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

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| In re:<br>Golden Sphinx Limited,<br><br>Debtor. | Case No.: 2:22-bk-14320-NB<br>Chapter: 15<br><br>**MEMORANDUM DECISION DENYING MOTION FOR ORDER AUTHORIZING THE PRODUCTION OF DOCUMENTS BY THE CUSTODIAN OF RECORDS OF EAST WEST BANK PURSUANT TO FEDERAL RULE OF BANKRUPTCY PROCEDURE 2004** |

This Court has reviewed creditor Garry Itkin's "Motion for Order Authorizing the Production of Documents by the Custodian of Records of East West Bank Pursuant to Federal Rule of Bankruptcy Procedure 2004." Dkt. 62 (the "Discovery Motion") and related pleadings. For the reasons set forth below, the Discovery Motion is denied.

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**1. Background**

On August 9, 2022, Andrew Wood and Alexander Adam (the "Foreign Representatives") filed a "Chapter 15 Petition for Recognition of a Foreign Proceeding" (dkt. 1) and "Motion for (I) Recognition of the Jersey Liquidation as a Foreign Main Proceeding and (II) Certain Related Relief." Dkt. 10 (the "Recognition Motion"). The Recognition Motion was opposed by Debtor's principal creditor, Mr. Itkin. Dkt. 37. On September 9, 2022, after reviewing the parties' papers and considering oral argument, this Court overruled Mr. Itkin's objections and entered an order granting the Recognition Motion. Dkt. 42.

On September 16, 2022, Mr. Itkin filed two motions seeking relief from the automatic stay to proceed with litigation pending in California State Court (the "California Action") and Federal District Court (the "Federal Action"). Dkt. 48 & 49 (the "R/S Motions"). This Court has denied the R/S Motions in substantial part but has continued the hearings on the R/S Motions to consider whether the Foreign Representatives have had a sufficient "breathing spell" to warrant lifting or modifying the automatic stay, or whether to grant a further continuance, as well as any other relevant changes in the circumstances. *See* Orders (dkt. 70, 71).

On December 27, 2022, Mr. Itkin filed the Discovery Motion seeking the production of documents from East West Bank pursuant to Rule 2004 (Fed. R. Bankr. P.), which Mr. Itkin's contends "may shed light on the New Albion Property Limited, which the Debtor claims to own, and … on the Debtor's financial condition" which could potentially uncover other assets that belong to the bankruptcy estate. Dkt. 62, p. 2:10-13. The Foreign Representatives filed an opposition. Dkt. 64. On January, 6, 2023, Mr. Itkin filed a reply. Dkt. 66.[1]

[1] The Discovery Motion was never formally set for hearing, but it has been addressed at various status conferences, and this Court has determined that no further argument is required. That is consistent with (a) the applicable legal standards, (b) the posted "Procedures of Judge Bason" (available at www.cacb.uscourts.gov) (the "Procedures"), (c) the frequent practice of bankruptcy courts regarding motions under Rule 2004, and (d) the implied consent, or forfeiture of any contrary arguments, by the parties in this case.

As held by the Bankruptcy Appellate Panel of the Ninth Circuit:

**2. Legal standards**

Rule 2004 provides "[o]n motion of any party in interest, the court may order the examination of any entity." Fed. R. Bankr. 2004(a). The parties dispute whether Rule 2004 (Fed. R. Bankr. P.) applies at all in chapter 15 cases and whether a request for discovery in a chapter 15 is governed by 11 U.S.C. § 1521(a)(4) and is limited to foreign representatives. Section 1521(a)(4) provides:

> (a) Upon recognition of a foreign proceeding, whether main or nonmain, where necessary to effectuate the purpose of this chapter [11 U.S.C. §§ 1501 *et seq.*] and to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including—
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> (4) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities ….

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The Fifth Amendment's requirement of due process applies in bankruptcy proceedings. Section 102(1)(A) of the Bankruptcy Code defines the phrase, "after notice and a hearing" as "such notice as is appropriate in the particular circumstances, and such *opportunity* for a hearing as is appropriate in the particular circumstances." 11 U.S.C. § 102(1)(A). Therefore, the concept of "notice and a hearing" is a flexible one. The bankruptcy judge has considerable, albeit not unlimited, discretion in determining if the notice and a hearing requirement has been satisfied.

Likewise, Rule 43(c) of the Federal Rules of Civil Procedure, which is applicable to contested matters under Rule 9017 of the Federal Rules of Bankruptcy Procedure, provides: "When a motion relies on facts outside the record, the court may hear the matter on affidavits …." [*In re Nicholson,* 435 B.R. 622, 635 (9th Cir. BAP 2010) (citations and some internal quotation marks omitted; emphasis in original), *abrogated on other grounds, as stated in In re Elliott*, 523 B.R. 188 (9th Cir. BAP 2014).]

In keeping with this approach, this Court's Procedures contemplate that discovery disputes may be resolved using streamlined procedures. *See* Procedures (citing Rule 43(c) and *Nicholson*). This Court takes judicial notice that motions under Rule 2004 frequently are ruled on without a hearing. *See* Rule 201(b)(1) (Fed. R. Evid.). *See also* LBR 1001-1(d) (Court's discretion); 9013-1(o)(1) (actual hearing generally not required).

In addition, in status conferences on February 7 and March 7, 2023 (each at 2:00 p.m.), this Court indicated its intention to rule on the Discovery Motion without a hearing, and this Court interpreted the colloquy with the parties as their implied consent or, alternatively, their forfeiture of any request for any further hearing or opportunity for any additional argument beyond what has already been stated on the record and in the parties' brief. *See In re Hamer,* 138 S.Ct. 13, 17 n.1 (2017) (distinguishing waiver and forfeiture); *Wellness Int'l Network, Ltd. v. Sharif,* 135 S.Ct. 1932 (2015) (holding, in different context, that consent need not be express); *In re Pringle,* 495 B.R. 447 (9th Cir. BAP 2013) (analyzing presumed consent).

Finally, this order denies the Discovery Motion without prejudice, so if appropriate the Discovery Motion can be renewed with an express request for a hearing. For all of the foregoing reasons, this Court is ruling on the Discovery Motion without any further hearing or any additional opportunity for oral argument.

As set forth below, on the one hand this Court is persuaded that Rule 2004 does apply in Chapter 15 cases, and that in appropriate circumstances some limited discovery would be available in this ancillary proceeding. On the other hand, this Court is not persuaded that Mr. Itkin has established that such circumstances exist at present.

**3. Rule 2004 applies in chapter 15 cases**

The Foreign Representatives contend that section 1521(a) – not Rule 2004(a) – governs the scope of discovery in a chapter 15 case. Opp (dkt. 64), p. 4:15-16. They argue that because of the "ancillary nature of Chapter 15, relief outside of that specifically provided for under Chapter 15 is not authorized." *Id.*, p. 4:26-27. This Court is not persuaded.

First, as Mr. Itkin highlights, Rule 2004 (Fed. R. Bankr. P.) does not contain any language limiting its application to chapters 7, 11, 12, or 13 (dkt. 66, pp. 5:22-6:1) and this Court is not aware of any other Bankruptcy Rule limiting Rule 2004's application in chapter 15 cases. To the contrary, Rule 1001 (Fed. R. Bankr. P.) provides that "[t]he Bankruptcy Rules and forms govern procedure in cases *under title 11 of the United States Code*." (emphasis added).

Second, the vast majority of the authorities cited by both parties support the conclusion that Rule 2004 does apply in chapter 15 cases, although generally those holdings have arisen from the foreign representatives' Rule 2004 discovery, not other parties' attempts to use Rule 2004. *See, e.g., In re Petroforte Brasileiro de Petroleo Ltda.,* 542 B.R. 899 (Bankr. S.D. Fla. 2015) (Rule 2004 is applicable in chapter 15 but should conform to the limits of section 1521); *In re Millenium Global Emerging Credit Master Fund Ltd.,* 471 B.R. 342, 347 (Bankr. S.D.N.Y. 2012) (citations omitted) ("[O]ne of the main purposes of chapter 15 is to assist a foreign representative in the administration of the foreign estate, which would militate in favor of granting a foreign representative broad discovery rights using the full scope of Rule 2004"); *see also In re Comair Ltd (In Bus. Rescue)*, 2021 Bankr. LEXIS 3137, at *24 n.19 (Bankr. S.D.N.Y. Nov. 14, 2021) (citing string of cases that "have found that Rule 2004 applies in chapter

15 case"); *In re Pro-Fit Holdings, Ltd*., 391 B.R. 850, 860 (Bankr. C.D. Cal. 2008) (Rule 2004 discovery is available in chapter 15 cases); *but see In re Sibaham, Ltd.,* 2020 Bankr. LEXIS 1393, at *10 (Bankr. W.D.N.C. May 4, 2020) ("Discovery in a Chapter 15 foreign main proceeding falls under § 1521(a)(4)" and can only be granted "at the request of the foreign representative").

**4. Discovery in chapter 15 cases is available to parties other than a foreign representative, but only in limited circumstances**

This Court also is unpersuaded by the Foreign Representatives' arguments that discovery is essentially unavailable to creditors in a chapter 15 case. True, discovery normally should take place in the foreign main proceeding, because Chapter 15 cases are intended to be ancillary proceedings that do not require bankruptcy courts to adjudicate claims or administer debtors' liquidations. But this Court can conceive of scenarios in which it might appropriate for a creditor to seek discovery in this ancillary proceeding.

For example, discovery might be appropriate if a court overseeing the foreign main proceeding were to *request* that this Court to oversee a discovery dispute or enforce one of its discovery orders. Limited discovery also might be appropriate if it were relevant to a pending contested matter involving the elements of the chapter 15 petition, or if Mr. Itkin were defending against a motion or adversary proceeding brought by the foreign representatives against him; but in these scenarios the Rule 7000 series discovery rules probably would apply, rather than Rule 2004. *See, e.g., In re Viacoa Itapemirim, S.A.,* 607 B.R. 761, 764 (Bankr. S.D. Fla. 2019) ("[A]ny cause that P&M might have to take discovery to challenge the Foreign Representative's authority must be established in the context of a contested matter"); *In re Transbrasil S.A. Linbas Aereas*, 557 B.R. 240, 243 (Bankr. S.D. Fla. 2016) (internal citation and quotation removed) ("The notion that this Court has recognized the [majority shareholder's] right to appear to conduct discovery in this Chapter 15 Case is taken out of context. This Court through the First Protective Order only permitted the [shareholder] to serve written

and documentary discovery on the Trustees pertaining directly to the pending Motion to Dismiss").

There may be other limited instances in which a creditor would be permitted to pursue discovery, if it would further this Court's assistance of the foreign main proceeding. For example, suppose that Mr. Itkin were to present sufficient grounds to suspect the existence of a fraudulent transfer claim that the foreign representatives were wrongfully refusing to pursue. This Court might be persuaded to authorize limited discovery relevant to that issue, and such discovery might be permitted under Rule 2004 because there would not yet be a contested matter or adversary proceeding in which such discovery could be taken.

But Mr. Itkin's does not seek discovery for any of the foregoing reasons. Instead, he apparently seeks to engage in the so-called Rule 2004 "fishing expedition," notwithstanding that the whole point of Chapter 15 is to avoid a multiplicity of international proceedings and instead focus most litigation in the foreign main proceeding. *See* Discovery Motion (dkt. 62), p. 2:10-13 (seeking document that "may shed light on the New Albion Property Limited, which the Debtor claims to own, and they, therefore, may shed light on the Debtor's financial condition and potentially uncover assets that belong to the bankruptcy estate"). This Court is not persuaded that this is a proper use of discovery in the circumstances presented, so the Discovery Motion must be denied.

**5. Alternatively, the requested discovery is not appropriate in view of the pending nonbankruptcy litigation**

The requested discovery is not appropriate for another reason. As highlighted by the Foreign Representatives, the requests are too closely related to the claims at issue in the California Action. Opp (dkt. 64), p. 11:6-23; *see also, e.g., In re USCO S.p.A v. ValuePart, Inc.,* 2015 U.S. Dist. LEXIS 99117, at *13-14 (W.D. Tenn. July 29, 2015) ("[D]iscovery pursuant to Rule 2004(a) is only available in the bankruptcy proceeding and cannot be used where the party requesting the Rule 2004 examination could

benefit their pending litigation outside of the bankruptcy court against the proposed Rule examinee") (citation and internal quotations omitted); *In re Bibhu*, 2019 WL 171550, at *2 (Bankr. S.D.N.Y. Jan. 10, 2019) (citing cases limiting Rule 2004 discovery where information could provide unfair advantage in pending adversary proceeding or litigation in nonbankruptcy court).

Mr. Itkin argues that he should be permitted to obtain the requested discovery because the discovery deadline has passed in the California Action. But that is all the more reason for this Court not to authorize discovery in this ancillary bankruptcy proceeding: it would appear to be an "end run" around the discovery limitations in the California Action.

**6. Alternatively, the scope of Mr. Itkin's discovery request is overly broad**

For the reasons set forth in section 5 of this discussion, above, and in the Foreign Representatives' papers (dkt. 64, pp. 9:10-10:7), this Court is also persuaded that the requested discovery is overly broad in the context of this chapter 15 case.

**7. Conclusion**

For the reasons set forth above, the Discovery Motion will be denied by separate order issued concurrent with this Memorandum Decision.

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Date: March 31, 2023

Neil W. Bason
United States Bankruptcy Judge