

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

In Re:

FREEDOM INDUSTRIES, INC.,

Debtor

Case No. 2:14-bk-20017
Chapter 11

MOTION FOR RULE 2004 EXAMINATIONS

NOW COMES West Virginia-American Water Company ("WVAWC"), by counsel, and moves this Court, pursuant to Bankruptcy Rule 2004, for entry of an order compelling (i) the production of certain records of Freedom Industries, Inc. ("Freedom" or "Debtor"); (ii) the examination under oath of Gary Southern, President of Freedom; and (iii) the examination under oath of Dennis Farrell, a former shareholder of Freedom and, on information and belief, a current management employee of Freedom. In support of this motion, WVAWC states as follows:

A. BACKGROUND

1. Freedom filed its voluntary petition under Chapter 11 on January 17, 2014 (the "Petition Date"), and continues to manage and operate its business as a debtor-in-possession.
2. No trustee has been appointed for the Debtor.
3. No Creditor's Committee has been appointed for the Debtor.
4. On information and belief, Freedom is in the business of producing, packaging, and selling specialty chemicals.

5. Freedom owns a “tank farm” which, together with certain barge loading and unloading facilities nearby, may also be referred to or known as Etowah River Terminal, at which it stores chemicals. The tank farm is situated on the Elk River approximately 1.5 miles up-river from WVAWC’s Charleston water treatment plant.

6. On January 9, 2014, an unknown quantity of 4-methylcyclohexane methanol (“MCHM”) was released from one of Freedom’s storage tanks into the Elk River. Upon information and belief, the MCHM dissolved into the waters of the Elk, which were drawn into the intake of the water treatment plant, thus contaminating water in the WVAWC system.

7. Upon information and belief, the required containment facilities at the Debtor’s tank farm were poorly maintained and defective, a situation known to management of the facility.

8. On the same day, West Virginia Governor Earl Ray Tomblin declared a state of emergency and ordered residents and other customers of WVAWC not to use water from the WVAWC system except for sanitation and fire protection.

9. As a result of the state of emergency and the contamination of the WVAWC system by MCHM from the Debtor’s storage tanks, many business customers of WVAWC were forced to close (pending restoration of full water service), many residents were advised to cease using water from WVAWC for any purpose, other than fire suppression or sanitation, and some people visited doctors and hospital emergency rooms complaining of symptoms that they thought might be caused by exposure to MCHM.

10. As a result of these events, to date approximately twenty-three (23) lawsuits have been filed against WVAWC in state and federal courts. Many of these suits allege a putative class. WVAWC therefore has large claims against Freedom arising both from the

cross-claims it will assert against Freedom in such lawsuits and from separate damages suffered directly by WVAWC because of the release and the expense incurred by it in the enormous effort undertaken to protect against and correct, on behalf of itself and the customers and communities it serves, the situation caused by the Freedom spill.

11. As a result of these damages, WVAWC has large claims against the Debtor, both directly for expenses incurred by WVAWC in dealing with and correcting the water supply situation caused by the Freedom spill and indirectly through cross-claims it will make against Freedom in the lawsuits filed against WVAWC.

12. Numerous questions have arisen relating to (i) the present ownership of the Debtor and the recent change in the ownership of the Debtor; (ii) what payments were made to owners or former owners in connection with the changes in ownership, the magnitude of such payments, and whether funds of the Debtor were used to effectuate the transfer or make the payments; (iii) whether the Debtor knew that the tanks and containment system were defective and, if so, for how long; (iv) whether the current and/or former owners of the Debtor took distributions of money and/or other assets that left the Debtor with unreasonably small capital and unable to comply with regulatory and other requirements with respect to the maintenance and safety of the facility; (v) the Debtor's liability, D&O, and other insurance coverage that may be applicable; (vi) the Debtor's current financial position; (vii) payments recently made by the Debtor to any of the creditors or owners; and (viii) other questions and issues referenced in or reasonably raised by the list of documents requested.

13. Additionally, the Debtor has filed numerous "first day motions" seeking authority from this Court to borrow money and pay pre-petition claims, which must be vetted and examined by creditors of the Debtor to determine, for example, the affiliation of the

lender, whether there could be collusion between the lender and management of the Debtor, and whether the proposed large payments of pre-petition claims are proper, necessary, or appropriate.

B. JURISDICTION

14. This Court has jurisdiction over this motion pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. The predicates for the relief requested are Rules 2004 and 7030 of the Federal Rules of Bankruptcy Procedure and 11 U.S.C. § 105.

C. REQUEST FOR RELIEF

15. By this motion, WVAWC respectfully requests the entry of an Order, substantially in the form attached hereto as Exhibit A, requiring the Debtor to produce the documents described in Schedule I to the Order and requiring Gary Southern and Dennis Farrell to appear and be examined; provided, that the documents listed in numbered paragraphs 13 through 17 on Schedule I to the Order need not be produced prior to the examination of Messrs. Southern and Farrell, but shall be produced by the Debtor within thirty (30) days.

16. WVAWC further seeks to limit attendance at the Rule 2004 examinations to counsel for WVAWC, counsel for the Debtor, counsel for Messrs. Southern and Farrell, counsel for the United States Trustee, and counsel for the Unsecured Creditors Committee if counsel for that Committee has been appointed by the time of the examinations. Because of the many lawsuits filed and the many trade creditors of the Debtor, the number of potential attendees at the examinations is so large as to create an impossible atmosphere for the examination unless attendance is limited. WVAWC proposes that it, Committee Counsel and

counsel for the United States Trustee take the examinations and, at WVAWC's expense, file accessible transcripts of the examination with the Clerk of this Court. WVAWC will request and pay for expedited transcription service for the transcript and, to the extent practicable, will file it within one (1) business day of receipt. WVAWC shall provide a copy of transcripts to those creditors requesting transcripts within two (2) business days of receipt of any written request made to William F. Dobbs, Jr. via email at wdobbs@jacksonkelly.com and Ellen S. Cappellanti via email at ecappellanti@jacksonkelly.com, charging only the direct cost of reproduction and mailing. Notwithstanding the above, if the Debtor asserts any kind of privilege to the production and examination, which would limit dissemination of the transcripts or exhibits from the examinations, WVAWC shall seek a ruling from this Court, or if an agreement were to be reached regarding the privilege, seek from this Court approval of any compromise, before filing the transcript or disseminating the transcript to third parties.

17. WVAWC further moves this Court to order a "rolling production" requiring the Debtor to produce requested documents as they identify and obtain or locate them, with all documents to be produced at least two business days before the first scheduled examination, except as otherwise provided in paragraph 15 hereof.

D. AUTHORITY FOR THE RULE 2004 EXAMINATIONS

18. Bankruptcy Rule 2004 provides that on motion of any party in interest the bankruptcy court may order the examination of any entity, and the examination may relate not 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 . . ." but also, in a Chapter 11 case, "to the operation of any business and the desirability of the continuance, the source of any money or property acquired or to be acquired for purposes of consummating a

plan and the consideration given or offered therefor, and any other matters relevant to the case or to the formulation of a plan.” Fed. R. Bankr. P. 2004(b) (emphasis added). It is well established that the scope of such an investigation is broad. The exploration in fact can be in the nature of a fishing expedition. *In re: Apex Oil Co.*, 101 BR at 102, 101 B.R. 92, 102 (Bankr. E.D. Mo. 1989). *See also In re: Hentz*, 2012 Bankr. BR 12-30114, 2012 WL 2263121 (Bankr. D.N.D. June 18, 2012), “The scope of a Rule 2004 examination is broader than the scope of discovery under Rule 26 of the Federal Rules of Civil Procedure.”, 9 Collier on Bankruptcy ¶ 2004.02[1] (16TH ed. 2012) (“The scope of Rule 2004(b) is very broad.”).

19. The examination and documents requested here are well within the broad scope of discovery authorized by Rule 2004. They relate to the management and operation of the Debtor’s business before, during, and after the recent reorganization and sale of business, transfers to and from the Debtor by insiders, the consideration paid to the Debtor’s former and current owners in connection with the recent reorganization and sale, current and historic financial statements and financial projections, the acts or omissions that led up to or caused the event that resulted in the Debtor’s bankruptcy filing, the Debtor’s liability and other insurance coverage, and the “first day” and subsequent motions filed by the Debtor relating to post-petition financing and payment of certain pre-petition claims against the Debtor.

E. NEED FOR EXPEDITED RELIEF

20. Because of the immense public interest in Freedom’s spill and almost immediate bankruptcy, and as a result of the first day motions and the Debtor’s many requests for expedited consideration, the requested Rule 2004 examination needs to be conducted as soon as possible. It could be very detrimental to creditors if any relief such as the granting of

liens on the payment of pre-petition claims is granted prior to the requested 2004 examinations. Before relief is granted, it is critical that creditors have access to information relating to the post-petition lender, the loan, the claims, the cause of the MCHM release, the pre-petition transactions with, between, or among current and former owners and shareholders, the Debtor's insurance coverage, the condition of the tank farm, the condition of the business, whether the business can continue to operate, and whether the business should be reorganized.

F. WVAWC'S ATTEMPT TO CONFER WITH THE DEBTOR

Given the need for expedited relief and the shortness of time to obtain the information requested in this Motion, WVAWC has made good faith and reasonable efforts to obtain the agreement of the Debtor to the requested 2004 exams. WVAWC counsel sent an email with the 2004 request to Messrs. Friedlander and Thompson yesterday, January 19, 2014, at 5:31 p.m. WVAWC spoke with Mr. Thompson this morning, January 20, 2014 at approximately 10:00 a.m. and sent an additional email to Messrs. Friedlander and Thompson at 11:48 a.m. today. WVAWC has just received a response from the Debtor indicating that it does not consent to the 2004 Exam at this time. WVAWC remains willing to work with the Debtor to reach agreement on this Motion.

WHEREFORE, WVAWC respectfully requests that this Court enter the Rule 2004 Examination Order attached to this Motion as Exhibit A.

Respectfully submitted,

**WEST VIRGINIA-AMERICAN
WATER COMPANY**

By Counsel

/s/ William F. Dobbs, Jr.

William F. Dobbs, Jr. (WV Bar No. 1027)

Ellen S. Cappellanti (WV Bar No. 627)

A. L. Emch (WV Bar No. 1125)

JACKSON KELLY PLLC

500 Lee Street, East; Suite 1600 (25301)

Post Office Box 553

Charleston, West Virginia 25322

Telephone:(304) 340-1000

Facsimile: (304) 340-1080

Email: wdobbs@jacksonkelly.com

aemch@jacksonkelly.com

ecappellanti@jacksonkelly.com

Counsel for West Virginia-American Water Company

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

In Re:

FREEDOM INDUSTRIES, INC.,

Debtor

Case No. 2:14-bk-20017
Chapter 11

CERTIFICATE OF SERVICE

I, William F. Dobbs, Jr., counsel for West Virginia-American Water Company, does hereby certify that service of the foregoing **MOTION FOR RULE 2004 EXAMINATIONS** was made by via ECF filing on this 20th day of January, 2014, as follows:

- J. Nicholas Barth nbarth@barth-thompson.com
- Mark E. Freedlander mfreedlander@mcguirewoods.com,
- hhickman@mcguirewoods.com
- Stephen L. Thompson sthompson@barth-thompson.com,
- office@barth-thompson.com; chris@barth-thompson.com
- United States Trustee ustpreion04.ct.ecf@usdoj.gov

/s/ William F. Dobbs, Jr.
William F. Dobbs, Jr.