

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

-----	Y	
	:	
SPORT & WHEAT CPA PA, a Florida	:	
corporation, individually and on behalf of	:	
a class of similarly situated businesses and	:	Case No. 3:20-cv-05425-
individuals,	:	TKW-HTC
	:	
	:	
Plaintiff,	:	
	:	
	:	
v.	:	
	:	
SERVISFIRST BANK INC.; SYNOVUS	:	
BANK; THE FIRST, A NATIONAL	:	
BANKING ASSOCIATION; and	:	
TRUIST BANK,	:	
Defendants.	:	
-----	X	

MOTION TO TERMINATE RULE 30(b)(6) DEPOSITION

INTRODUCTION

Plaintiff Sport & Wheat (“S&W”) rushed to file suit against Synovus over a claim of \$1,633, despite neither Plaintiff nor its counsel having made any demand for payment of that claim upon Synovus. Then Plaintiff’s counsel insisted on an immediate Rule 30(b)(6) deposition, despite the fact that responses to Plaintiff’s interrogatories and requests for documents were not due, which responses and documents are ordinarily the subject matter of a Rule 30(b)(6) interrogation.

Counsel for Synovus accommodated the insistence by Plaintiff's counsel for a 30(b)(6) deposition, and presented a witness for interrogation just three weeks after Plaintiff's Amended Complaint was filed.

Before the deposition, Plaintiff's counsel agreed to identify the Synovus borrower for whom S&W claimed to have acted as "agent," so that Synovus could research its dealings with that borrower to prepare the 30(b)(6) witness for the deposition upon which Plaintiff's counsel insisted. But then Plaintiff's counsel refused to identify the borrower.

Before the deposition, Synovus counsel asked Plaintiff's counsel to provide any communications S&W had had with Synovus, including "texts between Sport & Wheat, or someone at Sport & Wheat, and someone at Synovus" – again to prepare the 30(b)(6) witness. *See* 6/15/20 Email of P. Bates to B. Cash, attached hereto as Ex. 2. Plaintiff's counsel ignored those requests, and provided no such documents.

When the deposition took place, Plaintiff's counsel sought to interrogate the 30(b)(6) witness about texts that had been exchanged between one of S&W's principals and a Synovus employee in Florida. The two were apparently good friends, and embodied in the texts about multifarious personal matters were some references to the federal Paycheck Protection Program ("PPP"), the lending program that is at issue in this case. Ordinarily for a 30(b)(6) deposition the parties

know what documents are going to be discussed; that is essential to prepare a 30(b)(6) witness to speak for a corporation. But Plaintiff's counsel did not provide any documents to Synovus counsel in advance; instead he ignored the request by Synovus counsel for any communications S&W claimed to have had with Synovus.

The witness could not have known anything about the texts or learned anything about them in preparing for the 30(b)(6) deposition, both because Plaintiff's counsel refused to provide them and because it is contrary to bank policy for employees to discuss bank business via text message.¹

Ordinarily at *any* deposition before a lawyer interrogates a witness about a document, the lawyer gives both the witness and opposing counsel a copy of the document. That is basic professional and common courtesy, a rule universally followed in the collective experience of Synovus counsel – until this deposition in this case. Plaintiff's counsel had insisted on taking the deposition by Zoom rather

¹ 6/18/20 Synovus 30(b)(6) Deposition Rough Transcript at 65:15-23. Also, Synovus does not issue company cellphones to its employees; cellphones are the personal property of Synovus' employees. *Id.* at 65:1-5. Additionally, as a practical and technological matter, Synovus would have no way of searching the text messages of all of its nearly 5,000 employees even if it had the legal authority to do so.

Relevant excerpts from the “rough” deposition transcript from the Court Reporter are Exhibit 1 to this Motion. Because a Protective Order has not yet been entered in this case, Synovus is not filing the entire transcript on the docket.

than in person,² so he was not present to hand out copies of documents, and he refused to show the entirety of a document to the witness and Synovus counsel before interrogating the witness about parts of the document.³

Then, after some three hours of deposition, Plaintiff's counsel sought to interrogate the witness about a text which he, the lawyer, had redacted – *from which he had removed content*. See, e.g., 6/18/20 Synovus 30(b)(6) Deposition Rough Transcript at 132:10-12 (Plaintiff's counsel admitted that he had "grayed out the areas [of the text messages] that I'm just not interested in asking about," not because he was asserting some alleged privilege).⁴

Plaintiff's counsel even refused to provide the witness and Synovus counsel the complete, unredacted, document about which Plaintiff's counsel sought to interrogate the 30b6 witness.⁵ That was way beyond the pale. See Fed. R. Civ. P.

² Synovus counsel Philip Bates and Ramsey Prather were present in person, with the witness and the Court Reporter.

³ See, e.g., 6/18/20 Synovus 30(b)(6) Deposition Rough Transcript at 42:3-11 ("[Synovus counsel]: Mr. Cash, why don't you go ahead and email [the documents] to us and I can print out copies and we'll have copies available here in the room with the witness? [Plaintiff's counsel]: Well, I'm not going to do that because I don't know which exhibits I do and don't need to use, and I don't want to tip my hand on what the exhibits are before the time comes.").

⁴ Plaintiff's counsel has not contended that the redactions were made on the basis of any privilege, nor could he given that the redacted text messages are between an S&W principal and a third party.

⁵ See, e.g., 6/18/20 Synovus 30(b)(6) Deposition Rough Transcript at 132:7-133:8 ("[Synovus counsel]: Again, I object to your producing part of a document to ask a witness questions where the witness doesn't have the opportunity to examine the context in which the comments are made. [Plaintiff's counsel]: No. I disagree.")

30(c); Fed. R. Evid. 106. Synovus counsel had allowed the 30(b)(6) deposition to go forward, despite Plaintiff's counsel having obstructed preparation of the witness, despite Plaintiff's counsel having failed to provide information he had promised to provide that was needed to fully prepare the witness, and had even allowed Plaintiff's counsel to continue his interrogation despite refusing to provide copies of documents to the witness or Synovus counsel. Synovus counsel did that because they believed Plaintiff's counsel was merely trying to gin up a dispute so he could claim Synovus was being uncooperative. But attempting to interrogate a 30(b)(6) corporate representative witness about partial, redacted documents was too much: that was unfair to the witness, unfair to Synovus, and made a complete direct examination of the witness impossible. It was also a breach of all professional courtesies.

As a result of the misconduct by Plaintiff's counsel, counsel for Synovus had no choice but to terminate the deposition pending an Order of the Court. Because Plaintiff's tactics were unfair, unlawful, and reflect bad faith, Synovus respectfully asks that the Court enter an Order that the deposition is terminated.

BACKGROUND

A. Plaintiff's Meritless Amended Complaint

This lawsuit over a \$1,633 claim (see Am. Compl. ¶ 112, ECF 21) never communicated to Synovus before Plaintiff's counsel rushed to file suit has already

cost Synovus enormously – in lost time for Synovus employees who should be attending to customers, trouble, and legal expenses. The claim has no merit. *See Synovus’ Motion to Dismiss the Amended Complaint*, ECF 46. The reason for the conduct of Plaintiff’s counsel seems clear. Last week they filed a brief with the Judicial Panel on Multidistrict Litigation (“JPML”) seeking to join this lawsuit with other similar lawsuits filed around the country in an MDL. Plaintiff’s counsel obviously rushed to be the ‘first to file’ and ‘first’ to take a “30(b)(6) deposition” so they could seek a seat on an MDL committee, in the unlikely event an MDL is created. In an obvious attempt to make this lawsuit as expensive for Synovus as possible and in order to try to extract a settlement, Plaintiff’s counsel told the JPML that they wanted the case heard not by this Court, before whom they had filed the lawsuit, but by the Western District of Washington. That is 2,200 air miles and 2,700 road miles from Pensacola. Plaintiff’s excuse stated to the MDL was that this Court “continues to suffer from courthouse construction problems in Pensacola.”

As explained in Synovus’s Motion to Dismiss the Amended Complaint, this case involves the Paycheck Protection Program (“PPP”), created as part of the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. 116-136 (the “CARES Act” or “the Act”). The CARES Act is part of the Federal government’s response to the economic hardship caused by the COVID-19 pandemic. To

provide emergency assistance to small businesses affected by the pandemic, the PPP significantly expanded the Small Business Administration's ("SBA") 7(a) loan program for small businesses and provided a mechanism by which borrowers could receive funds to cover payroll and other expenses and, in certain circumstances, have their loans forgiven by the government. PPP loans are processed and disbursed through private lenders such as Synovus, and those lenders receive a statutory processing fee from the government for each approved loan.

Plaintiff S&W is an accounting firm. S&W claims it assisted a client with an application to Synovus for a PPP loan. S&W does not allege that Synovus authorized any such work; in fact S&W admits Synovus did not authorize such work and stated that it would not pay agent fees. Instead, S&W alleges that the CARES Act and SBA regulations thereunder create an absolute *entitlement* to fees for any agent who *claims* to have assisted a PPP borrower in preparing an application. S&W insists that lenders must pay those fees even where, as here, the lender in no way authorized the agent's activities. As explained in Synovus's motion to dismiss the amended complaint, the CARES Act created no such entitlement and does not even provide a private right of action. For these and other reasons under Florida law, all of Plaintiff's claims are meritless.

On May 17, 2020, Synovus promptly moved to dismiss Plaintiff's initial complaint. Ten days later, on May 27, 2020, Plaintiff rendered its initial complaint a nullity by filing an amended complaint which, among other things, added two defendants and attempted to remedy multiple blatant pleading deficiencies. Synovus promptly moved to dismiss Plaintiff's amended complaint, which is based on the same flawed legal theory as Plaintiff's initial complaint. Because of this Court's order requiring that discovery go forward despite the pending motion to dismiss, ECF No. 16, the parties proceeded with discovery.

B. The Rule 30(b)(6) Deposition

Plaintiff's gamesmanship with respect to the Rule 30(b)(6) deposition of Synovus began late on Friday afternoon, May 29 when, just two days after filing the amended complaint, Plaintiff's counsel emailed a Rule 30(b)(6) deposition notice stating Plaintiff's intention to depose Synovus on Friday, June 5—a mere five business days later. The 30(b)(6) deposition notice included 15 topics.⁶ Plaintiff's counsel did not call or email Synovus's counsel in advance of serving the Rule 30(b)(6) deposition notice to determine whether Synovus was available to

⁶ The 30(b)(6) deposition notice served by Plaintiff's counsel contained "topics" which were overbroad and irrelevant to this lawsuit over a claim of \$1,633 in which no class has been certified. For example, Plaintiff's counsel wanted to interrogate Synovus' corporate representative about *all* PPP loans – not just the one application submitted by the unidentified borrower for whom S&W claimed to have been an "agent." Synovus has processed some **20,000** PPP applications.

sit for a corporate deposition on that date. Plaintiff's counsel even admitted that he was "spring[ing]" the Rule 30(b)(6) notice on Synovus. *See* 5/29/20 Email from B. Cash, attached here to as Ex. 3.

In an effort to avoid burdening the Court with a Motion for Protective Order with respect to the Rule 30(b)(6) deposition, counsel for Synovus emailed Plaintiff's counsel on Sunday, May 31, 2020, stating that although it "is exceedingly odd for a plaintiff's lawyer to send a 30(b)(6) notice before he has seen any documents other than [the defendant's] motion to dismiss," Synovus was willing to meet and confer to try to reach a resolution regarding the Rule 30(b)(6) deposition. The parties met and conferred on June 1, 2020. During that call, counsel for Synovus again noted the oddity of proceeding with a 30(b)(6) deposition prior to the onset of document discovery. Yet Plaintiff's counsel insisted on proceeding with the deposition. Later that week, Synovus offered Tuesday, June 16, 2020 as an available date for the deposition, subject to Synovus's objections to the Rule 30(b)(6) notice. Plaintiff's counsel agreed that the deposition would take place two days later on June 18, 2020.

Synovus agreed to proceed with the Rule 30(b)(6) deposition at this early juncture in the case based largely on Plaintiff's representation that it would *voluntarily make information available to Synovus that Synovus would need to prepare for the deposition*. For example, on May 29, 2020—the same day that

Plaintiff served the Rule 30(b)(6) notice—Plaintiff’s counsel promised that “on request, Plaintiff will supply the Bank with sufficient information to identify all [PPP] Borrowers” for which S&W contends it served as a PPP agent. *See* 5/29/20 Pltf.’s Consolidated Discovery Requests to Defendant Synovus Bank at n. 1, attached hereto as Ex. 4. On June 2, 2020, Synovus counsel sent Plaintiff’s counsel an email requesting “the names and other identifying information for the persons firms, or corporations for whom your client contends it acted as an agent . . . as contemplated by footnote #1” to Plaintiff’s Requests for Production so that Synovus counsel could identify the borrower for which S&W contended in its Amended Complaint it had served as an “agent” and further investigate. *See* 6/2/20 Email from P. Bates to B. Cash, attached hereto as Ex. 5. On June 15, 2020, counsel for Synovus sent Plaintiff’s counsel an additional email specifically requesting that Plaintiff’s counsel provide any “texts between Sport & Wheat, or someone at Sport & Wheat, and someone at Synovus” before the deposition. *See* 6/15/20 Email of P. Bates to B. Cash, attached hereto as Ex. 2.

Plaintiff’s counsel did not respond to any of those requests. Plaintiff’s counsel did not do what he had promised to do. The result was that Synovus had no way to identify the borrower for which S&W contended in its Amended Complaint it had served as an “agent.” Synovus also had no way to search for email messages specific to that borrower or to consult with Synovus employees

who may have worked on the loan application for that borrower, which might have possibly allowed Synovus to try to find out whether text messages between Synovus employees and S&W existed. The purpose of Plaintiff's counsel seems clear: he broke his promise and ignored requests which were obviously intended to get the 30(b)(6) witness prepared because he did not want the witness to know about and be prepared to testify about the text messages Plaintiff's counsel intended to "spring" on the witness and Synovus. Plaintiff's counsel was intent on sandbagging, so that he could then complain that Synovus' 30(b)(6) witness was not prepared.

During the deposition Synovus counsel still attempted to resolve the issues caused by Plaintiff's counsel's conduct without seeking Court intervention. During the deposition, counsel for Synovus requested the basic professional and common courtesy of being provided with copies of documents about which Plaintiff's counsel sought to interrogate the witness. Plaintiff's counsel refused. Counsel for Synovus also objected to the use by plaintiff's counsel of heavily redacted text messages and requested copies of the unredacted documents as required by law. Plaintiff's counsel refused. *See, e.g.*, 6/18/20 Synovus 30(b)(6) Deposition Rough Transcript at 132:7-133:8; *see also* Fed. R. Civ. P. 30(c); Fed. R. Evid. 106. Synovus had an absolute right to be provided with unredacted copies of the text messages. Plaintiff's counsel was trying to attribute statements therein

by a bank employee in Pace, Florida to the corporation. The refusal by Plaintiff's counsel to provide unredacted copies was unfathomable bad faith. These facts, coupled with Plaintiff's failure to identify the borrowers as Plaintiff previously represented it would, gave Synovus no choice but to terminate the deposition pending an Order of the Court.

It is hard to imagine worse conduct; indeed, none of Synovus counsel have ever experienced anything like it. Plaintiff's counsel promised to provide the name of the Synovus borrower, then refused; insisted on taking the deposition by Zoom so he would not be present with Synovus counsel and would not have to show them or the witness complete documents before interrogating the witness about them; refused to show Synovus counsel and the witness the complete documents; and then, by his own overt admission, sought to interrogate the witness about a document he had himself redacted so it was not complete. Asked later that day to provide all the documents he had used so Synovus counsel could finally see them, he compounded the misconduct by sending *redacted versions* the next day.⁷

Now, Plaintiffs' counsel complains of the consequences of his own conduct: he has accused Synovus and its counsel of not having the witness properly prepared – after being told taking a 30(b)(6) deposition before any document

⁷ The day after the deposition, plaintiffs' counsel recanted and said he would send the unredacted documents. Those have not been sent.

exchange had occurred seemed foolish, and after reneging on his promise to provide the name of the Synovus borrower for which S&W claimed to be an agent, knowing full well not doing so would mean Synovus could not research that claim and fully prepare the 30(b)(6) witness to discuss it. See 6/19/20 & 6/20/20 Emails between J. Butler and B. Cash attached hereto as Ex. 6.)

ARGUMENT AND AUTHORITY

A. Federal Rule of Civil Procedure 30(d)(3)(A).

This Court has authority to terminate the Rule 30(b)(6) deposition of Synovus. Rule 30(d)(3)(A) provides that “[a]t any time during a deposition, the deponent or a party may move to terminate or limit it on the grounds that it is being conducted in bad faith or in a manner that unreasonably annoys, embarrasses, or oppresses the deponent or party.” Fed. R. Civ. P. 30(d)(3)(A). “The Rule expressly allows counsel to terminate the deposition pending the Order of the Court.” *Buckley Towers Condominium, Inc. v. QBE Ins. Corp.*, 2008 WL2645680, at *9 (S.D. Fla. June 26, 2008).

B. The Court should terminate the deposition because of the entirety of the misconduct by Plaintiff’s counsel.

Synovus counsel Mr. Bates finally terminated the 30(b)(6) deposition specifically because Plaintiff’s counsel sought to not only use documents he had refused to provide to Synovus in advance and which he refused to provide to the witness and Synovus counsel during the deposition, but then sought to interrogate

the witness about documents which he, Plaintiff's counsel, had redacted. But the entirety of Plaintiff's counsel's misconduct referenced above warrants an Order that the deposition is terminated.

C. The Court should also terminate the deposition because Plaintiff's counsel violated Synovus' right to present the witness with complete, unredacted copies of the text messages.

Plaintiff counsel's decision to attempt to examine Synovus with text messages which he had heavily redacted without first providing complete, unredacted copies of the text messages to the witness and to Synovus counsel violated federal law. Federal Rule of Evidence 106, sometimes referred to as the "rule of completeness," states that "if a party introduces all or *part of* a writing or a recorded statement, an adverse party may require the introduction, ***at that time***, of any other part—or any other writing or recorded statement—that in fairness ought to be considered at the same time." (Emphasis added.) Therefore when Synovus counsel requested the complete document, Plaintiff's counsel was obligated to provide it – then and there. That is simple fairness, to the witness, and to Synovus. By refusing to provide Synovus with unredacted copies of the text messages, Plaintiff's counsel deprived Synovus of its right to determine which portions of the text messages should be considered by the witness, in both his responses to questions on cross-examination and on later direct examination.

Additionally, Federal Rule of Civil Procedure 30(f)(2) requires that “documents and tangible things produced for an inspection during a deposition **must**, on a party’s request, be marked for identification and attached to the deposition. Any party may inspect and copy them.” (Emphasis added.) Plaintiff’s counsel violated this Rule during the deposition by refusing to permit Synovus to inspect unredacted copies of the text messages, and Plaintiff’s counsel continues to violate this Rule.

Plaintiff’s counsel’s tactics had immediate prejudicial consequences. Without unredacted copies of the text messages, Synovus’ 30(b)(6) witness could not fully respond to questions posed to him on cross-examination. Without unredacted copies, Synovus counsel could not conduct a complete direct examination of its Rule 30(b)(6) corporate representative. That prejudice was explicitly intended by Plaintiff’s counsel. The purpose was to sandbag Synovus and the witness, and to try to leave the factfinder with the impression that Synovus had no response to the text messages Plaintiff had used during the deposition.

The fact that Plaintiff’s counsel elected to conduct his examination of the 30(b)(6) witness by Zoom video conference does not change the law. Counsel was still obliged to conduct a “*fair* examination of the deponent” and to refrain from conducting the deposition “in bad faith.” See Fed. R. Civ. P. 30(d)(2), (d)(3)(A).

D. The Court should terminate the deposition because Synovus was entitled to be provided with the statements Plaintiff's counsel attempts to attribute to Synovus.

Plaintiff's counsel's tactical decision to sandbag Synovus' corporate representative with text messages Plaintiff contends are statements attributable to Synovus establishes a clear violation of Federal Rule of Civil Procedure 26(b)(3)(C). That Rule provides that "any party or other person may, *on request* . . . obtain the person's own previous statement about the action or its subject matter."

Synovus counsel requested any such text messages from Plaintiff's counsel before the Rule 30(b)(6) deposition, but Plaintiff's counsel failed to provide them. Indeed, on Monday, June 15, 2020, counsel for Synovus sent an email to plaintiff's counsel requesting "texts between Sport & Wheat, or someone at Sport & Wheat, and someone at Synovus" before the deposition. Plaintiff's counsel failed to respond. See 6/15/20 Email of P. Bates to B. Cash, attached hereto as Ex. 2. Rather than complying with its obligation to provide these text messages to Synovus before the deposition occurred, Plaintiff's counsel chose to sandbag Synovus' corporate representative during the deposition in violation of both the text and spirit of the rule.

CONCLUSION

Synovus respectfully requests that the Court terminate its Rule 30(b)(6) deposition in light of the bad faith manner in which that deposition was conducted.

Respectfully submitted, this 22nd day of June, 2020.

By: /s/Philip A. Bates

Philip A. Bates
Florida Bar #228354
PHILIP A. BATES, P.A.
25 West Cedar Street, Suite 550 (32502)
Post Office Box 1390
Pensacola, FL 32591
pbates@philipbates.net
(850) 470-0091

James E. Butler, Jr.
Georgia Bar #099625
Ramsey B. Prather
Georgia Bar #658395
BUTLER WOOTEN & PEAK LLP
105 Thirteenth Street
P.O. Box 2766
Columbus, GA 31902
jim@butlerwooten.com
ramsey@butlerwooten.com
(706) 322-1990

Paul J. Nathanson
Columbia Bar #982269
DAVIS POLK & WARDWELL LLP
901 15th Street, N.W.
Washington, D.C. 20005
paul.nathanson@davispolk.com
(202) 962-7000

Antonio M. Haynes
New York Bar #5151816

DAVIS POLK & WARDWELL LLP
450 Lexington Ave.
New York, NY 10017
antonio.haynes@davispolk.com
(212) 450-4000

Attorneys for Defendant Synovus Bank

CERTIFICATE PURSUANT TO LOCAL RULE 7.1(B) AND (C)

Pursuant to Local Rule 7.1(B) & (C), undersigned counsel certify that they attempted in good faith to resolve the issue through a meaningful conference with plaintiff's counsel during the deposition, but were unsuccessful.

By: /s/Philip A. Bates

Philip A. Bates
Florida Bar #228354
PHILIP A. BATES, P.A.
25 West Cedar Street, Suite 550 (32502)
Post Office Box 1390
Pensacola, FL 32591
pbates@philipbates.net
(850) 470-0091

LOCAL RULE 7.1(F) WORD LIMIT CERTIFICATION

Pursuant to Northern District of Florida Local Rule 7.1(F), I certify that this Motion to Terminate Rule 30(b)(6) Deposition is in compliance with the Court's word limit. According to the word processing program used to prepare this motion, the document contains 3,700 words, exclusive of the case style, signature block, and this certification.

By: /s/Philip A. Bates

Philip A. Bates

Florida Bar #228354

PHILIP A. BATES, P.A.

25 West Cedar Street, Suite 550 (32502)

Post Office Box 1390

Pensacola, FL 32591

pbates@philipbates.net

(850) 470-0091