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.
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PLAINTIFFS' RESPONSE TO DEFENDANT R. J. RUBLE'S MOTION TO STAY

Plaintiffs, Mark J. Gainor and Elyse Gainor, by and through their undersigned counsel, submit the following Response to Defendant R.J. Ruble's Motion and Memorandum to Stay – Pending His October 16 Criminal Trial ("Ruble's Motion to Stay").

This is an action against Sidley Austin, LLP ("Sidley") and various professionals for fraudulent tax shelter advice. At the heart of the fraud were two opinion letters authored by Ruble, then a partner in Sidley's predecessor Brown & Wood. Although Ruble was aware that the Internal Revenue Service had issued a Notice warning that the IRS considered the recommended strategy to be a fraudulent tax evasion scheme, Ruble, on behalf of Sidley's predecessor Brown & Wood, nonetheless provided Plaintiff Mark Gainor ("Gainor") a written

legal opinion that it was "more likely than not" that the tax deductions to be claimed as a result of implementing the strategy would be sustained if challenged by an IRS audit.

Unaware of the IRS Notice, Plaintiffs implemented the strategy and claimed the deductions on their tax returns. Predictably, the IRS disallowed the deductions, resulting in the Plaintiffs being required to pay an additional $17,000,000 in taxes and interest. In addition, the federal government indicted Ruble for tax fraud "on the same tax-related issues that exist here." Ruble's Motion to Stay at p.1.

Ruble's criminal trial is scheduled to begin October 16, 2007. He estimates it will last about two months. Citing an inability to effectively participate in these proceedings until after his criminal trial is over, Ruble has requested a stay of this case as to him until January 31, 2008.

Recognizing that, as a practical matter, discovery will not be obtainable from Ruble until his criminal trial is over, Plaintiffs will not object to the stay of discovery as to Ruble so long as Plaintiffs are not themselves unfairly prejudiced by the delay. To avoid unfair prejudice to Plaintiffs, it is essential that, as part of the stay, the trial of this case, currently scheduled for January 2008, be continued, and that the discovery cutoff date be extended for a period equivalent to the duration of the stay, to enable discovery to be obtained from Ruble. Further, as Ruble's motion agrees, discovery between the other parties should be permitted to proceed in accord with the current discovery schedule.[1] Absent such postponement of trial and extension of discovery, Plaintiffs must oppose the stay because it would severely prejudice Plaintiffs in that it

[1] Ruble's motion states that Sidley has indicated it would agree to the stay Ruble requests if the Court severs Ruble from this action and keeps the January 2008 trial date against Sidley and the other Defendants. However, Sidley's Response to Ruble's Motion to Stay was just received by counsel for Plaintiffs, and it appears to agree to continuance of the trial and an extension of the discovery for the purpose of taking Mr. Ruble's deposition, provided the current discovery cutoff date otherwise remains in effect. Plaintiffs desire an extension of the discovery period in order to propound all appropriate party discovery on Ruble, not just take his deposition. Plaintiffs are not herein requesting any other extension of the discovery period, but reserve the right to do so if circumstances so suggest.

would require them to go to trial without having a full and fair opportunity to conduct discovery and present testimony of a critical witness.

Plaintiffs need to obtain critical discovery from Ruble before the case is tried against any of the Defendants. Throughout the course of discovery, Sidley has acknowledged that Ruble was the central figure in the Gainor relationship and transactions, and that Ruble is the only one who has relevant information on many critical points in this action. For example, Mr. John MacKinnon, Sidley's corporate representative, repeatedly testified at Sidley's Rule 30(b)(6) deposition that he could not provide information on key aspects of this case because only Ruble knew these things, and Mr. MacKinnon had not been able to speak with Ruble (*see* pages of deposition of John A MacKinnon taken February 22 and 23, 2007 in this matter, attached hereto as **Composite Exhibit "A").** For example, only Ruble can provide the background facts from Sidley's perspective regarding how Sidley came to be involved in the Gainor transaction; only Ruble can provide Sidley's perspective on whether Andersen was acting as agent for Sidley or Sidley was acting as agent for Andersen, or exactly what their relationship was; only Ruble can say why he opened a "structuring tax advantaged transactions" file with Andersen designated as the client in July of 1999, shortly before the strategy was proposed to Gainor; only Ruble can say why, a few days later in August of 1999, he sent Andersen a "sample" opinion letter which laid out the structure of the strategy; only Ruble can provide Sidley's perspective on what it understood to be Andersen's intended use of the sample opinion letter, and if he knew that Andersen would use the sample opinion letter as a model for structuring the Gainor transactions; only Ruble can say what involvement Sidley had with development or implementation of the strategy; only Ruble can provide the background facts regarding how Sidley got to the point of issuing the Gainor opinion letters; only Ruble can say how he obtained the information about Mr.

Gainor contained in the opinion letters; only Ruble can say how he got the facts about the Gainor transactions that he put in his opinion letters; only Ruble can say what knowledge the Sidley firm had of the Gainor transaction and the opinion letters he issued; only Ruble can say whether internal Sidley procedures designed to safeguard client' rights were followed in connection with issuance of the opinion letters; only Ruble can say what discussions, if any, were had regarding the fee that Gainor would pay to Sidley; only Ruble can provide Sidley's perspective on the terms of Sidley's representation of Gainor and the duties he undertook; only Ruble can say what, if anything, Sidley told Gainor about the risks involved in implementing the strategy; to name only a few. Sidley has confirmed in its pleadings that Ruble is the only one with knowledge, claiming it has insufficient knowledge to admit or deny many of the allegations of Plaintiffs' Amended Complaint because it does not have access to Ruble (*see* Introductory paragraph of Sidley's Second Amended Answer to Amended Complaint and Demand for Jury Trial). In summary, Defendant Ruble is a truly central witness, and requiring Plaintiffs to proceed to trial without having an adequate opportunity to obtain discovery from Ruble, would greatly prejudice Plaintiffs.

Ruble has indicated through counsel that he will not provide any testimony until his criminal trial is over (see email correspondence from Ruble's counsel to Plaintiffs' counsel dated August 27, 2007 attached hereto as **Exhibit "B"**), and indeed Ruble has thus far refused to testify or respond to discovery on Fifth Amendment grounds in several other proceedings. *See* Depositions of R.J. Ruble in *Tolt Ventures v. KPMG*, Case No. 2003-69957, District Court of Harris County, Texas taken April 22, 2005 at p. 12; *Eacho v. KPMG,* Case No. 04-005746, Superior Court for the District of Columbia, taken June 22, 2005 at p. 8; *Schneider v. KPMG*, Case No. C10-02-000316, Circuit Court of the Ninth Judicial Circuit of Orange County, Florida

taken August 23, 2006 at p. 5; *Martin v. Jenkens & Gilchrist,* District Court of Harris County, Texas taken May 10, 2005 at p. 7 attached hereto as **Composite Exhibit "C."** However, once Ruble's criminal trial is completed, Plaintiffs will be able to obtain essential discovery from this critical witness. Thus, fair and even-handed administration of justice dictates that the trial of this case be continued so that Plaintiffs have a meaningful opportunity to obtain the discovery to which the law entitles them.

Since Sidley has acknowledged Ruble's central role in the actions underlying Plaintiffs' claims and repeatedly asserted that Ruble alone has exclusive knowledge of many key points Plaintiffs have sought to discover, Sidley cannot legitimately contend that discovery from Ruble is not important. Further, Defendants cannot persuasively argue that postponing the trial will prejudice them. As recently as four months ago, on May 17, 2007, Sidley and Merrill took the position in the parties' Joint Scheduling Report that in order to allow adequate time for proper discovery and preparation of this case, the trial should be scheduled for November 1, 2008. Since Ruble has requested only a four-month stay, a concomitant postponement of the trial would still yield a trial date earlier than November 1, 2008.

Whether to stay a civil action due to the pendency of a parallel criminal proceeding, is a matter committed to the sound discretion of the Court. *Ventura v. Brosky*, Slip Copy 2006 WL 3392207 (S.D. Fla.); *S.E.C. v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003) Under such circumstances, the court should attempt to balance the competing interests of all concerned, and reach an accommodation that best serves the interests of justice.

Among the important factors that courts consider in making this determination, are the burden on the defendant, prejudice to the plaintiff and efficient use of judicial resources. *S.E.C.*

v. Healthsouth Corp., 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003); *Scheuerman v. The City of Huntsville*, 373 F.Supp.29 1251 (N.D. Ala. 2005), cited in *Ventura v. Brosky, supra.*

In this case, a proper balancing of these factors should lead the Court to the conclusion that discovery should be stayed as to Ruble only for four months, and the trial date and the period for discovery from Ruble extended by an equal duration.

The decision to stay discovery against Ruble, continue the trial, and allow discovery among the other parties to otherwise proceed, best accommodates the competing interests of all parties. Ruble would not subjected to the burdens of having to defend two matters at the same time, or to the potential detriment of having to assert the Fifth Amendment in the civil proceeding. Plaintiffs, although anxious to get this case to trial, believe their interests would be better served by the short requested delay in trial, so that they can obtain critical discovery from Ruble before proceeding to trial, thereby according Plaintiffs their fundamental right to adequate discovery and full and fair presentation of evidence at trial. Similarly, the interests of justice clearly would be better served if this case were decided based on the testimony of people with knowledge, rather than on presumptions that attend assertion of the Fifth Amendment. Likewise, the interest of efficient use of judicial resources would be better served, as the discovery disputes that necessarily attend assertion of the Fifth Amendment privilege will be eliminated, or at least minimized. Finally, none of the other Defendants would suffer any substantive prejudice, and indeed, the case can be scheduled for trial within the time frame they agreed to in the Joint Scheduling Report.

Although Plaintiffs prefer the course set forth above, if the Court is not inclined to link the stay to a continuance of the trial, then the Court should deny the motion for stay. To do

otherwise would severely prejudice Plaintiffs and amount to a denial of their due process rights to adequate discovery and full and fair opportunity to present their case at trial.

Therefore, for the foregoing reasons, Plaintiffs respectfully request that the Court enter an Order which: (1) grants a stay of discovery as to Ruble only, for a period of four months; (2) allows the case to proceed in all other respects during the term of the stay; (3) removes the case from the trial docket for January 2008; and (4) allows Plaintiffs a reasonable period of time to conduct discovery of Ruble following the conclusion of his criminal trial. The trial should then be rescheduled for commencement sometime after completion after the extended Ruble discovery period.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 21st day of September, 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 W. Candelora
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