UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

In re: SCOTT A. BUSHEY, No. 7-15-10784 JA

Debtor.

ROGER CRONK, NANCY CRONK,
BRANDON ASHCRAFT, AMBER ASCHCRAFT,
and BLONDE & BITTER, LLC,

Plaintiffs,

v. Adversary No. 15-1066 J

SCOTT BUSHEY,

Defendant.

ORDER REGARDING USE OF DEPOSITION TRANSCRIPTS AT TRIAL

The objections to discharge in the above-captioned adversary proceeding and in adversary proceeding No. 15-1068 J will be tried together and are set for a three-day trial beginning on September 7, 2016. At a pre-trial conference held July 26, 2016, Plaintiffs Roger Cronk, Nancy Cronk, Brandon Ashcraft, Amber Ashcraft, and Blonde & Bitter, LLC (together "Creditors") indicated that they intend to introduce portions of certain deposition testimony for use at the trial. Defendant Scott Bushey did not attend the depositions in question, and has not obtained a copy of the deposition transcripts. The Court took under advisement the issue of whether Creditors must provide the complete transcripts for the depositions to Defendant as part of Creditors' exhibits to be exchanged before the trial.

DISCUSSION

Three rules are relevant to the Court's ruling on whether the Creditors should be required to provide Defendant with a copy of each deposition transcript where the Creditors will offer in evidence only part of the deposition testimony. The Court will address each of these rules.

A party may designate portions of a witness's deposition testimony for use at trial if the witness is unavailable. *See* Fed.R.Civ.P. 32(a)(4), made applicable to adversary proceedings by Fed.R.Bankr.P. 7032.[1] Creditors intend to designate portions of certain deposition testimony of witnesses who are more than 100 miles from the Bankruptcy Court for use at trial. Pursuant to Fed.R.Civ.P. 32(a)(6), made applicable to adversary proceedings by Fed.R.Bankr.P. 7032,

> [i]f a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts.
>
> Fed.R.Civ.P. 32(a)(6).

The purpose of Rule 32(a)(6) is to avoid the danger that the designated portion of a witness's testimony may be taken out of context or misinterpreted. *See* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2148 (2010) ("[R]eading only part [of the deposition testimony] creates risks that the statement of the witness will be misinterpreted by selective use of portions of the deposition testimony out of context or with qualifications of the testimony omitted. Rule 32(a)(6) . . . provides a means for avoiding this danger.") (citation omitted). *See also Rogers v. Roth*, 477 F.2d 1154, 1159 (10th Cir. 1973) ("Rule 32(a)(4), Fed.R.Civ.P. [now Rule 32(a)(6)], requires the use of other portions when only part is used to present a fair picture.") (citation omitted).[2] There is a very real possibility that a witness may give testimony in different parts of a deposition that qualifies or conflicts with other testimony given during the deposition.

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[1] A witness is "unavailable" if the Court finds "that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition." Fed.R.Civ.P. 32(a)(4)(B). Defendant does not contest that the witnesses for which Creditors intend to designate deposition testimony are "unavailable."

[2] *Westinghouse Elec Corp. v. Wray Equip. Corp.*, 286 F.2d 491, 494 (1st Cir. 1961) (discussing Rule 26(d), now Rule 32(a)(6), and stating that "[t]he rule provides a method for averting, so far as possible, any misimpressions from selective use of deposition testimony.").

"The party seeking to use the deposition has the burden of conforming with the rule." *Rogers,* 477 F.2d at 1159. Thus the *opposing* party may require the *offering* party to include as part of its designated testimony "enough of the surrounding questions and answers to put the statements into context." *Trepel v. Roadway Express, Inc.*, 194 F.3d 708, 719 (6th Cir. 1999).

Similarly, Rule 106 of the Federal Rules of Evidence provides:

> If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part — or any other writing or recorded statement — that in fairness ought to be considered at the same time.
>
> Fed.R.Evid. 106.

The Advisory Committee Notes to then proposed Rule 106 explain that "[t]he rule is an expression of the rule of completeness. *McCormick* §56. It is manifested as to depositions in Rule 32(a)(4) [now Rule 32(a)(6)] of the Federal Rules of Civil Procedure, of which the proposed rule is substantially a restatement." Fed.R.Evid. 106 advisory committee's note (citation in the original).

Fed.R.Civ.P. 30(f)(3), made applicable to adversary proceedings by Fed.R.Bankr.P. 7030, provides that a party must pay reasonable charges to obtain a copy of a deposition transcript.[3] A party may not avoid the obligation to pay the court reporter for a copy of a transcript by requesting a copy in discovery. *See* 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2117 (2010) ("discovery . . . does not exist to enable a litigant to circumvent the obligation to pay for a transcript of a deposition; a Rule 34 request for production of a copy of the transcript cannot be used as a vehicle to avoid

[3] Rule 30(f)(3) provides, in relevant part:

> When paid reasonable charges, the officer must furnish a copy of the transcript or recording to any party or the deponent.
> Fed.R.Civ.P. 30(f)(3).

purchasing it from the reporter pursuant to Rule 30(f)(3).") (citing *Schroer v. United States*, 250 F.R.D. 531 (D. Colo. 2008)).

Taking into account Fed.R.Civ.P. 30(f)(3), Fed.R.Civ.P. 32(a)(6) and Fed.R.Evid. 106, the Court will establish the following procedure for admitting portions of deposition testimony proffered by the Creditors.

WHEREFORE, IT IS HEREBY ORDERED:

1. At lease fifteen business days before trial, Creditors must designate the deposition testimony they wish to proffer by highlighting the portions of the depositing transcripts containing the designated testimony, and providing Defendant with a copy of the pages of the transcripts containing the designated testimony.

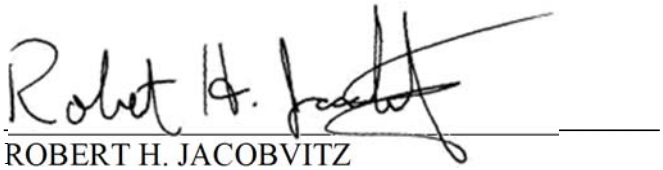
2. Counsel for Creditors will make the transcripts containing testimony Creditors will proffer in evidence available to Defendant's counsel for such counsel's review, during one morning or one afternoon at least ten business days before trial, at the offices of Creditor's counsel at a time mutually convenient for both counsel. Counsel for Defendant may not reproduce in any form any part of the transcript. Defendant by counsel may then designate during that morning or afternoon, by page and lines, any portions of the transcripts Defendant asserts Creditors must introduce in evidence to comply with Fed.R.Civ.P. 32(a)(6). *See, Westinghouse*, 286 F.2d at 494 ("The opposing party is entitled . . . to have the context of any statement, or any qualifications made as a part of the deponent's testimony also put into evidence."). Creditors must provide counsel for Defendant a copy of the pages containing testimony Defendant so designates. Counsel for Defendant must have a good faith basis for designating additional deposition testimony consistent with this order, and must not designate any testimony solely for the purpose of obtaining copies of portions of the deposition transcripts free of charge. *See In re Yasmin and Yaz (Drospirenone) Marketing, Sales Practices and PMF Products Liability Litigation*, 2011 WL 6740391, *19 (S.D.Ill. Dec. 22, 2011) (Rule 36(a)(6) "reads **only** so much counter designation . . . as is necessary to allow for a **fair** reading of the testimony.") (emphasis in original).

3. If Creditors assert that any testimony Defendant so designates is not required by Fed.R.Civ.P. 32(a)(6) in fairness to be considered with the testimony Creditors designated, Creditors may assert that objection in a motion in limine filed at least seven business days before trial and request a hearing on short notice.

4. Defendant may not designate any portions of the deposition testimony as trial evidence except as provided in paragraph 2 above, unless Defendant pays the court reporter for the transcript.

5. If Defendant wishes to obtain a complete copy of any deposition transcript for the purpose of designating other portions of the deposition testimony for use at trial, or for any other purpose, Defendant must pay a reasonable fee in accordance with Fed.R.Civ.P. 30(f)(3).

6. All pages of deposition transcripts containing designated testimony shall be marked as trial exhibits, with the pages from each transcript marked as separate exhibits.



ROBERT H. JACOBVITZ
United States Bankruptcy Judge

Date entered on docket: August 1, 2016

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