

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
CIVIL MINUTES**

Case Title :	City of Vallejo, California	Case No :	08-26813 – A – 9
		Date :	8/9/10
		Time :	9:00
Matter :	[724] – Motion/Application to Reconsider [WS-1] [703] Order on Motion/Application for Examination and For Production of Documents Filed by Debtor City of Vallejo, California (maws)		OPPOSED
Judge :	Michael S. McManus		
Courtroom Deputy :	Sarah Head		
Reporter :	Diamond Reporters		
Department :	A		

APPEARANCES for :**Movant(s) :**

Debtor(s) Attorney – Marc A. Levinson
Debtor(s) Attorney – John Killeen

Respondent(s) :

Creditor's Attorney – Dale Ginter, James Paul, Thomas Phinney, Aron Oliner, Richard Lapping, Steven Felderstein, Robert Kaplan (by phone), Mike Buckley (by phone), Lawrence Larose (by phone)

MOTION was :

Granted in part
See final ruling below.

ORDER TO BE PREPARED BY : Movant(s)

Final Ruling: The motion will be granted in part.

The chapter 9 debtor, the City of Vallejo, moves for reconsideration of the court's May 17, 2010 order granting National Public Finance Guarantee Corporation's ex parte application for a Rule 2004 examination order, contending that:

- (1) Rule 2004 does not apply to chapter 9 debtors;
- (2) NPFGC's request for information about the workout plan is premature and irrelevant because the workout plan is not a binding plan of adjustment; and
- (3) NPFGC's request for information is burdensome.

In its application for a Rule 2004 examination, NPFGC sought information to assess its impairment on the debtor's default on Vallejo Public Financing Authority Certificates of Participation, for which Wells Fargo Bank is a trustee. NPFGC insures the COPs through a reinsurance agreement. NPFGC has issued a Debt Service Reserve Surety Bond pursuant to a Financial Guaranty Agreement with the debtor. NPFGC is seeking information concerning the debtor's workout plan, a precursor to the debtor's plan of adjustment, and its impairment of its claims.

The principal issue in this motion is whether Fed. R. Bankr. P. 2004 applies to chapter 9 debtors. 11 U.S.C. § 341(b) provides the U.S. Trustee with authority to convene a meeting of creditors. 11 U.S.C. § 343 mandates that "[t]he debtor shall appear and submit to examination under oath at the meeting of creditors

under section 341(a) . . . [c]reditors [and] any trustee . . . may examine the debtor."

But, the examination required by section 343, to be taken at the meeting of creditors under the authority of section 341, is not conducted in chapter 9 cases. Neither section 341 nor section 343 are incorporated by 11 U.S.C. § 901(a). Thus, the court agrees with the debtor that Rule 2004, to the extent it draws its authority from section 343, is not applicable in chapter 9 cases.

Nevertheless, Rule 2004 is not based only on section 343.

Fed. R. Bankr. P. 2004(a) provides that "[o]n motion of any party in interest, the court may order the examination of any entity."

Rule 2004(b), titled "scope of examination," provides that "[t]he examination of an entity under this rule or of the debtor under § 343 of the Code 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. In a family farmer's debt adjustment case under chapter 12, an individual's debt adjustment case under chapter 13, or a reorganization case under chapter 11 of the Code, other than for the reorganization of a railroad, the examination may also relate to the operation of any business and the desirability of its continuance, the source of any money or property acquired or to be acquired by the debtor for purposes of consummating a plan and the consideration given or offered therefor, and any other matter relevant to the case or to the formulation of a plan."

Rule 2004(c) provides that "[t]he attendance of an entity for examination and for the production of documents, whether the examination is to be conducted within or without the district in which the case is pending, may be compelled as provided in Rule 9016 for the attendance of a witness at a hearing or trial."

Rule 2004 provides for two types of examinations: an examination "of an entity under this rule [and] [examinations] of the debtor under § 343." Stated differently, aside from examinations contemplated by section 343, the rule itself provides authority for examinations "of any entity." Fed. R. Bankr. P. 2004(a).

The debtor argues that NPFGC may not examine the debtor under the catch-all clause of Rule 2004 because "[w]hile the term 'entity' includes a municipality under [section 101(15) of] the Bankruptcy Code . . . , where specific provisions affirmatively bar an examination of the chapter 9 debtor because Congress feared infringing upon the ongoing operations of municipal debtors, see 11 U.S.C. §§ 901, 904, [those specific provisions] necessarily trump a vague, generalized provision which might otherwise permit examination." "It would be anomalous to Congress' statutory intent to prevent interference with the operation of chapter 9 debtors by excluding § 343 from application in chapter 9 cases by a backdoor reading of a Bankruptcy Rule."

However, Rule 2004 is the only discovery tool available in bankruptcy cases. Making it inapplicable in chapter 9 cases would mean that no one may propound discovery absent a contested matter to which the rules of discovery apply. While the intent of Congress to prevent interference with the operation of chapter 9 debtors is clear, Congress could not have intended to preclude any discovery in chapter 9 cases. That is why Congress did not write the rules on procedure in bankruptcy, including Rule 2004. Rather, they were promulgated by the Supreme Court.

In addition, nothing in Rule 2004 says that it is not applicable in chapter 9 cases or that chapter 9 debtors are not subject to the rule.

Also, the debtor fails to acknowledge the significant differences between Rule 2004 and section 343. On one hand, on its face, section 343 places no limitation on the scope of examinations that are permitted. Section 343 states that "[t]he debtor shall appear and submit to examination under oath at the meeting of creditors," without defining the scope of the exam. The U.S. trustee is charged with presiding over the meeting of creditors and, effectively, over the exam to be conducted at that meeting. Therefore, by permitting the examination of the debtor to be conducted at the meeting of creditors, section 343 excludes the court from limiting the scope of the examination. See 11 U.S.C. § 341(a), (c).

On the other hand, examinations under Rule 2004 may relate only to the acts, conduct, property, or 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. And, examinations under Rule 2004 may be ordered only by the court on motion of a party in interest, giving the court complete control over the scope, terms, time and location of the examination. See, e.g., Fed. R. Bankr. P. 2004(d).

On its face then, section 343 permits a much broader examination than permitted under Rule 2004, and is much more likely to interfere with the operation of a chapter 9 debtor, given the court's inability to oversee

examinations conducted at the meeting of creditors. That is why Congress excluded section 343 from section 901(a). Hence, excluding Rule 2004 from chapter 9 cases, as section 343 was excluded, cannot be justified.

Nevertheless, the court will not allow NPFGC to propound discovery on the debtor's workout plan because that plan is not a plan of adjustment that impairs NPFGC's claims. The court agrees with the debtor that allowing discovery on the workout plan is premature and unnecessarily financially burdensome at this time. This does not mean that the court will not permit discovery on the plan of adjustment. When the time comes for the court to consider the debtor's plan of adjustment, the court may allow discovery, including the discovery requested by NPFGC.

On the other hand, NPFGC may request information to assess its impairment on the debtor's default on the COPs. The portion of Rule 2004(b) permitting exams that relate "to the liabilities . . . of the debtor" applies in chapter 9 cases. The motion will be granted in part. The court will modify its order granting NPFGC's application for a Rule 2004 examination in accordance with this ruling. This ruling is without prejudice to a further motion for a protective order by the debtor.