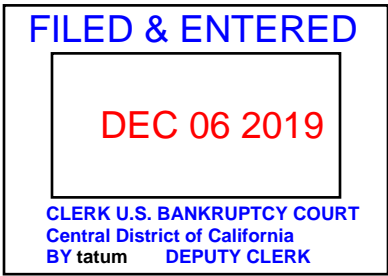


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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
ART & ARCHITECTURE BOOKS OF THE
21st CENTURY, a California corporation,

Reorganized Debtor.

Case No. 2:13-bk-14135-RK
Chapter 11

**MEMORANDUM DECISION ON: (I)
MOTION OF DOUGLAS CHRISMAS FOR
ORDER PURSUANT TO BANKRUPTCY
RULE 2004 AND BANKRUPTCY CODE
SECTIONS 105 AND 1142; AND (II)
MOTION OF PLAN AGENT SAM S.
LESLIE FOR PROTECTIVE ORDER RE:
2004 EXAMINATION REQUESTED BY
DOUGLAS CHRISMAS**

Pending before the court are: (1) the Motion of Douglas Christmas (“Christmas”) for Order pursuant to Bankruptcy Rule 2004¹ and Bankruptcy Code² Sections 105 and 1142 (“Rule 2004 Motion”), filed on January 29, 2019, Electronic Case Filing (“ECF”) Number 2423; and (2) the Motion of Plan Agent Sam S. Leslie (“Plan Agent”) for Protective Order Re: 2004 Examination requested by Douglas James Christmas (“Protective Order Motion”), filed on April 17, 2019, ECF 2445. The court has held multiple hearings on these motions, which were ongoing. The last scheduled hearing was for November 21,

¹ “Bankruptcy Rule 2004” refers to Federal Rule of Bankruptcy Procedure (“FRBP”) 2004.
² “Bankruptcy Code” refers to Title 11 of the United States Code, 11 U.S.C.

1 2019, which the court vacated upon application of the Plan Agent, which is further
2 discussed below.

3 In the Rule 2004 Motion, Christmas requested the entry of an order compelling the
4 Reorganized Debtor Art and Architecture Books of the 21st Century to produce
5 documents in response to his 22 requests for production and the Plan Agent to appear for
6 oral examination. Christmas requested the order on grounds that as a party in interest³, he
7 is entitled to relevant information about the performance of the Reorganized Debtor under
8 the confirmed reorganization plan. According to the Rule 2004 Motion, Christmas seeks
9 information about the post-confirmation Debtor to make an informed decision whether to
10 “give up on the plan” and/or pursue other options, such as moving to remove the Plan
11 Agent, converting the case, or exercising his right under the plan to move for approval of a
12 “Transaction”⁴ in lieu of continuing post-confirmation operations of the Reorganized
13 Debtor by the Plan Agent⁵.

14 _____
15 ³ Under 11 U.S.C. § 1109(b), “[a] party in interest, including . . . an equity security holder . . . may
16 raise and may appear and be heard on any issue in a case under this chapter.” Christmas is a party in
17 interest based on his status as: (i) the post-confirmation equity interest holder of the Reorganized Debtor
18 under the confirmed plan of reorganization, and (ii) a creditor, because he holds a scheduled priority wage
19 claim of \$5,000 and a scheduled general unsecured claim of \$286,311.06 for an alleged loan. See Second
20 Amended Plan of Reorganization of the Official Committee of Unsecured Creditors as Modified (the “Plan”),
ECF 1859 at 16 (the Plan providing for the “Replacement Share” as: “The single share of stock in the Post-
Confirmation Debtor issued to the Plan Trust that will be held by the Plan Trust for the benefit of
Christmas.”); Complaint, *Official Committee of Unsecured Creditors v. Christmas, et al.*, Adv. No. 2:15-ap-
01680-RK (alleging Christmas as having scheduled claims and seeking their disallowance or equitable
subordination). The Plan also defined “Christmas” as: “Douglas Christmas, the President and sole
shareholder of the Debtor.” ECF 1859 at 8.

21 ⁴ Pursuant to Sections 5.21 and 5.22 of the Plan: “If Christmas presents a proposed transaction to the
22 Plan Agent after the Effective Date, and the Plan Agent after seven calendar days does not agree to the
23 transaction, Christmas may file a motion with the Bankruptcy Court for authority to consummate the
24 transaction on behalf of the Post-Confirmation Debtor, which motion shall be served on all interested parties
including AERC and its bankruptcy counsel. At the hearing on approval of the transaction, the standard to
be applied by the Court is (a) whether the transaction will result in the occurrence of a Solvency Event, or (b)
if a Solvency Event will not result, whether the transaction is in the best interests of unsecured creditors and
the Post-Confirmation Debtor.” The Plan, ECF 1859 at 46-47 (§§ 5.21, 5.23).

25 ⁵ In the Rule 2004 Motion, Christmas framed the issue of the Reorganized Debtor’s post-confirmation
26 performance under the Plan Agent’s supervision as follows: “On April 6, 2016, the Post-Confirmation Debtor
27 was to pay Administrative Claims in full. Almost three years later, this still has not happened. Meanwhile,
28 under the sole control of Sam Leslie, the Post-Confirmation Debtor’s administrative insolvency has
deepened markedly as it operates the gallery at a loss and incurs substantial fees in pursuit of uncertain
litigation recoveries. As of November 2018, the Post-Confirmation Debtor has incurred more than \$5.6

(Continued...)

1 On February 5, 2019, the Plan Agent filed a written opposition to the Rule 2004
2 Motion, requesting that the motion be denied in its entirety and arguing that the motion
3 was filed to harass or burden the Reorganized Debtor and not to propose any legitimate
4 transaction in the best interests of creditors. ECF 2426. Specifically, the Plan Agent
5 argued that the Rule 2004 Motion was an attempt by Christmas to stop the Plan Agent's
6 fraud litigation against him in pending adversary proceedings⁶ and to obtain confidential
7 sales information in furtherance of his efforts to compete with the post-confirmation
8 Debtor. *Id.* at 1. The Plan Agent also argued that Christmas's counterclaims in the fraud
9 litigation, ECF 2425, mooted the motion because those claims addressed post-
10 confirmation administration of the Reorganized Debtor by the Plan Agent, and his
11 discovery could proceed in the adversary proceeding. *Id.* at 3-4. On February 5, 2019,
12 Eric Wilson and his companies⁷ filed a joinder in the Plan Agent's opposition to the Rule
13 2004 Motion. ECF 2428.

14 On February 12, 2019, Christmas filed a reply to the Plan Agent's opposition,
15 stating that he would limit his request for documents in a "reduced request" of 8 requests
16 for production. ECF 2433 at Schedule A. The "reduced request" asked that the
17 Reorganized Debtor produce: (i) inventories and schedules of assets; (ii) with respect to
18 any assets sold or gifted by the Reorganized Debtor on or after the effective date of the
19 confirmed reorganization plan, invoices and other documentation sufficient to evidence
20 any such sale or gift; (iii) documents sufficient to evidence the validity, priority and extent

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23 million in legal and accounting fees; less than half of which has been paid. Whether Mr. Leslie should
continue down this perilous path is a serious question." Rule 2004 Motion, ECF 2423 at 4.

24 ⁶ See e.g., Fifth Amended Complaint, *Sam Leslie, Plan Agent for Art & Architecture Books of the 21st*
Century v. Ace Gallery New York Corporation, a California corporation, et al., Adv. No. 2:15-ap-01679-RK;
25 Complaint, *Official Committee of Unsecured Creditors v. Christmas, et al.*, Adv. No. 2:15-ap-01680-RK.

26 ⁷ Eric Wilson is the President and sole shareholder of Wilson Administrative Services, Ltd., a
Canadian corporation, and one of the largest remaining creditors of the Debtor, directly or indirectly, through
27 his owned and controlled entities, including Wilson Administrative Services, and Telford Building, Ltd.
Claims Nos. 10, 17, 33, 34. Wilson and his owned and controlled entities are referred to herein as the
"Wilson Parties." The Wilson Parties are all creditors of the Debtor.

28 (Continued...)

1 of secured claims; (iv) accountings and reconciliations relating to artist and consignor
2 claims; (v) documents relating to the post-confirmation Debtor's relationship with Eric
3 Wilson and his companies; and (vi) documents relating to the Plan Agent's and LEA
4 Accountancy LLP's⁸ relationships with the Reorganized Debtor.⁹

5 After conducting two discovery dispute conferences, the parties filed a joint
6 statement on March 13, 2019, regarding their outstanding disputes concerning the Rule
7 2004 Motion and the "reduced" list of 8 requests for production of documents. ECF
8 2443.¹⁰

9 At the hearing on the Rule 2004 Motion held on April 3, 2019, the court and the
10 parties discussed scheduling of further proceedings, and the Plan Agent indicated that he
11 intended to move for a protective order. In a stipulated order, filed and entered on April
12 16, 2019, the court ordered that the Plan Agent was to file and serve his motion for a
13 protective order by April 17, 2019. ECF 2444 at ¶ 1. To address Christmas's request in
14 the Rule 2004 Motion for information about the status of post-confirmation performance of
15 the Reorganized Debtor under the Plan, the court also ordered the Plan Agent to file a
16 detailed status report by May 31, 2019, providing the court and all parties in interest with
17 detailed information concerning the financial state of the Reorganized Debtor and its post-
18 confirmation operations and affairs. *Id.* at ¶ 6. The court further ordered an evidentiary
19 hearing on the status of the post-confirmation performance of the Reorganized Debtor
20 under the administration of the Plan Agent, set for July 19, 2019, at which time the Plan
21 Agent and other witnesses would be available to testify and be cross-examined by parties
22 in interest, including Christmas. *Id.* at ¶ 7.

23
24 _____
25 ⁸ The Plan Agent is the managing partner of LEA Accountancy LLP, and he has engaged LEA to
26 provide accounting services for the reorganized debtor, and in his capacity as Plan Agent, he is the client of
LEA. ECF 2445 at 23; *Transcript of Testimony of Sam S. Leslie*, July 19, 2019, ECF 2513 at 50:25–51:02,
67:10–68:18.

27 ⁹ The requests in Schedule A, ECF 2433, covered these six areas of inquiry, but were separated into
eight requests for production.

28 ¹⁰ Each of the eight requests for production is discussed and ruled upon, in sequence, below.

1 In the Protective Order Motion, the Plan Agent requested the issuance of a
2 protective order to quash the discovery requested by Christmas in the Rule 2004 Motion.
3 ECF 2445. The Plan Agent argued that the Rule 2004 motion was brought for improper
4 purposes and that the discovery sought is burdensome, harassing and detrimental to the
5 Reorganized Debtor, alleging that Christmas seeks the commercially confidential business
6 records of the Reorganized Debtor in an effort to undermine the Debtor and Plan Agent.
7 *Id.* 1-3, 34. However, in the Protective Order Motion, the Plan Agent offered to share with
8 Christmas the following information subject to appropriate measures in a protective order:
9 (i) the Plan Agent would produce a copy of the inventory of artworks that are owned
10 outright by the Reorganized Debtor to be maintained in the possession of Jonathan
11 Shenson, Christmas's counsel, but could be viewed by Christmas in Shenson's office; (ii) to
12 the extent that the court would not be satisfied with the disclosures in the Plan Agent's
13 status report to be filed on May 31, 2019, the Plan Agent would provide further information
14 to the court for in camera review, which information would be produced to Christmas or
15 creditors if the court determined that there would be a proper interest justifying such
16 production; and (iii) if there would be a legitimate investor who is willing to fund a
17 transaction to pay all creditors in full or any other material transaction that would fall within
18 the Plan Agent's right to propose under 11 U.S.C. § 1127, the Plan Agent would agree to
19 provide appropriate information to such investor following execution of a nondisclosure
20 agreement. *Id.* at 33-34.

21 At the hearing on the Rule 2004 Motion and the Protective Order Motion on May
22 29, 2019, the court *sua sponte* raised the issue of applicability of the equitable doctrine of
23 unclean hands to Christmas's Rule 2004 Motion, and it requested the parties to address
24 whether the doctrine applied to Christmas and warranted denial of his Rule 2004 Motion.
25 *Transcript of Hearing on Rule 2004 and Protective Order Motions*, May 29, 2019, ECF
26 2483 at [page:line] 40:08 – 42:08. As a result, the court directed the parties to file briefing
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1 on the applicability of the doctrine. *Id.* at 53:01 – 57:06. In June and July 2019, Christmas
2 and the Plan Agent filed briefing¹¹ on the applicability of the doctrine of unclean hands.¹²

3 On May 31, 2019, the Plan Agent filed his status report on the post-confirmation
4 performance of the Reorganized Debtor under the plan and his declaration in support
5 thereof, as previously ordered by the court. ECF 2478. On July 19, 2019, the court
6 conducted the evidentiary hearing on the status of administration of the post-confirmation
7 Debtor, at which hearing the Plan Agent testified. *Transcript of Evidentiary Hearing*, July
8 19, 2019, ECF 2513. The hearing lasted a full day, but was not completed, and the court
9 continued the hearing to September 12, 2019. *Id.* at 293:24 – 294:08. During the
10 hearing on July 19, 2019, the Plan Agent indicated during his testimony that he was going
11 to amend and supplement the financial data and spreadsheets that accompanied his
12 status report filed on May 31, 2019.

13 On August 19, 2019, the Plan Agent filed an update to his status report filed on
14 May 31, 2019, which included supplemental financial data and spreadsheets addressing
15 inventory value reconciliation, secondary sales of artwork owned by Eric Wilson and
16 presentation of the estimated recovery on the pending adversary litigation. ECF 2517. In
17 a memorandum filed on the same date, August 19, 2019, the Plan Agent stated his
18 position that the initial evidentiary hearing on the status of post-confirmation performance
19 of the Reorganized Debtor and the scheduled further hearing were “beyond anything” to
20 which Christmas, given his own conduct, was entitled, urging that the Rule 2004 motion
21 should be summarily denied.¹³ ECF 2518.

22
23 ¹¹ See ECF 2484 (Christmas’s Brief on unclean hands); ECF 2485 (Plan Agent’s Brief on unclean
24 hands); ECF 2492 (Plan Agent’s Reply Brief); ECF 2494 (Christmas’s Reply Brief); ECF 2496 (Christmas’s
25 Brief regarding unclean hands and nexus requirement); ECF 2497 (Plan Agent’s Brief regarding unclean
26 hands and nexus requirement); ECF 2498 (Plan Agent’s Reply regarding unclean hands and nexus
27 requirement); ECF 2499 (Christmas’s Reply regarding unclean hands and nexus requirement); ECF 2504
28 (Plan Agent’s Sur-Reply regarding unclean hands and nexus requirement).

¹² The Wilson Parties filed joinders in the Plan Agent’s briefing. ECF 2489; ECF 2495.

¹³ The Plan Agent’s position stated in his August 19, 2019 memorandum implicitly retracts his previous
offer to conditionally produce the Reorganized Debtor’s inventory of artworks to Christmas and to provide
information to a “legitimate” investor to fund a Solvency Transaction as stated in the Plan Agent’s Protective

(Continued...)

1 On September 6, 2019, the Plan Agent filed a motion for continuance of the
2 hearing set for September 12, 2019, which the court granted, continuing the hearing from
3 September 12, 2019 to October 24, 2019. ECF 2532. The hearing was further continued
4 from October 24, 2019 to November 21, 2019, by stipulation and order filed and entered
5 on September 27, 2019. ECF 2536.¹⁴

6 _____
7 Order Motion, ECF 2445. The court construes the Plan Agent's conditional disclosure offer in the Protective
Order Motion as withdrawn.

8 ¹⁴ There is an apparent difference in opinion between the court and the parties regarding scheduling
9 for the Rule 2004 Motion and the Protective Order Motion, particularly with respect to the court's rulings on
10 the motions in relation to the continued evidentiary hearing. The Rule 2004 motion was filed at the end of
11 January 2019 and opposed in February. At the initial hearing, the Plan Agent indicated that he would seek a
12 protective order, and the parties agreed that he would file a motion for protective order, which he did in April.
13 ECF 2445. At the further hearing on the Rule 2004 Motion and the initial hearing on the Protective Order
14 Motion in May 2019, the court *sua sponte* indicated that it would order the Plan Agent to file a written status
15 report on the post-confirmation performance of the Reorganized Debtor under the plan, set an evidentiary
16 hearing and allow examination of the Plan Agent by parties in interest to address the concerns raised by the
17 Rule 2004 Motion. At this hearing in May 2019, the court raised *sua sponte* whether the equitable doctrine
18 of unclean hands applied to the Rule 2004 Motion. In June and July, the parties filed extensive briefing on
19 the applicability of unclean hands. At the June 26, 2019 hearing on the motions, the court discussed the
20 case of *In re Everett*, 364 B.R. 711, 723 (Bankr. D. Ariz. 2007), which construed the case law as requiring a
21 close nexus between the discovery sought and the alleged misconduct showing unclean hands, and the
22 parties requested an opportunity to brief the close nexus issue, which they completed on July 16, 2019,
23 three days before the July 19, 2019 evidentiary hearing. In his brief on unclean hands filed on June 19,
24 2019, Christmas requested that if the court determines that it has the power to invoke the doctrine of unclean
25 hands to the Rule 2004 motion, he urged that the court "defer making any decision here until after it has
26 conducted its evidentiary hearing on the Post-Confirmation Debtor's finances, operations and affairs,
27 scheduled for the July 19, 2019, because Mr. Christmas' allegations concerning Mr. Leslie's conduct must be
28 weighed in determining whether the doctrine applies." ECF 2494 at 2, citing, *Northbay Wellness Group, Inc.*
v. Beyries, 789 F.3d 956, 960 (9th Cir. 2015) (unclean hands defense in adversary proceeding). At the time,
this seemed to the court a reasonable request because the July 19, 2019 evidentiary hearing was coming
up shortly thereafter and the Ninth Circuit in *Northbay Wellness Group* counseled that courts should engage
in balancing when one party asserts the unclean hands defense against another party. According to the
Plan Agent, the motions were taken under submission after the completion of the briefing on unclean hands
and argument at the evidentiary hearing on July 19, 2019. ECF 2561. However, the July 19, 2019
evidentiary hearing was continued to September 12, 2019 because several attorneys had additional
examination questions for the Plan Agent. By application of the Plan Agent and order thereon, the court
continued the evidentiary hearing to October 24, 2019. By stipulation and order, the court further continued
the evidentiary hearing to November 21, 2019 due to scheduling conflicts of several attorneys. The court's
understanding was that the ruling on the Rule 2004 and Protective Order Motions would be made when the
evidentiary hearing was concluded because the examination of the Plan Agent at the evidentiary hearing
and the disclosure of financial data in his May 31, 2019 and August 16, 2019 status reports might obviate
the need for further discovery by Christmas on his document production requests. The court also
understood that the evidentiary hearing testimony and Plan Agent's status reports would be sufficient
information for the court to balance the parties' interests under *Northbay Wellness Group*. However, given
that the evidentiary hearing was not completed on July 19, 2019 as contemplated, the continuances of the
hearing have made the delay of the court's ruling on the Rule 2004 and Protective Order Motions somewhat
improvident. Having said this, it has been beneficial for the court to have had time to review the information

(Continued...)

1 On November 6, 2019, the court entered an order granting an application of the
2 Plan Agent to vacate the continued evidentiary hearing set for November 21, 2019 based
3 on cost and equitable considerations, and given the practicalities of the situation, the court
4 put the status of any further hearing in abeyance until other parties in interest could be
5 heard on the Plan Agent's concerns. ECF 2563. On November 13, 2019, the Wilson
6 Parties filed a joinder in the Plan Agent's application to vacate the continued evidentiary
7 hearing, ECF 2565, and Christmas filed an objection, ECF 2566.

8 I. DISCUSSION

9 In the Rule 2004 Motion, Christmas asserts that the motion should be granted
10 because as a party in interest, he is entitled to relevant information about the post-
11 confirmation performance of the Reorganized Debtor under the plan. As stated in his
12 moving papers, Christmas seeks information about the post-confirmation performance of
13 the Reorganized Debtor to make an informed decision whether to "give up on the plan"
14 and/or pursue other options, such as moving to remove the Plan Agent, converting the
15 case, or exercising his right under the plan to move for approval of a transaction in lieu of
16 continuing operations of the post-confirmation Debtor by the Plan Agent. At this time, the
17 outstanding requests for information from Christmas's Rule 2004 Motion are: (1) the 8
18 requests for production of documents in the "reduced request" set forth in his reply to the
19 Plan Agent's opposition to the Rule 2004 Motion and (2) the request for an oral
20 examination of the Plan Agent under Federal Rule of Bankruptcy Procedure 2004 ("Rule
21 2004").

22 As set forth below, the court first addresses certain principles regarding
23 examinations under Federal Rule of Bankruptcy Procedure ("FRBP") 2004, and then
24 discusses the parties' arguments regarding the applicability of the doctrine of unclean
25 hands here. Finally, the court determines that based on the substantial probative
26 evidence in support of the Plan Agent's allegations of fraud by Christmas, the party who

27 _____
28 in the Plan Agent's status reports and the testimony of the Plan Agent at the evidentiary hearing on July 19,
2019, all of which have some bearing on the court's ruling.

1 controlled the management of the prepetition and post-petition, preconfirmation Debtor,
2 which evidence is not disputed by Christmas in his papers, the doctrine of unclean hands
3 applies to Christmas's Rule 2004 Motion, which the court will deny on grounds that the
4 undisputed evidence shows for the purposes of the Rule 2004 Motion and the Plan
5 Agent's Protective Order Motion that Christmas is an unclean litigant and the court should
6 not exercise its judicial powers to grant him relief.¹⁵

7 **a. Federal Rule of Bankruptcy Procedure 2004**

8 On motion of any party in interest, the court may order the examination of any
9 entity pursuant to Rule 2004(a). "The purpose of a Rule 2004 examination is 'to show
10 the condition of the estate and to enable the Court to discover its extent and
11 whereabouts, and to come into possession of it, that the rights of the creditor may be
12 preserved.'" *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 514 (Bankr. E.D.N.Y. 1991)
13 (citing and quoting, *Cameron v. United States*, 231 U.S. 710, 717, 34 S.Ct. 244, 246,
14 58 L.Ed. 448 (1914) (discussing former § 21(a) of the Bankruptcy Act, from which
15 former Bankruptcy Rule 205 and current Rule 2004 are in part derived)).
16 "Examinations under Rule 2004 are allowed for the 'purpose of discovering assets and
17 unearthing frauds' and have been compared to a 'fishing expedition.'" *In re Duratech*
18 *Industries, Inc.*, 241 B.R. 283, 289 (E.D.N.Y. 1999) (quoting *In re GHR Energy Corp.*, 33
19 B.R. 451, 453 (Bankr. D. Mass. 1983)); *see also In re Drexel Burnham Lambert Group,*
20 *Inc.*, 123 B.R. 702, 711 (Bankr. S.D.N.Y. 1991) (comparing a Rule 2004 examination to a
21 "fishing expedition").

22 "The scope of a Rule 2004 examination is exceptionally broad and the rule itself is
23 'peculiar to bankruptcy law and procedure because it affords few of the procedural
24 safeguards that an examination under Rule 26 of the Federal Rules of Civil Procedure

25 ¹⁵ The court is mindful that its evidentiary determinations regarding the allegations of misconduct by
26 Christmas are solely for the purposes of resolving the issue of the applicability of the equitable doctrine of
27 unclean hands to the pending Rule 2004 and Protective Order Motions. The issue of whether or not
28 Christmas defrauded the bankruptcy estate and creditors of the preconfirmation Debtor is raised in the Plan
Agent's fraud claims in the pending adversary proceedings, and there are other parties who are litigating
such claims who have not necessarily participated in the determination of the pending motions.

1 does.” *In re Duratech Industries, Inc.*, 241 B.R. at 289 (quoting *In re GHR Energy Corp.*,
2 33 B.R. at 454). “There are, however, limits to the scope of Rule 2004 examinations.
3 Significantly, Rule 2004 examinations may not be used for the purposes of abuse or
4 harassment.” *In re Duratech Industries, Inc.*, 241 B.R. at 283 (citing *In re Mittco, Inc.*, 44
5 B.R. 35, 36 (Bankr. E.D. Wis. 1984)). A Rule 2004 examination must be both “relevant
6 and reasonable” and “may not be used to annoy, embarrass or oppress the party being
7 examined.” *In re Symington*, 209 B.R. 678, 685 (Bankr. D.Md.1997) (citations omitted).

8 “In evaluating a request to conduct a Rule 2004 examination, the court must
9 ‘balance the competing interests of the parties, weighing the relevance of and necessity of
10 the information sought by examination. That documents meet the requirement of
11 relevance does not alone demonstrate that there is good cause for requiring their
12 production.” *In re SunEdison, Inc.*, 562 B.R. 243, 250 (Bankr. S.D.N.Y. 2017) (quoting *In*
13 *re Drexel Burnham Lambert Group, Inc.*, 123 B.R. at 712). Moreover, “[Rule] 2004 is not
14 a substitute for discovery authorized in either adversary proceedings or contested matters
15 which is governed by [Rule] 9014 [relating to contested matters].” *In re Dinubilo*, 177 B.R.
16 932, 942 (E.D.Cal.1993) (citation omitted). This limitation of Rule 2004 by distinction with
17 Rule 9014 is often referred to as the “pending proceeding” rule.

18 If an adversary proceeding or a contested matter is pending and related to the
19 dispute at issue, then the parties to that proceeding or matter may no longer utilize the
20 liberal provisions of Federal Rule of Bankruptcy Procedure 2004 and should utilize the
21 discovery devices provided for in Federal Rules of Bankruptcy Procedure 7026 through
22 7037. *In re National Assessment, Inc.*, 547 B.R. 63, 65 (Bankr. W.D.N.Y. 2016). Courts,
23 however, will allow a party to utilize a Rule 2004 examination when the matter is not
24 related to the pending adversary litigation. *In re International Fibercom, Inc.*, 283 B.R.
25 290, 292-293 (Bankr. D. Ariz. 2002) (citations omitted).

26 Those courts allowing Rule 2004 examinations in pending litigation attempt to
27 balance the expansive nature of a Rule 2004 examination, which offers limited protection
28 to the examinee, with the more protected discovery process of the federal discovery rules.

1 See e.g., *In re M4 Enterprises, Inc.*, 190 B.R. 471, 475 (Bankr. N.D. Ga. 1995). The court
2 “holds the ultimate discretion whether to permit” or deny the use of Rule 2004, and the
3 determination is best left on a case by case basis. *In re International Fibercom, Inc.*, 283
4 at 292-293.

5 **b. The Doctrine of Unclean Hands**

6 The doctrine of unclean hands derives from the equitable maxim that “he who
7 comes into equity must come with clean hands.” *Ellenburg v. Brockway, Inc.*, 763 F.2d
8 1091, 1097 (9th Cir. 1985). This maxim “closes the doors of a court of equity to one
9 tainted with inequity or bad faith relative to the matter in which he seeks relief,
10 however improper may have been the behavior of the defendant.” *Id.* (quoting *Precision*
11 *Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. 806,
12 814, 65 S.Ct. 993, 997, 89 L.Ed. 1381 (1945)). In applying the doctrine, “[w]hat is material
13 is not that the plaintiff’s hands are dirty, but that he dirtied them in acquiring the right he
14 now asserts, or that the manner of dirtying renders inequitable the assertion of such rights
15 against the defendants.” *Id.* (quoting *Republic Molding Corp. v. B.W. Photo Utilities*, 319
16 F.2d 347, 349 (9th Cir. 1963). Thus, equity requires that those seeking its protection shall
17 have acted fairly and without fraud or deceit as to the controversy in issue. *Id.* (citing
18 *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387, 64 S.Ct. 622, 624, 88 L.Ed. 814
19 (1944) and *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245, 54 S.Ct.
20 146, 147, 78 L.Ed. 293 (1933)).

21 **i. Plan Agent’s Contentions**

22 In his brief filed on June 12, 2019, the Plan Agent argues that Christmas has
23 unclean hands and should be prevented from using the Rule 2004 examination procedure
24 to obtain any relief in this court of equity, and therefore, the court should deny Christmas’s
25 Rule 2004 motion, or, alternatively, enter a protective order barring or quashing the
26 discovery sought by the Rule 2004 motion. Citing *Johnson v. Yellow Cab Transit Co.*, 321
27 U.S. 387 (1944), the Plan Agent asserts that it is a fundamental principle that a party
28 seeking equitable relief must come with clean hands. 321 U.S. at 387. The Plan Agent

1 also cites and quotes *Precision Instrument Manufacturing Co. v. Automotive Maintenance*
2 *Machinery Co.*, 324 U.S. 806 (1945):

3 This maxim [that a party seeking equitable relief must come with clean hands]
4 necessarily gives wide range to the equity court's use of discretion in refusing to aid
5 the unclean litigant. It is not bound by formula or restrained by any limitation that
6 tends to trammel the free and just exercise of discretion. Accordingly, one's
7 misconduct needs not necessarily have been of such a nature as to be punishable
as a crime or as to justify legal proceedings of any character. Any willful act
concerning the cause of action which rightfully can be said to transgress equitable
standards of conduct is sufficient cause for the invocation of the maxim by the
chancellor.

8 324 U.S. at 815 (citations omitted). As further asserted by the Plan Agent, "[a]lthough
9 'precise similarity' between plaintiff's inequitable conduct and the plaintiff's claims is not
10 required, the misconduct 'must be relative to the matter in which [the plaintiff] seeks
11 relief[.]'" *Pom Wonderful LLC v. Welch Foods, Inc.*, 737 F.Supp.2d 1105, 1110 (C.D. Cal.
12 2010) (quoting *Precision Instrument Manufacturing Co. v. Automotive Maintenance*
13 *Machinery Co.*, 324 U.S. at 814).

14 Specifically, the Plan Agent argues that the unclean hands doctrine applies here
15 because the undisputed evidence in the record as primarily set forth in his declarations in
16 support of his status report filed on May 31, 2019, ECF 2478, and in support of his
17 supplemental brief on the doctrine of unclean hands, ECF 2486, and the declaration of an
18 expert consultant retained by him, a forensic accountant, Jennifer Ziegler, Certified Public
19 Accountant ("CPA"), ECF 2486-1, demonstrate that Christmas engaged in fraudulent
20 business practices as Debtor's principal immediately before this bankruptcy case was filed
21 and during the pendency of the bankruptcy case, from the petition date to the effective
22 date of the confirmed reorganization plan. The Plan Agent alleges that Christmas diverted
23 substantial sums of money belonging to the bankruptcy estate, totaling over \$17 million,
24 from the proceeds of sales of artwork owned or consigned to Debtor and the proceeds of
25 Debtor in Possession ("DIP") financing loans, to non-debtor entities controlled by
26 Christmas, namely, Ace New York Corporation ("Ace NY") and Ace Museum. *Status*
27 *Report and Declaration of Sam S. Leslie in Support Thereof*, ECF 2478; *Declaration of*
28 *Sam S. Leslie in Support of Plan Agent's Supplemental Brief re: Unclean Hands*, ECF

1 2486 at 5-14; Declaration of Jennifer Ziegler, Exhibit 2 to the *Declaration of Sam S. Leslie*
2 *in Support of Plan Agent's Supplemental Brief Re: Unclean Hands*, ECF 2486-1 at 14-123
3 (hereinafter, including the exhibits attached thereto, the "Ziegler Declaration").

4 The Plan Agent contends that the undisputed evidence described in his
5 declarations and the Ziegler Declaration shows that diversions of estate assets during
6 Christmas's management and control of the preconfirmation Debtor, to his controlled
7 nondebtor entities, were concealed from the oversight of the court and the parties in
8 interest in this case, including the official committee of unsecured creditors, through the
9 filing of false Monthly Operating Reports signed by Christmas and filed on behalf of the
10 Debtor-in-Possession and the making of other false statements by Christmas in connection
11 with the case.

12 **ii. The Plan Agent's Declarations and Ziegler Declaration**

13 In support of his opposition to the Rule 2004 Motion and his Protective Order
14 Motion, the Plan Agent has filed a copy of the declaration of Jennifer Ziegler ("Ziegler"),
15 which was first prepared and filed in support of the Plan Agent's motion to clarify the
16 interpretation of the Plan in the adversary proceeding involving the Plan Agent's fraud
17 claims, Adv. No. 2:15-ap-01679-RK, ECF 542, filed on March 21, 2019.¹⁶ The Plan Agent
18 retained Ziegler, an accountant¹⁷, to provide forensic accounting services. Specifically,
19 _____

20 ¹⁶ Citations to the Ziegler Declaration hereafter make reference to the paragraph numbers included in
the original declaration, which are included on the record, ECF 2486-1 at 14-123.

21 ¹⁷ Ziegler is a certified public accountant (CPA) licensed to practice in California and Oregon and holds
22 designations of CFF (Certified in Financial Forensics) and CFE (Certified Fraud Examiner). She has worked
23 in accounting for more than 30 years, specializing in forensic accounting for over 20 years. Over the last 20
24 years, Ziegler has worked on hundreds of accounting matters involving many types of businesses, including
25 insurance providers, public companies, government agencies, homeowners' associations, retailers,
26 wholesalers and startup companies. Many of her accountancy engagements were litigation and/or forensic
27 engagements which included matters pending in bankruptcy and probate courts, and many of the forensic
28 engagements were like the engagement for the Plan Agent in this bankruptcy case for the purpose of tracing
funds and identifying and tracking the use of funds. Ziegler is currently a managing director at the Berkeley
Research Group at its Century City (Los Angeles) office. Berkeley Research Group is a global strategic
advisory and expert consulting firm that provides independent advice, data analytics, authoritative studies,
expert testimony, investigations, and regulatory and dispute consulting to Fortune 500 corporations, financial
institutions, government agencies, major law firms and regulatory bodies around the world, and has 1,200
employees, and the firm has been recognized by Forbes Magazine on its Forbes List of Best Management

(Continued...)

1 Ziegler evaluated and verified the conclusions of Timothy Kincaid (“Kincaid”), an
2 accountant¹⁸ and a partner at LEA Accountancy, LLP, the Plan Agent’s accountancy firm,
3 in his declaration filed in the adversary proceeding, Adv. No. 2:15-ap-01679-RK, ECF
4 216, filed on October 19, 2017. ECF 2486-1, Ziegler Declaration at ¶ 4.

5 As discussed below, the court has reviewed the testimony of the Plan Agent,
6 Kincaid and Ziegler in their respective declarations and determines for purposes of the
7 pending Rule 2004 Motion and the Protective Order Motion that their testimony is credible
8 and supported by evidence that is undisputed and makes out a prima facie showing that
9 Christmas is an unclean litigant.

10 The court notes that Christmas has had a full and fair opportunity to offer evidence
11 to rebut the evidentiary showing by the Plan Agent that Christmas is an unclean litigant,
12 but Christmas has remained silent in the face of this adverse evidence, apparently
13 exercising his Fifth Amendment right not to give testimony which would be self-
14 incriminating. See *Memorandum Regarding August 7, 2019 Deposition Session of*
15 *Douglas Christmas and Continued Hearing on Examination of Plan Agent*, ECF 2518, filed
16 on August 19, 2019, at 2-4; *Transcript of Evidentiary Hearing*, July 19, 2019, ECF 2513 at
17 7-11, 60-64, 111-112 (internal page citations: 3-7, 57-60, 107-108) (discussions between
18 the court and counsel regarding Christmas’s oral motion or request to quash the witness
19 subpoena served on him by the Plan Agent to testify at the July 19, 2019 hearing based
20 on Fifth Amendment self-incrimination concerns). Christmas’s only evidence on the issue

21 _____
22 Consulting Firms for 2019. Listing for Berkeley Research Group,
23 <https://www.forbes.com/companies/berkeley-research-group> (accessed on November 19, 2019). Ziegler
24 has previously been a partner at the Gurseay Schneider and Hemming Morse accounting firms and an
25 auditor with KPMG and UCLA. She is a former chair of the California Society of CPAs, the largest state
26 CPA society in the United States, and currently serves as a California State delegate on the American
27 Institute of CPAs Council, the governing and standard-setting body for CPAs in the United States.

28 ¹⁸ As an accountant, Kincaid had provided 23 years of accounting services in private practice and for
Chapter 7 and Chapter 11 bankruptcy trustees and debtors. Based on this experience, Kincaid is familiar
with the interplay between accounting in and out of bankruptcy cases for individuals, corporations, limited
liability companies and closely held corporations on one hand and bankruptcy estates on the other hand.
Kincaid has performed numerous fraud analyses and other forensic accounting works in numerous
bankruptcy and nonbankruptcy cases.

(Continued...)

1 of unclean hands is his three-paragraph declaration filed in support of his Brief on the
2 Doctrine of Unclean Hands Regarding Nexus, ECF 2496, filed on July 3, 2019.¹⁹
3 Christmas's sole declaration on the issue on unclean hands was completely unresponsive
4 to the Plan Agent's evidence of fraudulent diversions presented in the Plan Agent's
5 declarations and the Ziegler Declaration filed on June 12, 2019 in support of the
6 allegations of fraud.

7 The testimony of the Plan Agent and Ziegler in their respective declarations
8 provides extensive detail about the alleged fraudulent diversion of assets belonging to the
9 bankruptcy estate by Christmas to non-debtor entities controlled by him, namely, Ace NY
10 and Ace Museum, and the court briefly describes this testimony as it relates to the court's
11 ruling upon the issue of the applicability of the doctrine of unclean hands to the pending
12 Rule 2004 Motion and Protective Order Motion:

- 13 (1) On the effective date of the Plan, April 6, 2016, Christmas told the Plan
14 Agent that the Debtor's general operating account had no significant funds that
15 could be used to pay payroll for Debtor's employees, which expenses were
16 imminently due, in part because Christmas had caused \$50,000 of the Debtor's

17 _____
18 ¹⁹ The Christmas Declaration stated as follows:

19 I, Douglas Christmas, do hereby declare:

- 20 1. I am over eighteen years of age and make this declaration in support of my Motion for Order
21 Pursuant to Bankruptcy Rule 2004 and Bankruptcy Code Sections 105 and 1142 (DKT #2423,
22 the "Motion"). Capitalized terms not otherwise defined in this Declaration shall have the
23 meaning ascribed to them in the Motion. Except as expressly noted, each of the facts contained
24 in this declaration is based on my personal knowledge, and, if called as a witness to do so, I
25 could competently testify thereto.
- 26 2. Since November 2018, I have been interested in proposing a transaction in the best interests of
27 creditors, in accordance with Plan sections 5.21 & 5.22, in which a newly-formed, properly
28 capitalized entity would acquire the Post-Confirmation Debtor's art assets for consideration in
the form of a cash payment at closing and the elimination or satisfaction of other claims against
the Debtor.
3. In order to obtain capital necessary to consummate any transaction, I need information about
the Post-Confirmation Debtor's art inventories and sales.

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

Executed this 3rd day of July 2019, at Los Angeles, California.

/s/ Douglas Christmas

1 funds to be transferred from Debtor’s account to that of Ace Museum on March
2 30, 2016, in order to pay rent that Ace Museum owed to its landlord, 400 S. La
3 Brea, LLC. *Declaration of Sam S. Leslie in Support of Plan Agent’s Supplemental*
4 *Brief re: Unclean Hands*, ECF 2486 at ¶ 16. The Plan Agent soon learned that
5 the amount of this March 31, 2016 diversion of estate funds to pay the rent of Ace
6 Museum was much greater than the amount Christmas represented to the Plan
7 Agent on the plan effective date, as confirmed by a letter from Christmas’s then
8 lawyer, David Shemano, to the Plan Agent’s lawyer, dated April 25, 2016, stating
9 that the amount of the diversion was \$264,000. *Status Report and Declaration of*
10 *Sam S. Leslie in Support Thereof*, ECF 2478 at 4, 5, 24 and Exhibit A attached
11 thereto (April 25, 2016 letter from Shemano stating, “Sam [i.e., the Plan Agent] is
12 correct that, on or about March 30, 2016, Douglas [Christmas] caused Ace Gallery
13 [i.e., Debtor’s trade name] to transfer approximately \$264,000 to Ace Museum.
14 The purpose of the transfers were to enable Ace Museum to pay April rent, which
15 was crucial at the time because Douglas was attempting to finalize the terms of a
16 monetization event sufficient to pay Ace Gallery creditors in full.”). This diversion
17 meant that the Reorganized Debtor had no operating funds on the effective date
18 of the plan— April 6, 2019—that would allow the Plan Agent to operate the
19 postconfirmation business of the Reorganized Debtor, causing the Plan Agent to
20 seek a line of credit from the primary unsecured creditor, Eric Wilson, to address
21 necessary operational expenses and the many outstanding legal matters of the
22 case. *Status Report and Declaration of Sam S. Leslie in Support Thereof*, ECF
23 2478 at 4, 5, 24 and Exhibits A and C attached thereto; *see also, Transcript of*
24 *Testimony of Sam S. Leslie*, July 19, 2019, ECF 2513 at 48:10–54:17. This
25 evidence supporting the Plan Agent’s fraud allegations is not disputed by
26 Christmas, and this undisputed evidence supports the Plan Agent’s allegations
27 that Christmas emptied the coffers of the bankruptcy estate of over a quarter of a
28 million dollars immediately before the turnover of control of the estate, which

1 deprived the Plan Agent of any operating funds to manage the Reorganized
2 Debtor. This undisputed evidence, by itself, supports application of the doctrine
3 of unclean hands here.

4 (2) In assisting the Plan Agent in this bankruptcy case, Kincaid's responsibilities
5 included review of all Debtor, Ace NY, and Ace Museum bank records, sales
6 invoices and other financial and business records, the vast majority of which were
7 housed with Debtor's records. In conducting a forensic review of Debtor's
8 records, Kincaid prepared, among other work product, a spreadsheet based on
9 information contained in those records that documented all of the artwork sales of
10 Debtor's owned and consigned artwork between the petition date of February 19,
11 2013 and the plan effective date of April 6, 2016, for which Ace NY received the
12 sales proceeds. ECF 216, Adv. No. 2-15-ap-01679-RK. The spreadsheet
13 documented which sales were made according to invoices in the name of the
14 Debtor or Ace NY, the date of the invoice, the name of the purchaser, the name
15 of the artist who created the artworks, and the sales price received by Ace NY or
16 Debtor, among other things, which enabled Kincaid to calculate various amounts,
17 including the total amount of sales proceeds that Ace NY received for Debtor's
18 artworks prior to the effective date and the total amount of sales proceeds
19 received by Ace NY for particular artists. *Id.* Based on his analysis of the Debtor-
20 in-Possession's financial books and records during the preconfirmation phase of
21 the bankruptcy case (i.e., from the petition date to the plan effective date), Kincaid
22 concluded that \$14,275,813.50 in proceeds of sales of artwork²⁰ that should have
23 been deposited in the Debtor-in-Possession's bank accounts were instead
24 deposited into the bank accounts of Ace NY, a shell corporation newly formed by
25 Christmas before Debtor's bankruptcy case. Kincaid also concluded that some of

26
27 ²⁰ The sales Kincaid documented included sales of artworks by artists with whom the Debtor had an
28 exclusive contractual relationship, sales that represented business opportunities that were property of the
Debtor, and sales from secondary art sales organized by one of the Debtor's customers in which the
Debtor's location and staff were used. ECF 216, Adv. No. 2-15-ap-01679-RK.

1 these proceeds were improperly transferred to Ace Museum, another entity
2 controlled by Christmas, rather than properly returned to Debtor. *Id.* Kincaid
3 stated that his review of Debtor's and Ace NY's business records, including sales
4 invoices and records of commissions due, showed that the sales of Debtor's
5 artworks resulting in the diversion of its funds to Ace NY were carried out by
6 employees and principals of Debtor, including Christmas and his wife, Jennifer
7 Kellen, and that the sales of artwork were facilitated, shipped and crated by
8 Debtor's employees and stored and shown in Debtor's premises. *Id.*

9 (3) As described in the Plan Agent's Supplemental Brief re: the Doctrine of
10 Unclean Hands, ECF 2485, supported by the Plan Agent's declaration, there is
11 substantial, probative and undisputed evidence that Christmas was knowingly
12 complicit in the apparent scheme to divert proceeds either from Debtor's artwork
13 or subject to Debtor's consignment rights to Ace NY. ECF 2485 at 10-11 (internal
14 page citation: 6-7). An email in March 2015 from Christmas to Debtor's customer,
15 Paul Balson ("Balson"), offered a 30% discount on certain artwork, explaining that
16 the price reduction was abnormal for the Debtor and was prompted by Debtor's
17 need to make a major expense payment that same week. March 17, 2015 e-mail
18 from Christmas to Balson, Exhibit 3 to the *Declaration of Sam S. Leslie in Support*
19 *of Plan Agent's Supplemental Brief Re: Unclean Hands*, ECF 2486-1 at 124-125.
20 After reaching an agreement on the discounted sale with Balson, Christmas stated
21 in an email to the customer, Balson, two days later, "The wire instructions are to
22 Ace Gallery New York which is a different account to the last wire that you sent
23 but my accounting office wants to process these sales through that account.
24 Since time is of the essence please . . . find wire instructions attached." March
25 19, 2015 e-mail from Christmas to Balson, Exhibit 4 to the *Declaration of Sam S.*
26 *Leslie in Support of Plan Agent's Supplemental Brief Re: Unclean Hands*, ECF
27 2486-1 at 126-130. Related emails from Debtor's controller, Lauren Gullotta, to
28 Balson included as attachments a bill of sale for the art on Ace NY letterhead and

1 wire instructions to the Ace NY account—Debtor’s “new account number.” March
2 19, 2015 e-mail from Lauren Gullotta to Balson, Exhibit 5 to the *Declaration of*
3 *Sam S. Leslie in Support of Plan Agent’s Supplemental Brief Re: Unclean Hands*,
4 ECF 2486-1 at 131-136. Christmas signed the Ace NY bill of sale, invoice #2073,
5 as “Director & Chief Curator.” *Id.* Records produced by City National Bank
6 indicate that Balson wired the sale price of \$258,000 to Ace NY on March 19,
7 2015, and that same day, Christmas caused at least \$228,000 to be wired from
8 Ace NY to Ace Museum, and \$226,000 was then wired from Ace Museum to 400
9 S. La Brea, LLC. City National Bank Wire and Account Records, Exhibits 6, 7
10 and 8 to the *Declaration of Sam S. Leslie in Support of Plan Agent’s*
11 *Supplemental Brief Re: Unclean Hands*, ECF 2486-1 at 137-147. This
12 uncontroverted evidence directly implicates Christmas in the scheme to divert
13 Debtor’s assets to his controlled nondebtor entity, Ace NY, while he was acting as
14 a fiduciary for Debtor’s bankruptcy estate as the person controlling Debtor during
15 this Chapter 11 bankruptcy case. This evidence by itself is sufficient to show that
16 Christmas is an unclean litigant for purposes of the pending Rule 2004 Motion and
17 the Protective Order Motion.

18 (4) The forensic analysis of the Plan Agent’s expert consultant, Ziegler, shows
19 that during Christmas’s management of the Debtor-in Possession, more than
20 \$790,000 of DIP financing proceeds approved by the court during the post-
21 petition, preconfirmation phase of the bankruptcy case, which proceeds were
22 estate property, were deposited into the bank accounts of non-debtor entities
23 controlled by Christmas, Ace NY and Ace Museum, instead of Debtor-in-
24 Possession accounts. The uncontroverted Ziegler analysis also demonstrates
25 that the diverted DIP proceeds were used not for the benefit of the estate, but for
26 the benefit of Christmas personally (through his controlled entities). ECF 2486-1,
27 Ziegler Declaration at ¶ 11. As the analysis shows, the funds were first deposited
28 into the Ace NY and Ace Museum accounts, and then transferred to Debtor’s

1 accounts. The Ace Museum accounts were then credited with payments on a
2 loan it had received from Debtor, which in effect meant that Ace Museum was
3 using Debtor's money, not its money, to receive a reduction on its loan debt to
4 Debtor, which would be a fraud on the estate. This evidence is not disputed by
5 Christmas, and this evidence supports the Plan Agent's allegations that Christmas
6 funneled the estate's DIP financing money through his controlled entities to give
7 his controlled entity, Ace Museum, unjustified loan payment credits during his
8 supervision of the bankruptcy estate, depriving the estate and its creditors of
9 value in that amount, which evidence by itself supports application of the doctrine
10 of unclean hands here.

11 (5) To complete her forensic analysis of Debtor's financial transactions during
12 the preconfirmation phase of the case, Ziegler reviewed thousands of documents
13 supporting the business activity of the Debtor for the time period of February 2013
14 through April 2016, which included the Monthly Operating Reports prepared by
15 the Debtor and signed by Christmas, bank statements of the Debtor referenced in
16 the Monthly Operating Reports, the electronic general ledgers of the Debtor, and
17 sales invoices of the Debtor, among other documents. Ziegler also interviewed
18 staff and accounting personnel who worked for the Debtor during this time period
19 in order to understand their accounting processes, such as sales invoice
20 processing, inventory maintenance, cash processing and bill payments. Ziegler
21 also reviewed accounting documents and correspondence independently
22 obtained from Debtor's computers, as well as bank records of Ace NY and Ace
23 Museum.

24 (6) According to Ziegler, the documents that she reviewed pertaining to Ace NY
25 included its initial tax return for the period of February 1, 2013 through October
26 31, 2013, which was filed on an IRS Form 1120 corporate income tax return (the
27 "Form 1120"). Ace NY's Form 1120 included an opening balance sheet showing
28 no assets or capital at its corporate formation, and thus, reflected that Ace NY did

1 not have any artwork or assets at the time that Debtor filed its Chapter 11
2 bankruptcy case in February 2013, the month Debtor filed its petition. Yet as
3 Ziegler noted, and as reported on Ace NY's Form 1120, Ace NY received
4 \$2,103,866 in artwork sales revenue during the same period of February 1, 2013
5 through October 31, 2013, the nine-month period after its corporate formation.
6 Based on her review of sales invoices, wire transfer instructions, bank
7 statements, deposit information, artist contracts, consignment agreements of
8 Debtor and Ace NY, and other documents, Ziegler determined that the \$2 million
9 in artwork sales revenue reported by Ace NY on its Form 1120 for the period of
10 February 1, 2013 through October 31, 2013 was diverted from the Debtor.
11 Accordingly, Ziegler opined that although Ace NY had no assets when it was
12 formed in February 2013, it was able to produce \$2 million of revenue, and she
13 confirmed that this \$2 million was from the sale of the Debtor's artwork. Christmas
14 does not offer any evidence to dispute Ziegler's analysis and conclusions that
15 Ace NY's \$2 million in revenue in 2013 was from the sale of Debtor's artwork.
16 (7) In her analysis, Ziegler described how these funds were diverted from the
17 Debtor to Ace NY when discussing the Debtor's artist consignment agreements²¹.
18 Ziegler reviewed Debtor's internal inventory records, artist contracts, and
19 consignment sheets, and found that all of the contracts²² she reviewed were
20 signed by Christmas on behalf of the Debtor. Ziegler stated that she was unable
21

22 ²¹ The Plan Agent in his status report and declaration filed on May 31, 2019 stated that both before
23 and during the Chapter 11 bankruptcy case of Debtor, Christmas many times failed to inform the artists of
24 sales of their work, falsely reported the amount of the sale or simply delayed payment of the artist's share.
25 ECF 2478. The Plan Agent further stated that although some of this was related to sales for which the funds
26 were diverted to the Ace NY bank account, Debtor as consignee is obligated to pay the artists for their share
27 of such sales, and thus, Debtor was not only deprived of its revenue due on the sales, but is liable to pay the
28 artists for their artist shares which Christmas diverted. The Plan Agent has confirmed that Debtor owes
artists approximately \$ 5 million for prepetition art sales and \$3 million for art sales during the pendency of
this Chapter 11 bankruptcy case. Christmas does not offer any evidence in his Rule 2004 Motion to dispute
this testimony of the Plan Agent.

²² The majority of the contracts Ziegler reviewed were signed before Debtor's bankruptcy petition filing,
and some contracts were signed after the bankruptcy filing.

1 to review or locate any contracts between Ace NY and any artist, indicating that
2 there were no such contracts (which is not disputed by Christmas). Additionally,
3 Ziegler found that many pieces of art were listed on both Debtor and Ace NY
4 invoices, including artwork that appeared to be owned and/or contracted by the
5 Debtor but was sold under the name of Ace NY.

6 (8) Ziegler cited the example of Charles Fine's Flor De Incino artwork, which
7 was on an inventory list in the Debtor's Exhibit Binder Volume 3, and was sold on
8 an Ace NY invoice, and the \$172,000 check payment (the "Fine Artwork
9 Proceeds") for that invoice was deposited into Ace NY's bank account on August
10 2, 2013.²³ Ziegler found that of the Fine Artwork Proceeds, \$165,000 was
11 transferred from Ace NY to Ace Museum's bank account on August 6, 2013, and
12 on the same day, \$165,000 was wire transferred out of the Ace Museum account
13 in two wire transfers: one transfer of \$150,000 to pay Ace Museum's rent
14 expense and one transfer of \$15,000 to Debtor's general bank account.²⁴ This
15 specific example shows a diversion of Debtor's funds totaling \$172,000, though a
16 small amount, \$15,000, was returned to the Debtor, with a resulting net loss to
17 the Debtor of \$157,000.²⁵ Ziegler found that in similar transactions, funds that
18 belonged to the Debtor through sales of its artwork were deposited first into Ace
19 NY's bank account and then transferred into Ace Museum's bank account, and
20 afterwards, portions of these transfers were deposited into the Debtor's bank
21 account or used to pay non-Debtor expenses. Christmas does not offer any
22 evidence to dispute Ziegler's analysis and conclusions that artwork sold under the
23

24 ²³ Copies of the cancelled check and bank statement showing the deposit were attached to the Ziegler
25 Declaration. See ECF 2486-1, Ziegler Declaration at Exhibits K, L, M, N, O, P.

26 ²⁴ Copies of the Ace NY and Ace Museum bank statements showing the deposits and transfers were
attached to the Ziegler Declaration. *Id.*

27 ²⁵ The Ziegler Declaration does not determine whether the \$15,000 might be an additional loss if
credited to Ace Museum as a reduction of Debtor's note receivable from Ace Museum.

28 (Continued...)

1 name of Ace NY was owned and/or contracted by the Debtor, and that proceeds
2 from such sales were diverted from the Debtor to Ace NY and Ace Museum.

3 (9) Consistent with the analysis described above, Ziegler found that customers
4 purchasing Debtor's artwork were sometimes instructed to wire transfer funds to
5 bank accounts other than the Debtor's. In one instance, an Ace Gallery (Debtor)
6 invoice for \$200,000 included wire instructions for an Ace NY bank account.²⁶
7 Similarly, three checks for sales of Debtor's artwork by Mary Corse and De Wain
8 Valentine, totaling \$393,000 were deposited into Ace Museum's bank account
9 instead of Debtor's. These examples alone demonstrate that Debtor's funds were
10 diverted to non-Debtor accounts totaling \$593,000, not an insignificant sum.
11 Christmas does not offer any evidence to dispute Ziegler's analysis and
12 conclusions that customers purchasing Debtor's artwork were instructed to wire
13 transfer funds to bank accounts other than Debtor's bank accounts.

14 (10) Ziegler also analyzed the Debtor's accounts receivable²⁷ as shown on its
15 Monthly Operating Reports. As Ziegler notes, Debtor's business was the sale of
16 artwork that results in either a payment of cash or a promise to pay in the future,
17 which is recorded as an account receivable. The first Monthly Operating Reports
18 filed by the Debtor indicated that there were no accounts receivable as of
19 February 28, 2013, which demonstrated to Ziegler that the Debtor typically
20 received payment in full at the point of sale. The Debtor reported an accounts
21 receivable balance of \$318,990.61, however, on its Monthly Operating Report for
22 the period ending April 30, 2013. The amount of accounts receivable reported on
23 Debtor's Monthly Operating Reports increased to \$4,359,643.13 as reported on
24 the Monthly Operating Report for the period ending November 30, 2014.

25 _____
26 ²⁶ Copies of Debtor's invoice and Ace NY wire instructions were attached to the Ziegler Declaration.
See ECF 2486-1, Ziegler Declaration, Exhibit Q.

27 ²⁷ Accounts receivable is an account to record amounts owed for services or sales that have not been
28 paid as of the reporting period, and accounts receivable usually have shorter terms than notes receivable.
See ECF 2486-1, Ziegler Declaration, ¶ 15.

1 According to Ziegler, if this were accurate, the increase in unpaid sales indicates
2 that some person or entity, or a combination of entities, owes the Debtor \$4.3
3 million for artwork sold for which payment has not been made.

4 (11) Based upon her review of accounts receivable records, Ziegler found that
5 the majority of the Debtor's accounts receivable were not supported by actual or
6 prospective sales. Ziegler determined that there were approximately 50
7 outstanding invoices that comprised the accounts receivable balance on the
8 Monthly Operating Reports, but, based on her analysis of the detailed invoices,
9 most of the invoices did not reflect valid accounts receivable, or the invoices had
10 already been paid. Ziegler provided some illustrative examples to explain why
11 this was the case: (1) Invoice #1660 for \$153,000, which was Debtor's invoice,
12 was included in the accounts receivable detail; the invoice was paid in February
13 2014; the funds were deposited into Ace NY's bank account; but the invoice
14 remained on Debtor's accounts receivable detail; (2) Invoice #1739 for \$200,000,
15 which was Debtor's invoice, was included in the accounts receivable detail; was
16 paid in August 2014; the funds were deposited into Ace NY's bank account; but
17 the invoice remained on Debtor's accounts receivable detail; and (3) Invoice
18 #1632 for \$95,000, which was Debtor's invoice, was included in the accounts
19 receivable detail; had a mark crossed through it, saying it was cancelled in
20 November 2015; but, the invoice remained on Debtor's accounts receivable
21 detail.²⁸ These three examples show that the accounts receivable listed on the
22 Monthly Operating Reports were incorrect and overstated by at least \$448,000.
23 Christmas does not offer any evidence to dispute Ziegler's analysis and
24 conclusions that the Debtor's accounts receivable stated on its Monthly Operating
25

27 ²⁸ See ECF 2486-1, Ziegler Declaration, ¶ 16.

28 (Continued...)

1 Reports were overstated and inaccurate because the accounts receivable were
2 either already paid or otherwise invalid.²⁹

3 (12) Ziegler's analysis of the Debtor's notes receivable³⁰, as reflected on Debtor's
4 Monthly Operating Reports, is similarly indicative of fraud. The first Monthly
5 Operating Report filed by the Debtor for the period ending February 28, 2013
6 indicated a notes receivable balance of \$4,501,971.82, which purportedly
7 reflected the amount due from Ace Museum to Debtor, as shown on the Debtor's
8 amended and corrected schedules of assets and liabilities and statement of
9 financial affairs, filed in April 2013. The Debtor reported a notes receivable
10 balance of \$3,306,959.80 on its Monthly Operating Report for the period ending
11 November 30, 2014, including repayments of the notes receivable totaling
12 \$1,195,012.02 over a 22-month period from February 2013 to November 30,
13 2014. According to Ziegler's analysis, Ace Museum's payments on the notes
14 receivable balance were illegitimate. Ziegler's uncontroverted testimony
15 describes a scheme whereby millions of dollars of the Debtor's money were
16 diverted into the bank accounts of Ace Museum and Ace NY during the 22-month
17 period, and that same money was then transferred back to the Debtor and
18
19

20 ²⁹ The accounts receivable scheme described by Ziegler is corroborated by the Plan Agent's
21 undisputed testimony. According to the Plan Agent in his status report and declaration filed on May 31,
22 2019, the alleged \$6,039,444 in accounts receivable on the latest Monthly Operating Report for Debtor,
23 which was filed by Christmas and signed under penalty of perjury, did not reflect Debtor's actual accounts
24 receivable from clients as a result of sales, but rather reflected an amount based primarily on falsified
25 invoices for sales that had already been completed through Ace NY and for which purchasers had already
26 made payment to the Ace NY bank account. According to the Plan Agent, the false invoices relied upon by
27 Ziegler and the Plan Agent in their analyses were part of a scheme designed, in part, to hide transfers of the
28 Debtor's proceeds from Ace NY and Ace Museum back to Debtor when expenses or obligations of the
Debtor became due. The Plan Agent's investigation determined that the collectible accounts receivable that
were owed to Debtor on the effective date were only \$58,256, rather than the \$6,039,444 in accounts
receivable on the latest Monthly Operating Report for Debtor filed by Christmas. See ECF 2478, Exhibit C.
Christmas does not offer any evidence in his Rule 2004 Motion to dispute this testimony of the Plan Agent.

³⁰ According to Ziegler, notes receivable is an account to record amounts owed for services or sales
that have not been paid as of the reporting period, though in contrast to accounts receivable which usually
have shorter terms than notes receivable.

1 represented as Ace Museum's repayments of its debt to Debtor as reflected in the
2 notes receivable balance. ECF 2486-1, Ziegler Declaration at ¶ 10.

3 (13) Ziegler also reviewed and analyzed Debtor's monthly cash receipts and
4 disbursements on a cash basis (also referred to as a profit and loss statement)
5 stated on its Monthly Operating Reports and found that these statements were
6 inaccurate. Ziegler found that the last Monthly Operating Report reported total
7 sales of \$11,061,741 since the petition date, which approximated the Debtor's
8 sales but failed to take into account the \$14.5 million in the Debtor's sales
9 proceeds that were deposited into the Ace NY bank account. For example,
10 Debtor's May 2013 Monthly Operating Report reflected artwork sales proceeds of
11 \$362,977.06 listed as "Accounts Receivable – Post filing - \$318,990.61" and
12 "General Sales - \$92,807.50." ECF 2486-1, Ziegler Declaration at ¶ 18. Debtor's
13 bank account deposits and artwork sales invoices only showed that Debtor
14 received \$92,807.50 that month from artwork sales, however, indicating that
15 Debtor did not receive invoices totaling \$270,169.56 from sales. That same
16 month, Ziegler found that Ace NY received \$671,615 in bank deposits from sales
17 of Debtor's artwork and transferred \$255,000 to the Debtor's general bank
18 account to pay rent, payroll, taxes and other expenses. As another example,
19 Ziegler found more than \$1 million in sales of Debtor's artwork on Debtor's
20 invoices and Ace NY's invoices for June 2014, but Debtor's bank account only
21 received sales proceeds of \$548,650.77.³¹ Ziegler found only \$517,456.65 in
22 deposits into Debtor's bank accounts attributable to invoiced artwork sales in
23 Debtor's name for June 2014, and found that bank deposits for the remaining
24 amount of the \$1 million in sales of Debtor's artwork totaling \$521,380 went into
25 Ace NY's bank account. ECF 2486-1, Ziegler Declaration at ¶ 19. Christmas
26

27 ³¹ The sales proceeds were reported on the June 2014 Monthly Operating Report as "Accounts
28 Receivable – Post filing - \$541,760.00," "Accounts Receivable – Pre filing - \$6,360.00," and "General Sales -
\$530.77" for a total of \$548,650.77. ECF 2486-1, Ziegler Declaration, ¶ 19 and Exhibit Y.

1 does not offer any evidence to dispute Ziegler's analysis and conclusions that the
2 Debtor's proceeds from its sold artwork were deposited into the bank account of
3 Ace NY, and not the Debtor's bank account, indicating that funds were diverted
4 outside the bankruptcy estate.

5 (14) In sum, according to Ziegler, over the time period when Christmas ran
6 Debtor's operations from February 2013 to April 2016, more than \$14 million from
7 sales of Debtor's artwork was deposited into Ace NY's bank accounts, and during
8 the 22 months of Debtor's Chapter 11 bankruptcy case through November 30,
9 2014, approximately \$5.4 from sales of Debtor's artwork was deposited into Ace
10 NY's bank account, of which Ace NY transferred a net total of \$2.5 million to Ace
11 Museum. Ziegler concluded that the funds deposited into Ace NY's bank account
12 and then transferred from Ace NY to Ace Museum were Debtor's funds and that
13 many of the deposits into Ace Museum's bank account were also Debtor's funds.
14 Ziegler attached to her declaration a schedule showing sales proceeds of
15 Debtor's artwork into Ace NY's bank account, and her schedule is consistent with
16 Kincaid's analysis and schedule of sales proceeds. Christmas does not offer any
17 evidence to dispute Ziegler's analysis and conclusions that under his
18 management and control of Debtor during the pendency of this bankruptcy case
19 from February 2013 through April 2016, \$14 million of Debtor's money from sales
20 of its artwork was diverted from the estate to his controlled entities, Ace NY and
21 Ace Museum, resulting in losses of millions of dollars for the bankruptcy estate
22 and its creditors. Nor does Christmas offer any evidence disputing that the losses
23 to the estate and its creditors during Christmas's management were compounded
24 by the use of approximately \$1.1 million of Debtor's money to improperly reduce
25 Ace Museum's loan debt owed to Debtor.

26 Based on the undisputed evidence in the Plan Agent's declarations and the Ziegler
27 Declaration, the court finds that the Plan Agent has made a prima facie showing that
28

1 Christmas is an unclean litigant to warrant the application of the doctrine of unclean hands
2 here.

3 **iii. Christmas's Contentions**

4 In his brief addressing the applicability of the doctrine of unclean hands, filed on
5 June 12, 2019, Christmas specifically argues that: (1) the doctrine of unclean hands
6 cannot apply to his Rule 2004 motion because the Rule 2004 motion is not an "action,"
7 citing *Securities and Exchange Commission v. McCarthy*, 322 F.3d 650, 657 (9th Cir.
8 2003), (2) the doctrine of unclean hands cannot be applied here because Christmas was
9 the sole shareholder and solely in control of the Debtor when the alleged misconduct
10 occurred, so the alleged misconduct is imputed to the post-confirmation Debtor; and (3)
11 the alleged misconduct is not directly related to "plaintiff's use of acquisition of the right in
12 suit[]," citing *inter alia, Pom Wonderful LLC v. Welch Foods, Inc.*, 737 F.Supp.2d at 1110.
13 According to Christmas, he "seeks information as [a] 'creditor' under Bankruptcy Rule 2004
14 concerning the post-confirmation Debtor's assets, operations and affairs which, in turn,
15 will enable him to make an informed decision about how value can be best realized for the
16 Debtor's creditor constituency *going forward* (e.g., whether to support the status quo in
17 which [the Plan Agent] is liquidating the Debtor's remaining inventory at fire-sale prices).
18 This request for information has nothing to do with the Plan Agent's allegations of
19 misconduct against Christmas more than three years ago when Christmas was in control of
20 the Debtor." ECF 2484 at 5 (internal page citation: 4)(emphasis in original).

21 The arguments made by Christmas in opposition to the application of the doctrine of
22 unclean hands are technical, as he does not address the evidence of his alleged
23 misconduct described in the declarations of the Plan Agent and Ziegler and the
24 documentary evidence in support thereof. Christmas is silent about this adverse evidence
25 other than his assertion that any misconduct that he may have engaged in was over three
26 years ago, or in other words, "that was then," and thus unrelated to the current situation
27 and his reported invocation in the related adversary proceedings of his Fifth Amendment
28 privilege against testimonial self-incrimination about the transactions for which the Plan

1 Agent offers evidence in the contested matters of the Rule 2004 Motion and the Protective
2 Order Motion (i.e., when asked about the alleged diversions of estate assets in the related
3 adversary proceedings). *See Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264
4 (9th Cir. 2000) (an adverse inference in a civil proceeding may be drawn “when
5 independent evidence exists of the fact to which the party refuses to answer”) (citations
6 omitted).

7 **c. Application**

8 The court rejects the first defense raised by Christmas, that the doctrine of unclean
9 hands is limited to actions and does not apply to motions or applications, because the
10 case cited by Christmas, *Securities and Exchange Commission (SEC) v. McCarthy*, 322
11 F.3d 650 (9th Cir. 2003), distinguishes between actions and motions or applications, but
12 does not involve the applicability of the unclean hands doctrine. In *McCarthy*, the Ninth
13 Circuit distinguished “applications” from “actions” for the purpose of determining whether
14 United States Securities and Exchange Commission applications brought under Section
15 21(e) of the Securities Exchange Act of 1934, 15 U.S.C. [s] 78u(e), require a formal
16 complaint and full formal proceedings pursuant to the Federal Rules of Civil
17 Procedure. *SEC v. McCarthy*, 322 F.3d at 656-657 (holding that the SEC in its
18 enforcement proceedings under the Securities Exchange Act could proceed by motion or
19 application). *McCarthy* did not involve the subject matter of these contested matters of
20 the motion under Federal Rule of Bankruptcy Procedure 2004 and related protective order
21 motion, and the applicability of the doctrine of unclean hands. Supreme Court case
22 precedent on the doctrine of unclean hands does not distinguish between actions and
23 motions in determining whether the doctrine applies, and even if there is some distinction
24 to be made, unlike in *SEC v. McCarthy*, the Rule 2004 motion here is made within the
25 bankruptcy case, which is an action itself, and does not involve the initiation of a new
26 litigation proceeding. The court does not find the distinction in *SEC v. McCarthy* involving
27 the initiation of SEC enforcement proceedings in district court applicable to the issue of
28 whether the doctrine of unclean hands may bar a litigant from taking an examination

1 pursuant to Federal Rule of Bankruptcy Procedure 2004. *SEC v. McCarthy* also does not
2 concern the court's broad authority to apply the doctrine of unclean hands. *Precision*
3 *Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 324 U.S. at 815
4 (“[The doctrine of unclean hands] necessarily gives wide range to the equity court’s use of
5 discretion in refusing to aid the unclean litigant. It is ‘not bound by formula or restrained
6 by any limitation that tends to trammel the free and just exercise of discretion.’”).
7 Accordingly, the court rejects Christmas’s argument based on *McCarthy* that the doctrine
8 of unclean hands is not applicable here because his Rule 2004 motion is not an action.

9 In the case cited by the Plan Agent, *Precision Instrument Manufacturing Co. v.*
10 *Automotive Maintenance Machinery Co.*, which addresses the unclean hands doctrine
11 directly, the Supreme Court broadly defined the doctrine of unclean hands as closing “the
12 doors of a court of equity to one tainted with inequity or bad faith relative to the
13 matter in which he seeks relief[.]” *Precision Instrument Manufacturing Co. v. Automotive*
14 *Maintenance Machinery Co.*, 324 U.S. at 814. In making this statement, the Supreme
15 Court did not draw any distinction between actions on one hand and motions or
16 applications on the other hand, but broadly stated that courts should not exercise their
17 judicial powers in aid of an unclean litigant. Based on this expansive language, the court
18 therefore finds no cause to restrict the application of the doctrine of unclean hands to Rule
19 2004 motions.

20 The primary legal authority relied upon by Christmas to argue that the equitable
21 doctrine of unclean hands does not apply to motions under Rule 2004 is *In re Harris*
22 *Group, Inc.*, 64 B.R. 417 (Bankr. E.D. Pa. 1986). ECF 2484 at 2. Christmas cites and
23 quotes the court’s opinion in *Harris Group* for the following proposition: “Equity must
24 comport with the rule making power vested by Congress in the Supreme Court. Such
25 rules, as represented here by Bankruptcy Rule 2004, are not easily amenable to the
26 engraftment of equitable exception.” ECF 2484 at 2, *citing and quoting, In re Harris*
27 *Group, Inc.*, 64 B.R. at 420. The legal authority for this proposition is not apparent from
28 the court’s opinion in *In re Harris Group, Inc.*, because the court did not cite any in support

1 of its proposition. *Id.* The other cases cited by the court in *In re Harris Group, Inc.*, in its
2 discussion of whether the doctrine of unclean hands applies to motions under Rule 2004
3 are not cited for the specific proposition described above, but in any event, do not relate
4 either to Rule 2004 or the doctrine of unclean hands. *In re Harris Group, Inc.*, 64 B.R. at
5 420 (citing *United States v. Wilson*, 707 F.2d 304, 311-312 (8th Cir. 1982) (considering
6 whether the United States is subject to application of equitable defenses if it raises an
7 equitable claim) and *Waldschmidt v. Ranier (In re Fulgham Construction Corp.)*, 706 F.2d
8 171, 173 (6th Cir. 1983) (considering the long-standing judicially evolved application
9 of the “net result rule” as the criteria for determining a preferential transfer as defined
10 in 11 U.S.C. § 547 under the then newly enacted Bankruptcy Reform Act of 1978)). *In*
11 *re Harris Group, Inc.* is problematic because it neither discusses the case law construing
12 Rule 2004, such as *In re GHR Energy Corp.*, 33 B.R. at 454 (inequitable to conduct Rule
13 2004 examination in bad faith) and *In re Mittco, Inc.*, 44 B.R. at 36 (inequitable to conduct
14 Rule 2004 examination for abuse or harassment), nor the case law relating to the doctrine
15 of unclean hands, such as *Precision Instrument Manufacturing Co. v. Automotive*
16 *Maintenance Machinery Co.*, 324 U.S. at 819 (applying the doctrine to plaintiff who comes
17 to the court with unclean hands relative to the dispute at issue, stating “the facts all add up
18 to the inescapable conclusion that [plaintiff] has not displayed that standard of conduct
19 requisite to the maintenance of [a] suit in equity.”). The opinion in *In re Harris Group, Inc.*,
20 is incompatible with the case law construing equitable exceptions to Rule 2004 for the
21 purposes of abuse or harassment. See e.g., *In re Duratech Industries, Inc.*, 241 B.R. at
22 283; *In re Mittco, Inc.*, 44 B.R. at 36; *In re Symington*, 209 B.R. at 685. In conducting a
23 Westlaw database search of *In re Harris Group, Inc.*, the court observed that there was no
24 reported case decision following it on this point. Accordingly, the court determines that
25 the opinion in *In re Harris Group, Inc.*, holding that the doctrine of unclean hands does not
26 apply to a Rule 2004 motion, is unpersuasive and does not follow it.

27 The court rejects the second defense raised by Christmas that any alleged
28 misconduct by him as the sole person in control of debtor is imputed to the post-

1 confirmation Reorganized Debtor. Although there is apparently no definitive case law in
2 the Ninth Circuit regarding whether the so-called *in pari delicto* defense may be asserted
3 against a bankruptcy trustee, or here, the plan agent, as to the bad acts of prior
4 management post-petition, as recognized by the court in *C&S Wholesale Grocers, Inc. v.*
5 *Delano Retail Partners, LLC (In re Delano Retail Partners, LLC)*, , 2014 WL 4966476, slip
6 op. at *3-6 (Bankr. E.D. Cal. 2014), this court finds persuasive the Third Circuit’s decision
7 and opinion in *In re Personal and Business Insurance Agency*, 334 F.3d 239 (3d Cir.
8 2003), which held that under the doctrine of imputation, or *in pari delicto*, the bad acts of a
9 debtor’s principal could only be imputed to a bankruptcy trustee in the case of prepetition
10 acts relating to a prepetition claim brought into the bankruptcy estate under 11 U.S.C. §
11 541, but rights arising under the Bankruptcy Code, such as avoidance claims for
12 fraudulent transfer under 11 U.S.C. § 548, which are not brought into the bankruptcy
13 estate by virtue of 11 U.S.C. § 541, may not be affected by imputation. 334 F.3d at 242-
14 247 (citing and distinguishing *Official Committee of Unsecured Creditors v. R.F. Lafferty &*
15 *Co.*, 267 F.3d 340 (3d Cir. 2001), the case relied upon by Christmas, involving prepetition
16 claims brought into the estate under 11 U.S.C. § 541 to hold that the so-called “sole actor
17 exception” does not apply to rights arising under other provisions of the Bankruptcy Code,
18 i.e., 11 U.S.C. § 548). The acts of Christmas as the person in control of the Debtor-in-
19 Possession during the post-petition administration of the Chapter 11 bankruptcy case are
20 not prepetition acts relating to a prepetition claim brought into the bankruptcy estate under
21 11 U.S.C. § 541, and therefore, do not implicate the doctrine of imputation, so that any
22 bad acts by him are imputed to the Reorganized Debtor and the Plan Agent. *Id.*; *see also*,
23 *Notinger v. Migliaccio (In re Financial Resources Mortgage, Inc.)*. 454 B.R. 6, 24 (Bankr.
24 D. N.H. 2011) (“Courts have reasoned that it is inequitable to impute a debtor’s bad
25 conduct to a trustee who comes to the court with clean hands to pursue claims on behalf
26 of innocent creditors.”), *citing inter alia*, *In re Personal & Business Insurance Agency*, 334
27 F.3d at 246-247 and *Cooper v. United States*, 362 F.Supp.2d 649, 656 (W.D.N.C.
28 2005)(“Imputing the bad acts of the debtor onto the bankruptcy trustee in the present case

1 renders a categorically inequitable result, that is, the innocent victimized creditors get
2 nothing.”). The Plan Agent argues that “Christmas’ imputation argument is particularly
3 galling, as it argues that Christmas’ personal malfeasance throughout this bankruptcy case
4 must be imputed to the post-confirmation Plan Agent who was appointed *because* of
5 Christmas’ fraudulent activities, and as Christmas seeks to personally benefit from such
6 imputation of his own bad acts.” ECF 2492 at 4-5. The court agrees with the Plan Agent
7 that it is not equitable, if not in bad taste, for Christmas to argue that if he committed bad
8 acts as debtor’s principal, they are imputed to the Plan Agent who, under the Plan, is
9 attempting to recover the value of the estate for payment of the claims of innocent
10 creditors who were apparently victimized by such bad acts. For the foregoing reasons,
11 the court rejects Christmas’s imputation defense to the application of the doctrine of
12 unclean hands.

13 The court rejects the third defense raised by Christmas, that the alleged misconduct
14 is not directly related to “plaintiff’s use of acquisition of the right in suit[,],” citing *inter alia*,
15 *Pom Wonderful LLC v. Welch Foods, Inc.*, 737 F.Supp.2d at 1110. Christmas argues that
16 his “request for information has nothing to do with the Plan Agent’s allegations of
17 misconduct against Christmas more than three years ago when Christmas was in control of
18 the Debtor.” ECF 2484 at 4. The gist of Christmas’s argument that he is entitled to the
19 requested information under Rule 2004 is concisely stated in his responsive Brief on the
20 Doctrine of Unclean Hands Regarding Nexus, ECF 2499 at 1:

21 The Plan provides Mr. Christmas the right to propose and more for Court-
22 approval of a transaction not resulting in a Solvency Event if in the best
23 interests of unsecured creditors (a “Transaction”) [citing Plan sections 5.21
24 and 5.22]. It also provides him the right to request information about the
25 Debtor’s assets for the purpose of proposing a Transaction. As the Plan
26 Agent, Mr. Leslie is obligated to “furnish such information concerning the
27 estate and the estate’s administration *as is requested by a party in interest*
28 [citing Plan section 5.4.2 and 11 U.S.C. §§ 704(a) and 1106(a)(1)]. And
through the 2004 Motion, Mr. Christmas requests information on the Post-
Confirmation Debtor’s art inventory and sales for the purposes of
proposing an asset sale transaction in the best interests of creditors [citing
the moving papers].

1 *Id.* (footnotes omitted and italics in original).

2 Regarding the relationship of his request with the alleged misconduct, Christmas
3 argues:

4 “Mr. Leslie’s allegations of misconduct (more than 3 years ago when Mr.
5 Christmas controlled the Debtor) do not *immediately and necessarily relate*
6 to Mr. Christmas’ request for information (as a party in interest) to propose
7 an asset sale transaction that will enhance recoveries for the Debtor’s
8 stakeholders. The only “connection” alleged by Mr. Leslie does not even
9 exist because the Transaction would NOT restore Mr. Christmas to his
10 prior role as a fiduciary of the Debtor’s creditors. And Mr. Leslie cannot
11 credibly contend that Mr. Christmas is acting with fraud or deceit with
12 respect to the requested relief. Mr. Christmas has a right to obtain court
13 approval of a Transaction; and the Plan provides him, as a party in
14 interest, with the right to the information requested [citing Plan section
15 5.4.2 and 11 U.S.C. §§ 704(a) and 1106(a)(1)].”

11 *Id.* at 3 (footnotes omitted and italics in original).

12 The Supreme Court’s decision in *Precision Instrument Manufacturing Co. v.*
13 *Automotive Maintenance Machinery Co.*, holding that application of the unclean hands
14 doctrine requires that the misconduct alleged be “relative to the matter in which [the
15 plaintiff] seeks relief,” is controlling here. 324 U.S. at 815. The Ninth Circuit follows this
16 interpretation, see e.g., *Ellenburg v. Brockway, Inc.*, 763 F.2d 1091, 1097 (9th Cir. 1985).

17 “Relative to” is a broad phrase meaning “with regard to” or “in connection with.”
18 Merriam-Webster’s Online Dictionary 2019, available at <https://www.merriam->
19 [webster.com/dictionary/relative%20to](https://www.merriam-webster.com/dictionary/relative%20to) (last visited November 5, 2019); see also *Wisconsin*
20 *Winnebago Business Committee v. Koberstein*, 762 F.2d 613, 618 (7th Cir. 1985)
21 (characterizing ‘relative to’ in a statute as “broad language”). Additionally, “relative to” is
22 synonymous with ‘related to,’ a term the Supreme Court and Ninth Circuit have likewise
23 interpreted generously. Although the “the breadth of the words ‘related to’ does not mean
24 the sky is the limit,” the Supreme Court has repeated that the “ordinary meaning of . . .
25 [the] words [‘related to’] is a broad one,” meaning “having a connection with or reference
26 to.” *Dan’s City Used Cars, Inc. v. Pelkey*, 569 U.S. 251, 260 (2013) (citations and internal
27 quotation marks omitted). The Ninth Circuit has consistently acknowledged the Supreme
28

1 Court's broad definition of "related to" or "relative to." *Pakootas v. Teck Cominco Metals,*
2 *Ltd.*, 905 F.3d 565, 585 (9th Cir. 2018) (citing and quoting *Dan's City Used Cars, Inc.*);
3 *California Tow Truck Association v. City & County of San Francisco*, 807 F.3d 1008, 1021
4 (9th Cir. 2015) (same).

5 Some courts have stated that in order to apply the doctrine of unclean hands, there
6 must be a "close nexus between a party's unethical conduct and the transactions on
7 which that party seeks relief," *In re Everett*, 364 B.R. 711, 723 (Bankr. D. Ariz. 2007)
8 (citing and quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245
9 (1933) (predicate act underlying an unclean hands defense must have an "immediate and
10 necessary relation to the equity that [one] seeks in respect of the matter in litigation.")).

11 In *Keystone Driller Co. v. General Excavator Co.*, the Supreme Court examined the
12 limits of the application of the doctrine of unclean hands, stating as follows:

13 But courts of equity do not make the quality of suitors the test. They apply
14 the maxim requiring clean hands only where some unconscionable act of one
15 coming for relief has immediate and necessary relation to the equity that he seeks
16 in respect of the matter in litigation. They do not close their doors because of
17 plaintiff's misconduct, whatever its character, that has no relation to anything
18 involved in the suit, but only for such violations of conscience as in some measure
19 affect the equitable relations between the parties in respect of something brought
20 before the court for adjudication. They apply the maxim, not by way of punishment
21 for extraneous transgressions, but upon considerations that make for the
22 advancement of right and justice. They are not bound by formula or restrained by
23 any limitation that tends to trammel the free and just exercise of discretion.

24 290 U.S. at 245 (citations omitted). This passage from the opinion in *Keystone Driller Co.*
25 *v. General Excavator Co.*, contains the "immediate and necessary relation" language
26 quoted by the court in *In re Everett* for its conclusion that a close nexus must be shown
27 between the inequitable conduct and the request for relief. The language in the *Keystone*
28 *Driller Co.* opinion, however, does not use the term "close nexus," but rather, "immediate
and necessary relation," which is qualified by the following language in the next sentence,
"They [i.e., the courts of equity] do not close their doors because of plaintiff's misconduct,
whatever its character, that has *no relation* to anything involved in the suit, but only such
violations of conscience as *in some measure* affect the equitable relations between the
parties in respect of something brought before the court for adjudication." 290 U.S. at 245

1 (citations omitted and emphasis added). That is, the stricter sounding language in this
2 passage from the *Keystone Driller Co.* opinion—that the request for relief must have an
3 “immediate and necessary relation” with the prior inequitable conduct—is qualified by less
4 restrictive language that the unclean hands doctrine is inapplicable where there is “no
5 relation,” and that there must be a relation “in some measure.” *Id.* Moreover, this
6 passage from the opinion in *Keystone Driller Co.* also indicates that the courts of equity
7 have broad discretion in applying the unclean hands doctrine as “[t]hey are not bound by
8 formula or restrained by any limitation that tends to trammel the free and just exercise of
9 discretion.” *Id.*

10 The Supreme Court further examined the unclean hands doctrine in *Precision*
11 *Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, citing *Keystone*
12 *Driller Co.*, and clarified what “relation” and “measure” a court of equity may evaluate to
13 preclude relief by application of the doctrine of unclean hands. The Supreme Court stated
14 in *Precision Instrument* that the doctrine of unclean hands “necessarily gives wide range
15 to the equity court’s use of discretion in refusing to aid the unclean litigant.” 324 U.S. at
16 815. As discussed above, the Supreme Court applied a broad “relative to” standard in
17 *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, which
18 this court must follow.

19 Here, the Plan Agent has sufficiently demonstrated that Christmas’s alleged
20 misconduct, which evidence put on by the Plan Agent’s forensic accountant is undisputed,
21 is “relative to” the Rule 2004 Motion. The Plan Agent has presented substantial, probative
22 and undisputed evidence in support of his allegations that transfers of more than \$14
23 million from sales of the Debtor’s owned and consigned artwork were made under
24 Christmas’s management and control of Debtor during the pendency of this bankruptcy
25 case to Christmas’s newly formed non-debtor entity, Ace NY. ECF 2486-1, Ziegler
26 Declaration at ¶ 10. The undisputed evidence also supports the Plan Agent’s allegations
27 that Christmas caused the transfer of more than \$790,000.00 in the estate’s DIP financing
28 proceeds, which financing this court authorized on August 30, 2013, ECF 336, to the

1 same non-debtor entity. *Id.*, ¶ 11. The substantial, probative and undisputed evidence
2 offered by the Plan Agent further shows inequitable conduct warranting application of the
3 unclean hands doctrine; the Monthly Operating Reports that Christmas signed and
4 submitted to the court on behalf of the Debtor under penalty of perjury and while serving
5 as a fiduciary to creditors of the estate, were false and misleading. ECF 2486-1, Ziegler
6 Declaration at ¶¶ 10-19. There is also substantial, probative and undisputed evidence
7 offered by the Plan Agent that Christmas ignored Debtor's counsel's warnings in
8 connection with the apparent diversion of DIP financing proceeds to non-debtor entities,
9 which demonstrates Christmas's blatant disregard for this court's authority. Exhibits 17
10 and 18 to the *Declaration of Sam S. Leslie in Support of Plan Agent's Supplemental Brief*
11 *Re: Unclean Hands*, ECF 2486-1 at 181-199. All of the uncontroverted evidence
12 described above is indicative of inequitable conduct that merits the application of the
13 doctrine of unclean hands here.

14 The direct answer to Christmas's argument that there is no immediate and
15 necessary relationship to the controversy in issue is that if the court and the parties in
16 interest, including the official committee of unsecured creditors, had known before plan
17 confirmation of the Plan Agent's substantial, probative and uncontroverted evidence of the
18 fraudulent acts of Christmas—who was in control of the Debtor-in-Possession—resulting in
19 the diversion of millions of dollars of Debtor's assets to his controlled nondebtor entities,
20 no doubt, the committee would have immediately moved for appointment of a Chapter 11
21 trustee based on fraud or mismanagement under 11 U.S.C. § 1104, which the court would
22 have almost certainly granted. But for this diversion of the Debtor's assets that Christmas
23 caused while he served in his post-petition fiduciary capacity as the person controlling
24 Debtor as the Plan Agent's substantial, probative and uncontroverted evidence shows, a
25 plan of reorganization may have paid creditors in some significant amount and perhaps
26 left Christmas in control of the post-confirmation Debtor.

27 If the Plan Agent's undisputed evidence of fraud had been known preconfirmation,
28 it is unlikely that Christmas would have ever received any rights to propose a transaction in

1 the Plan. Thus, here the alleged misconduct immediately and necessarily relates to the
2 requested relief, and the litigant has not acted fairly and without fraud or deceit as to the
3 controversy in issue. See Christmas’s Responsive Brief on the Doctrine of Unclean Hands
4 Regarding Nexus, ECF 2499 at 3, *citing inter alia*, *Keystone Driller Co. v. General*
5 *Excavator Co.* 290 U.S. at 245 and *Precision Instrument Manufacturing Co. v. Automotive*
6 *Maintenance Machinery Co.*, 324 U.S. at 814-815.

7 The court cannot ignore the Plan Agent’s substantial probative and undisputed
8 evidence in support of his allegations of fraud by Christmas while in control of the Debtor-
9 in-Possession, which indicates that Christmas obtained his plan rights to propose a
10 “Transaction” by fraud as well. Christmas now seeks to enforce his plan rights by
11 obtaining information ostensibly for that purpose. To allow this would be inequitable.
12 Christmas does not have an absolute right to request information concerning the estate or
13 its administration under Plan § 5.4.2 and 11 U.S.C. §§ 704(a). In his recitation of his right
14 to request information as a party in interest pursuant to 11 U.S.C. §§ 704(a) and
15 1106(a)(1), Christmas left out a relevant and important qualifier to such right in 11 U.S.C. §
16 704(a)(7)—that such right is subject to the condition, “unless the court orders otherwise.”
17 Fully stated, 11 U.S.C. § 704(a) provides: (a) The trustee shall— . . . (7) unless the court
18 orders otherwise, furnish such information concerning the estate and the estate’s
19 administration as is requested by a party in interest;” Based on the opposition of
20 the Plan Agent and the Wilson Parties and the evidence in support of their opposition, the
21 court orders otherwise based on the doctrine of unclean hands.

22 Christmas’s post-confirmation conduct is consistent with his preconfirmation
23 conduct of not acting in the best interests of creditors of the bankruptcy estate and now of
24 the Reorganized Debtor. Christmas has refused to answer interrogatories or respond to
25 requests for admission in the related adversary proceedings before this court, invoking his
26 Fifth Amendment privilege. *Declaration of David J. Richardson in Support of Motion of*
27 *Plan Agent for Protective Order re 2004 Examination Requested by Douglas James*
28 *Christmas*, ECF 2447 at 2-4, ¶¶ 10 and 11 and Exhibits G through N (Plan Agent’s

1 discovery requests and Christmas's responses thereto). Christmas has also reportedly
2 invoked his Fifth Amendment privilege extensively during depositions related to the
3 adversary proceedings as asserted by the Plan Agent. *Memorandum Regarding August*
4 *7, 2019 Deposition Session of Douglas Christmas and Continued Hearing on Examination*
5 *of Plan Agent*, ECF 2518 at 1-4. In considering the equities, Christmas cannot obstruct
6 discovery in one matter before this court and seek it zealously in another. *Lyons v.*
7 *Johnson*, 415 F.2d 540, 542 (9th Cir. 1969). An adverse inference may be drawn "when
8 independent evidence exists of the fact to which the party refuses to answer." *Doe ex rel.*
9 *Rudy-Glanzer v. Glanzer*, 232 F.3d at 1264 (9th Cir. 2000) (citations omitted). The
10 evidence in support of the Plan Agent's allegations of Christmas's fraud in his declarations
11 and in the Ziegler Declaration, ECF Nos. 2486 and 2486-1, which is undisputed,
12 establishes the existence of independent indicia of fraud, and based on this independent
13 evidence, the court may draw an adverse inference from Christmas's invocation of the
14 Fifth Amendment privilege in connection with the Plan Agent's allegations of fraud in the
15 related adversary proceeding, all of which supports a finding that Christmas is an unclean
16 litigant to apply the unclean hands doctrine to the pending Rule 2004 Motion and
17 Protective Order Motion.

18 In *Northbay Wellness Group, Inc. v. Beyries*, 789 F.3d 956 (9th Cir. 2015), the
19 Ninth Circuit held that "determining whether the doctrine of unclean hands precludes relief
20 requires balancing the alleged wrongdoing of the plaintiff against that of the defendant,
21 and 'weighing the substance of the right asserted by the plaintiff against the transgression
22 which, it is contended, serves to foreclose that right.'" 789 F.3d at 960 (citation omitted).
23 The outcome of a balancing analysis here is plain. The record for this contested matter
24 reflects substantial, probative and undisputed evidence that Christmas engaged in
25 fraudulent acts that harmed the bankruptcy estate and creditors while he was in charge of
26 the Debtor-in-Possession, resulting in losses to the estate and creditors of over \$17
27 million. These losses had and continue to have a direct impact on the current
28 predicament that the Reorganized Debtor is in, being deprived of over \$17 million in

1 estate assets, including the depletion of any operating funds in the estate at the time of
2 the turnover of the estate to the Plan Agent to the tune of over a quarter of a million
3 dollars. The evidence further indicates that these bad acts were concealed from the court
4 and the creditors of the estate by Christmas's signing and filing of false Monthly Operating
5 Reports during his administration of the Debtor-in-Possession. Christmas' statement that
6 the Reorganized Debtor has not been able to repay the estate's administrative claims
7 rings hollow when the substantial, probative and undisputed evidence offered by the Plan
8 Agent indicates that Christmas's bad acts resulted in a diversion of estate assets of \$17
9 million putting the Reorganized Debtor into a deep financial hole that the Plan Agent is
10 attempting to help the Reorganized Debtor recover from. In contrast, the Plan Agent, has
11 been transparent and cooperative, filing status reports³² regarding the post-confirmation
12 Debtor's operations and providing testimony during the evidentiary hearing.³³ The court
13 therefore concludes that the balance of the equities lies overwhelmingly in favor of the
14 Plan Agent, and finds that the doctrine of unclean hands precludes Christmas from
15 conducting a Rule 2004 examination of the Reorganized Debtor and the Plan Agent.
16 Christmas's Rule 2004 Motion should be denied as a classic example of abuse and
17 harassment that the court should prevent. *In re Mastro*, 585 B.R. 587, 597 (9th Cir. BAP
18 2018) (citing *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002)).

19 Even if a "close nexus between a party's unethical conduct and the transactions on
20 which that party seeks relief," *In re Everett*, 364 B.R. at 723, was the standard to be
21 applied here—it is not—the court finds that for purposes of the Rule 2004 Motion and
22 related Protective Order Motion, the substantial, probative and uncontroverted evidence of
23 Christmas's misconduct shows an "immediate and necessary relation to" the relief
24 Christmas seeks. *Id.* (citation omitted). The substantial, probative and undisputed
25 evidence offered by the Plan Agent shows the postpetition diversion of the estate's assets
26

27 ³² ECF Nos. 2478, 2517.

28 ³³ *Transcript of Evidentiary Hearing*, July 19, 2019, ECF 2513.

1 under Christmas's watch as the person in control of the post-petition, preconfirmation
2 Debtor left the Plan Agent and post-confirmation Debtor in a financial quagmire with "no
3 money for payroll day one." *Transcript of Testimony of Sam S. Leslie*, July 19, 2019, ECF
4 2513 at 68:02–68:18. The discovery Christmas seeks by the Rule 2004 Motion concerns
5 the Plan Agent's post-confirmation operation of the Debtor, which is necessarily related to,
6 and significantly affected by, the Plan Agent's substantial, probative and undisputed
7 evidence of defrauding the bankruptcy estate and its creditors at Christmas's behest.

8 Christmas's assertion that his request for information has nothing to do with the
9 Plan Agent's allegations of misconduct against Christmas and the related adversary
10 proceedings before this court, see ECF 2484 at 4, is nothing short of fanciful. Christmas
11 has stated that "he wants ACE Gallery back," ECF 2443 at 4, but Christmas has not
12 presented any evidence to the court that any transaction providing payment to all creditors
13 in full is forthcoming. Moreover, the Plan Agent has offered probative, substantial and
14 undisputed evidence that Christmas has established himself as a competitor to the
15 Reorganized Debtor. *Declaration of David J. Richardson in Support of Motion of Plan*
16 *Agent for Protective Order re 2004 Examination Requested by Douglas James Christmas*,
17 ECF 2447 at 4-5, ¶¶ 14-17 and Exhibits P, Q,R-1 through R-22 and S (incorporation
18 documents for Christmas's new business, Art Collection Development, LLC, and email
19 correspondence between Christmas on behalf of his business, "Ace Gallery New York,"
20 and prospective customers and agents regarding artwork sales). Without any evidence
21 put on the record by Christmas of a transaction that would pay all claims or benefit all
22 creditors, nor any specific allegations of misconduct by the Plan Agent put forth by a
23 single party in interest other than Christmas, the court is unable to conclude that the
24 request for the Rule 2004 examination is for any legitimate purpose beyond burdening
25 and harassing the Plan Agent.

26 Finally, the court rejects the Plan Agent's argument that Christmas's counterclaims
27 in the pending adversary proceeding mooted the Rule 2004 motion because those
28 counterclaims addressed post-confirmation administration of the Reorganized Debtor by

1 the Plan Agent, and thus, Christmas could have discovery in the adversary proceeding, but
2 the Rule 2004 Motion should be denied. The court rejects the Plan Agent's pending
3 proceeding argument because the scope of Christmas's counterclaims in the adversary
4 proceeding has a different focus than his Rule 2004 Motion. Christmas's counterclaims
5 seek to recover artwork in possession of the Reorganized Debtor that allegedly belongs to
6 Christmas and his controlled entity, Ace Museum, while the Rule 2004 Motion seeks
7 information about post-confirmation administration of the Reorganized Debtor by the Plan
8 Agent so that Christmas may propose a "Transaction" pursuant to the terms of the Plan,
9 which information does not strictly relate to assets that Christmas and Ace Museum may
10 own in the possession of the Reorganized Debtor. Because the focus of Christmas's
11 separate requests is different, the discovery sought by the Rule 2004 Motion is not
12 mooted by the counterclaims under the pending proceeding exception to Rule 2004.

13 As to the outstanding specific requests in the Rule 2004 Motion and in the
14 Protective Order Motion, the court further makes the following rulings:

15 **REQUEST FOR PRODUCTION NO. 1: ALL DOCUMENTS EVIDENCING**
16 inventories and schedules of ASSETS which YOU hold or have held a legal or beneficial
17 interest.

18 Ruling: Deny because the doctrine of unclean hands precludes the requested
19 discovery. Even though the Plan Agent voluntarily agreed to produce an inventory of
20 artworks that are owned outright by the post-confirmation Debtor to be maintained in the
21 possession of Jonathan Shenson, Christmas's counsel, but could be viewed by Christmas
22 in Shenson's office, the Plan Agent later withdrew that concession. The court agrees with
23 the Plan Agent that the inventory of the post-confirmation Debtor is sensitive commercial
24 information that should be protected against the competitors of the post-confirmation
25 Debtor, which include Christmas since he is trying to work as an arts dealer on his own.
26 The court therefore will construe the Plan Agent's offer to produce an inventory as
27 withdrawn and will not enforce such offer.

28

1 REQUEST FOR PRODUCTION NO. 2: With respect to ANY AND ALL ASSETS
2 sold by the POST-CONFIRMATION DEBTOR as of or at any time after the EFFECTIVE
3 DATE, DOCUMENTS sufficient to evidence the sale of such ASSETS including copies of
4 ANY invoices.

5 Ruling: Deny because the doctrine of unclean hands precludes the requested
6 discovery. The court specifically denies this request because Christmas is demanding
7 sales information from the Plan Agent, while at the same time asserting his Fifth
8 Amendment privilege in related litigation—refusing to answer a single question about *his*
9 sales practices during his tenure operating the business.

10 REQUEST FOR PRODUCTION NO. 3: With respect to ANY AND ALL ASSETS
11 gifted by the POST-CONFIRMATION DEBTOR as of or at any time after the EFFECTIVE
12 DATE, DOCUMENTS sufficient to evidence the gifting of such ASSETS including copies
13 of ANY invoices.

14 Ruling: Deny because the doctrine of unclean hands precludes the requested
15 discovery. Alternatively, as the Plan Agent stated in the parties' joint statement with
16 respect to outstanding disputes concerning the Rule 2004 motion, "The Plan Agent also
17 confirms that there are no documents responsive to Request No. 3, as there have been
18 no gifts made by the Plan Agent." ECF 2443 at 7. Christmas did not dispute the Plan
19 Agent's assertion that there are no documents to produce.

20 REQUEST FOR PRODUCTION NO. 4: ALL DOCUMENTS AND
21 COMMUNICATIONS CONCERNING WILSON and ANY OF WILSON'S BUSINESS
22 ENTITIES (including WASL) on or at any time after the EFFECTIVE DATE, including but
23 not limited to ANY DOCUMENTS AND COMMUNICATIONS RELATING TO (a)
24 agreements or arrangements for loans and/or other financial accommodations to the
25 POST-CONFIRMATION DEBTOR, (b) the BEVERLY HILLS PROPERTY and/or the
26 BEVERLY HILLS PROPERTY PURCHASE OPTION and (c) consignment of ANY
27 ASSETS.

28

1 Ruling: Deny because the doctrine of unclean hands precludes the requested
2 discovery. In the alternative, denial is appropriate because the matter has been
3 adjudicated to finality. Christmas requests all documents and communications regarding
4 Eric Wilson and his business entities, including but not limited to all agreements or
5 arrangements for loans and/or other financial accommodations to the post-confirmation
6 Debtor, and the Beverly Hills property, the purchase option for the Beverly Hills property
7 and all asset consignments because Christmas says there are “legitimate questions” about
8 the settlement agreement between Wilson and the post-confirmation Debtor and whether
9 the Plan Agent was a “disinterested fiduciary acting in the best interests of creditors (as
10 opposed to himself).” Christmas acknowledged that the settlement agreement was
11 approved by the court and subsequently consummated, which may limit the prospects for
12 undoing the transaction.

13 Christmas does not identify what “legitimate questions” exist about the settlement
14 agreement between Wilson and the post-confirmation Debtor, and if there were such
15 legitimate questions, they should have been raised in an objection to the motion for
16 approval of the settlement agreement under Federal Rule of Bankruptcy Procedure 9019.
17 Christmas’s suspicions do not constitute good cause to impose the cost of response to his
18 burdensome document production request on the post-confirmation Debtor relative to a
19 matter that has been adjudicated to finality.

20 REQUEST FOR PRODUCTION NO. 5: ALL DOCUMENTS AND
21 COMMUNICATIONS CONCERNING SECURED CLAIMS including but not limited to
22 BOOKS AND RECORDS EVIDENCING ANY accountings or reconciliations prepared by
23 the POST-CONFIRMATION DEBTOR and whether and to what extent ANY such CLAIM
24 is DISPUTED and/or has been ALLOWED or DISALLOWED and the extent to which such
25 CLAIM has been paid.

26 Ruling: Deny because the doctrine of unclean hands precludes the requested
27 discovery. Alternatively, denial is appropriate because there are no documents to
28 produce. As the parties stated in their joint statement with respect to outstanding disputes

1 concerning the Rule 2004 motion, “Based on representations made by the Plan Agent’s
2 counsel that – other than Mr. Wilson’s claims and claims by artists/consignors – there are
3 no Secured Claims against the post-confirmation Debtor; Mr. Leslie indicated there is
4 nothing to produce.” As to secured claims of Mr. Wilson and the artists/consignors,
5 Christmas’s requests for production nos. 4 and 6 address secured claims of those parties,
6 but otherwise, there are no documents to produce since it is not disputed that there are no
7 other secured claims.

8 REQUEST FOR PRODUCTION NO. 6: ALL DOCUMENTS AND
9 COMMUNICATIONS with respect to ANY AND ALL artists and consignors CONCERNING
10 (a) ANY requests or demands for payment and/or an accounting or reconciliation, (b) ANY
11 missing or damaged artwork or other ASSETS, and (c) ANY accountings or reconciliations
12 prepared by the POST-CONFIRMATION DEBTOR.

13 Ruling: Deny because the doctrine of unclean hands precludes the requested
14 discovery. Specifically, the court finds that Christmas’s failure to pay artists more than \$2
15 million of consignment payments that were due to artists for sales of their artworks
16 precludes the court from allowing this request for production pursuant to the doctrine of
17 unclean hands.

18 REQUEST FOR PRODUCTION NO. 7: ALL DOCUMENTS AND
19 COMMUNICATIONS CONCERNING ANY AND ALL agreements and other arrangements
20 between YOU and LESLIE and ANY AND ALL TRANSFERS between YOU and LESLIE.

21 Ruling: Deny because the doctrine of unclean hands precludes the requested
22 discovery. Additionally, Christmas’s document request is vague, overbroad and
23 burdensome. Christmas requests each and every document and communication
24 regarding all agreements and other arrangements between the post-confirmation Debtor
25 and the Plan Agent because Christmas has questions regarding the Plan Agent’s
26 compensation. The court notes that the document request, however, is not limited to the
27 Plan Agent’s compensation. While the document request could be narrowly tailored to
28 request the calculation of the Plan Agent’s compensation and the documentary support for

1 the calculation, the application of the unclean hands doctrine precludes enforcement of
2 this request. To request every document and communication regarding every agreement
3 and communication, formal and informal, without any limit on the subject matter is unduly
4 burdensome and excessive.

5 REQUEST FOR PRODUCTION NO. 8: ALL DOCUMENTS AND
6 COMMUNICATIONS CONCERNING ANY AND ALL agreements and other arrangements
7 between YOU and LEA Accountancy LLP and ANY AND ALL TRANSFERS between
8 YOU and LESLIE.

9 Ruling: Deny because the doctrine of unclean hands precludes the requested
10 discovery. Alternatively, Christmas's document request is vague, overbroad and
11 burdensome. Christmas requests each and every document and communication
12 regarding all agreements and other arrangements between the post-confirmation Debtor
13 and LEA Accountancy, LLP, the Plan Agent's accounting firm, because Christmas believes
14 that the employment of LEA Accountancy, LLP, "is precluded under [the] Plan Trust," and
15 Christmas has questions about whether the Plan Agent is "pushing off" his duties to his
16 firm employed by the post-confirmation Debtor, forcing the post-confirmation Debtor to
17 incur undue expense. If Christmas believes that the employment of LEA Accountancy,
18 LLP, is precluded by the Plan Trust, there is no apparent need for the document request
19 because such preclusion would be evident in the Plan Trust, which issue could be raised
20 by motion. While the document request could be narrowly tailored to request the
21 calculation of the amounts paid to LEA Accountancy, LLP, as an operating expense of the
22 post-confirmation Debtor and the documentary support for the calculation, the application
23 of the unclean hands doctrine precludes enforcement of this request. To request every
24 document and communication regarding every agreement, communication, and transfer,
25 without any limit on the subject matter, is unduly burdensome and excessive.

26 REQUEST FOR ORAL EXAMINATION OF PLAN AGENT

27 Ruling: Deny because the doctrine of unclean hands precludes the requested
28 discovery. As ordered by the court, the Plan Agent filed detailed status reports on May

1 31, 2019 and August 19, 2019 regarding the financial performance of the Reorganized
2 Debtor postconfirmation and appeared for examination at the evidentiary hearing on July
3 19, 2019. The July 19, 2019 evidentiary hearing allowed parties in interest, including
4 Christmas, to examine the Plan Agent. The information which has been provided by the
5 Plan Agent regarding the financial performance of the Reorganized Debtor is substantial,
6 probative and undisputed, and addressed the court's need for information regarding the
7 Reorganized Debtor's financial performance in implementing the confirmed plan. The
8 court finds that the Plan Agent provided sufficient information regarding the Reorganized
9 Debtor's financial performance under the confirmed plan to address the need for such
10 information for purposes of Rule 2004 and declines to permit further examination of the
11 Plan Agent at this time.

12 II. CONCLUSION

13 For the foregoing reasons, the court will deny the Rule 2004 Motion on the merits.
14 The court will also deny the Plan Agent's Protective Order Motion as moot since no
15 protective order is needed because the court is denying the relief requested by Christmas.
16 A separate final order consistent with this memorandum decision is being filed and
17 entered concurrently herewith.

18 IT IS SO ORDERED.

19 ###

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23
24 Date: December 6, 2019



Robert Kwan
United States Bankruptcy Judge