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July 25, 2011

BY FACSIMILE & HAND

Magistrate Judge James C. Francis
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Windsor v. *United States*, 10 Civ. 8435 (BSJ) (JCF)

Dear Judge Francis:

Along with the American Civil Liberties Union and the New York Civil Liberties Union, we write on behalf of plaintiff Edith Schlain Windsor in the above-captioned matter. Because, in their letter dated July 25, 2011 (the "July 25 letter"), the Bipartisan Legal Advisory Group of the House of Representatives ("BLAG") adds little to their initial objections refusing to respond in substance to Ms. Windsor's discovery requests, this reply will be brief.

First, it goes without saying that the Federal Rules of Civil Procedure apply to all cases filed in the federal district courts. There are no special rules that apply only to certain types of cases. There are no provisions that require that only certain of the Federal Rules, such as the rule allowing a party to request the production of documents, apply to this case, while other rules do not. And, there are certainly no rules that provide that certain parties, such as the House of Representatives, are somehow exempt from complying with some or all of the Federal Rules.

What happened in this case, as in any other case and in accordance with the Court-ordered schedule,[1] is that plaintiff propounded interrogatories and requests for admission ("RFAs") seeking to accomplish certain basic, traditional objectives of civil discovery. Thus, as in any case, plaintiff sought to identify the scope of factual and legal issues that were truly in dispute between the parties so as "to narrow[] and sharpen[] the issues, which is a major purpose of discovery." *See* Fed. R. Civ. P. 33, Advisory Committee Notes, 1970 Amendment, Subdivision (b) (currently Subdivision (a)(2)). Thus, for example, plaintiff asked BLAG to admit that the estate of her late spouse Thea Spyer would have been entitled to claim the estate tax marital deduction if Ms. Spyer had been married to a man, instead of a woman. (RFA No. 1.)[2] Similarly, plaintiff asked BLAG to identify which, of the various interests previously identified by members of Congress and others, it was relying upon to justify the constitutionality of DOMA in this case. (Interrogatory Nos. 1, 3.)

This, of course, is no different than a plaintiff in a negligence case who asks the defendant to admit that it was raining and that the road was slippery on the day that the accident in question happened. Similarly, it is no different than a plaintiff in an antitrust case who serves an interrogatory asking the defendant which, of a series of technical antitrust defenses, it intends to rely upon at trial.[3] In other words, these types of ordinary written discovery requests get propounded each and every day in courts throughout this nation. There is nothing so extraordinary about this case, this plaintiff, or this defendant-intervenor, that should excuse BLAG's good faith compliance here.

Second, as explained in our letter dated July 18, 2011 (the "July 18 letter"), BLAG is incorrect that Ms. Windsor's RFAs and interrogatories improperly seek legal conclusions. Indeed, the cases cited by BLAG in its July 25 letter actually illustrate the difference between interrogatories which improperly seek a legal conclusion and those that do not. In *Mobil Oil Co.* v. *Dep't of Energy*, No. 81-340, 1982 WL 1135 (N.D.N.Y. Mar. 8, 1982), for example, the plaintiff sought to compel the Department of Energy ("DOE") to answer interrogatories concerning whether the expiration of the Emergency Petroleum Allocation Act of 1973 affected the DOE's ability to adopt regulatory amendments through emergency rulemaking procedures. The interrogatories at issue in that case were improper because they concerned matters of "pure law." *Id.* at *2. Similarly, in *Weddington* v. *Consolidated Rail Corp.*, 101 F.R.D. 71 (N.D. Ind.

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1 As counsel for BLAG knows, we served our written discovery requests on June 3, 2011 – the date specified in the Court's Revised Scheduling Order dated May 11, 2011.

2 That BLAG claims to lack the "expertise" to acknowledge that Ms. Windsor would otherwise have been eligible for the estate tax marital deduction (July 25 letter at 2, n.2) is not a proper objection since BLAG itself chose to intervene in this case and the U.S. House of Representatives surely must have access to persons with knowledge of the tax laws. As for BLAG's objection that it cannot accept Ms. Windsor's tax claim at "face value," that is a problem of BLAG's own making. BLAG was entitled under the Federal Rules to request her deposition, but failed to do so.

3 Contrary to the suggestion in the July 25 letter (at 2), Rule 33 does not require us to review BLAG's briefs in other cases and speculate as to which justifications it intends to rely upon to justify DOMA in this case.

1984), the defendant railroad company was presented with an interrogatory asking whether it recognized a common law duty to protect the public by taking safety precautions. And, *Lane No. 1* v. *Lane Masters Bowling Inc.*, Slip Op. No. 06-508, 2011 WL 1097861 (N.D.N.Y. Mar. 22, 2011) is a patent case in which the court determined that requests asking whether a patent is valid or whether infringement has occurred improperly requested legal conclusions.

Thus, in order to fit within the holdings of the cases cited by BLAG, plaintiff would have had to have served BLAG with an RFA asking BLAG to admit, for example, that Congress's effort to intrude upon the states' regulation of marriage through DOMA was not rational. Here, by contrast, Ms. Windsor's discovery requests seek either relevant facts or relevant contentions and thus are not "objectionable merely because [they] ask[] for an opinion or contention that relates to fact or the application of law to fact . . . ." Fed. R. Civ. P. 33(a)(2).

Third and finally, as also set forth in our July 18 letter, both the Federal Rules of Civil Procedure and the case law provide that if BLAG truly believes that a word or phrase in a particular RFA or interrogatory that Ms. Windsor propounded is too "vague" or too "sweeping," then the proper response is for BLAG to object, but still answer the RFA with what BLAG believes to be the appropriate limitation. *See* Fed. R. Civ. P. 36(a)(4) ("A denial must fairly respond to the substance of the matter; and *when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest.*") (emphasis added). Simply refusing to respond, as BLAG has done here, either on the ground that answering would require BLAG to engage in what it characterizes as a "thought exercise" or that its answer might potentially have adverse legal or political consequences for BLAG (July 25 letter at 5) simply is not valid.

For the foregoing reasons, as well as those stated in our July 18 letter, plaintiff respectfully requests that the Court grant her motion to compel.

Respectfully submitted,

Roberta Kaplan /JB

Roberta A. Kaplan

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