IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
The Weinstein Company Holdings LLC, *et al.*,[1]	:	Case No. 18-10601 (MFW)
Debtors.	:	(Jointly Administered)
	:	**Re: Docket No. 275**

DEBTORS' OBJECTION TO HARVEY WEINSTEIN'S RULE 2004 MOTION

The Weinstein Company Holdings LLC (the "Company" or "TWC") and its affiliated debtors and debtors in possession (collectively, the "Debtors") hereby submit this Objection to *Harvey Weinstein's Motion for Entry of an Order Compelling Limited Discovery Under Rule 2004 of the Federal Rules of Bankruptcy Procedure*. In support of this Objection, the Debtors respectfully state as follows:

INTRODUCTION

1. Harvey Weinstein—TWC's former co-Chairman whose alleged sexual misconduct over decades sent TWC into a downward spiral last fall—is requesting that this Court compel Debtors to turn over Company records for purposes not authorized by Bankruptcy Rule 2004. At a time when TWC is focused on maximizing value for its creditors (some of which are Mr. Weinstein's alleged victims), Mr. Weinstein asks this Court to compel TWC to

[1] The last four digits of The Weinstein Company Holdings LLC's federal tax identification number are (3837). The mailing address for The Weinstein Company Holdings LLC is 99 Hudson Street, 4th Floor, New York, New York 10013. Due to the large number of Debtors in these cases, which are being jointly administered for procedural purposes only, a complete list of the Debtors and the last four digits of their federal tax identification numbers are not provided herein. A complete list of this information may be obtained on the website of the Debtors' noticing and claims agent at http://dm.epiq11.com/twc.

divert its attention toward reviewing and producing hundreds of thousands of Company emails spanning more than 12 years in order for Mr. Weinstein to "exonerate himself." (Mot. at 2) This Court, like another tribunal before it, should deny that request. Mr. Weinstein also seeks to compel the production of his "personal papers" and "effects" left behind at the Company—items that were returned to him months ago in coordination with his counsel. For the following reasons, the Debtors respectfully ask this Court to deny the Motion in its entirety:

2. **First**, Mr. Weinstein's Motion does not even attempt to establish any nexus between his document requests and these bankruptcy proceedings. Instead, Mr. Weinstein concedes that he seeks this Rule 2004 discovery for the sole purpose of defending himself in ongoing "civil proceedings and criminal investigations". (Mot. at 2.) Having made no argument that he seeks this discovery in order to assert any rights as a party-in-interest in these Chapter 11 cases, the Motion cannot pass the "threshold inquiry" under Rule 2004. *See In re Enron Corp.*, 281 B.R. 836, 842 (Bankr. S.D.N.Y. 2002) (denying motion because the movants "have not alleged, much less substantiated, that the Rule 2004 Material sought from the Objectants are properly discoverable in the context of a Bankruptcy Rule 2004 examination"). That alone is reason to deny the motion. Other than the fact the emails reside on Debtor-owned servers, and are thus property of the estate, Mr. Weinstein's emails have nothing to do with the liabilities or financial condition of the Debtors, nor do they relate to any matter which may affect the administration of the Debtors' estates. *See* Fed. R. Bankr. P. 2004(b).

3. **Second,** because the Motion does not have a proper purpose under Rule 2004, the Motion should be denied as an end-run around the Bankruptcy Code's automatic stay. While the Motion falsely asserts that "[n]o prior request for the relief sought herein has been made to this

or any other court" (Mot. at ¶ 32),[2] in fact Mr. Weinstein has so far unsuccessfully sought *these same documents* in two other actions using the same justification. One such request has been denied, and the other is pending, subject to the automatic stay:

> (i) *Weinstein vs. The Weinstein Company Holdings LLC, et al.*, JAMS Ref. No. 1425024989 (the "JAMS Arbitration"): In his JAMS Arbitration for wrongful termination against the Company, Mr. Weinstein moved to compel the production of "all e-mails by or on behalf of [Harvey Weinstein] and any PERSON, at any time, maintained by TWC" (*see* Feb. 2, 2018 Motion to Compel Letter at 6, attached as Exhibit 1). On February 8, 2018, the Arbitrator denied that motion, and ordered that the Company produce only emails relevant to Mr. Weinstein's October 2017 termination. The Company produced those emails on February 23, 2018.
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> (ii) *Weinstein v. The Weinstein Company Holdings LLC,* C.A. No. 2017-0765-JRS (Del. Ch.) (the "Chancery Action"): In his pending books and records action in the Delaware Chancery Court, Mr. Weinstein has demanded access to "all e-mails sent to or from Mr. Weinstein's email address". (*See* Chancery Compl., Ex. A at 1, attached as Exhibit 2.) The Company has opposed the action in full, and was awaiting a trial when the Chapter 11 filing automatically stayed the case.

To date, both of those efforts have failed, which is why Mr. Weinstein is now seeking a third bite at the apple. To the extent Mr. Weinstein is entitled to the requested emails (something the Debtors dispute), he must pursue those alleged rights in his already-pending actions. His stated

[2] Indeed, counsel for Mr. Weinstein in the instant Motion is a member of the same firm that represents him in an action in the Delaware Chancery Court seeking this same discovery.

intent for the discovery does not satisfy the requirements of Rule 2004, and he should not be allowed to improperly use Rule 2004 to circumvent the Bankruptcy Code's automatic stay.

4. **Third**, Mr. Weinstein is not being deprived of any "due process rights." (Mot. ¶ 25.) The fact that Mr. Weinstein's alleged conduct has made him the subject of criminal investigations and numerous civil actions does not give him any special (much less Constitutional) entitlement to far-reaching discovery. Under Mr. Weinstein's theory, any terminated employee who is the subject of criminal investigation would have unfettered access to his former employer's company servers. That has no support in the law and, unsurprisingly, Mr. Weinstein cites no authority for such a theory.

5. **Fourth**, granting the Motion would cause serious harm to the estate, particularly at this critical juncture. The Debtors are committed to maximizing the value of the estate in the impending sale process. The Debtors see no benefit in diverting their attention and scarce resources at this critical juncture to support Mr. Weinstein's efforts. Indeed, granting the Motion would harm the estate and its stakeholders by incurring the cost of an expensive review, including a privilege review, of an estimated 800,000 emails. Debtors project the cost of that review to be $750,000 or more—funds not provided for in the Debtor's DIP financing.

6. In short, Mr. Weinstein's purported needs should not be elevated over those of the Debtors' creditors. While Mr. Weinstein purports to seek "narrowly-tailored discovery" under Rule 2004, in reality he seeks the unrestricted disclosure of 12 years worth of emails for purposes wholly unrelated to these bankruptcy proceedings. The Motion should be denied.

BACKGROUND

A. Reports of Harvey Weinstein's Sexual Misconduct Lead to Civil Actions and Criminal Investigations.

7. In early October 2017, *The New York Times* and *The New Yorker* published articles chronicling allegations of sexual harassment, assault and rape by Harvey Weinstein spanning more than a decade. Since then, more than 80 women have publicly come forward to accuse Mr. Weinstein of sexual misconduct.

8. In the wake of these reports, Mr. Weinstein (and, at times, the Company and its board members) have been named in numerous civil lawsuits arising from Mr. Weinstein's reported sexual misconduct. In addition, various law enforcement authorities in the United States and the United Kingdom have reportedly opened criminal investigations into Mr. Weinstein's conduct.

B. Harvey Weinstein Demands Access to Company Emails and Other Documents Immediately After His Termination in October 2017 and Files An Action For Such Documents In Delaware Chancery Court.

9. Upon learning of these allegations, the Company's Board of Representatives (the "Board") terminated Mr. Weinstein's employment on October 8, 2017. The Board formally ratified the termination on October 17, and Mr. Weinstein resigned from the Board that same day. Following his termination, Mr. Weinstein requested that TWC voluntarily provide him access to his internal Company emails, personnel file and the TWC Code of Conduct. (*See* Oct. 16, 2018 Letter, attached as Exhibit 3.) TWC declined Mr. Weinstein's request, but agreed to produce the Company's Code of Conduct as well as corporate documents setting forth Mr. Weinstein's rights and obligations as a TWC shareholder. Unsatisfied, Mr. Weinstein served a books and records demand on October 18, 2017, seeking the very same documents (internal Company emails and his personnel file) under the Delaware Limited Liability Company Act

("LLC Act") and the Company's Third Amended and Restated Limited Liability Company Agreement. (*See* Chancery Compl., Ex. A.) Mr. Weinstein said he needed these documents (i) to aid his own defense of civil and criminal allegations arising out of his employment with TWC; and (ii) to support potential claims arising out of the wrongful termination of his employment. (*See id.*) When TWC repeated that it would not provide these documents (*see* Chancery Compl., Ex. B at 3), Mr. Weinstein filed the Chancery Action on October 26, 2017. In his Complaint, Mr. Weinstein again claimed that he wanted access to the Company's documents so that he could "assist" the Company in its defense of claims arising from his own conduct. (*See* Chancery Compl. ¶ 16.) The Company opposed the books and records action based on settled Delaware law that does not permit a shareholder to seek corporate documents for "personal purposes".[3] *See, e.g.*, *Pogue v. Hybrid Energy, Inc.*, C.A. No. 11563-VCG, 2016 WL 4154253, at *3 (Del. Ch. Aug. 5, 2016) (*see also* TWC's Answer, attached as Exhibit 4.) The Chancery Action was scheduled for trial in May 2018, but was automatically stayed upon the commencement of these cases on March 19.

C. Harvey Weinstein Seeks the Production of the Same Documents in the JAMS Arbitration.

10. The day before Mr. Weinstein filed the Chancery Action, he commenced the JAMS Arbitration. During subsequent discovery in that action, Mr. Weinstein again sought the same documents (asserting the same justifications), which the Company again opposed except to the extent such emails were relevant to Mr. Weinstein's October 2017 termination. On February 2, 2018, Mr. Weinstein moved to compel the production of "all e-mails by or on behalf of [Harvey Weinstein] and any PERSON, at any time, maintained by TWC." (*See* Feb. 2, 2018

[3] There is no dispute here that Mr. Weinstein's emails—sent from and stored on the Company's servers—are property of the Company.

Motion to Compel at 2.) Mr. Weinstein claimed to need "all" of his Company emails to defend himself against allegations of sexual misconduct. On February 8, 2018, the Arbitrator denied Mr. Weinstein's overbroad requests, except to the extent such emails were relevant to the Board's decision to terminate his employment (the category to which the Company had already agreed). The Company produced those emails on February 23, 2018.

D. Harvey Weinstein Files This Rule 2004 Motion, Seeking the Same Documents In a Third Forum.

11. Despite his lack of success in two other forums, Mr. Weinstein filed the present Motion on April 20, 2018, again seeking access to the same Company emails, and again asserting the same justifications. As explained below, Mr. Weinstein's third attempt has even less merit than his first two efforts.

ARGUMENT

A. Rule 2004 Discovery Must Be Meaningfully Related To The Bankruptcy Proceedings.

12. Pursuant to Rule 2004(b), a party-in-interest may seek discovery relating "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* . . . ." Fed. R. Bankr. P. 2004(b) (emphases added). In other words, the requested discovery must be meaningfully tied to the bankruptcy proceedings and the movant's interests in the estate. This is the "threshold inquiry" of any Rule 2004 Motion. *See, e.g., In re Enron Corp.*, 281 B.R. at 842. A party in interest, while not defined in the Bankruptcy Code, is generally understood to mean a creditor or equity security holder seeking to protect or enforce economic rights in the bankruptcy case, not a person seeking to place burdensome discovery obligations on the estate allegedly to defend separate criminal or civil proceedings.

13. Although the scope of discovery permitted under Rule 2004 is broader than what is allowed under the Federal Rules of Civil Procedure, Rule 2004 "may not be used for purposes of abuse or harassment and it cannot stray into matters which are not relevant to the basic inquiry." *In re Washington Mut., Inc.*, 408 B.R. 45, 50 (Bankr. D. Del. 2009) (internal citations omitted). In exercising its discretion, the Court must "restrict discovery that appears unduly intrusive or burdensome". *In re Roman Catholic Church of Diocese of Gallup*, 513 B.R. 761, 766 (Bankr. D.N.M. 2014); *see also In re E. W. Resort Dev. V, L.P., L.L.L.P.*, No. 10-10452 (BLS), 2014 WL 4537500, at *7 (Bankr. D. Del. Sept. 12, 2014) ("there are limits, such as when a 2004 examination is used to abuse or harass"); *In re Farris-Ellison*, No. 2:11-BK-33861-RK, 2015 WL 5306600, at *3 (Bankr. C.D. Cal. Sept. 10, 2015) ("Rule 2004 examination must be both relevant and reasonable and may not be used to annoy, embarrass or oppress the party being examined") (internal citations omitted).

B. Mr. Weinstein Does Not Have A Proper Purpose Under Rule 2004 For Seeking His Emails.

14. By his own admission, Mr. Weinstein seeks these Company documents solely for his own personal use in other pending litigations and investigations. (*See* Mot. at 2.) Courts routinely and properly deny Rule 2004 motions where the discovery sought lacks any connection to either the moving party's interests in the bankruptcy proceedings or the administration of the estate. *See, e.g., In re Enron Corp.*, 281 B.R. at 842 (denying Rule 2004 motion where the moving party sought documents for use in a separate litigation, and the requested documents lacked any "nexus" to the movant "as a party in interest in [the] bankruptcy case"); *In re Coffee Cupboard, Inc.*, 128 B.R. 509, 516 (Bankr. E.D.N.Y. 1991) ("Rule 2004 examinations should not be used to obtain information for use in an unrelated case or proceeding pending before another tribunal"). Here, as the Motion concedes by its silence on this issue, there is no nexus between

these Chapter 11 cases and the purposes for which Mr. Weinstein seeks his emails—namely, to exonerate and defend himself in civil cases and criminal investigations.[4]

15. Further, Mr. Weinstein's insistence that the Debtors will benefit from producing these documents is wrong. The Debtors are far better situated than Mr. Weinstein to defend themselves in the civil litigation and do not seek (or need) Mr. Weinstein's assistance in doing so. Even in cases against both the Company and Mr. Weinstein, the Company has never been in joint defense with Mr. Weinstein and believe that it is unlikely that their interests will frequently—if ever—be aligned. Thus, as the Debtors have explained before, they neither need nor want Mr. Weinstein's help examining Company documents or defending litigation. Indeed, the Debtors may have claims *against* Mr. Weinstein for, among other things, the value destruction his alleged conduct brought to the Company.

C. Mr. Weinstein Must Pursue His Purported Right to Inspect his Company Emails in the Chancery Action.

16. The Motion should fail for the additional reason that it is an end-run around Section 362(a) of the Bankruptcy Code's automatic stay, which was imposed on Mr. Weinstein's Chancery Action. That action seeks the *same documents* for the *same purpose* and is brought by the *same counsel* as the instant Motion. Prior to the automatic stay, Mr. Weinstein and the Company had exchanged discovery requests under which Mr. Weinstein was to be deposed this month, and the Court had set a trial for May 31, 2018. The trial date was adjourned as a result of the stay, but Mr. Weinstein has not withdrawn his Complaint. As such, in order to pursue that identical claim, Mr. Weinstein must seek relief from the automatic stay so that he can pursue the Chancery Action—something he has not sought in the Motion, which instead incorrectly

[4] How exactly any email could exonerate Mr. Weinstein from allegations of sexual assault is not clear to the Debtors, but that is not an issue the Court need address in denying Mr. Weinstein's motion to compel for the other reasons set forth herein.

represents that "[n]o prior request for the relief sought herein has been made to this *or any other court*." (Mot. at ¶ 32 (emphasis added).) An improper use of a Bankruptcy Rule 2004 request should not substitute for a motion for relief from the automatic stay.

17. Even if Mr. Weinstein were to seek to lift the automatic stay in the Chancery Action, the Debtors believe such a motion would fail.

D. Mr. Weinstein's Due Process Theory Is Baseless.

18. Mr. Weinstein vaguely asserts that Debtors are violating his "due process rights", without ever specifying what rights he is invoking. There is no "violation." And, notably, he cites no case or statute to support this assertion. In short, he has no entitlement to Company documents (including his Company email from the time he was an employee) and Debtors owe him no special "rights" because he is the subject of lawsuits and investigations.

19. Instead, Mr. Weinstein—like every other litigant in a case—must obtain relevant discovery through the regular document exchange process pursuant to the relevant rules of each jurisdiction. For example, in the civil cases Mr. Weinstein is defending, he is free to issue document requests or subpoenas to any appropriate party for documents directly relevant to his defense. And in the criminal investigations, Mr. Weinstein has not even been charged with any crime to date. And if he is, it is the prosecutor who has a duty to produce exculpatory evidence, not Mr. Weinstein's former employers. *See, e.g., Brady v. Maryland*, 373 US 83 (1963). Moreover, if he is charged, Mr. Weinstein can avail himself of whatever discovery rights are permitted by law. *See, e.g.*, Fed. R. Crim. P. 17(c). On this Motion, however, Mr. Weinstein fails to identify any due process right that would entitle him to 800,000 Company emails because no such right exists.[5]

[5] Again, the Debtors set aside the question about whether emails could even plausibly be used as "exculpatory evidence" to rebut the sexual misconduct allegations made publicly against

E. The Cost to the Estate of Granting the Motion Is An Estimated $750,000.

20. The Debtors estimate that there are more than 800,000 documents on Weinstein's Company email accounts. Were the Motion to be granted, the Debtors would have to review each of these documents for attorney-client privilege or attorney work product, and apply any necessary redactions of such privileged or protected information. This privilege review would cost approximately $750,000 (in addition to the cost of making a traditional electronic production with metadata). Thus, granting the motion would have the effect of causing the estate to incur substantial costs at the creditors' expense for Mr. Weinstein's benefit. When weighed against the implausible and speculative benefits Mr. Weinstein claims, the balance heavily tips in favor of the Debtors. *See In re Eagle-Picher Indus., Inc.*, 169 B.R. 130, 134-35 (Bankr. S.D. Ohio 1994) (denying Rule 2004 motion where "the discovery proposed . . . is extremely broad and would clearly be disruptive and costly for the [examinee], while the benefit to the movants . . . is far from clear."). And even if Mr. Weinstein had made an effort to narrow the scope of his demand (which he did not), the requests would still be improper under Rule 2004 for the reasons set forth above. The estate should not be spending its limited resources helping Mr. Weinstein, especially at this critical junction in the cases where it is seeking approval of its proposed sale.

F. **Mr. Weinstein's Personal Effects Were Returned Months Ago At His Request.**

21. Finally, the Motion should be denied as moot to the extent Mr. Weinstein is requesting that the Debtors produce his "personal effects." Mr. Weinstein's personal property was returned to him at his own request through his counsel in December 2017. (*See* Dec. 5,

Mr. Weinstein. In the prior emails that Mr. Weinstein sought relating to certain women (Mot at ¶ 10), he asked, for example, for communications from alleged victims thanking Mr. Weinstein for an employment opportunity.

2017 Email, attached as Exhibit 5.) That delivery cost the Company $5,200, which Mr. Weinstein refused to reimburse. (*See* Dec. 18, 2017 Email, attached as Exhibit 6.) Moreover, the lease for Mr. Weinstein's former TWC office (375 Greenwich) has now been rejected and surrendered upon approval of the Court and no further Company property remains at that location. *See In re The Weinstein Company Holdings LLC, et al.*, 18-10601 (MFW), April 18, 2018 Order [D.I. 261]. To the extent Mr. Weinstein continues to receive personal mail at Company premises, that personal correspondence is provided to Mr. Weinstein's accounting firm, Citrin Cooperman, at Mr. Weinstein's request. (*See* Feb. 5, 2018 Email, attached as Exhibit 7.) As Mr. Weinstein's counsel has been told multiple times, the Debtors have no idea what the basis is for this aspect of the Motion. It too should be denied.

CONCLUSION

22. WHEREFORE, the Debtors respectfully request that the Court deny Harvey Weinstein's Rule 2004 Motion in full and grant such other and further relief as may be appropriate.

Dated: April 27, 2018
Wilmington, Delaware

/s/ Paul N. Heath

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