UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NATAN APPLEBAUM, et al.,

Plaintiffs,

- against -

NATIONAL WESTMINSTER BANK,

Defendant.

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ORDER

CV 2007-0916 (DLI)(MDG)

Go, United States Magistrate Judge:

Plaintiffs bring this action against National Westminster Bank ("NatWest") for civil damages for knowingly providing material support or resources to to the Islamic Resistance Movement, commonly known as HAMAS, a foreign terrorist organization, in violation of 18 U.S.C. § 2339B and financing acts of terrorism in violation of 18 U.S.C. § 2339C. Plaintiffs seek an order imposing sanctions against NatWest's counsel, Jonathan Blackman, for his conduct at the deposition of NatWest witness Michael Hoseason held in connection with this and a related action, Weiss v. National Westminster Bank, 06-cv-4622 (DLI)(MDG).

BACKGROUND

Plaintiffs allege, inter alia, that NatWest maintained bank accounts in England for Interpal, the principal clearinghouse for funds raised throughout Europe and the Middle East on behalf of HAMAS. Plaintiffs further allege that NatWest transmitted and deposited millions of dollars on behalf of Interpal to agents of

HAMAS and alleged terrorist organizations. Mr. Hoseason was the leader of NatWest's Money Laundering Suspicion Team from 1999 to 2003.

Plaintiffs contend that Mr. Blackman impeded their ability to conduct an orderly deposition of Mr. Hoseason by making speaking objections and engaging in disruptive conduct. Plaintiffs point to the fact that Mr. Blackman appears on 114 of the 141 pages of the deposition transcript, or 81% of the pages. Plaintiffs further argue that Mr. Blackmun made speaking objections which were deliberately designed to coach his witness and that he made insulting and unprofessional comments to opposing counsel. Such conduct by Mr. Blackman followed his accusations of racism leveled at other counsel at the depositions of two other NatWest witnesses earlier that week. Mr. Blackman counters that his conduct was proportional to the degree of improper questions posed by plaintiffs' counsel.

DISCUSSION

Plaintiffs seek sanctions under 28 U.S.C. § 1927 and Rule 30(d) of the Federal Rules of Civil Procedure. Section 1927 provides that "[a]ny attorney who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." 28 U.S.C. § 1927. Courts in the Second Circuit have construed Section 1927 as requiring "a clear showing of bad faith on the part of the attorney." See Shafi v. British Airways, PLC, 83 F.3d 566, 571 (2d Cir. 1996); Phillips v. Mfrs. Hanover Trust

Co., No. 92 Civ. 8527, 1994 U.S. Dist. LEXIS 3748, at *3-*4 (S.D.N.Y. March 29, 1994). A clear showing of bad faith can be established where an attorney's actions are "so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as delay." Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986); see Revson v. Cinque & Cinque, 221 F.3d 71, 78 (2d Cir. 2000).

In the Second Circuit, courts "typically consider three factors: (1) the extent and pervasiveness of the interruptions, as evidenced by the number of times that the attorney appears on the transcript; (2) the character of the interruptions (e.g., whether they included personal attacks on opposing counsel, or were merely groundless objections); and (3) the effect of the attorney's conduct (e.g., whether the deposition was entirely destroyed or merely prolonged)." Sicurelli v. Jeneric/Pentron, Inc., No. 02 CV 4934, 2005 WL 3591701, at *3 (E.D.N.Y. Dec. 30, 2005).

As to the first factor, although Mr. Blackman appears on 81% of the pages of the deposition transcript, many of his statements were limited simply to objecting to the form of the question and advising the witness that he may answer. The extent of counsel's objections is less pervasive than of counsel in other cases where the court imposed sanctions under section 1927. Compare Morales v. Zondo, 204 F.R.D. 50, 54 (S.D.N.Y. 2001) (granting sanctions under section 1927 where counsel appeared on more than 85% of the pages of the deposition transcript with statements other than an objection as to form or a request to the court reporter to read

back a question) and Unique Concepts, Inc., v. Brown, 115 F.R.D. 292, 293 (S.D.N.Y. 2003) (granting sanctions under section 1927 where counsel appeared on 91% of the transcript pages with statements other than an objection as to form) with Sicurelli, 2005 WL 3591701, at *4 (denying sanctions under section 1927 where counsel appeared on 76% and 67% of transcript pages with statements other than objections to form or requests to the court reporter to have a question read back); Phillips v. Manufacturers Hanover Trust Co., No. 92 CIV. 8527, 1994 WL 116078, at *3-*4 (S.D.N.Y. Mar. 29, 1994) (denying sanctions where counsel appeared on 60% of transcript pages with statements including objections to form).

Second, as to the character of the interruptions, plaintiffs point to a number of instances in which Mr. Blackman engaged in lengthy speeches rather than limiting himself to brief explanations of objections. They also complain about his statements criticizing the way the opposing counsel conducted the examination and his attempts to control the manner in which questions were asked, sometimes by making personal attacks on opposing counsel. Mr. Blackman counters that his conduct was justified because the questioning by plaintiffs' counsel was improper and abusive.

This Court agrees that Mr. Blackman sometimes made unduly lengthy objections. A number of these objections arose as a result of Mr. Blackman's intolerance of opposing counsel's practice of questioning Mr. Hoseason about the contents of a document without first showing him the document. In many

instances, the witness was unable to answer without review of the document and Mr. Werbner persisted in this manner of questioning. However, there is no rule that a questioner must show a witness a document before asking a question pertaining to the contents of a document. At one point, Mr. Blackman took it upon himself to show the witness a document that related to a pending question. See Tr. at 16. In other instances, Mr. Blackman accused plaintiffs' counsel of posing deliberately misleading questions.

The following are just a few notable examples of Mr. Blackman's attempts to control the conduct of the deposition, beginning with Mr. Blackman's expressions of dissatisfaction because the witness was not shown a document.

> Q. I will represent to you that -- strike that.
>
> Mr. Blackman: Why don't you just show him the document so he doesn't have to accept your representations. You are looking at the document. Is this a game? Show him the document.
>
> Q. Isn't it true that the amber color code used by NatWest was done where there was suspicion about the customer but wrongful money laundering conduct had not been proved.
>
> Mr. Blackman: Objection to the form of the question. I am going to direct him not to answer when you start reading or purporting to read things to him that he does not have. Don't answer the question. He will show you the document if he wants to.
>
> Q. Are you refusing to answer the question, Mr. Hoseason?
>
> Mr. Blackman: Why don't you show him the document? Mr. Werbner, answer my question. I am going to show him the document. Do we have the document? Can we get it? I think it is really outrageous, not to mention a waste of time, to ask someone questions when you are reading from a document and you won't show it to him. I think that is really unfair.
>
> Q. Will you answer the question?

Mr. Blackman: You can answer the question. What is the question? Don't assume anything he is telling you is true when he says to you "isn't it true that" because it is probably not.

Tr. at 15-16.

Mr. Blackman also made gratuitous speeches in expressing his dissatisfaction as to how certain questions were posed.

Q. Would you read the sentence that appears under that?

A. The sentence under neither [sic] the heading criminal activity says:

> Contrary to pop beleave [sic] this is not just drug trafficking criminal activity including terrorism, theft, fraud, blackmail, counterfeiting and illegal deposit taking check quote.

Q. Do you agree with that?

Mr. Blackman: Mr. Werbner, this is not an appropriate question. It really isn't. I mean this is not a Texas jury trial. Maybe you do this stuff where you come from but we don't do it in cases in the Federal court in New York. This witness doesn't have to agree or disagree with what is in the document. I am going to let him answer the question but it is completely irrelevant to any issue in this case.

Tr. at 48-49.

* * *

Q. But at some point, without being precise as to the date, you did discover that the United States Government had declared Interpal to either be engaged in terror financing or to be suspected of that, correct?

A. Correct.

Q. Now, even after the US Government made that declaration about NatWest customer, NatWest continued to render financial services, isn't that right?

A. Correct.

Q. For more than a year, are isn't that true?

Mr. Blackman: I am not going to even bore to object to the argumentative nature of these questions. You know the answer to these questions and this is supposed to

> be a discovery deposition and we will stipulate to that fact, but if you think that somehow important or impressive to ask these "even if" questions you are certainly free to spend your time doing that.
>
> ...
>
> A. I don't know exactly how long.
>
> Q. Do you know generally how long?
>
> A. No.

Tr. at 33.

In addition, on several occasions, counsel objected on the ground that he perceived an unambiguous question to be unclear. Generally, the witness is the person to determine whether he understands the question, to ask for clarification if necessary and then to answer it to the best of his ability. See Phillips, 1994 WL 116078, at *3; Hall v. Clifton Precision, A Division of Litton Sys., Inc., 150 F.R.D. 525, 530 n. 10 (E.D. Pa. 1993). Indeed, Mr. Hoseason did sometimes ask plaintiffs' counsel to clarify or reformulate a question when he was confused. The following are examples of Mr. Blackman objections to the clarity or wording of a question:

> Q. Mr. Hoseason, from your preparation for this deposition, isn't it true that Natwest put red flags on Interpal on numerous internal bank records?
>
> Mr. Blackman: Objection to the form of the question. I don't know what "numerous" means, but you can answer.

Tr. at 15.

* * *

> Q. . . . Can you explain why NatWest put red flags on Interpal on numerous Goalkeeper records, yet continued to provide Interpal with financial services?
>
> Mr. Blackman: Again, I object, as I did to a similar question a while ago. It is argumentative, but you can answer, and also so far hypothetical, since you have not shown him the document, but you can answer the

question.

A. There was no reason not to continue to provide financial services to a customer that had a red flag against them.

Q. Explain that?

Mr. Blackman: In general terms now or about Interpal? Can you clarify the question, Mr. Werbner? No, he won't clarify the question. Mr. Werbner is shaking his head. He does not wish to clarify the question. I am going to just object and say the question is unclear whether we are talking about Interpal or customers in general. To the extent you can answer, given that deliberate uncertainty, you certaintly may, Mr. Hoseason.

Tr. at 17-18.

* * *

Q. . . . Isn't it true that a NatWest customer who is appearing multiple times on the bank's Money Laundering Suspicion Reports should be of greater concern to the bank than a customer who has not appeared multiple times?

Mr. Blackman: Objection, argumentative, you may answer.

A. No.

Q. Please explain.

Mr. Blackman: Is that a question, "Please explain?" What don't you understand about the answer, Mr. Werbner? You can answer, I suppose, if you are capable of reading Mr. Werbner's mind about his problem, since he won't articulate it. You may answer.

A. An internal Suspicion Report could be generated by or could be created by any member of bank staff. Those individuals may or may not have or have varying degrees of knowledge of the customer. They might therefore submit multiple Suspicion Reports for no good reason.

Id. at 23-24.

Most troubling were Mr. Blackman's speaking objections in which he appeared to suggest to the witness how to answer a question. For example:

Q. How do you explain that conduct of NatWest?

> Mr. Blackman: Why does he have to explain it Mr. Werbner? I would ask you to explain the question. The question lacks foundation because it assumes that an English bank should stop providing financial services to a customer to whom it is lawfully entitled to provide those services in the UK because the United States Government in a regulation which on its face does not apply in that situation has put the customer on a list. That is why the question lacks foundation, as you know. So to ask him to explain it implies that there is something to explain. Having made in a [sic] objection, you may answer the question.

Tr. at 33. This objection was particularly inappropriate, both in requiring the questioner to give a reason for his question and then in thwarting a spontaneous (and frank) response.

> Q. What other type of disclosure is there, as it was done during your work on the NatWest Money Laundering Team? ...
>
> Mr. Blackman: Object to the form of the question. I am not sure that there is another type, but you can answer.
>
> A. We either make a disclosure to the authorities or we don't.

Tr. at 10.

* * *

> Q. Are you aware that around August 2003 the United States Government declared Interpal, the bank in the West customer, to be (NatWest) to be an organization engaged in terror financing?
>
> Mr. Blackman: Object to the form of the question. Actually there was a specific designation what Interpal was, which you have I guess chosen for some reason not to use, but you can answer the question.
>
> . . .
>
> A. I am aware that around that time that they appeared on a list of some description. I don't believe that that list specifically related to persons and entities engaged in terrorist financing. I think it was a list of people and entities that were suspected of being so.

Tr. at 31.

* * *

> Q. What is your understanding of the reference to "the current volatile situation in Palestine?"

> Mr. Blackman: I am going to object for lack of foundation because if he didn't write this then you are asking him to speculate about what somebody else wrote. That is my objection. You may answer.
>
> A. I don't know specifically because I don't know who wrote it.

Tr. at 131-32.

As to the third factor, despite the manner of Mr. Blackman's frequent interruptions, there was a valid basis for many of his objections to the form of questions, as illustrated in the last example. Virtually every time he objected to form, he also instructed the witness to answer. More importantly, his conduct did not impede most lines of questioning. In the few instances where Mr. Blackman instructed Mr. Hoseason not to answer a question, nearly every instruction was based on privilege or work product grounds. Plaintiffs' counsel was able to finish Mr. Hoseason's deposition and there were no material questions that Mr. Hoseason was prevented from answering.

Thus, in considering the three applicable factors, this Court finds that Mr. Blackman's conduct was not so outrageous to rise to the level of the bad faith warranting sanctions under section 1927. Accordingly, plaintiffs' motion for sanctions pursuant to section 1927 is denied.

Unlike section 1927, Rule 30(d)(2) does not require a clear showing of bad faith. Rather, under Rule 30(d)(2), sanctions may be imposed on an attorney who "impedes, delays, or frustrates the fair examination of the deponent." Fed. R. Civ. P. 30(d)(2). The Advisory Committee Notes to Rule 30 explain that sanctions are authorized for making improper objections or giving

directions not to answer prohibited in the rule. See Advisory Committee's Notes to 1993 Amendments. "The making of an excessive number of unnecessary objections may itself constitute sanctionable conduct." Id.

Also, Rule 30(c)(2) requires that an objection "be stated concisely in a nonargumentative and nonsuggestive manner." Fed. R. Civ. P. 30(c)(2). As the Advisory Committee observed, depositions "frequently have been unduly prolonged, if not unfairly frustrated, by lengthy objections and colloquy, often suggesting how the deponent should respond." Id.

At the deposition, Mr. Blackman argued that his speaking objections were required in order to permit plaintiffs' counsel to respond to objections. However, it was inappropriate for Mr. Blackman to elaborate extensively on his reasons for objecting, particularly in the argumentative and suggestive manner in which he did. As illustrated above, some of his objections turned into long colloquies peppered with personal attacks on opposing counsel.

Notwithstanding Mr. Blackman's failure to follow the directive in Rule 30(c)(2) in many instances, his objections to the form of questions were not necessarily baseless. This Court recognizes that he was raising his numerous objections to form at the deposition in order not to waived them. See Advisory Committee's Notes to 1993 Amendments. Critically, despite frequent objections, the questioning of Mr. Hoseason proceeded -- often for extended periods of time with no interruption other than simple objections to form before Mr. Blackman delivered his

next lengthy objection. In fact, plaintiffs' counsel does not identify any subject matter the witness was prevented from answering. Although I find from review of the entire transcript that some of Mr. Blackman's conduct was intermittently, at best, intemperate, I do not find that his conduct either destroyed the deposition or frustrated the fair examination of the deponent. Thus I deny plaintiffs' motion for sanctions under Rule 30. See, e.g., Synventive Molding Solutions, Inc. v. Husky Injection Molding Systems, Inc., 262 F.R.D. 365, 375-76 (D.Vt. 2009) (declining to award sanctions where "voluminous, unwarranted and often argumentative objections 'verge[d] on frustrating the fair examination' of the deponent, but opposing counsel was not prevented from completing the deposition") (quoting Philips); Cameron Industries, Inc. v. Mothers Work, Inc., 2007 WL 1649856 at *5 (S.D.N.Y. 2007). However, Mr. Blackman is cautioned that other courts may not look as charitably upon such behavior that is at the edge of acceptable conduct.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for sanctions is denied.

SO ORDERED.

Dated: Brooklyn, New York
October 5, 2011

/s/
MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE