

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MAINE

In re:

MONTREAL, MAINE & ATLANTIC
RAILWAY, LTD.,

Debtor.

Bk. No. 13-10670
Chapter 11

**OMNIBUS REPLY TO RESPONSES AND OBJECTIONS FILED IN RESPONSE TO
THE TRUSTEE'S MOTIONS FOR ORDERS COMPELLING CERTAIN
PARTIES TO APPEAR FOR RULE 2004 EXAMINATION AND TO
PRODUCE DOCUMENTS IN CONNECTION THEREWITH**

Robert J. Keach, as trustee (the "Trustee") of Montreal Maine & Atlantic Railway, Ltd. (the "Debtor"), by and through his undersigned counsel, hereby submits this omnibus reply (the "Reply") to the *Slawson Exploration Company, Inc. and Devlar Energy Marketing, LLC's Response in Opposition to the Trustee's Motion for Rule 2004 Examination ad to Produce Documents in Connection Therewith* [D.E. 1190] (the "Slawson/Devlar Objection"), the *Arrow Midstream Holdings, LLC's Objections and Response to the Trustee's Motion for Order Compelling Arrow Midstream Holdings, LLC to Appear for Rule 2004 Examination and to Produce Documents in Connection Therewith* [D.E. 1191] (the "Arrow Objection"), the *Non-Parties' Opposition to the Trustee's Motions for Orders Compelling Them to Appear for Rule 2004 Examinations and to Produce Documents* [D.E. 1195] (the "Non-Parties Objection"), and the *Joint Response and Objection to the Motions for Rule 2004 Examination* [D.E. 1196] (the "Joint Response") (collectively, the "Objections"), with respect to the Trustee's motions for an order authorizing a Rule 2004 examination and the production of documents (collectively, the "Rule 2004 Motions") with respect to (i) ConocoPhillips [D.E. 1118], (ii) Enserco Energy LLC

[D.E. 1119], (iii) InCorr Energy [D.E. 1120], (iv) Shell Oil Company [D.E. 1121], (v) Marathon Oil Corporation [D.E. 1138], (vi) Slawson Exploration Company, Inc. [D.E. 1139], (vii) Oasis Petroleum, Inc. [D.E. 1140], (viii) Oasis Petroleum LLC [D.E. 1141], (ix) QEP Resources, Inc. [D.E. 1142], (x) Devlar Energy Marketing, LLC [D.E. 1143], and (xi) Arrow Midstream Holdings, LLC [D.E. 1144] (collectively, the “Objecting Parties”). For the reasons set forth below, the Objections are premised on misapprehensions of fact and law and therefore must be denied. In further support of this Reply, the Trustee states as follows:

A. The Trustee and the Objecting Parties Are Not Parties to a Pending Proceeding That Prohibits the Trustee from Utilizing Rule 2004

i. The Adversary Proceeding

1. The Slawson/Devlar Objection, the Arrow Objection and the Non-Parties Objection request that the Court deny the Rule 2004 Motions on the basis that the Trustee cannot rely on Rule 2004 as a means to pursue discovery because of the Trustee’s pending adversary proceeding against WFS (the “Adversary Proceeding”).¹ See Slawson/Devlar Objection, pp. 3-7; *see also* Arrow Objection, pp. 6-8; Non-Parties Objection, ¶¶ 20-27. The Arrow Objection, for example, asserts that “the Rule 2004 examination functions as stealth discovery in aid of the Adversary Proceeding, the very type of conduct the pending proceeding limitations were designed to thwart.” Arrow Objection, p. 7. Such reliance on the pending proceeding rule, however, is entirely misplaced.

2. To the extent they assert the defense, the Objecting Parties fail to recognize that the “pending proceeding rule is predicated on the fact of a pending action between the same two parties (*i.e.*, the Rule 2004 movant and the target).” Robert J. Keach & Halliday Moncure, *Rule*

¹ Unless otherwise defined herein, all capitalized terms shall have the meaning ascribed to them in the Rule 2004 Motions.

2004 as a Pre-Litigation Tool in a Post Twombly/Iqbal World: Part I, 29 ABIJ. 28, 82 (Oct. 2010) (*citing* In re Washington Mutual Inc., 408 B.R. 45, 51 (Bankr. D. Del. 2009)). Those entities not affected by the pending adversary proceeding “should not be able to avoid an examination under Fed.R.Bankr.P. 2004.” In re Bennett Funding Group Inc., 203 B.R. 24, 29 (Bankr. N.D.N.Y. 1996) (*citing* Intercontinental Enters., Inc. v. Keller (In re Blinder, Robinson & Co., Inc.), 127 B.R. 267, 275 (D.Colo.1991)). “To rule otherwise would mean that a trustee would be precluded from using the Rule as to *all* entities once an adversary proceeding has been commenced.” Bennett, 203 B.R. at 29.

3. Furthermore, courts recognize limits on the pending proceeding rule, since “aggressive application of the ‘pending proceeding’ rule may prevent legitimate Rule 2004 examinations on matters wholly unrelated to the pending proceeding, thereby interfering with the trustee’s fiduciary duty to maximize estate assets.” Washington Mutual, 408 B.R. 45, 51 (Bankr. D. Del. 2009). It is necessary, therefore, for courts to determine “whether the Rule 2004 examination will lead to discovery of evidence related to the pending proceeding or whether the requested examination seeks to discovery evidence unrelated to the pending proceeding.” Washington Mutual, 408 B.R. at 51.

4. In the current case, the Objecting Parties are not parties to the Adversary Proceeding. Moreover, they are not affected by the Adversary Proceeding because the Trustee’s claims against WFS do not impact the Trustee’s claims, if any, against the Objecting Parties or impact the Objecting Parties abilities to protect their rights with respect to such claims. As such, the Trustee, through the proposed Rule 2004 examinations of the Objecting Parties, seeks evidence entirely unrelated to the Adversary Proceeding because he is seeking evidence of potential claims against the Opposing Parties. To the extent the Opposing Parties deny the

existence of any cause of action that may be asserted against them, the Trustee notes that the purpose of Rule 2004 is to allow him to make that determination. Moreover, if the Objecting Parties want to waive all of their rights to file motions to dismiss any future action(s), then perhaps Rule 2004 discovery can be foregone. Absent such a waiver, the Objecting Parties cannot complain if the Trustee seeks greater certainty as to the estate's causes of action, if any.

ii. The Canadian Class Action

5. Certain of the Opposing Parties seek to raise the proceeding action rule with respect to the Class Action.² For example, the Arrow Objection, asserts that “the Rule 2004 examination the Trustee seeks to impose upon Arrow is the functional equivalent of the class representatives serving discovery upon Arrow in their class action, but without the procedural rights and safeguards afforded to Arrow in that litigation.” Arrow Objection, p. 9.

6. Similar to the reasons the proceeding action rule does not apply with respect to the Adversary Proceeding, the rule is also not applicable with respect to the Class Action. Specifically, in that case, the Debtor and the Opposing Parties are co-defendants and no cross claims have been asserted. Moreover, the Class Action as it relates to the Debtor has been stayed pursuant to section 362 of the Bankruptcy Code. *See* 11 U.S.C. § 362. Accordingly, the pending proceeding rule is inapplicable with respect to the Class Action because that litigation is not between the Trustee and the Objecting Parties, in as much as neither has made a claim against the other. *Cf. Washington Mutual*, 408 B.R. at 50 (A Rule 2004 examinations may be not be allowed if “the party requesting the Rule 2004 examination could benefit *their* pending litigation outside of the bankruptcy court against the proposed Rule 2004 examinee.”) (emphasis added) (internal quotation omitted). For the same reason, the proposed Rule 2004 examinations do not affect the Objecting Parties with respect to the Class Action. *Cf. In re Lufkin*, 255 B.R. 204, 208

² The term “Class Action” shall have the meaning ascribed to it in the Arrow Objection.

(Bankr. E.D. Tenn. 2000 (“Where the primary purpose is to benefit the bankruptcy estate, the fact that [examination] may also produce information which in turn may collaterally be used by third parties in separate litigation outside of the bankruptcy case [] is no reason to restrict its use or to shield parties ... from such possible litigation”) (internal quotation omitted).

7. To the extent the Objecting Parties request that the Trustee enter into a protective order to prohibit the turnover of documents to parties in the Class Action, the Trustee is amenable to entering into such an agreement.

B. The Trustee has Demonstrated the Need for a Rule 2004 Examination of the Objecting Parties

8. The Non-Parties Objection and the Arrow Objection argue that the Trustee has not identified a connection between the Objecting Parties and the Debtor so as to establish good cause for a Rule 2004 examination. *See* Non-Parties Objection, ¶¶ 28-34; *see also* Arrow Objection, pp. 10-14. Specifically, the Non-Parties Objection asserts that the “Trustee does not allege that either of the Non-Parties has any information regarding the Debtor’s acts, conduct or financial affairs that would warrant a Rule 2004 examination.” Non-Parties Objection, ¶ 33. As set forth below, this assertion is without merit.

9. There is little doubt that Rule 2004 is designed for use as a pre-litigation discovery device, useful for both discovering potential estate causes of action and supporting facts in the first instance, as well as to determine the odds of a successful prosecution of the claim. *See* Bennett, 203 B.R. at 28 (Rule 2004 “is properly used as a pre-litigation device to determine whether there are grounds to bring an action,” and the rule is a “broad discovery tool”); *see also* Washington Mutual, 408 B.R. at 53 (“Legitimate goals of Rule 2004 examinations include discovering assets, examining transactions, and determining whether wrongdoing has occurred.”); In re Mirant Corp., 326 B.R. 354, 357 (Bankr. N.D. Tex. 2005)

(Rule 2004 “may be critical to ensure that no viable cause of action is lost” and that “all possible claims...have been identified.”); Cohen v. Morgan Schiff & Co. Inc. (In re Friedman’s Inc.), 385 B.R. 381, 428 (S.D. Ga. 2008) (“Rule 2004 is a ‘powerful tool, enabling an attorney investigating a claim to perform almost all of the necessary discovery before filing an action.’”) (*quoting* Solomon v. Riverview Finance Co., 70 B.R. 501, 504 (Bankr. E.D. Mich. 1987)). “Generally, good cause is shown if the Rule 2004 examination is necessary to establish the claim of the party seeking the examination....” In re Metiom Inc., 318 B.R. 263, 268 (S.D.N.Y. 2004) (internal quotation omitted).

10. Here, as set forth in the Rule 2004 Motions, the Trustee seeks to utilize Rule 2004 to determine whether the Debtor’s estate has any causes of action against any person or entity other than WFS arising out of the Derailment. The Trustee’s ability to use Rule 2004 is not limited to parties with “special knowledge” of the Debtor’s financial affairs. *See* Arrow Objection, p. 13. Rather, the Trustee, as a fiduciary of the Debtor’s estate, is duty bound to identify all assets, including, but not limited to, possible causes of action of the estate. This includes potential causes of action against the Opposing Parties. Indeed, the failure to conduct such pre-litigation discovery may be a breach of the Trustee’s fiduciary duties to the estate.

11. Moreover, all of the Objecting Parties are connected to the Derailment. Each of the Objecting Parties has been identified as having sold crude oil to Western Petroleum and/or WFS, which was part of the cargo on the Train. Each of the Objecting Parties has also been identified as a party that provided information relevant to the classification of the Crude Oil. That connection, or set of connections, is sufficient to establish good cause. *See* Metiom, 318 B.R. at 268 (Good cause is shown if “the Rule 2004 examination is necessary to establish the claim of the party seeking the examination....”); *see also* In re Drexel Burnham Lambert Group

Inc., 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991) (“Good cause may ordinarily be sustained by a claim that the requested documents are necessary to establishment of the moving party’s claim....”) (internal citation omitted).

C. The Scope of the Rule 2004 Motions is Within the Broad Limits of Rule 2004

12. As a whole, the Objections oppose the scope of the Rule 2004 Motions. However, Rule 2004 is extremely broad in scope; in what is now a well-worn description, a Rule 2004 examination has been likened to a lawful “fishing expedition.” Bennett, 203 B.R. at 28; *see also* In re Hammond, 140 B.R. 197, 201 (S.D. Ohio 1992) (“[T]he scope of a Rule 2004 examination is broad. Indeed, some have compared it to a ‘fishing expedition’”); In re Madison Williams & Co., LLC, 2014 WL 56070, at *3 (Bankr. S.D.N.Y. Jan. 7, 2014) (“The general rule is that the scope of a Rule 2004 examination is very broad and great latitude of inquiry is ordinarily permitted”) (internal quotations omitted).

13. The “purpose of a Rule 2004 exam is to assist a trustee in a bankruptcy proceeding to learn quickly about the debtor entity so that he or she may maximize the realization of the debtor’s estate and discover the existence and location of assets of the estate.” Metiom Inc., 318 B.R. at 270 n.6 (internal quotation omitted). In other words, Rule 2004 enables a party in interest to

obtain information about the debtor’s financial condition, matters that may affect the administration of the debtor’s estate, right to a discharge, or operation of a business and the desirability of its continuance, sources of, and consideration for, money or property to consummate a plan, and other matters relevant to the case or formulation of a plan.

In re Daisytek Inc., 323 B.R. 180, 187 (N.D. Tex. 2005). Simply stated, Rule 2004 is extremely broad in scope.

14. The Objections' attempts to oppose and limit the scope of the Rule 2004 Motions, therefore, are contrary to the purpose of Rule 2004. Nevertheless, upon entry of an order granting the Rule 2004 Motions, the Trustee is willing to continue discussions with counsel for the Objecting Parties to refine the Trustee's document requests. Further, in response to the Objections, the Trustee will schedule the Rule 2004 examinations in accordance with Rule 2004(e).

WHEREFORE, the Trustee requests that the Rule 2004 Motions be granted, the Objections be denied, and the Court grant such other and further relief as is just and proper.

Dated: November 12, 2014

ROBERT J. KEACH
CHAPTER 11 TRUSTEE OF MONTREAL
MAINE & ATLANTIC RAILWAY, LTD.

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