

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 06-21748-CIV-MARTINEZ-BANDSTRA

MARK J. GAINOR and ELYSE GAINOR,

Plaintiffs,

vs.

SIDLEY AUSTIN LLP, a Delaware
limited liability partnership, f/k/a/ BROWN
& WOOD, R.J. RUBLE, an individual,
ARTHUR ANDERSEN, LLP, an Illinois
limited liability partnership, MICHAEL S.
MARX, an individual, P. ANTHONY
NISSLEY, an individual, MERRILL
LYNCH & CO., INC., a Delaware
corporation, and MARK C.
KLOPFENSTEIN, an individual,

Defendants.

**DEFENDANT SIDLEY AUSTIN LLP'S SEPARATE STATEMENT OF
UNDISPUTED MATERIAL FACTS IN SUPPORT OF ITS
MOTION FOR PARTIAL SUMMARY JUDGMENT ON DAMAGES**

Pursuant to Local Rule 7.5, Defendant Sidley Austin LLP (“Brown & Wood”) submits this separate statement of undisputed material facts, together with references to supporting evidence in support of Brown & Wood’s Motion for Partial Summary Judgment on Damages.

<u>Undisputed Facts¹</u>	<u>Supporting Evidence</u>
1. In January 1999, Gainor completed the sale of assets of his company, Gainor Medical Management, LLC (“GMM”), to Matria, Inc. for over \$100 million in cash and stock.	Exh. A ² at ¶ 29 (Amended Complaint)
2. Gainor and his wife personally owed roughly \$17 million in taxes from the sale of GMM assets.	Exh. A at ¶ 32, 49 (Amended Complaint); Exh. B at 90:10-15; 115:6-14; 132:24-25; 322:23-24; 530:19-21 (Gainor Dep.)
3. Gainor asked Arthur Andersen, his longtime financial advisors, if a strategy existed that could help him reduce his taxes.	Exh. B at 81:12-82:2 (Gainor Dep.)
4. Andersen told Gainor that by engaging in two transactions (the “§ 301 Transactions”), he could potentially shelter \$17 million in taxes.	Exh. B at 90:10-91:12; 116:19-24; 184:24-185:15 (Gainor Dep.)
5. Gainor decided to execute the § 301 Transactions.	Exh. A at ¶¶ 35-41 (Amended Complaint)
6. The § 301 Transactions involved the use of corporate entities -- Bryan Medical, Inc. (“Bryan Medical”) and Lucor Special Investments, Inc. (“Lucor”). Bryan Medical and Lucor were incorporated in Georgia.	Exh. E at A+P 0576-0579 (Statement to IRS); Exh. Z at GAINOR 1416 (Bryan Certif. of Ex.); Exh. AA at GAINOR 0425 (Lucor Certif. of Ex.)
7. MJG Partners, a limited partnership of which Mark Gainor served as a limited partner, was also formed in	Exh. BB (MJG Certif. of Ex.); Exh. FF (MJG Ventures Certif. of Ex.); Exh. F at Rachlin 8053 (MJG Partners Ga. Tax Return); Exh. H

¹ Brown & Wood accepts these facts as undisputed for purposes of this motion only.

² All Exhibit citations refer to the Exhibits attached to the Declaration of Gabriel P. Sanchez filed concurrently herewith.

<u>Undisputed Facts¹</u>	<u>Supporting Evidence</u>
Georgia. The general partner, MJG Ventures, was a Georgia limited liability company owned by Mark and Elyse Gainor.	at GAINO 004729-004730 (Member's Certificate); Exh. B at 142:15-20; 144:23-25 (Gainor Dep.)
8. Lucor is the successor to Gainor Medical U.S.A., Inc. ("GMUSA").	Exh. G (Certif. of Merger); Exh. E at A+P 0576 (Statement to IRS)
9. Bryan Medical, not Gainor, entered into a written contract with Arthur Andersen on September 9, 1999.	Exh. I at GAINOR1966-1968 (Bryan AA Contract); Exh. B at 172:12-25 (Gainor Dep.)
10. Lucor (as GMUSA), not Gainor, entered into a written contract with Arthur Andersen on September 9, 1999.	Exh. J at GAINO 000006-8 (Lucor AA Contract); Exh. B at 168:15-169:8 (Gainor Dep.)
11. Bryan Medical, not Gainor, entered into a Loan and Collateral Account Agreement with Merrill Lynch on or about September 28, 1999 for a credit facility of up to \$48 million.	Exh. B at 565:7-566:7, 567:10-24 (Gainor Dep.); Exh. K at GAINO 004104-004132 (Bryan Loan); Exh. E at A+P 0578 (Statement to IRS); Exh. U at GAINO 000586 (Bryan Security Interest).
12. Bryan Medical borrowed \$38.1 million and secured its loan with Merrill Lynch by granting a security interest in over \$40 million in United States' Treasury bills it purchased with loan proceeds.	Exh. E at A+P 0578 (Statement to IRS); Exh. U at GAINO 000586 (Bryan Security Interest).
13. Lucor (as GMUSA), not Gainor, entered into a Loan and Collateral Account Agreement with Merrill Lynch on October 18, 1999 for a credit facility of up to \$33 million.	Exh. B at 565:7-566:7, 567:10-24 (Gainor Dep.); Exh. L at K&S 559-587 (Lucor Loan); Exh. E at A+P 0576 (Statement to IRS); Exh. V at GAINO 001185-001186 (Lucor Security Interest).
14. Lucor borrowed \$28.6 million and secured its loan with Merrill Lynch by granting a security interest in over \$30 million in United States' Treasury bills it purchased with loan proceeds, and in GMM LLC membership units held by Lucor.	Exh. E at A+P 0576 (Statement to IRS); Exh. V at GAINO 001185-001186 (Lucor Security Interest); Exh. W at GAINO 002675 (LLC Security Agreement).

<u>Undisputed Facts¹</u>	<u>Supporting Evidence</u>
15. MJG Partners was the sole owner of Bryan Medical and Lucor on August 3, 1999 and December 23, 1999, respectively, after Gainor contributed 100% ownership in each company to the partnership.	Exh. X at GAINO 004057-004060 (Bryan Partnership Contribution Agreement); Exh. Y at GAINO 001336-001340 (Lucor Partnership Contribution Agreement); Exh. E at A+P 0577 (Statement to IRS)
16. Once Bryan Medical and Lucor had obtained the Merrill Lynch loans and bought the Treasury bills, MJG Partners sold both corporations.	Exh. E at A+P 0576-0579 (Statement to IRS)
17. Defendant Mark Klopfenstein, through his company Palladium and its subsidiaries, Bryan Holdings and LSI Holdings, was the buyer of Bryan Medical and Lucor, respectively. Bryan Holdings and LSI Holdings were both organized in Georgia.	Exh. A at ¶¶ 39, 82 (Amended Complaint); Exh. E at A+P 0577-0578 (Statement to IRS); Exh. CC (Bryan Holdings Certif. of Ex.); Exh. DD (LSI Holdings Certif. of Ex.).
18. On December 14, 1999, MJG Partners entered into a Stock Purchase Agreement with Bryan Holdings for the sale of Bryan Medical for \$297,115. The closing took place at King & Spaulding's offices in Atlanta, Georgia.	Exh. A at ¶ 39 (Amended Complaint); Exh. M at Rachlin 74 (Bryan Stock Purchase); Exh. E at A+P 0578 (Statement to IRS)
19. Bryan Holdings made a purchase price adjustment payment of \$470,050 on January 18, 2000. The total purchase price for Bryan Medical was \$767,165.	Exh. E at A+P 0579 (Statement to IRS)
20. On December 23, 1999, MJG Partners entered into a Stock Purchase Agreement with LSI Holdings for the sale of Lucor for \$125,755. The closing took place at King & Spaulding's offices in Atlanta, Georgia.	Exh. A at ¶ 39 (Amended Complaint); Exh. N at GAINO 003269, 003272 (Lucor Stock Purchase); Exh. E at A+P 0577 (Statement to IRS)
21. LSI Holdings made a purchase price adjustment payment of \$862,004 on	Exh. E at A+P 0577 (Statement to IRS)

<u>Undisputed Facts¹</u>	<u>Supporting Evidence</u>
January 18, 2000. The total purchase price for Lucor was \$987,759.	
22. On January 6, 2000, Bryan Medical paid \$392,000 in fees to Andersen out of funds drawn from the Bryan Medical brokerage account with Merrill Lynch. Lucor paid Andersen \$300,000 from its Merrill Lynch brokerage account.	Exh. O at Rachlin 7, 9 (Bryan Payments to Andersen); Exh. P at A+P 0459-0467 (Lucor Payments to Andersen); Exh. R at Rachlin 3283-3284 (Lucor Account Statements); Exh. E at A+P 0580, 0582 (Statement to IRS).
23. On January 25, 2000, Bryan Medical and Lucor each paid Brown & Wood \$200,000 (a total of \$400,000).	Exh. Q at A+P 0451, 458; Rachlin 6, 5709 (Brown & Wood Payments); Exh. R at Rachlin 3286 (Lucor Account Statements); Exh. E at A+P 0580, 0582 (Statement to IRS).
24. Merrill Lynch charged a loan facility fee and interest in conjunction with its loans to Bryan Medical and Lucor. Altogether, Bryan Medical paid \$605,598 and Lucor paid \$432,848 in fees and interest to Merrill Lynch.	Exh. K at GAINO 004107-004110(Bryan Loan); Exh. L at K&S 562-565 (Lucor Loan); Exh. D at 1 (Damages Summary); Exh. T at GAINOR 1811(Merrill Cost Breakdown).
25. On December 17, 1999, three days after MJG Partners sold Bryan Medical, Bryan repaid the \$38,100,000 principal amount plus interest to Merrill Lynch on the Bryan Loan.	Exh. E at A+P 0579 (Statement to IRS); Exh. A at ¶ 82 (Amended Complaint).
26. On December 29, 1999, six days after MJG Partners sold Lucor, Lucor repaid the \$28,600,000 principal amount plus interest to Merrill Lynch on the GMUSA Loan.	Exh. E at A+P 0577 (Statement to IRS); Exh. A at ¶ 82 (Amended Complaint)
27. Bryan Medical also paid a \$10,000 flat fee to Merrill Lynch's attorneys, Loeb & Loeb. Lucor paid a \$6,000 flat fee to Loeb & Loeb.	Exh. D at 1 (Damages Summary); Exh. R at Rachlin 3283 (Lucor Account Statements); Exh. T at 2 (Merrill Cost Breakdown)
28. MJG Partners declared on its 1999 federal income tax returns a capital loss of \$39,972,278 from the sale of the shares of Bryan Medical, and a	Exh. A at ¶ 39 (Amended Complaint); Exh. E at A+P 0577, 0579 (Statement to IRS).

<u>Undisputed Facts</u>	<u>Supporting Evidence</u>
capital loss of \$30,596,521 from the sale of the shares of Lucor. MJG Partners' losses passed through to Plaintiffs' 1999 personal federal tax return.	
29. The IRS audited Plaintiffs' 1999 federal tax returns.	Exh. A at ¶ 49; Exh. E at A+P 0579 (Statement to IRS).
30. On January 20, 2006, Plaintiffs settled with the IRS and paid \$17 million in back taxes and interest. Plaintiffs paid no penalties.	Exh. A at ¶ 49 (Amended Complaint).
31. In their statement to the IRS, Plaintiffs declared under penalty of perjury that Bryan Medical and Lucor paid Arthur Andersen's, Brown & Wood's, and Merrill Lynch's fees and interest.	Exh. E at A+P 0573, 0577, 0579, 0580, 0582 (Statement to IRS)

DATED: July 24th, 2007

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy was sent via the Southern District of Florida's CM/ECF System and/or electronic mail to all counsel of record and by U.S. Mail to the pro se parties identified on the attached Service List this 26th day of July, 2007.

Respectfully submitted,

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