UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

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

MARK J. GAINOR and ELYSE GAINOR,

Plaintiffs,

v.

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.
_____/

PLAINTIFFS' REPLY TO DEFENDANT SIDLEY AUSTIN'S OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL FULL AND COMPLETE RESPONSES TO DISCOVERY

Plaintiffs, Mark J. Gainor and Elyse Gainor, pursuant to Rule 7.1 of the Local Rules of this Court, submit the following reply to Defendant Sidley Austin's Opposition to Plaintiffs' Motion to Compel Full and Complete Responses to Discovery.

I. INTRODUCTION

Counsel for Plaintiffs and Sidley continued to confer on the issues addressed in Plaintiffs' Motion to Compel and were able to reach an agreement on almost all of the

issues. However, counsel were unable to resolve the motion as it pertains to Plaintiffs' First Request for Admissions to Sidley. Based on Rule 36 of the Federal Rules of Civil Procedure and precedent from this Court, Plaintiffs' motion to compel Sidley to admit or deny the matters set forth in the request for admissions should be granted.

II. REQUEST FOR ADMISSIONS

A. Plaintiffs' Request for Admissions Properly Seek Application of Law to Fact

Rule 36 expressly permits request for admissions that require the application of law to fact. Application of law to fact cannot be done without making a legal conclusion.[1] Sidley has taken the position that request for admissions that require a legal conclusion are prohibited. The 1970 amendments to Rule 36 foreclose Sidley's argument. See Treister v. PNC Bank, WL 521935 (S.D. Fla. 2007)(Slip Copy). Those courts that sustain objections to request for admissions on the basis that the request for admissions call for "legal conclusions" (i.e. application or interpretation of law) are either (i) referring to requests that call for general or conclusions of law (i.e. not applied to the facts of the case) or (ii) basing their decisions on old precedent or other cases which were based on old precedent. This Court is not one of those courts. Contrary to Sidley's assertion in its opposition memorandum, the Southern District has addressed this issue. See Treister v. PNC Bank, WL 521935 (S.D. Fla. 2007)(Slip Copy). To the extent there is a split among the federal courts on this issue, the United States District Court for the

[1] Sidley concedes that application of law to fact requires one to make a legal conclusion in its opposition memorandum: "In truth, the supposed distinction between requests concerning pure questions of law and requests seeking application of law to fact means little." (Opposition Mem. at 6).

Southern District of Florida clearly applies a literal interpretation of Rule 36 and allows request for admissions that require application of law to the facts of the case.

In Treister, the Southern District stated

> Rule 36 … governs requests of admission, allowing a party to serve "on any other party a written request for the admission … of the truth of any matters within the [general scope of discovery] set forth in the request that relate to statements or opinions of fact or of the application of law to fact."

Id. at 2 (Citing Perez v. Miami-Dade County, 297 F.3d 1255, 1263-64 (11th Cir. 2002).

The request for admission at issue in Treister stated "PNC Bank was not required to provide to you copies of any cancelled checks drawn and cleared on your Smith Barney account." Id. at 3. Plaintiffs objected to the request on the grounds that the request "calls for a legal conclusion that cannot be fairly admitted or denied by Plaintiffs who are not lawyers." Id. at 2. The Court stated that "Plaintiffs' objection is based on the argument that admissions requests are not proper for statements that are purely conclusions of law, and which the parties themselves would not be able to answer without the assistance of their counsel." Id. The Court found this argument to be without merit. Id. The Court reasoned,

> After the 1970 Amendments, that argument is no longer possible as the Committee expressly contemplated that requests that were designed to narrow the legal issues for trial were entirely proper. Thus, as the Eleventh Circuit recognized in Perez, "statements or opinions of fact or of the application of law to fact" are appropriate responses to admissions under Rule 36.

Id. The Court found that the request clearly called for an application of law to fact and, therefore, were proper. Id. at 3. The Court ordered the plaintiffs, "together with their lawyer," to respond to the request. Id.

The requests at issue in the present case, like the requests in Treister, clearly call for the application of law to certain facts in this case. The Southern District has already considered the same objections and arguments Sidley raises in this case and found them to be without merit. This Court expressly recognized that requests are not improper under Rule 36 because they require legal conclusions. Further, this Court expressly recognized that requests are not improper because they require input or analysis from the party's attorney. Sidley's objections and arguments to the contrary should be rejected.

B. Plaintiff's Request for Admissions are Specific to the Work Performed by Sidley for Gainor in 1999.

Having recognized the weakness in its initial objection that request for admissions that seek conclusions of law are improper, Sidley argues for the first time in its opposition memorandum that the request for admissions propounded by Plaintiffs are impermissible because the facts in the requests, particularly the term "work," were not specific enough to enable Sidley to admit or deny the requests. The Court should reject this argument also.

The requests at issue in this case collectively ask Sidley to admit or deny whether Treasury Circular 230 and ABA formal opinion 346 were applicable to the work that Sidley performed for Mr. Gainor in 1999. The only work performed in this case by Sidley for Gainor in 1999 is the work Sidley did on the tax shelters and accompanying tax opinion letters it provided to Gainor for his companies. That is the only work referenced in Plaintiffs' Complaint alleged to have been performed by Sidley for Gainor in 1999. Both the Treasury Circular 230 and ABA formal opinion 346 deal with standards concerning tax opinions. It is simply disingenuous for Sidley to argue that it is unable to

admit or deny the requests because it cannot determine what work Plaintiff is referring to or that because Ruble no longer works for Sidley it cannot determine the scope of the work Sidley performed.

C. Plaintiffs' Requests are Designed to Narrow the Legal Issues in this Case

As noted by this Court in Treister, the purpose of allowing requests for admissions that call for the application of law to fact is to narrow the legal issues in the litigation. The requests at issue in this case are designed solely to narrow legal issues in this case. If, after Sidley and its attorney review the ABA Opinion and Treasury Circular, Sidley believes they are not applicable to the work Sidley performed for Gainor in 1999, then Sidley need simply deny the request. If, on the other hand, Sidley agrees that they do apply and admits the requests, the need for discovery related to those issues and proof on those issues can be avoided saving the time and resources of the Court and the attorneys and parties involved. However, rather than simply admit or deny the request for admissions, Sidley has chosen to not answer them. Instead, Sidley raises objections and arguments that have already been rejected and found to be without merit by this Court. See Treister v. PNC Bank, WL 521935 at 2.

III. REQUEST #3 OF PLAINTIFF'S SIXTH REQUEST FOR PRODUCTION (RUBLE TRANSCRIPTS)

This request seeks "All transcripts of any sworn testimony given by R.J. Ruble in connection with any claims against Sidley Austin arising out of R.J. Ruble's issuance of tax shelter opinion letters." Plaintiffs have reached an agreement with Sidley on this issue. Sidley has produced Ruble's transcripts. However, Sidley has not produced the

exhibits to the transcripts. Plaintiffs understand that Sidley has agreed to produce the exhibits. Plaintiffs request the Court order Sidley to produce the exhibits to Ruble's testimony within the next 10 days so that Plaintiffs can adequately prepare for upcoming depositions and future discovery in this case.

IV. PRIVILEGE LOG

Plaintiffs believe that they have reached an agreement with Sidley on the contents of Sidley's privilege log. However, to date, no privilege log has been produced. Plaintiffs request the Court order Sidley to produce its privilege log and non-privileged documents within the next 10 days so that Plaintiffs can review the privilege log and determine if any additional motions need to be made concerning the privilege log and adequately prepare for upcoming depositions and future discovery in this case.

V. REQUEST #29 OF PLAINTIFFS' SECOND REQUEST FOR PRODUCTION

Plaintiffs believe they have resolved this issue with Sidley.

VI. REQUEST #7 OF PLAINTIFFS' THIRD REQUEST FOR PRODUCTION (SIDLEY'S INSURANCE CLAIM FOR LOST/DESTROYED FILES)

Plaintiffs believe they have resolved this issue with Sidley.

VII. CONCLUSION

The request for admissions at issue call for the application of certain legal standards to certain facts in this case. The requests are designed to narrow legal issues relevant to this case. As a result, the request for admissions are proper. Plaintiffs respectfully request that this Court enter and order compelling Sidley to admit or deny the

matters set forth in Plaintiffs' First Request for Admissions to Sidley and to produce all documents Sidley agreed to produce that have not yet been produced within 10 days.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of August, 2007, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

s/ Richard Benjamin Wilkes
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