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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, v. KELLEY DRYE & WARREN LLP, Defendant.	No. 10 Civ. 655 (LTS)(MHD) **FILED UNDER SEAL** **DEFENDANT'S COUNTER-STATEMENT OF FACTS PURSUANT TO LOCAL CIVIL RULE 56.1(B) IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

Defendant Kelley Drye & Warren LLP ("Defendant," "Kelley Drye," or "Firm"), by its attorneys, Proskauer Rose LLP, responds to plaintiff EEOC's Local Rule 56.1 Statement of Material Facts in Support of its Motion for Partial Summary Judgment Dismissing Defendant's Nineteenth Affirmative Defense as follows:

Plaintiff's Statement No. 1

The Nineteenth Affirmative Defense of Defendant Kelley Drye & Warren, LLP ("Kelley Drye" or "Defendant") states as follows: "To the extent D'Ablemont is successful in recovering any damages, Kelley Drye is entitled to a setoff of, *inter alia*, the total amounts D'Ablemont has received from third parties for legal services he has provided to those third parties, as well as amounts D'Ablemont has received from the Firm, or owes the Firm, and all debts of D'Ablemont forgiven by the Firm." (Defendant's Answer, pp. 7–8.)

Defendant's Response to No. 1

Undisputed.

Plaintiff's Statement No. 2

Kelley Drye has stated that the primary component of its setoff claims in its Nineteenth Affirmative Defense involve [sic] "direct third party payments D'Ablemont received for legal services rendered by him to a firm client." (See Declaration of Jeffrey Burstein in Support of Motion for Partial Summary Judgment ("Burstein Dec.") ¶ 2, Exh. A, February 10, 2011 letter from Bettina B. Plevan, Esq., counsel for Defendant, p. 2.)

Defendant's Response to No. 2

Disputed, except Defendant does not dispute that the direct third party payments D'Ablemont received for legal services rendered by him to firm clients constitute the largest portion, by dollar amount, of the setoffs Defendant seeks.

Plaintiff's Statement No. 3

The Kelley Drye Partnership Agreement provision at issue in this litigation required that equity partners fully relinquish their equity interest in the Firm and enter into "Life Partner" status at 70 years of age. (See Declaration of Eugene T. D'Ablemont in Support of Motion for Partial Summary Judgment ("D'Ablemont Dec."), ¶ 3, Exh. A.)

Defendant's Response to No. 3

Disputed. The Kelley Drye Partnership Agreement provision referenced required that Partners fully relinquish their equity interest in the Firm and enter into "Life Partner" status on "the first day of the Fiscal Year following the Partner's sixty-ninth birthday." (D'Ablemont Dec., Exh. A, sec. 501(a).)

Plaintiff's Statement No. 4

The Charging Party, Eugene T. D'Ablemont, turned 70 years of age in 2000 and in that year he lost all of his equity interest at Kelley Drye. That year, after involuntarily relinquishing his equity partner status, Mr. D'Ablemont entered into an agreement to serve as counsel for two related long-standing clients, and receive a retainer while continuing to work for Kelley Drye as a Life Partner. Mr. D'Ablemont fully notified Kelley Drye about these arrangements. (Declaration of Eugene T. D'Ablemont Pursuant to 28 U.S.C. § 1746 ("D'Ablemont Dec.") ¶¶ 3–4, Exhs. B and C.)

Defendant's Response to No. 4

Disputed. D'Ablemont voluntarily relinquished his equity partner status pursuant to a Partnership Agreement that he voluntarily entered into and from which he received significant benefits during his tenure as a Kelley Drye Partner. (See Declaration of John M. Callagy in Opposition to Plaintiff EEOC's Motion for Partial Summary Judgment ("Callagy Dec.") ¶ 2.)

Moreover, D'Ablemont did not "fully notif[y]" the Firm about his arrangements with the referenced clients. He only provided it with copies of letters he received from the two clients, which did not specify the length of the engagement, the amount to be paid, or the nature of the work to be performed. (D'Ablemont Dec., Exh. B; Callagy Dec. ¶ 4).

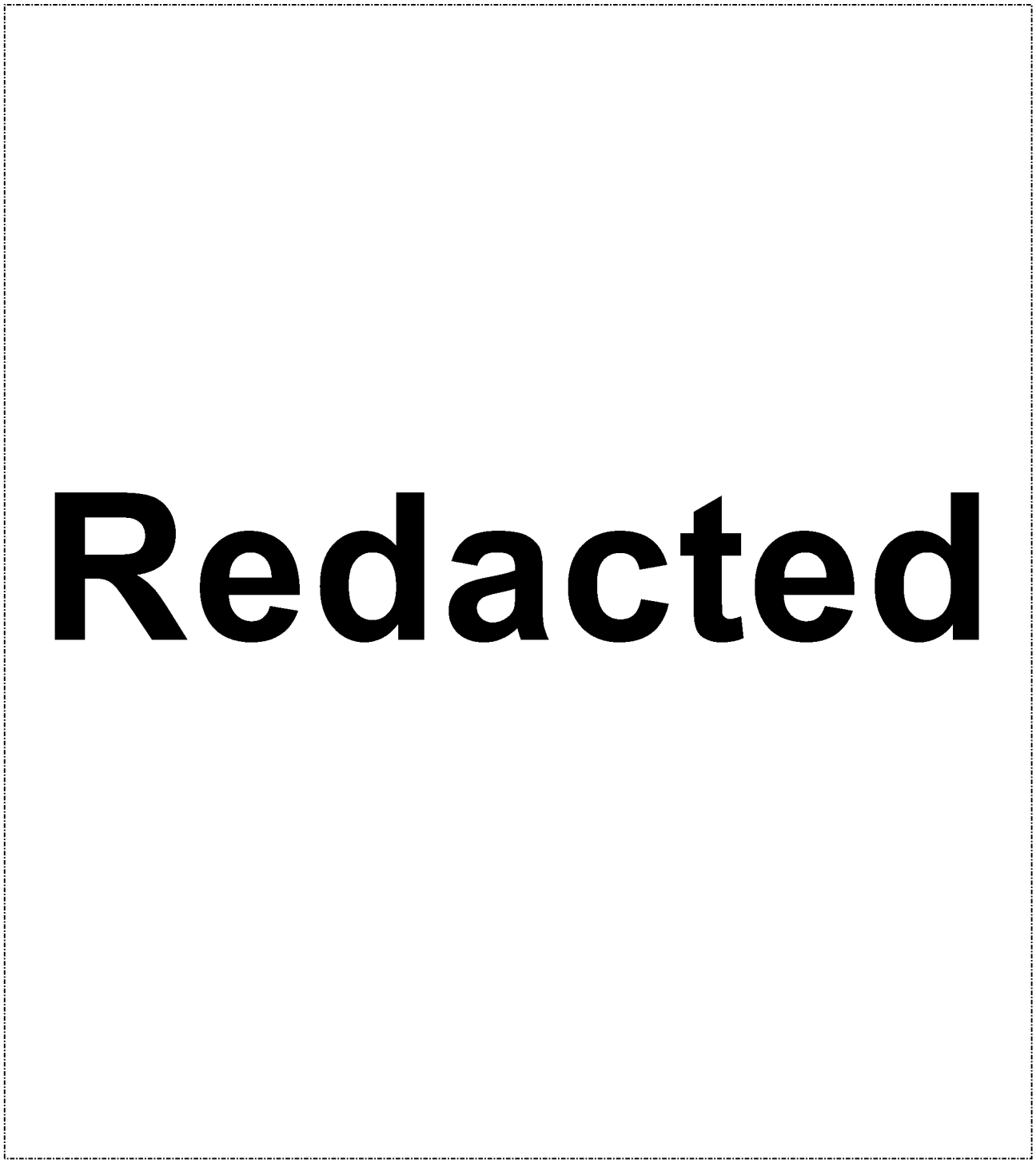
Plaintiff's Statement No. 5

The arrangement whereby Mr. D'Ablemont acted as counsel to these two related clients and received retainer payments is identical in nature to agreements entered into by other Kelley Drye attorneys who received direct payments from clients for services rendered, both before and after 2000. (D'Ablemont Dec., ¶ 5, Exhs. D, E, F, G and H.)

Defendant's Response to No. 5

Disputed. None of the agreements to which EEOC refers were identical or even similar to D'Ablemont's arrangements with two clients as described in the two letters D'Ablemont submitted to the Firm. All of these agreements were agreements between the Firm and the Partner, and in the case of Redacted, the agreement was between Redacted, the Firm, and Redacted Redacted as well. (D'Ablemont Dec., Exhs. D–H.) All of the agreements provided benefits to the Firm that it would not otherwise have secured.

Redacted



Under Kelley Drye's Partnership Agreement, all amounts paid by clients for the work of Kelley Drye attorneys are considered the property of Kelley Drye. (Callagy Dec., ¶ 3.) In rare instances, Kelley Drye Partners are permitted to accept direct payments, but only if these

arrangements are approved by the Firm. (*Id.* ¶ 10.) All of these arrangements, except D'Ablemont's, were agreed to in writing by the Firm and the partner at issue, and were based on the Firm's determination, based upon the totality of the circumstances, that such a relationship was in the best interests of the Firm. (*Id.*)

Plaintiff's Statement No. 6

In his role as counsel for these two clients since 2000, Mr. D'Ablemont selected only Kelley Drye attorneys to perform legal work for such clients (apart from the legal services provided by Mr. D'Ablemont himself), which has resulted in Kelley Drye's receipt of Redacted Redacted in revenue since Mr. D'Ablemont was forced into Life Partner status. (D'Ablemont Dec., ¶ 7.)

Defendant's Response to No. 6

Disputed. Defendant also asserts that these alleged facts are not material to EEOC's motion. Furthermore, Defendant has not conducted discovery concerning, and therefore does not know, whether D'Ablemont selected only Kelley Drye attorneys to perform legal work for the two clients with which he had retainer agreements. D'Ablemont's arrangements with Redacted and Redacted have not been as beneficial to the Firm as he asserts they have been. Had D'Ablemont charged these clients for his time through Kelley Drye, the limited data that Kelley Drye has for the years 2004 and 2007–2009 shows that the Firm would have billed and collected well over $Redacted for his time during that limited time frame.[1] (Declaration of Joseph C. O'Keefe in

[1] D'Ablemont apparently recorded the time that he devoted to work for Redacted and Redacted outside of the Firm's time recording system. Kelley Drye was only able to locate a limited number of these documents. Specifically, Kelley Drye obtained from D'Ablemont's records in its electronic document management system (1) a chart showing the total number of hours D'Ablemont "billed" on Redacted matters for each month in 2004; (2) D'Ablemont's "time entries" for Redacted matters for August–December 2007, January–July 2008, and January–June

Opposition to Plaintiff EEOC's Motion for Partial Summary Judgment ("O'Keefe Dec.") ¶ 3.) Moreover, D'Ablemont admitted that his arrangements have "significantly reduced" the legal fees received from these clients by the Firm. (*Id.*, Exh. A.) In particular, he wrote in a letter to one client that "Redacted Redacted Redacted Redacted Redacted Redacted" (*Id.*)

Plaintiff's Statement No. 7

While Kelley Drye was aware of and approved these arrangements, its initial position was that Mr. D'Ablemont could not obtain an annual bonus payment as compensation for legal services rendered to the Firm as Life Partner in addition to receiving these retainer payments. In a March 12, 2001 memo Redacted, Mr. D'Ablemont argued that he should be permitted to obtain a bonus payment for legal services rendered to Kelley Drye as a Life Partner in addition to these retainer payments. (D'Ablemont Dec., ¶ 6, Exh. I.)

Defendant's Response to No. 7

Disputed. Although Defendant was generally aware of D'Ablemont's desire to enter into retainer agreements with two Firm clients, D'Ablemont and the Firm never reached an

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2009; and (3) D'Ablemont's "time entries" for Redacted for January–June 2009. (O'Keefe Dec. ¶ 2.) Kelley Drye believes that D'Ablemont possesses the remainder of these records but he has not yet furnished them. (*Id.*)

agreement whereby the Firm approved these arrangements. (Callagy Dec. ¶ 4.) Defendant's position was that D'Ablemont could not obtain an annual bonus in addition to receiving and keeping the clients' retainer payments. Redacted and Redacted Redacted explicitly advised Mr. D'Ablemont in a February 22, 2000 memorandum that he could *either* retain the direct payments from Redacted and Redacted, or be considered for an annual bonus by the Firm's Executive Committee, but he could not have both. (Callagy Dec., Exh. B.) The Firm never altered its position on this issue, but rather paid bonuses to D'Ablemont year after year without knowledge of the payments that Mr. D'Ablemont continued to receive directly from Redacted and Redacted for legal services after 2001. (*Id.* ¶¶ 5–9; *see also* Declaration of Thomas Carty in Opposition to Plaintiff EEOC's Motion for Partial Summary Judgment ("Carty Dec.") ¶ 3.)

Plaintiff's Statement No. 8

On April 10, 2001, Mr. D'Ablemont received a bonus from Kelley Drye for his legal services rendered to Kelley Drye in 2000, and has annually received such bonuses since. (D'Ablemont Dec., ¶ 6, Exh. J.)

Defendant's Response to No. 8

Disputed. D'Ablemont demanded and received a bonus from Kelley Drye in 2000 and in each year since as an "honorarium" (as he described it), not for legal services rendered. (Callagy Dec. ¶ 5; D'Ablemont Dec., Exh. I.)

Plaintiff's Statement No. 9

The retainer payments from these two related clients to Mr. D'Ablemont routinely were noted on Mr. D'Ablemont's annual tax returns, which were prepared by Kelley Drye.

Additionally, the cover letters for the bills sent to these clients each month by Mr. D'Ablemont for legal services both by Mr. D'Ablemont and other Kelley Drye attorneys reflected that pursuant to the above-noted retainer agreements, there were no charges for Mr. D'Ablemont [sic] time. (D'Ablemont Dec., ¶ 8.)

Defendant's Response to No. 9

Disputed. Defendant has not conducted discovery concerning what information D'Ablemont provided to the Firm to prepare his tax returns. Kelley Drye disputes the implication that the Firm's management had knowledge of D'Ablemont's ongoing retainer relationship with two Firm clients and the payments he received directly from them. Although the Firm provided assistance to some of its Partners in the preparation of their tax returns, D'Ablemont's tax returns and related documentation were prepared by an accountant and a tax attorney employed by Kelley Drye. (Callagy Dec. ¶ 6.) The Executive Committee was not involved in the preparation of and had no knowledge of D'Ablemont's income tax returns. (*Id.*) Nor was Mr. Callagy even aware that Firm personnel prepared Mr. D'Ablemont's income tax returns. (*Id.*) Also, any bills and cover letters D'Ablemont prepared and sent were not provided to Firm management and presumably were sent directly to the clients he was billing. (*Id.* ¶ 7.) The Executive Committee does not review bills sent to clients or involve itself in the partner's day-to-day details of the billing process. (*Id.*) Firm partners, including Mr. D'Ablemont, enjoy a great deal of discretion and autonomy in the billing process and Firm management typically would become involved in the billing process only if a client had significant unpaid accounts receivable. (*Id.*)

Plaintiff's Statement No. 10

The issue of Mr. D'Ablemont receiving both payments from these clients and a bonus for work performed at Kelley Drye did not arise again for over seven years until the July 2008 when someone at the Firm "accidentally" opened a check with such a retainer payment, that had been sent to Mr. D' Ablemont at the Firm (as had occurred on a monthly basis since 2000). (D'Ablemont Dec., ¶ 9.)

Defendant's Response to No. 10

Undisputed, except that Defendant disputes the implication that the check payable to D'Ablemont was opened intentionally for the purposes of retaliating against him. In July 2008, the mailroom inadvertently delivered an envelope containing the check to the Accounting Department. (Carty Dec. ¶ 2.) The Accounting staff, following their normal procedures, opened the envelope and removed the check and related correspondence. (*Id.*) The normal procedure when a check made out to an individual Partner arrives is to forward the check to the Partner and ask him or her to endorse it for deposit in the Firm's bank account. (*Id.*) Consequently, the Accounting staff forwarded the check to D'Ablemont and asked him to endorse it and return it to Accounting for deposit. (*Id.*) Mr. D'Ablemont did not endorse and return the check for deposit into a Kelley Drye account. (*Id.*)

Plaintiff's Statement No. 11

Mr. D' Ablemont had filed his age discrimination charge with EEOC on February 29, 2008. (D'Ablemont Dec., ¶ 2.)

Defendant's Response to No. 11

Undisputed.

Plaintiff's Statement No. 12

The opening of the check referenced in paragraph 10 above engendered memos between Kelley Drye and Mr. D'Ablemont on the retainer payment issue, the last being a memo from Mr. D'Ablemont dated October 20, 2008. (D'Ablemont Dec., ¶ 10, Exh. K.)

Defendant's Response to No. 12

Disputed. The last memo from D'Ablemont concerning the retainer payment issue was dated October 28, 2008. (D'Ablemont Dec., Exh. K.)

Plaintiff's Statement No. 13

Kelley Drye's setoff claim regarding Mr. D'Ablemont's receipt of "free legal services" primarily involved legal fees in a real estate matter involving Mr. D'Ablemont and his son which went to litigation. Mr. D'Ablemont appeared as counsel *pro se* but was assisted at trial by a Kelley Drye attorney because Mr. D'Ablemont was a witness. The time spent on this matter by this Kelley Drye attorney was written off by Kelley Drye in June 2007 pursuant to standard practice at the Firm, and Mr. D'Ablemont never was billed for this work. (D'Ablemont Dec., ¶ 11.)

Defendant's Response to No. 13

Disputed. The matter in which D'Ablemont received "free legal services" from the Firm was not a real estate matter, but rather was a legal malpractice, breach of contract, and breach of fiduciary duty action filed by D'Ablemont and his son against another law firm that he had hired to represent his son in a personal real estate eviction proceeding. (Callagy Dec. ¶ 11.) D'Ablemont handled the matter *pro se* until it went to trial, at which point Kelley Drye Partner Redacted appeared as D'Ablemont's trial counsel in or about April 2006. (*Id.*) The "assistance" provided by the Kelley Drye Partner who served as D'Ablemont's trial counsel, and

in turn, by the Firm, incurred over $Redacted in billable time and disbursements for the work of the Partner and disbursements. (*Id.* ¶ 11 & Exh. D.) Contrary to D'Ablemont's statement, and as D'Ablemont well knows (according to his own sworn testimony in the trial of this matter), it is not the Firm's standard practice to perform this type of legal work for its Partners for free, or to write off legal fees and disbursements for such work that it does perform. (*Id.* ¶ 11 & Exh. G.)

Redacted

Plaintiff's Statement No. 14

The second component of Kelley Drye "free legal services" claim involves work performed by Kelley Drye for a Redacted for Mr. D'Ablemont's Redacted. This issue was resolved with finality on July 18, 2008, by a letter from Redacted writing off the time for work performed on this matter by a Kelley Drye attorney (D'Ablemont Dec., ¶ 12, Exh. L.)

Defendant's Response to No. 14

Disputed. The Firm reluctantly wrote off these legal fees and disbursements only after D'Ablemont balked at the prospect of either his Redacted or himself paying for them, despite knowing perfectly well that Redacted was expected to pay for this work, as reflected, for example, in a Firm e-mail chain of November 29, 2007, where D'Ablemont recommended to a credit analyst within Kelley Drye that the Firm not require at the outset of the

representation an advance retainer from this new client because, *inter alia*, D'Ablemont "would be surprised if our bill exceeds $10,000." (Callagy Dec. ¶ 12 & Exhs. I, H.)

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