UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

ALYSSON MILLS, IN HER CAPACITY AS RECEIVER FOR ARTHUR LAMAR ADAMS AND MADISON TIMBER PROPERTIES, LLC, Plaintiffs, v. THE UPS STORE, INC.; HERRING VENTURES, LLC d/b/a/ THE UPS STORE; AUSTIN ELSEN; TAMMIE ELSEN; COURTNEY HERRING; DIANE LOFTON; CHANDLER WESTOVER; RAWLINGS & MACINNNIS, PA; TAMMY VINSON; and JEANNIE CHISHOLM, Defendants.	Case No. 3:19-cv-364-CWR-FKB Arising out of Case No. 3:18-cv-252, *Securities and Exchange Commission v. Arthur Lamar Adams and Madison Timber Properties, LLC* Hon. Carlton W Reeves, District Judge

THE UPS STORE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL

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I. INTRODUCTION

Although Plaintiff asserts she has an absolute right to the discovery she seeks by her Motion to Compel, Federal Rule of Civil Procedure 26(b)(1) provides that a party may obtain discovery of relevant matter only if it is

> proportional to the needs of the case, considering the issues at stake in the litigation, the amount in controversy, the parties' relevant access to relevant information, the parties resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Fed. R. Civ. P. 26(b)(1). During the informal discovery conference, the Court and the parties discussed this proportionality test at length, and TUPSS, Inc. asserted that the discovery in question failed the test. Yet, Plaintiff's Motion does not attempt to show the discovery in question is proportional to the needs of the case, taking into account the listed considerations. The discovery is not proportional. As shown below, there is little if any need or benefit to the proposed discovery at issue in Plaintiff's Motion to Compel, and whatever minimal benefit there might be is far outweighed by the burden of it. Plaintiff's Motion should be denied.

II. THE ISSUES IN THIS CASE AND THE NEED FOR DISCOVERY IN LIGHT OF PLAINTIFF'S THEORIES AND THE EVIDENCE

A. Like Most Thieves, Adams Operated Alone

The Plaintiff, Allyson Mills, has been appointed as Receiver over the estates of Lamar Adams, who in 2018 pled guilty to one count of wire fraud, and his business Madison Timbers LLC. In May 2018, the government filed a three count criminal complaint against Adams – two counts of wire fraud and one count for bank fraud. That complaint did not name any other defendant or allege any unindicted co-conspirators. Shortly thereafter Adams pleaded guilty to one count of wire fraud in connection with a transaction that is not at issue in this litigation. At his plea hearing, Adams agreed with the following description of his fraudulent scheme:

Starting by at least 2011, Adams falsely told investors that he "was in the business of buying timber rights from landowners and then selling the timber rights to lumber mills at a higher price. The object of the scheme was to cause persons to invest in loans that were purportedly for the purpose of financing such contracts for the purchase of timber rights to be sold to lumber mills." (McDonald Decl. ¶ 2.)

In truth, with rare exceptions not applicable in this action, Adams did not buy timber rights or enter into contracts with lumber mills. Instead,

> Adams created false timber deeds purporting to be contracts conveying timber rights from landowners to Madison Timber Properties. Adams forged the signatures of landowners whose names were obtained from timber maps. Adams had many of the documents notarized to make the investments appear legitimate. To further conceal the scheme, Adams required the investors to agree not to record their timber deeds unless Madison Timber Properties defaulted on the loan agreement by failing to make a payment.

Id. Adams used new investor money to fund his own a lavish lifestyle and to pay earlier investors. *Id*.¶

About a year after charging Adams, the government indicted one other person, William McHenry, in connection with Adams' scheme, who worked hand in glove with Adams for a decade, and who recruited dozens of the investors who invested with Adams. McHenry went to trial, and both he and Adams testified. Adams testified that he never told anyone else about his fraudulent scheme and that he personally drafted the paperwork (the promissory notes and timber deeds) that he used. McHenry also took the stand, and testified that he, like the investors, had also been duped by Adams, who he did not suspect as running a fraudulent scheme. McHenry was acquitted. *Id*. ¶

No one else has been charged. Given its loss in the McHenry case and the passage of time, it is highly unlikely the government has other charges to bring against anyone.

B. Plaintiff's Efforts To Recover Money Lost by Investors From Persons and Entities Who Were Used by Adams

Plaintiff has brought numerous civil actions against numerous parties for allegedly aiding and abetting Adam's scheme and conspiring with Adams, seeking to recover the sums investors lost. Although Ms. Mills is also the Special Master in the criminal action against Adams, charged with determining the amount of restitution Adams must pay his victims, she has for the past three years stated that the amount cannot yet be determined, apparently because it is unknown how much she, in her capacity as Receiver, will recover from defendants like those in this case: five Mississippi notary publics who worked a The UPS Store franchised business in Madison, Mississippi; the owner of that The UPS Store small business; The UPS Store, Inc., the franchisor of The UPS Stores; three notary publics who worked at the law firm of Rawlings & MacInnis; and the law firm itself. (First Amended Complaint ("FAC.") Although Plaintiff has refused to state the amount of losses allegedly incurred by investors, it appears that Adams ran his Ponzi scheme so successfully, for so long, that only investors who gave him money after April 2017 were not repaid. (FAC ¶ 23.)

C. Plaintiff's Theory that Seven Different Mississippi Notary Publics, Working at Two Separate Businesses, Signed Certifications Stating They Were Taking Acknowledgments from Landowners Who Were Not Present on Dozens of Occasions Spanning Many Years

Plaintiff's FAC alleges that the five notary public defendants employed by Herring Ventures "notarized the signatures of purported grantors-landowners who were not present, in direct violation of Rule 5.1 [of the Code of Mississippi Rules], and notarized timber deeds for which the grantors-landowners' signatures were blank, in direct violation of Rule 5.6." [1] (FAC ¶

[1] The Receiver actually alleges in her federal court complaint that each of the named Defendants in this action "conspired" with Adams in furtherance of his scheme. Pursuant to Federal Rule of Civil Procedure 11, by filing that complaint, the Receiver's counsel certifies that "the factual contentions have evidentiary support." Although Rule

65.) Plaintiff makes the same allegations against the two notary publics employed at Rawlings & MacInnis.

To demonstrate her theory, Plaintiff FAC pasted into her FAC an example of one such document by Defendant Tammie Elsen, a notary public employed by the Herring Ventures The UPS Store.

Dated: 4/12/18, 2018 Madison Timber Properties, LLC
John L. Black

BY: John L. Black
GRANTOR GRANTEE

STATE OF MISSISSIPPI
COUNTY OF Madison
The foregoing PERSONALLY appeared before me, the undersigned notary public for the jurisdiction aforesaid on the 12th day of April, 2018, the within named two, who acknowledged that they signed, executed and delivered the above foregoing instrument, after first having been duly authorized to do so.

My Commission Expires: May 6, 2018 Tammie Elsen NOTARY PUBLIC

MADISON COUNTY
Commission Expires
May 6, 2018
TAMMIE ELSEN
ID # 79277
STATE OF MISSISSIPPI
NOTARY PUBLIC

There is no question that there was no John L. Black who actually granted Adams any interest in any timber rights, and no Mr. Black "personally appeared" before Ms. Elsen on April

11 provides a bit of safe harbor by allowing a party to state in the pleading that a particular factual contention "if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery," Plaintiff's allegations of conspiracy were not "so identified," meaning counsel certified that they had evidentiary support for that factual allegation at the time the Complaint was filed. We cannot imagine Plaintiff or her counsel honestly believe that Adams and these notary publics were conspirators.

12, 2018 asking that she take Mr. Black's acknowledgement.

Contrary to Plaintiff's FAC, and as this example confirms, the The UPS Store notary publics did not "notarize the signature" of Adams or the landowner; that is, the notary did not certify that she ***witnessed*** either Adams or the landowner sign the documents in the notary's presence, so there was no violation of Rule 5.1, (which is not a law in all events). Rather, this example, and all the other timber deeds in question, purport to show that the notary public took an "acknowledgment." When a notary public takes an acknowledgement from a person, the notary public states that the signer appeared before the notary and that he or she (the signer) acknowledged that the signer had executed the document. The State of Mississippi has forms with language that a notary public should use to take an acknowledgment which can be found at Mississippi Code Annotated § 89-3-7. The form language is:

> "STATE OF
>
> COUNTY OF
>
> Personally appeared before me, the undersigned authority in and for the said county and state, on this day of , 20 , within my jurisdiction, the within named _____ , who acknowledged that (he) (she) (they) executed the above and foregoing instrument.
>
> **(NOTARY PUBLIC)**
>
> My commission expires:
>
> "
>
> (Affix official seal, if applicable)

Id. The name of the person who is seeking to have his or her acknowledgement taken should be inserted in the blank space.

In her Opposition to TUPSS, Inc.'s Motion to Dismiss, Plaintiff laid out her theory of liability against the The UPS Store notary publics: "The amended complaint alleges that The

UPS Store Madison 'provided notary services in furtherance of [its] business,' and that '[g]iven the volume of timber deeds Adams presented to the UPS employees without the grantors-landowners present,' The UPS Store Madison knew or should have known that the deeds were fake." TUPSS, Inc.'s Motion to Dismiss was denied, so TUPSS, Inc. accepts that Plaintiff's theory must have passed a "plausibility" test, but nonetheless Plaintiff's theory does not make much sense, which bears on the issue of what amount of discovery is proportional to the needs of the case.

Plaintiff's assertion that '[g]iven the volume of timber deeds Adams presented to the UPS employees without the grantors-landowners present,' The UPS Store Madison knew or should have known that the deeds were fake" is both factually incorrect, and in all events, simply makes no sense. Now that Plaintiff finally produced copies of the unredacted timber deeds, those documents show that Adams did not present a great "volume of timber deeds . . . to the UPS employees without the grantors-landowners present." Plaintiff has produced 69 timber deeds where Plaintiff contends one of five different The UPS Store® employees purportedly took an acknowledgment from a grantor-landowner between 2014 and April 2018, and only 61 during the relevant period of April 2017 to April 2018. Of those 61 timber deeds, there were only 14 dates on which the The UPS Store® notary public purportedly took acknowledgements regarding more than one timber deed, and on those 14 dates, there are were never more than three separate timber deeds. (McDonald Decl. ¶ 4.) Thus, Plaintiff's repeated suggestion that notary publics were taking acknowledgments on "stacks" of timber deeds at a time is disproved by Plaintiff's production. Rather, Adams generally brought in one timber deed at a time, on different dates, with only his signature, asking different notaries public to take his acknowledgement. For example, Plaintiff's production shows that Defendant Austin Elsen, a notary public employed by

Herring Ventures, took an acknowledgement on only three timber deeds, on three separate dates: one deed on April 21, 2017; one deed on June 27, 2017; and one deed on December 26, 2017. *Id.*

Even if Adams had brought in stacks of documents at a time seeking acknowledgements, it would not be inherently suspicious, nor would it somehow tip-off a notary that the document was "fake." When a notary public takes an acknowledgement, he or she is not attesting to, or evaluating, whether the document is fake or genuine, the notary is only attesting that the signer has personally appeared and stated that the signer signed the document. In short, Plaintiff's suggestion that the The UPS Store notary publics engaged in misconduct of some sort by taking acknowledgments on numerous documents at a time is factually and legally incorrect.

D. Adams' Admissions that, After the Notary Public Took Adams' Acknowledgements, Adams Altered The Documents

Plaintiff will have to try to prove that the The UPS Store notary public improperly took the acknowledgement of two persons –who "personally appeared" before the notary and acknowledged that they executed "the above and foregoing instrument" – when in fact only one person (Adams) was present. Everyone recognizes that no grantor-landowner *actually* visited a The UPS Store with Adams to ask a notary public to take both their acknowledgments at the same time. But that does not mean that the notary public falsely purported to take acknowledgements of ***two*** signers, although only Adams was present. Plaintiff admits that the signature lines for the landowner-grantor was blank, and there was nothing improper of a notary public taking an acknowledgment from Adams of his signature just because there was another place on the document for someone else to sign. **Adams has admitted both that (1) he personally forged the signatures of those grantors-landowners, and (2) he changed the acknowledgments to change the language from taking only his acknowledgement to taking**

acknowledgements from "the within two" after he presented the timber deeds to the notary public.

When Adams pleaded guilty, he advised the Court that he personally forged the grantor-landowner signatures on those timber deeds. (McDonald Decl. ¶ 2, Exh. A.) Plaintiff admits that Adams added those forged signatures after having a notary public acknowledge his (Adams' signature.) (FAC ¶65.) Plaintiff has also produced documents where Adams admitted how he personally changed the timber deeds after the fact. Adams also wrote in a text message:

> If I ever get access to my computer again, I can show y'all the computer program I used to change the notary part of a timber deed from my signature to "the within named two.' It changed PDF documents to Word so I could change Tammy notarizing my signature to two signatures. I will also show this to the government when we start meeting.

(*Id.* ¶ 6, Exh. B.)

The notion that Adams, who successfully ran a Ponzi scheme for a decade without being caught, would bring in documents in which he had ***already*** forged the name of the fictitious landowner and had ***already*** changed the language to say that the notary was taking the acknowledgement from "the within two" and ***then*** asked seven different notary publics to falsely certify that he or she was taking the acknowledgement of both Adam and the absent, fictitious landowner is patently implausible. And, as stated, Adams has already confessed he changed the deeds ***after*** the notary had properly taken an acknowledgement of Adams.

E. Plaintiff's Theory that TUPSS, Inc. Is Liable for Investor Losses Because It Allegedly Controls Every Aspect of Herring Ventures' Business

Although the Court is not going to deny Plaintiff discovery on the ground that Plaintiff's claims against the notary publics, their employer Herring Ventures, and TUPSS, Inc. have absolutely no merit, understanding what Plaintiff must prove is critical to this Court's evaluation of whether the discovery sought is necessary and the likelihood that the discovery in question

will be beneficial. The current discovery dispute centers on what amount of discovery into TUPSS, Inc. "control" over Herring Ventures The UPS Store is "proportional to the needs of the case." To evaluate that, the type of evidence that is relevant under substantive law to establish a franchisor's control, and the Plaintiff's theory of liability, must be considered.

In connection with TUPSS, Inc. Motion to Dismiss for failure to state a claim, TUPSS, Inc. argued:

> The leading case in Mississippi on franchisor liability is *Parmenter v. J&B Enterprises*, 99 So. 3d 207 (Miss. Ct. App. 2012). Parmenter was a customer of a McDonald's restaurant franchisee, defendant J&B Enterprises, which operated a McDonald's restaurant. When Parmenter complained about how long it was taking for his order, one of J&B Enterprises' employees, Ms. Jones, beat him with a spatula. Parmenter sued Jones' employer (franchisee J&B Enterprises) and also McDonald's Corporation, the franchisor. The Court ruled that McDonald's Corporation could not be liable for the torts of the franchisee's employee unless McDonald's itself was Jones' employer. *Id.* at 213 ("we must first determine whether McDonald's was in fact an 'employer' or acting as a master of another party."). And the Court found that McDonald's Corporation was not Jones' employer because McDonald's Corporation did not have the right to "hire or fire employees, to direct the hours the employees worked, or to direct the details of the manner in which the day-to-day work of each employee was completed." *Id.* at 215.

Based on *Parmenter*, relevant evidence would be (1) whether TUPSS, Inc. had the right to hire or fire the notary public defendant employees, (2) whether TUPSS, Inc. had the right to direct the hours that each of the notary public defendant employees worked, and (3) whether TUPSS, Inc. had the right to direct the details of the manner in which the day-to-day work of each notary public defendant employee was completed. In this current discovery dispute, Plaintiff does not seek any of that information, nor contend that TUPSS, Inc. has refused to give it.

In Opposition to TUPSS, Inc.'s Motion to Dismiss, and in the pending Motion to Compel, Plaintiff relied on *Allen v. Choice Hotels Intern.*, 942 So. 2d 817, 821 (Miss. Ct. App. 2006) and *Elder v. Sears Roebuck & Co.*, 516 So. 2d 231, 234–35 (Miss. 1987). In *Allen*, the court wrote:

> courts have held the franchisor vicariously liable only when it had the right to control the specific instrumentality or aspect of the business that was alleged to have caused the harm. We find this application of the law to be consistent with Mississippi law, which has consistently refused to hold the employer of an independent contractor liable unless the employer was maintaining a "right of control over the performance of that aspect of work which gave rise to the injury."

Allen v. Choice Hotels Int'l, 942 So. 2d 817, 822 (Miss. App. 2006). *Allen* confirms relevant discovery would focus on the degree to which TUPSS, Inc. controlled the way these notary publics—appointed by the Governor—took acknowledgements while working in the employ of franchisee Herring Ventures. None of the discovery at issue in this Motion concerns that issue. In *Allen*, the Court of Appeals, affirmed the grant of summary judgment for the franchisor because it did not control the day to day operations of each of its Comfort Inn franchised locations. *Id*. ("Our review of this issue is consistent with that of other courts, which have generally granted summary judgment for a franchisor after finding the franchisor did not control the franchisee's day-to-day operation, as will be discussed *infra.*"*)*

Plaintiff also relied on *Elder v. Sears Roebuck & Co.*, which involved a slip-and-fall at a Sears "catalogue store," a location owned and operated pursuant to a "Sears authorized merchants agreement" as an independent contractor. After a jury verdict for plaintiff, the trial court set aside the verdict on the ground the owner of the Sears catalogue store was an independent contractor. The Mississippi Supreme Court reversed and reinstated the verdict.

In *Allen*, the Mississippi explained (and distinguished) *Elder*: "[in *Elder*,] the Mississippi Supreme Court held Sears liable, notwithstanding the fact that the store in question was run by an "independent" third party, because Sears held itself out to the public as the entity that the public was doing business with." *Id* at 827. In *Allen*, the Mississippi Court of Appeals found *Elder* inapplicable because the operator of the Comfort Inn was required to have a sign at the reception desk stating that the motel was independently operated. Herring Ventures similarly has

a sign on their front door stating it is an independently owned business. (McDonald Decl. ¶ 7, Exh. C.) Further, here, the issue of apparent authority is irrelevant because the investors who were bilked by Adams were not misled by the forged and fake timber deeds into thinking they were doing business with a The UPS Store. The forged and fake timber deeds did not refer to The UPS Store anywhere.

TUPPS, Inc. submits that the most important document addressing to what extent TUPSS, Inc. controls the day to day operations of Herring Ventures and the performance of its employees who are notary publics is the franchise agreement, which is a lengthy and detailed document explaining in detail the legal relationship between TUPSS, Inc. and Herring Ventures. (McDonald Decl. ¶10, Exh. D.) It was produced long ago. TUPSS, Inc. has also produced its confidential Center Operations Manual, which is a 436 page document. Plaintiff has stipulated that it can be filed under seal, and we are in the process of preparing the stipulation and proposed order so the Court can inspect that lengthy document as well. (McDonald Decl. ¶ 8.)

III. THE DISCOVERY AT ISSUE IS NEEDLESS OR AT LEAST DISPROPORTIONAL TO THE NEEDS OF THIS CASE

A. Plaintiff's RFP for "All Documents" Concerning the "Standards and Specifications" Referenced in the Franchise Agreement Is Grossly Overbroad

The primary issue on Plaintiff's Motion to Compel (at least from TUPSS, Inc.'s perspective because of the burden involved) concerns RFP 8, which demands TUPSS, Inc. "produce any and all documents evidencing your 'Standards and Specifications,' as defined in the Franchise Agreement, to which Herring Ventures, LLC d/b/a The UPS Store was required to adhere" from 2009 to date. TUPSS, Inc. objected:

> Specific Objections and Response to Request for Production No. 8**:**
>
> TUPSS, Inc. objects to this Request on the grounds that it is vague, ambiguous, overbroad, unduly burdensome, and neither relevant to the subject of this action

> nor proportional to the needs of the case to the extent it seeks "any and all documents" without any limitations based on the claims or defenses at issue in this case. TUPSS, Inc. further objects to this Request to the extent that it seeks information that is already within Plaintiff's possession, custody, or control. In addition, TUPSS, Inc. objects to the extent that this Request seeks information protected by the attorney-client privilege, the attorney work product doctrine, or any other privilege, protection, or immunity from disclosure.

During the meet and confers, counsel for TUPSS, Inc. explained that as drafted this RFP would require production of all documents on topics that have nothing to do with the issues in this case, for example, whether a franchisee is misusing the UPS or The UPS Store marks, or not maintaining the interior of their centers in a clean manner, etc. etc. However, when TUPSS, Inc. explained how overbroad the request was and the extraordinary expense TUPSS, Inc. would incur, Plaintiff's counsel refused to narrow the request in any way and instead declared it would move to compel. Even after this Court warned Plaintiff that if a motion to compel were filed, the Court would not likely rewrite or narrow a party's discovery request, Plaintiff would not narrow this request.

Plaintiff's Motion to Compel compliance with this request should be denied. (McDonald Decl. ¶ 9.) The cost and expense of complying with this RFP far exceeds the likely benefit of the discovery. (Milner Decl. ¶ 6.)

The definition of the term "Standards and Specifications" in the Herring Ventures Franchise Agreement is extremely broad:

> "**Standards and Specifications**" means the standards of quality, appearance, and service for Centers, and all standards, specifications, requirements and procedures specified from time to time by TUPSS in the Manuals or in other written directives pertaining to the business activities of franchisees, including TUPSS's standards in sign quality and appearance, Center appearance, advertising, maximum retail prices, computer hardware and software, Data Security Requirements, stationery, business cards, business forms and other promotional material, defined product and service offerings, general decor and standards, and standards, specifications, requirements and procedures relating to the E-Commerce Program.

(McDonald Decl. ¶ 10, Exh. D.)

Thus, Plaintiff's RFP 8 calls for the production of "all documents evidencing" any "standard, specification, requirements [or] procedures specified" by TUPSS, Inc. in writing "pertaining to the business activities of franchisees" between 2009 and today. That RFP is grossly disproportional "to the needs of the case" which, perhaps, involves the narrow issue of what control TUPSS, Inc. had over the way a few employees, of one franchisee in Madison, Mississippi, performed their duties as notary publics. As set out in the concurrently filed Declaration of Judith Milner, the burden and expense of trying to comply with such a broad document demand would be extraordinary in terms of time and expense. (Milner Decl. ¶¶4-5). Countered against that extraordinary burden, Plaintiff provides hardly any justification for the request.

To try to justify her patently overbroad discovery demand, Plaintiff simply rewrites it in her Motion to Compel rather than defend what she propounded and refused to narrow. Plaintiff asserts, falsely, that "'Standards and Specifications' is defined in the Franchise Agreement as the document(s) governing the "quality, appearance, and service for Centers." (Memo at 7.) That is simply not true, as shown above by the full text of the defined term Standards and Specifications. The Franchise Agreement does **not** define "Standards and Specifications" as the "document(s) governing the quality, appearance, and service for Centers," as if there were a small set of readily available documents which TUPSS, Inc. could, but will not, produce. Instead, as the Franchise Agreement shows, the term Standards and Specifications is defined as ***any*** standard, specification, requirement or procedure specified by TUPSS, Inc., in any written form, "pertaining to the business activities of franchisees." As explained in the Milner Declaration, it would take weeks to search for every communication with franchisees during the proposed time

frame and identify responsive documents, which would include documents about topics having nothing do with the taking of acknowledgements. This request is patently overbroad and grossly disproportional to the needs of this case. Plaintiff's Motion to Compel further response to this RPF should be denied, and TUPSS, Inc. submits it would be inappropriate to try to narrow this RFP for Plaintiff's benefit.

B. Plaintiff's Demand that TUPSS, Inc. Produce "Signage" Provided to Herring Ventures Should Be Denied

As has been her usual tactic in this action, Plaintiff served identical document demands on TUPSS, Inc. and Herring Ventures, seeking the same documents from each. Thus, Plaintiff's RFP 12 to Herring Ventures demanded production of any signage or other material in your store or in your possession that advertises notary services." Herring Ventures agreed to produce the documents and produced responsive documents. (McDonald Decl. ¶ 11, Exh. E.) Plaintiff also served RFP 9 on TUPSS demanding production of "any signage or other material provided by you to Herring Ventures, LLC that advertises notary services." TUPSS, Inc. objected on the ground, among others, that the documents were already in Plaintiff's possession because they were produced by Herring Ventures. During the meet and confer process counsel for TUPSS, Inc. explained to Plaintiff's counsel that TUPSS, Inc. has no way of knowing what marketing materials any one particular franchisee has opted to utilize, and that Herring Ventures would be the only party who knew what notary marketing materials it had opted to use, which had already been produced. (*Id.*)

Nonetheless, Plaintiff filed this motion to compel to produce TUPSS, Inc. to produce, presumably, the same documents already in Plaintiff's possession.

The easy answers to Plaintiff's Motion to Compel further response to RFP 9 is that (1) TUPSS, Inc. does not know what notary marketing materials Herring Ventures chose to use, so

TUPSS, Inc. cannot produce notary marketing materials that it knows Herring Ventures used, (Declaration of Karen Kelly), and (2) this request is disproportional to the needs of the case because Herring Ventures has already supplied the requested documents to Plaintiff. Those easy answers resolve the matter.

But TUPSS, Inc. also wants to point out that "signage" is plainly irrelevant to any issue in this case. Plaintiff suggests that signage is relevant based on the theory that, "where 'a party holds itself out as offering services to the public and . . . consumers are reasonably led to believe that they are doing business with that party. . . . '" *Id.* at 827 (quoting *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 200 (Miss. 1988)). (Memo at 4.) But here there were no "consumers" who were "led to believe they [were] doing business with [TUPSS, Inc.]" The injured parties here were investors, who neither did business with TUPSS, Inc. nor were led to believe they were doing business with TUPSS, Inc. The fraudulent timber deeds used by Adams did not reference The UPS Store in any way, or identify the notary public as being an employee of a The UPS Store franchised business. The investors did not see any signage at a The UPS Store (and if any investor did, it had no connection to the injury inducing transaction). This case is thus unlike *Sears*, where the plaintiff fell in a business that she reasonably believed was a Sears store.

C. As Explained to Plaintiff, TUPSS, Inc. Did Not Provide Any Training to Herring Ventures' Employees Regarding the Obligations of Notaries Public Under Mississippi Law

Plaintiff's RFP 6 demands TUPSS, Inc. "produce any documents relating to orientation or training you provided to Herring Ventures, LLC or its employees regarding the provision of notary services, including but not limited to documents relating to TUPSS's New Franchisee Training Program." During the multiple meet and confers with Plaintiffs' counsel, counsel for TUPSS, Inc.'s counsel advised that there are no other training materials provided to Herring Ventures, LLC other than the Franchise Agreement and Center Operations Manual about how a

franchisee offers notary services, and those documents state that it is the franchisee's obligation to comply with all applicable laws and regulations. TUPSS, Inc. as a franchisor, does not deal directly with a franchisee's employees, and certainly does not undertake to train every franchisee's employees who are notary publics about their duties as notary public's under each state's laws. As evidenced by the concurrently-filed Milner Declaration, paragraphs 2 and 3, there are no other materials to produce. There is no basis for ordering further compliance with RFP 6.

D. TUPSS, Inc. Properly Responded to Interrogatory No. 2.

Plaintiff's RFP 2 asks TUPSS, Inc. to "state all facts supporting the basis for your denial of the Amended Complaint's paragraph 55." Paragraph 55 alleges "The UPS Store, Inc. controls every aspect of its stores' business, including their provision of notary services. The UPS Store, Inc. dictates the location and designs of its stores, the signage they may use, the merchandise they sell, the services they offer, and the manner in which they conduct their business."

TUPSS, Inc. tried its best to answer this Interrogatory, by stating:

> TUPSS, Inc. does not "control every aspect" of Defendant Herring Ventures LLC's ("Herring Ventures") business. TUPSS, Inc. has produced the franchise agreement between TUPSS, Inc. and Herring Ventures, which provides the facts supporting the basis for denying the allegations contained in Paragraph 55 of the Amended Complaint. *See* TUPSS0000001-0000114. Consistent with the Franchise Agreement between Herring Ventures and TUPSS, Inc., Herring Ventures is an independently owned and operated business responsible for, among other things: (1) all employment decisions, including hiring, supervising, and firing its employees; and (2) running the day-to-day operations of the store in compliance with all federal, state, and local laws and regulations.

Again, rather than defend a bad discovery request, Plaintiff tries to rewrite it in her Motion to Compel. Plaintiff asserts "UPS's response does nothing to address its denial that UPS 'dictates the location and designs of its stores, the signage they may use, the merchandise they sell, the services they offer, and the manner in which they conduct their business.'" But Plaintiff

did not ask a series of interrogatories asking whether TUPSS "dictates" this or that. She asked one interrogatory asking TUPSS, Inc. to admit that it controlled every aspect of every The UPS Store's business." Once again, the fact that Plaintiff does not even try to defend the discovery she propounded proves TUPSS, Inc.'s point – the discovery as drafted is objectionable and improper.

How much detail is necessary to answer Plaintiff's ill-considered interrogatory? Does TUPSS, Inc. need to say: TUPSS Inc. does not admit the allegation in FAC ¶ 55 because TUPSS, Inc. does not control "every aspect" of every store's business because, for example, TUPSS, Inc. does not control the exact time each center opens each day, does not control who unlocks the door in the mornings, does not control how each employee combs their hair, does not control how each customer is greeted, does not control how many employees are working at the center each hour of each day, does not control . . . The Court gets the picture.

TUPSS, Inc. adequately answered a poorly drafted Interrogatory. Plaintiff's Motion to Compel a further response to Interrogatory No. 2 should be denied.

Dated: March 11, 2021

By: *s/ Mark R. McDonald*

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CERTIFICATE OF SERVICE

I, Mark R. McDonald, do hereby certify that I electronically filed the above and foregoing **THE UPS STORE, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO COMPEL** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to the following counsel of record:

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THIS, the 11th day of March, 2021.

/s/ Mark R. McDonald
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