

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK**

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In re:	: Chapter 11
	:
Orion Healthcorp, Inc., <i>et al.</i> ,	: Case Nos. 18-71748 -67 (AST)
	: Case No. 18-71789 (AST)
Debtors.	: Case No. 18-74545 (AST)
	:
	: (Jointly Administered)
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**EX PARTE MOTION OF THE LIQUIDATING TRUSTEE FOR
AN ORDER, PURSUANT TO RULES 2004 AND 9016 OF THE FEDERAL
RULES OF BANKRUPTCY PROCEDURE, AUTHORIZING THE ISSUANCE
OF A SUBPOENA TO JPMORGAN CHASE BANK, NATIONAL ASSOCIATION**

Howard M. Ehrenberg, the duly appointed liquidating trustee (the “Liquidating Trustee”) in the above-captioned chapter 11 cases (the “Chapter 11 Cases”), by and through his undersigned counsel, files this *ex parte* motion (the “Motion”), pursuant to Rules 2004 and 9016 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for the entry of an order, substantially in the form attached hereto as **Exhibit A**, authorizing the Liquidating Trustee to issue a subpoena for the production of documents by and examination of JPMorgan Chase Bank, National Association (the “Escrow Agent”) in connection with the administration of the Orion Liquidating Trust. In support of the Motion, the Liquidating Trustee respectfully represents as follows:

PRELIMINARY STATEMENT

1. In June 2013, Debtor Orion HealthCorp, Inc. (“Orion”) was part of a financial transaction involving several legal entities, including non-debtors Constellation Health, LLC and Orion Disbursing Agent, LLC. As part of the financial transaction, Orion was sold by Orion Disbursing Agent, LLC to Constellation Health, LLC. In connection therewith, the parties to the

financial transaction entered into an escrow agreement (the “Escrow Agreement”),¹ pursuant to which the Escrow Agent was appointed and an escrow account (the “Escrow Account”) was established and funded with \$700,000.

2. Since confirmation of the *Debtors’ Third Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code* (the “Plan”), the Liquidating Trustee has been investigating the Debtors’ records and has attempted to recover the Debtors’ assets wherever they are. In addition to commencing several adversary proceedings, the Liquidating Trustee has undertaken a wide range of informal and formal discovery in his attempt to locate assets for the benefit of creditors. To that end, the Liquidating Trustee has learned of the existence of the Escrow Account.

3. The Liquidating Trustee’s counsel has communicated with the Escrow Agent in an attempt to obtain additional information regarding the Escrow Account, including but not limited to, the current amount being held in the Escrow Account and legal claims certain parties may have asserted to the funds in the Escrow Account. This information is essential for the Liquidating Trustee to carry out his duties under the Plan and determine what interest the Debtors have in the funds currently held in the Escrow Account. However, the Escrow Agent has declined to provide the Liquidating Trustee with such information since neither the Liquidating Trustee nor the Debtors were a party to the original Escrow Agreement, despite the fact that the Escrow Account was funded in connection with the purchase of Orion and is clearly information that is relevant to the Liquidating Trustee.

4. Bankruptcy Rule 2004 permits a broad investigation into the affairs of third parties to assist debtors with, *inter alia*, examining transactions, determining claims and locating assets. The Liquidating Trustee’s requests for documents from the Escrow Agent fall squarely

¹ A copy of the Escrow Agreement is attached to the Document Request which is attached hereto as **Exhibit B**.

within that directive and are essential to the Liquidating Trustee's duties owed to the beneficiaries of the Liquidating Trust. In fact, the Plan specifically states that "[a]ny and all rights to conduct investigations pursuant to Bankruptcy Rule 2004 held by the Debtors or the Committee shall vest with the Liquidating Trust upon the Effective Date and shall continue in effect until dissolution or termination of the Liquidating Trust." *See* Plan, § 6.3(h). The discovery requested in this Motion pursuant to Bankruptcy Rule 2004 (the "Rule 2004 Discovery") will provide the Liquidating Trustee with information that could result in substantial recoveries for the Debtors' creditors. Accordingly, the Liquidating Trustee respectfully requests that the Court authorize the issuance of a subpoena for the production of documents by and examination of the Escrow Agent.

JURISDICTION AND VENUE

5. The Court has jurisdiction over this matter under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue is proper in this Court under 28 U.S.C. §§ 1408 and 1409. The statutory basis for the relief requested herein is section 105(a) of the Bankruptcy Code and Bankruptcy Rules 2004 and 9016.

BACKGROUND

6. On March 16, 2018 and July 5, 2018 (together, the "Petition Date"), respectively, the Debtors filed the Chapter 11 Cases in the United States Bankruptcy Court for the Eastern District of New York (the "Court").

7. On February 26, 2019, the Court entered an order confirming the Plan [D.I. 701] (the "Confirmation Order"), pursuant to which, among other things, the Liquidating Trustee was appointed to prosecute all Causes of Action vested in the Liquidating Trust, marshal all of the Debtors' assets, and make distributions to creditors.

8. Pursuant to the Plan, "the Liquidating Trustee shall retain and may enforce all

rights to commence and pursue, as appropriate, any and all Causes of Action[.]” Plan § 11.14.

The Plan further provides that “[t]he Liquidating Trustee shall have the right to seek the examination of any Person pursuant to Bankruptcy Rule 2004.” Plan § 11.15.

9. To the extent not detailed herein, additional information about the Debtors, including their business operations and the events leading up to the filing of the Chapter 11 Cases, can be found in the *Declaration of Timothy J. Dragelin in Support of Chapter 11 Petitions and First Day Motions* [D.I. 2], which is fully incorporated herein by reference.

RELIEF REQUESTED

10. By this Motion, the Liquidating Trustee seeks entry of an order, substantially in the form annexed hereto as **Exhibit A**, (i) authorizing the issuance of subpoenas directing the Escrow Agent to produce documents in accordance with the requests set forth in **Exhibit B** (the “Document Requests”) and (ii) authorizing the Liquidating Trustee to request or conduct other examinations including, but not limited to, the issuance of additional subpoenas to the Escrow Agent without further order of this Court, in connection with the investigation described in this Motion.

11. The information sought by the Liquidating Trustee is necessary to, among other things, properly locate assets belonging to the Debtors’ estates.

BASIS FOR REQUESTED RELIEF

12. Bankruptcy Rule 2004 authorizes “the examination of any entity relating to the acts, conduct, property, liabilities or financial condition of the debtor, or to any matter which may affect the administration of the debtor’s estate, or the debtor’s right to a discharge.” *Motor Coach Indus., Inc. v. Drewes (In re Rosenberg)*, 303 B.R. 172, 175 (B.A.P. 8th Cir. 2004) (citing Fed. R. Bankr. P. 2004(a),(b)). The Bankruptcy Rule “cut[s] a broad swath through the debtor’s affairs, those associated with him, and those who might have had business dealings with him.” *In*

re Johns- Manville, 42 B.R. 362, 364 (S.D.N.Y. 1984) (citing *In re Mantolesky*, 14 B.R. 973, 976 (Bankr. D. Mass. 1981)); *see also Air Line Pilots Assocs., Int’l v. Am. Nat’l Bank & Trust Co. of Chicago (In re Ionosphere Clubs, Inc.)*, 156 B.R. 414, 432 (S.D.N.Y. 1993) (“Because the purpose of the Rule 2004 investigation is to aid in the discovery of assets, any third party who can be shown to have a relationship with the debtor can be made subject to a Rule 2004 investigation.”); *In re Apex Oil Co.*, 101 B.R. 92, 102 (Bankr. E.D. Mo. 1989) (investigation under Rule 2004 “may include the examination of the debtor and third parties concerning the debtor’s assets and affairs”) (emphasis in original) (citation omitted); *In re Valley Forge Plaza Assocs.*, 109 B.R. 669, 674 (Bankr. E.D. Pa. 1990) (“Third parties having knowledge of the debtor’s affairs, as well as the debtor itself, are subject to examination.”).

13. Moreover, the Court’s broad equitable powers under section 105(a) of the Bankruptcy Code, as supplemented by Bankruptcy Rules 2004 and 9016, empower the Court to fashion an order or decree in aid of the enhancement of the value of the Debtors’ estates for the benefit of all stakeholders. “On motion of any party in interest, the court may order the examination of any entity” and “the production of documents . . . may be compelled as provided in Rule 9016.” *See* Fed. R. Bankr. P. 2004, 9016.

14. A Bankruptcy Rule 2004 inquiry is “broad and unfettered.” *In re Millennium Lab Holdings II, LLC*, 562 B.R. 614, 626 (Bankr. D. Del. 2016) (citations omitted); *see also In re Valley Forge Plaza Assoc.*, 109 B.R. at 674 (collecting citations); *In re Countrywide Home Loans, Inc.*, 384 B.R. 373, 400 (Bankr. W.D. Pa. 2008); *In re Ionosphere Clubs, Inc.*, 156 B.R. at 432 (stating that a Rule 2004 examination “is supposed to be a ‘fishing expedition,’ as exploratory and groping as appears proper . . .”).

15. In deciding whether to permit Rule 2004 discovery, courts “balance the competing interests of the parties, weighing the relevance of and necessity of the information

sought by examination.” *In re Drexel Burnham Lambert Grp.*, 123 B.R. 702, 712 (Bankr. S.D.N.Y. 1991). The purpose of the request and its degree of intrusiveness are relevant to this determination. *See id.* at 711-12; *In re Hawley Coal Mining Corp.*, 47 B.R. 392, 394 (S.D. W. Va. 1984).

16. Bankruptcy courts routinely find that a request for examination under Rule 2004 “fits squarely within the purpose of Rule 2004” where the moving party sought “to examine third parties for the purpose of ‘discovering assets, examining transactions, and determining whether wrongdoing has occurred.’” *See, e.g., In re Millennium Lab Holdings II, LLC*, 562 B.R. at 627 (quoting *In re Washington Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009)).

17. Here, the Liquidating Trustee seeks documents and information which, upon information and belief, are in the Escrow Agent’s possession, custody, or control in order to determine the estates’ interest in the funds held in the Escrow Account. *See id.; see also In re Table Talk, Inc.*, 51 B.R. 143, 145 (Bankr. D. Mass. 1985) (finding that 2004 examinations are allowed for “the purpose of discovering assets. . . .”) (internal citations omitted). As such, the Liquidating Trustee’s Document Requests fit squarely within the purpose of Bankruptcy Rule 2004. Moreover, the Escrow Agent fits well within the definition of third parties who may properly be subject to a Bankruptcy Rule 2004 investigation. *See In re Apex Oil Co.*, 101 B.R. at 102 (“The purpose of the F.R.B.P. 2004 investigation is to aid in the discovery of assets, and if a third person can be shown to have a relationship with the debtor’s affairs, the party is subject to the F.R.B.P. 2004 investigation.”) (citation omitted); *see also In re Washington Mut., Inc.*, 408 B.R. at 53 (granting debtor’s Rule 2004 motion to examine JP Morgan Chase Bank, N.A. in connection with, *inter alia*, potential fraudulent transfer claims); *In re Valley Forge Plaza Assocs.*, 109 B.R. at 674 (“Third parties having knowledge of the debtor’s affairs, as well as the debtor itself, are subject to examination.”).

18. It is critically important for the Liquidating Trustee to obtain this discovery from the Escrow Agent to exercise his duties under the Plan and the Liquidating Trust Agreement to conduct an appropriate investigation and locate assets of the estates. *Motor Coach Indus., Inc.*, 303 B.R. at 175 (trustee was “required” to “use the examination powers available through Rule 2004 to investigate the claim as an asset of the estate” in order “to fulfill his statutorily mandated responsibilities.”); *see also In re Recoton Corp.*, 307 B.R. 751, 755 (Bankr. S.D.N.Y. 2004) (“The purpose of a Rule 2004 examination is to assist a party in interest in determining the nature and extent of the bankruptcy estate, examining transactions and assessing whether wrongdoing has occurred.”) (citation omitted).

19. In light of foregoing, the Liquidating Trustee respectfully submits that the Document Requests fall within the purview of Bankruptcy Rule 2004, are not unduly burdensome, and are targeted and reasonably calculated to acquire the necessary facts needed for the investigation of a potential significant asset that may be brought into the Debtors’ estates for the benefit of creditors.

RESERVATION OF RIGHTS

20. The Liquidating Trustee hereby reserves all rights to request, pursuant to Bankruptcy Rule 2004 or otherwise, additional documents or further examination of the Escrow Agent and any other third party upon review of the documents produced in connection with this Motion.

CONCLUSION

WHEREFORE, the Liquidating Trustee respectfully requests that the Court (i) enter an order, substantially in the form attached hereto as **Exhibit A**, granting the relief requested in this Motion, and (ii) grant such other and further relief as the Court may deem proper.

Dated: New York, New York
September 1, 2021

/s/ Jeffrey P. Nolan
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