

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re:	)	Chapter 7
	)	
RESTAURANTS ACQUISITION I, LLC	)	Case No. 15-12406(KG)
	)	
_____ Debtor.	)	<b>Re: D.I. Nos. 556 and 557</b>

**MEMORANDUM ORDER**

International Fidelity Insurance Company ("IFIC") has moved for authorization to "Attend and Participate in the Rule 2004 Examinations to be Conducted by the Trustee on November 16 and November 17" (the "Motion"). IFIC wants to attend and participate in Rule 2004 examinations which the Chapter 7 Trustee has arranged to take. IFIC wants to attend and participate in the Rule 2004 examinations in connection with litigation IFIC commenced against the Rule 2004 examinees pending in the United States District Court for the Western District of Texas. The Court will deny the Motion on the basis of the "pending proceeding rule" which provides that once an adversary proceeding or contested matter has been commenced, discovery must proceed under the federal discovery rules. *See, e.g., In re Wash. Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009). *See also, 2435 Plainsfield Ave. v. Township of Scotch Plains (In re 2435 Plainsfield Ave.)*, 223 B.R. 440, 455-56 (Bankr. D.N.J. 1998) (Rule 2004 examination prohibited while adversary proceeding pending), and cases cited.

Here, IFIC has commenced the litigation<sup>1</sup> against the examinees alleging that the examinees are personally liable in their capacities as managers of Debtor for failing to remit tax refunds to the State of Texas. Under the circumstances, IFIC will have to proceed with discovery in its litigation pursuant to the Federal Rules of Civil Procedure. *See, e.g., In re Enron Corp.*, 281 B.R. 836, 842 (Bankr. S.D.N.Y. 2002) (ruling that courts are concerned with using a Rule 2004 examination in pending litigation outside the bankruptcy court); *In re SunEdison, Inc.*, 572 B.R. 482, 490 (Bankr. S.D.N.Y. 2017) (holding that a party in pending litigation cannot seek one-sided discovery through Rule 2004); and *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 516 (Bankr. E.D.N.Y. 1991) (holding that a party in pending litigation before another body should not obtain information through Rule 2004 examinations). Therefore, the Motion is denied. Further, since IFIC has known since September 2017 that the Chapter 7 Trustee would be taking Rule 2004 examinations and only now filed the Motion three days before the scheduled Rule 2004 examinations, the Motion to Shorten is similarly denied.

Dated: November 14, 2017

  
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KEVIN GROSS, U.S.B.J.

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<sup>1</sup> The Chapter 7 Trustee reports that IFIC may be seeking a default judgment against the examinees. IFIC will then be entitled to discovery in aid of execution.