UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PARMALAT SECURITIES LITIGATION	:	MASTER DOCKET
	:	04 MD 1653 (LAK)
This document relates to: 06 Civ. 0383 (LAK)	:	
06 Civ. 3109 (LAK)	:	
	:	**ELECTRONIC FILING**
	:	

GRANT THORNTON INTERNATIONAL'S OPPOSITION TO PLAINTIFFS' MOTION TO RECONSIDER THE COURT'S JUNE 13, 2007 ORDER REGARDING THE AMENDED POTTER REPORT

Plaintiffs' Motion to Reconsider the Court's June 13, 2007 Order Regarding the Amended Potter Report ("Motion for Reconsideration") should be denied because there is nothing worth reconsidering. It is undisputed that Plaintiffs used the ten days allotted by this Court to allow the parties to address technical deficiencies in expert reports to add new opinions. In so ordering Grant Thornton International's ("GTI") June 12, 2007 letter, this Court made clear that it did not intend to allow parties to use the ten day extension to add new opinions, and nothing in Plaintiffs' Motion for Reconsideration or Plaintiffs' June 14, 2007 letter changes this simple fact. This Court's June 13, 2007 Order should be the end of the matter.

I. THE PURPOSE OF THIS COURT'S MAY 10, 2007 DIRECTIVE WAS TO ALLOW THE PARTIES TO BRING THEIR EXPERT REPORTS INTO COMPLIANCE WITH FED. R. CIV. P. 26

During a May 10, 2007 conference, this Court granted parties "ten days" to try and meet "some of the objections" regarding non-compliance with Fed. R. Civ. P. 26 made by Defendants to the expert reports and disclosures submitted by various Plaintiffs. (Bernard Decl. Ex. A at 17). This Court continued that "if I conclude afterward that there has not been very substantial compliance with the rules, the experts as to whom that's true may simply be out of the case without any further opportunity to cure." Id. GTI did not understand this directive to allow

Plaintiffs to offer new opinions in the revised reports they submitted. This is, however, exactly what Plaintiffs did. Nowhere in Potter's initial report will this Court find the following opinions, which were added for the first time in his amended report:

A. Grant Thornton had a conflict of interest in acting as Bonlat's auditors because Grant Thornton was aware of Bonlat's original purpose and its subsequent auditing of Bonlat did not evidence appropriate professional skepticism. (Bernard Decl. Ex. B at 7).

B. Grant Thornton and Deloitte, like other international accounting firms, generally conducted their business as single firms throughout the countries in which they performed audits. Id.

C. Grant Thornton International ("GTI") had the ability to exercise control over Grant Thornton S.p.A. in its audit work. Id.

D. Grant Thornton LLP ("GT-US") held a significant position of influence with respect to GTI. Id.

E. GTI possessed information that Grant Thornton S.p.A. ("GT-Italy") was conducting inadequate audits, at least by 1999. GT-US should have concluded that Parmalat's financial statements were misstated and that GT-Italy had failed to properly audit Parmalat's financial statements through "Project Bridge." Id.

F. GTI and GT-US both failed to implement available measures to prevent GT-Italy from continuing to conduct substandard audits. Id.

G. Due to the irregularities on Parmalat's financial statements and the gaping holes in GT-Italy's workpapers, it is my opinion that Grant Thornton United States should immediately have recognized that GT-Italy's audits fell below GAAS standards and that Parmalat's financial statements had been misstated, unsupported, or at least warranted closer scrutiny. Id. at 146.

H. Having gained knowledge of numerous, serious red flags in relation to the Parmalat audits, Grant Thornton United States had a professional obligation to report these to GTI. GTI, had it carried out its responsibilities to properly supervise the Grant Thornton network, would have further investigated the Parmalat audits . . . In my opinion, at this materiality level, the transactions purportedly emanating from Bonlat were clearly material from fiscal 1999 to 2002. Id.[1] (citations omitted).

I. However, GT-US knew through Project Bridge, and GTI knew through multiple firm reviews that GT-Italy was conducting audits that fell below both Grant Thornton standards and external standards. In my opinion, GTUS and GTI should have followed

[1] GTI acknowledges that Mr. Potter identified two alleged "red-flags" in his original report at pp. 693-94, but the remainder of this opinion is completely new. Pl.'s Ex. F.

> up and mandated compliance with Grant Thornton standards or removed GT-Italy from the worldwide Grant Thornton organization. Either of which would have halted the fraud at a much sooner date. In my opinion, GTI was [sic] should have also scrutinized more closely GT-Italy's engagement with Parmalat which was GT-Italy's largest client. Id. at 147 (citations omitted).

When Plaintiffs refused to retract these opinions, (Bernard Decl. Ex. C), GTI wrote to the Court on June 12, 2007, that it "did not understand [the Court's directive issued at the May 10, 2007 conference] to mean that the parties could use the time to add additional opinions" and asked the court to strike from Mr. Potter's amended report any new opinions. On June 13, 2007 this Court "So Ordered" GTI's letter. (Bernard Decl. Ex. D). Nothing could be clearer – this Court did not intend to allow parties to offer new opinions. Thus, Mr. Potter's new opinions were properly stricken and he was properly precluded from offering these opinions at his upcoming deposition and at trial.[2]

II. PLAINTIFFS DID MORE THAN RESPOND TO DEFENDANTS' OBJECTIONS

Plaintiffs attempt to justify Mr. Potter's new opinions by claiming that they were merely responding to Defendants' objections. But adding new opinions in no way addressed Defendants' complaints. This Court contemplated amendments to "meet some of the objections" regarding non-compliance with Rule 26. Insofar as Mr. Potter condensed his report, put his original opinions in bullet-form at the beginning of his amended report, and withdrew certain references to Dr. Stefania Chiaruttini, Oliver Galea, Roberto Megna, and Franco Lagro, GTI has no objections. GTI objects only to Mr. Potter's substantive changes and new opinions that were not contained in the original report.

[2] Plaintiffs' claims of due process and fairness do not bear on this issue – even if the Court does consider Plaintiffs' submissions, they cannot succeed.

III. MR. POTTER'S LENGTHY QUOTATIONS OF DEPOSITIONS AND REPORTS OF OTHERS DOES NOT ALLOW HIM TO OFFER OPINIONS HE DID NOT OFFER PREVIOUSLY

Plaintiffs further argue, that even if this Court did not grant Plaintiffs license to amend their expert reports, the new opinions merely represented the "consolidation and elimination of lengthy deposition quotes and summaries of other information Mr. Potter used in reaching his conclusions." (Pl.'s Mem. at 5). Plaintiffs' critique of a report they submitted notwithstanding, this argument fails. Indeed, in Mr. Potter's original report, for example, he devotes over 145 pages to excerpts from the deposition of Jacqueline Akerblom, Dom Esposito, Barry Barber, Clive Bennett, and David McDonnell. (Bernard Decl. Ex. E at 678-699, 750-876). Only four opinions, three of which are only one sentence long, actually flow from these 145 pages. Now, however, Mr. Potter offers nine new opinions. This is not "consolidation and elimination;" this is wholesale addition.

Plaintiffs also now resort to mischaracterizing testimony included in the initial report to support new opinions in the amended report. Plaintiffs quote the testimony of Massimo Barbaria, a GT-Italy employee, as a particular example of testimony in the initial report that supports Mr. Potter's new opinions regarding GT-US's control within the GTI organization and its involvement with Parmalat and "Project Bridge." (Pl.'s Mem. at 5). Plaintiffs deliberately misconstrue this language as it could not be clearer from the deposition transcript that Mr. Barbaria's statement had nothing to do with either Parmalat or "Project Bridge." Instead, as Mr. Barbaria makes clear, just a few lines above the quoted testimony, he is discussing the audit of a completely unrelated and different company, Ansaldo Sistemi Industrali. (Pl.'s Ex. G). Plaintiffs' blatant misuse of testimony only further undercuts their already baseless contention that Mr. Potter's new opinions merely represent "consolidation and elimination."

IV. PLAINTIFFS AGREED TO A DEADLINE AND SHOULD NOT BE HEARD TO CLAIM PREJUDICE

The point at issue is Plaintiffs' improper submission of new expert opinions, not whether GTI or Plaintiffs are prejudiced. Plaintiffs cannot argue, to support their claim that the new opinions should be allowed to stand, that they will be prejudiced and GTI will not be. See Bard v. Board of Educ. of City of New York, No. 99 Civ. 0149 (BSJ)(DF), 2002 WL 188471, at *5 (S.D.N.Y. Feb. 6, 2002) ("[P]laintiff cannot avoid its discovery obligations merely by arguing that, because trial is not imminent, defendants would not be prejudiced by a belated expert disclosure. Both defendants and the Court are entitled to assume that, if plaintiff agrees to a deadline, and certainly if that deadline is ordered by the Court, plaintiff will either meet the deadline or request an adjournment."); see also Levy v. Eisner LLP, No. 04 Civ. 0398 (BSJ)(MHD), 2006 WL 2015368, at *1 (S.D.N.Y. July 12, 2006) (rejecting plaintiffs' assertion that, because it would not prejudice defendant, a request for a *nunc pro tunc* extension of the deadline for expert discovery should be granted). Moreover, a court's scheduling order should not be modified except for good cause. See Fed. R. Civ. P. 16(b).

Plaintiffs' manufactured claim of prejudice is nothing more than a blatant attempt to detract attention from the simple fact that they submitted a report that they later decided did not say what they wished. Unhappy with the substance of the report they submitted, Plaintiffs used the extra ten days to draft a new report. The deadline for opening reports was May 1, 2007. Any opinions had to be set forth by that date. Plaintiffs' sloppy initial report is not good cause. Put simply, Plaintiffs failed to offer several opinions regarding GTI and GT-US and they cannot add them in a report served twenty days after the initial deadline. No other party has had this advantage and none, including other Plaintiffs who submitted amended reports, sought it. Plaintiffs have known since they entered the case the deadline for opening expert reports.

Indeed, the date was extended from November 28, 2006 to February 22, 2007, then to April 3, 2007, and finally to May 1, 2007. Plaintiffs had more than sufficient time to submit a proper report.

Moreover, GTI is prejudiced by Plaintiffs' amended report. Rebuttal reports were originally due on June 4, 2007. Your Honor extended this deadline ten days until June 14, 2007. However, Plaintiffs did not submit the amended report of Mr. Potter until May 21, 2007, twenty days after the original filing deadline. Thus, GTI lost ten days with which to review and respond to Mr. Potter's report. A loss of ten days when the response period was only approximately thirty days is significant.

Finally, Plaintiffs suggest that GTI did not suffer prejudice because Plaintiffs could have submitted the new opinions as part of their rebuttal reports responding to GTI's and GT-US's initial reports. We do not concede that that would have been proper rebuttal, but even if it were, the point is that Plaintiffs failed to do that. Plaintiffs were aware of our opposition to the amended Potter report before the deadline for the submission of rebuttal reports, and again chose not to submit a rebuttal report. That strategic decision, like the decision to submit a 900+ page monstrosity of an initial expert report and to not spend the time or the money to prepare a proper report, was a decision of Plaintiffs own making. They should not now be heard to complain of it, or to ask this Court to effectively give them a "do over," again.

CONCLUSION

For the foregoing reasons, GTI respectfully requests that this Court decline to reconsider its June 13, 2007 Order or, in the alternative, that it reaffirm this Order.

Dated: New York, New York
June 22, 2007

STROOCK & STROOCK & LAVAN LLP

By: /s/ James L. Bernard
James L. Bernard (JB-4273)
Katherine I. Puzone (KP-8657)

180 Maiden Lane
New York, New York 10038-4982
(212) 806-5400
Attorneys for Grant Thornton International