

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PARMALAT SECURITIES LITIGATION)
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This document relates to: 05 Civ. 04015)

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DR. ENRICO BONDI,)
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Plaintiff,)
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v.)
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BANK OF AMERICA CORPORATION, et al.,)
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)
Defendants.)

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**Reply in Support of Renewed Cross-motion
for a Protective Order for Messrs. Lagro, Megna and Galea
Fed. R. Civ. P. 26(c)(2), (4)**

We do not understand why the Bank of America is so afraid of having three partners in PricewaterhouseCoopers S.p.A. (“PwC Italy”) – Franco Lagro, Oliver Galea and Roberto Megna – testify as experts for Dr. Bondi in his U.S. cases, just as they did in Italy, as the Court suggested they might do in its April 18 ruling. *In re Parmalat Securities Litig.*, 2007 WL 1169217 at *2 (S.D.N.Y. Apr. 18, 2007).¹ The proper course is for the Court to enter the protective order Dr. Bondi has asked for so that these witnesses’ depositions can proceed. If the Bank is not satisfied with their testimony, it can renew its motion to strike – rather than seeking a premature ruling to try to keep PwC Italy from providing the assistance to Dr. Bondi that it agreed to provide over three and half years ago.

There was no conflict when the PwC Italy experts (a) testified in the Milan criminal proceedings against the Bank and (b) submitted their expert report in the Parma criminal proceedings in which the Bank is also a defendant. There is no conflict now.²

The Bank has shown no good reason why the Court should not enter the protective order Dr. Bondi has asked for. We would submit that, conceptually, virtually every motion for a protective order could be characterized as seeking some form of “advisory opinion” – because it is necessarily

¹ The Bank’s reply to Dr. Bondi’s July 12, 2007 opposition to the Bank’s motion to strike was due on Friday, July 13, 2007. S.D.N.Y. Local Civ. R. 6.1(a)(3); Kaplan, J., individual practices at 3 (“Briefs and Motion Papers” ¶ 3). It was not filed until three days later, on July 16. We respectfully submit it should be stricken as untimely. *Id.*

² The Bank continues to raise – without any evidentiary support – the claim that PwC Italy has a “conflict” in testifying for Dr. Bondi in the U.S. proceedings because PricewaterhouseCoopers LLP (“PwC USA”) audits the Bank. *See, e.g.*, Bank opposition at 2 n.1, 4 n.6, 5 n.7. The Bank again continues to deliberately conflate PwC Italy and PwC USA – carefully avoiding any reference to PwC USA and referring instead in opaque terms to “PwC.” PwC USA’s website states that “each [of the member firms of PricewaterhouseCoopers International Limited] is a separate and independent legal entity.” *See* <http://www.pwc.com> (accessed July 16, 2007). It is undisputed that PwC Italy has never audited the Bank anywhere in the world and, contrary to the Bank’s suggestion (at 2 n.1), it has never been a “client” of PwC Italy. It is also clear that PwC Italy *has been* providing “litigation-related consulting [and] expert witness services” (*id.*) for Dr. Bondi since virtually day one of its engagement in late 2003 and early 2004.

asking for an order to protect in advance against “annoyance, embarrassment, oppression or undue burden or expense.” Fed. R. Civ. P.26(c). Dr. Bondi’s motion for a protective order is no more a request for an advisory opinion than the Bank’s own motion for a protective order to limit the deposition testimony of its CEO – both seek concrete relief in advance to govern how a deposition is to proceed. Now that the PwC Italy witnesses have made it clear they will not come to the U.S. unless they are given protection against being served with process and other forms of harassment, the Court should enter an order protecting them from these tactics.

The Bank does not suggest any reason why serving the PwC Italy experts would be proper or have any purpose other than harassment. *Universal Trading & Inv. Co. v. Kitichenko*, 2007 WL 295548 at *3 (N.D. Cal.), cited by the Bank (at 8 n.12), had nothing to do with Rule 26(c) and was the obverse of the situation here – the court declined to rule in advance whether service on one defendant would be effective service on others, not on whether a protective order should be entered to avoid oppression to a party. The ruling in *American Centennial Ins. Co. v. Handal*, 901 F. Supp. 892, 895 (D.N.J. 1995), also cited by the Bank (at 9), makes it clear that, where, as here, a foreign party attends a deposition in the U.S. solely for the convenience of other parties, any attempt to serve process on him is inappropriate. There is no issue of “obstruction of justice.” *Id.* The issue is avoiding oppression under Rule 26(c).

Contrary to the Bank’s *ipse dixit* (at 8 n.11), there is also nothing in Rule 26(b)(4)(A) – or any other provision of law – that “requires that these witnesses be made available for depositions in the United States.” Rule 26(c)(2) provides that the Court may specify any “place” where discovery may be had. *See, e.g., Abdullah v. Sheridan Square Press Inc.*, 154 F.R.D. 591, 592 (S.D.N.Y. 1994) (court ordered plaintiff’s deposition in England because he would lose his chance at political asylum if he came to the U.S.). Over 125 depositions in these MDL proceedings have already taken place outside the U.S. Having three more will not inconvenience the Bank (or anyone else). If the

Court is not prepared to enter a protective order precluding process being served on the expert witnesses while they attend depositions in the U.S. – and if the Bank (as well as other parties to these MDL proceedings) will not agree not to do so – the simple solution is for the Court to allow them to take place in Italy.

There is nothing to prevent the Bank (or Grant Thornton) from asking about the witnesses' education, expertise, bias and the like. Dr. Bondi is also not seeking any form of order that would restrict any party from enquiring about anything relevant to the PwC Italy experts' reports. *See Bechard v. Costanzo*, 1995 WL 105991 at *2 (N.D.N.Y.) (medical expert permitted to testify on events that occurred after the alleged malpractice, because it would bear on the malpractice claims themselves). In *Martin v. Valley National Bank of Arizona*, 1992 WL 203840 at *1 (S.D.N.Y.), the Court ordered a party to produce an expert's workpapers that were part of his overall analysis. Here, all the available materials the PwC Italy experts considered have already been disclosed. The Bank has made no claim that there are any other documents that should be disclosed. If, after taking the three witnesses' depositions, it believes there are any, the proper course is to move to have Dr. Bondi produce them, not to try to subpoena the experts while they are in the U.S. solely to give their depositions. *See Herrick Co., Inc. v. Vetta Sports, Inc.*, 1998 WL 637468 at *2 (S.D.N.Y.), cited by the Bank (at 10).

Dr. Bondi is not asking for "special witness protections" (Bank opp. at 10). He is simply asking for the protections Rule 26(c) authorizes by its terms. As demonstrated in Dr. Bondi's cross motion, Rule 26(a)(2)(B) calls for a report that "contain[s] a complete statement of all opinions to be expressed and the basis and reasons therefor." Rule 26(b)(4)(B) requires that a report be provided before a deposition is taken of an expert. Taken together, these provisions contemplate that an expert's deposition will be limited to the matters set forth in his or her report.

The Court should therefore direct in its protective order that the PwC Italy experts will testify exclusively on their reports and on the facts described in them, and will not be questioned about other opinions, assessments, evaluations or any other aspects in which responding would require some other opinion or judgment. *See* Fed. R. Civ. P. 26(c)(4) (authorizing a protective order “that certain matters not be inquired into, or that the scope of . . . discovery be limited to certain matters”). If, during the witnesses’ depositions, an issue arises as to whether a line of questioning is or is not proper, it can be resolved at that time. But the Court should make it clear that the subject-matter of the experts’ testimony will be on their reports, and only their reports.

Conclusion

For the reasons set forth above, we therefore respectfully request that the Court enter a protective order pursuant to Rule 26(c)(2) and (4) on the appropriate parameters (and, if the Court deems it appropriate, the location) of the PwC Italy depositions under Rule 26(b)(2)(A). These witnesses will then testify in deposition. If the Bank is not satisfied with their testimony, it can renew its motion to strike based on an appropriate record – rather than on a premature and, we submit, improper effort to keep Dr. Bondi from having the assistance of the expert Italian auditing firm he retained over three and half years ago and that has been assisting him since then in his efforts to restore Parmalat’s financial health.

Dated: July 17, 2007
New York, New York

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