



written responses to the interrogatories and document requests and to produce documents in response to those document requests and demands made at the defendants' depositions, in violation of this Court's orders, and (ii) entering a default judgment against the defendants.

### **Background**

On July 1, 2000 (the "Petition Date"), the Cassandra Group (the "Debtor") filed a voluntary petition in this Court for relief under Chapter 7 of title 11 of the United States Code (the "Bankruptcy Code"). Thereinafter, Robert Geltzer was appointed as the chapter 7 Trustee.

Prior to the Petition Date, the primary business of the Debtor was to render investment advisory services to various clients. Dana Giacchetto was the principal, sole shareholder and chief officer of the Debtor from the time he caused the Debtor to be incorporated in 1991, until approximately April of 2000. The Defendants are the parents of the Mr. Giacchetto.

On June 14, 2002, the Trustee filed a complaint seeking (i) to avoid fraudulent transfers aggregating \$88,000 made by the Debtor to Alma Giacchetto, the mother of Dana Giacchetto, and fraudulent transfers aggregating \$20,000 made by Cassandra to Cosmo Giacchetto, father of Dana Giacchetto, (collectively, the "Fraudulent Transfers"), and to recover said amounts from the respective Defendants, together with interest, costs and attorneys' fees; or, alternatively, (ii) to avoid preferential transfers aggregating \$10,000 made by Cassandra to Alma Giacchetto (the "Preferential Transfers"), and to recover said amount from Alma Giacchetto, together with interest, costs and attorneys' fees.

A Summons and the Complaint were served on the Defendants on June 27, 2002. According to the Trustee on or about April 8, 2003, the Defendants served their Answer, disputing the Trustee's allegations. The Answer was never filed with the Court and does not appear on the Court's docket.

On December 14, 2004, the Trustee served initial discovery requests upon Leonard A. Glionna, counsel for the Defendants, requesting interrogatories, production of documents and notices of depositions of the Defendants. In order to accommodate the Defendants, the Trustee consented to several requests for adjournments of pre-trial conferences and extensions of time to respond to the initial discovery requests, due to, among other reasons, the alleged health issues of the Defendants and Mr. Glionna.

According to the Trustee, on August 15, 2005, the Trustee advised Mr. Glionna that he would seek a conference with the Court to resolve long-standing discovery issues. At the August 16, 2005 conference, the Trustee represented to this Court that Mr. Glionna had counter-signed a letter agreeing, among other things, (i) that the Defendants would respond to the initial discovery requests by August 31, 2005 and would appear for their depositions in September 2005, and (ii) that the Defendants agreed that the Trustee had satisfied his obligations under Local Bankruptcy Rule 7007-1(b) and that the Trustee would have the right to move to strike the Defendants' answer and move for a default judgment against them without any further attempts to confer.

Following the pre-trial conference, this Court entered a scheduling order which required the Defendants: (1) to provide written responses to the Plaintiff's First Set of Interrogatories to Defendants, and to the Plaintiff's First Request for Production of Documents (the "Document Requests"), both dated December 14, 2004; (2) to produce to the Trustee all non-privileged documents responsive to the Document Requests no later than 5:00 p.m. on August 31, 2005; (3) to appear for a deposition at the offices of Bryan

Cave LLP, in September 2005; and (4) that the Trustee's appearance at the Conference satisfied his obligations under Local Rule 7007-1, and, in the event that the Defendants failed to comply with the Order, the Trustee was authorized to file a motion to strike the Defendants' answer and move for a default judgment against them, without further delay or any further attempts to confer.

Over two months later, on November 9, 2005, Defendants produced two pages relating to bond ownership, copies of two checks relating to deposition fees and two letters relating to the Defendants' health issues. Only one page of these documents was actually responsive to the Trustee's requests. That one page was only the first of a two page document and the second page was never provided.

On December 28, 2005, this Court so-ordered and entered a Stipulation and Order Regarding Discovery, which ordered, among other things, that the Defendants appear for a deposition by no later than 2:00 p.m. on January 10, 2005 (the "Deposition Date"). The Stipulation provided that if either of the Defendants failed to appear for their deposition, the Defendants would not oppose any motion by the Plaintiff to strike the Defendants' pleadings and/or to seek entry of a default judgment against either or both of the Defendants.

The Trustee conducted depositions of the Defendants on January 10 and 11, 2006. In the course of depositions, the Trustee again requested documents, all but one of which was within the scope of documents already requested.

On January 17, 2006, after consulting with the Court, the Trustee advised Mr. Glionna that the Court scheduled the trial for April 10, 2006, at 10:00 a.m., with a final pre-trial conference on March 28, 2006, at 10:00 a.m. On February 6, 2006, the Trustee transmitted by priority mail to Mr. Glionna a letter providing, among other things, that

documents responsive to the deposition demands were to be produced no later than March 3, 2006.

After receiving no response, on March 13, 15, 16 and 21, the Trustee contacted Mr. Glionna in an attempt to determine whether the Defendants would be responding to the document requests and, pursuant to the Federal Rules of Bankruptcy Procedure 7026, to learn whether the Defendants intended to call witnesses at trial. The Defendants produced no documents, and on the eve of the scheduled final pre-trial hearing, Mr. Glionna represented to counsel for the Trustee that the Defendants would be proceeding *pro se* in the trial of this adversary proceeding.

The day before the final pre-trial scheduled for March 28, 2006, Mr. Glionna requested an adjournment of the hearing until March 30. The Trustee consented to the adjournment and the Court granted the adjournment. The day before the re-scheduled hearing, Mr. Glionna again requested that the hearing be postponed or alternatively, that Mr. Glionna be permitted to appear telephonically for health reasons. This time, the Trustee opposed the adjournment. The Court granted Mr. Glionna's request to appear telephonically. No objection to the Trustee's motion to strike and for a default judgment was ever filed.

The Trustee informed the Court at the hearing on March 30, 2006 that the evening before the hearing, he received some tax returns from the Defendants and statements from a Brown & Brown account. These documents were still only some of the documents the Trustee had been seeking for 15 months.

### **Discussion**

Federal Rule of Civil Procedure 37(b)(2) provides, in pertinent part, that when a party fails to obey a court order to provide or permit discovery, a court may enter an

order striking pleadings, staying further proceedings until the order is complied with, dismissing the action or proceeding, or rendering a default judgment against the disobedient party. John B. Hull, Inc. v. Waterbury Petroleum Prod., Inc., 845 F.2d 1172, 1176 (2d Cir. 1988); Starbrite Waterproofing Co., Inc. v. Aim Constr. & Contracting Corp., 164 F.R.D. 378, 381 (S.D.N.Y. 1996). Rule 37 sanctions are intended prevent a party from benefiting from its failure to comply, and to deter such conduct.

A court has “broad discretionary power” to impose sanctions upon a party for failure to comply with the legitimate discovery requests of its adversary. In re Barnholdt, 74 B.R. 760, 763 (Bankr. N.D.N.Y. 1987). In exercising its discretion, the Court should consider the dissuasive effect an order may have upon the party at fault in the present case, and the impact upon discovery in other pending litigation. Id. at 763. “The Court must scrutinize the manner and extent of the discovery request, the degree of fault which the party complained of rightly bears for the failure to comply, and whether noncompliance follows prior court involvement in the discovery process.” Id. at 763-64.

Federal Rule of Civil Procedure 37 provides the Court with a variety of sanctions, the harshest of which is striking a pleading. This type of relief is to be granted sparingly, and in extreme circumstances. In re Barnholdt, 74 B.R. at 764. Severe sanctions are justified, however, when a party has evidence “bad faith, willfulness, or gross negligence with respect to a discovery request, or where there has been a total failure to answer.” In re Barnholdt, 74 B.R. at 764; Starbrite Waterproofing Co., Inc., 164 F.R.D. at 381.

The Trustee’s requests for interrogatories, depositions and documents in this case were legitimate requests in light of the causes of action. In at least one instance, the Defendants acknowledged possession or the ability to obtain possession of their tax returns, but the Defendants failed to produce even those documents, demonstrating their willfulness and bad faith in their dealings with the Trustee and with this Court.

The Defendants were made aware several times that the Trustee intended to move forward to strike the pleadings and move for a default judgment against the Defendants if they continued to refuse to comply with this Court's orders, in fact counsel for the Defendants stipulated to orders that indicated the Trustee's intention to move for such relief. They continued to ignore this Court's orders. The prior production of one document in response to the Trustee's various requests is completely unsatisfactory and the belated production of some of the documents late yesterday afternoon or evening, literally on the eve of this hearing is too little too late.

Throughout the course of these proceedings, the Defendants displayed a cavalier disregard for the discovery rules and the orders of this Court and have precluded the Trustee from timely prosecuting this action.

### **Conclusion**

There has been no answer filed with the Court in this proceeding, but to the extent the Defendants have served an answer upon the Trustee and the Trustee has represented acceptance of such answer, that answer is stricken. As a result of the Defendant's continuing refusal to comply with discovery requests of the Trustee a default shall be entered against the Defendants.

SUBMIT ORDERS CONSISTENT WITH THE ABOVE RULING.

Dated: New York, New York  
March 30, 2006

/s/ Hon . Burton R. Lifland  
United States Bankruptcy Judge