EEOC v. Sidley Austin Brown. Doc. 125 Att. 1

EXHIBIT A

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EXHIBIT B

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EXHIBIT C

GRIPPO & ELDEN LLC
111 South Wacker Drive
Chicago, Illinois 60606
(312) 704-7700
FAX: (312) 558-1195
(312) 263-7356

To Call Writer Direct
(312) 704-7764
msolis@grippoelden.com

January 4, 2007

Via Electronic Mail

Laurie S. Elkin
Justin Mulaire
UNITED STATES EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
500 West Madison Street, Suite 2800
Chicago, Illinois 60661

Re: **EEOC v. Sidley Austin LLP**

Dear Laurie and Justin:

This letter will confirm our discussion during today's meet and confer with respect to the EEOC's responses to Sidley's Third Set of Interrogatories and Document Requests, as set forth in my December 15, 2006 letter. Please let me know right away if this does not accurately reflect our conversation.

A. Interrogatory No. 1
("Age-based retirement policy" and individuals impacted by the alleged policy)

You confirmed that the EEOC is not withholding any information pursuant to its objection that this is a "premature contention interrogatory." You agreed to supplement your response by January 19th to provide the names of the individuals impacted by the alleged policy and any exceptions thereto.

B. Interrogatory No. 2
(Evidence to support the EEOC's claim of pretext)

You will supplement your response to provide the information requested on an individual-by-individual basis by January 19th.

GRIPPO
&ELDEN

C. **Interrogatory No. 3**
(Efforts to obtain a substantially equivalent position)

You will identify by January 19th the Bates numbers of any responsive documents the EEOC has produced to date by January 19th. You will further supplement your response to this interrogatory to provide the requested information by February 1st.

D. **Interrogatory No. 4**
(How long putative claimant would have worked at Sidley)

You will supplement your response to provide, at minimum, a narrative answer where a precise date is not possible, for each putative claimant by February 1st.

E. **Interrogatory No. 5**
(Description of post-Sidley work history)

You will identify by January 19th the Bates numbers of any responsive documents the EEOC has produced to date. You will further supplement your response to this interrogatory to provide the requested information by February 1st.

F. **Interrogatory No. 6**
(Description of post-Sidley employment benefits)

You will identify by January 19th the Bates numbers of any responsive documents the EEOC has produced to date. You will supplement your response to this interrogatory to provide the requested information by February 1st.

G. **Document Requests No. 1 and 2**
(All documents relating to damages and post-Sidley employment benefits)

You will identify by January 19th the Bates numbers of any responsive documents the EEOC has produced to date. By early next week, you will inform us of a date certain by which you will produce the remaining documents responsive to this request, including putative claimants' tax returns.

H. **Document Request No. 3**
(All documents relating to post-Sidley performance in a legal position)

The EEOC will stand on its objections to this document request and will not supplement its response. We are at issue over this document request.

REDACTED

We look forward to receiving your supplemental responses. In the meantime, please contact me if you want to discuss any of the above.

Sincerely,

Maile Solis Szukala KLS

Maile H. Solís-Szukala

MHS/db

EXHIBIT D

From: Maile Solís-Szukala
To: justin.mulaire@eeoc.gov; laurie.elkin@eeoc.gov
Date: 1/29/2007 5:11 PM
Subject: Supplemental Responses to Sidley's 3rd Set of Discovery Requests
CC: Bills, Matthew; Conway, Mike; Murray, Lynn

Laurie and Justin:

This will follow up on our meet-and-confer teleconference on January 4th. When we spoke, you agreed to do the following by January 19th: (1) provide cites to responsive documents referenced in your responses; (2) supplement your response to Interrogatory No. 1 by providing the names of individuals impacted by Sidley's alleged age-based retirement policy, and any exceptions thereto; and (3) agreed to supplement your response to Interrogatory No. 2 by stating, on an claimant-by-claimant basis, the evidence supporting the EEOC's claim that the reasons asserted in Supplemental Amended Exhibit D were in fact a pretext for age discrimination. (You also agreed to further supplement your responses by February 1.) We have not received the supplemental responses promised by January 19th. Please let me know when you intend to provide them.

Thanks,
Maile

Maile H. Solís-Szukala
Grippo & Elden LLC
111 S. Wacker Drive
Chicago, IL 60606
Ph: (312) 704-7764
Fax: (312) 558-1195
msolis@grippoelden.com

EXHIBIT E

From: Maile Solís-Szukala
To: justin.mulaire@eeoc.gov; laurie.elkin@eeoc.gov
Date: 2/5/2007 12:34 PM
Subject: Supplemental Responses to Sidley's Third Set of Discovery Requests
CC: Bills, Matthew; Conway, Mike; Murray, Lynn

Laurie and Justin:

This is our second follow-up on the EEOC's promised supplemental responses to Sidley's Third Set of Interrogatories and Document Requests. As referenced in my January 29, 2007 email, the EEOC promised to provide the supplemental responses outlined in my email by January 19, 2007. The EEOC did not provide these responses, did not request additional time, and did not respond to my January 29th email.

In addition, the EEOC had agreed to further supplement its responses to Interrogatories 1-6 and Document Requests 1 and 2 by February 1, 2007. Again, the EEOC did not provide the promised supplemental responses and did not request additional time. Please confirm that you will provide all promised responses by Wednesday, February 7, 2007.

Thanks,
Maile

Maile H. Solís-Szukala
Grippo & Elden LLC
111 S. Wacker Drive
Chicago, IL 60606
Ph: (312) 704-7764
Fax: (312) 558-1195
msolis@grippoelden.com

>>> Maile Solís-Szukala 1/29/2007 5:11 PM >>>
Laurie and Justin:

This will follow up on our meet-and-confer teleconference on January 4th. When we spoke, you agreed to do the following by January 19th: (1) provide cites to responsive documents referenced in your responses; (2) supplement your response to Interrogatory No. 1 by providing the names of individuals impacted by Sidley's alleged age-based retirement policy, and any exceptions thereto; and (3) agreed to supplement your response to Interrogatory No. 2 by stating, on an claimant-by-claimant basis, the evidence supporting the EEOC's claim that the reasons asserted in Supplemental Amended Exhibit D were in fact a pretext for age discrimination. (You also agreed to further supplement your responses by February 1.) We have not received the supplemental responses promised by January 19th. Please let me know when you intend to provide them.

Thanks,
Maile

Maile H. Solís-Szukala
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Chicago, IL 60606
Ph: (312) 704-7764

Fax: (312) 558-1195
msolis@grippoelden.com

EXHIBIT F

From: Maile Solís-Szukala
To: ELKIN, LAURIE
Date: 2/7/2007 3:34 PM
Subject: Re: Sidley
CC: Conway, Mike; lmurray@gippoelden.com

Laurie-

We are not available to meet and confer regarding your issue this week. Also, please note that we are waiting for supplemental responses to our discovery requests (which were due on 1/19 and 2/1 but have not yet been served), and would like to discuss amendment of the Subsequent Employment Protective Order to permit us to share such information with our team members and clients. It would make sense to discuss all pending issues at once.

Maile

Maile H. Solís-Szukala
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Chicago, IL 60606
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msolis@grippoelden.com

EXHIBIT G

THIS EXHIBIT FILED UNDER SEAL

EXHIBIT H

THIS EXHIBIT FILED UNDER SEAL

EXHIBIT I

THIS EXHIBIT FILED UNDER SEAL

EXHIBIT J

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EXHIBIT K

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EXHIBIT L

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	Case No. 05 cv 0208
v.	)	Judge James Zagel
SIDLEY AUSTIN BROWN & WOOD LLP,	)	Magistrate Judge Ashman
Defendant.	)	

EEOC'S EIGHTH SET OF INTERROGATORIES TO SIDLEY AUSTIN

Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), pursuant to Rule 33 of the Federal Rules of Civil Procedure, propounds the following Interrogatories upon Sidley Austin, LLP ("Sidley"), to be answered fully, in writing and under oath, within thirty (30) days from the date of service hereof.

DEFINITIONS AND INSTRUCTIONS

The Definitions and Instructions set forth in the EEOC's First Set of Interrogatories are hereby incorporated by reference.

INTERROGATORIES

1. List each employment benefit offered to partners in the years from 1989 to the present (including health insurance, life insurance, disability insurance and pension benefits), describe the benefit, state the cost charged to each partner for this benefit and the cost paid by the firm for this benefit.

October 3, 2006 Respectfully Submitted,

s/ Deborah Hamilton

Laurie Elkin
Deborah L. Hamilton
Justin Mulaire
Trial Attorneys
U.S. Equal Employment Opportunity Commission
500 West Madison St., Room 2800
Chicago, IL 60661
312-353-7722

CERTIFICATE OF SERVICE

Deborah L. Hamilton, an attorney, hereby certifies that she caused a copy of the foregoing to be e-mailed to counsel of record at the following address on October 3, 2006:

To: Gary M. Elden
Lynn H. Murray
Gregory C. Jones
John E. Bucheit
Amanda McMurtrie
Grippo & Elden
111 S. Wacker Dr.
Chicago, IL 60606

lmurray@grippoelden.com
msolis@grippoelden.com

s/ Deborah Hamilton

EXHIBIT M

THIS EXHIBIT FILED UNDER SEAL

EXHIBIT N

1
2 IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION
4 UNITED STATES EQUAL EMPLOYMENT)
OPPORTUNITY COMMISSION,)
5)
) No. 05 CV 208
6)
Plaintiff,)
7)
vs.) Chicago, Illinois
8)
SIDLEY, AUSTIN, BROWN &)
9 WOOD, L.L.P.,) October 6, 2006
)
10 Defendants.) 10:13 o'clock a.m.
11
TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE JAMES B. ZAGEL
13
14 For the Plaintiff:
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
15 BY: Deborah L. Hamilton
Laurie S. Elkin
16 500 West Madison Street
Suite 2800
17 Chicago Illinois 60661
18 For the Defendant:
GRIPPO & ELDEN
19 BY: Lynn H. Murray
Maile Solis-Szukala
20 111 South Wacker Drive
Chicago Illinois 60606
21
22
23 Blanca I. Lara, CSR, RPR
219 South Dearborn Street
24 Room 2504
Chicago, Illinois 60604
25 (312) 435-5895

1 one reason or another and communicated this and this is why we
2 thought he was not as productive as others, had nothing to do
3 with the fact that he was 58 years old and somebody who was 38
4 years old started doing their work. It would be important for
5 them to know if at a subsequent firm they had the same opinion
6 of him and if he did the same things.
7 That, I think, is what they're looking for, and
8 they're entitled to find that, but for the purposes of the
9 plaintiff in this case you don't want to put them in a
10 position -- or let's put it this way, if I were in your shoes,
11 I wouldn't want to put them in a position where they discover
12 that some guy goes to a new firm and does a series of things
13 which the firm thinks they're not good, not bad enough to get
14 rid of him but really things that are problems, becomes a
15 problem partner in another firm and these are the problems, X,
16 Y and Z. You don't want to have that kind of discovery and
17 then have Sidley come and say, well now that we think about
18 it, in addition to these other things that we raised with you
19 there was also X, Y and Z.
20 So you don't want to put them in a position where
21 they've heard the story. And that I'm willing to let you
22 avoid. But eventually when they have stated their reasons why
23 they have done what they have done with respect to each of
24 these individuals, they're entitled to mine the future conduct
25 of those individuals to find out if there is anything which

EXHIBIT O

1
IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
3
UNITED STATES OF AMERICA)
4)
) No. 05 CV 208
5)
Plaintiff,)
6)
vs.) Chicago, Illinois
7)
SIDLEY, AUSTIN, BROWN &)
8 WOOD, L.L.P.,) November 21, 2006
)
9 Defendants.) 10:16 o'clock a.m.
10
TRANSCRIPT OF PROCEEDINGS
11 BEFORE THE HONORABLE JAMES B. ZAGEL
12
For the Plaintiff:
13 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BY: Deborah L. Hamilton
14 Justin Mulaire
West Madison Street
15 Suite 2800
Chicago Illinois 60661
16
For the Defendant:
17 GRIPPO & ELDEN
BY: Michael Conway
18 Maile Solis-Szukala
111 South Wacker Drive
19 Chicago Illinois 60606
20
21
Blanca I. Lara, CSR, RPR
22 219 South Dearborn Street
Room 2504
23 Chicago, Illinois 60604
(312) 435-5895
24
25

1 THE COURT: There we are.

2 -- I am going with the EEOC's version, the yellow

3 version, with some exceptions.

4 The first exception is on Page 3. I don't think that

5 disclosure by the former partner requires a specific order of

6 the Court. The general ruling required it.

7 Going to Page 6, I agree with the EEOC on these two

8 points, but I have to tell you that I envision that there will

9 be a separate authorization of some disclosure of this to some

10 named specific persons at Sidley & Austin who will sign

11 various statements governing their use of material at a

12 subsequent date, because I think that is the only practical

13 way to work this.

14 As it stands now, we're dealing with something that

15 is entirely hypothetical because Sidley's lawyers, let alone

16 Sidley, Sidley's lawyers have not yet seen or at least they

17 haven't seen much of the data that they're interested in, and

18 its significance to any possible defense cannot possibly be

19 clear to them. When it is clear to them, I might have a

20 better articulated reason why disclosure should be made more

21 broadly than to the attorneys and only the attorneys for

22 Sidley. And I suspect that the information does have some

23 relevance. They're going to want to have some representative

24 of the defendant have access to them, and under certain

25 conditions, I would be willing to permit it. But as it stands

EXHIBIT P

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	No. 05 C 0208
Plaintiff,	)	Honorable James B. Zagel
v.	)	Magistrate Martin C. Ashman
SIDLEY AUSTIN BROWN & WOOD LLP,	)	
Defendant.	)	

DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES, COMPLIANCE WITH SUBPOENAS, AND SUPPLEMENTATION OF DEFICIENT DISCOVERY RESPONSES

The Equal Employment Opportunity Commission (the "EEOC") began investigating Sidley Austin LLP's ("Sidley") decision to change the status of 32 of its partners to counsel or senior counsel six years ago. Over the last 18 months, Sidley has produced nearly 40,000 pages of documents, in response to four sets of document requests, and has provided lengthy responses to five different sets of interrogatories. In contrast, however, the EEOC has refused to provide the most basic information relating to the allegations of the putative claimants. Apparently, the EEOC believes that one set of rules applies to Sidley, but an entirely different set of rules applies to the EEOC. However, the EEOC is subject to the Federal Rules of Civil Procedure just like any other litigant.

This motion seeks (1) a complete response to three Sidley interrogatories seeking the EEOC's position on damages, mitigation and similarly-situated younger individuals (Section I); (2) certain information relating to the putative claimants' post-Sidley employment, including their tax returns and supporting documents (Section IIA), documents reflecting the terms and conditions of their post-Sidley employment (Section IIB) and documents relating to

their performance in subsequent employment (Section IIC); and (3) a ruling that the EEOC should immediately and fully supplement or be bound to its deficient discovery responses (Section III). Controlling authority supports each of these requests.

Local Rule 12(k)/37.2 Statement

The parties have met and conferred with respect to the discovery disputes in this motion. On July 17, 2006, the EEOC sent a letter (belatedly) objecting to subpoenas issued to the putative claimants. (Ex. A.)[1] Sidley responded two weeks later and the EEOC replied. (Exs. B and C.) Simultaneously, Sidley outlined its concerns about the EEOC's interrogatory responses. The EEOC responded by saying that it would supplement certain responses, but would not withdraw its objections to the requests at issue in this motion. (Exs. D and E.) On August 31, 2006, the parties held a teleconference in which they discussed all of these issues. Although the EEOC had agreed to supplement certain additional responses following Sidley's objections, those responses remain deficient.

ARGUMENT

Federal Rule of Civil Procedure 26(b)(1) provides that "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party . . . ." Sidley seeks information relevant to both the EEOC's claims and Sidley's defenses, which is "reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Sidley asks the Court to order the EEOC to produce the requested information.

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[1] References are to exhibits attached to this motion. The names of individuals and law firms other than Sidley have been redacted from the attached exhibits and the publicly-filed version of this Memorandum. In addition, pursuant to the Amended Protective Order entered in this case, Exhibits F, I, L and M, which consist of confidential information, have been filed under seal.

I. The EEOC Should Be Required To Provide Sidley With Its Contentions On Damages, Mitigation And "Comparators" Before Depositions Begin.

Depositions will commence shortly and will include the depositions of dozens of putative claimants and Sidley partners. The EEOC contends that certain individuals were discriminated against on the basis of their age, and those contentions are the principal focus of the upcoming depositions. The EEOC has not been willing to provide certain critical information about the basis for those claims or the damages allegedly suffered by the putative claimants. Sidley is entitled to understand the EEOC's contentions as to the damages suffered by these individuals, any efforts at mitigation (including the reasons for turning down positions offered by Sidley) and the EEOC's assertion that similarly-situated younger individuals were treated more favorably. In each instance, the EEOC should be required to provide a complete and accurate interrogatory answer, to which it should be bound absent supplementation allowed by the Federal Rules.

A. The EEOC Must Describe The Putative Claimants' Alleged Damages.

In order to evaluate, test, and possibly refute damages sought by the EEOC, Sidley asked the EEOC to "[d]escribe for each Alleged Claimant each element or item of damages you contend the Alleged Claimant suffered as a result of Sidley's alleged discrimination," including the type and amount of damages, how the damages were calculated, and facts and documents supporting the EEOC's contention. (Ex. F, EEOC's Response to Sidley Austin LLP's Second Set of Interrogatories and Requests for the Production of Documents, Int. No. 7.) The EEOC responded that it would provide documents sufficient to reflect the

putative claimants' subsequent income from non-Sidley employment but has not yet done so and has refused to identify its damage contentions or calculations.[2]

Rule 26(a)(1)(C) requires the EEOC to provide a "computation of any category of damages claimed" *at the outset of the case*. The EEOC cannot credibly assert that a request for such information is premature *now*, more than six years after it began its investigation, 18 months after it filed the case, and almost a year after it received information from Sidley on the individuals' compensation. The EEOC claims to represent 27 of the individuals and has interviewed many others. It has all the information necessary to calculate damages.

In addition, it is clear that the EEOC developed damage contentions for its internal use during the investigation phase. The EEOC hired an accounting expert as early as 2003, who prepared documents such as "EEOC Analysis: Analysis of Partner Data Provided By Sidley Including Regression Analysis of Compensation and Likelihood of Being Demoted" (withheld as privileged). The EEOC's public statements and discovery responses also suggest the existence of a damages analysis. In January 2005, EEOC Regional Attorney John Hendrickson stated to the press: "It only takes two years of back pay before you're over a million dollars." (Ex. G, Jan. 14, 2005, "U.S. accuses law firm of age bias; EEOC suit targets demotions, mandatory retirement policy" in *Chicago Sun-Times*.) At a minimum, Mr. Hendrickson's statements to the press establish that the EEOC has generated its own analysis of damages, which it is required to disclose pursuant to Rule 26.

---

[2] The EEOC initially stated that it lacked the necessary information to respond to such an interrogatory, asserting that Sidley had not produced benefits information. When Sidley pointed out that the EEOC had not requested such information in discovery and asked that the EEOC respond to the interrogatory while noting that its investigation continued relating to benefits, the EEOC stated that it was unwilling to do so.

The very purpose of the damages contention interrogatory is to "get out on the table plaintiff's damages contentions so that defendant can explore them during the discovery period." *See First Health Group Corp. v. United Payors & United Providers, Inc.*, No. 96 C 2518, 1999 WL 515499, at *1 (N.D. Ill. July 12, 1999). The EEOC must quantify its damages, or in the alternative explain why it cannot. *Id.*; *see also Thomas & Betts Corp. v. Panduit Corp.*, No. 93 C 4017, 1997 WL 603880 (N.D. Ill. Sept. 23, 1997) (plaintiff's failure to quantify damages to the extent it possessed facts to more fully respond amounted to noncompliance with discovery order).

B. The EEOC Must Provide Its Evidence That These Putative Claimants Mitigated Their Damages.

The EEOC also has refused to describe in detail the efforts undertaken by the putative claimants to mitigate their damages. (Ex. F, Int. No. 9.) In addition to acknowledging that is has not collected all of the information necessary to respond to this interrogatory, the EEOC simply listed the putative claimants' subsequent employment, if any, and stated that "discovery continues." (*Id.*) As with the damages interrogatory, information sought regarding mitigation is relevant and critically important to exploration of damages during deposition discovery. Moreover, as Sidley bears the burden of establishing the putative claimants' failure to mitigate, *see Gaffney v. Riverboat Servs. of Indiana*, 451 F.3d 424, 460 (7th Cir. 2006), Sidley is entitled to the requested information.

As an initial matter, almost all of these individuals were offered a position as counsel or senior counsel at Sidley at a compensation level roughly equivalent to what they were paid as partners. To the extent they turned down that offer, Sidley is entitled to documents reflecting the individual's rationale for doing so. In addition, to the extent the EEOC contends

that certain individuals were unable to obtain comparable employment with other law firms or employers, Sidley is entitled to explore their efforts in that regard prior to taking their deposition.

C. The EEOC Must Identify Similarly-Situated Younger Individuals Who It Claims Were Treated More Favorably ("Comparators").

Interrogatory No. 2 of Sidley's First Set of Interrogatories seeks the EEOC's identification of any similarly-situated younger individuals who it contends were treated more favorably, commonly referred to as "comparators." To the extent the EEOC intends to use the burden-shifting method of proof, this is an element of its prima facie case. *See, e.g.*, *Raymond v. Ameritech Corp.*, 442 F.3d 600, 610 (7th Cir. 2006) (stating that a plaintiff must show that he or she was treated differently than a similarly-situated person outside of his or her protected class). Sidley has provided hours, billings, compensation, practice group and other information for all Sidley partners during the period in question, and the EEOC has access to the individuals themselves – a source of information on younger employees they thought were treated more favorably. As with damages, the EEOC has taken inconsistent positions on this issue. In its July 14, 2004, Notice of Determination, the EEOC stated that, after a four-year investigation, the record showed that "for each and every one of the partners over 40 years of age who were downgraded or expelled there were multiple other partners, including younger partners, who did not perform as well but who were not downgraded or expelled." (Ex. H.) Until one week ago, however, the EEOC had firmly refused to identify those similarly-situated individuals. On September 8, 2006, the EEOC identified a number of such individuals, but stated that "investigation continues." (Ex. I, EEOC's Fourth Supplemental Response to Defendant's First Set of Interrogatories, Int. No. 2.) In order to contest the EEOC's case, and as the parties begin the process of deposing Sidley partners and putative claimants, Sidley must know the identity of all comparators, and the EEOC should not be allowed to continue to supplement its response.

Sidley, therefore, requests that the Court set a date by which the EEOC must answer without further supplementation, subject to an "interest of justice exception." (Ex. J, Transcript of July 13, 2006 Proceedings at 8:20-9:2.)

II. The EEOC Should Be Required To Produce Relevant Information Regarding Post-Sidley Employment.

Sidley served the subpoenas on the EEOC directed to each of the putative claimants the EEOC purports to represent on June 12, 2006. The EEOC did not provide any objections until more than one month later, on July 17, 2006. Federal Rule of Civil Procedure 45(c)(2)(B) requires objections within 14 days of service of a subpoena. As a result, the EEOC's objections are untimely and waived.

A. The Putative Claimants' Tax Returns Are Discoverable and Should Be Produced.

Sidley's subpoenas seek tax returns and supporting documentation (Ex. K, Subpoena Rider, request nos. 2 and 3.) The EEOC has stated that it will not produce tax returns for a putative claimant (unless the tax return is the *only* evidence of employment income) but that it will provide other information from which Sidley can glean or compute the putative claimants' income. This is simply not sufficient.

Controlling authority holds that a party's tax return is relevant and discoverable when, as here, he or she places his or her income at issue. *See Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 75 (7th Cir. 1992) ("[Plaintiff] himself put the level and sources of his income at issue . . . by claiming damages following the termination of his contract with [the defendant]."); *see also Simon v. Whichello*, No. 1:05-CV-333, 2006 WL 2042154, at *3 (N.D. Ind. July 18, 2006) (compelling production of one of the plaintiff's tax returns, "[g]iven the broad scope of discovery allowed by the Federal Rules," because they would "help to prove or disprove Plaintiffs' allegation.") In this case, the EEOC has alleged that the putative claimants have been

Case 1:05-cv-00208 Document 90 Filed 09/15/2006 Page 8 of 15

financially damaged by Sidley's decision to change their status in 1999, putting their income directly at issue and making their tax returns discoverable.[3]

Sidley is not only entitled to the tax returns but also the underlying data that supports the returns (*e.g.*, W-2 or K-1 forms and pension, IRA, or Social Security statements). *See, e.g., Britton v. D.A. Stuart Co.*, No. 03 C 6493, 2004 WL 2385006, at *1 (N.D. Ill. Oct. 25, 2004) (Zagel, J.) (directing plaintiff to produce W-2 forms and tax returns). This information is necessary in order for Sidley to understand the tax returns and all sources of income. For example, if a putative claimant and his or her spouse file a joint income tax return, without these supporting documents Sidley will not be able to determine the income allocable to the putative claimant. Additionally, the underlying data will allow Sidley to confirm that it possesses the relevant evidence regarding mitigation and provide a basis to question witnesses at their depositions regarding other income.

The tax returns are calculated to lead to the discovery of admissible evidence, and should be produced on that basis.

B. The EEOC Should Be Required To Produce Documents Reflecting The Putative Claimants' Ownership Interests In Other Law Firms and The Terms and Conditions of Post-Sidley Employment.

Sidley has requested documents reflecting the putative claimants' ownership interest in any law firm during the period of claimed damages and the terms and conditions of post-Sidley employment. (Ex. K, request nos. 4 and 10.) These documents are relevant to the

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[3] Sidley understands the sensitive nature of individual tax returns and will, of course, treat all tax returns as "confidential" under the Amended Protective Order. Indeed, as the EEOC acknowledged at a recent hearing, Sidley has gone to great efforts (opposed by the EEOC) to protect the individuals' private information from public disclosure. *See* Ex. J at 20:18-21:2 (by Deborah Hamilton: ". . . [Sidley] are the ones who were the strenuous promoters of confidentiality and it was our view that because of our public agency role, we would try to keep as little confidential as possible.") The fact that a tax return contains private information, however, is not a basis to refuse production of relevant information. *See, e.g., Simon*, 2006 WL 2042154, at *3 (compelling production of tax return).

issues of damages and mitigation. For example, an attorney's later partnership or employment agreement may discuss terms and conditions of employment which might be different than the terms of their Sidley employment. They will almost certainly include information on benefits and compensation formulae. *See CSC Holdings, Inc. v. Redisi*, 309 F.3d 988, 996 (7th Cir. 2002) (holding that defendants are entitled to certain documents in order to present an alternative and lower calculation of damages than the plaintiff had submitted). The value of an ownership interest may also relate to damages.

Documents relating to ownership interests and terms and conditions of employment also are relevant to the issue of mitigation. For example, Sidley is entitled to know if a putative claimant's compensation is based in part on the number of hours worked or billings in order to determine whether the individual made reasonable and diligent efforts to mitigate damages, *i.e.*, whether the individual worked at full capacity. The documents requested will allow Sidley to explore the EEOC's damages claim and its own defenses relating to mitigation.

C. The EEOC Should Be Required to Produce Documents Relating To The Putative Claimants' Post-Sidley Performance.

Sidley has requested documents relating to the putative claimants' performance in subsequent employment, including hours billed to clients, revenues generated from billings to clients, business generated or clients retained, and business development efforts. (Ex. K, request nos. 5, 6, 7, and 8.) The EEOC has refused to produce any documents responsive to these requests, asserting that the requested documents are not relevant.

1. The Requested Documents Are Relevant to the Issue of Mitigation.

As explained above, Sidley is entitled to know the efforts each putative claimant has undertaken to mitigate any damages. The information that Sidley seeks in response to these subpoena requests is directly relevant to a mitigation analysis. For example, the number of hours

a putative claimant has billed will help determine whether an individual worked at full capacity after leaving Sidley. A decision to voluntarily work part-time or accept a lesser job, for example, may relate to mitigation of damages. Likewise, business and revenue generation and business development all relate to a putative claimant's reasonable efforts to mitigate damages.

2. <u>Documents Similar to Those Requested by Sidley Were Sought by and Produced to the EEOC.</u>

The EEOC has itself requested post-status-change performance information from Sidley, arguing that information regarding the post-status-change performance of *each* partner whose status was changed is "relevant" and citing *Gage v. Metropolitan Water Reclamation Dist. of Greater Chicago*, 365 F. Supp. 2d 919, 932 (N.D. Ill. 2006) (Denlow, M. J.) (plaintiff's subsequent performance reviews admissible at trial) and *Bauer v. Chicago Title & Trust Co.*, 1985 WL 4900 at *6 n.3 (N.D. Ill. Dec. 12, 1985) ("[s]ubsequent performance is highly relevant to plaintiff's discharge"). Sidley produced post-1999 performance information for those attorneys still at Sidley under an "Attorneys' Eyes Only" designation. The EEOC, having demanded (and received) this information itself, cannot now credibly resist production of information relating to those individuals who no longer work at Sidley.

3. <u>The EEOC Has Placed the Putative Claimants' Post-1999 Performance At Issue.</u>

The EEOC has itself put the post-Sidley performance of the putative claimants at issue in this case and thus has opened the door to production of these documents. At the deposition of Sidley partner Virginia Aronson, EEOC attorney John Hendrickson questioned Ms. Aronson about the post-Sidley performance of former Sidley partners, asking her how several of the partners " < **REDACTED** > " and representing that " < **REDACTED** > " (Ex. L, Feb. 23, 2006 Deposition of Virginia Aronson at 127:12-21.) The EEOC cannot simultaneously rely on an individual's supposed post-Sidley performance while refusing to

provide Sidley with the evidence that would either support or rebut this assertion. *See Wolfolk v. Rivera*, 729 F.2d 1114, 1119 (7th Cir. 1983) (trial court properly admitted evidence concerning plaintiff's performance at previous employment in order to impeach his testimony concerning his performance there). The EEOC should be ordered to produce putative claimants' post-1999 performance information.

III. The EEOC's Supplemental Discovery Responses Remain Deficient.

During the parties' August 31, 2006 discovery conference, the EEOC agreed to supplement its responses to provide certain requested information. The EEOC provided its Fourth Supplemental Responses to Sidley's First Set of Discovery Requests and the EEOC's First Supplemental Responses to Sidley's Second Set of Discovery Requests to Sidley on September 8, 2006. (Exs. I and M.) Despite Sidley's numerous attempts to obtain the information and responses to which it is entitled, the EEOC's discovery responses remain deficient and must be addressed.

A. Information Learned From Former Sidley Partners (Interrogatory No. 9 of Sidley's First Set of Interrogatories)

In this interrogatory, Sidley asked the EEOC to identify all communications regarding this litigation between the EEOC and any Sidley partner or employee. Despite supplementing its responses three times, the EEOC's response to this interrogatory did not contain all such communications. Counsel for the EEOC acknowledged this fact during the August 31 meet and confer, stating that because different people in the office were conducting the interviews, the drafters of the discovery responses could not be sure that the answer was complete. The EEOC agreed, however, to provide a verification that its answer was complete and contained every conversation that the EEOC has had with any Sidley partner or employee.[4]

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[4] This was defined to include present or former partners or employees.

The EEOC has provided no such verification. The EEOC has had more than ample opportunity to disclose all communications called for by this interrogatory. It should be barred from relying on any information, or offering any person as a witness, not disclosed to date.

In addition, the EEOC should be compelled to describe any conversations it has had with < REDACTED > regarding this litigation. During the parties' meet and confer, Sidley's attorneys asked the EEOC to confirm whether it represents < REDACTED > for purposes of this litigation and to confirm that the facts gathered from any conversation with < REDACTED > were fully set forth in the EEOC's discovery responses. The EEOC's omission of < REDACTED > name from the list of putative claimants it purports to represent establishes that it does *not* in fact represent < REDACTED > (despite the fact that it has claimed that an attorney-claimant privilege applies to its communications with him). In its supplemental response, however, the EEOC did not describe the substance of any conversations with < REDACTED > , and should be required to do so.

B. Evidence Of An Age-Based Retirement Policy
(Interrogatory No. 6 of Sidley's First Set of Interrogatories.)

The EEOC provided Sidley with its fourth supplemental response to Interrogatory No. 6, which seeks all of the evidence that Sidley has an "age-based retirement policy," but still refuses to certify that this is all the evidence based on the documents produced and depositions taken to date. (Ex. I.) The EEOC states instead that "discovery continues." The EEOC should be held to their current responses unless it can establish that later-provided responses were formulated through information learned after this date.

C. Basis For Claims Relating to < REDACTED > And < REDACTED > (Interrogatory No. 5 of Sidley's Second Set of Interrogatories)

< REDACTED > and < REDACTED > , two putative claimants, were 39 at the time of the decision to change status. In Interrogatory No. 5 of Sidley's Second Set of Interrogatories, Sidley asks whether the EEOC contends that they are covered by the ADEA, and the basis for that contention. In response, the EEOC stated that Sidley changed their "status from partner to counsel or otherwise caused their departure from partnership status when they were each 40 years old." (Ex. F.) Sidley objected to this vague response and asked the EEOC to supplement its answer to provide the operative event that the EEOC contends took place after < REDACTED > or < REDACTED > turned 40. (Ex. D.)

In its amended response to Interrogatory No. 5, however, the EEOC provides no additional detail for this contention, simply stating that "Sidley changed their status as Sidley partners when they were each 40 years old." (Ex. M.) Sidley is entitled to know what alleged employment action (e.g., the decision to change status or the notification of the change in status) the EEOC deems operative in determining that < REDACTED > and < REDACTED > are covered by the ADEA.

D. Basis For Claims Of Liquidated Damages (Interrogatory No. 8 of Sidley's Second Set of Interrogatories)

In this interrogatory, Sidley asked the EEOC to describe all facts "and identify all documents you contend support the EEOC's claim for liquidated damages, including all facts and documents you contend demonstrate that Sidley did not have a good faith and non-reckless belief" that the putative claimants were exempt from the ADEA at the time the changes of status took place. (Ex. F.) The EEOC objected to this interrogatory as premature, and referred to its response to Interrogatory No. 8 of Sidley's First Set of Interrogatories, which provides none of

the requested information. Sidley objected to this response and asked the EEOC to specify which alleged facts support its claim for liquidated damages. (Ex. D.) In its first supplemental response, the EEOC provides no additional facts, merely stating that the deposition of < REDACTED > , a former Sidley partner, "is likely to lead to additional information responsive to this interrogatory." (Ex. M.) The EEOC's response constitutes an admission that it presently is aware of no facts to support its liquidated damages claim. The EEOC should be held to its answer and should not be permitted to rely on any facts currently known to it to support its contention.

CONCLUSION

For the reasons set forth above, Sidley hereby requests that this Court enter an order: (1) directing the EEOC to answer Interrogatory Nos. 7 and 9 of Sidley's Second Set of Interrogatories; (2) setting a date by which the EEOC can no longer supplement, subject to an interest of justice exception, its answer to Interrogatory No. 2 of Sidley's First Set of Interrogatories; (3) directing the EEOC to produce documents of the putative claimants it allegedly represents, in response to Requests 2, 3, 4, 5, 6, 7, 8, and 10 of Sidley's subpoenas; and (4) holding the EEOC to its current deficient discovery responses unless it can establish that later responses were formulated through information learned after its prior response.

Dated: September 15, 2006

Respectfully submitted,

SIDLEY AUSTIN LLP

By: /s/ Lynn H. Murray
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CERTIFICATE OF SERVICE

I, Maile H. Solís, an attorney, hereby certify that on **September 15, 2006**, I caused a true and complete copy of the foregoing **DEFENDANT'S MEMORANDUM IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES, COMPLIANCE WITH SUBPOENAS, AND SUPPLEMENTATION OF DEFICIENT DISCOVERY RESPONSES (redacted form)** to be served by Electronic Mail Transmission via ECF as to Filing Users upon the following:

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