

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF:  
LEONARD A. PELULLO

v.

FRED SCHWARTZ and  
ADORNO & ZEDER, P.A.

CIVIL ACTION

NO. 98-5526

M E M O R A N D U M

Broderick, J.

March 16, 1999

In November 1995, Leonard Pelullo ("Pelullo") filed a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Eastern District of Pennsylvania. Thereafter, Pelullo filed an adversary proceeding (the "Adversary Proceeding") against Fred Schwartz and the law firm of Adorno & Zeder (the "Defendants"). The Bankruptcy Court had jurisdiction over the Adversary Proceeding pursuant to 28 U.S.C. § 1334(b); 28 U.S.C. § 157; Eastern District of Pennsylvania Local Rules of Civil Procedure 1.1.1(d); Standing Order dated July 25, 1984 (as amended by Order dated November 8, 1990). Pelullo's bankruptcy case was subsequently converted to a Chapter 7 proceeding. David A. Eisenberg, Esquire, was appointed as trustee for Pelullo's bankruptcy estate (the "Trustee"), and he was substituted as the plaintiff in the Adversary Proceeding. See 11 U.S.C. § 323 (trustee is representative of estate and has capacity to sue and be sued.)

On March 6, 1998, the Bankruptcy Court entered an order dismissing the Adversary Proceeding, and on August 26, 1998, the Bankruptcy Court denied the Trustee's motion for reconsideration of that order. Presently before this Court is an appeal of those orders brought by the Trustee.

Also pending before this Court is a motion by the Defendants (Appellees in the instant appeal), to strike certain portions of the Trustee's brief before this Court. For the reasons stated below, the judgment of the Bankruptcy Court will be affirmed. Consequently, the Defendants' motion to strike certain portions of the Trustee's brief will be dismissed as moot.

### **The Adversary Complaint**

According to the Complaint in the Adversary Action, Leonard A. Pelullo, the Debtor in this bankruptcy case, was incarcerated pursuant to certain jury verdicts in United States of America v. Leonard A. Pelullo, No. 91-60, Eastern District of Pennsylvania (the "Criminal Action"). As of the date the Complaint was filed, four trials had occurred in the Criminal Action. According to the Complaint, in each of the four trials, the Government alleged that Pelullo had converted a \$114,000 wire transfer from a subsidiary of the Royale Group, Ltd. in order to repay a personal loan. In support of these allegations, the Government offered the testimony of two FBI Agents who claimed that during an

interview with the FBI, Pelullo had admitted using the wire transfer to repay the personal loan.

According to the Complaint, Defendant Schwartz was in attendance at that FBI interview because Defendant Schwartz and his law firm, Defendant Adorno & Zeder, had agreed to serve as Pelullo's legal counsel in connection with the FBI interview and the Government's pre-indictment investigation in the Criminal Action. Defendant Schwartz no longer represented Pelullo at the time of his criminal trials. The Complaint alleges that Defendant Schwartz repeatedly promised Pelullo and/or his trial lawyers that he would testify that Pelullo did not admit during the FBI interview that he had used the wire transfer to repay a personal loan. However, the Complaint alleges, Schwartz failed to testify at the trials, and intentionally evaded and hid from service of witness subpoenas. As a result, according to the Complaint, Pelullo was deprived of the exculpatory evidence that Schwartz would have provided at the trials.

The Complaint in the Adversary Proceeding alleges three causes of action under state law: one count of breach of fiduciary duty, one count of negligence/malpractice, and one count of promissory estoppel/detrimental reliance.

#### **The Adversary Proceeding in the Bankruptcy Court**

On May 20, 1997, the Bankruptcy Court entered a pretrial

order in the Adversary Proceeding setting a discovery deadline of July 21, 1997. Defendants' counsel served Pelullo with their first set of interrogatories and first set of requests for production on June 10, 1997, and Pelullo's responses to these interrogatories and requests for production were due on July 10, 1997. However, on June 26, 1997, Pelullo's case was converted to a Chapter 7 proceeding, and the Trustee, along with Trustee's counsel, were appointed. Pelullo had not responded to the Defendants' discovery requests as of the date of the conversion, and on August 25, 1997, Defendants served a copy of the discovery requests on the Trustee. The Trustee's responses to these discovery requests were due on September 24, 1997.

On November 6, 1997, Defendants had not received any responses to their discovery requests and they contacted the Trustee in writing, requesting the outstanding discovery. On November 20, 1997, having still received no responses, the Defendants filed a motion to compel discovery. On December 2, 1997, the Bankruptcy Court conducted a conference call with Defendants and the Trustee. The Bankruptcy Court did not extend the deadline for responding to the outstanding discovery requests, nor did the Bankruptcy Court issue an order compelling responses to those requests.

On December 11, 1997, Defendants again contacted the Trustee seeking responses to the original discovery requests no later

than January 2, 1998. Defendants received no response to this letter, and on January 7, 1998, the Defendants filed a second motion to compel discovery and for imposition of sanctions.

On January 15, 1998, the Bankruptcy Court conducted a hearing to consider the Defendants' second motion to compel. At that hearing, the Bankruptcy Court approved a consent order jointly submitted by the Trustee and the Defendants ("Consent Order") which required, in part, that "the Trustee shall serve full and complete answers to the Defendants' First Set of Interrogatories on counsel for the Defendants on or before February 3, 1998." Further, the Consent Order provided that "if the Trustee fails to comply with this Order, this adversary proceeding shall be dismissed with prejudice upon notice to the Court of the Trustee's failure to comply with this Order."

On February 4, 1998, having not received any response to the discovery requests, the Defendants filed a praecipe and certification for dismissal of the Adversary Proceeding, seeking dismissal of the Adversary Proceeding as provided in the Consent Order. However, in an ex-parte letter to the Bankruptcy Court dated February 3, 1998, the Trustee requested an additional thirty-day extension of the Consent Order's February 3, 1998 deadline. The letter claimed that Pelullo's recent movement from one prison facility to another prevented Pelullo from having access to his legal documents and prevented preparation of any

meaningful discovery responses. The Trustee stated that "[w]hile compliance [with the Consent Order] at this time is impossible, a modest deadline extension would allow Pelullo an opportunity to provide full and fair disclosure." On February 19, 1998, the Bankruptcy Court granted the extension, and the revised deadline for providing responses to the discovery requests was March 5, 1998.

On March 6, 1998, the Defendants still had received no response to the discovery requests. They filed a second praecipe and certification for dismissal of the Adversary Proceeding. On March 6, 1998, the Bankruptcy Court, in accordance with the Consent Order, entered an order dismissing the Adversary Proceeding with prejudice. The Bankruptcy Court noted that "[t]he Trustee did not file any request for a further extension beyond March 5, 1998 -- the very date sought by the Trustee, and approved by me on 2/19/98 -- namely, 30 day extension from the deadline ordered on 1/15/98."

On March 14, 1998, the Trustee filed a motion for reconsideration, asking the Bankruptcy Court to vacate its order dismissing the Adversary Proceeding. In his motion for reconsideration, the Trustee raised for the first time the fact that the Debtor, Leonard Pelullo, intended to exercise his Fifth Amendment privilege against self-incrimination in response to the Defendants' discovery requests. In support of this assertion,

the Trustee submitted the Certification of Allen Dubroff, Esquire, an attorney for Pelullo, who stated that he had "conferred with Mr. Pelullo and he has informed me that he asserts his Fifth Amendment right against self-incrimination, and accordingly, at this time, will not be responding to Defendants' interrogatories and requests for production of documents." This Certification of Allen Dubroff, Esquire, is dated February 27, 1998. The Trustee also submitted a letter from Richard A. Ripley, another of Pelullo's criminal attorneys, advising Pelullo to assert his Fifth Amendment privilege in connection with the discovery requests in the Adversary Proceeding. This letter is dated March 2, 1998. In his motion for reconsideration, the Trustee also sought a stay of discovery in the Adversary Proceeding.

On August 26, 1998, the Bankruptcy Court denied the motion for reconsideration, specifically outlining the reasons for the entry of the order dismissing the Adversary Proceeding, and finding that "the trustee has not established that reconsideration is necessary due to an intervening change in controlling law, the availability of new evidence not previously available or to correct a clear error of law or prevent manifest injustice." Moreover, the Bankruptcy Court noted, "case law supports the proposition that a defendant is entitled to dismissal of a civil complaint where the plaintiff places the

defendant at an undue disadvantage by raising his Fifth Amendment privilege to refuse to respond to discovery that is necessary to enable the defendant to prepare a defense to the civil complaint, Serafino v. Hasbro, Inc., 82 F.3d 515, 518-19 (1st Cir. 1996), and we find this body of law equally applicable to the case before us."

### **Jurisdiction and Standard of Review**

Title 28 U.S.C. §157(b)(1) provides that a bankruptcy judge may only enter appropriate orders and judgments, subject to review under section 158, of "core proceedings arising under title 11, or arising in a case under title 11..." In a non-core proceeding, a bankruptcy judge may enter appropriate orders and judgments, subject to review under § 158, only if the parties consent. § 157(c)(2). Without the consent of the parties in a non-core proceeding, the bankruptcy court must submit proposed findings of fact and conclusion of law to the district court, which enters final judgment. § 157(c)(1).

A proceeding is "core" if it "invokes a substantive right provided by title 11 or if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case." Torkelson v. Maggio (In re the Guild and Gallery Plus, Inc.), 72 F.3d 1171, 1178 (3rd Cir. 1996) (citation omitted); see also 28 U.S.C. § 157(b)(2). The claims raised in the Adversary

Complaint, as heretofore discussed, are clearly non-core, since they neither invoke a right provided by Title 11 nor could they arise only in the context of a bankruptcy case. The claims depend solely on state law and could proceed outside of the bankruptcy court.

However, it is also clear from the Consent Order entered into by both the Trustee and the Defendants that all parties consented to the Bankruptcy Court's entering final judgment in this case, in the event that the Trustee did not meet the discovery deadlines set in the Consent Order. See In re Lease-A-Fleet, Inc., 1992 WL 81326 (E.D.Pa.); In re Westbrook, 123 B.R. 728, 730 (Bankr.E.D.Pa. 1991). Therefore, pursuant to 28 U.S.C. § 157(c)(2), this Court sits as an appellate court and has plenary review of questions of law. Findings of fact may not be set aside unless clearly erroneous. See Century Glove, Inc. v. First American Bank of New York, 860 F.2d 94, 99 (3rd Cir. 1988).

### **Issues on Appeal**

The Trustee presents the following issues for appeal:

1. Whether the Bankruptcy Court's dismissal of this adversary proceeding was in error;
2. Whether the Bankruptcy Court's denial of Plaintiff's Motion for Reconsideration under F.R.Civ.P. 59(e) constituted an error;

3. Whether the Bankruptcy Court failed to consider Plaintiff's Motion for Reconsideration under F.R.Civ.P. 60(b);

4. Whether Plaintiff's Motion for Reconsideration should have been granted under F.R.Civ.P. 60(b)(1) and (b)(6);

5. Whether the Bankruptcy Court's conclusion that Plaintiff has asserted Fifth Amendment privilege against self-incrimination is an error;

6. Whether debtor's temporary assertion of his Fifth Amendment privilege against self-incrimination entitles Defendants to dismissal with prejudice;

7. Whether the Bankruptcy Court's denial of Plaintiff's Motion for Reconsideration constitutes an abuse of discretion.

### **The Dismissal Order**

The Bankruptcy Court was well within its discretion in dismissing the Adversary Proceeding. To begin, the Bankruptcy Court dismissed the Adversary Proceeding pursuant to the Consent Order into which the Trustee had freely entered. That Consent Order explicitly provided that the Adversary Proceeding would be dismissed in the event the Trustee failed to respond to the outstanding discovery requests by March 5, 1998, which is precisely what happened. The Bankruptcy Court noted in its dismissal order that it was dismissing the Adversary Proceeding in accordance with the terms of the Consent Order. As a general

rule, parties to a consent judgment cannot appeal that judgment. See, e.g., Anderson v. White, 888 F.2d 985, 991 (3rd Cir. 1989). It is clear that the Bankruptcy Court acted entirely within its discretion in dismissing the Adversary Proceeding pursuant to the terms of the Consent Order.

Nonetheless, out of an abundance of caution, this Court will undergo a thorough analysis of the Bankruptcy Court's decision to dismiss the Adversary Proceeding, and this Court will evaluate the merits of the Fifth Amendment issues raised by the Trustee. Such an analysis likewise reveals no abuse of discretion on the part of the Bankruptcy Court.

In adversary proceedings in bankruptcy cases, the rules of discovery under the Federal Rules of Civil Procedure apply. See e.g., Fed.R.Bankr.P. 7026-7037. Failure to respond to discovery posed under Fed.R.Bankr.P. 7033 & 7034 permits imposition of sanctions under Fed.R.Bankr.P. 7037. See, e.g., Fed.R.Civ.P. 33(b)(5); Fed.R.Civ.P. 37(a)(2)(B). Under Fed.R.Bankr.P. 7037, a bankruptcy court may dismiss an action or proceeding for failure to comply with discovery orders. See Fed.R.Civ.P. 37(b)(2)(C): see also Burns v. MacMeekin (In re MacMeekin), 722 F.2d 32, 34 (3d Cir. 1983)(holding that "dismissal with prejudice is the ultimate sanction for failure to comply with discovery orders").

The following factors govern a determination of whether to

impose the sanction of dismissal: (1) the extent of the party's personal responsibility; (2) the prejudice to the adversary caused by the failure to meet scheduling orders and respond to discovery; (3) a history of dilatoriness; (4) whether the conduct of the party or the attorney was willful or in bad faith; (5) the effectiveness of sanctions other than dismissal; and (6) the meritoriousness of the claims. United States of America v. One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, 938 F.2d 433, 439 (3rd Cir. 1991); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 868 (3rd Cir. 1984).

The Third Circuit has also provided the following guidance with regard to the application of these Poulis factors:

...Poulis did not provide a magic formula whereby the decision to dismiss or not to dismiss a plaintiff's complaint becomes a mechanical calculation easily reviewed by this Court. As we have already recognized, not all of the Poulis factors need be satisfied in order to dismiss a complaint. See C.T. Bedwell & Sons, Inc. v. Int'l. Fidelity Ins. Co., 843 F.2d 683, 696 (3rd Cir. 1988). Instead, the decision must be made in the context of the district court's extended contact with the litigant.

Mindek v. Rigati, 964 F.2d 1369, 1373 (3rd Cir. 1992).

Sitting as a court of appeal, this Court must review the Bankruptcy Court's decision for abuse of discretion. One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, 938 F.2d at 439; Poulis, 747 F.2d at 870. In doing so, this Court will address the Poulis factors seriatim.

1. The extent of the party's personal responsibility. The

Trustee was substituted as the Plaintiff in the Adversary Proceeding upon conversion of Pelullo's bankruptcy to a Chapter 7 proceeding, and is therefore the "party" in question. See 11 U.S.C. § 323. There appears nothing in the record to suggest that the Trustee himself, as opposed to his attorneys, is personally responsible for the persistent failure to meet discovery deadlines. However, the Court notes that the Trustee, while represented by attorneys, is himself an attorney, and was thus aware of the need to respond to discovery requests, and of the consequences of failing to do so. Furthermore, even assuming the Trustee bore no personal responsibility, his "lack of responsibility for [his] counsel's dilatory conduct is not dispositive, because a client cannot always avoid the consequences of the acts or omissions of its counsel." Poulis, 747 F.2d at 868 (citing Link v. Wabash Railroad, 370 U.S. 626, 633, 82 S.Ct. 1386, 1390, 8 L.Ed.2d 734)(1962)).

Moreover, the Trustee's difficulties communicating with Pelullo due to Pelullo's assertion of his Fifth Amendment privilege did not relieve the Trustee of his duty to submit timely responses asserting his inability to comply on this ground. One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, 938 F.2d 433, 439; Fed.R.Civ.P. 34(b).

Finally, even if this Court were to treat Pelullo as the

real party in interest in the Adversary Proceeding, Pelullo also bears personal responsibility for the failure to meet the discovery deadlines. Specifically, his assertion of his Fifth Amendment privilege, under the circumstances discussed below, does not justify the failure to respond in any form to the Defendants' discovery requests.

In SEC v. Graystone, 25 F.3d 187, 190 (3rd Cir. 1994), the Third Circuit held:

The privilege against self-incrimination may be raised in civil as well as in criminal proceedings and applies not only at trial, but during the discovery process as well. Unlike the rule in criminal cases, however, reliance on the Fifth Amendment in civil cases may give rise to an adverse inference against the party claiming its benefits. Baxter v. Plamigiano, 425 U.S. 308, 818, 96 S.Ct. 1558, 47 L.Ed.2d 810, 821 (1976). Use of the privilege in a civil case may, therefore, carry some disadvantages for the party who seeks its protection.

SEC v. Graystone Nash, Inc., 25 F.3d 187, 190 (3rd Cir. 1994).

The Third Circuit further held that in connection with the use of a Fifth Amendment privilege in a civil case, "[a] trial court must carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment," and that "the effects that an invocation of the privilege against self-incrimination will have in a civil suit depends to a large extent on the circumstances of the particular litigation." Id. at 192. The Court in Graystone also noted that the potential for exploitation and abuse of the Fifth Amendment Privilege must be evaluated when

considering the adversary's entitlement to equitable treatment, and when weighing the unfair prejudice that might result from an invocation of the Fifth Amendment. Id. at 190.

In Hoffman v. U.S., 341 U.S. 479, 486 (1951), the United States Supreme Court held that it is the initial responsibility of the court to determine whether the invocation of a Fifth Amendment privilege is justified:

[the] protection [provided by the Fifth Amendment] must be confined to instances where the witness has reasonable cause to apprehend danger from a direct answer.... The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself -- his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified, ... and to require him to answer if 'it clearly appears to the court that he is mistaken.'... To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

Hoffman, 341 U.S. 486-87 (internal citations omitted).

Having reviewed the Defendants' interrogatories and requests for production of documents which Pelullo has refused to answer, this Court has determined that Pelullo's blanket invocation of the Fifth Amendment to justify his complete failure to respond to any of the Defendants' discovery requests is an abuse of the Fifth Amendment privilege in this civil action instituted by Pelullo. To begin, the law is clear that if a litigant wishes to assert his Fifth Amendment privilege in response to

interrogatories or requests for production of documents, he must assert timely objections in response to individual discovery requests. Fed.R.Civ.P. 33(a), 34(b); One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, 938 F.2d 433, 439. Furthermore, while several of the Defendants' interrogatories call for responses which might tend to incriminate Pelullo (i.e. requesting information regarding Pelullo's relationships and business dealings with Anthony DiSalvo and Nicodemo Scarfo), it is clear to this Court that there is no evidence, in the context of this civil action which Pelullo instituted, that a responsive answer to the vast majority of the Defendants' discovery requests might in any way tend to incriminate Pelullo. This Court specifically finds that there is no justification for Pelullo's claiming his Fifth Amendment privilege in relation to the following interrogatories and requests for production of documents:

1. State the dates the law firm of Adorno & Zeder, P.A. represented the Plaintiff and describe the scope of each such representation, including a description of the matters that Adorno & Zeder, P.A. were instructed to provide representation and counsel on behalf of the Plaintiff.

2. State the dates Fred Schwartz represented the Plaintiff and describe the scope of each such representation, including a

description of the matters Fred Schwartz was instructed to provide representation and counsel on behalf of the Plaintiff.

3. State the dates of trials referenced in paragraphs 8 and 12 of the Complaint.

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7. State each and every fact upon which you base your allegations in paragraph 9 of the Complaint. In addition, identify all witness and documents you relied on in making these allegations.

8. State each and every fact upon which you base your allegation in paragraph 11 of the Complaint that Fred Schwartz "admitted that Pelullo did not state during the [FBI interview] that the Wire Transfer was sued [sic] to repay the DiSalvo loan." In addition, identify all witness and documents you relied on in making these allegations.

9. State each and every fact upon which you base your allegation in paragraph 12 of the Complaint that Fred Schwartz repeatedly promised you and/or your "trial lawyers" that he would attend the trials and testify on your behalf. In addition, identify all documents and witnesses you relied on in making this allegation and identify each of your "trial lawyers."

10. State each and every fact upon which you base your allegations in paragraph 13 of the Complaint that Fred Schwartz refused to attend each of the trials in the [Criminal Action] to

testify regarding his knowledge of the statements made during the [FBI interview]. In addition, identify all documents and witness you relied on in making these allegations.

11. State each and every fact upon which you base your allegations in paragraph 13 of the Complaint that Fred Schwartz represented to you and your trial lawyers that he would be present at certain locations to accept service of a witness subpoena. In addition, identify all documents and witnesses you relied on in making this allegation and identify each of your "trial lawyers."

12. State each and every fact upon which you base your allegations in paragraph 13 of the Complaint that Fred Schwartz "intentionally evaded and hid from service" of witness subpoenas. In addition, identify all documents and witnesses you relied on in making this allegation.

13. Identify all persons or companies that made or attempted service of a subpoena upon Fred Schwartz and indicate when such service was made or attempted, the locations and the result.

14. Set forth, in detail, the "exculpatory evidence" that Fred Schwartz would have provided in the [Criminal Action] as alleged in paragraph 14 of the Complaint. In addition, identify all documents and witnesses you relied on in making this allegation.

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16. State each and every fact upon which you base your allegation in paragraph 16 of the Complaint that Fred Schwartz "violated the attorney/client privilege between Schwartz and Pelullo by providing information to the U.S. Government and other parties that is protected by the attorney/client privilege and/or work product doctrine." In addition, identify all documents and witnesses you relied on in making this allegation and identify the representatives of the U.S. Government and the "other parties" discussed in paragraph 16 of the Complaint.

17. Identify all counsel who represented the Plaintiff in connection with any of the trials or appeals in the [Criminal Action].

18. State each and every fact upon which you base your allegation in paragraph 27 of the Complaint that you relied upon Fred Schwartz's representations and or promises to your detriment in preparing for and/or conducting the trials in the [Criminal Action]. In addition, identify all documents and witnesses you relied on in making this allegation.

19. State each and every fact upon which you base your allegation in paragraphs 20, 24, and 28 of the Complaint that you have incurred legal fees and expenses of \$2,500,000 through the four trials and three appeals associated with the [Criminal Action] and identify any and all documents concerning or relating

to the foregoing.

20. State each and every fact upon which you base your allegation in paragraphs 20, 24, and 28 of the Complaint that you have "been forced to forfeit to the United States Government in assets with a value in excess of \$8,000,000" and identify any and all documents concerning or relating to the foregoing. In addition, identify the assets that you allege were forfeited to the United States government.

22. State each and every fact upon which you base your allegation in paragraphs 20, 24, and 28 of the Complaint that you have lost income in excess of \$5,000,000 and identify any and all documents concerning or relating to the foregoing.

23. State each and every fact upon which you base your allegation in paragraphs 20, 24, and 28 of the Complaint that default judgments in excess of \$50,000,000 have been entered against you and identify any and all documents concerning or relating to the foregoing.

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26. With respect to each expert you have consulted (or expect to consult) in the preparation of your case, and whom you expect to call as an expert witness during the trial of this Complaint [provide certain information regarding the expert's background and opinions.]

27. To the extent not provided in the answer to the

preceding interrogatory, identify each other witness you intend to call at trial, and as to each provide [information about the witness's background and their expected testimony.]

28. Identify all exhibits that you intend to and/or will introduce at the trial of this adversary proceeding.

29. Identify all individuals who provided information used to answer these interrogatories, and as to each individual provide the following information: a. name; b. interrogatory or interrogatories for which information was provided; and c. current or last known address if such individual is not the Plaintiff.

30. Identify the date you answered these interrogatories.

Requests for Production of Documents:

1. Produce all documents which are identified in response to the interrogatories set forth above or which provide information upon which the Plaintiff has relied in answering the foregoing interrogatories.

2. Produce all exhibits which the Plaintiff expects to offer in evidence or have identified at trial.

3. Produce all documents which the Plaintiff contends support the allegations contained in Plaintiff's Complaint.

4. Produce all documents evidencing or reflecting the dates either of the Defendants represented the Plaintiff and/or the scope of such representation, including, but not limited to,

engagement and retainer letters.

5. Produce all documents constituting, evidencing, summarizing or reflecting any verbal or written communications between Plaintiff and either of the Defendants.

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7. Produce all indictments of the Plaintiff.

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11. Produce all post-trial motions, pleadings, and other documents filed by the Plaintiff in connection with the [Criminal Action].

12. Produce all appellate briefs filed by the Plaintiff in connection with the [Criminal Action].

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There can be no question that Pelullo's blanket assertion of his Fifth Amendment privilege in refusing to respond to all of the Defendants' discovery requests is an abuse of the privilege, especially in view of the fact that he is required to give specific answers to specific questions. One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, 938 F.2d 433, 439; Fed.R.Civ.P. 34(b). As to the majority of the Defendants' interrogatories and requests for production of documents, this Court has found that there is nothing in the questions themselves nor in the context in which

they were asked which would suggest that responsive answers could in any way tend to incriminate Pelullo. Thus, Pelullo's use of the Fifth Amendment privilege provides no justification for Pelullo's or the Trustee's failure to provide discovery responses in compliance with the Consent Order entered into by the Trustee and the Defendants, and issued by the Bankruptcy Court.

Moreover, even if Pelullo's invocation of his Fifth Amendment privilege was valid in connection with a few of the Defendants' discovery requests, it may nonetheless "carry some disadvantages" and must be balanced against "the adversary's entitlement to equitable treatment," as has been previously noted. Graystone, 25 F.3d 187, 190, 192. Assuming for the sake of argument now that Pelullo's invocation of his Fifth Amendment privilege was valid in connection with a few of the Defendants' discovery requests, and having weighed the equitable interests of the Defendants to obtain information related to the claims against them, there is no question that Pelullo's assertion of his privilege does not absolve Pelullo or the Trustee of their responsibility for their repeated failure to respond to most of the Defendants' discovery requests.

In Serafino v. Hasbro, Inc., 82 F.3d 515 (1st Cir. 1996), the First Circuit held that a district court's dismissal of a case was proper where the plaintiff asserted his Fifth Amendment privilege in a civil action, which resulted in the defendants

being unable to obtain information which was central to the case against them -- information which could not be obtained from any other source. The First Circuit stated:

The Supreme Court has indicated that the assertion of the privilege may sometimes disadvantage a party.... We think that in the civil context, where, systemically, the parties are on a somewhat equal footing, one party's assertion of his constitutional right should not obliterate another party's right to a fair proceeding. In other words, while a trial court should strive to accommodate a party's Fifth Amendment interests, ... it also must ensure that the opposing party is not unduly disadvantaged..... After balancing the conflicting interests, dismissal may be the only viable alternative.

Id. at 518 (internal citations omitted). In Serafino, the First Circuit upheld the District Court's findings that the information requested, and which the plaintiff refused to supply on Fifth Amendment grounds, was central to the defendants' defense; that there was no effective substitute for the plaintiff's answers; and that there was no adequate alternative remedy to dismissal.

In the instant Adversary Proceeding, Pelullo, who brought the action in the first instance, has asserted his Fifth Amendment privilege and refused to respond to all discovery requests made by the Defendants. There is no question that the requested information is central to the Defendants' defense in the Adversary Action, and it is also clear that most of the information requested could only be provided by Pelullo. Thus, Pelullo's broad assertion of his Fifth Amendment privilege cannot justify Pelullo's or the Trustee's conduct in the Bankruptcy

Court, and does not absolve the Trustee and Pelullo of responsibly to respond to discovery in connection with the vast majority of the discovery requests wherein this Court has determined, based on the implications of the questions and the setting in which they were asked, that a responsive answer could in no way tend to incriminate Pelullo.

Finally, this Court notes that unlike in Graystone or Serafino, the Bankruptcy Court did not dismiss the Adversary Proceeding as a result of Pelullo's assertion of his Fifth Amendment rights. Indeed, the Fifth Amendment issue was first raised by the Trustee in his motion for reconsideration of the Bankruptcy Court's dismissal order, which was based on entirely different grounds. Pelullo's assertion of his Fifth Amendment privilege was offered by the Trustee after his case was dismissed as a justification for his failure to respond timely to the Defendants' discovery requests. As the Third Circuit noted in One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, under remarkably similar circumstances: "both claimants simply ignored all discovery requests, ignored the court's order compelling discovery, and apparently never mentioned [one of the claimant's] Fifth Amendment privilege in relation to the discovery requests until after the claims had been dismissed..... Thus, the Fifth Amendment provides no justification for the claimant's conduct in

the district court." 938 F.2d 433, 439.

2. Prejudice to the adversary. There has been prejudice to the Defendants as a result of the Trustee's repeated failure to respond to discovery requests and to obey the Bankruptcy Court's order. The proceeding was delayed, and the Defendants were required to move to compel discovery twice. See One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, 938 F.2d at 440; Poulis, 747 F.2d at 868. The Defendants "encountered lack of cooperation from the plaintiff in areas where the plaintiff should cooperate under the spirit of the federal procedural rules." Poulis, 747 F.2d at 868.

3. A history of dilatoriness. As discussed in the chronology of events recounted above, the Trustee in this case repeatedly violated discovery deadlines, both those prescribed by Fed.R.Civ.P. 33(a) and 34(b), and those imposed by the Bankruptcy Court. The Trustee failed to respond to requests to provide discovery prior to the filing of the motions to compel, and the Trustee flagrantly disobeyed the Bankruptcy Court's orders compelling discovery. See One Million Three Hundred Twenty-Two Thousand Two Hundred Forty-Two Dollars and Fifty-Eight Cents, 938 F.2d at 440. "Time limits imposed by the rules and the court serve an important purpose for the expeditious processing of litigation. If compliance is not feasible, a timely request for

an extension should be made to the court. A history by counsel of ignoring these time limits is intolerable." Poulis, 747 F.2d at 686.

Furthermore, while not relying on this fact in deciding this case, this Court notes that the Trustee has a history of dilatoriness with this Court that extends beyond the instant appeal. Specifically, this Court dismissed another Adversary Proceeding in this same bankruptcy case which had been withdrawn from the Bankruptcy Court and which was being prosecuted by the Trustee. That Adversary Proceeding was dismissed because of the Trustee's failure over many months to respond to a motion to dismiss, despite an order from this Court to do so. The Court notes that the law firm which represented the Trustee in that case also represented the Trustee in the Adversary Proceeding below and in the instant appeal.

4. Whether the attorney's conduct was willful or in bad faith. While there is nothing in the record directly to suggest that the Trustee or the attorneys representing him acted in "bad faith" in failing to respond to discovery requests from September of 1997 until March of 1998, there is also nothing in the record to excuse the Trustee's failure to answer those discovery requests with regard to which this Court has determined there was no basis for taking the Fifth Amendment. There is also nothing in the record to excuse the Trustee's failure to request

additional time in which to respond to the outstanding discovery. Furthermore, as heretofore discussed, a response to all of the Defendants' discovery requests by a plea of the Fifth Amendment, without answering each question, was an abuse of the privilege.

5. Alternative sanctions. After repeatedly failing to respond to the Defendants' discovery requests, in violation of both the Federal Rules of Civil Procedure and the Bankruptcy Court's orders, the Trustee entered into a Consent Order in which he specifically agreed that the case should be dismissed if he failed to respond to the outstanding discovery requests as ordered by the Bankruptcy Court. Therefore, regardless of what alternative sanctions may have been available to the Bankruptcy Court, there can be no question that the sanction of dismissal was appropriate, particularly given that this Court has found, based on the implications of the question and the setting in which it was asked, that a responsive answer to the vast majority of the discovery requests could in no way tend to incriminate Pelullo.

6. Meritoriousness of the claim. "A claim ... will be deemed meritorious when the allegations of the pleadings, if established at trial, would support recovery by plaintiff...." Poulis, 747 F.2d at 869-70. This Court will not speculate on the meritoriousness of the claims in the Adversary Proceeding given that the other Poulis factors weigh so heavily in favor of

dismissal.

The Poulis factors strongly support the Bankruptcy Court's decision to dismiss the Trustee's claims in the Adversary Proceeding. The Bankruptcy Court soundly exercised its discretion in dismissing the Adversary Proceeding, and this Court will therefore affirm the Dismissal Order of March 6, 1998.

#### **The Reconsideration Order**

The standard of review of a bankruptcy judge's denial of a motion for reconsideration is whether the bankruptcy judge abused his discretion. Marta Group, Inc. v. County Appliance Co., Inc., 79 B.R. 200, 205 (E.D.Pa. 1987); see also North River Insurance Company v. Cygnet Reinsurance Company, 52 F.3d 1194, 1203 (3rd Cir. 1995); Lorenz v. Griffith, 12 F.3d 23, 26 (3rd Cir. 1993). The Bankruptcy Court was clearly within its discretion in denying the Trustee's Motion for Reconsideration, regardless of whether that motion was considered pursuant to Fed.R.Civ.P. 59(b) or Fed.R.Civ.P. 60(b).

#### **Defendants' Motion to Strike**

Finally, the Defendants have brought a motion to strike certain portions of the Trustee's brief before this Court. Because all issues in this appeal have been resolved in favor of

the Defendants, and because this Court will affirm the judgments of the Bankruptcy Court, the Defendants' motion to strike certain portions of the Trustee's brief will be dismissed as moot.

For the reasons stated above, the order of the Bankruptcy Court dated March 6, 1998, dismissing the Trustee's Adversary Proceeding, will be affirmed. Likewise, the order of the Bankruptcy Court dated August 26, 1998, denying the Trustee's motion for reconsideration, will also be affirmed. The motion by the Defendants to strike certain portions of the Trustee's brief will be dismissed as moot.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE MATTER OF:

CIVIL ACTION

LEONARD A. PELULLO

v.

NO. 98-5526

FRED SCHWARTZ and

ADORNO & ZEDER, P.A.

O R D E R

AND NOW, this 16th day of March, 1999; for the reasons set forth in this Court's accompanying memorandum of this date;

**IT IS ORDERED:** The Order of the Bankruptcy Court dated March 6, 1998, dismissing the Trustee's Adversary Proceeding, is **AFFIRMED**;

**IT IS FURTHER ORDERED:** The Order of the Bankruptcy Court dated August 26, 1998, denying the Trustee's motion for reconsideration, is **AFFIRMED**;

**IT IS FURTHER ORDERED:** The Defendants' motion to strike certain portions of the Trustee's brief is **DISMISSED AS MOOT**.

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RAYMOND J. BRODERICK, J.