**United States Bankruptcy Court**
**District of New Jersey**
**Mitchell H. Cohen U.S. Courthouse**
**P.O. Box 2067**
**Camden, New Jersey 08101**

**JUDITH H. WIZMUR**
**Chief, U.S. Bankruptcy Judge**

**(856) 757-5126**

March 5, 2008

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Re: James Feltman, Chapter 11 Trustee of Certified HR Services Company f/k/a The Cura Group, Inc. and Certified Services, Inc. v. Granite State Insurance Company
Case No. 07-00111

Dear Counsel:

In this miscellaneous proceeding, two motions are pending. James S. Feltman, Chapter 11 Trustee of Certified HR Services Company f/k/a The Cura Group, Inc., et al, the plaintiff in an adversary proceeding pending in the United States Bankruptcy Court, Southern District of Florida, Case No. 05-22912-BKC-RBR, against Granite State Insurance Company, moves to compel production of

documents and attendance at deposition, for sanctions, and for an order to show cause why Justine Sciarra should not be held in contempt. As well, defendant Granite State Insurance Company moves for sanctions against Justin Sciarra and his counsel based on discovery violations. Following a series of scheduled and adjourned hearings, and the entry of an interim order, Mr. Sciarra did appear for deposition.[1] Remaining to be resolved is whether sanctions should be imposed upon Mr. Sciarra and/or his attorney Paul Verner, Esquire for Mr. Sciarra's failure to appear at the earlier scheduled depositions. If so, the extent of those sanctions must be determined.

Justin Sciarra was personally served with a Subpoena for Deposition Duces Tecum on or about January 19, 2007. The depositions of four individuals, including Mr. Sciarra, were scheduled for February 13, 2007. Counsel for the trustee and counsel for Granite State Insurance Company flew to New Jersey from Florida to conduct the depositions. About an hour and fifteen minutes before Mr. Sciarra's deposition was to begin, Mr. Verner called to say that he was ill and would not be able to attend the deposition.

The deposition was rescheduled for March 13, 2007, by video conference.

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[1] The record does not reflect whether any documents were actually produced. The movants do not raise the issue of further production here.

The rescheduling of the deposition was sent to both Mr. Sciarra and Mr. Verner. Both Mr. Sciarra and Mr. Verner failed to appear.

The deposition was again rescheduled by notice dated August 9, 2007, first scheduling the deposition for September 4, 2007, and then correcting the date to September 5, 2007. Again, a video conference connection was arranged, and Mr. Sciarra was noticed of this fact on or about August 30, 2007. Both Sciarra and his counsel were noticed by mail and facsimile of the scheduled date. A subpoena was also issued with a return of service. Again, no appearance was made by either Mr. Sciarra or Mr. Verner.

Following the initiation of this proceeding in the United States Bankruptcy Court for the District of New Jersey on October 9, 2007, an order was entered on November 5, 2007, requiring Mr. Sciarra to appear for deposition "on or before November 16, 2007", and to produce documents responsive to the subpoena on or before November 14, 2007. The remaining issues on the pending motions, including entitlement to sanctions, were reserved for consideration at the next hearing scheduled for November 19, 2007.[2]

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[2] Mr. Verner contests the designation on the order as a "consent order", reflecting that he did not agree to have the issue of sanctions reserved. Consent of all parties was not necessary for the reservation of the issue of sanctions. There is no need to resolve the issue of whether consent was afforded.

Prior to the entry of the order, on or about October 24, 2007, the parties conferred and Mr. Verner noted that November 14, 2007 would be an available date for him and Mr. Sciarra to appear. On October 24, the trustee's Florida counsel, Craig Pugatch, mailed a deposition notice to confirm the arrangements for November 14, 2007 in New Jersey. Another notice was sent by Mr. Pugatch to inform Mr. Verner that the deposition would be taken by videoconference. No change in date or time was noted. A subsequent follow-up letter was sent to Mr. Verner prior to November 14.

Yet again, Mr. Verner and Mr. Sciarra failed to appear. According to Mr. Verner, he was on trial in New York through November 14, 2007, and did not receive the notice until he was back in his office on November 15. He claims that he was aware that the order of the court required him and his client to appear on November 16, 2007 for deposition, and he was confident that he could accommodate the appearance. In the meantime, Florida counsel had traveled to New Jersey for the November 14 depositions.

Justin Sciarra's deposition was finally taken on December 7, 2007. Remaining to be resolved are the quest for fees and costs by the two law firms who performed services on behalf of James S. Feltman, Trustee, including Ravin Greenberg LLC, the New Jersey firm that initiated this New Jersey proceeding, and

Rice Pugatch Robinson & Schiller PA, the Florida firm representing James S. Feltman, Trustee, in the pending Florida litigation. As well, Granite State Insurance Company, through counsel, Zeichner Elman & Krause LLP, seeks the imposition of sanctions in the form of attorney's fees and costs against both Mr. Sciarra and Mr. Verner.

Through counsel, Mr. Sciarra offers several arguments why sanctions should not be imposed. First, Mr. Verner charges movant's counsel with "poor communications and ham-fisted conduct". He offers no explanation regarding his non-appearance and the non-appearance of his client either on March 13, 2007 or September 5, 2007.[3] As to the November 14 date, Mr. Verner acknowledges having a conversation with Mr. Pugatch in which he "opined that the 14th would be a good day for the deposition". That conversation apparently took place around October 24, 2007. Mr. Verner also acknowledges that the notice of deposition setting the date of November 14, 2007 was mailed to his office. He reflects that he was on trial on that date, that the trial had run unexpectedly through November 14, and that he had assumed that the deposition would occur on November 16. His assumption was based on the fact that the order mentioned November 16 in connection with Mr. Sciarra's deposition.

[3] As to the September 5, 2007 scheduled date, Mr. Verner asserts that notice of the hearing was served "on the eve of the Labor Day holiday". The record reflects that actually, the notice was served on August 9, 2007.

Mr. Verner's explanations are wholly unsatisfactory to defeat the entitlement of the moving parties for sanctions. The "poor communications" regarding depositions were exclusively on Mr. Verner's part. The record reflects that he received the notices for the March 13 and September 5 deposition dates, but did not communicate in any way to counsel that those dates were problematic and needed to be adjusted. As to the November 14 date, Mr. Verner agreed to that date. He is charged with the notice received by his office confirming that date.[4] The fact that the order entered November 5, 2007 required a deposition to be held "on or before November 16" does not excuse Mr. Verner's failure to communicate to movants that he and his client would not be available on November 14. The failure of Mr. Verner and Mr. Sciarra to appear on three occasions for scheduled depositions without any communication to movants is inexcusable and warrants the imposition of sanctions.

Rule 45(e) of the Federal Rules of Civil Procedure, made applicable to bankruptcy proceedings pursuant to Fed.R.Bankr.P. 9016, provides in relevant part that "[t]he issuing court may hold in contempt a person who, having served, fails without adequate excuse to obey the subpoena." See, e.g., International Brotherhood of Electrical Workers, Local 474 v. Eagle, Civ. No. 06-2151-M1/V,

[4] Mr. Verner's explanation that he is a sole practitioner and has only a receptionist/typist on staff has no bearing on his responsibility to attend to correspondence and scheduled depositions.

2007 WL 622504, *5 n.3 (W.D.Tenn. Feb. 22, 2007) ("In the case of a non-party, Rule 45(e) is the only authority provided to sanction for failure to comply with a subpoena."). "Absent an improperly issued subpoena or an 'adequate excuse' by the non-party, failure to comply with a subpoena made under Rule 45 may be deemed a contempt of the court from which the subpoena issued. Indeed, the judicial power to hold a non-party who has failed to obey a valid subpoena in contempt is the primary mechanism by which a court can enforce a subpoena." Beruashvili v. Hobart Corp., No. CV 2005-1646, 2006 WL 2289199, *1 (E.D.N.Y. Aug. 8, 2006) (citations omitted).

Mr. Sciarra contests the imposition of sanctions on the ground that this court did not have jurisdiction over the non-party witness, Mr. Sciarra, by virtue of a defective subpoena issued by Florida counsel in a Florida bankruptcy matter. Mr. Sciarra cites Fed.R.Civ.P. 45(a)(2), which provides as follows:

> (2) Issued from Which Court. A subpoena must issue as follows:
>
> (A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;
>
> (B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and
>
> (C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

According to Mr. Sciarra, the various subpoenas for depositions issued by Florida counsel should have been captioned with a District of New Jersey docket number, in a proceeding opened by Florida counsel, signed and served by the clerk of the District of New Jersey, or an officer of that court, namely, a licensed New Jersey attorney admitted to practice in this district and/or in the bankruptcy court. In this regard, Mr. Sciarra's objections go to both the form of the subpoena and counsel's ability to issue it. In both respects, Mr. Sciarra is wrong, and his objections are overruled.

Rule 45 sets out the requirements as to the form and content of a subpoena, the court from which it must issue, and the parties who have the authority to issue it. Pursuant to Rule 45(a)(1), a subpoena must:

> (i) state the court from which it issued;
>
> (ii) state the title of the action, the court in which it is pending, and its civil-action number;
>
> (iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and
>
> (iv) set out the text of Rule 45(c) and (d).

Fed.R.Civ.P. 45(a)(1). Contrary to Mr. Sciarra's objection, there is no additional requirement that a case first be opened in the jurisdiction from which the

subpoena will issue.[5] Instead, the rule provides only that the subpoena must identify the court from which the subpoena is issued and the court and the underlying matter that is pending. The subpoenas at issue here did this.

As noted above, Rule 45 directs that the subpoena must issue from the court in the district where the deposition is to be taken or the documents are to be inspected. Fed.R.Civ.P. 45(a)(2). The rule goes further to explain that the subpoena may be issued by the clerk of the court or by an attorney. Mr. Sciarra contends that if an attorney issues the subpoena, he must be an attorney that is licensed to practice in New Jersey. That is not an accurate reflection of the rule. Rule 45(a)(3) provides:

> (3) Issued by Whom. The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:
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> (A) a court in which the attorney is authorized to practice; or
>
> (B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.

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[5] It is noted that the clerk's office will open a Miscellaneous Proceeding case when they are asked to issue a subpoena for a case filed in another jurisdiction or where there is a motion to compel compliance with a subpoena. They do not open a Miscellaneous Proceeding for subpoenas issued by counsel, as was done in this case.

Fed.R.Civ.P. 45(a)(3). Mr. Sciarra contends that only subsection (3)(A) is applicable here. However, Rule 45(a)(3)(B) provides that an attorney may also sign and issue a subpoena as an officer of the court in the district where the deposition will be taken, provided the attorney is authorized to practice in the court where the underlying action is pending. In other words, the rule allows counsel for James S. Feltman, Trustee, to sign and issue a subpoena in the District of New Jersey for a deposition that takes place in New Jersey, because he is an attorney licensed to practice in Florida, where the underlying action is pending. There is no dispute that Mr. Rice and Mr. Pugatch are licensed attorneys of the Florida Bar. Therefore, there is no support for the suggestion that the subpoenas were improperly issued.

Mr. Sciarra will be held in contempt pursuant to Fed.R.Civ.P. 45(e) for his failure to comply with the above mentioned subpoenas. Sanctions in the form of attorney's fees are appropriate in this case. See First Indem. of America Ins. Co. v. Shinas, No. 03 Civ.6634, 2005 WL 3535069 (S.D.N.Y. Dec. 23, 2005); Bulkmatic Transport Co., Inc. v. Pappas, No. 99Civ.12070, 2001 WL 504839, *3 (S.D.N.Y. May 11, 2001). Alternatively, I note that sanctions are also appropriate pursuant to the court's inherent power. Chambers v. NASCO, Inc., 501 U.S. 32, 49, 111 S. Ct. 2123, 2135, 115 L.Ed.2d 27 (1991) ("the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct").

The parties have filed fee applications in connection with their motions in this matter.

On behalf of Mr. Sciarra, Mr. Verner contests the reasonableness of the various fees and costs requested. He requests an evidentiary hearing to determine the reasonableness of the fees and costs charged. This request is denied as unnecessary in this case. Where the fees and costs charged are clearly set forth, and a reasonableness determination is readily accomplished, there is no requirement that a evidentiary hearing be held to determine the appropriate and reasonable fees and costs to be awarded. See Angelico v. Lehigh Valley Hosp., Inc., 184 F.3d 268, 279 (3d Cir. 1999) (whether an evidentiary hearing is required is within the court's discretion); Blum v. Witco Chemical Corp., 829 F.2d 367, 377 (3d Cir. 1987) (evidentiary hearing is only required where court cannot fairly determine reasonableness of fee request). A review of each of the three applications for fees follows:

1. Rice Pugatch Robinson & Schiller, PA.

The application for fees and costs submitted by the law firm of Rice Pugatch Robinson & Schiller, PA is reasonable, with one exception. The firm seeks to charge Sciarra for the fees ($1,075.00) and costs ($290.00) associated with the

deposition scheduled for February 13, 2007. Several other depositions were scheduled and taken during the relevant time interval**.** The purported reason for the failure of Sciarra and Verner to appear was Verner's illness. Sciarra will not be charged for his failure to appear on that date.

Sciarra's challenge to those fees incurred in connection with the filing of the New Jersey miscellaneous proceeding and the entry of a pro hac vice order is rejected. Following several unsuccessful attempts to obtain the appearance of the non-party witness Sciarra, counsel had no recourse but to engage New Jersey counsel to file the miscellaneous proceeding. Florida counsel is entitled to be reimbursed for the time spent in attending to that necessary activity.

The fee award to Rice Pugatch Robinson & Schiller, PA on the motion for sanctions is $6,315.00 in fees and $2,432.78 in costs.

2. Ravin Greenberg LLC.

Florida counsel was required to retain local counsel in New Jersey to file the Miscellaneous Proceeding herein. The fees and costs sought by local counsel are reasonable, with the exception that travel expenses are customarily awarded at half the regular rate charged by counsel, to recognize that time was spent on the

matter, but that the activity involved was of a ministerial nature. Accordingly, an adjustment of $1,072.50 will be made. The award to Ravin Greenberg LLC is $3,162.50 in fees and $166.00 in costs.

3. Carlson and Lewittes, PA.

As to the application of the law firm of Carlson and Lewittes, Sciarra contends that no fees may be granted to the firm, because the firm did not issue any of the subpoenas for the depositions scheduled herein. Sciarrra is correct that all of the depositions were scheduled by the Rice Pugatch firm. The motion for sanctions against Justin Sciarra and his counsel was filed by Ronald Lewittes on behalf of Granite State Insurance Company on December 7, 2007, the date that Sciarra's deposition was actually taken. The author of the subpoena is, however, not determinative here.

This is not a case of a fee shifting award in favor of the prevailing party. Rather, it is a finding of contempt and an award of attorney's fees against Mr. Sciarra for failing to comply with the subpoenas. Mr. Sciarra's inexcusable behavior caused counsel for the defendant in the pending Florida action to travel from Florida to New Jersey with the understanding that a deposition would occur here. It was clearly understood from the outset that Mr. Lewittes would be

involved. The second page of the subpoenas clearly noticed Mr. Lewittes and the email correspondence between the various parties also copied or was directed to Mr. Lewittes. Extending the sanctions to include his counsel fees in this regard are appropriate.

Counsel's declaration asserts $834.68 in costs associated with the failed November 14, 2007 deposition, which may be granted. The following counsel fees may also be awarded against Mr. Sciarra and his counsel:

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|---|---|---|
| 1. | Fees for February 13, 2007 deposition - | None |
| 2. | Fees for March 13, 2007 depositions<br>5.8 hours @ $350 - | $2,030 |
| 3. | Fees for November 14, 2007 deposition<br>8.7 hours @ $350 -<br>3.8 hours @ $175 (travel time) - | $3,045<br>$1,330 |
| | TOTAL FEES | $6,405 |

Counsel for the trustee shall submit an order in conformance with this opinion.

Very truly yours,

JUDITH H. WIZMUR
CHIEF JUDGE
U.S. BANKRUPTCY COURT

JHW:tob