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ABA BUSINESS LAW SECTION

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June 6, 2017 17-BK-B

Advisory Committee on Bankruptcy Rules
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, DC 20544

Re: Proposed Amendment to Bankruptcy Rule 2004(c)

Ladies and Gentlemen:

This letter and the attached proposed amendment to Bankruptcy Rule 2004(c) is submitted by the Section of Business Law (the "Section") of the American Bar Association ("ABA") on behalf of its Committee on Bankruptcy Court Structure and Insolvency Process. Please note that the comments expressed in this letter and the attachment hereto represent the views of the Section only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore should not be construed as representing the policy of the ABA.

I write to submit for consideration by the Advisory Committee on Bankruptcy Rules a proposed amendment to Bankruptcy Rule 2004(c). By way of background, one of the subcommittees of the Committee on Bankruptcy Court Structure and Insolvency Process is its Subcommittee on Electronic Discovery (ESI) in Bankruptcy Cases (the "Subcommittee"). The Subcommittee previously published a Best Practices Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases in the August 2013 issue of *The Business Lawyer*. As a follow up to that work, the Subcommittee has put together for consideration by the Advisory Committee a proposed amendment to Bankruptcy Rule 2004(c). In addition, the Subcommittee has prepared a Report to accompany the proposed rule amendment. Copies of the proposed amendment to Bankruptcy Rule 2004(c) and the Report in support thereof are enclosed herewith.

If either I or Richard Wasserman, the chair of the Subcommittee, can answer any questions about the proposed amendment or the Report, please do not hesitate to contact me or Mr. Wasserman, who can be reached at 410-244-7505 or rlwasserman@venable.com. Thank you in advance for your consideration.

Sincerely,

William D. Johnston
Chair, Business Law Section

PROPOSED BANKRUPTCY RULE AMENDMENT

Amend Bankruptcy Rule 2004(c) to add the new sentence highlighted below at the end of subdivision (c).

Rule 2004. Examination

(a) Examination on Motion. On motion of any party in interest, the court may order the examination of any entity.

(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. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

(c) Compelling Attendance and Production of Documents. The attendance of an entity for examination and for the production of documents, 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. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending. **Proportionality considerations apply to a request for the production of documents or electronically stored information in connection with a Rule 2004 examination.**

(d) Time and Place of Examination of Debtor. The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) Mileage. 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. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for the examination, whichever is the lesser.

ABA BUSINESS LAW SECTION SUBCOMMITTEE ON ELECTRONIC DISCOVERY (ESI) IN BANKRUPTCY CASES*

REPORT ON PROPOSED AMENDMENT TO BANKRUPTCY RULE 2004(c)

Production of Documents and Electronically Stored Information (ESI) In Connection With Bankruptcy Rule 2004 Examinations

This Report proposes an amendment to Bankruptcy Rule 2004(c). The proposed amendment to Bankruptcy Rule 2004(c) and the accompanying analysis have been prepared by the Electronic Discovery (ESI) in Bankruptcy Cases Subcommittee (the "Subcommittee") of the American Bar Association, Business Law Section, Bankruptcy Court Structure and Insolvency Process Committee. The Subcommittee is a successor to the Working Group identified below which published its *Best Practices Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases* in the August 2013 issue of The Business Lawyer, Volume 68, Issue 4, at 1113-1148.

Introduction

One of the fundamental principles in evaluating discovery requests in connection with electronically stored information (ESI) is the principle of "proportionality". How this principle should be applied in connection with Bankruptcy Rule 2004 examinations, and requests for production of documents and ESI in connection with a Rule 2004 examination, is the subject of this Report.[1] As

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* The names of the members of the Subcommittee appear at the end of this Report.

[1] Bankruptcy Rule 2004 provides as follows:

Rule 2004 Examination

(a) *Examination on Motion.* On motion of any party in interest, the court may order the examination of any entity.

(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. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan.

more fully discussed below, it is proposed that Bankruptcy Rule 2004 be amended to add a new last sentence to Rule 2004(c).

Proposed Amendment to Bankruptcy Rule 2004(c)

It is proposed that Bankruptcy Rule 2004(c) be amended by adding the following new sentence at the end of subdivision (c):

> Proportionality considerations apply to a request for the production of documents or electronically stored information in connection with a Rule 2004 examination.

Discussion

The importance of the proportionality principle in connection with pretrial discovery, including pretrial discovery in bankruptcy cases, is discussed at some length in the *Best Practices Report on Electronic Discovery (ESI) Issues in Bankruptcy Cases* published by the ABA Electronic Discovery (ESI) in Bankruptcy Working Group in the August 2013 issue of The Business Lawyer. With respect to Chapter 11 cases, Principle 3 in the *Best Practices Report* states: "Proportionality considerations regarding the preservation and production of ESI are particularly important in the bankruptcy context. A party's obligations with respect to the preservation and production of ESI should be proportional to the significance, financial and otherwise, of the matter in dispute and the need for production of ESI in the matter." (*Id.*, at 1116-1117,1121-1122.) Similarly, with respect to Chapter 7 and Chapter 13 cases, the *Best Practices Report* states "...a guiding principle is that a debtor's obligation with respect to the preservation and production of ESI should be proportional to the

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(c) *Compelling Attendance and Production of Documents.* The attendance of an entity for examination and for the production of documents, 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. As an officer of the court, an attorney may issue and sign a subpoena on behalf of the court for the district in which the examination is to be held if the attorney is admitted to practice in that court or in the court in which the case is pending.

(d) *Time and Place of Examination of Debtor.* The court may for cause shown and on terms as it may impose order the debtor to be examined under this rule at any time or place it designates, whether within or without the district wherein the case is pending.

(e) *Mileage.* 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. If the debtor resides more than 100 miles from the place of examination when required to appear for an examination under this rule, the mileage allowed by law to a witness shall be tendered for any distance more than 100 miles from the debtor's residence at the date of the filing of the first petition commencing a case under the Code or the residence at the time the debtor is required to appear for examination, whichever is the lesser.

resources and sophistication of the debtor, the significance of the matter to which the ESI relates, and the amount or value of the property at issue." (*Id.*, at 1126.)

The December 2015 amendments to the Federal Rules of Civil Procedure confirm the increased importance of proportionality as a guiding principle in the scope of discovery in the federal courts. Rule 26 of the Federal Rules of Civil Procedure was amended (effective December 1, 2015) to add proportionality as part of the governing standard as to the scope of discovery under the Federal Rules. As amended, Rule 26(b)(1) now provides: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." (New language highlighted.)

For those familiar with the general principles relating to Bankruptcy Rule 2004 examinations, it is often said that the scope of a Bankruptcy Rule 2004 examination is in the nature of a "fishing expedition." The roots of this concept trace back to an 1899 case from the District Court in the Southern District of New York, In re Foerst, 93 F.190 (S.D.N.Y. 1899). Although we think of the principle as permitting a "fishing expedition," the actual term used in the Foerst case is a "fishing examination." The Court there stated: "The examination for this purpose is of necessity to a considerable extent a fishing examination. The extent to which it shall be permitted to go, must be determined by the sound judgment of the officer before whom it is taken.... If the result of such an examination may often be a considerable amount of immaterial testimony, this is a much less evil than to stifle examination by technical rules which would defeat the purpose of the act, and discredit the administration of the law in the interest of creditors." 93 F. at 191.

Various Circuit Courts of Appeals have recognized the broad nature of Bankruptcy Rule 2004 examinations. See, e.g., In re Hope 7 Monroe Street Ltd. Partnership, 743 F.3d 867, 874 (D.C. Cir. 2014) ("Bankruptcy Rule 2004 allows for a broad scope of discovery, permitting 'examination of an entity' related to 'any matter which may affect the administration of the debtor's estate.'... Rule 2004 examinations have been characterized as 'fishing expeditions' because of the broad scope of inquiry the rule permits."); Simon v. FIA Card Services, N.A., 732 F.3d 259, 278 (3d Cir. 2013) ("[C]ourts have recognized that Rule 2004 examinations are broad and unfettered and in the nature of fishing expeditions.", quoting from In re Enron Corp., 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002)); Chereton v. U.S., 286 F.2d 409, 413 (6th Cir. 1961) ("The inquiry may even be a fishing expedition." citing In re Foerst, supra).

Notwithstanding the broad scope of Bankruptcy Rule 2004 examinations recognized in the cases, courts have also recognized that there are limits to such examinations. As one court has stated:

> Nonetheless, there are important limits to the scope of an examination taken pursuant to Rule 2004.... A 2004 examination should only be used for the legitimate purpose of obtaining information relating 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 right to a discharge." Fed.R.Bankr.Pro. 2004. The examination of a witness about matters having no relationship or no effect on the administration of an estate is improper.... Furthermore, like other methods of discovery, Rule 2004 examinations may not be used to annoy, embarrass or oppress the party being examined.... "Rule 2004 requires that we balance the compelling interests of the parties, weighing the relevance of and necessity of the information sought by examination. That documents meet the requirement of relevance does not alone demonstrate that there is good cause for requiring their production. The burden of showing good cause is an affirmative one in that it is not satisfied merely by a showing that justice would not be impeded by production of the documents...." (citations omitted.)

In re Coffee Cupboard, Inc., 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991).

Similarly, Bankruptcy Judge Cole (now Chief Judge of the Sixth Circuit Court of Appeals) stated in In re Fearn, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989), "[w]hile the scope of Rule 2004 examination is very broad, it is not limitless. The examination should not be so broad as to be more disruptive and costly to the party sought to be examined than beneficial to the party seeking discovery." Accord In re DeShetler, 453 B.R. 295, 302 (Bankr. S.D. Ohio 2011) (the court there adding, "[u]pon a creditor objection, the examiner must establish 'good cause,' taking into consideration the totality of the circumstances, including the importance of the information to the examiner and the costs and burdens on the creditor. ... The level of good cause required to be established varies depending on the potential intrusiveness."

Bankruptcy Rule 2004(c) expressly authorizes a subpoena to be issued for the production of documents in connection with a Rule 2004 examination. Bankruptcy Rule 2004(c) provides that Bankruptcy Rule 9016 governs compelling production of documents in connection with a Rule 2004 examination. Bankruptcy Rule 9016 (Subpoena) incorporates by reference Rule 45 of the Federal Rules of Civil Procedure,

which includes electronically stored information (ESI) within the materials that can be subpoenaed.

A close analysis of Rule 45 of the Federal Rules of Civil Procedures reveals that proportionality considerations are applicable to the production of documents including electronically stored information pursuant to a subpoena issued under Rule 45. Significantly, Rule 45(d)(1) provides that a party or attorney issuing a subpoena must take "reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." A party or attorney failing to do so is subject to potential sanctions. Similarly, Rule 45(d)(3)(A) provides that upon timely motion, the court must quash or modify a subpoena that "(iv) subjects a person to undue burden."

Rule 45 continues, specifically with respect to electronically stored information, in addressing "inaccessible electronically stored information" in Rule 45(e)(1)(D). That subdivision provides that the person responding need not provide discovery of ESI from sources that are "not reasonably accessible because of undue burden or cost." The burden to make this showing is placed on the person responding to the subpoena. Rule 45(e)(1)(D) continues: "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."

Turning then to Rule 26(b)(2)(C), it provides that the court must limit the frequency or extent of discovery otherwise allowed by the federal rules if it determines that: "(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1)."[2] Accordingly, the proportionality consideration that is the hallmark of Rule 26(b)(1) applies to requests for production of electronically stored information pursuant to a subpoena, both through Rule 45's direct prohibition on undue burden and expense and through the incorporation of Rule 26(b)(2)(C) and its reference to Rule 26(b)(1).

Consistent with this approach, the Subcommittee recommends that a proposed amendment to Bankruptcy Rule 2004(c) be added to avoid any doubt that proportionality considerations apply. The proposed amendment is set forth above. It is purposely very simple and straight-forward. The proposed amendment is consistent with the recent amendments to Rule 26 of the Federal Rules of Civil Procedure and the policy underlying that Rule as evidenced in the Advisory Committee Note accompanying the 2015 Amendments. The proposed rule

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[2] The other limitations set forth in Rule 26(b)(2)(C) are "(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;" and "(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action." The three limitations set forth in Rule 26(b)(2)(C) are set forth in the disjunctive.

amendment is recommended to clarify any ambiguity that may exist and assist courts and persons utilizing a subpoena for the production of documents or electronically stored information in connection with a Rule 2004 examination.

In addition, the proposed amendment serves another purpose. It specifically references "electronically stored information," whereas Bankruptcy Rule 2004(c) as currently written only references "documents." Bankruptcy Rule 2004(c) has not been amended since 2002. Since that time, "electronically stored information" has taken on increased importance in the more recent amendments to the discovery rules in the Federal Rules of Civil Procedure. See, e.g., the 2006 and 2015 Amendments to Rules 26, 34 and 37, Fed.R.Civ.P. Because of the ever-growing significance of electronically stored information in the world of data and documents and the addition of that term to the Federal Rules of Civil Procedure, it seems to be an appropriate time to update Bankruptcy Rule 2004(c) and add a reference to electronically stored information.[3]

The importance of proportionality considerations in connection with a Rule 2004 examination has recently been recognized in a Memorandum Decision and Order Regarding Application for a Rule 2004 Examination issued by Bankruptcy Judge Stuart M. Bernstein, of the United States Bankruptcy Court for the Southern District of New York in In re SunEdison, Inc., 562 B.R. 243 (Bankr. S.D.N.Y. 2017). Judge Bernstein was presented with an application for a Bankruptcy Rule 2004 examination of the Debtors and production of a broad range of documents including electronically stored information. The Memorandum Decision begins with a discussion of the background and relevant considerations concerning Rule 2004 examinations. The Decision notes that the costs of compliance with discovery requests have substantially increased over the years. "The era of paper discovery in relatively small cases has given way to the discovery not only of paper but also of vast amounts of electronically stored information...." 562 B.R. at 250. The Memorandum Decision continues: "The proliferation of information and the costs associated with retrieving, reviewing and producing discovery in civil litigation have led to the 2015 amendments to the Federal Rules of Civil Procedure which emphasize the concept of proportionality. ... Rule 2004 has not been similarly amended but the spirit of proportionality is consistent with the historic concerns regarding the burden on the producing party and is relevant to the determination of cause." Id. Judge Bernstein concludes that, under the facts and circumstances presented, the applicant "has not established cause for most of the information it seeks." 562 B.R. at 251. The analysis by Judge Bernstein confirms that proportionality considerations should apply to

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[3] Although it is not within the scope of the amendment to Bankruptcy Rule 2004(c) proposed in this Report, consideration might be given to amending the title of Bankruptcy Rule 2004(c) to read "Compelling Attendance and Production of Documents and Electronically Stored Information" or "Compelling Attendance and Production of Documents, Electronically Stored Information and Tangible Things." See Rule 45(a) of the Federal Rules of Civil Procedure. Correspondingly, the first sentence in Bankruptcy Rule 2004(c) might be amended to add the words "and electronically stored information" or the words ", electronically stored information and tangible things" after the word "documents."

requests for the production of documents and electronically stored information as part of a Rule 2004 examination. A copy of the SunEdison Memorandum Decision is attached hereto.

The Subcommittee considered whether the proposed rule amendment should apply the proportionality principle not only to requests for the production of documents and electronically stored information in connection with a Rule 2004 examination, but also to the scope of the Rule 2004 examination itself. The Subcommittee decided that the proposed amendment should apply only to requests for the production of documents or electronically stored information in connection with a Rule 2004 examination. Although not rejecting the concept that proportionality considerations may apply to the scope of Rule 2004 examinations, it was felt that that determination should be left to the courts on a case-by-case basis depending upon the facts and circumstances of each case.[4]

Conclusion

Notwithstanding the broad scope of Bankruptcy Rule 2004 examinations, to the extent that a Rule 2004 examination subpoena requests the production of electronically stored information (ESI), the proportionality principle should be applied in evaluating the scope of such production and the burden imposed by the requested production. Similar to the considerations outlined in the *Best Practices Report*, the parties involved should attempt to negotiate a consensual agreement regarding the requested ESI production, and if they are unable to reach agreement and the issue is presented to the court for determination, the court should evaluate the production requested, including the scope and manner of the search to be undertaken, the form of production and the relative costs involved, with proportionality as a guiding principle.[5]

Thank you for your consideration of the proposed amendment and this Report.

Richard L. Wasserman, Chair
of the ABA Subcommittee on Electronic
Discovery (ESI) in Bankruptcy Cases

[4] In the process of preparing this Report, the Subcommittee received a thoughtful comment from Bankruptcy Judge Christopher Klein, a former member of the Advisory Committee on Bankruptcy Rules. A copy of Judge Klein's comments is attached hereto for the Advisory Committee's consideration.

[5] Although it is beyond the scope of this Report, it has been suggested that Bankruptcy Rule 2004 be amended to add appropriate provisions modeled on Rule 26(g) of the Federal Rules of Civil Procedure. This suggestion is passed along to the Advisory Committee for its consideration.

Subcommittee Members

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562 B.R. 243
United States Bankruptcy Court,
S.D. New York.

IN RE: SUNEDISON, INC. et al. [1] Debtors.

Case No. 16–10992 (SMB)
|
Signed January 18, 2017

Synopsis
Background: Creditor of subsidiary of one of Chapter 11 debtors, to which that debtor was also liable on guarantee of subsidiary's debt, filed request pursuant to Bankruptcy Rule 2004 for production of documents relating to sale of subsidiary's assets and upstreaming of sales proceeds to debtors. Debtors objected.

[Holding:] The Bankruptcy Court, Stuart M. Bernstein, J., held that creditor was not entitled to broad production of "all documents and communications" relating to sale of assets and upstreaming of sales proceeds.

So ordered.

Attorneys and Law Firms

***245** McCARTER & ENGLISH, LLP Counsel for CSI Leasing, Inc. and CSI Leasing Malaysia Sdn. Bhd. 245 Park Ave., 27th Floor New York, New York 10167, Daniel R. Seaman, Esq. Of Counsel

TOGUT, SEGAL & SEGAL LLP Co–Counsel for the Debtors and Debtors-in-Possession One Penn Plaza, Suite 3335 New York, New York 10119, Frank A. Oswald, Esq. Brian F. Moore, Esq. Of Counsel

MEMORANDUM DECISION AND ORDER REGARDING APPLICATION FOR A RULE 2004 EXAMINATION

STUART M. BERNSTEIN, United States Bankruptcy Judge:

Applicants CSI Leasing, Inc. ("CSILI") and CSI Leasing Malaysia Sdn. Bhd. ("CSIM" and, together with CSILI, "CSI") seek authorization to examine the Debtors pursuant to Rule 2004 of the Federal Rules of Bankruptcy Procedure ("Rule 2004"). The proposed examination broadly relates to the sale of assets by a non-Debtor, who owes money to CSI, and the upstreaming of the sales proceeds to the Debtors. The Debtors opposed the application, and the Court held a hearing on November 17, 2016 and reserved decision. For the reasons that follow, the application is denied except to the limited extent noted below.

BACKGROUND [2]

On June 7, 2011, SunEdison Kuching Sdn. Bhd. ("SEK") —a non-Debtor wholly-owned subsidiary of the Debtor SunEdison Products Singapore Pte. Ltd. ("SEPS") (*Schedule A/B* at 23 of 31 (ECF/SEPS Doc. # 5)— entered into an equipment lease with CSIM, which incorporated an equipment schedule dated July 1, 2011 (the "Equipment Lease"). (*Application on Presentment of Creditor CSI Leasing, Inc. for Entry of an Order Pursuant to Fed. R. Bankr. P. 2004 Authorizing and Directing the Examination of the Debtors*, dated Aug. 23, 2016 ("*Application* "), at ¶ 2 (ECF Doc. # 1048).) SEPS guaranteed the Equipment Lease. (*Application* at ¶ 3.) SEPS is a direct subsidiary of SunEdison International, Inc., which, in turn, is a direct subsidiary of SunEdison, Inc. ("SUNE"). (*See Corporate Ownership Statement of SunEdison Products Singapore Pte Ltd.* at 7 of 18 (ECF/ SEPS Doc. # 1).) SEK defaulted on the Equipment Lease, and SEPS defaulted on the guarantee. (*Application* at ¶ 4.) As a result, each owes CSI approximately $2.5 million. (*Id.*)

In March 2016, SEK entered into an asset purchase agreement (the "APA") to sell substantially all of its assets to XiAn ***246** LONGi ("LONGi"), a Chinese company, for approximately $63 million. (*Id.* at ¶ 5.) There is no evidence that any Debtor was a party to the APA. LONGi apparently paid all but $18 million (the "$18 Million Holdback") at the closing to SEK, with the balance to be paid in the future upon the satisfaction of certain conditions. (*Id.*) In the meantime, SEK transferred the sale proceeds paid at the closing to the Debtors (the "Upstream"), "namely SunEdison, Inc.," leaving little to no assets in SEK to pay its creditors. (*Id.* at ¶ 6.) CSI has

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expressed concern that if SEK receives any part of the $18 Million Holdback, it will upstream those sums (the "Future Upstreams") as well. (*Id.* at ¶ 7.)

Most of the Debtors, including SEPS and SUNE, commenced chapter 11 cases on April 21, 2016. In September 2016, CSI filed Proof of Claim No. 2879 against SEPS in the amount of $2,496,611.09, and Proof of Claim No. 2234 against SUNE in the amount of $51,144.47. The Debtors have reviewed the claims and determined that they should be allowed. (*Debtors' Objection to the Application of CSI Leasing, Inc. for Entry of an Order Pursuant to Fed. R. Bankr. P. 2004 Authorizing and Directing the Examination of the Debtors*, dated Nov. 10, 2016 ("*Debtors' Objection*"), at ¶ 13 (ECF Doc. # 1577).)

The actual value of CSI's claims is, however, uncertain. During earlier proceedings in connection with the Court's motion relating to the appointment of an official equity committee, the Court found that the Debtors owed $4.2 billion in prepetition secured and unsecured debt, and its contingent debt could exceed an additional $1.2 billion. *In re SunEdison, Inc.*, 556 B.R. 94, 101 (Bankr. S.D.N.Y. 2016). Furthermore, the Debtors were authorized to borrow $300 million after the petition date. *Id.* at 101 n.7. In contrast, the projected value of its assets was no more than $1.5 billion, net of the debtor-in-possession financing. *Id.* at 101. The Court concluded that the Debtors appeared to be hopelessly insolvent, and declined to appoint an official equity committee. *Id.* at 107. It looks like CSI's potential distribution in the chapter 11 cases, if any, will be only a small percentage of the face amount of its claims.

One other point is the status of SEK. The Debtors have informed the Court that SEK is currently the subject of a Malaysian insolvency proceeding, and a liquidator was appointed on October 4, 2016. (*Debtors' Objection* at 4.) According to CSI, it may be the largest creditor in that proceeding. (*See Memorandum of Law in Further Support of the Application [Docket Document No. 1048] of Creditor CSI Leasing, Inc. for Entry of an Order Pursuant to Fed. R. Bankr. P. 2004 Authorizing and Directing the Examination of the Debtors*, dated Nov. 14, 2016 ("*Supplemental Memorandum*"), at ¶ 5 (ECF Doc. # 1596).) The parties have not informed the Court whether the Malaysian liquidator has standing and intends to pursue the transfer by SEK to the Debtors.

A. CSI's Rule 2004 Application

After most of the Debtors, including SEPS and SUNE, had commenced chapter 11 cases, CSI filed the *Application* seeking Rule 2004 discovery. The *Application* included sixteen paragraphs requesting the production of "documents," and in most cases "communications" as well, relating to the subject matter of the specific request (the "Requests").[3] I have renumbered the ***247** Requests and placed them into the following three categories:

i. Documents and Communications relating to the Upstream and Future Upstreams

1. All documents "that relate to the Upstream."

2. All documents "that relate to the Future Upstream."

3. "All documents and communications related to the Debtor's anticipated receipt of the Future Upstream."

4. "All documents and communications related to the Debtor's intended uses of the Upstreamed Funds as part of the Debtor's plan of reorganization."

5. "All documents and communications related to the Debtor's intended uses of the Future Upstreams as part of the Debtor's plan of reorganization."

6. "All documents and communications reflecting any opinion or analysis that the Upstream or Future Upstreams did aid or will aid the Debtors' ability to reorganize."

ii. Documents and Communications relating generally to the Debtors' Chapter 11 Cases

7. "All documents and communications related to the sources of funds which the Debtor may use to fund the Debtor's plan of reorganization."

8. "All documents and communications related to the projected income and expenses of the Debtors during this bankruptcy proceeding."

9. "All documents and communications upon which the Debtors may rely to argue that the interests of CSI are adequately protected."

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iii. Documents and Communications relating to SEK, the Malaysian proceeding and CSI's recovery in that proceeding

10. Documents "that relate to the APA."

11. "All documents related to why SEK did not seek bankruptcy protection via the SunEdison Bankruptcy."

12. "All documents related to SEK directors, officers, or employees who went ***248** to work for (or consult for) LONGi after (or around the time that) the APA was entered into."

13. "All documents and communications reflecting any lawsuits, proceedings, mediations, or actions that [the Debtors] are aware of relating to SEK's debts to creditors in Malaysia or elsewhere."

14. "All documents and communications relating to any direction or consultation the Debtors gave to SEK for the time period of the one-year period prior to the APA up to the present."

15. "All documents and communications reflecting any claims, demand letters, lawsuits, proceedings, mediations, or actions that [the Debtors] are aware of where it is asserted or referenced that the Upstream or Future Upstreams damaged or will damage a creditor's ability to recovery from SEK or SEPS or any of the Debtors."

16. "All documents and communications reflecting any lawsuits, proceedings, mediations, or actions that [the Debtors] are aware of relating to SEPS's debts to creditors in Malaysia or elsewhere."

(Requests, Ex. A, Documents Requested.)

B. The Informal Discovery

After CSI filed the *Application*, the Debtors began providing responsive information on a rolling basis and the parties agreed to adjourn the hearing on the *Application* to a later date. (*Debtors' Objection* at 3.) On September 29, 2016, the Court entered an order further authorizing and directing the Debtors to produce to CSI "the APA and certain related supply agreements, and the closing binder for the same." (*Order Authorizing and Directing the Initial Production of Documents of the Debtors*, dated Sep. 29, 2016 (the "*Initial Order* "), Ex. A, at 5 (ECF Doc. # 1284).) The *Initial Order* was entered without prejudice to CSI's rights to seek additional relief demanded in the *Application*, (*Initial Order* at 2), and the *Application* was subsequently set for hearing on November 17, 2016. (*Notice of Rescheduling of Application on Presentment of Creditor CSI Leasing, Inc. for Entry of an Order Pursuant to Fed. R. Bankr. P. 2004 Authorizing and Directing the Examination of the Debtors*, dated Oct. 13, 2016 (ECF Doc. # 1385).)

C. Subsequent Proceedings Relating to CSI's 2004 Application

The informal discovery efforts did not satisfy CSI. Consequently, the Debtors filed a formal objection to the *Application*, characterizing it as premature, overly broad, speculative and unduly burdensome. (*Debtors' Objection* at 2, ¶¶ 8–9.) The Debtors argue that they have agreed to allow CSI's claims, and CSI does not need the information to frame its claims. (*Id.* at ¶ 13.) In addition, authorizing discovery at this point in these chapter 11 cases might set an unwieldy precedent and open the floodgates for similar requests by other claimants. (*Debtors' Objection* at ¶ 8.) Furthermore, CSI's requests exceeded the scope of Rule 2004, (*id.* at ¶ 10), CSI had not demonstrated good cause, (*Debtors' Objection* at ¶¶ 12–13), the Debtors had already provided information about the Malaysian proceeding and CSI should make any further requests in that proceeding, (*id,* at ¶ 14), and CSI could get information relating to the Debtors' financial history by reviewing the Debtors' publicly available Schedules of Assets and Liabilities, Statement of Financial Affairs and Monthly Operating Reports. (*Debtors' Objection* at ¶¶ 11, 15.)

CSI responded largely reiterating its arguments made in the *Application*. In contrast to the Debtors' characterization that the Request was overly broad and speculative, CSI submitted that they were "narrowly ***249** tailored." (*Supplemental Memorandum* at ¶ 10 (footnote omitted).) CSI also acknowledged based upon its own due diligence that the Future Upstreams would probably never be tendered, (*id.* at ¶ 6), and characterized their requests simply as "directing the Debtors to provide oral testimony and produce documents related to the Upstream." (*Id.* at ¶ 8 (footnotes omitted).) CSI further argued that its requests would not cause undue cost or disruption to the Debtors because it was not seeking discovery of any documents that the Debtors had already provided or documents that did not exist. (*Id.* at ¶ 10.) Furthermore, good cause existed because the Rule 2004

examination was necessary to effectively enforce their rights in the United States and in Malaysia. (*Id.* at ¶ 12.) Finally, CSI disputed the Debtors' claim that it should first seek the documents and communications from the Malaysian liquidator. The Debtors had already admitted they had responsive documents, and the possible existence of such documents elsewhere did not relieve the Debtors of their obligations under Rule 2004. (*Id.* at ¶ 14.)

DISCUSSION

[1] **[2]** Rule 2004 provides in relevant part that the Court may authorize the examination of any entity relating "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." FED. R. BANKR. P. 2004(b). In chapter 11 cases, the examination may extend to matters relating "to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan." *Id.* The party seeking Rule 2004 discovery has the burden to show good cause for the examination it seeks, and relief lies within the sound discretion of the Bankruptcy Court. *Picard v. Marshall* (*In re Bernard L. Madoff Inv. Secs. LLC*), Adv. Pro. No. 08–01789, 2014 WL 5486279, at *2 (Bankr. S.D.N.Y. Oct. 30, 2014); *see In re Bd. of Dirs. of Hopewell Int'l Ins. Ltd.*, 258 B.R. 580, 587 (Bankr. S.D.N.Y. 2001) (Rule 2004 gives the Court "significant" discretion).

[3] **[4]** **[5]** A party seeking to conduct a Rule 2004 examination typically shows good cause by establishing that the proposed examination " 'is necessary to establish the claim of the party seeking the examination, or ... 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)); *accord In re AOG Entm't, Inc.*, 558 B.R. 98, 109 (Bankr. S.D.N.Y. 2016); *In re Drexel Burnham Lambert Grp., Inc.*, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991). In evaluating a request to conduct a Rule 2004 examination, the Court must "balance the competing interests of the parties, weighing the relevance of and necessity of the information sought by examination. That documents meet the requirement of relevance does not alone demonstrate that there is good cause for requiring their production." *Drexel Burnham*, 123 B.R. at 712; *accord In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991); *In re Fearn*, 96 B.R. 135, 138 (Bankr. S.D. Ohio 1989) ("While the scope of Rule 2004 examination is very broad, it is not limitless. The examination should not be so broad as to be more disruptive and costly to the party sought to be examined than beneficial to the party seeking discovery.")

In the past, courts have referred to the expansive reading of Rule 2004 comparing it to a "fishing expedition," ***250** *Drexel Burnham Lambert Grp., Inc.*, 123 B.R. at 711, a concept generally attributed to an old case that described the examination of the bankrupt as a "fishing examination." *In re Foerst*, 93 F. 190, 190 (S.D.N.Y. 1899). But the cost of compliance has increased substantially since then. The era of paper discovery in relatively small cases has given way to the discovery not only of paper but also of vast amounts of electronically stored information ("ESI"), possibly stored on outdated systems, on numerous personal computers and servers located throughout the world. SHIRA A. SCHEINDLIN, MOORE'S FEDERAL PRACTICE, E–DISCOVERY: THE NEWLY AMENDED FEDERAL RULES OF CIVIL PROCEDURE 3 (2006). Discovery has become an increasingly expensive aspect of civil litigation.

The proliferation of information and the costs associated with retrieving, reviewing and producing discovery in civil litigation have led to the 2015 amendments to the Federal Rules of Civil Procedure which emphasize the concept of proportionality. Under Rule 26, the scope of discovery extends to any matter relevant to a party's claim or defense and "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." FED. R. CIV. P. 26(b)(1). In addition, a party need not provide discovery of ESI from sources "that the party identifies as not reasonably accessible because of undue burden or cost," but the party from whom discovery is sought has the burden of showing "that the information is not reasonably accessible because of undue burden or cost," and even it meets that burden, "the court may nonetheless order discovery from such

sources if the requesting party shows good cause." Fed. R. Civ. P. 26(b)(2)(B).

[6] Rule 2004 has not been similarly amended but the spirit of proportionality is consistent with the historic concerns regarding the burden on the producing party and is relevant to the determination of cause. The Requests provide a good illustration. CSI's claims, while significant in face value, are small when viewed in the context of chapter 11 cases involving over $5 billion in debt with little prospect of anything more than a small recovery for unsecured creditors. By the November 17, 2016 hearing, the Debtors had already produced over 1,200 pages of information responsive to Requests as well as supplemental requests not included in the *Application*. (*Debtors' Objection* at 3–4.) These documents covered, among other things, the APA, (*id.* at 4; *Initial Order*), information showing the flow of funds, (Tr. at 56:6–13), and the Malaysian insolvency proceeding. (*Debtors' Objection* at ¶ 14.) CSI wants more, but the cost of retrieving, reviewing and producing "all documents and communications" relating to [4] each of the sixteen specific requests may exceed CSI's distribution in the Debtors' cases, and some of the requests could be made by every creditor and equity interest holder in these cases. Moreover, the Debtors have determined to allow CSI's two claims, and the additional discovery does not appear to be necessary to resolve any material ***251** issues in these chapter 11 cases between CSI and the Debtors.

Turning to the Requests, CSI has not established cause for most of the information it seeks. The cause it is required to demonstrate must relate to these cases. Although many of the requests are ostensibly relevant to the subject matter of the Debtors' cases, the primary focus of the *Application* is the need for information to use in the Malaysian insolvency proceeding.

CSI makes no secret of this purpose. CSI has implied that the Upstream was a fraudulent transfer by SEK. The *Application* argued that the Upstream left "little to no assets and little to no money to pay the just claims of SEK's creditors," (*Application* at ¶ 6), and the Debtors have information and knowledge regarding the Upstream, the $18 Million Holdback, and "other potential future expectant interests from SEK and/or LONGi." (*Id.* at ¶ 7.) Most telling, CSI argued that it needed the Rule 2004 discovery immediately to support its request for relief in the Malaysian insolvency proceeding:

> It also appears the Debtors are pursuing certain courses that are calculated, at least in part, to circumvent existing obligations and defeat Malaysian creditors (including but not limited to CSI) that may have rights to proceeds under the APA or otherwise. *With possible legal actions that CSI could take in Malaysia (including, but not limited to, injunctive relief)*, and with three months having transpired since CSI's Application was filed with this Court, it is imperative that CSI immediately obtain the information it has requested in the Application and without further delay so that it may effectively enforce its rights here and in Malaysia.

(*Supplemental Memorandum* at ¶ 12 (emphasis added).)

CSI confirmed the reason why it needed the information at oral argument. In response to the Court's question on that point, CSI's counsel stated "[w]e need discovery because of the related claims that exist in this case related to our Malaysian enterprise." (Tr. at 49:1–3.) He also stated that the Upstream "directly affects our claims and rights in Malaysia," (Tr. at 49:24–50:1), and "a debtor was used as a conduit to commit the overall transaction, which denied all the Malaysian creditors any recovery from SEK nondebtor and SPS debtor." (Tr. at 53:13–16.) I do not mean to minimize the possible grievance of or the potential remedies available to SEK's creditors and/or the Malaysian liquidator as a result of the Upstream, although I draw no conclusions. Nevertheless, the party seeking Rule 2004 discovery must show a need or undue hardship relating to the bankruptcy case in which the information is sought, not in some other, foreign proceeding.

While the Upstream may be germane to these cases because it arguably stripped SEPS of assets to pay CSI's claim in that case, [5] the extent of the discovery that CSI demands pertaining to the Upstream and other requests within the scope of Rule 2004 is disproportionate. Part of the problem may be CSI's misperception of its own Requests. It has described the Requests as "narrowly

tailored," (*Supplemental Memorandum* at ¶ 10), and "surgical," (Tr. at 54:24), but they are quite the opposite. First, CSI has not placed reasonable limits on the sources or types of information that the Debtors must search for and retrieve. ***252** The Requests generally ask for "all documents and communications" that "relate to" the subject matter of the specific request. The Court has noted the breadth of these terms. CSI will accept nothing less. It placed only two limits on the Debtors' duty to disclose that are meaningless: the Debtors do not have to produce any documents and communications they have already produced, and they don't have to produce any documents and communications that don't exist, at least while they don't exist. (*Supplemental Memorandum* at ¶ 10.) But for these limits, CSI insists that the Debtors must produce everything.

CSI has not articulated a rationale for compelling the production of all documents and communications relating to the Upstream. The Debtors have not disputed the Upstream, and it should be sufficient for CSI if the Debtors produce information showing how the money moved from SEK to SEPS and beyond. The Debtors should not be required to search every document, email and byte of data located on the servers and computers of its far-flung affiliates. [6]

Second, other requests are premature, unnecessary or overly broad. For example, CSI has acknowledged that Future Upstreams are unlikely. Nevertheless, it insists on compliance with three separate requests devoted entirely to Future Upstreams and a fourth request that includes both Upstreams and Future Upstreams. CSI also seeks discovery of all "documents and communications" related to (1) the possible sources of plan funding, (2) the Debtors' projected income and expenses and (3) documents and communications the Debtors "may" use "to argue that the interests of CSI are adequately protected." Given the broad duty to produce documents and communications "relating to" possible sources of plan funding and the Debtors' projected income and expenses, these two requests could conceivably cover every document and communication that exists. Moreover, the request for plan funding documents is premature; there is no plan and, as far as I can tell, no funding. In any event, this is the type of information that would be disclosed in a disclosure statement.

[7] The request relating to the adequate protection of CSI's interests is the most perplexing. To begin with, CSI has not requested adequate protection. More importantly, it is not entitled to adequate protection. Adequate protection must be provided to protect against the decline in value to a non-debtor's interest in property of the estate resulting from the imposition of the automatic stay, 11 U.S.C. § 362(d)(1), the use, sale or lease of that property, 11 U.S.C. 363(e), or the granting of a priming lien on that property to secure post-petition financing. 11 U.S.C. § 364(d)(1)(B); *see also* 11 U.S.C. § 361; *In re Garland Corp.*, 6 B.R. 456, 462 (1st Cir. BAP 1980) (Cyr, J.) Unsecured creditors like CSI do not have an interest in property of the estate that merits adequate protection, and there is no express statutory requirement that unsecured creditors receive adequate protection. *Garland Corp.*, 6 B.R. at 462; *In re R.F. Cunningham & Co.*, 355 B.R. 408, 412 (Bankr. E.D.N.Y. 2006) ("There is no statutory requirement that unsecured creditors receive adequate protection, and the lack of adequate protection does not entitle an unsecured creditor to relief from the stay.").

Accordingly, the *Application* is denied except to the extent that the Debtors are directed to provide sufficient information ***253** to identify the flow of funds that comprise the Upstream.

So ordered.

All Citations

562 B.R. 243, 63 Bankr.Ct.Dec. 163

Footnotes

1 The Debtors in these chapter 11 cases include SunEdison, Inc.; SunEdison DG, LLC; SUNE Wind Holdings, Inc.; SUNE Hawaii Solar Holdings, LLC; First Wind Solar Portfolio, LLC; First Wind California Holdings, LLC; SunEdison Holdings Corporation; SunEdison Utility Holdings, Inc.; SunEdison International, Inc.; SUNE ML 1, LLC; MEMC Pasadena, Inc.; Solaicx; SunEdison Contracting, LLC; NVT, LLC; NVT Licenses, LLC; Team–Solar, Inc.; SunEdison Canada, LLC; Enflex Corporation; Fotowatio Renewable Ventures, Inc.; Silver Ridge Power Holdings, LLC; SunEdison International, LLC; Sun Edison LLC; SunEdison Products Singapore Pte. Ltd.; SunEdison Residential Services, LLC; PVT Solar, Inc.; SEV Merger Sub Inc.; Sunflower Renewable Holdings 1, LLC; Blue Sky West Capital, LLC; First Wind Oakfield Portfolio, LLC; First

Wind Panhandle Holdings III, LLC; DSP Renewables, LLC; Hancock Renewables Holdings, LLC; EverStream Holdco Fund I, LLC; Buckthorn Renewables Holdings, LLC; Greenmountain Wind Holdings, LLC; Rattlesnake Flat Holdings, LLC; Somerset Wind Holdings, LLC; SunE Waiawa Holdings, LLC; SunE MN Development, LLC; SunE MN Development Holdings, LLC; SunE Minnesota Holdings, LLC and TerraForm Private Holdings, LLC.

2 The following conventions are used in citing to the record. "ECF Doc. # —" refers to documents filed on the docket of the main chapter 11 case, *In re SunEdison, Inc., et al.*, case no. 16–10992. "ECF/SEPS Doc. # —" refers to documents filed in the chapter 11 case, *In re SunEdison Products Singapore PTE Ltd.*, case no. 16–11014. "# of #" refers to the page number and total number of pages placed by the CM/ECF filing system at the top of every page of a filed document. "Tr." refers to the transcript of the hearing held in the main chapter 11 case on November 17, 2016 (ECF Doc. # 1646).

3 The Requests include broad definitions of "documents and "communications." " 'Document' or 'documents' means any writing or record of any type or description, including but not limited to the original, any non-identical copy or any draft, regardless of origin or location, of any paper, electronically-stored file, book, pamphlet, computer printout, newspaper, magazine, periodical, letter, memorandum, telegram, report, record, study, inter-office or intra-office communication, handwritten or other note, diary, invoice, purchase order, bill of lading, computer print-out, transcript of telephone conversations and any other retrievable data, working paper, chart, deed, survey, notes, map, graph, index, disc, data sheet or data processing card, or any other written, recorded, transcribed, punched, taped, magnetically recorded, filmed or graphic matter, however produced or reproduced to which You have, or have had, access." (Requests, Ex. A, Definitions and Instructions at ¶ 13.) 'Communication' means any transfer of information, oral or written, be it in the form of facts, ideas, inquiries, opinions, or otherwise, by any means, at any time or place, under any circumstances, and is not limited to transfers between persons, but includes other transfers, such as records and memoranda to the file." (*Id.* at ¶ 14.) I use the words "documents' and "communications" as a short hand to refer to all of the things in the definitions.

The Requests also impose certain onerous obligations with respect to the production of documents. For example, the "Debtors have a duty to search for responsive documents and things in all media and sources in their possession, custody or control where paper or electronic files are kept or stored, including floppy disks, hard drives on or for personal computers, computer servers, mainframe storage tapes or disks, archive facilities and backup facilities," (*id.* at ¶ 7), they are deemed "to be in control of a document if you have the right to secure the document or a copy thereof from another person having actual possession thereof," and "shall identify and provide the location of all responsive documents of which you are aware but which are not in your custody, possession or control." (*Id.* at ¶ 6.)

4 "The term 'relating to' (including any variant thereof), includes referring to, alluding to, responding to, pertaining to, concerning, connected with, commenting on or in respect of, analyzing, touching upon, constituting and being, and is not limited to contemporaneous events, actions, communications or documents. (Requests, Ex. A, Definitions and Instructions at ¶ 15.)

5 On the other hand, CSI implies that the sale proceeds were fraudulently transferred and should be recovered for the benefit of SEK's creditors. This is inconsistent with the argument that the proceeds could or should be used to satisfy CSI's claims in these cases.

6 Nothing herein relieves the Debtors of the duty to produce the APA-related documents that were the subject of the earlier order described above.

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Wasserman, Richard L.

Subject: FW: BBC - Request for Comment --- Objection/Friendly Amendment
Attachments: Proposed Bankruptcy Rule Amendment.pdf

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Subject: BBC - Request for Comment --- Objection/Friendly Amendment

I heartily endorse the concept that proportionality considerations apply to production of documents or electronically stored information. However, based on my experience as a member of the Advisory Committee on the Bankruptcy Rules for seven years, I perceive a problem with the text of the proposed amendment to Federal Rule of Bankruptcy Procedure 2004(c).

The difficulty is that the text of the proposed amendment will be perceived by the Committee as too vague. As drafted, it merely states an aspiration. What are "proportionality considerations"? To what does one refer for guidance? Explanations in advisory committee notes or references to cases or law review articles are notoriously ineffective devices to flesh out a vague concept.

The better approach would be to anchor the concept to the proportionality provisions in the Federal Rules of Civil Procedure by specific references to the Civil Rules that include the provisions, which are, I think, FRCivP 26(b) ("proportionality") and 45(d)(1) ("avoiding undue burden or expense"). That would have the effect of incorporating an understanding of proportionality already understood in federal jurisprudence and by the Article III courts that review Bankruptcy Court orders.

While I submit that those provisions probably do already apply as a practical matter to Rule 2004, I agree it would be helpful to include a reference to those rules in Rule 2004.

By way of friendly amendment, I suggest that the proposed sentence to be added to Rule 2004(c) be revised to read as follows:

"Requirements of proportionality and avoiding undue burden and expense, as provided in FRCivP 26(b) and FRCivP 45(d), apply to a request for the production of documents or electronically stored information in connection with a Rule 2004 examination."

Christopher Klein
U.S. Bankruptcy Judge
Eastern District of California