UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

WINN-DIXIE STORES, INC. and BI-LO HOLDINGS, LLC,

Plaintiffs,

CASE NO.: 3:15-cv-1143-BJD-PDB

v.

SOUTHEAST MILK, INC., et al.,

Defendants.

DEFENDANT SOUTHEAST MILK, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' SECOND MOTION TO COMPEL

Defendant, SOUTHEAST MILK, INC. ("SMI"), by and through its undersigned counsel, hereby submits the following Memorandum of Law in Opposition to Plaintiffs' Second Motion to Compel (Doc. 107) (the "Motion"):

I. INTRODUCTION

There are no grounds for granting Plaintiffs' Motion. SMI's designated representatives were adequately prepared to testify as to each of the noticed topics of examination at the 30(b)(6) deposition. Plaintiffs fail to identify any topic about which SMI was unprepared to testify and otherwise fail to establish that SMI did not properly prepare its designated representatives for the deposition. Additionally, there is no basis for requiring SMI to produce a third IT declaration, as SMI has already provided information to Plaintiffs above and beyond what was required by this Court's prior Order. The Motion has no merit and should be denied.

II. SMI PRODUCED ADEQUATELY PREPARED WITNESSES FOR THE 30(B)(6) DEPOSITION

A. Plaintiffs Do Not Identify Any Deposition Topic for Which SMI's Representatives Were Unprepared.

Plaintiffs fail to identify any of the 23 noticed topics of examination about which SMI's designated representatives refused or were unable to testify. Instead, Plaintiffs refer to individual questions which they contend indicate a complete lack of preparation on the part of SMI. Plaintiffs make no effort to argue how the responses given at the deposition show that the witnesses were not prepared on any specific topic or how the witnesses were so unprepared as to constitute a non-appearance at the deposition. The Motion focuses on answers given to specific questions without linking those answers to a wholesale failure to prepare as to a noticed topic of examination. This failure is critical because whether a 30(b)(6) witness is adequately prepared depends on the witness's ability to testify as to a noticed topic of examination, not on the witness's ability to answer a specific question at the deposition.

The fact that a corporate designee is "unable to answer certain, specific questions does not mean that [the corporation] failed to produce knowledgeable, prepared, and competent corporate designees." Barn Light Electric Company, LLC v. Barnlight Originals, Inc., Case No. 8:14-cv-1955-MSS-AEP, 2016 WL 7155850, at *1 (M.D. Fla. Mar. 1, 2016); see also Local Access, LLC v. Peerless Network, Inc., Case No. 6:14-cv-399-Orl-40TBS, 2016 WL 392569, at *6 (M.D. Fla. Feb. 2, 2016) ("The fact that [the deponent] could not answer with the exactitude Plaintiffs desired does not render him unknowledgeable or his testimony unresponsive."). "[C]ourts in the Eleventh Circuit have determined that under Rule 30(b)(6), 'the inadequacies in a deponent's testimony must be egregious and not merely lacking in desired specificity in discrete areas.'" Taffe v. Israel, Case No. 16-61595-Civ-COOKE/TORRES, 2017 WL 1709693, at *2 (S.D. Fla. May 3, 2017). Additionally, Rule 30(b)(6) does not require a deponent "to

remember every detail on the topics propounded. . . . All that is required is [the corporation's] conscientious and good faith preparation of [the deponent] to be able to testify fully on the topics noticed." Local Access, LLC, 2016 WL 392569, at *6.

Here, Plaintiffs fail to identify any topic which was asked about but went wholly unanswered at the 30(b)(6) deposition. Instead, Plaintiffs include a chart of individual questions with alleged "I don't know" responses. While Plaintiffs list a topic number next to some of the responses, this is a far cry from establishing that SMI's witnesses were completely unprepared to testify as to those topics as a whole. This is particularly true given that Plaintiffs' topics of examination were very broad in nature. See Stoneeagle Services, Inc. v. Pay-Plus Solutions, Inc., Case No. 8:13-CV-2240-T-33MAP, 2015 WL 12843846, at *2 (M.D. Fla. April 29, 2015) (stating that "a 30(b)(6) deposition is not intended to be a 'memory contest'" and that the noticed deposition topics included "a broad range of financial categories" and that even the corporation's CFO "should not be expected to memorize figures concerning a range of issues").

For example, Plaintiffs' topic 5 is "[t]he steps that SMI took to identify, preserve, collect and produce to Plaintiffs documents responsive to Plaintiffs' Requests for Production of Documents, dated August 3, 2016, October 12, 2016 and November 11, 2016." Topic 16 is "[s]teps taken by SMI to identify, preserve, collect, review and produce responsive hard copy paper documents, including documents concerning NMPF, CWT, DCMA, SDCA and Plaintiffs." These broad topics very generally ask SMI to describe all of its document production efforts in this case (involving the production of nearly 17,000 pages of documents), without identifying any particular areas of concern. Under Rule 30(b)(6), Plaintiffs had an obligation to "describe with reasonable particularity the matters for examination." Fed. R. Civ. P. 30(b)(6). Plaintiffs did not meet that obligation with respect to many of the topics listed. Further, there are

a number of questions listed in the chart which are not even linked to a noticed topic of examination and therefore are not areas in which SMI would have had a duty to prepare its designees.

B. A 30(b)(6) Deponent Is Permitted to Answer That He or She Does Not Know the Answer to a Specific Question.

Moreover, merely answering "I don't know" in a 30(b)(6) deposition does not equate to a complete failure to be prepared. A "corporation's obligation under Rule 30(b)(6) does not mean that the witness can never answer that the corporation lacks knowledge of a certain fact." Stoneeagle Services, Inc., 2015 WL 12843846, at *1. It is well-settled that "[a]bsolute perfection is not required of a 30(b)(6) witness. The mere fact that a designee could not answer every question on a certain topic does not necessarily mean that the corporation failed to comply with its obligation." American K-9 Detection Services, Inc. v. Rutherfoord International, Inc., Case No. 6:14-cv-1988-Orl-37TBS, 2016 WL 7183365, at *5 (M.D. Fla. May 16, 2016) (brackets in original); see also Peeler v. KVH Industries, Inc., Case No. 8:12-cv-1584-T-33MAP, 2014 WL 117101, at *7 (M.D. Fla. Jan. 13, 2014) ("Perfection is not required of a Rule 30(b)(6) corporate designee-deponent."); Health & Sun Research, Inc. v. Australian Gold, LLC, Case No. 8:12-cv-2319-T-33MAP, 2013 WL 6187576, at *3 (M.D. Fla. Nov. 25, 2013) (stating that although witness did not know the answers to some questions posed during a 30(b)(6) deposition, "a 30(b)(6) deponent does not have to be 'perfect'"); Taffe, 2017 WL 1709693, at *2 (stating "a discovery violation does not necessarily occur under Rule 30(b)(6) when a designated witness testifies with respect to certain subject matter but not others, especially where the witness is not expected to be omniscient nor expected to have computer-like memory").

Thus, Plaintiffs must do more than merely cite to an "I don't know" response to demonstrate that SMI has failed to meet its obligations. Additionally, Plaintiffs fail to

demonstrate that they asked logical follow-up questions regarding SMI's discovery efforts in order to obtain "information regarding what SMI did to search for emails, documents and other information responsive to Plaintiffs' document requests," which Plaintiffs acknowledge was the purpose of the 30(b)(6) deposition. Motion at p. 4. For example, while Plaintiffs state in their chart that Ms. Wooten testified that she did not know whether SMI had a copy of a requested video, there is no showing that Plaintiffs asked the logical follow-up question of whether Ms. Wooten took steps to search for the video. Had Plaintiffs' counsel asked, Ms. Wooten would have described her efforts to search for the video and her inability to locate it. A simple line of questioning would have completely addressed that deposition topic.

Nothing prevented Plaintiffs from asking appropriate questions to obtain pertinent information regarding SMI's discovery efforts. In fact, Plaintiffs' deposition questioning was cursory at best; Plaintiffs did not attempt to fully explore the knowledge held by each of the witnesses presented. It cannot be concluded that a witness was unprepared on a given topic when the questions asked did not elicit the breadth of the deponent's knowledge on that topic. Plaintiffs should not be entitled to a "do over" because they now believe they should have asked different or additional questions.

C. SMI's Designated Representatives Were Not Required to Speak with Any Other Person in Preparation for the 30(b)(6) Deposition.

Furthermore, the fact that SMI's designated representatives testified that they did not speak to anyone else in preparation for the 30(b)(6) deposition does not mean that they were not adequately prepared to testify at the deposition. As an initial matter, Plaintiffs do not cite any legal authority for the broad proposition that the failure to speak to someone else *ipso facto* means that the witness is not prepared and that the corporation did not satisfy its obligations under Rule 30(b)(6). More importantly, however, Plaintiffs' contention ignores the purpose of

the 30(b)(6) deposition which, as noted, was to obtain information regarding SMI's document production. Indeed, the Court's May 3, 2017 Order (the "Order"; Doc. 97) required SMI to "produce a representative for a Federal Rule of Civil Procedure 30(b)(6) deposition on document-production efforts." Order at pp. 1-2. Plaintiffs cite to deposition testimony wherein Ms. Wooten and Ms. Weaver identified their predecessors, but there is nothing in the referenced testimony to suggest that those predecessors would have relevant information not already in the possession of the corporation. In particular, there is no reason to believe that those former employees would have any information relevant to SMI's document production efforts in this case. Moreover, Plaintiffs do not establish that there was any other person who would have known the information necessary to respond to those specific questions where the designated witnesses did not know the answer.

SMI's duty to prepare its designated witnesses for the 30(b)(6) deposition is governed by a rule of reason. Hiscox Dedicated Corporate Member, Ltd. v. Matrix Group Limited, Inc., Case No. 8:09-cv-2465-T-33AEP, 2011 WL 13150169, at *2 (M.D. Fla. July 14, 2011). If a deponent is able to answer the majority of the key questions posed at a 30(b)(6) deposition, then the deponent is adequately prepared for the deposition. See Chick-fil-A v. ExxonMobil Corp., Case No. 08-61422-CIV, 2009 WL 3763032, at *12 (S.D. Fla. Nov. 10, 2009). Plaintiffs do not cite any deposition testimony which establishes that SMI's witnesses were unable to answer the majority of the questions posed or that SMI was unreasonable in its deposition preparation efforts.

Plaintiffs also appear to take issue with the fact that SMI's designated representatives had personal knowledge about the areas in which they were designated to testify, describing SMI's "approach" as "present[ing] relevant first-hand fact witnesses in place of a more

comprehensively prepared witness." Motion at p. 13. As previously mentioned, the intended purpose of the 30(b)(6) deposition was to provide information about SMI's document production efforts. The three representatives designated for the deposition have the most knowledge of those efforts and are best able to testify on behalf of SMI. There are no other persons with better knowledge as to the noticed topics of examination, and Plaintiffs have not demonstrated otherwise. SMI's representatives did not, for example, suggest that there was someone else who would have known the answers to the questions at issue. Thus, SMI did not attempt to thwart the purposes of the 30(b)(6) deposition by presenting witnesses who disclaimed knowledge known by someone else in the corporation.

Where "there is no showing that there is *anyone* in [the] corporation who has any more knowledge than what was provided during the deposition . . . the fundamental purpose behind [Rule 30(b)(6)] does not truly apply." Catalina Rental Apartments, Inc. v. Pacific Insurance Co., Case No. 06-20532-CIV, 2007 WL 917272, at *3 (S.D. Fla. Mar. 23, 2007) (emphasis in original). In such instance, neither the Court nor the opposing parties "are left to wonder, based upon the representative's claim of lack of knowledge, whether there are others inside the corporation who have corporate knowledge that has not been disclosed." Id. (denying request for sanctions where there was no showing "that anyone else in the corporation has such knowledge than was already provided" and there was nothing in the deponent's answer which suggested bad faith on the part of the deponent or corporation).

Accordingly, the Motion should be denied as to the 30(b)(6) deposition.

III. SMI HAS FULLY COMPLIED WITH THIS COURT'S ORDER REGARDING THE IT DECLARATION

In the Motion, Plaintiffs seek a third IT declaration setting forth information which was not part of this Court's Order. Plaintiffs misconstrue the scope of the Court's Order regarding

the IT Declaration. The Order did not, as Plaintiffs seem to believe, invite the Plaintiffs to demand that SMI answer any and all of their questions regarding electronic discovery. Rather, the Order required SMI to provide a declaration "regarding the configuration of Joe Wright's laptop, efforts made to retrieve his emails, why the laptop crashed, and any other pertinent information." Order at p. 1. SMI did just that in the Declaration of Danielle Weaver for Southeast Milk, Inc. served on May 5, 2017 (the "First Declaration"; Ex. 5 to Motion). Moreover, while SMI believes that the First Declaration fully complied with the requirements of the Order, SMI agreed to, and did, provide a second declaration in response to Plaintiffs' May 8, 2017 correspondence seeking further information (the "Second Declaration"; Ex. 5 to Motion). In the Second Declaration, in addition to providing even more information regarding the steps that Ms. Weaver took as part of her search of Joe Wright's laptop, Ms. Weaver also provided information explaining actions she did not take as part of her search.

Despite the fact that SMI has gone above and beyond what this Court has ordered, Plaintiffs now seek a third declaration covering questions which Plaintiffs admit were not part of Ms. Weaver's assignment. Motion at p. 18. Because Ms. Weaver has already stated in the Second Declaration that she did not have information about the remaining questions raised by Plaintiffs because they were not part of her assignment, there is nothing more for Ms. Weaver to declare as to those questions. In reality, what Plaintiffs are seeking is an Order compelling Ms. Weaver to perform additional actions which were not required by the Order. The Order merely required SMI to explain certain document production efforts, not to take any additional actions. The First Declaration and the Second Declaration fully describe SMI's discovery efforts as they pertain to Joe Wright's laptop, as required by the Order. Accordingly, Plaintiffs' request for a third declaration should be denied.

IV. CONCLUSION

Given the foregoing, the Motion is without merit and should be denied in its entirety. SMI presented adequately prepared witnesses at the 30(b)(6) deposition and has provided all information required by the Court's Order with respect to the IT declaration. Further, the Court should award reasonable attorneys' fees and costs incurred by SMI in opposing the Motion, pursuant to Rule 37(a)(5)(B), Fed. R. Civ. P.

Dated: August 7, 2017

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 7, 2017, a true and correct copy of the foregoing was filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

/s/ Michael J. Beaudine
Michael J. Beaudine, Esq.