

Case No. 06-21748-CIV-MARTINEZ-BANDSTRA

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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 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 OBJECTIONS TO PLAINTIFFS' EVIDENCE
SUBMITTED IN OPPOSITION TO PARTIAL SUMMARY JUDGMENT**

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Defendant Sidley Austin's ("Brown & Wood") hereby objects to the evidence submitted by Plaintiffs in support of their Opposition to Sidley Austin's Motion For Partial Summary Judgment.

I. OBJECTIONS TO AFFIDAVIT OF MARK J. GAINOR

Brown & Wood objects to every instance in Gainor's Affidavit where he collectively refers to communications he had with "Defendants" without identifying which of the seven Defendants he had the communications with and which particular individual employee of the corporate Defendants he allegedly spoke. *See* Gainor Affidavit ¶¶ 10, 11, 12, 20, 22. These statements lack adequate foundation.

Brown & Wood also objects to every instance in Gainor's Affidavit where he collectively refers to actions taken by "Defendants" without identifying which of the seven Defendants took the action. *See* Gainor Affidavit ¶¶ 10, 11, 12, 20, 11, 12, 22. These statements lack adequate foundation.

Objection 1: Paragraph 10

Statement: *"I authorized Defendants to proceed with implementing the proposed tax planning strategy."*

Objection: Lack of Foundation; Legal Conclusion.

Basis: Gainor does not identify which of the seven Defendants he "authorized" to proceed with implementing the proposed tax planning strategy. He also does not state how he "authorized" them to proceed.

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Objection 2: Paragraph 11

Statement: *“Thereafter, Defendants orchestrated a series of complex transactions involving numerous entities, loans, transfers of interests, and shifts of money. ... Defendants caused the transactions involved in the strategy to be implemented.”*

Objection: Lack of Foundation; Conclusion.

Basis: Gainor does not identify which of the seven Defendants did the orchestrating or caused the transaction to be implemented. Further, Gainor’s statement in this paragraph that he “did not understand the mechanics or the details of the transaction” undermines his foundation to testify about the transaction. Gainor’s statement that Defendants “caused the transactions involved in the strategy to be implemented” is a conclusion, not a fact.

Objection 3: Paragraph 11

Statement: *“I merely did what my trusted advisors told me to do. ... They told me I needed to do certain things to realize the personal tax savings they had promised, and they prepared the documents and told me to sign them. I trusted them to be giving me sound advice, and did what they told me to do.”*

Objection: Lack of Foundation.

Basis: Gainor does not identify which of his “trusted advisors” told him to do anything or when they told him to do things.

Objection 3: Paragraph 12

Statement: *“As part of the process, at the direction of Defendants, I placed at least \$4.5 million of my own money into the bank account of one of the entities, in addition to transferring my interests in various entities according to the directions of the Defendants.”*

Objection: Lack of Foundation.

Basis: Gainor does not identify which of the seven Defendants he did things at the direction of. He also does not identify the entity he placed the \$4.5 million into,

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the “various entities” involved in the transfer of his interests, or what interests were transferred, or to whom they were transferred.

Objection 4: Paragraph 17

Statement: “...*after the advice ... proved to be false and fraudulent .*”

Objection: Lack of Foundation; Argumentative; Legal Conclusion; Opinion.

Basis: Gainor does not provide any foundation for his argumentative, legal conclusion, and opinion that the advice he received was false and fraudulent.

Objection 5: Paragraph 19

Statement: “...*his participation in the scheme caused me damages in excess of \$1.1 million.*”

Objection: Lack of Foundation; Legal Conclusion; Opinion.

Basis: Gainor does not provide any foundation for his legal conclusion and opinion that Klopfenstein caused him damages in excess of \$1.1 million.

Objection 6: Paragraph 20

Statement: “*But for Defendants’ actions, I would not have agreed to sell Bryan Medical and Lucor to Transtar for the price paid. The result of following Defendants’ advice was an additional loss of over \$1.1 million, which was Defendant Klopfenstein’s fee for doing the transactions.*”

Objection: Lack of Foundation; Legal Conclusion; Speculation; Opinion.

Basis: Gainor does not identify which of the seven “Defendants” he is referring to or identify what actions or advice he claims Defendants took and gave him. His statement that “But for Defendants’ actions, I would not have agreed to sell” is speculative. His statement that “The result of following Defendants’ advice was an additional loss of over \$1.1 million” is an opinion and legal conclusion without any foundation.

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Objection 7: Paragraph 21

Statement: *"Defendants' fees were paid with funds to which I would have been entitled if they had not been used to pay to the Defendants as fees."*

Objection: Lack of Foundation; Legal Conclusion; Speculation; Opinion.

Basis: This a legal conclusion speculating on the outcome of an alternative course of events that did not occur. Further, it is an opinion without foundation.

Objection 8: Paragraph 22

Statement: *"If Defendants had told me to pay the fees of Andersen, Sidley Austin, Merrill Lynch and Mr. Klopfenstein directly from my personal funds, I would have done so;*

Objection: Lack of Foundation; Speculation.

Basis: This is speculation without any foundation.

Objection 9: Paragraph 22

Statement: *"just like I injected \$4.5 million of my personal funds into one of the corporate bank accounts when Defendants told me to."*

Objection: Lack of Foundation.

Basis: Gainor does not identify which of the seven Defendants told him to inject funds. He also does not identify which corporate bank account he injected funds into.

Objection 10: Paragraph 22

Statement: *"My money was used to pay Defendants' fees."*

Objection: Lack of Foundation; Legal Conclusion; Opinion.

Basis: Whether this was Gainor's money is a legal conclusion. Gainor does not provide any foundation to show that "his money" was actually used to pay Defendants' fees. He previously testified in ¶ 11 that he "did not understand the mechanics or details of the transaction" and thus lacks foundation to testify on this topic.

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Objection 10: Paragraph 22

Statement: *“The reason Defendants’ fees were paid the way they were is because that is what Defendants told me to do.”*

Objection: Lack of Foundation; Conclusion; Opinion

Basis: Gainor does not identify which of the seven Defendants told him what to do. Gainor’s statement that the reason they were paid this way is an opinion and lacks foundation.

II. OBJECTIONS TO DECLARATION OF RICHARD CANDELORA

Objection 1: Exhibit 1

Document: Statement of Sidley Austin LLP from May 2007

Objection: Relevance.

Basis: This statement has nothing to do with Plaintiffs or their transaction. This statement was issued in connection with the United States Attorney’s decision not to prosecute Sidley Austin in connection with the BLIPS, FLIPS, OPIS, and CARDS tax shelters.

Objection 2: Exhibit 2

Document: U.S. Attorney Southern District of New York Press Release Announcing Decision Not To Prosecute Sidley Austin LLP

Objection: Hearsay; Relevance.

Basis: Plaintiffs are attempting to use statements from this document prepared by the U.S. Attorney for the truth of the matters asserted therein. It is hearsay, without an exception. It also does not discuss Plaintiffs or their transaction,

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Objection 3: Exhibit 10

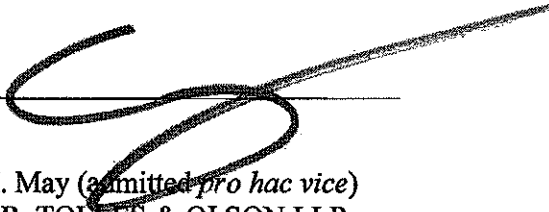
Document: Series of emails among Arthur Andersen and others

Objection: Relevance.

Basis: These emails have nothing to do with Plaintiffs or their transaction.

DATED: September 7, 2007

By: _____



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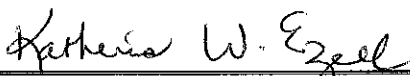
Attorneys for Defendant Sidley Austin LLP

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 on the attached Service List this ___ day of September, 2007.

Respectfully submitted,

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