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,

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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: NO FRANCHISOR LIABILITY FOR NOTARY PUBLIC CONDUCT

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I. SUMMARY OF TUPSS' REPLY

Plaintiff's Response to TUPSS' Motion for Summary Judgment asserts, repeatedly, that she "has not been permitted to take a single deposition in this" action (Opp. at 2), so per Federal Rule of Civil Procedure 56(d), the Court should deny TUPSS' Motion subject to re-filing once Plaintiff has decided she has taken "adequate" discovery. Given the number of lawsuits that Plaintiff has commenced, she can be excused for not knowing the procedural history of each of them, but in truth, for ***more than three years*** Plaintiff had an unfettered right to take depositions in this case and she chose not to do so. Magistrate Judge Ball did not put a moratorium on depositions in this action January 31, 2022, and that ended when consolidation was closed in September 2023.

The Fifth Circuit has a settled standard for evaluating a Rule 56(d) request for delay, and Plaintiff does not address it, much less satisfy it.

> Per Rule 56(d), a district court may defer or deny a summary judgment motion, or allow additional time for discovery, if a "nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." To win on a Rule 56(d) motion, the moving party must "show (1) why she needs additional discovery and (2) how that discovery will create a genuine issue of material fact." It's not enough to "simply rely on vague assertions that additional discovery will produce needed, but unspecified facts." Instead, the movant "must set forth a plausible basis for believing that specified facts, susceptible of collection within a reasonable time frame, probably exist and indicate how the emergent facts, if adduced, will *influence the outcome of the pending summary judgment motion*." The movant "must also have diligently pursued discovery."

Byrd v. BP Exploration & Prod., Inc., 2023 WL 4046280, at *2 (5th Cir. June 16, 2023) (citation omitted). If the Court applied that standard here, Plaintiff's request to delay resolution of TUPSS' Motion to allow for discovery would have to be denied.

On the merits of TUPSS' Motion, Plaintiff also ignores the Fifth Circuit's admonitions that, under *Erie*, a federal court "do[es] not 'adopt innovative theories of state law' but aim[s]

simply 'to apply that law as it currently exists.' And we 'are emphatically not permitted to do merely what we think best; we must do that which we think the state supreme court would deem best.'" *Weatherly v. Pershing, L.L.C.*, 945 F.3d 915, 920-21 (5th Cir. 2019). Here, Plaintiff urges the Court to adopt theories of liability that no Mississippi court, nor any other court, has adopted, and which would stand well settled law of franchisor liability on its head. Under Mississippi law, a franchisor is entitled to summary judgment if the undisputed facts show that the franchisor did not "control[s] the specific instrumentality or aspect of the business that was alleged to have caused the harm" (*Allen v. Choice Hotels Int'l*, 942 So. 2d 817, 822 (Miss. App. 2006)), or have the power to hire and fire the franchisee's employees *(Parmenter v. J&B Enters.*, 99 So. 3d 207, 215 (Miss. Ct. App. 2012)). Plaintiff's contention that, under Mississippi law, the determination of franchisor liability is "fact specific", which precludes resolution by summary judgment is likewise dead wrong. To the contrary, every reported case in Mississippi state court alleging franchisor liability was decided in the franchisor's favor on summary judgment, and there is no reported decision in Mississippi where summary judgment for the franchisor was denied. Plaintiff thus urges this Court to do something no Mississippi state court has ever done.

To evaluate Plaintiff's Rule 56(d) request, the Court must evaluate Plaintiff's legal arguments. *Byrd*, 2023 WL 4046280, at *2 (affirming order denying Rule 56(d) request because the district court properly found "the evidence the workers sought . . . was 'irrelevant.'"). Thus, this Reply first addresses Plaintiff's arguments on the merits, before addressing the Rule 56(d) issues.

II. TUPSS IS ENTITLED TO SUMMARY JUDGMENT

A. Plaintiff's Contention that Summary Judgment Should Be Denied Because TUPSS' Motion to Dismiss Was Denied Is Wrong, Obviously

Plaintiff first asserts that TUPSS' Summary Judgment Motion should be denied because "the law has not changed" since the Court denied TUPSS' Motion to Dismiss in 2019. (Opp. at 3.) Plaintiff's suggestion that the Court's short order denying TUPSS' Motion to Dismiss adopted Plaintiff's arguments about Mississippi law regarding franchisor liability (and did so for all time) is incorrect. Indeed, when it ruled on TUPSS' Motion to Dismiss, the Court invited a summary judgment motion. (ECF No. 49 ("The better course of action is to begin that discovery . . . and adjudicate the motions for summary judgment next year.").)

B. The Undisputed Evidence Shows that TUPSS Does Not Control the "Specific Instrumentality"—the Notaries—Who Are Alleged to Have Caused Harm

Plaintiff intentionally misstates TUPSS's argument as being that, under Mississippi law, franchisor liability "turn on whether a franchisor had the power to hire and fire a franchisee's employee." (Opp. at 2.) Plaintiff then attacks that strawman by saying it cannot be the law or else a franchisor would never be liable (thereby conceding that TUPSS does not have the power to hire or fire the notaries involved in this case.) In truth, TUPSS' Motion addressed at length the rule announced in *Allen* that a franchisor can be "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." (*See* ECF No. 385 at 1.) TUPSS' Motion addressed the alternative theory of franchisor liability rejected in *Parmenter*—seeking to hold franchisor McDonald's liable on a "joint employer" theory—but TUPSS never argued that a franchisor can be liable only if it hires and fires a franchisee's employees. It is telling that Plaintiff sees the need to mischaracterize TUPSS' argument.

Despite the plain holding of *Allen* that a franchisor must "control the specific instrumentality or aspect of the business that was alleged to have caused the harm," Plaintiff never addresses that holding, much less contends there is, or could be, a genuine dispute about whether TUPSS "control[ed]" the notaries in this case, who are Mississippi public officials. *See Allen*, 942 So. 2d at 822 ("Because the Allens were harmed by an alleged deficiency in the Comfort Inn's security, we must look to whether Choice exercised control over, or had the right to control, the hotel's security.")).

Plaintiff is similarly incorrect that "*Allen* and *Parmenter* stand for the proposition that the [vicarious liability] inquiry is a fact-intensive one" that precludes summary judgment. (Opp. at 4.) To the contrary, the Court in *Allen* not only affirmed summary judgment for the franchisor in that case, but expressly noted that franchisors are "generally" entitled to summary judgment where, as here, the undisputed facts show that the franchisor does not control day-to-day operations over the specific instrumentality that caused the alleged harm. 942 So. 2d at 822 ("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.") Likewise, *Parmenter* affirmed summary judgment for McDonalds. Indeed, Plaintiff does not cite a single case in Mississippi where a franchisor was ***not*** granted summary judgment.

Although the Fifth Circuit has admonished that, under *Erie*, a federal court must defer to a state court's decisions, and not adopt "innovative" theories not previously adopted by a state court's highest court, Plaintiff asks the Court not to apply *Allen's* "specific instrumentality" rule, and instead to adopt a theory that is not so much "innovative" as radical—namely, that a franchisor is liable if the franchisor exercises "strict control" over other aspects of a franchisee's

operation (what they sell, what staff wear, the hours they must be open for business). (*See* Opp. at 10 (TUPSS "had very strict control over the Madison [Center]", citing provisions of the Franchise Agreement and other documents addressing general operational standards and guidelines that have nothing to do with how notaries public perform their duties.).) Plaintiff misunderstands the basic concept of what a "franchise" is and proposes a rule that would turn the law of franchisor liability on its head.

Federal law defines in the Code of Federal Regulations what a "franchise" is, and that very definition includes the ***requirement*** that the franchise agreement specifies that "[t]he franchisor will exert or has authority to ***exert a significant degree of control over the franchisee's method of operation***, or provide significant assistance in the franchisee's method of operation." 16 C.F.R. § 436.1 (emphasis added). The *Allen* Court likewise recognized that "[i]n a typical franchise agreement, there are detailed requirements regarding the franchisee's operation of the franchise." 942 So. 2d at 826. The *Allen* Court also explained that a franchisor must "'prescribe rigid control over day-to-day business functions because they otherwise risk non-compliance with the Lanham Act,' and ultimately the loss of the trademark." *Id*. Thus, a franchisor must "exert a significant degree of control over the franchisee's method of operation" or else it wouldn't be a franchise business and the franchisor could lose trademark protection. Plaintiff's theory that Mississippi would adopt a rule that any franchisor who exerts "significant control," generally, over the franchisor's method of operation will be liable for any harm caused by a franchisee or its employees would turn the law of franchising on its head, and swallow the rule declared in *Allen* that a franchisor is liable only if it "control the specific instrumentality or aspect of the business that . . . cause[d] the harm." *Id*. at 823. If this Court predicted Mississippi would adopt such a rule of franchisor liability, it would threaten the business model of every

franchisor doing business in Mississippi. (Can there be any doubt that McDonald's Corporation exercises "strict control" over such things as menu offerings, marketing, signage, uniforms, etc.)

Furthermore, the *Allen* Court rejected the theory Plaintiff proposes, and this Court is required to defer to that appellate decision unless convinced the Mississippi Supreme Court would disagree. In *Allen,* the Court accepted that Choice Hotels exercised "rigid control" over its franchisees through a "system" of "standards [and] specifications" (including displaying Comfort Inn advertising), "rules and regulations" in "145-page proprietary document that covers numerous items with which [franchisees] must comply", and the right to inspect franchisees for compliance. *Allen* at 824-27. But that "rigid control" did not cause the *Allen* Court to reverse summary judgment for the franchisor. *Id*. at 825 ("the franchise agreement in this case indicates that the agreement, like the agreements discussed in other cases, is meant to provide a system of uniformity for Choice's' franchisees.") Instead, the *Allen* Court noted "'the clear trend in the case law . . . that the quality and operational standards and inspection rights contained in a franchise agreement do not establish a franchisor's control or right of control over the franchisee sufficient to ground a claim for vicarious liability as a general matter or for all purposes.'" *Id*. at 826-27 (quoting *Kerl v. Rasmussen*, 682 N.W.2d 328, 338 (Wis. 2004)) (collecting cases). The Court in *Allen* decided to follow that "clear trend" and thus necessarily rejected the very theory that Plaintiff asks this Court to adopt.

Instead of addressing the "specific instrumentality" rule announced in *Allen*, Plaintiff refers to the ten factor test articulated by the Mississippi Supreme Court in 1931 "used in determining whether a party is the master of another party." *Id*. (citing *Kisner v. Jackson*, 159 Miss. 424, 428-29, 132 So. 90, 91 (1931)[1]. The *Allen* Court adopted the "specific

[1]The Mississippi Supreme Court has expressed ambivalence about that ten factor test announced in *Kisner* almost a century ago. *See Miss. Dep't of Empl. Sec. v. Dover Trucking*, 334 So. 3d 61, 66 ("This Court has explained 'the

instrumentality" rule because "[w]e 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.'" *Id*. at 822.[2] But even if the *Kisner* ten factor test needs to be separately addressed, it is undisputable that the notaries were not TUPSS' "servants," and TUPSS was not the notaries "master." Indeed, ***none*** of the *Kisner* factors are satisfied here.

i. ***Whether the principal master has the power to terminate the contract at will***. There is no contract between the Notaries and TUPSS. Under the Franchise Agreement, TUPSS has no power over any employment decisions at the Madison Center. (O'Neal Decl. ¶¶ 4-5.) TUPSS cannot even terminate the Franchise Agreement with Herring Ventures "at will." (D. Herring Decl. Ex. A § 12.2.)

ii. ***Whether he has the power to fix the price in payment for the work, or vitally controls the manner***. TUPSS, Inc. does not control or "fix" the prices that Herring Ventures charged for notary services, which are set by Mississippi law. (D. Herring Decl. ¶ 7); *see* Miss. Code Ann. § 25-34-51. Herring Ventures has sole control over what prices to set for all services it provides, other than UPS shipping. (D. Herring Decl. ¶ 7.)

iii. ***Whether he furnishes the means and appliances for the work***; TUPSS, Inc. did not and could not provide the "means and appliances" for the Herring Notaries' work as notaries public. Each of the Herring Notaries was required to obtain his or her own official seal from the county board of supervisors, and was responsible for keeping it secure. *See* Miss. Code Ann. §§ 25-34-33, 25-34-35).

iv. ***Whether he has control of the premises***; TUPSS, Inc. had no control over where any of the Herring Notaries performed official acts as notaries public; and did not have control over Herring Ventures' The UPS Store premises. (O'Neal Decl. ¶ 9.)

v. ***Whether he furnishes the materials upon which the work is done and receives the output thereof, the contractor dealing with no other person in respect to the output***; As set forth above, TUPSS, Inc. did not and could not "furnish the materials" for the Herring

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difficulty in applying these tests . . . .'. '[O]n quite analogous factual situations' this Court has 'reached opposite conclusions.'" (citations omitted).)

[2] After the Mississippi Court of Appeals decided *Allen*, but before it decided *Parmenter*, this Court issued an opinion in *Hayes v. Enmon Enters., LLC*, 2011 WL 2491375 (S.D. Miss. June 22, 2011) denying summary judgment to a franchisor of janitorial services in a slip-and-fall case after applying these factors. Unlike here, the issue in that case was whether the janitor whose conduct caused the harm was an employee or an independent contractor/franchisee. *Id*. at *6.

Notaries' work as notaries public. Further, the person seeking to have a document notarized by one of the Herring Notaries receives "the output thereof".

vi. ***Whether he has the right to prescribe and furnish the details of the kind and character of work to be done***; TUPSS, Inc. had no "right to prescribe and furnish the details" of how the Herring Ventures performed their official duties as notaries public. As set forth above, the Herring Notaries were required to provide notary services in accordance with Mississippi law, and were regulated by the Secretary of State.

vii. ***Whether he has the right to supervise and inspect the work during the course of employment***; TUPSS, Inc. had no right to "supervise or inspect" any of their work as notaries public. (O'Neal Decl. ¶ 6.)

viii. ***Whether he has the right to direct the details of the manner in which the work is to be done***; TUPSS, Inc. did not and could not "direct the details" of how the Herring Notaries performed their official duties as notaries public.

ix. ***Whether he has the right to employ and discharge the subemployees and to fix their compensation***; Herring Venture had sole authority to employ or discharge the Herring Notaries. (O'Neal Decl. ¶¶ 4-5; D. Herring Decl. ¶¶ 3-4.)

x. ***Whether he is obliged to pay the wages of said employees***. TUPSS, Inc.was not. (O'Neal Decl. ¶ 5.).

In *Allen*, the Court affirmed summary judgment for the franchisor because:

> Applying these factors, we find that Choice did not act as a master to the Comfort Inn. Choice did not pay the hotel staff's wages, Choice did not have the right to hire or terminate "subemployees" or fix their wages, and Choice had no right to direct the details of the operation of the Comfort Inn. While the Rules and Regulations contained many specific requirements, Choice did not have the right to tell Comfort Inn how to conduct its day-to-day business, such as what hours employees would work or what hours the hotel should be open. Furthermore, Choice did not have the right to tell the Comfort Inn what rate to rent its rooms at, nor could Choice terminate the franchise agreement at will. While some of the other factors might support a finding that Choice acted as the master of the Comfort Inn, the factors as a whole indicate that the Comfort Inn was not Choice's servant.

Allen, 942 So. 2d at 821. As shown, none of the *Kisner* factors support a finding that TUPSS is the "master" of the notaries.

Finally, Plaintiff barely acknowledges that notaries public are public officials of the State of Mississippi who cannot be mere "servants" of a franchisor. When providing notary services,

those notaries are functioning with the power and authority of the State of Mississippi and have a sworn duty to "obey the law" and "faithfully discharge the duties of the office." MS Const. Art. 14 § 268. Those principles led the Supreme Court of Georgia considering a substantively similar statutory regime governing notaries to hold that when a notary public "acts in his official capacity, the [company] no longer has control over him and cannot direct how his duties shall be done." *Anthony v. Am. Gen. Fin. Servs., Inc.*, 287 Ga. 448, 451, 697 S.E.2d 166, 169 (2010). Plaintiff argues that, in an appropriate case, the Mississippi Supreme Court will someday rule that a notary's ***employer*** can be liable for a notary's conduct (which the Supreme Court has never done in the past), but Plaintiff offers no reason to think the Mississippi Supreme Court would go much further and hold the employer's ***franchisor*** can be liable.

C. TUPSS Cannot Be Liable on an Apparent Authority Theory

Plaintiff alternatively argues that a genuine issue of fact exists regarding whether TUPSS can be liable on an apparent authority theory because TUPSS allows its franchisees to display UPS and The UPS Store branding. Under Mississippi law, "[t]here are three essential elements to apparent authority: (1) acts or conduct of the principal; (2) reliance thereon by a third person, and (3) a change of position by the third person to his detriment. All must concur to create such authority." *Steen v. Andrews*, 223 Miss. 694, 698 (1955). Here, Plaintiff proposes a genuine issue of fact exists regarding the first element because TUPSS allows its franchisees prominently to display the UPS and The UPS Store trademarks throughout The UPS Store centers. No court in Mississippi has adopted such a rule about franchisor liability and the Mississippi Court of Appeals rejected the theory in *Allen*.

Both Federal and Mississippi law define a "franchise" as being an arrangement whereby a franchisor grants the franchisee the right to use the franchisor's trademarks. *See* 16 C.F.R. § 436.1 ("Franchise means any continuing commercial relationship . . . . in which the terms of

the . . . contract specify, . . . that: (1) The franchisee will obtain the right to operate a business that is identified or associated with the franchisor's trademark, or to offer, sell, or distribute goods, services, or commodities that are identified or associated with the franchisor's trademark"); Miss. Code Ann. § 75-24-51 ("'Franchise' means a written arrangement . . . in which a person for a consideration grants to another person a license to use a trade name, trademark, service mark, or related characteristic, and in which there is a community of interest in the marketing of goods or services at wholesale, retail, by lease, agreement or otherwise.") Thus, ***all*** franchisors allow their franchisees to utilize their trademarks for marketing purposes (else they wouldn't be franchisors.) To hold that a franchisor exposes itself to liability if it allows franchisees to use and display those trademarks would again, turn the law on its head. There is no way the Court could predict the Mississippi Supreme Court would adopt such a radical ("innovative") theory of liability, a ruling which would reverberate throughout the business of franchising.

Plaintiff suggests that TUPSS might be liable because Herring Ventures displayed "only" one sign identifying it as a franchisee. The significance of TUPSS' requirement that franchisees identify themselves as franchisees is that it proves indisputably that TUPSS is not engaging in conduct intended to mislead customers into thinking a The UPS Store center is owned and operated by UPS itself. That was the basis for the Court affirming summary judgment for Choice Hotels, which required "a sign indicating that the Gulfport Comfort Inn was run by an independent party, and not by Choice." *Allen*, 942 So. 2d at 827 ("Choice did not lead the public to believe that customers were doing business with Choice.") Indeed, the notion that at least one such sign is necessary to avoid liability is not true, and Plaintiff provides no authority, from any jurisdiction, adopting such a rule. *See, e.g.*, *Carris v. Marriott Int'l, Inc.*, 466 F.3d 558, 562 (7th

Cir. 2006) ("[a]lmost everyone knows that chain outlets, whether restaurants, motels, hotels, resorts, or gas stations, are very often franchised rather than owned by the owner of the trademark that gives the chain its common identity in the marketplace.") Do customers at a McDonald's restaurant or Marriot hotel see even one sign identifying the business owner as a franchisee? Of course not. But to hold that the absence of a sign, or "only one" sign, creates a triable issue of fact about a franchisee's "apparent authority" would open the flood gates. The *Allen* Court rejected such an "innovative" theory, as have other courts. *See McKinnon v. Yum! Brands, Inc.*, 2017 WL 3659166, at *10 (D. Idaho Aug. 24, 2017) ("the Court concludes that Plaintiffs' reliance on uniform Taco Bell branding and advertising as a means for establishing apparent agency will not suffice. Plaintiffs have not pointed to any other actions by Taco Bell and YUM which manifested control over the Subject Restaurant. In fact, a placard placed inside the Subject Restaurant indicated that ES-O-EN, and not Taco Bell, owned and operated the restaurant, such that customers had notice they were not dealing with the Taco Bell corporation.") (citing cases); *see also Hutchins v. Dia Lodging LLC*, 2021 WL 8083699, at *8 (E.D. Ark. Sept. 30, 2021) (granting summary judgment because "[i]t is undisputed that DIW's standards of operation and design manual expressly requires franchisees to have at the front desk a 'Franchisee Plaque stating "This facility is Independently Owned and Operated under a Franchise Agreement"'", citing *Allen*, and noting that "[m]any courts have held that signage and national advertising are insufficient to establish an apparent agency relationship."); *Cropp v. Golden Arch Realty Corp.*, 2009 WL 10710585, at *6 (D.S.C. Mar. 31, 2009) (concluding "that the placement of the McDonald's name on uniforms, pay reports, and signs do not amount to a representation of an agency relationship. The plaintiff has not proven the first element of the apparent agency test.").

Plaintiff's apparent authority theory fails for the further reason that Adams did not "change his position" to his detriment by relying on TUPSS' conduct. Adam's liabilities were not "increased" due to the fact that some of this timber deeds were notarized at a The UPS Store. And any alleged change in position by investors would be irrelevant since it is undisputed that it was Adams, not any investor, who patronized the Herring Ventures' The UPS Store in Madison. It is undisputed that the timber deeds did not refer to The UPS Store or UPS. (*See, e.g.*, ECF No. 01-1.)

III. PLAINTIFF'S REQUEST TO DELAY RESOLUTION OF TUPSS' MOTION INDEFINITLEY SHOULD BE REJECTED

A. Plaintiff Does Not Identify "Specified Facts" Which "Probably Exist" that Would Influence the Outcome of TUPSS' Motion

Plaintiff asserts she wants to depose witnesses about such things as Herring Ventures' "hours of operation, the goods and services it offers and sells, its pricing, and its advertising and marketing" and "UPS's inspections of The UPS Store Madison's business." (Mills Decl. ¶¶ 10-11.) But as, shown above, TUPSS' control of its franchisee's operations in general is irrelevant, since franchisors must exercise "significant" control. With respect to the relevant question whether TUPSS exercised control over the notaries when they provided services to Adams, Plaintiff does not claim there is a "plausible basis" for believing that facts exist showing that TUPSS exercised control over how those notaries provided notarial services to Adams. *Byrd*, 2023 WL 4046280, at *2. Plaintiff tacitly concedes that she can defeat TUPSS' Motion only if the Court adopts her theory of franchisor liability that no court in Mississippi has adopted, namely that a franchisor is liable is liable whenever the franchisor imposes operating standards on its franchisees.

Furthermore, Plaintiff's recitation of the discovery she seeks is exactly the kind of "vague assertions that additional discovery will produce needed, but unspecified facts" that the Fifth Circuit expressly held were an insufficient basis to grant a Rule 56(d) motion. *Id.*

Finally, Plaintiff cannot show she "diligently pursued discovery." She has had more than three years to take depositions, and she failed to take a single deposition, even though the Court in 2019 indicated summary judgment could be decided within a year.

Plaintiff simply has not met the standard under Rule 56(d) to warrant delaying resolution of TUPSS' Motion, largely because she does not identify any discovery that could possibly show that TUPSS controls the notaries who provided services to Adams.

B. Even if the Court Is Inclined to Grant Plaintiff Additional Time for Discovery, It Should Be No More than 45 Days

Plaintiff does not identify the specific discovery she seeks, nor propose a specific amount of time she claims is necessary to complete that discovery. She just asks the Court to deny TUPSS' Summary Judgment Motion so she can take "adequate discovery." Setting aside the fact that such a request is inconsistent with *Byrd*, and would almost certainly not fly if proposed by a typical party, Plaintiff's idea is a bad one—for Plaintiff, Defendants, and the Court.

This Court's Local Rules require the parties to consider whether there are "any motions whose early resolution would have a significant impact on the scope of discovery or other aspects of litigation," and "whether discovery should be conducted in phases or be limited to or focused upon particular issues, and what limitations should be placed on discovery." L.U. Civ. R. 26(f)(3)-(4). TUPSS' Motion is exactly the kind of motion that should be resolved "early" (before the close of all discovery) since it could have a very significant impact on other discovery and other aspects of this litigation, including discovery from investors. Discovery

limited at this time to the few witnesses[3] who conceivably have knowledge about the "particular issue" whether TUPSS controlled the notaries employed by Herring Ventures makes perfect sense.

TUPSS will not repeat why it would be error to prohibit Defendants from obtaining discovery from investors. (ECF Nos. 216, 224, 231, 243, 265, 275, 281, 326, 353, 366.) Defendants will have no choice but to continue to seek discovery from investors unless the Court agrees that discovery should be limited at this time to the issues raised in TUPSS' Motion for Summary Judgment until that Motion is decided. And it is in everyone's interests that that limited discovery be completed promptly. Forty five days should be ample to take at most seven depositions.

Dated: April 22, 2024

By: */s/ Mark R. McDonald*

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[3] The only witnesses with any personal knowledge about whether TUPSS controlled the notaries are (1) TUPSS, (2) the five notaries, and (3) Herring Ventures.

By: */s/ LaToya C. Merritt*

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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 REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT RE: NO FRANCHISOR LIABILITY FOR NOTARY PUBLIC CONDUCT** with the Clerk of the Court using the CM/ECF system which sent notification of such filing to all counsel of record.

Dated: April 22, 2024

/s/ Mark R. McDonald
Mark R. McDonald