

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-05425-
TKW-HTC

Synovus Bank submits this opposition to plaintiff's Motion for Leave to Further Amend the Complaint filed on August 31. Doc. 89. Synovus respectfully asks the Court to deny plaintiff's admittedly futile request.

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motions to dismiss.¹ Doc. 87. The Court held that plaintiff’s claim that it was “entitled” to “agent fees” under the CARES Act and related SBA regulations “**clearly fails** on the merits.” Doc. 87 at 3-4, 6 n. 6 (emphasis added). The Court likewise disposed of plaintiff’s conversion and quasi-contract claims under Florida law as utterly meritless. Doc. 87 at 10-13. The Court explained that the claims asserted by plaintiff “are not likely to be found suitable for class action treatment.” Doc. 87 at 12 n. 14 (citing *Vega v. T-Mobile, USA, Inc.* 563 F.3d 1256, 1274 (11th Cir. 2009)).

Given the Court’s analysis of the legal issues, this Court held it is “**highly unlikely** that Plaintiff will be able to further amend the complaint to state a claim against Defendants.” Doc. 87 at 13 (emphasis added). The Court then gave plaintiff two options. *First*, the Court stated that plaintiff “may seek leave to file an amended complaint . . . **if [plaintiff] can do so in good faith.**” Doc. 87 at 13 (emphasis added). *Second*, the Court stated that plaintiff could request that the Amended Complaint be dismissed with prejudice so that plaintiff could “try its luck at the Eleventh Circuit.” Doc. 87 at 13.

Disregarding the Court’s Order, plaintiff has now elected a *third* option of plaintiff’s own creation. Plaintiff wants this Court to “grant [plaintiff’s] motion for

¹ Plaintiff filed its initial complaint on April 26, 2020. After Defendants filed motions to dismiss that initial complaint, plaintiff filed its Amended Complaint on May 27, 2020.

leave [to file a Second Amended Complaint], renew [the Court’s] own order dismissing this Second Amended Complaint, and forgo the need for any party to deal with new motions to dismiss” regarding plaintiff’s Second Amended Complaint. Doc. 89

Plaintiff’s motion violates this Court’s Order – it is not “in good faith.” Doc. 89. That is crystal clear from the face of plaintiff’s motion for leave to amend, which concedes that plaintiff’s proposed Second Amended Complaint would be futile. The very first sentence of plaintiff’s motion for leave to amend states that plaintiff “***accepts the ruling of the Court***, granting the motion to dismiss filed by each Defendant.” Doc. 89 at 1 (emphasis added). Plaintiff’s motion concedes that the “proposed Second Amended Complaint may be subject to dismissal again.” Doc. 89 at 1. Plaintiff’s motion concedes that “the core legal issues have already been briefed once, and [plaintiff] is under no illusion that the Court will reverse itself on those matters.” Doc. 89 at 3-4.² Plaintiff’s motion even admits that the irrelevant additional material contained in the proposed Second Amended Complaint add nothing of substance and necessarily will not change the Court’s ruling on Defendants’ motions to dismiss. Doc. 89 at 4

² Of course, the resolution of the “core legal issues” (e.g., whether plaintiff could ever be entitled to so-called “agent fees”) is dispositive of plaintiff’s claims as this Court held in its Order granting Defendants’ respective Motions to Dismiss. Doc. 87.

(“Because nothing is being significantly changed here, [plaintiff] expects that the Court would likely dismiss this complaint again.”).

Why in the world would plaintiff seek leave to file a Second Amended Complaint that the plaintiff knows is futile and that plaintiff admits “changes nothing significant” about the Amended Complaint? The answers to that question are simple.

First, in light of the multiple defeats suffered by those advancing these “agent fee” cases,³ the only tactic available to plaintiffs’ counsel is to try to unreasonably and vexatiously multiply these proceedings in the hopes of forcing some sort of nuisance settlement.⁴

³ *First*, on August 5, 2020, the Judicial Panel on Multidistrict Litigation denied plaintiffs’ counsel’s request to centralize dozens of so-called PPP “agent fee” cases pending around the country into an MDL. *Then*, on August 17, 2020, in the first of the some 70 such cases filed, this Court granted Defendants’ motions to dismiss, rejecting the plaintiffs’ claims of ‘entitlement’ to agent fees, which this Court held was the “central issue” in such cases. *Then*, on August 25 and 26, to avoid similar orders in the three cases against Synovus in which motions to dismiss had been filed, plaintiffs’ counsel in those cases dismissed Synovus from those cases. *Williams & Haupt, P.C. v. Synovus Bank, et al.*, No. 4:20-cv-00160-RSB (S.D. Ga. Aug. 26, 2020), Dkt. No. 41; *Barrena v. Ameris Bank, et al.*, 4:20-CV-00166-MHC (N.D. Ga. Aug. 25, 2020), Dkt. No. 27; *Alliant CPA Grp. LLC v. Synovus Bank, et al.*, No. 1:20-cv-02026-MLB (N.D. Ga. Aug. 25, 2020), Dkt. No. 121. *Then*, on September 1, just four days after Synovus filed its motion to dismiss, plaintiff’s counsel dismissed yet another lawsuit against Synovus, that one pending in the Western District of Virginia. *Accountek Financial Management Ltd. v. Synovus*, Case No. 5:20-cv-47-EKD (W.D. Va.).

⁴ That is a vain hope: Synovus will not settle baseless lawsuits.

Second, plaintiff is trying to change the record on appeal. Plaintiff had a chance to file its Amended Complaint after reading Defendants' motions to dismiss. This Court dismissed *that* Amended Complaint. Now plaintiff wants to put in to the Record yet another amended complaint without giving Defendants an opportunity to make a record in response to it before the Court dismisses it too, as plaintiff asks. Plaintiff's counsel apparently hopes to be able to inject new arguments into the appeal, in addition to those made to the Court.

It is black-letter law in the Eleventh Circuit that a District Court cannot commit reversible error by denying a futile request for leave to amend a complaint. *See, e.g., Johnson v. Ga. Dept. of Veterans Serv.*, 791 F. App'x 113, 116 (11th Cir. 2019) (affirming the district court's denial of the plaintiff's motion for leave to amend where the amendment would be futile); *Broughton v. U.S. Bank, N.A.*, 571 F. App'x 891, 892 (11th Cir. 2014) (affirming the district court's dismissal for failure to state a claim and denial of the plaintiff's motion for leave to amend complaint where plaintiff conceded that his prior complaint was "rendered futile" by precedent); *Patel v. Ga. Dept. BHDD*, 485 F. App'x 982, 983 (11th Cir. 2012) (affirming the district court's order granting the defendant's motion to dismiss and denying the plaintiff's motion for leave to amend where the amendment would be futile); *Travelers Cas. & Sur. Co. of Am. v. Reznick Grp., P.C.*, 271 F. App'x 833, 836 (11th Cir. 2008) (same); *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1263

(11th Cir. 2004) (same). Because plaintiff admits that the amendment is futile, the Court should deny plaintiff's request.

If the Court grants plaintiff's motion for leave to amend, Synovus requests that the Court give Synovus the opportunity to refile its motion to dismiss and require plaintiff to respond to that motion to dismiss before dismissing plaintiff's proposed Second Amended Complaint.

CONCLUSION

Synovus respectfully requests that the Court deny plaintiff's Motion for Leave to Further Amend the Complaint.

—Signatures on following page—

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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 Dismiss the Amended Complaint and Memorandum of Law in Support Thereof is in compliance with the Court's word limit. According to the word processing program used to prepare this motion and memorandum, the document contains 1,572 words.

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