

**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.;
SYNOVUS BANK;
THE FIRST, A NATIONAL
BANKING ASSOCIATION; and
TRUIST BANK,

Defendants.

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

MOTION FOR LEAVE TO AMEND THE COMPLAINT

Sport & Wheat accepts the ruling of the Court, granting the motions to dismiss filed by each Defendant. As the Court has anticipated, an appeal is likely to be taken to the Eleventh Circuit Court of Appeals.

Before that appeal proceeds, however, Sport & Wheat seeks leave to file an amended complaint. Sport & Wheat anticipates that, following the logic of the Court's Order, this proposed Second Amended Complaint may be subject to dismissal again. Sport & Wheat respectfully asks the Court to grant its motion for leave to amend.

ARGUMENT

Under Rule 15(a)(2), amendment of a pleading may be granted only with a party's written consent or leave of court. The Court is to "freely give leave when justice so requires." *Id.* Sport & Wheat submits that justice would require the Court to grant leave to amend the complaint, because that would allow Sport & Wheat to make its best case on appeal.

In accordance with Loc. R. 15.1(B), the proposed Second Amended Complaint is being filed now. As a convenience, a redline comparing the former operative complaint with the proposed amendment is attached as an exhibit to this motion.

The proposed Second Amended Complaint:

- Amends those parts of the former complaint which asserted that Form 159 and other SBA regulations were still applicable to these transactions. As the Court knows, Sport & Wheat receded from these positions after intervening caselaw led it to change its position. (ECF No. 87, Court's Order, at 7 & n.8.) The proposed amendments do not vary from the legal theory Sport & Wheat advanced in its briefs; they just bring the complaint itself into line with those briefs.
 - o **Locations:** Paragraphs 56–57, 64–78; new Ex. A is also attached (it is a copy of Form 159).
- Attaches exhibits and cites to them. These exhibits, two sets of text messages and deposition excerpts from Synovus's Rule 30(b)(6) deposition, were previously attached to Sport & Wheat's response to Synovus's motion to dismiss. The purpose of attaching these exhibits to the complaint itself is to ensure that they are in the record as part of

the pleadings. The facts shown in these exhibits, such as that bank employees communicated directly with Sport & Wheat, were already dealt with extensively in the briefing and by the Court.

- o **Locations:** Exs. B, C, D; paragraphs 110–25.
- Adds an exhibit that is directly responsive to the Court’s footnote 13. (ECF No. 87 at 12, n.13.) The Court wrote in part that “the amended complaint does not allege that the other defendant, The First, had any communications . . . from which it could be inferred that The First knew that Plaintiff conferred a benefit on it.” *Id.* A proposed exhibit and three paragraphs of allegations show that TheFirst did have knowledge of Sport & Wheat’s participation in a loan application. This exhibit was already discussed in the operative complaint (but it was not attached).
- o **Locations:** Ex. E; paragraphs 137–39.
- Drops Count 4, the declaratory judgment count.
- Makes very minor grammatical or technical fixes.
- o **Locations:** Scattered points.

Again, the intent of these amendments was to sharpen Sport & Wheat’s legal theory—making the complaint conform to the very new caselaw that came down in other districts during the pendency of the briefing—and to add factual support to existing allegations in the form of documents, exhibits, which the Court has either already seen or (in the case of Ex. E) were referred to in the operative complaint.

No party would suffer prejudice by permitting amendment of the complaint. The core legal issues have already been briefed once, and Sport & Wheat is under

no illusion that the Court will reverse itself on those matters. This is not a motion for reconsideration in the guise of a motion for leave to amend.

Because nothing is being significantly changed here, Sport & Wheat expects that the Court would likely dismiss this complaint again. Sport & Wheat humbly suggests that the Court could grant this motion for leave, renew its own order dismissing this Second Amended Complaint, and forgo the need for any party to deal with new motions to dismiss. That would be consistent with the Court's invitation to have the Court enter judgment dismissing the case with prejudice "based on the rulings in this Order," ECF No. 87 at 13, and it would promote efficiency for the Court and the litigants.

CONCLUSION

Sport & Wheat would appreciate the Court's consideration and respectfully asks that this motion be granted.

CERTIFICATE REGARDING LOC. R. 7.1(B) AND 7.1(D)

This is an outcome-determinative motion under Loc. R. 7.1(D), in that the action finally ends if this motion is not granted, and thus an attorney conference is not required. Moreover, the Court contemplated that Sport & Wheat might seek leave to amend in its last Order. (ECF No. 87 at 13.) Therefore, Sport & Wheat did not confer with the Defendants regarding their position on this motion.

One Defendant, Synovus, contacted Sport & Wheat on its own to say that it would be opposed to any such motion.

Dated: August 31, 2020

Respectfully submitted,

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