UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re PARMALAT SECURITIES LITIGATION	MASTER DOCKET 04 MD 1653 (LAK)
This document relates to: 05 Civ. 04015	
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DR. ENRICO BONDI, Plaintiff, v. BANK OF AMERICA CORPORATION, et al., Defendants.	

Dr. Bondi's Opposition to Bank of America's Motion to Strike Messrs. Lagro, Megna and Galea as Testifying Expert Witnesses and Renewed Cross-motion for a Protective Order

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Preliminary Statement

On April 18, 2007, the Court denied Dr. Bondi's motion to have the reports prepared by three partners in PricewaterhouseCoopers S.p.A. ("PwC Italy") – Franco Lagro, Oliver Galea and Roberto Megna – admitted as reports of public offices or agencies under Fed. R. Evid. 803(8)(C). The Court's ruling, however, suggested an alternative: Dr. Bondi could designate them as Rule 26 experts: "[] it is not too much to ask that Dr. Bondi – who has spent tens of millions of Euros on these endeavors – and the other plaintiffs spend a bit more to have the authors of these documents testify in person and be subject to cross-examination." *In re Parmalat Securities Litig.*, 2007 WL 1169217 at *2 (S.D.N.Y. Apr. 18, 2007).

Dr. Bondi therefore asked the PwC Italy experts to testify in his U.S. cases as designated experts under Rule 26(a)(2) – just as Mr. Lagro had testified in criminal proceedings against the Bank of America in Milan, Italy, and Messrs. Galea and Megna had submitted their expert reports in criminal proceedings against Grant Thornton S.p.A. in Parma, Italy.

Unknown to Dr. Bondi, however, starting at least as early as mid-2006, the Bank of America has been using its enormous leverage with its U.S. auditor, PricewaterhouseCoopers LLP ("PwC USA"), to try to keep PwC Italy from assisting Dr. Bondi in his U.S. cases. In the face of this pressure, the PwC Italy witnesses asked, not unreasonably, that they be protected from both harassment and a claim by PwC USA that they had somehow gone beyond their engagements with Dr. Bondi in testifying against the Bank. Dr. Bondi therefore tried to find a way to accommodate their requests, but they have now – as of yesterday – refused to testify unless they are assured of certain simple protections against harassment and improper coercion.

Dr. Bondi has made no misrepresentations to the Court, or to anyone else. He has attempted to satisfy PwC Italy's concerns and have its personnel testify – first by discussing these issues directly with PwC Italy, then by asking the defendants to agree to them, and then by moving for a

protective order. As also demonstrated below, Dr. Bondi has complied fully with the Court's June 26, 2007 Order, MDL # 1400. The Bank's motion to "strike" Messrs. Lagro, Galea and Megna as experts should therefore be denied.

Following the events of the last two months, these three experts have now refused to testify unless their reasonable requests for protection are granted. Dr. Bondi's renewed cross motion for a protective order therefore does not seek an advisory opinion, but is ripe in seeking reasonable protections under Rule 26(c) to have the PwC Italy witnesses testify.

Argument

I. As the Chronology Demonstrates, There Has Been No Misrepresentation to Anyone

The Bank's motion argues (at 1-2) that Dr. Bondi's retention of PwC Italy on March 26, 2004 to perform certain audits of Parmalat S.p.A. somehow prevented PwC Italy from assisting Dr. Bondi in his litigation against the Bank. This is demonstrably incorrect.

A. PwC Italy has already testified against the Bank in Italian criminal proceedings

On June 7, 13 and 15, 2006, PwC Italy's Franco Lagro testified adversely to the Bank of America in the criminal proceedings in Milan, Italy in which the Bank of America is a defendant. *See* declaration of Loren Kieve, July 12, 2007 ("Kieve decl.") ¶¶ 2, 3, 4, exhs. 1, 2, 3 (partial transcripts (translated into English) of proceedings before the Court of Milan, Italy, June 7, 13, 15, 2006).

As the Milan court transcript for June 15, 2006 indicates, Bank of America was represented by counsel, Mr. Olivo, throughout Mr. Lagro's testimony [Kieve decl. ¶ 4, exh. 3 at ST/5]; Mr. Lagro testified about the Bank's role [*id., passim*]; he was queried by the Bank's counsel [*id.*]; and the Milan court confirmed that PwC Italy's March 14, 2005 report on "Transactions with Bank of America" was admitted into evidence [*id.,* at ST/150 - ST/153].

On September 28, 2006, Bank of America's counsel, Olivo, extensively cross-examined Mr. Lagro. *See* Kieve decl. ¶ 5, exh. 4 (transcript (in English) of proceedings before the Court of Milan, Italy, September 28, 2007), *passim.* Olivo's cross included questions about other PwC member firms' audits of Parmlat subsidiaries outside of Italy. [*Id.* at ST/35 - ST/36, ST/38.] Cross-examination by other counsel also dealt with other PwC member firms' audits. [*Id.* at ST/115.]

Mr. Lagro's testimony to the Milan Court also confirmed that the reports PwC Italy prepared for Dr. Bondi were to be used for his various litigations, including his three actions in the United States. [*Id.* at ST/117 - ST/118.]

B. No engagement agreement restricts PwC Italy from testifying

1. The March 2004 engagement does not prevent PwC Italy from testifying

There is nothing in either the March 26, 2004 engagement between Dr. Bondi and PwC Italy or the March 31, 2004 "Summary of engagement for Parmalat" [*see* McLaughlin decl., exh. A] from PwC Italy to other PricewaterhouseCoopers "Offices" that remotely suggests that PwC Italy cannot testify anywhere in the world for Dr. Bondi.

The *outward* direction by PwC Italy that "because of the need to avoid being in an adversarial position with other PwC clients, litigation-related consulting or expert witness services should not be undertaken" [*id.* at PwC LLP 000022] was not a restriction on what PwC Italy could or could not do – but a direction *by* PwC Italy that *other* PwC member firms should not take on any expert witness or consulting roles that might put them "in an adversarial position" *vis-a-vis* Dr. Bondi or other persons or entities that might become embroiled in litigation around the world.

This is made clear by the sentence immediately preceding this admonition: "Parmalat, its directors, its *auditors* [*e.g.*, Grant Thornton] and some of its *creditors* [*e.g.*, the Bank of America] are facing, or are at the risk of facing, considerable litigation in the Italian courts *and elsewhere*." [*Id.* (emphasis added).]

2. No other engagements prevent PwC Italy from testifying

The Bank's suggestion that anything in any of Dr. Bondi's engagement agreements with PwC Italy precludes PwC Italy from testifying against the Bank (or anyone else) also has no basis in fact.

First, PwC Italy's engagement letters – long before Dr. Bondi's U.S. lawsuits were even filed – contemplated that it would and could testify in Court. PwC Italy was first retained on December 15, 2003. *See* Kieve decl. ¶ 6, exh. 5 (letter from Franco Lagro, PwC Italy, to Parmalat Finanziaria S.p.A., 15 dicembre 2003, at P016186229), ¶ 7, exh. 6 (translation of selected text quoted below). Under the heading numbered 10, "Altri aspetti di carattere generale" ("Other aspects of general character"), it states that:

> Nel caso ci venga chiesto o autorizzato da Voi, o rechiesto da disposizioni di legge o nel corso di in procedimento giuidiziario, di produrre le nostre carte di lavoro o di testimoniare in merito al nostro incarico con Voi, i nostri onorari professionali e le spese sostenute nell'ottemperare a tale richiesta saranno a carico Vostro.

[*Id*.] Translated into English:

> If we are requested or authorized by you, or required by legal provisions or during judicial proceedings to produce our working papers or to testify concerning our task with you, our professional fees and the expenses incurred in granting the request will be paid by you.

This same (or virtually identical) language appears in almost every other engagement letter between Dr. Bondi and PwC Italy, including the specific engagement letter of April 5, 2004 where PwC Italy undertook to prepare a report on Parmalat's transactions with Bank of America. *See, e.g.*, Kieve decl. ¶ 8, exh. 7 (letter from Franco Lagro, PwC Italy, to Dr. Enrico Bondi, 5 aprile 2004, at P016186013).

Second, the Bank's own declaration demonstrates that has been on notice for well over a year that PwC Italy was going to and did testify against the Bank in the Italian proceedings. *See* Kieve decl. ¶ 9, exh. 8 ("Corrected Declaration of H. Elizabeth Baird," May 31, 2007 ("Baird

decl.") ¶ 3 ("In the second quarter of 2006, I spoke with Richard DeMarco of PwC US's legal department regarding the testimony of Franco Lagro in criminal proceedings in Milan, ...")).

Third, there is no material difference between PwC Italy's testifying against the Bank in Italy and its testifying against the Bank in Dr. Bondi's U.S. case against it regarding exactly the same reports. The same entity that is a defendant in Italy is a defendant here – and many of the same transactions and manipulations are in issue in both proceedings. And these same three witnesses have already given deposition testimony in these MDL proceedings in March of this year.

Fourth, at no time during Mr. Lagro's testimony in the Italian proceedings did the Bank suggest that there would be a "conflict" on PwC Italy's part in his doing so.

Fifth, at no time during the depositions in Italy in this case of the three PwC Italy witnesses did the Bank even hint that there would be a conflict.

Sixth, during the entire time that Dr. Bondi was seeking to have the Court admit the PwC Italy reports under Fed. R. Evid. 803(8)(C), the Bank also never intimated there was a conflict or that Dr. Bondi could not use the PwC Italy reports because of one.

3. The Bank has known since 2005 that PwC Italy was assisting Dr. Bondi

Dr. Bondi's complaint against the Bank was filed in October 2004. The Bank knew no later than October 3, 2005 that PwC Italy had prepared a large number of reports, including one on Parmalat's transactions with the Bank, because that was when Dr. Bondi produced them in this action. Kieve decl. ¶ 10. It knew no later than early 2006 that PwC Italy was testifying against it in the Italian criminal proceeding. Kieve decl. exh. 8 (Baird decl. ¶ 3). It never claimed that this testimony conflicted with PwC USA's role as the Bank's auditor. It should therefore not conflict with PwC Italy's ability to testify to the same or other issues in Dr. Bondi's U.S. cases.

C. Dr. Bondi asks PwC Italy to testify in the U.S. cases

After the Court denied Dr. Bondi's motion to admit the Lagro and Galea/Megna reports under Fed. R. Evid. 803(8)(C) and indicated that, if Dr. Bondi wanted to have these reports admitted, he should formally designate their authors as experts, Dr. Bondi asked them to agree to this. Kieve decl. ¶¶ 12-15. Because of the pressure the Bank had exerted on PwC Italy (at that time unknown to Dr. Bondi), PwC Italy asked for certain protections:

1. The attendance of Messrs. Lagro, Galea and Megna for deposition in these proceedings would not be deemed a submission to jurisdiction in the United States.
2. They would not be subject to process when they appear for deposition.
3. Their signing the protective order would subject them to jurisdiction solely to enforce the terms of that order.
4. They would not be required to produce any documents (their reports, attachments and documents they considered that can reasonably be identified have already been produced).
5. They would testify exclusively on their reports and on the facts described in them, and would not be questioned about opinions, assessments, evaluations or any other aspects in which responding would require a judgment to be made.

See McLaughlin decl., exh. B. (April 27, 2007 letters from Pierangelo Schiavi of PwC Italy to Dr. Bondi's counsel, Nicola Palmieri).

None of these requests was unreasonable. All of them were ones that should apply as a matter of course in any event. The only unreasonable request was to have these three witnesses' prior deposition testimony struck – which Dr. Bondi told PwC Italy could not be done. *See* McLaughlin decl., exh. G. Because the deadline for designating experts was May 1, 2007, with PwC Italy's consent Dr. Bondi designated them as such on that date. Kieve decl. ¶ 18.

The Schiavi letters simply reflected a "wish list" that PwC Italy wanted in place to protect its three expert witnesses from unwarranted harassment. Dr. Bondi's counsel immediately notified PwC Italy that, although he would try to accommodate its requests, none of them could be guaranteed. To be clear, these were not and are not "terms of engagement" and Dr. Bondi never agreed or had any form of written engagement with PwC Italy for their testimony in the U.S. – other than his previous ones dating from 2003 and 2004 that contemplated they might be called, in then unspecified proceedings, to testify in connection with their written reports. Kieve decl. ¶¶ 17, 18.

D. Dr. Bondi moves for a protective order

When the Bank and the Grant Thornton defendants would not agree to the requests PwC Italy had made, Dr. Bondi moved for a protective order. The Court granted that order in part, but declined to rule on the jurisdictional issues as seeking an advisory opinion. Dr. Bondi and his counsel continued to try to persuade PwC Italy to permit its personnel to come to the U.S. At the same time, the Bank continued to exert pressure on PwC Italy. It was not until July 11, 2007 – after the Bank filed its motion to strike – that PwC Italy finally said that it would not do so unless all the requests in the Schiavi letters were met. Kieve decl. ¶¶ 20-32.

E. The Bank raises a spurious claim of a conflict

On May 11, 2007, the Bank's counsel wrote Dr. Bondi's counsel raising the specter of a "conflict." The Bank asserted that "PwC acts as auditor for Bank of America in the United States and Italy." Kieve decl. ¶ 22, exh. 10. To the extent that the Bank's reference to "PwC" is to "PwC Italy," that claim is simply not true. PwC Italy does not audit, and has never audited, the Bank of America, in Italy or anywhere else. Kieve decl. ¶ 23. As demonstrated above, the Bank has been on notice for years that PwC Italy has been assisting Dr. Bondi in his restructuring and litigations in Italy as well as the U.S.

F. Obtaining the consent of all parties was never a term of any engagement

The Bank previously asserted, based on the Baird declaration – and apparently continues to assert (at 4) – that "the terms of PwC [Italy]'s engagement with Bondi specified that no PwC [Italy] representative would testify in the US MDL proceedings unless all parties consented thereto." This was not true then and it is not true now. The two April 27, 2007 Schiavi letters, as well as Dr. Bondi's counsel's draft response (sent to PwC Italy's counsel), are not "engagement" letters and never were. Nor do they purport to give any party *carte blanche* on whether PwC Italy will testify, in the U.S., or anywhere else.

G. The PwC Italy witnesses will testify on their reports, as Dr. Bondi's expert disclosures state

The statement in the Calamari draft letter that "[t]he appearances of Messrs. Lagro, Galea and Megna will not be used to establish anything other than those facts [set forth in their reports]" is both true and nothing new. [McLaughlin decl., exh. G.]

It is fully consistent with Dr. Bondi's expert designations [Kieve decl. ¶ 24, exh. 11]:

> Mr. Lagro's testimony will be limited to facts and observations already set forth in the reports prepared by [PwC Italy] for the Extraordinary Administration. Mr. Lagro has not been asked to form any opinions or perform any analysis beyond what is contained in [those] reports.
>
> . . .
>
> Mr. Megna has not been asked to form any opinions or perform any analysis beyond what is contained in reports he prepared for the Public Prosecutor of Parma.
>
> . . .
>
> Mr. Galea has not been asked to form any opinions or perform any analysis beyond what is contained in reports he prepared for the Public Prosecutor of Parma.

H. "Opinion" vs. "fact" testimony

The Bank's argument that it will not be permitted to examine the PwC Italy witnesses on their "opinions" is also meritless. To the extent these reports contain conclusions or audit

judgments, the Bank is free to ask about them. The Court has found that the reports of Messrs. Lagro, Galea and Megna "applied established auditing principles which, of course, involve matters of judgment, characterization and opinion." *See In re Parmalat Securities Litig.*, 2007 WL 1169217 at *2.

Whether the Bank wants to call them "facts" or "opinions," the result is the same: they are prepared to testify to the complicated series of financial transactions and the reconstruction of the balance sheets detailed in their reports. *See, e.g., Jenkins v. Bartlett,* 487 F.3d 482, 488 (7th Cir. 2007) (no particular form required for report so long as it contains the necessary basic information).[1]

I. There is nothing else in the 2007 correspondence that restricts the witnesses

The statement in the draft letter from Dr. Bondi's counsel that "[i]t would be improper for any party to question these witnesses on topics outside that limited scope" [McLaughlin decl., exh. G at P06185473-74] simply tracks the provisions of Fed. R. Civ. P. 26(b)(4)(A) that contemplate that an expert will be questioned on his or her report, and that report alone. *See* 1993 Advisory Committee Notes ("the deposition of an expert required by subdivision (a)(2)(B) to provide a written report may be taken only after the report has been served").

All that the two April 27 Schiavi letters sought, with one exception, was to have the defendants confirm that they would abide by the normal rules applicable to experts' depositions. Dr. Bondi's counsel told PwC Italy's counsel that that one exception – the request that the PwC

[1] Grant Thornton International ("GTI") has joined in the Bank's motion. In its opposition to Parmalat Capital Finance Limited's motion to exclude GTI's expert, John Garvey, as expressing "matters of law" GTI stressed that "[i]t is well established that an expert can explain complex evidence to a jury so that it will be better able to reach its own conclusions on the ultimate issues." *See* MDL # 1405 at 1. *See also United States v. All Funds on Deposit in Any Accounts Maintained At Merrill Lynch, Pierce, Fenner & Smith*, 801 F. Supp. 984, 997 (E.D.N.Y. 1992) (Weinstein, J.) (expert testimony appropriate on a complex series of offshore financial transactions). That is what the three PwC Italy experts do with their reports.

Italy witnesses' previous deposition testimony be expunged – was impossible. [McLaughlin decl., exh. G.]

II. Dr. Bondi Has Complied with the Court's June 25, 2007 Order.

Contrary to the Bank's unfounded assertion (at 9, citing exh. J to the McLaughlin declaration), Dr. Bondi is not "quibbling" with the Court's Order. As Dr. Bondi's counsel have repeatedly told the Bank, Dr. Bondi has produced every scrap of paper "containing the terms of the engagement between [Dr. Bondi] and any PricewaterhouseCoopers entity or representative regarding this MDL proceeding." *See* McLaughlin decl. exh. R. And, although the Court's Order was limited to "this MDL proceeding," Dr. Bondi has also produced the earlier engagement letters between Dr. Bondi and PwC Italy, most of which were executed long before he filed his U.S. cases. *See* McLaughlin decl. exh. J.

As we noted in our June 29, 2007 letter to the Bank's counsel, *see* McLaughlin decl. ¶ 19, exh. R, "Judge Kaplan's ruling directed us to produce "all engagement letters, retention agreements, and other writings containing the terms of the engagement between [Dr. Bondi] and any PricewaterhouseCoopers entity or representative ***regarding this MDL proceeding***" (emphasis added). That is what your motion sought and what we have produced."

We understood, and continue to understand, that this language meant what it says. The purport of the Bank's motion and, we believe, the Court's order was to obtain documents reflecting Dr. Bondi's 2007 request that the PwC Italy experts testify in his U.S. actions – *i.e.,* "this MDL proceeding" in which these actions are consolidated for pretrial proceedings.

The only specific document the Bank claims was "withheld" – an e-mail from Mr. Palmieri to PwC Italy's Franco Lagro – was produced to the Bank as soon as it was located. *See* Kieve decl. ¶ 33, exhs. 12, 13 (declaration of Nicola W. Palmieri, July 11, 2007).

III. Dr. Bondi's Court Filings Have All Been Made in Good Faith

We respectfully submit that Dr. Bondi's filings have all been made with a good faith basis. In the absence of the 1993 amendments to Rule 26(a)(2)(B) – contemplating that an expert's report include "information considered by the [expert] witness in forming the opinions" – Rule 26(b)(3) would presumptively protect Dr. Bondi's work product communications with his experts. *See* 6 Moore's Federal Practice § 26.80[1][a] (2006). The expert witness stipulation was intended to revert to the pre-1993 practice. No other party has disclosed, or offered to disclose, the terms of engagement of any of their experts or any communications with those experts.

We also respectfully believe that there was no inconsistency in Dr. Bondi's request that he be permitted to explore the immense pressure outlined in the Baird declaration, and at this point unrefuted, that the Bank of America had placed (and apparently continues to place) on PwC Italy through PwC USA to not have Dr. Bondi's three PwC Italy experts testify in his U.S. actions. Although PwC Italy and PwC USA hold themselves out as separate entities, Ms. Baird's own declaration shows that the Bank had ready access to otherwise confidential information about Dr. Bondi's relationship with PwC Italy and that the Bank has been doing everything it could to prevent the PwC Italy experts from offering their clearly relevant testimony. We respectfully submit that it was not bad faith to surmise that the Bank wanted PwC USA to do something about its demands, or it would not have made them to begin with.

IV. There Is No Basis for Excluding the PwC Italy Experts' Testimony

Fed. R. Civ. P. 37(c)(1) provides that: "A party that without substantial justification fails to disclose information required by Rule 26(a) . . . is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed."

"[I]mposition of sanctions under Rule 37 is a drastic remedy and should only be applied in those rare cases where a party's conduct represents flagrant bad faith and callous disregard of the

Federal Rules of Civil Procedure." *Hinton v. Patnaude*, 162 F.R.D. 435, 439 (N.D.N.Y. 1995); *see Martinez v. Port Auth. of New York and New Jersey*, 2005 WL 2143333 at *14 (S.D.N.Y. Sept. 2, 2005) (many S.D.N.Y. rulings require a showing of "flagrant bad faith" and "callous disregard" of the Federal Rules); *Ward v. The National Geographic Society*, 2002 WL 27777 at *1 (S.D.N.Y. Jan. 11, 2002) (Kaplan, J.) ("there is no indication that the failure demonstrates 'flagrant bad faith and callous disregard of the rules"); *see also Semi-Tech Litig. LLC v. Bankers Trust Co.*, 219 F.R.D. 324, 325 (S.D.N.Y. 2004) (Kaplan, J.) ("the imposition of sanctions under [Rule 37] is discretionary, and preclusion will be ordered only in rare cases").

A. The Rule 37 factors call for GT-US's motion to be denied

A court considering a motion to exclude must consider "(1) the party's explanation for the failure to comply with the discovery order; (2) the importance of the testimony of the precluded witness; (3) the prejudice suffered by the opposing party as a result of having to prepare to meet the new testimony; and (4) the possibility of continuance." *Softel, Inc. v. Dragon Med. & Scientific Comm., Inc.*, 118 F.3d 955, 961 (2d Cir. 1997). These factors all call for the Bank's motion to be denied.

As demonstrated in the reports themselves, they comply in all material respects with Rule 26's requirements. As the Court has pointed out, "[t]he cases are complex." *In re Parmalat Securities Litig.*, 2007 WL 1169217 at *2. The reports are self-evidently comprehensive and involve issues that are central to Dr. Bondi's two cases. Allowing these witnesses' testimony on the discrete issues covered in their reports will not materially prejudice either the Bank or the Grant Thornton defendants. *See Pollack v. Safeway Steel Products, Inc.*, 2007 WL 998979 at *4 (S.D.N.Y. Mar. 30, 2007) (defendant would not be prejudiced by allowing plaintiff's expert to testify even where expert was not disclosed until two months after the expert discovery deadline because defendant had known of plaintiff's intention to call the expert as a witness and would have

the opportunity to depose him); *see also Outley v. City of New York*, 837 F.2d 587, 591 (2d Cir. 1988) ("Before the extreme sanction of preclusion may be used by the district court, a judge should inquire more fully into the actual difficulties which the violation causes, and must consider less drastic responses").

As noted above, and as the Court itself pointed out, the Bank will have full opportunity to take their depositions and they will "be subject to cross-examination."

The final factor – the possibility of a continuance – is not applicable because no trial date has been set. *See Brenton v. Consolidated Rail Corp.*, 2006 WL 1888598 at *4 (S.D.N.Y. July 7, 2006).

This is not a case remotely akin to *Duncan v. WJLA-TV, Inc.*, 106 F.R.D. 4, 5-6 (D.D.C. 1984), or *Fulfree v. Manchester*, 95-civ-7723 (S.D.N.Y., Dec. 10, 1997). The PwC Italy witnesses have agreed to testify, but simply want appropriate protection against being harassed when they give their depositions under Rule 26(b)(4)(A). Nor, as demonstrated above, has there been any willful or disobedient conduct. Dr. Bondi has complied fully with the Court's rulings.

V. The Court Should Enter a Rule 26(c) Protective Order

Despite Dr. Bondi's good faith efforts to convince PwC Italy to permit its three partners, Lagro, Galea and Megna, to appear for their depositions, PwC Italy has now stated unequivocally that it will not do so unless it and they are protected from further pressure and harassment by the Bank. Kieve decl. ¶ 32.

On Dr. Bondi's motion, the Court has already ruled that the putative class – and by the same rationale any MDL parties other than the Bank and the Grant Thornton defendants – will not be permitted to use the PwC Italy witnesses in their cases, and presumably will not be able to ask questions at these witnesses' depositions. *See* Order, June 26, 2007, MDL # 1410.

To resolve the other issues now insisted on by PwC Italy and have these depositions go forward, we respectfully submit that the Court should enter the following further protections under Rule 26(c):

1. The attendance of Messrs. Lagro, Galea and Megna for deposition in these proceedings shall not be deemed a submission to jurisdiction in the United States.
2. They will not be subject to process when they appear for deposition.[2]
3. Their signing the protective order will subject them to jurisdiction solely to enforce the terms of that order.
4. They will not be required to produce any documents (their reports, attachments and documents they considered that can reasonably be identified have already been produced).
5. They will testify exclusively on their reports and on the facts described in them, and will not be questioned about opinions, assessments, evaluations or any other aspects in which responding would require some other opinion or judgment.

A. Avoiding subpoena harassment and improper claims of jurisdiction

Dr. Bondi's previous motion for a protective order sought a ruling from the Court that these witnesses would not be subjected to subpoenas or other forms of harassment when they testify,

[2] As an alternative to the first two provisions, the Court could direct that the depositions take place in Italy pursuant to Fed. R. Civ. P. 26(c)(2). Over 75 depositions have been taken in Italy (and some 50 others in other countries). Kieve decl. ¶ 34. The Bank has agreed to have other expert depositions taken outside of New York, including in Los Angeles and Chicago, for the convenience of both the expert witness and counsel. *Id.* ¶ 35. Having the depositions in Italy will help ensure that (a) PwC Italy cannot object to them and (b) no U.S. process can be served on the PwC Italy witnesses. *Cf. 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.). If PwC Italy still resists giving a deposition, we would support the Bank's and Grant Thornton's counsel's use of the powers conferred on them by this Court's prior orders as Commissioners to take the depositions of Messrs. Lagro, Galea and Megna under the Hague Convention on the Taking of Evidence Abroad.

based on established law to this effect. *See* Motion for a Protective Order Regarding Dr. Bondi's Expert Witnesses, June 11, 2007, MDL # 1331. The Court declined to rule on this issue in advance [Order of June 26, 2007, MDL # 1410.] This, however, is no longer a hypothetical issue and we are not asking for an advisory opinion. The PwC Italy witnesses have now flatly refused to appear for deposition unless they are given this protection. Kieve decl. ¶ 32.

The law is clear that serving process on a witness who is in the jurisdiction for a deposition is oppressive. *See American Centennial Ins. Co. v. Handal*, 901 F. Supp. 892, 896 (D.N.J. 1995) (a party present in the jurisdiction for his deposition was immune from service of process); *see also Viking Penguin v. Janklow*, 98 F.R.D. 763, 765 (S.D.N.Y. 1983) (same); *Shapiro & Son Curtain Corp. v. Glass*, 348 F.2d 460, 462 (2d Cir. 1965) (affirming district court order quashing service on a nonresident witness present in the jurisdiction solely for his deposition).

Rule 26(c) authorizes the entry of a protective order "to protect a party or person from . . . oppression." The Court should therefore order that (1) the appearance of Messrs. Lagro, Galea and Megna for deposition in these proceedings shall not be deemed a submission to jurisdiction in the United States; (2) they will not be subject to process when they appear for deposition; and (3) their signing the protective order – so they can be given material covered by that order in their depositions – will subject them to jurisdiction solely to enforce the terms of that order.[3] *Id.*

[3] There is no issue of whether signing the protective order will conflict with Italian law. The Bank has cited no law, Italian or otherwise, that would preclude the PwC Italy witnesses from signing and abiding by the protective order. Dr. Chiaruttini previously declined to sign the protective order because she believed she has an obligation to the Milan Public Prosecutors to turn over any material information regarding the Deloitte defendants that could conflict with the protective order's requirement that she keep any confidentially-designated Deloitte information confidential. Given Deloitte's settlement with Dr. Bondi, that is no longer an issue, and it was an issue only with respect to Dr. Chiaruttini, who has since signed the protective order as to Grant Thornton. Kieve decl. ¶ 36. exh. 17.

B. Avoiding other harassment and oppression

Rule 26(a)(2)(B) sets forth the requirements of an expert report. As demonstrated in Dr. Bondi's June 18, 2007 opposition to Grant Thornton LLP's motion to exclude Dr. Bondi's Italian experts [MDL # 1372], his expert disclosures comply with those provisions. All the available materials the PwC Italy witnesses considered in preparing their reports have been produced. There is nothing in the Federal Rules of Civil Procedure authorizing a subpoena to an expert witness for additional materials.

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. As the 1993 Advisory Committee Notes stress, the expert must "prepare a detailed and complete written report, stating the testimony the witness is expected to present during direct examination, together with the reasons therefor."

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"); 6 Moore's Federal Practice § 26.105[5] (2006) ("the courts have begun, with more frequency, to use Rule 26(c)(4) to circumscribe the scope of discovery," particularly where it is irrelevant and immaterial").

Conclusion

For the reasons set forth above, we therefore respectfully request that the Bank of America's motion to preclude the expert testimony of Messrs. Lagro, Galea and Megna be denied. We further request that the Court enter a protective order pursuant to Rule 26(c)(2) and (4) as requested above on the parameters (and, if the Court deems it appropriate, the location) of the PwC Italy depositions under Rule 26(b)(2)(A). It is a cardinal principle of American jurisprudence that the Court is entitled to every man's or woman's evidence. The Bank should not be able to benefit from the inappropriate leverage it has brought to bear on PwC Italy to bar Dr. Bondi from key evidence in his litigations in the United States.

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QUINN EMANUEL URQUHART OLIVER & HEDGES LLP

By: /s/ Loren Kieve
John B. Quinn (JQ 0716)
Peter E. Calamari (PC 3964)
Loren Kieve (LK 3624)
Brian Timmons (*pro hac vice*)
Johanna Ong (*pro hac vice*)
Terry L. Wit (TW 3078)

51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

Attorneys for plaintiff Dr. Enrico Bondi, as Extraordinary Commissioner of Parmalat Finanziaria, S.p.A., Parmalat S.p.A. and other affiliated entities in Extraordinary Administration under the laws of Italy