removed state court complaint, and the Law Firm may observe and review those documents and information. However, Mr. Wade may object to requests for any documents or communications that are entitled to a privilege and not subject to § 521(a)(4) turnover. The court retains the right to review such objections.[7] As an example, the court notes that recorded information prepared to defend state court actions against the debtor does not relate to property of the estate; whereas, recorded information prepared in relation to counterclaims to the state court action does relate to property of the estate because the counterclaim is an asset of the estate. The court further notes that with such highly experienced and competent council, the parties should be able to distinguish the lines of privilege and decency without the need for further court involvement or intervention.

Conclusion

Considering a totality of the particular facts and circumstances and applicable law and consistent with the foregoing, the court denies Mr. Wade's renewed motion for a protective order, which motion the court deems here as being in the nature of a Rule 9024 (i.e., Rule 60) request for relief from the August 13, 2013 order. However, the court supplements its prior discussion in the August 13, 2013 order to further clarify the boundaries of the ordered 2004 Exam in relation to the various provisions of the Bankruptcy Code (i.e. §§ 521(a)(4) and 704(a)(7)). Accordingly, the Law Firm may observe the Trustee's 2004 Exam and review all non-privileged documents and information, but it may not conduct its own, independent discovery outside the applicable rules within the pending adversary proceedings and the terms and conditions of this court's August 13, 2013 order and this order.

[7] See Fed. R. Bankr. P. 7026; Fed. R. Civ. P. 26(b)(5).

The Bankruptcy Court Clerk is directed to cause a copy of this Memorandum, Order, and Notice to be sent to the following interested entities:

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