UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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 SIDLEY AUSTIN BROWN & WOOD, 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 OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL FULL AND COMPLETE RESPONSES TO DISCOVERY

I. INTRODUCTION

Counsel have resolved all but one of the disputes listed in Plaintiffs' Motion to Compel Full and Complete Responses to Discovery from Defendant Sidley Austin LLP ("Sidley"): only Plaintiffs' requests for admission remain at issue. As set forth in detail below, because Plaintiffs' requests require Sidley to admit that certain regulations or rules apply generally to the facts of this case, they impermissibly call for legal conclusions, and Sidley's objections should be sustained.

II. ARGUMENT

A. Plaintiff's Requests Impermissibly Seek Admissions That Certain Regulations Or Guidelines Apply To This Case.

Plaintiffs seek admissions that Treasury Circular 230 and ABA Formal Opinion 346 apply to the unspecified "work performed by Sidley Austin for Mark Gainor in 1999." Plaintiffs concede that "requests relating to pure questions of law are improper" (Plaintiffs' Memorandum ("Mem.") at 2 (citing *Abbott v. United States,* 177 F.R.D. 92, 93 (N.D.N.Y. 1997)), but argue that the Court should overrule Sidley's objections to their requests because Plaintiffs require only the "application of law to the particular facts of the case." (Mem. at 3.)

Neither the Eleventh Circuit nor the district courts of this circuit have specifically addressed whether requesting an admission that a given law or regulation applies in a case violates Federal Rule 36. Nevertheless, nearly every court to have considered the question holds such requests call for a legal conclusion and are therefore improper.

In *Disability Rights Council v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 1 (D.D.C. 2006), the plaintiffs, disabled individuals and a rights organization, filed suit alleging that the defendant had failed to provide adequate paratransit services in violation of the Americans with Disabilities Act (the "ADA") and other statutes. *Id.* at 1.

The defendant served requests for admission, seeking, among other things, admissions that "there is no provision of the ADA . . . or the Federal Transit Administration . . . regulations and guidance applicable to various claims stated in the complaint." *Id.* The plaintiffs objected to the requests as calling for a legal conclusion.

The court sustained the plaintiffs' objections, holding:

> In 1970, Rule 36 was amended to allow for requests applying law to fact. Fed.R.Civ.P. 36 advisory committee note (1970). It is still true, however, that one party cannot demand that the other party admit the truth of a legal conclusion. For example, it would be inappropriate for a party to demand that the opposing party ratify legal conclusions that the requesting party has simply attached to operative facts. *Lakehead Pipe Line [Co. v. Amer. Home Assur. Co.], 177 F.R.D. [455, 458 (D. Minn. 1997)]* at 458. *See also Reichenbach v. City of Columbus*, 2006 WL 143552 at *2

> (S.D.Ohio 2006) (defendants properly objected to a request for admission asking them to admit that the curb ramp at issue was not compliant with the federal accessibility design standards on the ground that it sought a purely legal conclusion).

Id. at 3 (citations omitted).

Likewise, in *English v. Cowell*, 117 F.R.D. 132 (C.D. Ill. 1986), the plaintiff accused a union and its officers of violating various federal laws. The plaintiff served requests for admission that attempted "to elicit from the Defendants an admission that the Defendants are subject to the [statutes under which the plaintiff brought the action]." *Id.* at 135. The court held that "[t]he request calls for a legal conclusion and therefore is beyond the scope of a request for admissions." *Id.*

In *Ransom v. United States*, 8 Cl. Ct. 646 (1985), on which Plaintiffs themselves rely (Mem. at 2), the court upheld the defendant's objection to a request for admission reading: "'Admit that jurisdiction of the within action is conferred on the United States Claims Court by Title 28, United States Code Section 1491 and Title 41, United States Code, Section 609.'" *Ransom*, 8 Cl. Ct. at 648. The court in *Ransom* observed that "[a] request may properly address jurisdictional facts, but this one seeks a pure conclusion of law *not directly related to specified facts*." *Id.* (emphasis added).

The request for admission at issue in *Ransom* asked the defendant to admit that under the unspecified facts of the case the jurisdiction-conferring statutes listed in the request applied; the request failed to set forth a specific set of facts and then request an admission concerning the legal effect of that specifically delineated set of facts. Similarly, in the case at bar, Plaintiffs ask Sidley to admit that certain regulations and ABA opinions apply to its unspecified work for Mr. Gainor; indeed, because Plaintiffs allege conspiracy and argue that the statements and conduct of every other Defendant should be deemed Sidley's statements and conduct, Plaintiffs are really asking whether certain regulations and bar opinions apply to almost every fact of this case. Their requests are essentially indistinguishable from those rejected in *Disability Rights Council*, *English*, and *Ransom*.

The courts' consistent refusal to allow requests to admit of this type may also reflect concern that such requests do not lend themselves to "reasonable inquiry," as required under Rule 36(a). In order to answer Plaintiffs' requests, Sidley would need either to assign one of its own lawyers to research Treasury Circular 230 and ABA Formal Opinion 346, or assign its outside counsel to do so. Moreover, since discovery remains open and Sidley no longer has access to the former partner who performed work for Mr. Gainor, even ascertaining the scope of the unspecified "work" at issue presents difficulties. In other words, Plaintiffs' requests require far more inquiry than, for example, the request actually approved in *United States v. Ransom*: "Admit that by execution and delivery of the bid bond referred to in Request No. 33 above, there existed a privity of contract between plaintiffs, and each of them, and the Air Force." 8 Cl. Ct. at 648. Because the plaintiff in *Ransom* formulated a highly specific request, the legal and factual inquiry necessary to answer becomes more manageable – more subject to "reasonable inquiry" – than a request to admit that a certain complex set of regulations applies to an unspecified set of facts

Finally, although no case we have found supports the propriety of the requests for admission Plaintiffs have propounded here, review of the extant authority does show that district courts apply varying degrees of scrutiny to requests that a party admit legal conclusions under Rule 36. On the one hand, the cases cited in Plaintiffs' Memorandum, particularly *Audiotext Comm. Network, Inc. v. U.S. Telecom, Inc.*, No. 94-2395-GTV, 1995 WL 625744 (D. Kan. Oct. 5, 1995), in which the court actually permitted the defendant to serve *89 requests for admission* that simply mirrored every allegation in the complaint, take an expansive view of a party's rights to seek admissions of legal conclusions. On the other hand, cases such as *Disability Rights Council*, 234 F.R.D. at 1, and *English v. Cowell*, 117 F.R.D. at 132, restrict a party's right to seek admissions of legal conclusions. These courts generally hold that a party may not demand that its opponent ratify legal conclusions which the requesting party has simply attached to the general, operative facts of the case. *Disability Rights Council*, 234 F.R.D. at 3 (citing cases).

The district courts of the Eleventh Circuit are particularly strict in this regard, which may explain the absence of supporting Eleventh Circuit authority in Plaintiffs' Memorandum. For example, in *Manfred v. Everett*, No. 1:04-CV-3223-TWT, 2006 WL 1627062 (N.D. Ga. June 9, 2006), the plaintiff, an inmate in a Georgia county jail, alleged the defendant, a correctional officer, had repeatedly assaulted him. *Id.* at *1. The defendant denied the allegation and served a number of requests for admission on the plaintiff, which the plaintiff failed to answer. Thereafter, the district court deemed admitted a number of key facts, including that "after the Plaintiff raised his arms in a threatening manner, the Defendant attempted to restrain him;[] in the process, both men slipped and fell on the wet floor in front of the shower area; [and] the Defendant assisted the Plaintiff to his feet and then escorted him to his cell[.]" *Id.* at *2.

The series of requests for admission to which the plaintiff failed to respond also included a request that the plaintiff admit that "the Defendant used reasonable force to restrain him," without specifying the facts on which the plaintiff based its legal conclusion. *Id.* at *2, n.2. This time, however, the trial court refused to deem the matter admitted, holding that "their request calls for a legal conclusion which is impermissible." *Id.* In other words, the court rejected a request for admission that simply attached the desired legal conclusion to the unspecified, general facts of the case.

Likewise, in *Border Collie Rescue, Inc. v. Ryan*, 418 F. Supp. 2d 1330, 1339 n.6 (M. D. Fla. 2006), the plaintiffs' Rule 36 requests sought admission that a defendant had acquired misappropriated trade secrets from a co-defendant. As in *Manfred*, the request sought admission of a legal conclusion about the generalized facts of the case. And, as in *Manfred,* the district court held the request objectionable. *Id.*

In *United States v. Block 44*, 177 F.R.D. 695 (M.D. Fla. 1997), the court again sustained objections to the plaintiff's request that the defendant admit a legal conclusion. In their papers, Plaintiffs attempt to distinguish *Block* on the ground that the request for admission "concerned purely legal questions regarding which party had the burden of proof." (Mem. at. 3.)

The request for admission at issue in *Block* read as follows:

> "In the trial of just compensation in this case, the burden is on the defendant landowner to establish, by a 'preponderance of the evidence,' that the fair market value, on the date of taking, of the estate or interest in the property which has been taken by the government, is as much as it alleges."

177 F.R.D. at 695. One could accurately recast the above request as, "admit that under the facts of this case, the governing burden of proof falls on the landowner to establish the fair market value." This hardly differs from Plaintiffs' requests that Sidley admit that under the facts of the case, certain opinions or regulations governed Sidley's conduct, yet Plaintiffs argue one request represents a pure question of law, while the other seeks application of law to fact.[1]

In truth, the supposed distinction between requests concerning pure questions of law and requests seeking application of law to fact means little. Almost all requests for admission that ask the opposing party to admit a conclusion of law seek "an application of law to the particular facts of the case." No one would ask an opponent to admit that the First Amendment guarantees the freedom of speech – arguably a pure question of law – in a products liabilities case about a defective sports car. Parties seek admissions of law to help them prevail under a specific fact pattern; therefore, requests for admission almost always refer – either explicitly or implicitly – to the facts. Nevertheless, in order to withstand objection, the cases – especially cases in the Eleventh Circuit – require that a party specify the facts at issue *explicitly and concretely* – in particular, the cases disallow requests to admit of the kind Plaintiffs champion here: that a certain statute or rule applies to the general, unspecified facts of a case. *Disability Rights Council*, 234 F.R.D. at 3; *English*, 117 F.R.D. at 135; *Ransom*, 8 Cl. Ct. at 648.

In sum, because Plaintiffs fail to tether their requests sufficiently to specific facts, this Court should sustain Sidley's objections to Plaintiffs' requests for admission.

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[1] In what is apparently the only case from the district courts of Florida that overrules a "legal conclusion" objection to a request for admission, the request for admission set forth the specific facts at issue in a tailored and concrete manner: "[admit that] PNC Bank was not required to provide to you copies of any cancelled checks drawn and cleared on your Smith Barney account." *Treister v. PNC Bank,* No. 05-232207-CIV, 2007 WL 521935, at *3 (S.D. Fla. Feb. 15, 2007). This request does not require the application of law to the unspecified or general facts of a claim or the case itself, but rather to a specific set of facts delineated in the request.

B. Request No. 3 of Plaintiffs' Sixth Request For Production

Counsel have resolved this issue.

C. Plaintiffs' Request For a Privilege Log

Counsel have agreed that "Sidley Austin will provide a privilege log for privileged communications prior to March 14, 2004, that relate to Boss (or Section 301)-type transactions, to tax transactions with Andersen, and to the applicability of Notice 1999-59 on tax opinions issued by the firm." For the period after March 14, 2004 to the date when plaintiffs first filed suit in June 2004, counsel have agreed that Sidley Austin will "provide a log that identifies categories of generic communications that [Sidley is] withholding on the grounds of privilege (e.g., communications with Munger, Tolles & Olson), except that [Sidley] will list privileged communications, if any, that relate to [plaintiffs] or their specific transaction."

D. Request No. 29 of Plaintiffs' Second Request For Production

Counsel have resolved this issue.

E. Request Involving Insurance Claims For Files Destroyed On September 11, 2001

Counsel have resolved this issue.

III. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Compel should be denied in its entirety.

DATED: August 13 , 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 13th day of August, 2007.

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