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The Honorable Philip H. Brandt  
Chapter 15  
Hearing Date: November 8, 2007  
Hearing Time: 9:30 a.m.  
Hearing Location: Seattle – Room 8106  
Response Date: Date of Hearing

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

In re:	}	
IAN GREGORY THOW,	}	No. 05-30432-PHB
Debtor.	}	NEWS MEDIA’S REPLY TO MOTION TO INTERVENE AND FOR ACCESS TO RULE 2004 EXAMINATION

Neither Mr. Thow nor the Foreign Representative dispute there is a presumption of public access to bankruptcy court proceedings. Instead, they argue that the Rule 2004 Examination is discovery and not the type of proceeding that is presumptively open. They are mistaken on the particular facts of this case and mistaken in general in respect of 2004 examinations. In addition, the Foreign Representative asserts that because Canadian law governing examination of debtors requires that the hearing be conducted in private, this Court should ignore the long-established public policy in favor of open access to bankruptcy court proceedings. This Court must reaffirm the public’s right of access.

**A. This 2004 Examination Was to be Conducted in Public.**

Both the Debtor and the Foreign Representative fundamentally mistake the nature of the 2004 examination in this case. Pursuant to the request of the Canadian Court, and pursuant to the Stipulated Order entered by this Court, this Court ordered

1 [t]hat Ian Gregory Thow shall attend an examination conducted by the  
2 Foreign Representative's counsel on Monday, October 29, 2007  
3 commencing at 9:30 a.m., at the Bankruptcy Court for the Western  
4 District of Washington, Seattle, to answer under oath as to the conduct of  
5 Mr. Thow and his business and financial affairs....

6 Stipulated Order re Court Ordered 2004 Examination and Document Production (Docket  
7 No. 49). (emphasis added.) Thus, the examination was to be in this Court, which is a court  
8 proceeding open under Fed. R. Bankr. P.5001(b).

9 When the parties showed up in court for the examination, the Debtor and the  
10 Foreign Representative objected to the presence of the media and asked for the  
11 examination to be conducted outside of the presence of the media. It was conducted in an  
12 ante room to the courtroom. Thus, after obtaining an order for examination in the court,  
13 the parties decided to not do public examination so as to exclude the media. None of the  
14 cases discussed by the Debtor or the Foreign Representative stand for the proposition that a  
15 2004 examination that was to be conducted at the court house, presumably in the presence  
16 of the Judge, can exclude the press in contravention to Fed. R. Bankr. P 5001(b). They  
17 invoked the open procedure, and cannot now claim that what was being done was private  
18 discovery – it was to be public discovery.

19 **B. 2004 Examinations are not Pre-Trial Discovery.**

20 Even if the parties had not made the examination a public proceeding by court  
21 order, the case law that has examined the nature of 2004 proceedings demonstrates that  
22 2004 examinations are to be open to the public. Rule 2004 Examinations have  
23 traditionally been public proceedings. *In re Symington*, 209 B.R. 678, 693 (Bankr. D. Md.  
24 1997) (“It is critical to the function of the bankruptcy process that *Rule 2004* examinations  
25 of debtors and third parties authorized by the bankruptcy court be open to the public.”);  
26 Mark D. Boom et. al, *Reorganizing in a Fish Bowl: Public Access vs. Protecting*  
27 *Confidential Information*, 73 AM. BANKR. L.J. 775, 792 (1999) (“[H]istorical experience  
shows that Rule 2004 examinations have for the most part been required to be open to the

1 public”). These examinations are open for good reason. Allowing public access to such  
2 examinations aids in accurate fact-finding and ensures that a witness will be treated fairly  
3 and equitably. *In re Symington*, 209 B.R. at 694-95. More generally, allowing public  
4 access to bankruptcy proceedings fosters public confidence in the bankruptcy system. *In*  
5 *re Crawford*, 194 F.3d 954, 960 (9th Cir. 1999); *In re Barney’s, Inc.*, 201 B.R. 703, 707  
6 (Bankr. S.D.N.Y. 1996).

7 Courts have consistently recognized that Rule 2004 examinations are not pretrial  
8 discovery. In *In re Symington*, a Maryland bankruptcy court extensively discussed the  
9 differences between Rule 2004 examinations and pretrial discovery under the Federal  
10 Rules of Civil Procedure. These differences include timing (a Rule 2004 examination can  
11 be undertaken before a lawsuit is filed) and authorization to conduct Rule 2004 discovery  
12 belongs exclusive to the moving party (by comparison, Fed. R. Civ. P. 26 is freely  
13 available to both parties). 209 B.R. at 684-86 (and citing cases); *see also In re Enron*  
14 *Corp.*, 281 B.R. 836, 840-841 (2002) (citing cases discussing the difference between a  
15 Rule 2004 examination and the federal discovery rules); *In re Ionosphere Clubs, Inc.*, 156  
16 B.R. 414, 433 (Bankr. S.D.N.Y. 1993) (“The information collected informally by the  
17 Examiner pursuant to a Bankruptcy Rule 2004 ‘fishing expedition’ here does not even rise  
18 to the level of Rule 26 discovery materials considered by the Supreme Court.”); *In re*  
19 *Robert Landau Assocs. Inc.*, 50 B.R. 670, 675 (Bankr. N.Y. 1985) (Rule 2004 examination  
20 is not discovery). Another difference is that the scope and the nature of the 2004  
21 examination are set by the court in advance and an order for a 2004 examination is  
22 prerequisite to examination unlike discovery under the Federal Rules of Civil Procedure,  
23 which can be conducted without court involvement.

24 Rather, a Rule 2004 examination is closer to a creditors meeting pursuant to 11  
25 U.S.C. § 341, where the intent of both examinations is to ascertain information about the  
26 debtor’s assets and liabilities. *In re Symington*, 209 B.R. at 694. Section 341 meetings are  
27

1 public proceedings traditionally open to the public. The most thorough discussion of the  
2 long history of open examinations of debtors in respect of their assets and affairs, including  
3 Section 341 hearings, is *In re Astri Investment, Management & Securities Corp.*, 88 B.R.  
4 730, 736-741 (D. Md. 1988). In that case, the District Court stated:

5 “Both the history and the function and policy of our bankruptcy laws  
6 require the conclusion that a presumptive First Amendment right of access  
7 to creditors’ meetings exist – a right which *should not be denied unless, in  
8 a given case, there is a showing that a restriction of access ‘is essential to  
9 preserve higher values and is narrowly tailored to serve that interest.’*”<sup>1</sup>

10 *Id.* at 741 (quoting the United States Supreme Court in *Press Enterprise Co. v. Superior  
11 Court*, 464 U.S. 501, 510 (1984)).

12 The three cases cited by the parties that Rule 2004 examinations are closed  
13 proceedings are inapplicable because the public’s right to attend the hearing was not at  
14 issue. The cases are also distinguishable. In *In re Apex Oil Co.* and *In re Ionosphere  
15 Clubs*, the primary issue was whether documents gathered during a Rule 2004 examination  
16 were part of the public record under 11 U.S.C. § 107(a). In addition, the examinations  
17 were conducted pursuant to protective orders that third parties relied on in cooperating  
18 with the examination.<sup>2</sup> *In re Apex Oil Co.*, 101 B.R. 92, 102 (Bankr. E.D. Mo. 1989); *In  
19 re Ionosphere*, 156 B.R. at 433. The *Apex* court was especially concerned about the  
20 complexity of the litigation and the concern that the examinations might not have been  
21 conducted without such an order. *In re Apex*, 101 B.R. at 103. Here, there is no protective  
22 order in place, so the parties cannot argue that Mr. Thow relied on a protective order as a

23 <sup>1</sup> *In re Astri* involved a debtor who was a securities dealer-broker, a type of business that  
24 has been the subject of public scrutiny. *In re Astri*, 88 B.R. at 741. The court recognized  
25 that the public had an interest in attending a critical component of a bankruptcy proceeding  
26 where the debtor’s bankruptcy affected large numbers of people. *Id.*

27 <sup>2</sup> Similarly, these cases are also distinguishable to the extent that third parties were being  
compelled to give information to the examiner. Here, the News Media seek access to the  
examination of the Debtor himself. Thus, concern about protecting the privacy of third  
parties is not present, and the Foreign Representative does not cite privacy concerns of  
third parties as a rationale for closing the examination. Mr. Thow makes such an assertion,  
but provides no evidentiary support.

1 condition of cooperation. *In re Enron Corp.* did not address the public access issue: The  
2 court was concerned that a party was improperly seeking access to the examination records  
3 to assist in litigation in another proceeding. 281 B.R. at 842.

4 Finally, *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), is inapposite. As the  
5 very first line of the case makes clear: “This case presents the issue whether parties to civil  
6 litigation have a First Amendment right to disseminate, in advance of trial, information  
7 gained through the pretrial discovery process.” *Id.* at 22. The underlying case was a  
8 defamation claim against the Seattle Times and another newspaper. The plaintiff sought a  
9 protective order because the newspapers intended to use information in future newspaper  
10 stories gained during discovery in which they were a party defendant. *Id.* at 24. The Court  
11 held that “where, as in this case, a protective order is entered on a showing of good cause  
12 as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not  
13 restrict the dissemination of the information if gained from other sources, it does not  
14 offend the First Amendment.” *Id.* at 37. Although the case limited the ability of the  
15 *parties* to release the information when a protective order was in place, the Court did not  
16 hold that all discovery materials are automatically closed to public access and it did not  
17 restrict the right of third parties who gain the information from other sources to  
18 dissemination the information. Here, the News Media are not parties and they are not  
19 attempting to publish information they personally gained through discovery. Their ability  
20 to distribute the information is based on the revelation of the information in a court  
21 proceeding in which the newspapers were parties defendant. *Rhinehart* is thus  
22 inapplicable.

23 **C. Rule 2004 Does not Exclude the Media Because it has no Pecuniary**  
24 **Interest.**

25 The Foreign Representative asserts that the media must have a pecuniary interest in  
26 order to participate in a 2004 examination. Foreign Representative’s Brief at 7-9. This  
27 argument fails for several reasons. First, it confuses what is being asked by the press. The

1 Foreign Representative argues that only parties in interest, narrowly defined to be those  
2 with a pecuniary interest, can “conduct” a 2004 exam. But he confuses taking the  
3 examination and setting in on the examination without asking any questions. It is the latter  
4 that is being asked in this case. Also, as demonstrated by the media’s opening  
5 memorandum, it is clear that the press has a cognizable interest in court proceedings.  
6 Finally, once the press has been allowed to intervene, it becomes by definition a party in  
7 interest. Otherwise, intervention would be a meaningless act.

8 **D. Comity Does Not Require U.S. Courts to Abandon Their Policy of**  
9 **Open Hearings**

10 The fact that Canadian courts are also closed to the media is also unpersuasive.  
11 Even though Chapter 15 requires the Court to comply with applicable foreign law, comity  
12 does not require a U.S. bankruptcy court to conduct itself as if it were a Canadian court.  
13 11 U.S.C. § 1506 provides that “[n]othing in this Chapter prevents the court from refusing  
14 to take and action governed by this Chapter if such action would be manifestly contrary to  
15 the public policy to the United States.” As discussed in the News Media’s initial brief,  
16 public policy strongly favors open courts. *See In re Astri*, 88 B.R. 730 at 741 (“Both the  
17 history and the function and policy of our bankruptcy laws require the conclusion that a  
18 presumptive First Amendment right of access.”). This public policy right is well  
19 established under the First Amendment to the U.S. Constitution and the common law right  
20 of access.

21 **E. The Parties Have Not Met Their Burden**

22 Because the Rule 2004 Examination is a public proceeding, a compelling reason  
23 with a specific, articulated factual basis for denial of access is the proper standard, not  
24 good cause. *Hagestad v. Tragesser*, 49 F.3d 1430, 1433-34 (9th Cir. 1995). However, Mr.  
25 Thow and the Foreign Representative have not met either standard. The Foreign  
26 Representative provides the declaration of Michael Cheevers, who is concerned that  
27 allowing public access will cost additional money to creditors, that creditors may attempt

1 to seize Mr. Thow's offshore assets, and that examinations of other parties may be  
2 prejudiced. Declaration of Michael Cheevers at 3. Mr. Cheevers provides no information  
3 about the cost, or that creditors have shown any inclination that they will try to seize the  
4 assets, or any specifics relating to other possible examinations. Such vague and conclusory  
5 statements about what might happen – but lacking in detail to indicate there is a real threat  
6 – does not meet the burden. Similarly, Mr. Thow makes unsubstantiated claims about the  
7 impact on third parties and on himself personally. Debtor's Response at 6-7. Despite  
8 having nearly a week since the News Media filed its brief opposing closure, the parties still  
9 cannot point to any specific reason beyond a general fear about speculative impacts. *See*  
10 *Hagestad*, 49 F.3d at 1434 (the presumption of openness may be overcome only "on the  
11 basis of articulable facts known to the court, not on the basis of unsupported hypothesis or  
12 conjecture") (internal quotation marks and citations omitted).

13 **F. The News Media Should Be Allowed To Intervene**

14 Mr. Thow<sup>3</sup> argues that the news media cannot meet the standard for intervening  
15 under either Fed. R. Bankr. P. 2018(a) or Fed. R. Civ. P. 24(b)(2). None of the cases cited  
16 by Mr. Thow or the Foreign Representative have denied the media's request to intervene  
17 on the issue of access to court records and proceedings – whether or not the media have a  
18 pecuniary interest. Thus, the media's right to intervene is well established.

19 For the foregoing reasons, the intervenor News Media ask the Court's permission  
20 to intervene; that this Court order that an audio and/or written copy of the transcript of the  
21 Rule 2004 Examination be made available to the news media within 24 hours of the  
22 Court's ruling on this matter; and that the Court affirm that the intervenor news media be  
23 allowed to attend future Examinations.

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26 <sup>3</sup> The Foreign Representative does not appear to argue against intervention, but that once  
27 the media has intervened that they are not parties in interest, narrowly defined to be those  
with pecuniary interests, who cannot conduct or participate in a Rule 2004 examination.

1 DATED this 7th day of November, 2007.

2 Davis Wright Tremaine LLP  
3 Attorneys for CHEK-TV and *The Times-Colonist*

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of November, 2007, I caused the foregoing document to be filed with the Clerk of the above-captioned court using the CM/ECF filing system which will send notification of such filing to the following:

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A copy of the foregoing document(s) was /were delivered via U.S. Mail to:

NONE

Executed at Seattle, Washington, this 7th day of November, 2007.

/s/ C. Keith Allred  
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