2018 WL 4579831
Only the Westlaw citation is currently available.
United States District Court, S.D. New York.

Carl CARVER et al., Plaintiffs,
v.
BANK OF NEW YORK MELLON, et al., Defendants.

15-CV-10180 (JPO) (JLC)
|
Signed 09/25/2018

Attorneys and Law Firms

Heather M. McElroy, Andrew H. Mohring, Barry M. Landy, Esther O. Agbaje, Ciresi Conlin, LLP, Minneapolis, MN, Marc H. Rifkind, Slevin & Hart, Regina Mary Markey, James Brian McTigue, McTigue Law LLP, Richard S. Siegel, Alston & Bird LLP, Washington, DC, for Plaintiffs.

Elizabeth M. Sacksteder, James L. Brochin, William Clareman, Amy Lynn Barton, Jeremy Aaron Benjamin, Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York, NY, for Defendants.

MEMORANDUM ORDER

JAMES L. COTT, United States Magistrate Judge

***1** Plaintiffs (ERISA participants and a trustee) have brought this putative class action pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, 29 U.S.C. §§ 1001 *et seq.*, claiming that Defendant Bank of New York Mellon ("BNYM") breached its fiduciary duty to ERISA plans that held American Depositary Receipts ("ADRs") for which BNYM served as a depositary. Specifically, Plaintiffs contend that BNYM breached its fiduciary duty to ERISA ADR holders in connection with its ADR-related foreign exchange ("FX") conversions and engaged in prohibited transactions under ERISA. Currently pending before the Court is Plaintiffs' challenge to certain of BNYM's responses to Plaintiffs' second set of requests for admission ("RFAs") served pursuant to Rule 36 of the Federal Rules of Civil Procedure. While Plaintiffs seek a conference to address their objections to BNYM's RFA responses and to compel "proper responses," the Court believes this matter can be resolved on the current record given the comprehensive submissions that the parties have made as well as the nature of the dispute.

I.

Before considering the particular RFAs at issue, a brief review of Rule 36 is in order. The Rule provides in relevant part as follows: "A party may serve on any other party a written request to admit, for purposes of the pending action only, the truth of any matters within the scope of Rule 26(b)(1) relating to: (A) facts, the application of law to fact, or opinions about either; and (B) the genuineness of any described documents." Fed. R. Civ. P. 36(a)(1)(A), (B). A responding party has the following options: (1) do nothing whatever and the RFA is then deemed admitted; (2) seek an extension to respond; (3) move for a protective order on the ground that the request will cause undue burden or expense; (4) make a specific admission; (5) deny the matter that it is requested to admit; (6) set out reasons why it cannot admit or deny; or (7) object to the RFA. *See* 8B Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2259, at 354–56 (3d ed. 2010) (listing options).[1] "It is expected that denials will be forthright, specific, and unconditional." *Id.* § 2260, at 359. The Rule also expressly states that "[a] party must not object solely on the ground that the request presents a genuine issue for trial." Fed. R. Civ. P. 36(a)(5). However, an objection may "be based on vagueness, that is, the respondent cannot answer because the meaning of the request is uncertain." *Republic of Turkey v. Christie's, Inc.*, No. 17-CV-3086 (AJN) (SDA), 2018 WL 3970905, at *4 (S.D.N.Y. Aug. 20, 2018) (quotation omitted); *see also Erie Ins. Prop. & Cas. Co. v. Johnson*, 272 F.R.D. 177, 185 (S.D. W. Va. 2010) (objection that RFA using the term "insureds" was vague sustained).

***2** As one court has recently observed: "Properly used, requests to admit serve the expedient purpose of eliminating the necessity of proving essentially undisputed issues of fact. They are intended to save time and expense by narrowing the issues to be tried." *Tamas v. Family Video Movie Club, Inc.*, 301 F.R.D. 346, 347 (N.D. Ill. 2014) (citation omitted). However, the Rule "should not be used unless the statement of fact sought to be admitted is phrased so that it can be admitted or denied without explanation." *United Coal Cos. v. Powell Constr. Co.*, 839 F.2d 958, 968 (3d Cir. 1988) (citation omitted).

Courts and commentators have recognized that Rule 36 can be misused. For example, "where requests for admission are not designated to identify and eliminate matters on which the parties agree, but to seek information as to the fundamental disagreement at the heart of the lawsuit, or are unduly burdensome, a court may excuse a party from responding to the requests." *Republic of Turkey*, 2018 WL 3970905, at *3 (citing *Tamas*, 301 F.R.D. at 347–48). *See also* Wright, Miller, & Marcus, *Federal Practice and Procedure* § 2252. Additionally, requests for admission are not to be used "in the hope that a party's adversary will simply concede essential elements [of the case]." *River Light V., L.P. v. Lin & J. Intern., Inc.*, 299 F.R.D. 61, 63 (S.D.N.Y. 2014) (citations omitted). Finally, a request for admission cannot be used to require a party to admit the truth of a legal conclusion. *Disability Rights Council v. Wash. Metro. Area Transit Auth.*, 234 F.R.D. 1, 3 (D.D.C. 2006).

II.

Plaintiffs challenge BNYM's responses to 25 different RFAs, although all but three of them involve variations of the same issue presented in paired requests (*i.e.*, one seeking an admission that BNYM took an action, and the other alternatively seeking an admission that BNYM did not take that same action). [2] The RFAs in question are as follows: [3]

- Nos. 41/42 – Did BNYM ever select worse FX conversion rates than were available in arms-length transactions when converting ADR-FX Cash Distributions for which it was a Depositary Bank?
- Nos. 43/44 – Did BNYM ever select worse FX conversion rates than were available in arms-length transactions in the interbank market when converting ADR-FX Cash Distributions for which it was a Depositary Bank?
- Nos. 46/47 – Did BNYM give ADR-FX clients FX Deal Rates that were at or near the worst interbank rates for the ADR-FX clients reported during the trading day or session?
- Nos. 48/49 – Did BNYM ever tell investors that a Cover Rate existed for ADR FX for which BNYM served as the Depositary?
- Nos. 50/51 – Since October 1, 2015, has BNYM continued to take a Spread on ADR FX transactions?
- Nos. 52/53 – Since April 5, 2016, has BNYM continued to take a Spread on ADR FX Cash Distribution conversions?
- Nos. 54/55 – Since April 5, 2016, has BNYM continued to assign a Deal Rate to ADR FX using range of day pricing?
- Nos. 56/57 – Has BNYM ever disclosed the Cover Rates to the owners of ADRs for which BNYM serves as a Depositary?
- Nos. 98/99 – Did BNYM act solely in the interest of ERISA Entities when performing ADR FX transactions?
- Nos. 100/101 – Did BNYM attempt to defray all reasonable expenses for ADR Owners when performing ADR FX transactions?
- Nos. 127/128 – Was it the practice of BNYM's Global Markets Division to price small transactions at the current market rate?
- No. 139 – Did BNYM provide to ADR Owners the interest it earned on Cash Distributions made by foreign issuers and received by BNYM as the depositary of an ADR for which it served as depositary?

***3** • No. 142 – When performing ADR FX, does BNYM assign Deal Rates that tended to be at or near the worst rates available in the relevant interbank range?

- No. 143 – Did BNYM systematically assign Deal Rates to ADR FX at the rate that is at or near the worst rate for the ADR Owner?

While BNYM's responses to these RFAs raise a concern, as is discussed below, the Court denies Plaintiffs' motion to compel amended responses to these RFAs on several grounds. First, BNYM has denied each of the RFAs in question, and, as such, no amended responses are needed. *See, e.g., Republic of Turkey*, 2018 WL 3970905, at *4 (citing *Bernstein v. Principal Life Ins. Co.*, No. 09-CV-4925 (CM) (HBP), 2010 WL 4922093, at *4 (S.D.N.Y. Dec. 2, 2010)) (plaintiffs "have denied each of the requests

in this group;" "[a]lthough defendant may disagree with these responses, that disagreement does not render the responses inadequate").

Second, the RFAs in dispute do not conform to the requirements of Rule 36 and the case law construing the Rule. In particular, the RFAs do not seek to establish the admission of facts about which there is no real dispute. To the contrary, these RFAs seek information as to "the fundamental disagreements at the heart of the lawsuit." *Republic of Turkey*, 2018 WL 3970905, at *3. The issues raised by the RFAs are thus more appropriately addressed through deposition and document discovery.

Third, many of the RFAs use terminology that is either vague, ambiguous, or at a minimum, subject to dispute given that the terms are not specifically defined.[4] They are not phrased so that they can be admitted or denied without explanation, a *sine qua non* for a proper RFA.

Fourth, at least some of the RFAs improperly seek the ratification of legal conclusions.

Finally, the RFAs are improperly aspirational, in that Plaintiffs hope that BNYM will "simply concede essential elements" rather than contest them.

More specifically, the Court makes the following determinations as to each RFA (or related pairs):

***4** • RFAs 41 & 42, 43 & 44, 46 & 47, and 142 & 143: These related RFAs, by their terms, require BNYM to admit that thousands of FX conversion rates provided to its clients compared favorably or unfavorably to rates in "arms-length transactions," or to rates that were "at or near the worst interbank rates." As BNYM points out in its letter to the Court, these terms are undefined and it is impossible to compare two undefined quantities and yet these RFAs seek exactly that information. BNYM's Letter dated August 22, 2018 ("BNYM Ltr.") (Dkt. No. 167), at 4. In addition, RFAs 142 and 143 use the term "deal rate," which is another undefined term and one that goes to the heart of the lawsuit. The vagueness and subjectivity of the various terms used in these RFAs also make them improper. To the extent that Plaintiffs wish to discover the rates that BNYM provided ADR investors, and how BNYM attempted to set a price for ADR-related conversions, they should do so through deposition testimony and document requests. Additionally, if BNYM has produced documents stating the rates it provided ADR investors, Plaintiffs could seek an admission as to the genuineness of such documents under Rule 36(a)(1)(B).

- RFAs 48 & 49 and 56 & 57: These RFAs seek admissions as to whether BNYM disclosed "cover rates" to ADR owners or that such rates existed for ADR FX. Again, "cover rates" is an undefined term, the meaning of which is disputed by the parties. As such, these RFAs are saddled with vague and undefined terms and are improper.

- RFAs 50–55: These RFAs share a common defect: they all include terms that are vague and ambiguous. RFAs 50 through 53 all turn on the meaning of the word "spread," and whether BNYM took a "spread" on ADR FX transactions and on ADR FX Cash Distribution conversions. But like some of the other terms, "spread" is not a defined term. In addition, RFAs 54 and 55 use the term "deal rate," which the Court previously determined was an undefined term. It is therefore not feasible for BNYM to respond to RFAs with such vague and ambiguous terms, which again cut to the core of the litigation.

- RFAs 98–101: These RFAs seek admissions as to whether BNYM "acted solely in the interest" of Plaintiffs when performing ADR FX transactions and attempted to defray expenses when performing these transactions. Whether an entity complied with its fiduciary duties is a legal question, and therefore not properly the subject of an RFA. Moreover, it appears that many ADR FX conversions did not involve any ERISA investors so these RFAs are overly broad. It is also not clear what "reasonable expenses" means in the context of RFAs 100 and 101.

- RFAs 127, 128, and 139: RFAs 127 and 128 seek an admission from BNYM that it was its practice to price "small transactions" at the current market rate. What is meant by "small transactions" is undefined. Such vague RFAs are accordingly improper. RFA 139 seeks an admission that BNYM provided ADR owners the interest it earned on cash distributions as the depositary of an ADR for which it served as the depositary. Again, this RFA is so broad in scope as to be essentially meaningless. It is not clear which ADR

owners are implicated, or which cash distributions are involved.

In sum, the RFAs at issue are flawed for the various reasons identified by the Court. They are not attempts to establish the admission of facts about which there is no real dispute. To the contrary, these RFAs raise issues that go to the heart of the case. Although Plaintiffs understandably disagree with BNYM's responses, "that disagreement does not render [them] inadequate." *Bernstein*, 2010 WL 4922093, at *4.

Finally, a word about BNYM's responses. As the Court discussed earlier in this Memorandum Order, a recipient has a number of options in responding to RFAs. However, BNYM's responses deviate in part from the options permitted by Rule 36. Specifically, rather than simply "deny," move for a protective order to avoid responding, or "object" and state the reasons for its objection, BNYM chose to object, state the basis for its objection, and then recast the RFA and respond to it in its own terms before otherwise denying it. For example, RFA 41 sought an admission "that BNYM selected worse FX conversion rates than were available in arms-length transactions when converting ADR-FX Cash Distributions for which it was a Depositary Bank." BNYM objected to the RFA, *inter alia*, on relevance grounds, and contended that it was overbroad, vague, ambiguous, and failed to specify any time period. But instead of concluding its response at this point, it then recast the RFA and admitted that "it priced each ADR-related FX transaction consistent with the 'Deal_Rate' reported in BARS data produced in this action for such transaction," and "otherwise denied." BNYM's responses are replete with such re-castings of the RFAs. But such responses are not contemplated by Rule 36 and serve no useful purpose. If anything, they have the potential to muddy the record, broadening rather than narrowing the issues to be further adjudicated. In its response to RFA 41, BNYM's "admission" appears to be effectively meaningless for purposes of the litigation. In sum, the "denials" and "objections" (with reasons) BNYM has interposed comport with Rule 36 but the "re-castings" do not, and therefore have no legal consequence. [5]

III.

***5** For the foregoing reasons, Plaintiffs' letter-motion to compel amended responses to the RFAs in dispute is denied. Plaintiffs are directed to file their August 15th letter-motion to the Court (previously sent only by email) on the docket, with the redactions identified in their cover letter submitted to the Court. This filing is without prejudice to the Court ordering that some or all of these redactions may be removed during the course of further proceedings in the litigation. The exhibits attached to the letter-motion may also be filed under seal until further order of the Court.

SO ORDERED.

All Citations

Slip Copy, 2018 WL 4579831

Footnotes

1 Rule 36(a)(4) provides: "If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. 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. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only if the party states that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to enable it to admit or deny."

2 For example, RFA No. 41 asks BNYM to admit that it selected worse FX conversion rates than were available in arms-length transactions when converting ADR-FX Cash Distributions for which it was a Depositary Bank, whereas RFA No. 42 asks BNYM to admit that it did not select worse FX conversion rates than were available in arms-length transactions when converting ADR-FX Cash Distributions for which it was a Depositary Bank.

3 While Plaintiffs have phrased each of their RFAs in the form of "Admit that ...," for clarity the Court summarizes each "pair" of RFAs in the form of a question.

4 Plaintiffs' attempt to define some of the terms in question (such as "cover rate," "deal rate," "global markets," "spread," and "trading revenue," among others) by reference to excerpts from the deposition testimony of a BNYM Rule 30(b)(6)

witness is inadequate as there is an insufficient basis to conclude that the witness can define such terms for all purposes in this litigation (or that he was even defining any of these terms during his testimony). Moreover, no authority is cited for the proposition that the Court can rely on such deposition testimony to define otherwise contested terminology.

5 BNYM contends that it "appropriately qualified" its responses, as is its right, citing *Henry v. Champlain Enterprises, Inc.*, 212 F.R.D. 73, 77 (N.D.N.Y. 2003). BNYM Ltr., at 3. But in *Henry*, the court observed only that "[t]here will be times ... when the answer cannot be a succinct yes or no, and a qualification of the response is indeed necessary. Under these circumstances, the answering party is obligated to specify so much of its answer as true and qualify or deny the remainder of the request." *Henry*, 212 F.R.D. at 77-78 (citations omitted). The *Henry* court's observation is consistent with Rule 36(a)(4), which provides that "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." Here, BNYM does not simply qualify its responses to the RFAs; instead it effectively rewrites the RFAs and then answers them. Rule 36 does not allow for such responses.

End of Document