

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

<p>SKAZZI3 CAPITAL LIMITED,</p> <p style="text-align: center;">Petitioner,</p> <p>v.</p> <p>PATHWAY GENOMICS CORPORATION,</p> <p style="text-align: center;">Respondent.</p>	<p>Case No.: 18cv317-BEN(KSC)</p> <p style="text-align: center;">ORDER DENYING WITHOUT PREJUDICE PLAINTIFF'S EX PARTE APPLICATION FOR AN INSPECTION ORDER</p> <p>[Doc. No. 67.]</p>
--	--

Before the Court is petitioner's *Ex Parte* Application for an Order to Inspect Respondent's Principal Place of Business. [Doc. No. 67.] Respondent has not filed a response or opposition to the *Ex Parte* Application, and it is not clear from the papers submitted that respondent was properly served with petitioner's moving papers. For the reasons outlined more fully below, the Court finds that petitioner's *Ex Parte* Application must be DENIED.

Background

By way of a Petition to Enforce an Arbitration Award, petitioner seeks to enforce a money judgment against respondent. [Doc. No. 1.] On December 26, 2018, the District Court entered judgment against defendant in the amount of \$442,670.25, an amount that was due and owing under the parties' Settlement Agreement. At the same time, the

1 District Court granted a writ of attachment in the amount of \$442,670.25. [Doc. No. 26.]
2 Thereafter, a writ of attachment was imposed on April 30, 2019 as to certain corporate
3 property of defendant's, including bank accounts and accounts receivable arising out of
4 any trade with certain identified third parties. [Doc. No. 36, at pp. 1-2.] On or about
5 May 10, 2019, petitioner recovered a total of \$4,199.43 via writ of execution. [Doc. No.
6 67-2, at p. 2.]

7 On May 8, 2019, petitioner completed a judgment debtor examination of
8 respondent through respondent's representative, Stephanie Cox. [Doc. No. 37.] In
9 support of the current *Ex Parte* Application, petitioner submitted a transcript of this
10 examination. [Doc. No. 67-2, at pp. 40-57.] At the time of the examination, Ms. Cox
11 testified she was employed by respondent as an office manager, had been in this position
12 about a year, and had been employed by respondent since November 2014. [Doc. No.
13 67-2, at p. 45-46.] Ms. Cox testified she did not have any knowledge about respondent's
14 property, receivables, and assets, and she did not know who would be familiar with these
15 topics. [Doc. No. 67-2, at p. 55.] In general terms, Ms. Cox was able to describe the
16 operations taking place at respondent's principal place of business and did identify some
17 employees and former employees who may have knowledge about respondent's finances.
18 [Doc. 67-2, at pp. 46-54.]

19 On December 20, 2019, the District Court issued an Order requiring defendant to
20 assign to plaintiff its interest and rights in all monetary payments due or to become due
21 from retail portals CVS, Meijer pharmacies, Walmart, and Amazon.com, as well as credit
22 card processors American Express Corporation, Visa U.S.A. Inc., and Mastercard
23 International Incorporated. [Doc. No. 62, at p. 6.] At the same time, the District Court
24 issued an order restraining defendant from assigning or otherwise disposing of its rights
25 and interests to payments through these portals. [Doc. No. 62, at p. 6.]

26 Although respondent was initially represented by counsel in this action, counsel
27 filed a Motion to Withdraw on October 1, 2019. [Doc. No. 49.] This Motion was
28 granted in an Order filed December 17, 2019. Although respondent was directed to

1 obtain new counsel within thirty days and have new counsel file a notice of appearance
2 [Doc. No. 59, at p. 4], no appearance of counsel has been filed and respondent remains
3 unrepresented in this action.

4 Discussion

5 In the *Ex Parte* Application, petitioner seeks an order allowing a direct inspection
6 of respondent's principal place of business, because it has been unable to determine
7 through a judgment debtor examination and written discovery requests what property,
8 receivables, and other assets could be used to satisfy the judgment. [Doc. No. 67-1, at p.
9 7.] In addition, on January 15, 2020, petitioner received a document entitled Notice of
10 Sale Process for Pathway Genomics Corporation Assets from a "secured creditor" named
11 Vadim Shulman. [Doc. No. 67-1, at p. 3; Doc. No. 67-2, at pp. 34-35.] Petitioner
12 believes this notice raises significant concerns that respondent is being stripped of all its
13 value and assets through self-dealing and/or fraudulent transfers that will prevent plaintiff
14 from being able to enforce the judgment. [Doc. No. 67-1, at p. 6.]

15 Although no confirming evidence was submitted, petitioner's *Ex Parte* Application
16 suggests that Mr. Shulman is respondent's "CEO, Secretary, CFO, and board member."
17 [Doc. No. 67-1, at p. 4.] According to the Notice of Sale, respondent defaulted on
18 "Promissory Notes" in the aggregate original principal amount of \$9,250,000 and
19 "Additional Amounts" of approximately \$16,028,400 that were owed to Mr. Shulman, as
20 a secured creditor. Therefore, Mr. Shulman exercised his right to "take control of the
21 Collateral." [Doc. No. 67-2, at p. 34.] Pursuant to the Notice of Sale, Mr. Shulman
22 provided shareholders and stakeholders ten (10) business days to make offers to acquire
23 respondent's "operating assets," including "all personal and intellectual property and
24 goodwill." [Doc. No. 67-2, at p. 34.] An auction was scheduled to occur if acceptable
25 offers were received. [Doc. No. 67-2, at p. 35.]

26 The Notice of Sale also states as follows: "The Secured Creditor [*i.e.*,
27 Mr. Shulman] has provisionally agreed to continue to finance [respondent] through the
28 restructuring period on a modified basis in order to maintain operations sufficient to

1 support the fulfillment of customer contracts and [respondent's] goodwill. *All such*
2 *financing will be senior secured credit.* [¶][Respondent] is working with its advisors to
3 determine the level of financing required." [Doc. No. 67-2, at p. 35.] For further
4 information, Notice recipients were provided with contact information for Mark A.
5 Greenberg of Silverstone Capital Advisors, LLC and John A. Sten of Pierce Atwood
6 LLP. [Doc. No. 67-2, at p. 35.] Although petitioner's counsel submitted a Declaration in
7 support of the *Ex Parte* Application to Inspect Respondent's Principal Place of Business,
8 the Declaration does not state whether these individuals were contacted for additional
9 information. [Doc. No. 67-2, at pp. 1-5.]

10 Respondent argues that the Notice of Sale creates exigent circumstances which
11 justify an inspection order. [Doc. No. 67-1, at p. 6.] However, petitioner did not cite,
12 and this Court was unable to locate, any authority which would authorize the Court to
13 issue an order granting petitioner the right to enter and inspect respondent's principal
14 place of business under the circumstances presented to locate assets that may aid in the
15 enforcement of the judgment. Federal Rule of Civil Procedure 34 does provide in part as
16 follows:

17 (a) A party may serve on any other party a request within the scope
18 of Rule 26(b):

19 (2) to permit entry onto designated land or other property
20 possessed or controlled by the responding party, so that the requesting
21 party may inspect, measure, survey, photograph, test or sample the
22 property or any designated object or operation on it.

23 (b) The request:

24 (A) must describe with reasonable particularity
25 each item or category of items to be inspected;

26 (B) must specify a reasonable time, place and
27 manner for the inspection and for performing the related
28 acts; and

1 (C) may specify the form or forms in which
2 electronically stored information is to be produced.

3
4 Fed.R.Civ.P. 34(a)(2).

5 After a formal, written request has been made under Rules 34(a) and 34(b), “[t]he
6 party to whom the request is directed must respond in writing within 30 days after being
7 served. . . .” Fed.R.Civ.P. 34(b)(2)(A). “For each item or category, the response must
8 either state that inspection and related activities will be permitted as requested or state with
9 specificity the grounds for objecting to the request, including the reasons.” Fed.R.Civ.P.
10 34(b)(2)(B). If the responding party objects to the request for an inspection, the parties
11 must meet and confer and contact the Court if they are unable to reach agreement.
12 Fed.R.Civ.P 37(a)(1); Civ. L.R. 26.1(a); Chambers Rule VIII(A). If the responding party
13 does not respond and/or declines to meet and confer, the requesting party may then file a
14 motion to compel as provided in Federal Rule of Civil Procedure 37(a).

15 A Rule 34 request for “unrestricted access” to a party’s “corporate headquarters” is
16 “overly broad on its face.” *Schwab v. Wyndham Int’l, Inc.*, 225 F.R.D. 538-539 (N.D. Tex.
17 2005). “Since entry upon a party’s premises may entail greater burdens and risks than
18 mere production of documents, a greater inquiry into the necessity for inspection would
19 seem warranted.” *Keith H. v. Long Beach Unified School Dist.*, 228 F.R.D. 652, 659 (C.D.
20 Cal. 2005), quoting *Belcher v. Bassett Furniture Indus., Inc.*, 588 F.2d 904, 908 (4th Cir.
21 1978.). As noted above, inspection requests under Rule 34(a) must be within the scope of
22 Rule 26(b), and, as a result, “the degree to which the proposed inspection will aid in the
23 search for truth must be balanced against the burdens and dangers created by the
24 inspection.” *Belcher*, 588 F.2d at 908. For example, Rule 26(b)(1) indicates that the Court
25 must consider “whether the burden . . . of the proposed discovery outweighs its likely
26 benefit.” Fed.R.Civ.P. 26(b)(1). Rule 26(b)(2)(B) further states that the Court must limit
27 discovery that “can be obtained from some other source that is more convenient, [or] less
28 burdensome. . . .” Fed.R.Civ.P. 26(b)(2)(C)(i).

1 Here, petitioner's *Ex Parte* Application and supporting documents do not indicate
2 respondent has been properly served with a formal, written Rule 34 request for inspection
3 or with respondent's *Ex Parte* Application for an Inspection Order. Rather, the Declaration
4 of petitioner's counsel only states that he has attempted to contact respondent via telephone
5 and by e-mail at an e-mail address provided to him by respondent's former counsel, but
6 respondent has not returned any of counsel's calls or e-mails. [Doc. No. 67-2, at pp. 4.]
7 As a result, the parties have not satisfied the meet and confer requirements. In addition,
8 respondent is unrepresented at this time, even though the District Court directed respondent
9 to retain new counsel by January 17, 2020. [Doc. No. 59, at p. 4.] Petitioner also reported
10 in the *Ex Parte* Application that respondent has moved its office, but respondent has not
11 provided this information to the Court. [Doc. No. 67-1, at p. 7 n.1.] The Court's docket
12 does not even include an address for respondent or any other information that could be
13 used to serve respondent through the Court's electronic-filing system. Because respondent
14 is unrepresented, has not provided information necessary for electronic service, and has
15 not responded to e-mails or telephone calls, it would be necessary for petitioner to serve
16 respondent with discovery requests and any other documents, such as motions or *ex parte*
17 applications, as provided in Federal Rule of Civil Procedure 5.

18 Moreover, without more, it does not appear that a Rule 34 inspection by petitioner
19 of respondent's place of business is likely to result in discovery of information that would
20 be helpful in enforcing the judgment. In this regard, the Court notes that petitioner has not
21 described items that it wishes to inspect on the premises "with reasonable particularity,"
22 and it does not appear petitioner has any information as to what assets or information about
23 assets could be located at respondent's principal place of business that might be used to
24 satisfy the judgment. Fed.R.Civ.P. 34(b)(1)(A). In addition, as outlined more fully below,
25 there are less burdensome means for petitioner to discover relevant information.
26 Accordingly, under the circumstances presented, the Court finds that petitioner's *Ex Parte*
27 Application must be DENIED to the extent it seeks an inspection order under Rule 34.

28 ///

1 With respect to the enforcement of money judgments, Federal Rule of Civil
2 Procedure 69 provides as follows: “A money judgment is enforced by a writ of execution,
3 unless the court directs otherwise. The procedure on execution—and in proceedings
4 supplementary to and in aid of judgment or execution—*must accord with the procedure*
5 *of the state where the court is located. . . .*” Fed.R.Civ.P. 69(a)(1) (emphasis added).

6 In California, “[d]etailed statutory provisions govern the manner and extent to which
7 civil judgments are enforceable.” *Imperial Bank v. Pim Electric, Inc.*, 33 Cal.App.4th 540,
8 546 (1995). “In 1982, California enacted a comprehensive Enforcement of Judgments Law
9 (“EJL”) governing the enforcement of all civil judgments in California.” *In re Burns*, 291
10 B.R. 846, 850 (9th Cir. 2003), citing *Cal. Practice Guide: Enforcement Judgements &*
11 *Debts* §6:1-6:2 (The Rutter Group). Petitioner has not cited, and the Court was unable to
12 locate, any authority on the enforcement of civil judgments under California law, for this
13 Court to issue an order allowing petitioner to enter and conduct a direct inspection of
14 respondent’s principal place of business to discover assets and other property that could be
15 used to satisfy the judgment.

16 Instead, under California law, a judgment creditor may apply to the Court for an
17 order requiring the judgment debtor or any “third person” who “has possession or control
18 of property in which the judgment debtor has an interest or is indebted to the judgment
19 creditor. . .” to appear before the Court for examination. Cal. Code Civ. Proc. §§ 708.110
20 and 708.120. A “specified individual” may be ordered to appear for examination. Cal.
21 Code Civ. Proc. § 708.150. In addition, any person with knowledge that may aid in the
22 enforcement of a judgment, *e.g.*, the debtor’s accountant, bookkeeper, and others who do
23 not possess or control the debtor’s property or owe the debtor money, may be subpoenaed
24 to testify. *Shrewsbury Mgmt., Inc. v. Superior Court*, 32 Cal. App. 5th 1213, 1225-1226
25 (2019). *See also Cal. Practice Guide: Enforcement Judgements & Debts* §6:1282.

26 Following a judgment debtor examination, a creditor may request a “turnover order”
27 requiring the debtor or a third party to deliver identified assets to a levying officer or a
28 receiver. *In re Burns*, 291 B.R. at 854-855. If an order to appear for an examination is

1 properly served (*i.e.*, by a sheriff, marshal, a person specially appointed by the court in the
2 order, or a registered process server), an examinee who fails to appear is subject to
3 contempt. Cal. Code Civ. Proc. §§ 708.110; 708.120; 708.150; 708.170.

4 Thus far, respondent has not answered petitioner's written discovery requests despite
5 the Court's Order to do so. [Doc. No. 64.] Petitioner was able to conduct a debtor's
6 examination on May 8, 2019, but the examination did not result in enough information to
7 aid in satisfaction of the judgment. [Doc. No. 67-2, at p. 43.] Respondent's office manager
8 was produced as respondent's "person most knowledgeable" about receivables, assets, and
9 other property. [Doc. No. 67-2, at pp. 44-57.] The office manager testified she did not
10 have any knowledge about respondent's property, receivables, and assets. [Doc. No. 67-
11 2, at p. 55.] However, the office manager did describe respondent's business operations at
12 its principal place of business and did disclose the names of individuals employed or
13 formerly employed by respondent who could possibly provide relevant information. The
14 transcript of the debtor's examination also indicates petitioner was aware at that time of
15 the examination that Mr. Shulman was one of respondent's investors and that he was listed
16 with the Secretary of State as respondent's chief executive officer, secretary, president, and
17 director. [Doc. No. 67-2, at pp. 46-55.] In addition, as noted above, the Notice of Sale
18 provided recipients with contact information for two individuals who could provide
19 "further information." [Doc. No. 67-2, at p. 35.]

20 In sum, rather than a direct inspection of respondent's principal place of business,
21 petitioner must, as provided by California law, exhaust sources of relevant information
22 through direct examination of the judgment debtor and third parties who may have
23 knowledge that could aid in the enforcement of the judgment. Accordingly, this Court
24 finds that petitioner's *Ex Parte* Application for an Order to Inspect Respondent's Principal
25 Place of Business must be DENIED.

26 In the *Ex Parte* Application, plaintiff also requests a temporary restraining order or
27 preliminary injunction prohibiting defendant from transferring any property, receivables or
28 assets that would frustrate plaintiff's efforts to enforce the judgment. [Doc. No. 67-1, at

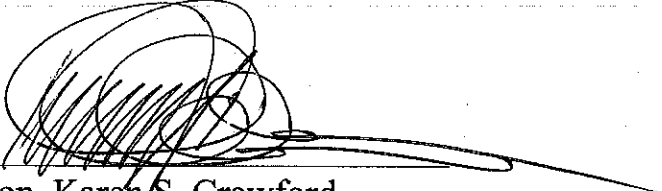
1 pp. 8-9.] In addition, after filing the instant *Ex Parte* Application, plaintiff filed another
2 set of documents related to its request for a temporary restraining order or preliminary
3 injunction. [Doc. No. 68.] This portion of plaintiff's Ex Parte Application is under
4 submission. The Court will respond separately to plaintiff's request for a temporary
5 restraining order and/or a preliminary injunction in a report and recommendation to the
6 District Judge assigned to this case.

7 Conclusion

8 Based on the foregoing, IT IS HEREBY ORDERED that petitioner's Ex Parte
9 Application for an Order to Inspect Respondent's Principal Place of Business is
10 DENIED. This Order is without prejudice to petitioner seeking and obtaining orders for
11 the judgment debtor and/or third parties to appear for examination as provided by
12 California law.

13 IT IS SO ORDERED.

14 Dated: March 3, 2020

15 
16 Hon. Karen S. Crawford
17 United States Magistrate Judge
18
19
20
21
22
23
24
25
26
27
28