

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
05 CVS 2500

HARCO NATIONAL INSURANCE  
COMPANY,

Plaintiff

v.

GRANT THORNTON LLP,  
Defendant

**HARCO NATIONAL INSURANCE COMPANY'S  
REPLY BRIEF IN SUPPORT OF ITS MOTION TO  
COMPEL BDO SEIDMAN, LLP AND THE  
WITNESS SUSAN LISTER TO ANSWER  
CERTAIN DEPOSITION QUESTIONS AND  
PRODUCE CERTAIN DOCUMENTS.**

**AND**

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
05 CVS 6212

SIRIUS AMERICA INSURANCE  
COMPANY,

Plaintiff

v.

GRANT THORNTON LLP,  
Defendant

**HARCO NATIONAL INSURANCE COMPANY'S  
REPLY BRIEF IN SUPPORT OF ITS MOTION TO  
COMPEL BDO SEIDMAN, LLP AND THE  
WITNESS SUSAN LISTER TO ANSWER  
CERTAIN DEPOSITION QUESTIONS AND  
PRODUCE CERTAIN DOCUMENTS.**

**AND**

NORTH CAROLINA  
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
05 CVS 2299

HARCO NATIONAL INSURANCE  
COMPANY,

Plaintiff

v.

BDO SEIDMAN, LLP,  
Defendant

**HARCO NATIONAL INSURANCE COMPANY'S  
REPLY BRIEF IN SUPPORT OF ITS MOTION TO  
COMPEL BDO SEIDMAN, LLP AND THE  
WITNESS SUSAN LISTER TO ANSWER  
CERTAIN DEPOSITION QUESTIONS AND  
PRODUCE CERTAIN DOCUMENTS.**

Plaintiff Harco National Insurance Company (“Harco” or “Plaintiff”) files this reply brief in support of its motion to compel Defendant BDO Seidman, LLP (“BDO”) and the witness Susan Lister to answer certain deposition questions and produce certain documents and in response to BDO’s memorandum of law opposing Plaintiff’s motion (“BDO’s Mem.”), pursuant to North Carolina Rules of Civil Procedure 26, 30, 33 and 37 and the General Rules of Practice and Procedure for the North Carolina Business Court, as follows:

**Argument**

BDO acknowledged that Susan Lister verified the discovery responses on behalf of BDO. (BDO’s Mem. p.3). BDO further acknowledges that Harco is entitled to know the factual basis on which Ms. Lister had knowledge to verify the responses. (BDO’s Mem. p.3-4, 9-10). However, BDO claims that Ms. Lister “answered *all* questions about her factual basis for verifying the discovery responses” including, to the extent she relied upon them, the contents of her meeting with Debra Nager and the work papers she reviewed. (BDO Mem. pp. 3, 9-10) (emphasis added). A review of the interrogatories and Ms. Lister’s deposition transcript proves otherwise.

**I. Ms. Lister Should Be Compelled to Answer Certain Deposition Questions.**

Through interrogatories, Harco requested information regarding BDO’s audit of CBC and its parent company, CFG (“the Audit”). BDO responded to various interrogatories that BDO acted in accordance with its policy and applicable auditing standards in the Audit, which responses Ms. Lister verified based on her personal knowledge. (Hulett Aff., filed with Pl.’s Mot. to Compel, Ex. B and C). Ms. Lister did not have personal knowledge of the Audit and verified the interrogatories based solely through her review of “some” work papers and other documents and her discussions with Ms. Nager at the Meeting. (Hulett Aff., Ex. A , pp. 37-38 ll.

10-12, p. 83 ll. 10-25, pp. 144-45 ll. 5-24, p. 147 ll. 3-15, pp. 182-83 ll. 24-9, pp. 191-92 ll. 24-13). Without both of these pieces of information, Ms. Lister would not have a factual basis to verify that BDO acted in accordance with generally accepted accounting practices and principles as BDO stated in its discovery responses. (*See* Interrogs. 5, 8, 9, 10 as quoted *infra*). Harco sought information regarding Ms. Lister’s factual basis of the interrogatories at the deposition. For example, Harco sought the factual basis of Interrogatory 9:

**9. Describe in detail the audit procedures performed by you during the Audit to ensure the proper recording and valuation of CFG’s goodwill, as well as any work performed to determine that the goodwill recorded by CFG was not impaired.**

ANSWER: With respect to this Interrogatory, BDO responds that the procedures utilized by BDO in performing the audit were in accordance with applicable auditing standards. BDO further responds pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure that additional information responsive to this Interrogatory may be derived or ascertained from the Audit work papers to be produced in discovery in this matter, and the burden of deriving or ascertaining the answer is substantially the same for the Plaintiff as for BDO.

(Hulett Aff., Ex. B and C). At the deposition, BDO refused to let Ms. Lister respond to a question regarding Ms. Lister’s conversations with Ms. Nager regarding goodwill:

11 Q. Did you recall discussing with  
12 Ms. Nager what work was done to establish any  
13 good -- to establish the value of any goodwill  
14 that was on the books and records of CBC?

15 MS. DUBIS: Same instruction

(Hulett Aff., Ex. A , p. 44 ll. 11-15). The “same instruction” from counsel was “I am going to instruct the witness not to answer in that that would reveal work product that was done at the direction of counsel.” (Hulett Aff., Ex. A , pp. 43-44 ll. 18-21). Yet, at the deposition Ms. Lister confirmed that her sole basis for verifying Interrogatory 9 was her conversation with Ms. Nager.

(Hulett Aff., Ex. A, pp. 145-46 ll. 9-3). Harco received no answer for this question due to the objection despite the fact it was directly related to Ms. Lister's factual basis for her verification of Interrogatory 9.

Harco also sought information from Ms. Lister related to Interrogatory 10:

**10. Describe the procedures BDO used during the Audit to determine that fiduciary funds were being properly segregated from other funds.**

ANSWER: With respect to this Interrogatory, BDO responds that the procedures utilized by BDO in performing the audit were in accordance with applicable auditing standards. BDO further responds pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure that additional information responsive to this Interrogatory may be derived or ascertained from the Audit work papers to be produced in discovery in this matter, and the burden of deriving or ascertaining the answer is substantially the same for the Plaintiff as for BDO.

(Hulett Aff., Ex. B and C). At the deposition, the following was asked in relation to fiduciary funds:

6 Q. Do you recall whether or not you  
7 discussed with Ms. Nager what work was done to  
8 determine whether or not any of the accounts of  
9 CBC were fiduciary accounts?

10 MS. DUBIS: Same instruction.

(Hulett Aff., Ex. A , pp. 44 ll. 6-10) Again, the "same instruction" as quoted *supra* meant that Harco failed to receive an answer to this question regarding Ms. Lister's personal knowledge and verification of the interrogatories. (Hulett Aff., Ex. A, pp. 43-44 ll. 18-21). Other interrogatories for which Harco attempted to determine Ms. Lister's factual basis for her personal knowledge that BDO acted in accordance with applicable auditing standards included the following:

**5. Describe the efforts taken by BDO to assure that the firm would be independent with respect to CFG and the result of those efforts.**

ANSWER: BDO objects to this Interrogatory on the grounds that it is uncertain as to what the Plaintiff means by “independent.” Subject to and without waiving the foregoing objection, BDO responds based on its understanding of the meaning of independent with respect to performing an audit that *BDO acted in accordance with its policy and with applicable auditing standards* in determining BDO’s independence with respect to CFG. BDO further responds pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure that additional information responsive to this Interrogatory may be derived or ascertained from the Audit work papers to be produced in discovery in this matter, and the burden of deriving or ascertaining the answer is substantially the same for the Plaintiff as for BDO.

SUPPLEMENTAL ANSWER: In further response to this Interrogatory, BDO states *that it complied with its policy and with applicable auditing standards* regarding the audit of non-public companies to confirm that BDO partners, employees, and alliance firm members were free of financial and personal ties to CFG, including, but not limited to: completion and approval of BDO’s Acceptance of New Clients form (BDO 12-02-002091-2104); completion of BDO’s Audit Engaging Planning Supplement – Independence and other Matters (BDO 12-02-000478-480); and Receipt of BDO’s Alliance Firm Independence Questionnaire and related documents from Beard Miller Company LLP (BDO 12-02-000500-540).

**8. Describe your overall assessment of the internal controls of CFG and list each specific internal control identified, state whether BDO chose to rely or not to rely on each identified control, and describe in detail the effect this assessment had on BDO’s audit methodology and level and nature of testing.**

ANSWER: With respect to this Interrogatory, BDO responds that *BDO’s audit methodology including the nature, timing and extent of testing was determined in accordance with applicable auditing standards* and established materiality limits as well as examination of the processes applied in the prior year’s audit. BDO further responds pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure that additional information responsive to this Interrogatory may be derived or ascertained from the Audit work appears to be produced in discovery in this matter, and the burden of deriving or ascertaining the answer is substantially the same for the Plaintiff as for BDO.

SUPPLEMENTAL ANSWER: BDO reasserts that, pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure, the overall assessment of the internal controls of CFG and BDO’s audit methodology, including the nature, timing and extent of testing, may be readily derived and ascertained from the Audit work appears previously produced by BDO in this matter. In further response to this Interrogatory, BDO states that it did not rely on CFG’s internal controls, but

performed and relied upon substantive audit procedures to support its audit opinion.

**15. Describe any communications with the auditor or audit firm that immediately preceded BDO, if any, or any communications with any accounting firm that immediately preceded BDO with regard to the CFG engagement by providing the date of the first contact, the individual who made the first contact, the identity of the individual at the prior firm and the name of the prior firm that was so identified and provide in detail each subsequent communication with that firm with regard to the Audit.**

ANSWER: With respect to this Interrogatory, BDO responds pursuant to Rule 33(c) of the North Carolina Rules of Civil Procedure that information responsive to this Interrogatory may be derived or ascertained from the Audit work papers to be produced in discovery in this matter, and the burden of deriving or ascertaining the answer is substantially the same for the Plaintiff as for BDO.

(Hulett Aff., Ex. B and C) Yet, BDO refused to allow the witness to respond to questions inquiring as to her personal knowledge of these matters. In regards to the work papers Ms. Lister reviewed to determine that BDO acted in accordance with applicable auditing standards, Harco asked Ms. Lister the following:

15 Q. Okay. Do you recall what -- with  
16 regard to the work papers, do you recall what  
17 areas you discussed with Ms. Nager?  
18 MS. DUBIS: I am going to instruct  
19 the witness not to answer in that that  
20 would reveal work product that was done  
21 at the direction of counsel.

(Hulett Aff., Ex. A , pp. 43 ll. 15-21).

## **II. Ms. Lister and BDO Should Be Compelled to Produce Certain Documents.**

Ms. Lister acknowledged she reviewed some work papers and took notes during her review of the work paper and during the meeting. (Hulett Aff., Ex. A, p. 52 ll.11-21, pp. 178-79

ll. 19-9). However, Ms. Lister could not recall what work papers she had reviewed and discussed with Ms. Nager. (Hulett Aff., Ex. A, p. 143 ll.12-20, pp. 146-48 ll. 12-15, pp. 150-51 ll. 19-3, pp. 153-54 ll. 15-20, p. 177 ll. 7-9, p. 180 ll. 14-22, pp. 218-19 ll. 9-3). When asked whether she reviewed a certain work paper, Ms. Lister's frequent response was "I don't recall." (Hulett Aff., Ex. A, p. 143 ll.12-20, pp. 146-48 ll. 12-15, pp. 150-51 ll. 19-3, pp. 153-54 ll. 15-20, p. 177 ll. 7-9, p. 180 ll. 14-22, pp. 218-19 ll. 9-3). For instance, the following is a typical example of Ms. Lister's failure to recollect what she had reviewed:

19 Q. And having read this page, do you  
20 have any recollection of ever having looked at  
21 it before?

22 A. I don't recall.

23 Q. Do you have any recollection of  
24 having any discussions with Ms. Nager about the  
25 manner in which they tested for impairment of

1  
2 the goodwill?

3 A. No, I don't recall.

(Hulett Aff., Ex. A , pp. 150-51 ll. 19-3). These work papers are what formed Ms. Lister's personal knowledge to enable her to verify the interrogatories. (Hulett Aff., Ex. A, p. 48 ll. 10-20, p. 138 ll. 16-25, pp. 182-83 ll. 24-9, pp. 191-92 ll. 19-7). Harco is entitled to know what Ms. Lister reviewed and to review all of Ms. Lister's notes. However, BDO refuses to identify the documents Ms. Lister reviewed which formed the sole basis for her verification and Ms. Lister

failed to recall what she reviewed. (Hulett Aff., Ex. A, p. 48 ll. 10-20, p. 83 ll. 21-25, p. 138 ll. 16-25, pp. 182-83 ll. 24-9, pp. 191-92 ll. 19-7).

BDO contends in its brief that Harco has the full set of work papers and Harco “has the same opportunity for analysis [of the work papers] as did Mr. [Scott] Univer or Ms. Lister.” (BDO Mem. p. 7). However, Ms. Lister did not receive the full set of work papers from which she conducted her analysis. (Hulett Aff., Ex. A, pp. 32-33 ll. 23-3, p. 115 ll. 6-12, p. 147 ll. 3-15, p. 203 ll. 5-7). Likewise, she did not review all of the papers given to her. (*Id.*). Ms. Lister only reviewed a few select papers in order to give her the knowledge she needed to verify the interrogatories. (*Id.*). As Ms. Lister analyzed only select papers, Harco is entitled to know which of the work papers formed the factual basis for her knowledge to verify the responses.

Ms. Lister acknowledged that she took notes of her review of the documents and possibly took notes of her meeting with Ms. Nager. (Hulett Aff., Ex. A, p. 52 ll. 11-21, pp. 178-79 ll. 19-9). Yet, BDO refuses to provide Ms. Lister’s notes. As Ms. Lister cannot recall the details of the meeting with Ms. Nager and what documents she reviewed which formed the basis for her verification, then Harco has a substantial need for Ms. Lister’s notes and cannot obtain this information from any other source without undue hardship as Ms. Lister is the only person who verified BDO’s supplemental responses to interrogatories. N.C. R. Civ. P. 26(b)(3); *see Xerox Corp. v. International Business Machines Corp.*, 64 F.R.D. 367 (S.D.N.Y. 1974) (ordering documentation of in-house attorney’s interview notes to be produced when 23 of the witnesses could not recall information when deposed); *Bird v. Penn Central Co.*, 61 F.R.D. 43, 47 (E.D. Pa. 1973) (finding that Rule 26(b)(3) protects work product, “[h]owever, exceptions have been made where such information is directly at issue, and the need for its production is compelling”). Here, the need is compelling as Harco is entitled to Ms. Lister’s factual basis for her verification,



yet, she cannot recall the details forming her personal knowledge. Thus, Ms. Lister's knowledge is at issue and her contemporaneously made notes of her review of the work papers and the meeting should be produced.

Harco does not seek BDO's counsel's mental impressions. Rather, Harco seeks to know the factual basis behind the verification of the interrogatories. BDO will not let Harco know this factual basis. BDO should be compelled to have Ms. Lister answer certain deposition questions and produce the related documents related to the factual basis for her verification. Harco does not have to show substantial need or undue hardship because the information Harco seeks is either not protected by a privilege or has been waived through Ms. Lister's verification.

**Conclusion**

WHEREFORE, Plaintiff Harco National Insurance Company respectfully requests that this court grant Harco's motion to compel BDO Seidman, LLP and the witness Susan Lister to answer certain deposition questions in Raleigh, NC, or in New York, NY at BDO's expense, and produce certain documents within a date certain of this court's order. Further, Harco requests any and all such other and further relief, both at law and in equity, to which it may show itself to be justly entitled.

This 3rd day of June 2008.

RAGSDALE LIGGETT PLLC

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**Certificate of Compliance**

This brief complies with Rule 15.8 of the General Rules of Practice and Procedure for the North Carolina Business Court as reported by the word-processing software.

By: \_\_\_\_\_/s/\_\_\_\_\_  
Mary Hulett  
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Reply Brief in Support of Harco National Insurance Company's Motion to Compel BDO Seidman, LLP and the Witness Susan Lister to Answer Certain Deposition Questions and Produce Certain Documents** was served on all counsel of record addressed as follows via electronic service.

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This the 3rd day of June 2008.

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