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Re: Robert T. Bullock
Case No. 01-67426
Adv. Pro. No. 02-80174

LETTER DECISION AND ORDER

As the Court indicated at oral argument on January 27, 2004, it is issuing a Letter Decision and Order on the motion of Robert T. Bullock ("Debtor"), filed on January 7, 2004, in the above-referenced adversary proceeding. The Debtor has requested that this Court issue an order compelling discovery pursuant to Rule 7037 of the Federal Rules of Bankruptcy Procedure ("Fed.R.Bankr.P.") and awarding expenses and attorney's fees in connection with his motion. The relief requested arises out of a deposition of George Fanelli ("Fanelli"), one of the plaintiffs in the adversary proceeding, conducted on December 22, 2003. The Debtor asserted that at the deposition, Fanelli's counsel, Louis T. Brindisi, Esq. ("Brindisi"), violated Fed.R.Bankr.P. 7030 in that he improperly (1) directed Fanelli not to answer certain questions; (2) answered some of the questions for Fanelli; and (3) made objections and statements in a manner that suggested to Fanelli how to answer certain questions.

Rule 30(d)(1) of the Federal Rules of Civil Procedure ("Fed.R.Civ.P."), as incorporated in

Fed.R.Bankr.P. 7030, provides that

> [a]ny objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).

Fed.R.Civ.P. 30(d)(1).

"Zealous representation has its limitations." *Moralies v. Zondo, Inc.*, 204 F.R.D. 50, 57 (S.D.N.Y. 2001). In particular, "'there is a duty imposed upon counsel to deal fairly and sincerely with the court and opposing counsel so as to conserve the time and expense of all, and that actions may be litigated in an orderly manner.'" *Id.*, quoting *Learning Int'l, Inc. v. Competence Assurance Sys.*, No. 90 Civ. 2032, 1990 WL 204163 at *3 (S.D.N.Y. Dec. 13, 1990).

At the argument on January 27, 2004, the Court found that the deposition was replete with inappropriate objections by Brindisi and instances where Brindisi had either answered the questions for Fanelli or had suggested answers to him. The Court has reviewed the deposition of Fanelli and makes the following findings:

<u>Directing Fanelli not to answer certain questions</u>

Examples of such impropriety of conduct by Brindisi are found at

page 18, lines 9-10: I object. I direct him not to answer the question. He's already answered the question.

page 25, lines 21-25 page 26, line 2: I'm going to object to any questions about Royal Alliance. Royal Alliance is not a party to this proceeding. If you want to ask him about Mr. Bullock, fine. I'm going to direct him not to answer any question regarding Royal Alliance.

page 26, lines 6-11: I'm directing him not to answer questions regarding Royal Alliance.

page 53, lines 24-25: This question has already been asked and answered.

page 54, lines 21-22 The question has been asked and answered and I direct him not to answer it again.

In this deposition it was stipulated on the record "that all objections, except objections as to form, are reserved until the time of trial, and that objections as to form shall be noted on the record . . . ." Tr. at 3. Such objections are appropriate at a deposition because they allow an opportunity for the questioning attorney to correct the form of his/her question. *See In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614, 618 (D. Nev. 1998). Otherwise, Fed.R.Civ.P. 30(d)(1) makes it clear that "a person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)." Fed.R.Civ.P. 30(d)(1).

In this case, the Court had placed no limitations on the deposition of Fanelli and there is nothing in the docket or the deposition transcript to indicate that Brindisi intended to seek relief pursuant to Rule 30(d)(4) or that his direction to Fanelli not to respond to various questions was based on the exercise of a privilege. Accordingly, the above statements made by Brindisi were improper objections.

Testifying for Fanelli

The following are examples of instances in which Brindisi testified for Fanelli:

page 11, lines 2-5 He did not answer the question. He said he was confused.

page 15, lines 3-5 He already testified somebody forged their names on the check from Royal Alliance.

page 15, line 18 What he's saying . . . .

page 15, lines 11-16 He already testified, number one, he took a check from Royal Alliance, he had the signatures of George

	and John Fanelli, they were not their signatures, in addition to what you already said.
page 16, lines 5-6	Because the checks went to him.
page 21, lines 15-17	Other than the documents that have been received by you already?
page 21, lines 21-22	You have the letterheads. Your client says he is a . . . .
page 26, lines 8-11	He already testified earlier his brother's the one that did the dealings with Mr. Bullock and he does not remember everything that happened concerning the transactions.
page 32, lines 6-9	That's based upon investigations that were done by his attorney, as you know, and documents that were provided to us.
page 47, lines 17-20	You mean other than – other than what the Defendant has already testified to as to what he did with the funds, other than the documentation you have?
page 49, lines 4-7	Wait a second. We're not going to do this. We're just not going to do this. Mr. Bullock has already testified at a Deposition. Okay? He's . . . .
page 50, lines 20-24	You have the supplied documents. You asked for us to produce documents. You have all of those documents. You know exactly what he did with his money, because you have the documents.
page 51, lines 15-16	He said that was his belief.
page 52, lines 19-22	That's not what he said. He says he's a party to the lawsuit, he relied upon his brother. His brother is the one that did the negotiations.
page 54, lines 5-9	He's already testified it's his belief that the money was used by Mr. Bullock for his own personal reasons, for his own personal finances and it went into his own personal account. That's his belief.

<u>Objections and statements suggesting the answers or coaching the witness</u>

In addition, the following statements represent instances in which Brindisi improperly

coached Fanelli or suggested the appropriate answers:

page 11, lines 11-12	He's talking about even this investment.
page 20, lines 17-23	You have a whole group of documents that were signed by Mr. Bullock on the letterheads of Royal Alliance and you know how he registered himself. He was a registered representative of Royal Alliance. There is no question about that. He lost his license just recently . . . .
page 22, line 14	That you know of, yeah.
page 26, line 19	If you know.
page 30, line 24	If you know.
page 37, lines 23-24	He already said he relied on his brother.
page 38, lines 7-18	Wait a second. He said that he thought the investment was risky, number one. He didn't know anything about it, number two, and he relied on his brother, number three. That's what he's already testified to. And now you're becoming argumentative asking him about his being involved in an investment that was risky. He's already told you he relied on his brother, and that's how the investment came about, plus representation by Mr. Bullock.
page 47, lines 17-20	You mean other than - other than what the Defendant has already testified to as to what he did with the funds, other than the documentation you have?

"Under no circumstances shall counsel elaborate or present an argument or make reference to other evidence unless the court so requests. * * * Speaking objections and coaching objections are simply not permitted in depositions in federal cases." *McDonough v. Keniston*, 188 F.R.D. 22, 24 (D.N.H. 1998). If the deponent does not understand the question, clarification should be sought from the attorney conducting the deposition. In this case, it was inappropriate for Brindisi to tell the witness what to say or how he should answer a specific question or for Brindisi to simply testify for

Fanelli. *See Stratosphere*, 182 F.R.D. at 621. "Testimony taken during a deposition is to be completely that of the deponent, not a version of the testimony which has been edited or glossed by the deponent's lawyer." *Quantachrome Corp. v. Micromeritics Instrument Corp.*, 189 F.R.D. 697, 700 (S.D. Fla. 1999). This approach is based on the fact that a deposition is "to find what a witness saw, heard, or did - what the witness thinks," not what his attorney heard or thinks. *Hall v. Clifton Precision, A Div. of Litton Systems, Inc.*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).

The examples cited above make it clear that Brindisi, in an attempt to be of assistance to his client, stepped over the line in putting his own "spin" on the facts, rather than allowing his client to testify and to seek clarification when a particular question might have been confusing. Such conduct is not to be tolerated.

Having reviewed the record and having listened to argument by the parties, it is hereby

ORDERED that Debtor's motion for reimbursement of expense is granted to the extent of having Brindisi bear the reasonable costs associated with bringing the instant motion to compel; it is further

ORDERED that Debtor's counsel file with the Court and serve on Brindisi within ten (10) days of the date of this Order a request for reasonable expenses, including attorney's fees, specifying the expense, the amount of the expense and the extent of legal services rendered in connection with the motion herein; it is further.

ORDERED that the examination of George and John Fanelli reconvene within twenty (20) days of this Order; and it finally

ORDERED that the examination be conducted in compliance with Fed.R.Civ.P. 30(d) and that (1) counsel for the Plaintiffs not direct any witness at the deposition not to answer a question unless it is to claim a privilege, to enforce a limitation directed by the Court, or to present a motion

under Fed.R.Civ.P. 30(d)(4); (2) if a witness requires clarification, explanations or the meaning of any questions, words or documents presented, the witness shall seek clarification from Debtor's counsel, not counsel for the Plaintiffs; (3) counsel for Plaintiffs refrain from making any speaking objections or any statements or engage in any conduct at the deposition which may suggest how the witness should answer any question; (4) objections to the form of a question should be succinctly made, stating the basis of the objection only; (5) counsel for the Plaintiffs and the client-witness(es) shall not engage in private, off the record conferences while the deposition is being conducted, except for the purposes of deciding whether to assert a privilege; and (6) counsel for the Plaintiffs shall refrain from commenting during the deposition, interrupting the deposition unnecessarily or interpreting or restating any question asked by counsel for the Debtor.

Dated at Utica, New York

this 19th day of February 2004

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STEPHEN D. GERLING
Chief U.S. Bankruptcy Judge