

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

SPORT & WHEAT CPA PA,
a Florida corporation, individually and
on behalf of a class of similarly situated
businesses and individuals,

Plaintiff,

v.

SERVISFIRST BANK INC., et al.,

Defendants.

Case No. 3:20-cv-5425-TKW-HTC

**PLAINTIFF SPORT & WHEAT’S OPPOSITION TO
SYNOVUS BANK’S MOTION TO TERMINATE ITS OWN DEPOSITION**

Sport & Wheat has tried to work with Synovus throughout this litigation. From the outset, Synovus has responded with extreme aggression and hostility. Synovus now accuses Sport & Wheat of breaching “all professional courtesies.”

The Court should recognize what an extremely thin motion this is. Several pages are wasted complaining about the fact that this action was filed, but in all 20 pages, Synovus has cited exactly *one* case in support of its overblown argument that this deposition was “unfair, unlawful, and [in] bad faith.” (Mot. at 5.) The full, final deposition transcript was available to Synovus the same day it filed this motion, but Synovus did not file it, claiming it needed a protective order, which it has never sought. (Mot. at 3, n.1) This motion is all about eighteen screenshots’ worth of text

messages, but Synovus didn't file them either and *still* doesn't want the Court to see them—even under seal. And although it complained mightily about the scope of the deposition, it did not file the deposition notice either. (Mot. at 8, n.6.)

In this motion, Synovus directly attacks the character and professionalism of an attorney. That is a very serious charge. And it is very telling that Synovus did not come forward with any evidence to support that charge.

Nothing untoward happened at this deposition—except that one of the parties walked out with plenty of questions pending. Even after that happened, Sport & Wheat was willing to drop the entire issue for now. Having been forced to defend itself—and its own lawyer's professionalism—Sport & Wheat seeks attorney fees for the time spent on this motion.

I. Governing law.

Fed. R. Civ. P. 30(c) provides in part: “The examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence, except Rules 103 and 615.”

Fed. R. Civ. P. 30(c)(2) provides in part: “An objection at the time of the examination—whether to evidence, to a party's conduct, to the officer's qualifications, to the manner of taking the deposition, or to any other aspect of the

deposition—must be noted on the record, **but the examination still proceeds; the testimony is taken subject to any objection.**” (Emphasis added.)

Fed. R. Civ. P. 30(d) states in part:

(d) Duration; Sanction; Motion to Terminate or Limit.

(2) *Sanction.* The court may impose an appropriate sanction—including the reasonable expenses and attorney’s fees incurred by any party—on a person who impedes, delays, or frustrates the fair examination of the deponent.

(3) *Motion to Terminate or Limit.*

(A) *Grounds.* At any time during a deposition, the deponent or a party may move to terminate or limit it on the ground 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. 37(a)(5) provides that a motion seeking discovery which is granted by a court requires attorney’s fees to be awarded in favor of the movant, *unless* the movant “filed the motion before attempting in good faith to obtain the disclosure or discovery without court action.” The same rule holds that when a discovery motion is denied, the court must award reasonable fees to the party that opposed the motion, unless the motion was substantially justified.

Paragraph 7 of the Court’s Initial Scheduling Order, ECF No. 16, states that the Court ordinarily awards fees for time spent filing and arguing discovery motions.

Loc. R. 7.1(B) requires the parties to confer prior to filing any motion raising an issue.

II. The facts of this deposition.

The Court ordered that discovery should begin immediately. (ECF No. 16.) Accordingly, on May 29, Sport & Wheat served a deposition notice on Synovus. (Mot. Ex. 3, at 2.)

Synovus absolutely misrepresents this notice, from the get-go. In Synovus's telling, the choice to serve a deposition notice was malicious, improper — “exceedingly odd.” (Mot. 9.) Synovus leaves out the completely reasonable nature of the initial communication serving the notice. Sport & Wheat was extremely polite:

Request for 30(b)(6) deposition

Regarding the deposition of Synovus Bank: we would like to have this on June 5. I never just spring notices on people, but I wanted you to see the topics now. **If that does not work, we are willing to go into the next week (June 8-12).** Please tell us the physical location of the witness, but we expect to conduct the entire thing via Zoom. I will amend the notice once we have worked out the details.

(Mot. Ex. 3 at 2 (emphasis added).) Sport & Wheat did *not* “spring” the notice on anyone. Moreover, the e-mail stated, “I am grateful for the help and will do what I

can to repay the favor. My personal cell number is . . . and I am happy to talk with any of you. Have a good weekend.”

This friendly opening e-mail was met with an aggressive response.

Ultimately, as Synovus correctly recounts, the parties *agreed* on the deposition date of June 18—two weeks after Sport & Wheat’s preferred date of June 5. (Mot. at 9.) June 18 was a date that Synovus offered and Sport & Wheat accepted. The deposition notice is attached. (Ex. A.)

This deposition was taken remotely using Zoom. Sport & Wheat’s attorney, Bill Cash, now lives in Chicago full time. John Wirt and Pamela Wirt, also counsel for Sport & Wheat, attended the deposition. The Wirts also maintain an office in Illinois and were attending the deposition from Wisconsin.

There is nothing nefarious about taking a remote deposition, contra Synovus’s insinuations that this was some kind of tactic. (Mot. at 12.) There is a global pandemic afoot. Levin Papantonio lawyers are forbidden from taking airplanes. Currently (but not at the time of the deposition), Chicago residents are required to quarantine for 14 days if they travel to virus hotspots including Florida.¹

¹ City of Chicago press release (Jul. 2, 2020), *available at* https://www.chicago.gov/city/en/depts/cdph/provdrs/health_protection_and_response/news/2020/july/chicago-department-of-public-health-commissioner-issues-emergenc.html.

Cash has not left the city for months. Unusual times require video depositions; they are suddenly the norm in federal litigation.

On June 9, Synovus served discovery on Sport & Wheat, including a request for production of documents and interrogatories, so Sport & Wheat's response was due July 9.

Thus, by offering a deposition date of June 18, Synovus knew full well it was heading into a deposition without a document production or interrogatory responses from Sport & Wheat. That was Synovus's choice. Synovus could have offered a later date, refused to sit for deposition until July 9, or even moved for a protective order. **However much it complains, Synovus went into this deposition knowing full well that it did not have any of Sport & Wheat's documents.** Synovus presented its witness on the date it chose, in the location it chose, using technical means it agreed to.

Although Synovus chose not to, Sport & Wheat has attached the entire transcript of this deposition to this brief. (Ex. B.) The Court may be inclined to take the time to review it in full. Sport & Wheat stands behind it.

At the deposition, Synovus had a large screen showing plaintiff's counsel, and counsel could see the witness and some of defense counsel. The witness had

access to a second computer, on which he could read documents. Everyone in the room had ample access to see documents that were being displayed.

The witness testified that he was prepared to testify about all “communications the bank had with Sport & Wheat, any communications inside the bank about Sport & Wheat, transactions Sport & Wheat participated in, and so on.” (Ex. B, Adams Dep. 14:6–16.) He also testified, however, that he did almost nothing to specifically learn about Sport & Wheat’s involvement with the bank. *Id.* at 14:24–16:7. He interviewed no one, contacted no one, and did nothing to determine the extent of Synovus’s communications with Sport & Wheat. *Id.*

Sport & Wheat displayed its exhibits on the large screen and the second laptop provided to the witness. Synovus’s lawyers argued that they were entitled to see the exhibits before the witness was questioned. *Id.* at 42:12–15. Sport & Wheat agreed to that procedure: “That’s fine. But you’re going to have to sit there by the witness then and you’re going to have to read every page. If that’s how you want to do it, that’s fine.” *Id.* at 42:16–43:9. The first exhibit was an e-mail from a bank manager discussing how busy the bank was getting. (Ex. C.) There were no problems with this exhibit, and Synovus doesn’t complain about it now.

The second exhibit used with the witness, Ex. D, also proceeded uneventfully. Ex. D was an e-mail chain between Sport & Wheat and a Synovus

employee called Anna Weaver. No one objected to the Zoom procedure or the display of the exhibit to the witness. (Ex. B, Adams Dep. At 106:22–107:15.) Sport & Wheat’s counsel was polite and considerate: “Let me know when you guys are ready and I will try to make it a little bigger. Does that help?” *Id.* The witness was able to see the document and answered several questions about it. *Id.* at 106:8–110:15.

The point of Ex. D was to lay the foundation for another exhibit, a composite set of selected text messages between Anna Weaver and Sport & Wheat’s principal, Jill Sport. This exhibit was Ex. E and it was marked on page 116 of the deposition. Sport & Wheat has redacted Ex. E in pink, under the Florida accountant-client privilege, Fla. Stat. § 90.5055.

Other than the pink redactions, Ex. E is *exactly* what the witness saw during the deposition. Synovus is flat wrong when it says that Sport & Wheat attached “*redacted versions*” of these messages to this deposition. (Mot. at 12.) Ex. E is the exhibit that was introduced; the grey boxes on Ex. E were shown to the witness as well.

To be clear, Sport & Wheat would have shown additional text messages to this witness, but Synovus walked out of the deposition, preventing it from doing so. Sport & Wheat also had other texts with a second bank employee it would have

used. Sport & Wheat would still like to provide all available messages to the Court under seal.

Ex. E has eighteen pages—each page being a screenshot of some text messages. Synovus does not tell the Court that it allowed Sport & Wheat to conduct this examination with *eleven* pages of these eighteen pages of screenshots before it began objecting. (Ex. B, Adams Dep. 116:7–124:18.) These questions were absolutely courteous: “Q. Do you see that? A. I do see that.” *Id.* at 117:2–12.

Many of the text messages establish that, contra Synovus’s arguments in its motion to dismiss, ECF No. 46 at 5 (“Synovus is unaware of *any* communications from S&W inquiring about” payment), the bank *did* communicate with and rely on Sport & Wheat for help in processing loan applications, and Sport & Wheat did seek to be paid.

For example, in the texts, Sport & Wheat asked if bank statements would need to be provided, and Ms. Weaver responded. (Ex. E at 2–3.) The witness read these texts and answered a question about it:

Q. Okay. And Ms. Sport here says, “Other banks are asking for bank statements to support payroll amounts. Any idea if that’s going to be required by you?”

Do you see that one?

A. I do.

Q. I mean, by this point you can already tell that the bank is now aware—is aware on April 3rd that Jill Sport is communicating with the bank on behalf of borrowers, correct?

MR. BATES: Object to the form of the question. I will just leave it there per your prior request.

A. Yes. We would be aware that we're communicating with an individual, a CPA.

(Ex. B at 117:13–118:4.) These were relevant, admissible answers. And it was not “unlawful” or even hardball to ask this witness about these fairly obvious texts.

The examination continued through other relevant messages. As another example:

Q. . . . Do these texts support that Ms. Sport was helping put an application to the bank? Wouldn't this support that the bank knew Ms. Sport was trying to make an application?

A. It would indicate that this Ms. Sport is, you know, doing something in the process, you know, submitting information it appears on behalf of the customer.

(Ex. B at 122:11–20.) This question drew no objection from Synovus. There was no complaint from the witness about not understanding or being able to see the message.

Synovus did not begin objecting to this set of text messages until the eleventh page of screenshots. *Id.* at 124:19–125:9. Sport & Wheat asserted that it would

continue asking questions. *Id.* at 125:10–19. This was a dispute and both sides did not agree, but both sides were respectful about it.

The deposition continued, for about fifteen minutes, with no objection or complaint from Synovus. *Id.* at 127:3–129:6.

Synovus sought a break for lunch, which was agreed to. *Id.* at 129:11–15. Synovus again complained that it was entitled to see all the text messages that had not yet been used with the witness. *Id.* at 130:5–7. Sport & Wheat agreed to produce the text messages one at a time, so that Synovus’s lawyer could preview them, but did not agree to providing the entire set. *Id.* at 130:8–15.

After the break, questioning continued with the eighteenth screenshot. *Id.* at 130:22–132:6 (viewing Ex. E at 18). These questions concerned the core question in this entire action: whether Synovus would pay Sport & Wheat for its time and what Synovus’s policy may have been. These questions didn’t draw objections. And they were extremely relevant. *E.g.*, “Q. Should [the banker] have been aware of the policy on this date? A. Yes, she should have.” *Id.* at 132:3–6. Moreover, many of the questions had nothing to do with the document itself.

It is true that some of the screenshots had grey boxes on them. *E.g.*, Ex. E at 11–18. These redactions were obvious, not concealed, and Sport & Wheat explained the purpose was to “make it clearer to the witness what it is we are and

aren't talking about." *Id.* at 132:7–17. In fact, the redacted texts do not concern this action, and some of them are there to preserve the medical privacy of third parties. The point of these boxes was to focus the witness on relevant texts—just the same way a party might show a witness one e-mail out of a hundred. No rule requires a party introducing a text message to also tender every text the two texters have ever exchanged.

Just fifteen minutes after the thirty-minute lunch break, Synovus demanded another break:

Q. Mr. Adams, are you familiar with Larry Strain?

A. Yes.

MR. PRATHER: We need to take a break real quick.

MR. CASH: No. We just did take a break.

MR. PRATHER: Mr. Cash, we're taking a break. Okay?
We're taking a break.

MR. CASH: No.

MR. PRATHER: Mr. Cash, we're taking a break.

MR. CASH: You take a break, that's on you. We're not taking breaks. I want to continue on.

MR. BATES: Go ahead. He won't answer until you get back.

MR. CASH: I'm going on with the questions. I am the officer taking the deposition. You're not taking a break. We just took a break.

Id. at 133:16–134:12.

Synovus then complained of an unexplained “technical issue,” *id.* at 134:13–16, and its lawyers stated that one of them needed to take a phone call:

MR. PRATHER: Mr. Ramsey has a call that he has to take. I'm waiting for him to get off his call.

MR. CASH: I am taking the deposition. I'm sorry that your lawyer can't sit there and do the deposition. After you guys lectured me about professional courtesy, this is highly irregular. You just had your break. Take your calls on your own time. You all agreed to be here.

COURT REPORTER: Mr. Cash, you're the only one here.

Id. at 136:8–20.

After returning from the break, Synovus cited Rule 30(d) and stated its intention to move to terminate the deposition. *Id.* at 137:2–14. Sport & Wheat reminded Synovus that under Rule 30(c)(2), when the conduct of deposition is objectionable, the objection is noted, but the examination still proceeds. *Id.* at 137:15–138:14.

Sport & Wheat also pointed out that it had other questions to ask that did not related to the disputed text messages: “You're cutting off questions that I had that

did not relate to exhibits. I am not finished with my exam. The witness has not appeared on all the topics.” *Id.* at 138:2–6.

Synovus walked out, leaving an empty conference room. (Ex. F (photo).)

III. Argument.

A. This motion was prematurely filed and is also moot.

This motion was premature and should not have been filed. Synovus certified in its Loc. R. 7.1(B) certification that it conferred with Sport & Wheat “during the deposition.” Synovus does not say that it actually conferred with Sport & Wheat before filing the motion, and it didn’t.

This violated Loc. Rule 7.1(B), and it is troubling because Sport & Wheat gave Synovus an offramp to avoid this entire motion. In an e-mail sent the day after the deposition, Sport & Wheat told Synovus:

“On further reflection, we have decided not to press to complete the 30(b)(6) deposition next week. We intend to pick up the matter at a later date—after Synovus makes a full and fair production of interrogatory responses, documents, and RFAs—and we will consider if we need more deposition time then. If we do, we’ll work it out with you, and if we can’t, we’ll file a motion to compel and we’ll put the facts of yesterday before the court.”

(Mot. Ex. 6 at 3.) Sport & Wheat did this with the direct intention of avoiding the motion now at bar. It was an attempt to lay down the sword and just get on with the case. So nothing compelled the filing of this motion.

Loc. Rule 7.1(B), and Fed. R. Civ. P. 37, are a safety valve to avoid heated disputes exactly like this one. Wright & Miller says, “This ‘stop-and-think’ occasion should afford both sides an opportunity to reflect on whether they should moderate their positions. Put differently, this is an opportunity for them to consider whether the initial position they have taken is really substantially justified.” 8B Fed. Prac. & Proc. Civ. § 2288 (3d ed.). This didn’t happen, despite Sport & Wheat’s olive branch.

For these reasons, even if the Court grants Synovus’s motion, it should not award attorney fees to Synovus—the requisite Rule 37(a) conference did not occur.

This motion is also moot, because Synovus already got what it wants—Synovus unilaterally terminated this deposition, by walking out of it. Given that resumption of this deposition may never occur—Sport & Wheat has not decided if it will seek to conclude this deposition—there is no ripe dispute.

However, Synovus *did* file this motion. Accordingly, the Court’s Order regarding the award of attorney fees on discovery motions should apply. (ECF No. 16, Order at 10–11.) The Court should award Sport & Wheat’s attorney fees in connection with having to respond to this motion—which was only occasioned by Synovus’s deposition misconduct.

Synovus hates this case and chastises this case—and plaintiff’s counsel—in very personal terms. Synovus made the decision to unilaterally walk out of this deposition, possibly because it did not like the testimony its witness gave. Sport & Wheat gave Synovus the chance to reconsider filing this motion and asked it to come back to the table to work together. Specifically, Sport & Wheat wrote, “On a personal note, I want to say that nobody likes scorched-earth tactics; they are exhausting, and they violate the liberal spirit of the Rules. We are willing to push the reset button with your team if you want to start over.” (Mot. Ex. 6 at 4.)

Synovus rejected that too—saying “we decline to engage with you further about this subject.” (Mot. Ex. 6 at 2.) That was contumacious.²

B. This deposition was not taken in violation of Rule 30.

To file a motion to terminate a deposition, the party has to show that the deposition was “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). This deposition simply did not reach that standard. The only part of this rule Synovus relies on is “bad faith.” (Mot. at 15.)

“Bad faith” means questions that do not advance the objectives of the case, but are asked for some illegitimate purpose. *E.g., Redwood v. Dobson*, 476 F.3d 462,

² And these are just the communications Synovus *itself* chose to file with the Court.

467–68 (7th Cir. 2007) (asking witness about his mental health and if he was “involved in any type of homosexual clique” would have met the standard of Rule 30(d)(3)).

Nothing close to that occurred in this deposition. There is not one word in Synovus’s 20-page motion that says Sport & Wheat asked questions that were not germane to the action, or harangued the witness, or insulted him.

Irrelevant and personal questions, such as asking about a deponent’s personal financial affairs and salary, when those matters are irrelevant to the action, is the type of questioning that qualifies for an order under Rule 30(d). *E.g.*, *Dent v. U.S. Tennis Assoc.*, No. CV-08-1533, 2010 WL 1286391 (E.D.N.Y. Mar. 30, 2010). Again, Synovus does not argue that anything like this happened. Synovus does not argue that the questions asked were irrelevant.

Compare this deposition with *Rottlund Co. v. Pinnacle Corp.*, 222 F.R.D. 362, 381 (D. Minn. 2004), where the court wrote, “Mr. Carmichael, an opposing attorney taking Mr. Jorgenson’s deposition, wanted to be the first to tell Mr. Jorgenson, who is about 25 years old, drives 50 some miles one way to work, and has three daughters, that he was going to lose his job.” *Id.* It continued, “This conduct is the epitome of bad faith harassment. The line of questioning had nothing

to do with the lawsuit and was intended for no other reason than to inflict emotional angst.” *Id.*

That is what bad faith looks like. Sport & Wheat’s questions regarding communications between the plaintiff and the defendant—which were absolutely relevant topics, disclosed on the deposition notice, Ex. A—were the epitome of fair questions.

Instead, it was Synovus’s conduct that was in bad faith and frustrated the purpose of discovery. By walking out entirely, its “conduct clearly impeded and delayed the . . . deposition of witnesses and interfered with the search for the truth, which, after all, is the ultimate goal of both the discovery and trial process.” *United States v. Kattar*, 191 F.R.D. 33, 38–39 (D.N.H. 1999).

Synovus did not appear to like the answers its witness was giving. The witness was giving useful concessions regarding the value of Sport & Wheat’s services to Synovus. *E.g.*, Ex. E at 120:19–121:2 (“there would be some indication that this individual was, you know, in some form helping or asking questions”). But that is not a reason to employ Rule 30(d). “Rule 30(d)[(3)] is not a backdoor mechanism for counsel to instruct witnesses not to answer certain questions. Nor is it designed in any way to preclude a witness from answering questions based on

relevance.” *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, No. 07-22988-CIV, 2008 WL 2645680, at *8 (S.D. Fla. Jun. 26, 2008).

C. Synovus was not ambushed by the seven screenshots it objected to; its counsel were aware that they did not have any documents from Sport & Wheat before they arrived at the deposition.

Synovus’s *only* objection is that its lawyers did not get copies of the text messages that were used in examining its witness ahead of time. Its own motion shows exactly why this objection is baseless—it knew what it was getting into.

Very early on, Synovus knew it didn’t have any of Sport & Wheat’s documents. Synovus itself wrote on May 31 that it is “exceedingly odd for a plaintiff’s lawyer to send a 30(b)(6) notice before he has seen any documents.” (Mot. at 9; Ex. G at 2.) On June 1, Synovus again complained of “the oddity of proceeding with a 30(b)(6) deposition” prior to document discovery. (Mot. at 9.) Synovus also flagged the issue of possibly presenting an unprepared witness: “A 30 (b) (6) notice imposes significant legal requirements. Our client is not going to show up unprepared to meet those requirements.” (Ex. G at 1.)

Whether Sport & Wheat’s discovery sequencing was “odd” is really not for Synovus to comment on (although it is another example of how Synovus needlessly impugns Sport & Wheat, its lawyers, and their decisions). It is long settled that

there is no set order for discovery devices to be used. *Purofied Down Prods. Corp. v. Royal Down Prods., Inc.*, 87 F.R.D. 685, 691 (W.D. Mich. 1980).

The critical point here is that Synovus *knew* it did not have any document discovery in hand from Sport & Wheat. Nevertheless, Synovus offered a deposition date of June 18, well in advance of Sport & Wheat's July 9 discovery response deadline.

And it's true—Sport & Wheat offered to identify the anonymous borrowers in its complaint. And Sport & Wheat continues to be willing to do that. However, nowhere did Sport & Wheat promise to do so *prior* to the deposition of Synovus.

Synovus claims that its requests for this information on June 2 and June 15, which were not responded to, constitute some kind of malice on Sport & Wheat's part. If Synovus really felt that the lack of this information was critical, Synovus could have picked up the phone and asked to put the deposition off. Synovus could also have filed a motion for protective order. The fact that Synovus did neither of these things is telling: Synovus made its choice.

Moreover, what is Synovus now telling the Court? That the truth changes depending on which party goes first? That its witness would testify differently if he had had these text messages? Synovus did not point to a single question whose

answer would have been different had its witness read the text messages an hour, or a month, in advance.

Synovus's deponent was its chief commercial banking officer. (Ex. B, Adams Dep. 19:2–5.) It's not the case that he was confused by some scattered text messages. This high-ranking officer was perfectly capable of explaining his uncertainty and delimiting his own answers. *E.g., id.* at 119:10–24 (“it's hard to know what would have been inferred”), *id.* at 121:3–11 (“I can't infer what from this exchange . . . which I'm seeing for the first time”).

Finally, Synovus complains about the “redactions,” and repeatedly insinuates that these were deceptive and improper. It does not point to one redaction that changed the meaning of the texts that were shown. These were not redactions of *relevant* material; they were grey boxes to direct the witness to the relevant areas in question. Some of them concealed matters, including medical histories, that would be sensitive or embarrassing to the bank employee and third persons, which Synovus knows. These matters were covered up out of a sense of decency, not trickery. Sport & Wheat has offered to put all of these in front of the Court for its review. Sport & Wheat *still* does not understand Synovus's repeated refusal to have the Court see the evidence on this motion—particularly where it has

put an attorney's character and professionalism at stake. That is a lot more important than the outcome of any one case.

D. Synovus did not properly investigate its own files, and if it had, it would have uncovered the information it complains it didn't have.

Synovus complains in its motion that there was “no way” to investigate or consult with Synovus employees regarding any borrower connected with Sport & Wheat. (Mot. at 10–11.) But that's not true. The complaint was filed on April 26. Synovus had almost two months before the deposition to do its due diligence using the information given there. For example:

- Sport & Wheat is in Pace, and there is exactly one Synovus branch in Pace. Did Synovus really not contact anyone working at its Pace office to discuss this suit?
- Sport & Wheat *itself* is a Synovus customer and banks at this branch.³ Did no one at Synovus check whether plaintiff and defendant had any other relationship, or attempt to locate relevant witnesses?
- Synovus's witness said it had issued a litigation hold. *Id.* at 67:18–21. When this hold was communicated to the bank's employees, did Synovus really not bother to identify the people in possession of relevant information? How does a hold like that work?
- Further, Sport & Wheat put the exact dollar amount of its client's loan in the complaint, the dates on which it was funded, stated the nature of the business, and even used an initial matching the company's name. Was there really no way for Synovus to identify the nine-person surgical group in Pensacola beginning with the letter *C* that received a \$163,303 loan on or about April 21? (ECF No. 1, Compl. ¶¶ 63, 71.)

³ It is leaving.

The scant text messages used with Synovus's witness *are* documents in the direct possession, custody, or control of Synovus. While Synovus misleadingly tells the Court that texting is against company policy, ECF No. 72 at 3, n.1, it plainly happens at this company—just like it happens all over America. Synovus presented this witness on the date and at the location of its choosing. Synovus knew that the topics included communications between the bank and Sport & Wheat. If Synovus did not prepare its witness, that was a violation of Rule 30(b)(6) on Synovus's part.

These were bank employees' communications, and Synovus has control over them. Indeed, counsel is informed that Synovus interviewed Ms. Weaver and the second bank employee discussed in the deposition the very day of the deposition. Presumably, Synovus now has gathered the relevant communications—which almost assuredly will include more than a handful of texts. Sport & Wheat does not know what communications the bank had internally. That's what the deposition was about. Synovus should have prepared itself before presenting its witness on the date of its choosing.

E. Even if Synovus’s lawyers had seen all pages of the proffered exhibits at the beginning of the deposition, they would not have been allowed to discuss them with their witness.

Synovus also complained that its lawyers were not allowed to see Sport & Wheat’s texts to put them in “context.” (Ex. B at 133:3–7.) This did not mean that the deposition was taken in bad faith or in violation of Rule 30.

Nothing gives a party’s *attorneys* the right to see all of the potential exhibits that could be used with a witness. The deposition had started. As even the witness acknowledged, there is no right to communicate with the attorneys about the subject of the deposition. *Id.* at 7:24–8:5. Nobody objected to this instruction. That’s because it’s the law.

“A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness’s own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers.” *Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993). Once the deposition begins, the “witness is on his or her own.” *Id.*

So what difference would it have made if the attorneys were able to see all of the text messages in the exhibit? They were forbidden from discussing them with the witness. “If the witness does not understand the question, or needs some

language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question.” *Id.* at 528–29. That did not happen here because the text messages are pretty clear; Synovus just didn’t like what they showed.

Even though there is no law requiring it, Sport & Wheat did offer to send the messages one at a time to Synovus. *Id.* at 130:8–15. Sport & Wheat also offered to allow Synovus’s lawyers to read documents on the same screen, before the witness would—which they agreed to do. *Id.* at 42:16–43:9.

Synovus’s real objection is not to the conduct of this particular deposition, or any specific Rule 30 violation (it certainly can’t find a provision in Rule 30 that required these texts to be sent over days in advance). Synovus’s *real* objection is that it did not have some documents that it knew existed. But again, Synovus knew that going in.

F. Regrettably, Synovus should be sanctioned for its willful misconduct and for filing this baseless motion.

Synovus ensured that it would get its own way by unilaterally walking out of this deposition. Synovus wrongly obstructed Sport & Wheat’s right to have truthful, unvarnished answers to its questions. It should be sanctioned for violating Rule 30(c) by walking out, and it should pay for Sport & Wheat’s time in defending this motion.

Synovus walked out with further questions pending. Sport & Wheat’s counsel stated: “I want it to be clear. There are questions I would have asked that did not involve these documents that you think are in dispute.” *Id.* at 138:10–13. Even if it *was* appropriate to argue over the text messages, Synovus’s witness should have stayed in the chair, and the deposition should have proceeded under Rule 30(c): an objection “must be noted on the record, but the examination still proceeds; the testimony is taken subject to any objection.” There were other topics on which the witness could have and should have testified.

Despite all that, after it was over, Sport & Wheat extended a friendly hand, offered to “push the reset button,” and encouraged Synovus to avoid this motion. (Mot. Ex. 6 at 4.) Synovus curtly responded, “we decline to engage with you further about this subject.” *Id.* at 2.

Synovus’s bad behavior should not be rewarded, or it will continue.

In this motion, Synovus’s lawyers, in personal terms, have gone out of their way to say that “none of [them] have ever experienced anything like” Sport & Wheat’s counsel’s “misconduct.” (Mot. at 12.) The undersigned—a former judicial law clerk for Chief Judge Rodgers, a practicing lawyer for eleven years with no allegations of unprofessionalism, and a partner in Levin Papantonio before moving to Illinois—can state that this is the first time he has ever seen *any* witness

walk out of *any* deposition. And he can state this is the only case he's handled where one party's extreme animosity has overwhelmed the case from the start. This is not normal litigation practice. The communications that have been directed at plaintiff's counsel—including Sport & Wheat lawyers other than the undersigned, even plaintiff lawyers in other PPP cases against Synovus—have not met the professional standard.

Every lawyer is guilty of some degree of hubris and every honest lawyer can look in the mirror and see the flaws. Plaintiff's counsel is not immune to that. However, the conduct on the other side of this case has been fairly disappointing and egregious.

Synovus injects irrelevant matter into every filing. For example, in this motion that is ostensibly about a Rule 30(b)(6) deposition, there was no reason to bring up anything to do with the Judicial Panel on Multidistrict Litigation. (Mot. at 6.) In so doing, Synovus did not even truthfully describe Sport & Wheat's brief to the Panel. (Incidentally, Sport & Wheat's attorneys congratulated Synovus on *their* well-written brief to the Panel—and would heartily do so again. Synovus responded with sarcasm. Ex. H.) There was also no need, in this motion, to bemoan the supposedly low value of the claim, Mot. at 1, 5–6, no need to accuse Sport & Wheat of “rushing” to file its complaint, *id.* at 6, no need to accuse Sport & Wheat's

counsel of angling for “a seat on an MDL committee,” *id.*, no need to argue whether there was standing to file this case, *id.* at 7, no need to claim that the amended complaint corrected “multiple blatant pleading deficiencies,” *id.* at 8, no need to complain that the deposition was “sprung” on Synovus, *id.* at 8–9, and so on.⁴ There *certainly* was no need to baselessly accuse counsel of “insist[ing] on taking the deposition by Zoom so he would not be present with Synovus counsel,” *id.* at 12.

Synovus’s irrelevant, negative allegations are in every filing. (“It appears S&W rushed to file suit to position itself among other plaintiffs that have filed similar putative class action complaints” Mot. to Dismiss, ECF No. 46 at 5. This wasn’t true; Sport & Wheat filed the first case in the Nation.) Synovus insinuates that Sport & Wheat’s lawyers are lying to the Court, even in the 26(f) report. (“Plaintiff has attempted to make representations regarding statements made by other parties during the conference despite the fact that no court reporter was present and no transcript exists.” Rule 26(f) Report, ECF No. 61 at 17, n.4. Sport & Wheat stands by what it said.) It inserts caustic remarks in almost every e-

⁴ Sport & Wheat does not want to have to respond to all this cruft every time either. But the alternative is to let it all go uncorrected. The Court should order Synovus to stick to the point in its future filings.

mail between counsel. And it's not just a personality problem between one lawyer and another lawyer. The comments come from across the Synovus team.

Synovus spends much of its motion complaining that Sport & Wheat did not identify one single borrower, Borrower C, named in the complaint and the amended complaint, which would supposedly have changed everything in this deposition. Disclosing borrowers' identities could implicate the Florida accountant-client privilege. Fla. Stat. § 90.5055. When on June 30, a different Sport & Wheat lawyer asked to have a call with Synovus about a protective order that would permit disclosure of all the borrowers' identities, Synovus refused! (Ex. I.) Ironically, Synovus then accused Sport & Wheat of trying to make this litigation as expensive as possible. *Id.* at 1.

Synovus has been suspicious and hostile of this action from the beginning. In fact, on the very first call between the plaintiff's lawyers and the defense team, Synovus asked permission to tape-record the call. This is unheard of.

Synovus's aggressive and sometimes nasty tone is not even limited to the attorneys in this case. Synovus is a defendant in a similar PPP case in the Northern District of Georgia and is represented by one of the same Georgia lawyers that represents it here. That lawyer uses the same sarcastic, derisive language as well. (Ex. J (threatening Rule 11 sanctions; writing: "Ordinarily one would expect the

requested information to be disclosed in the Complaint. It is very basic information.”).)

Synovus’s extremely hostile and aggressive posture has no place in this District. It can stake its position and still remain cordial, even friendly, to its opponents. Other parties are doing that. Synovus’s decision to storm out of a deposition, rather than following Rule 30(c) and simply noting its objection on a question-by-question basis, was egregious. But it was just part of a pattern of scorched-earth tactics it has been using this entire action. It is time to turn down the heat and tone down the rhetoric. This is *civil* litigation.

V. Remedy sought.

An appropriate remedy may be difficult to craft because the Court has stayed discovery. However, Sport & Wheat seeks the following:

- Its attorney fees for the time spent arguing over questions at the deposition; writing this brief; and arguing against this motion at the hearing set for July 9.
- An order that Synovus violated Rule 30(c) by leaving rather than answering questions under objection.
- An order that if the Court lifts the stay on discovery, Synovus must return to conclude this Rule 30(b)(6) deposition, at Sport & Wheat’s election, without the need for further motion practice. The parties should be ordered to reach a mutually agreeable date without Court intervention.

Sport & Wheat has given thought to whether seeking this relief requires Sport & Wheat to file a motion to compel of its own. Sport & Wheat decided against doing so, because both sides have fully ventilated the dispute, and because Rule 37's award of fees was already implicated by Synovus's filing this motion. If an affirmative motion on Sport & Wheat's part is necessary to secure relief, then Sport & Wheat would appreciate the Court's guidance.

VI. Conclusion

Synovus's motion should be denied, and the Court should award the relief sought by Sport & Wheat.

Dated: July 6, 2020

Respectfully submitted,

/s/ William F. Cash III

Virginia M. Buchanan

(Fla. Bar No. 793116)

Matthew D. Schultz (Fla. Bar No. 640328)

William F. Cash III (Fla. Bar No. 68443)

**LEVIN, PAPANTONIO, THOMAS,
MITCHELL, RAFFERTY & PROCTOR,
P.A.**

316 South Baylen Street, Suite 600

Pensacola, FL 32502

Phone: 850-435-7059

Email: bcash@levinlaw.com

/s/ John S. Wirt

John S. Wirt, Esq. (Fla. Bar No. 117640)
Pamela Cocalas Wirt, Esq. (Fla. Bar No.
109576)

WIRT & WIRT, P.A.

5 Calhoun Ave, Suite 306

Destin, FL 32541

Tel: 847-323-4082

Fax: 314-431-6920

jwirt@wirlawfirm.com

Attorneys for the Plaintiff

CERTIFICATE OF WORD COUNT UNDER LOC. R. 7.1(F)

I certify that the core of this brief contains 6,843 words, including headers,
footnotes, and quotations.

/s/ William F. Cash III