

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF SOUTH CAROLINA**

IN RE:

C/A No. 22-01409

Jasper Pellets, LLC,

Chapter 11

Debtor(s).

**ORDER AUTHORIZING RULE 2004
EXAMINATION OF TONY NIMMER**

THIS MATTER is before the Court on the Motion for Order Authorizing Rule 2004 Examination of Tony Nimmer filed by Jasper Pellets, LLC (the “Rule 2004 Motion”).¹ The Debtor seeks to conduct the examination of Tony Nimmer (“Nimmer”) regarding the Debtor’s operations, the Debtor’s assets and liabilities, the Debtor’s post-petition negotiations for the sale of its assets, and any other matters which may affect the administration of the Debtor’s estate. CM Biomass Partners A/S (“CM Biomass”), which was deemed the successful bidder of the Debtor’s assets but subsequently terminated the asset purchase agreement, filed an objection to the Rule 2004 Motion (the “Objection”),² and the Debtor replied to the arguments made in the objection (the “Reply”).³ The Court held a hearing on December 21, 2022, at which time the parties presented legal arguments. Debtor’s counsel reported to the Court that counsel for the Unsecured Creditor’s Committee, while not present, had asked him to make a representation to the Court that the Committee supported the Motion. Counsel for U.S. Bank Trust Company, N.A, as Indenture Trustee (the “Indenture Trustee”)⁴ also indicated its support for the Debtor’s Motion.

¹ ECF No. 241, filed Dec. 14, 2022.

² ECF No. 242, filed Dec. 15, 2022.

³ ECF No. 245, filed Dec. 20, 2022.

⁴ The Indenture Trustee is a secured creditor of the Debtor holding a first-priority, perfected lien on substantially all of the Debtor’s assets, which presently has relief from stay allowing it to exercise its state law rights and remedies in its collateral under the Court’s order entered on September 13, 2022 (ECF No. 130).

After considerations of the pleadings filed and the record before the Court as well as the legal arguments presented, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

The Debtor filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code on May 27, 2022. Debtor is a manufacturer of biomass wood pellets used for fuel. While the Debtor's plant ceased operating at some point in 2021, the Debtor continues as a debtor-in-possession, and no trustee has been appointed. The Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") on June 16, 2022.

On August 19, 2022, the Debtor filed a motion seeking authorization under 11 U.S.C. § 363 to sell substantially all of its assets and seeking the approval of bidding procedures to be used at an auction of the assets. On October 5, 2022, CM Biomass and the Debtor entered into an Asset Purchase Agreement (the "APA") with CM Biomass as the stalking horse purchaser of the assets. No parties, other than CM Biomass, submitted qualifying bids and, pursuant to the approved bid procedures, the Debtor, in consultation with the Committee, designated CM Biomass as the successful bidder. The hearing on the sale of the assets was held before the Court on October 25, 2022. At some point on October 24, 2022, CM Biomass's counsel contacted Debtor's counsel and advised that, in communicating with the Town of Ridgeland, an issue had come up regarding the Town of Ridgeland's noise ordinance. At the scheduled sale hearing on October 25, 2022, Debtor advised the Court that, due to "newly discovered" issue regarding the Town of Ridgeland's noise ordinance, it needed additional time to resolve the issue with CM Biomass; as a result, the parties requested a continuance of the sale hearing until November 9, 2022.⁵ At the hearing on November 9, 2022, counsel for CM Biomass informed the Court that the APA was terminated

⁵ ECF No. 185, consent order entered Oct. 26, 2022.

pursuant to its terms on November 4, 2022, and a Notice of Termination of Asset Purchase Agreement, along with a copy of the letter dated November 4, 2022 sent to Debtor's officer and Debtor's counsel informing them of the termination, was filed with the Court.⁶ Following CM Biomass' termination of the APA, on November 10, 2022, the Debtor sought approval to examine representatives from the Town of Ridgeland pursuant to Fed. R. Bankr. P. 2004 on or about November 29, 2022, and the Court granted such approval.

On December 1, 2022, CM Biomass commenced an adversary proceeding against Debtor by filing a Complaint for Damages and Declaratory Relief (the "Complaint"). *See* Adv. Pro. 22-80045-eg. In the Complaint, CM Biomass alleges, among other things, that "[o]n or about October 21, 2022, [CM Biomass], through a conversation with Tony Nimmer of the neighboring Nimmer Turf Farm, became aware for the first time of significant issues between the Town of Ridgeland, South Carolina and the Debtor relating to the operation of the Debtor's facility."⁷ Neither Nimmer nor the Nimmer Turf Farm is a party to the adversary proceeding, and neither was mentioned again in the Complaint.⁸ The Complaint seeks (a) a judgment of the Court against the Debtor finding that the Debtor breached the APA, committed various forms of fraud, and engaged in unfair and deceptive trade practices; (b) a declaratory judgment that, due to the various acts, omissions, fraud, and concealment allegedly committed by the Debtor, the APA is null and void and that CM Biomass' obligations are extinguished and that the \$250,000 good faith deposit should be returned to CM Biomass; and (c) an award of compensatory, punitive, and treble damages awarded to CM Biomass in an amount to be determined by the Court. More specifically, the Complaint asserts a

⁶ ECF No. 208, filed Nov. 10, 2022.

⁷ Adv. Pro. 22-80045-eg, ECF No. 1 at ¶36.

⁸ Nimmer is the son of one of the members of the Debtor, Frederick Nimmer, who is deceased. Nimmer is the executor of his father's estate. Debtor's counsel advised that Nimmer is the owner of Nimmer Turf Farm, which has its headquarters directly across from the Debtor's pellet mill property and owns land surrounding the pellet mill.

total of nine causes of action against the Debtor, including: breach of contract, violation of the South Carolina Unfair Trade Practices Act pursuant to S.C. Code Ann. § 39-5-20, fraud, negligent misrepresentation, fraud in the inducement, breach of contract accompanied by a fraudulent act, fraudulent concealment, unjust enrichment, and declaratory judgment. The answer to the complaint is due on January 3, 2023.

On December 14, 2022, the Debtor filed the Rule 2004 Motion. In addition to seeking permission to examine Nimmer on January 4, 2023, the Rule 2004 Motion also includes seventeen requests for documents or communications, none of which appear to seek documents or communications involving CM Biomass. In its Objection, CM Biomass asserts what is commonly referred to as the “pending proceeding rule”—that because an adversary proceeding has been initiated, any further discovery should be limited and conducted as set forth under the Federal Rules of Civil Procedure rather than Rule 2004 of the Federal Rules of Bankruptcy Procedure. In its Response, the Debtor asserts that it is seeking to examine Nimmer for reasons which are primarily unrelated to the adversary proceeding—to wit, for the purpose of investigating (1) the alleged noise issues complained of by the Town of Ridgeland and then complained of by CM Biomass; (2) any potential claims that the Debtor has, or might have, against the Town of Ridgeland and its employees; and (3) any claims the Debtor has, or might have, against Nimmer, any of his businesses, or any of his employees. Moreover, the Debtor argues that Nimmer is not a party to the adversary proceeding and that “the Debtor is well aware that his testimony in the 2004 examination cannot be used in the adversary proceeding.” The Debtor further asserts that Nimmer has knowledge regarding the Debtor’s interactions and communications with the Town of Ridgeland regarding the noise issues. The Debtor asserts that the information it seeks to obtain from Nimmer through the 2004 examination, including but not limited to a prepetition engineering

report regarding the noise issue that is believed to be in Nimmer's possession, is critical for resolving the issue with the Town of Ridgeland so that the pellet mill can again be marketed for sale. Debtor's counsel stated that he previously requested this information from Nimmer prior to CM Biomass's filing of the adversary proceeding. The Debtor stated that it was willing to share with CM Biomass any documents obtained through the 2004 examination that were not confidential or privileged and that CM Biomass was welcome to attend the 2004 examination.

CONCLUSIONS OF LAW

Rule 2004(a) of the Federal Rules of Bankruptcy Procedure permits the Court to order the examination of any entity upon the motion of any party in interest. Fed. R. Bankr. P. 2004(a). Under Rule 2004(b), such examination "may relate only to the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge." Fed. R. Bankr. P. 2004(b). The decision to allow a Rule 2004 examination is within the discretion of the court. *See In re Oklahoma Automatic Door, Co., Inc.*, 599 B.R. 167 (Bankr. W.D. Okla. 2019) ("Because Rule 2004(a) provides that the court *may* order the examination of any entity, its plain meaning grants the bankruptcy court's complete discretion in determining whether a Rule 2004 examination is appropriate.") (citing cases); *In re Enron Corp.*, 281 B.R. 836, 840 (Bankr. S.D.N.Y. 2002) ("The Court has the discretion to grant a request for a 2004 examination, ... and in the proper context the Court may authorize the examination of third parties that possess knowledge of the debtor's acts, conduct, liabilities or financial condition which relate to the administration of the bankruptcy estate.") (internal citations omitted).

A party's ability to obtain court approval of a Rule 2004 examination may be limited by the "pending proceeding rule," which, as mentioned above, is a well-recognized exception to the

availability of Rule 2004 when litigation is commenced. *In re Enron Corp.*, 281 B.R. at 840; *see also In re Sheehan*, 625 B.R. 72, 76 (Bankr. N.D. Ill. 2021); *In re Southeastern Materials, Inc.*, No. 09-52606, 2010 WL 5128608, at *3 (Bankr. M.D.N.C. Dec. 10, 2010). The rationale for the “pending proceeding rule” is to prevent the party from using the Rule 2004 examination, which allows for broad and unfettered discovery, as a tactic to circumvent the procedural safeguards of the Federal Rules of Civil Procedure. *In re Enron Corp.*, 281 B.R. at 841. However, courts have recognized that this rule does not apply to parties not affected by and issues not raised in pending adversary proceedings. *See In re Washington Mut., Inc.* 408 B.R. 45, 53 (Bankr. D. Del. 2009) (allowing Rule 2004 examination where the party did not seek discovery of evidence related to the adversary action and where the party from whom discovery was sought was not a party to the pending proceeding); *In re Buick*, 174 B.R. 299, 306 (Bankr. D.Colo. 1994) (stating that “entities not affected by the adversary proceeding do not require the greater protections afforded under the Federal Rules.”) (quoting *Intercontinental Enters., Inc. v. Keller (In re Blinder, Robinson & Co., Inc.)* 127 B.R. 267 (D. Colo. 1991)). “Discovery of evidence *related to* the pending proceeding must be accomplished in accord with more restrictive provisions of [the Federal Rules of Bankruptcy Procedure], while *unrelated* discovery should not be subject to those rules simply because there is an adversary proceeding pending.” *In Bennett Funding Group, Inc.*, 203 B.R. 24, 29 (Bankr. N.D.N.Y. 1996). Courts have noted that the “aggressive application of the ‘pending proceeding rule’ may prevent legitimate Rule 2004 examinations on matters wholly unrelated to the pending proceeding, thereby interfering with the trustee’s [or debtor-in possession’s] fiduciary duty to maximize estate assets.” *In re Washington Mut., Inc.*, 408 B.R. at 51.

The cases cited by the parties, with the exception of *In re Southeastern Materials, Inc.*, all address situations where the Rule 2004 examination sought was of a party to the adversary

proceeding. Compare *In re Blackjewel, L.L.C.*, No. 3:19-BK-30289, 2020 WL 6948815, at *6 (Bankr. S.D.W. Va. Jul. 14, 2020); *In re Symington*, 209 B.R. 678, 684 (Bankr. D.Md. 1997), with *In re Se. Materials, Inc.*, No. 09-52606, 2010 WL 5128608, at *3 (M.D. N.C. Dec. 10, 2010). In this case, Nimmer is not a named party, but merely a witness to the Debtor's activities and interactions with another non-party (the Town of Ridgeland), who is likely to possess knowledge that is important to the resolution of an issue preventing the sale of assets, which is critical to the administration of the estate. In *Southeastern Materials, Inc.*, the Court balanced the needs of the trustee to examine non-party witnesses in a Rule 2004 examination "to investigate the financial affairs of the debtor that may affect the administration of the estate" against the concerns of the opposing party in an adversary proceeding. *In re Se. Materials, Inc.*, 2010 WL 5128608, at *10.

Here, the Court similarly has to grapple with competing concerns. On the one hand, CM Biomass, as the Plaintiff in the adversary proceeding commenced against the Debtor, is entitled to the protections provided by the Federal Rules of Civil Procedure. On the other hand, the Debtor is seeking to examine Nimmer, who is not a named party in the complaint. Of greater importance is the fact that the Debtor, as the debtor-in-possession still in control of the assets, needs to exercise its duties pursuant to 11 U.S.C. § 1107, and, in order to maximize the value of the estate for the benefit of creditors, has to determine what claims and causes of action it may have. Even more importantly, as the Debtor argues, it has been advised by its investment banker that it should not reenter the market to sell the pellet mill without first addressing the alleged noise issues that led to CM Biomass' termination of the APA.

Rule 2004(b) expressly provides a party in interest with the ability to examine an entity with respect to "the acts, conduct, or property or to the liability and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate." Fed. R. Bankr.

P. 2004(b). As the court acknowledged in *In re Enron Corp.*, 281 B.R. at 840, “[a]s a general proposition, Rule 2004 examinations are appropriate for revealing the nature and extent of the bankruptcy estate . . . , and for ‘discovering assets, examining transactions, and determining whether wrongdoing has occurred.’” (citations omitted). To carry out its duties, the Debtor has to sell the pellet mill and determine if they have any causes of action against any parties. The Debtor does not have the luxury of waiting months before it can depose witnesses as the Indenture Trustee has the right to foreclose at any point.⁹ The Debtor was already in the process of investigating any possible cause of action as well as the alleged noise violation by informally requesting information from Nimmer and seeking the prior Rule 2004 examination of representatives of the Town of Ridgeland at the time the adversary was commenced, which halted Debtor’s efforts to address these issues.

The Debtor acknowledges that the testimony in the Rule 2004 examination would not be used in the adversary proceeding with CM Biomass, except as otherwise provided in the Federal Rules of Civil Procedure or through the consent of the Parties. The Debtor further acknowledges that any documents produced through the Rule 2004 examination will also be shared with CM Biomass unless they are subject to a privilege or a confidentiality agreement. Lastly, Debtor’s counsel further acknowledged that CM Biomass could be present at any 2004 examination conducted. At the hearing, when asked how CM Biomass would be prejudiced if the Rule 2004 Motion were granted, CM Biomass indicated that allowing the Rule 2004 examination would lead to Nimmer possibly having to be deposed twice and further gives the Debtor the advantage to start

⁹ At the hearing, CM Biomass argued that the Indenture Trustee would not want to foreclose on a pellet mill that, by the Debtor’s own admission, is currently not able to be sold given the issues regarding the alleged noise and permit violations. However, such argument is solely speculation and there is no evidence before the Court that the Indenture Trustee has agreed that it will not foreclose on the assets.

its discovery process earlier than what would otherwise be allowed under the Federal Rules of Civil Procedure.

The Court has the discretion to place limitations on 2004 examinations as justice requires. *See In re Kearney*, 590 B.R. 913, 921 (Bankr. D.N.M. 2018). Balancing all these concerns, the Court will allow the Debtor to obtain documents from and conduct the Rule 2004 examination of Nimmer; provided, however, that no documents should be produced under this order relating to the communications that took place between CM Biomass or any of its officers, agents or directors or attorneys and Nimmer related to CM Biomass's interest in the purchase of the Debtor's assets or the termination of the APA. The Rule 2004 examination should also avoid any questions related to such information. Moreover, a representative of CM Biomass as well as its counsel should be allowed to attend any examination and should be provided with a copy of any document produced in response to the Rule 2004 Motion by Nimmer within 2 days of the Debtor receiving them, unless Nimmer has asserted a privilege or their confidential nature. Lastly, the testimony provided at the Rule 2004 examination cannot be used in the adversary proceeding unless the parties consent or unless Nimmer becomes unavailable to be deposed, in which case the Court will then consider its admissibility to the extent the parties cannot agree.

As in *Southeastern Materials*, the Court acknowledges that this ruling will require the Debtor to walk somewhat of a fine line during the examination and will require the Debtor and CM Biomass to make some judgment calls. To the extent that, after conferring and attempting to amicably resolve the issue, the parties reach an impasse as to the scope of a question posed during the examination, the Debtor may choose to either save the question for a later deposition to be conducted under the Federal Rules of Civil Procedure or, to the extent the issue is pressing, the


parties may request a conference call with the Court to receive a telephonic ruling on whether the question is consistent with this ruling.

Based on the foregoing, it is hereby ORDERED that the Rule 2004 Motion is granted subject to the limitations set forth in this Order.

AND IT IS SO ORDERED.

**FILED BY THE COURT
12/22/2022**




Elisabetta G. M. Gasparini
US Bankruptcy Judge
District of South Carolina

Entered: 12/22/2022