UNITED STATES TAX COURT
WASHINGTON, DC 20217 **PA**

ADRIAN D. SMITH & NANCY W. SMITH, ET AL.,	)	
Petitioners,	)	
v.	)	Docket Nos. 13382-17, 13385-17, 13387-17.
COMMISSIONER OF INTERNAL REVENUE,	)	
Respondent	)	

O R D E R

On March 25, 2020, petitioners filed a Status Report, advising the Court that, in their view, respondent has failed to comply with the Court's Order dated March 12, 2020, granting in part petitioners' Motion to Compel Responses to Interrogatories, filed March 6, 2020. The foregoing Order directed respondent to serve on counsel for petitioners, on or before March 19, 2020, full, complete, and responsive answers, made under oath and in good faith, to interrogatory Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of Petitioner's [sic] First Set of Interrogatories, served on respondent on October 11, 2018 (petitioners' First Interrogatories).[1] As noted by the Court in the foregoing Order, petitioners' First Interrogatories seek to clarify respondent's positions and contentions in these cases; namely, the factual or legal basis for respondent's determinations in the notices of deficiency that, for the taxable years at issue, petitioners are not entitled to the credit for increasing research activities under section 41.[2]

In their Status Report petitioners assert that respondent's supplemental answers to petitioners' First Interrogatories, sent under cover of letter dated March 18, 2020

[1]The Order denied so much of petitioners' Motion as it relates to interrogatory No. 3.

[2]Section references are to the Internal Revenue Code of 1986, as amended and in effect at all relevant times, and Rule references are to the Tax Court Rules of Practice and Procedure.

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(respondent's Supplemental Answers),[3] "remain insufficient" and consist of "untimely objections, * * * incomplete responses, and * * * theories bankrupt of both legal and factual support." Additionally, petitioners assert that the Supplemental Answers "are neither under oath nor made in good faith." Petitioners argue that the insufficiency of respondent's Supplemental Answers prejudices them by hindering their ability to prepare adequately for trial:

> Petitioners need clear and detailed statements of Respondent's positions and why Respondent is asserting such positions. Petitioners are not asking for legal briefing or citation to case law. Above all else, Petitioners need to know the factual basis of Respondent's claims. It is essential to the litigation process, and toward a fair and just outcome. At the present, not only have Petitioners been deprived of the above-referenced particulars, but also identification of the documentation responsive to their specific requests. This level of understanding is critical to counsel's preparation for trial. For instance, Petitioners need to know exactly what documents opposing counsel has identified, versus merely globally referencing the entire production without identification by bates number.

By their Status Report petitioners request "that the Court revisit its March 12, 2020 Order and compel Respondent to provide actual substantive responses to the pending Interrogatories as previously ordered by the Court."

In our view respondent's Supplemental Answers provide substantively sufficient responses to interrogatory Nos. 1, 7, 9, 11, 13, 14, and 15.[4] Nevertheless, as petitioners note the Supplemental Answers are not signed and sworn by respondent as required by Rule 71(c) and are therefore procedurally defective. See Rule 71(a) (providing that, if the party served is a government agency, interrogatories are to be answered "by an officer or agent who shall furnish such information as is available to the party"), (c) (providing that, unless objected to, "[e]ach interrogatory shall be answered separately and fully under oath"); see also Deseret Mgmt. Corp. v. United

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[3]Petitioners have attached a copy of respondent's Supplemental Answers as Exhibit B to their Status Report.

[4]Although respondent has lodged objections to interrogatory Nos. 13, 14, and 15, which we hereby overrule as untimely, he has also provided substantive answers thereto. We find those answers to be sufficient, insofar as they establish that respondent does not maintain the contentions that are the subject of the foregoing interrogatories.

States, 75 Fed. Cl. 571, 572-573, 574-575 (Fed. Cl. 2007) (holding that counsel representing the Internal Revenue Service (IRS) in the proceeding was an "officer or agent" for purposes of signing responses to interrogatories issued to the IRS; holding, further, that counsel must "furnish such information as is available to the party" (i.e., the IRS) and certify under penalties of perjury that the responses were true and correct). Accordingly, we will direct respondent to serve on petitioners signed and sworn copies of the Supplemental Answers with respect to interrogatory Nos. 1, 7, 9, 11, 13, 14, and 15.

We agree with petitioners, however, that respondent's Supplemental Answers are not only procedurally defective but also substantively insufficient with respect to interrogatory Nos. 2, 4, 5, 6, 8, 10, and 12.[5] First, respondent has failed to identify the factual basis for all but one of the contentions he asserts therein. In response to interrogatory No. 1, respondent has identified 16 broad contentions, such as "Adrian Smith + Gordon Gill Architecture, LLP (AS+GG) did not perform or pay for qualified research"; "AS+GG employees did not perform qualified services"; and "[t]he claimed supply costs were not consumed in qualified research activities." These broad contentions are a sufficient response to interrogatory No. 1, as it requests only that respondent "provide a complete list of reasons why the IRS contends that Petitioners are not entitled to the R&D tax credits it claimed." However, interrogatory No. 2 requests that, for each of the contentions identified in response to interrogatory

[5]To the extent that respondent has lodged objections to interrogatory Nos. 8 and 10, we agree with petitioners that those objections are untimely and hereby overrule them. See Rule 71(c) (requiring that objections to interrogatories be served within 30 days after service thereof). Moreover, we also agree with petitioners that the timing and nature of respondent's objections to the foregoing interrogatories, as well as those he has lodged with respect to interrogatory Nos. 13, 14, and 15, see supra n.4, indicate a lack of good faith, particularly in view of the fact that, at the time respondent lodged the objections, the Court had already reviewed the interrogatories to which they were directed, found them to be proper, and ordered respondent to answer them. As noted in the Court's Order dated March 12, 2020, petitioners' Motion to Compel requests sanctions in the event respondent fails to comply fully. The Court has yet to rule on the foregoing request, and petitioners' Status Report is silent on the issue. Accordingly, we will direct petitioners to file a report as set forth below, advising the Court of their then-current position as to whether the sanctions requested in their Motion to Compel should be imposed. See Zenith Elec. Corp. v. WH-TV Broad. Corp., 395 F.3d 416, 420 (7th Cir. 2005) (holding that the District Court did not abuse its discretion by excluding certain evidence based on the party's failure to provide a responsive answer to a contention interrogatory requesting a description of the party's damages theory and the proof to be employed).

No. 1, respondent identify, inter alia, "the factual basis or reasons why you so state". While an interrogatory requesting "each and every fact" or "all facts" supporting an opposing party's contention may in some cases be held to be overly broad and unduly burdensome, it is well established that an interrogatory may reasonably ask for the material or principal facts that support a contention, and we find that petitioners' requests for the factual bases supporting respondent's contentions are reasonable[6] and will serve a substantial purpose in this proceeding.[7] See Myers v. Anthem Life Ins. Co., 316 F.R.D. 186, 198 (W.D. Ky. 2016) ("The 'general view is that contention interrogatories are a perfectly permissible form of discovery, to which a response ordinarily would be required.'") (quoting Starcher v. Corr. Med. Sys., Inc., 144 F.3d 418, 421 n.2 (6th Cir. 1998)); Alta Health Strategies, Inc. v. Kennedy, 790 F. Supp. 1085, 1100 (D. Utah 1992) ("Generally, interrogatories requiring legal or factual conclusions or opinions are to be answered 'when they would serve a substantial purpose in expediting the lawsuit, leading to evidence or narrowing the issues.'") (quoting Luey v. Sterling Drug, Inc., 240 F. Supp. 632, 636 (W.D. Mich.1965)); see also Lucero v. Valdez, 240 F.R.D. 591, 594-595 (D. N.M. 2007) (directing the plaintiff to further answer certain contention interrogatories requesting that he, with respect to each contention, "[s]tate the basis for and identify each document" that supported the contention; " * * * [The plaintiff] need not provide a narrative account of his case in response to these interrogatories, but should set forth the material or principal facts that support his claims."); Moses v. Halstead, 236 F.R.D. 667, 674 (D. Kan. 2006) ("[T]he general rule in this Court is that interrogatories may properly ask for the 'principal or material' facts which support an allegation or defense."). Apart from stating the basis for his contention that the "funded research" exception under section 41(d)(4)(h) applies in these cases (albeit doing so only indirectly, in response to interrogatory No. 11), respondent's Supplemental Answers do not sufficiently respond to petitioners' request for "the factual basis or reasons" supporting

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[6]For example, the scope of interrogatory No. 2 is limited in two respects: (1) It does not request "each and every fact" or "all facts" underlying respondent's contentions; and (2) each request for a "factual basis" is further limited by reference to each contention stated by respondent in his answer to interrogatory No. 1. We find that the remaining interrogatories at issue are also sufficiently narrow in scope. In any event, respondent has not lodged any objection as to undue burden in his Supplemental Answers and, even if he had, such an objection would be untimely.

[7]In our view proper answers to the interrogatories at issue should narrow the issues in these cases about which there is a reasonable dispute. See Schaap v. Exec. Indus., Inc., 130 F.R.D. 384, 388 (N.D. Ill. 1990) ("[O]ne of the main goals of discovery is to clarify, narrow, and sharpen the issues.")

respondent's stated contentions.[8] In our view this omission is improper given the procedural posture of these cases.[9]

Second, in his Supplemental Answers respondent repeatedly asserts that in support of his stated position or contention he relies on "petitioners' bates-numbered document productions". However, respondent does not identify the Bates numbers of the particular documents on which he purports to rely for his stated position or contention. Such a position is contrary to well established discovery principles. "An attorney who is faced with 'contention' type discovery must identify the witnesses and documents he/she has marshaled in a way to support his/her client's position and to help illuminate the issues to be resolved as the responses and answers are due." Burnett & Morand P'ship v. Estate of Youngs, No. 3:10-cv-3-RLY-WGH, 2011 WL 1237950, at *3-*4 (S.D. Ind. Apr. 4, 2011) (directing the defendant "to identify all

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[8]As noted supra p. 2, we have also found that respondent's Supplemental Answers provide sufficient response to interrogatory No. 7, which asks whether respondent contends that AS+GG did not properly substantiate the qualified research expenses (QREs) it claimed for the relevant period. Respondent has responded to interrogatory No. 7 by stating, inter alia, "Yes, respondent contends that AS+GG did not properly substantiate its R&D tax credits." In our view respondent need not state a factual basis in support of the foregoing contention.

[9]If contention interrogatories are served too early in a proceeding--namely, before the opposing party has had a reasonable opportunity to conduct discovery--the Court may determine that answers need not be furnished at that time. See Rule 70(b) (providing, with respect to discovery requests involving contentions or opinions, that "the Court may order that the information or response sought need not be furnished or made until some designated time or a particular stage has been reached in the case or until a specified step has been taken by a party"); see also In re Convergent Techs. Sec. Litig., 108 F.R.D. 328, 340-341 (N.D. Cal. 1985) (denying in large part the defendant's motions to compel answers to contention interrogatories as premature but nevertheless directing the plaintiffs at that time, and with respect to the controverted allegations in the pending complaint, to "identify * * * any witnesses whom plaintiffs know have information that supports or contradicts any of the controverted allegations" and "to produce * * * all the documents in plaintiffs' control that support or contradict any of the controverted allegations"). No delay is necessary or appropriate here. The Petitions in these cases were filed in June 2017, and the period for formal discovery has ended. We therefore agree with petitioners that respondent has had "ample time" to formulate and state his positions and contentions, particularly in view of the Court's granting the vast majority of his extensive and highly detailed discovery requests.

documents that it intends to use at trial to support its affirmative defenses, regardless of whether or not the documents have already been produced independently by some other party to this lawsuit"; further directing that "[t]he foregoing identification needs to be reasonably specific--at least by Bates stamp number--though it does not require * * * [the defendant] to explain how or why said document supports the defense"); see also Deere v. Am. Water Works Co., 306 F.R.D. 208, 220 (S.D. Ind. 2015) (directing the defendant in a negligence suit "to provide a complete and unequivocal response" to a contention interrogatory requesting that, if the defendant was asserting that another party might be liable for the plaintiff's injuries, that the defendant "please state all facts on which * * * [it was relying] in making this contention, as well as * * * the names, addresses, and telephone numbers of all persons who have knowledge of the facts; and * * * [that the defendant please] identify all writings and other tangible things that support your contention and state the name, address, and telephone number of the person who has each writing or thing"; finding that "the interrogatory at issue will help narrow the issues in this litigation by establishing which of many potential theories Defendant may assert to try to avoid liability"); Davis v. City of Springfield, Ill., Nos. 04-3168, 07-3096, 2009 WL 268893, at *7 (C.D. Ill. Jan. 30, 2009) (directing the defendant to respond to an interrogatory requesting that the defendant, with respect to each of its 12 affirmative defenses, "state the facts upon which it bases the defense, . . . identify any person known to have personal knowledge of each fact, and . . . identify any document that memorializes any fact or otherwise supports its assertion of the affirmative defenses"); Lucero, 240 F.R.D. at 595 (directing the plaintiff to "identify the documents that support his claims"); Moses, 236 F.R.D. at 674 ("[I]nterrogatories may seek the identities of knowledgeable persons and supporting documents for the 'principal' or 'material' facts supporting an allegation or defense."). Moreover, courts have rejected attempts by the opposing party to respond to contention interrogatories with vague references to documents already produced in the proceeding. See Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co., Inc., 246 F.R.D. 522, 529 (S.D. W. Va. 2007) (finding the plaintiff's answer to a contention interrogatory requesting the "evidentiary support" for a particular assertion in its pleadings to be "nonresponsive" where it stated that "all facts, documents, statements, and evidence adduced to date in discovery of this matter constitute evidentiary support" for the assertion); see also Myers, 316 F.R.D. at 198 (directing the defendant to answer a contention interrogatory requesting that it "[s]tate each defense, including affirmative, that Defendant is asserting or relying on in this action" and "[f]or each defense, provide the material facts supporting said defense"; rejecting the defendant's attempt to answer by reference to the administrative record); Lucero, 240 F.R.D. at 595 (finding that the plaintiff failed to provide a sufficient response to certain contention interrogatories where in response "he simply referred Defendants to documents he had already produced or documents that would be produced during further discovery").

Third, and finally, in his Supplemental Answers respondent also repeatedly asserts that in support of his stated position or contention he relies on "the anticipated testimony" of employees ("present and former") and contractors of Adrian Smith + Gordon Gill, LLP (AS+GG). However, respondent does not actually identify the persons he intends to call as witnesses. As the foregoing authority demonstrates, an attorney facing contention interrogatories must, inter alia, identify the witnesses he has marshaled in support of his client's position. See supra pp. 5-6. In our view respondent's repeated reference to present and former employees and contractors of AS+GG--without actually naming the witnesses he intends to call--is insufficient.

As discussed in the Order dated March 12, 2020, this Court has been clear that "to prepare properly for a trial, it is necessary for each party to know the position of the other party, and discovery may be used to clarify that position." Zaentz v. Commissioner, 73 T.C. 469, 478 (1979). We conclude that respondent's Supplemental Answers, with respect to interrogatory Nos. 2, 4, 5, 6, 8, 10, and 12, are insufficient to permit petitioners to reasonably prepare for trial. Accordingly, we will direct respondent to further supplement his responses to the foregoing interrogatories as set forth below.

In view of the foregoing, it is

ORDERED that respondent shall, on or before April 28, 2020, serve on counsel for petitioners, signed and sworn copies of his Supplemental Answers with respect to interrogatory Nos. 1, 7, 9, 11, 13, 14, and 15 of petitioners' First Interrogatories. See Rule 71(c). It is further

ORDERED that respondent shall further supplement his Supplemental Answers by serving on counsel for petitioners, on or before April 28, 2020, full, complete, and responsive answers, made under oath and in good faith, to interrogatory Nos. 2, 4, 5, 6, 8, 10, and 12 of petitioners' First Interrogatories. In accordance with the foregoing, respondent shall supplement his Supplemental Answers by: (1) stating, to an extent that permits petitioners to reasonably prepare for trial, the factual basis for each of the positions and contentions he asserts in the Supplemental Answers (with the exception of his contentions that the "funded research" exception under section 41(d)(4)(H) applies in these cases and that AS+GG has not properly substantiated the QREs it claimed for the relevant period); (2) identifying, by Bates number, each of "petitioners' bates-numbered document productions" on which he purports to rely for each of the positions and contentions he asserts in the Supplemental Answers; and (3) identifying each of the persons he intends to call as a witness to provide "the anticipated testimony" on which he purports to rely for each of the positions and

contentions he asserts in the Supplemental Answers. Respondent need not provide a narrative account of his case; however, he must at a minimum set forth the material or principal facts that support each of the positions and contentions set forth in his Supplemental Answers (with the exception of his contentions that the "funded research" exception under section 41(d)(4)(H) applies in these cases and that AS+GG has not properly substantiated the QREs it claimed for the relevant period). It is further

ORDERED that petitioners shall, on or before May 1, 2020, file a report advising the Court whether, in petitioners' view, respondent has satisfactorily complied with this Order. The foregoing report shall also advise the Court of petitioners' then-current position as to whether the sanctions requested in petitioners' Motion to Compel Responses to Interrogatories, filed March 6, 2020, should be imposed. It is further

ORDERED that petitioners' request for sanctions in their Motion to Compel Responses to Interrogatories, filed March 6, 2020, will be held in abeyance until after May 1, 2020.

Respondent is hereby advised that, in the event he does not fully comply with the provisions of this Order, he may later be precluded from introducing evidence that would have been responsive to petitioners' interrogatories, or other sanctions may be imposed as the Court deems appropriate. See Rule 104(c).

(Signed) Joseph H. Gale
Judge

Dated: Washington, D.C.
April 21, 2020