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U.S. DISTRICT COURT
SALT LAKE CITY

**IN THE UNITED STATES DISTRICT COURT IN AND FOR
THE DISTRICT OF UTAH**

WORLD WIDE ASSOCIATION OF
SPECIALTY PROGRAMS, a Utah
corporation,

Plaintiff,

vs.

PURE, INC., PURE FOUNDATION, INC.,
SUE SCHEFF, JEFF BERRYMAN

Defendants.

**REPLY MEMORANDUM IN
SUPPORT OF MOTION FOR
SANCTIONS AND ORDER OF
DEPOSITION**

Civil No. 2:02 CV 0010

Honorable Paul G. Cassell

Plaintiff World Wide Association of Specialty Programs, by and through undersigned counsel, hereby submits this Reply memorandum in support of plaintiff's Motion for Sanctions and Order of Deposition arising out of defendant Sue Scheff's failure to appear for her scheduled deposition in Ft. Lauderdale, Florida on January 22, 2004. Plaintiff set forth the issues in its initial moving papers as, first, whether Scheff failed to appear for her deposition having been given proper

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notice and, second, whether Scheff had substantial justification for her non-appearance to avoid sanctions. Scheff admits she refused to testify at her scheduled deposition. Her justification is she gave proper notice of certain conditions prior to her being deposed which were not met.

Here, Scheff's refusal to testify constitutes a non-appearance under Rule 37(d). Because of the great expense and importance of this particular deposition, Scheff was required to demonstrate she sought the specific protection she alleged and, moreover, could possibly have been entitled to such protection. Instead, Scheff's sole bases for her refusal, i.e. no stipulation the deposition would be for "attorneys' only" and plaintiff's refusal to produce the Bock e-mails, demonstrate only that Scheff is belatedly trying to justify plainly improper conduct with makeshift arguments and fabricated disputes. There is no justification for Scheff's non-appearance.

ARGUMENT

I. SCHEFF'S REFUSAL TO TESTIFY IS SANCTIONABLE ABSENT SUBSTANTIAL JUSTIFICATION

Scheff is liable for sanctions under Fed. R. Civ. P. 37(d) for non-appearance. Scheff claims she did "appear," just refused to answer any questions. The semantic battle Scheff proposes is not worth the effort. Scheff does not cite a rule or case in support of her position and the point is irrelevant. Rules 30(d)(3) and (4), in conjunction with Rule 37(a)(4), provide for sanctions where a deponent or counsel improperly delay or terminate a deposition without substantial justification. Scheff admits she refused to testify because plaintiff's counsel would not sign a stipulation the deposition would be for "attorneys only." Whether deemed a non-appearance, improper delay or an improper termination, the conduct is still sanctionable. Thus, the only remaining issue is whether

Scheff's refusal to testify was substantially justified.

II. SCHEFF'S CLAIM OF A VERBAL AGREEMENT THE DEPOSITION WOULD BE "ATTORNEYS ONLY" DOES NOT HOLD WATER

Scheff claims she refused to testify because she had a verbal agreement the deposition would be for "attorneys only" and plaintiff still had not produced the Bock e-mails. Scheff's current reliance on the Bock e-mails as an excuse for her non-appearance illustrates Scheff's confused and haphazard approach to avoiding these sanctions. The argument runs thusly: Scheff destroyed hundreds of e-mails so that plaintiff could not question her on their contents. Now that plaintiff has the e-mails, Scheff needs to see them because she is consistently perjuring herself due to the fact she cannot remember all the incriminating evidence she destroyed and keeps lying about her activities. As novel as the argument is, Scheff fails to point to any correspondence, proposed stipulations or alleged oral agreements that Scheff would not testify without the Bock e-mails. Quite simply, the matter was **never** discussed until the morning of Scheff's deposition. Then it was only hastily put forward by Scheff's counsel desperately seeking an excuse to terminate the deposition. Scheff cannot wait until the morning of her deposition, with three persons having prepared and traveled to Florida, to impose conditions on the taking of her deposition. Yet, insisting on production of the Bock e-mails before her testimony is precisely such a case. Accordingly, Scheff cannot use the Bock e-mails as justification for her non-appearance.

Scheff's claim of a verbal agreement the deposition would be for "attorneys only" is equally improvised. On November 21, 2003, defendants proposed Scheff be deposed on January 22nd immediately following defendants' deposition of Lynne Pretzfeld in Florida. *See Exhibit A.* On

December 31st, plaintiff's counsel was waiting to hear from defendants on coordination efforts for Scheff's deposition with Mrs. Pretzfeld. Plaintiff's counsel wrote, "I have not heard back from you regarding the deposition of Ms. Scheff. Shall I simply notice it up? Please let me know." *See* Exhibit B. Scheff's counsel responded, "[b]efore we conduct another deposition of Sue, I must insist on an agreement to prevent the dissemination of this deposition and the sensitive and confidential information that it is likely to contain." *See* Exhibit C. Thus, on January 2, 2004, plaintiff's counsel wrote, "Thank you for your December 31st letter. Am I to understand that Ms. Scheff will not appear for a January 22, 2004 deposition absent some kind of additional protective order? I either need that confirmed or to discuss it with your office." *See* Exhibit D. In other words, if Scheff's deposition was going to be cancelled, plaintiff wanted to know then before travel arrangements and significant preparation expenses were incurred.

On January 7, 2004, plaintiff's counsel, Spencer Siebers, called and spoke with Richard Henriksen, defendants' counsel.¹ Mr. Henriksen expressed concern that plaintiff would publish Scheff's upcoming deposition before this Court had a chance to rule on his Motion for Preliminary Injunction. Both counsel thus agreed to proceed with the deposition and not disseminate the information to third parties until the Court ruled on the Motion. There was never any mention of the clients at all, much less a limitation of the deposition to "attorneys only." Mr. Henriksen did not send a follow-up letter the next day, or the next, or the next. Instead, it was almost two weeks later

¹ As officers of the Court Mr. Siebers and Mr. Silvester have obligations of candor and honesty before this Court and, for that reason, have not attached affidavits merely restating the contents of this memorandum. Any false or misleading statements are equally actionable under Rule 11 as they would be if set forth in affidavit form.

Mr. Henriksen suddenly decided to send a follow-up letter.

The reason is obvious. For two weeks there was no need for follow-up letters or proposed stipulations because the parties had an agreement plaintiff would not publish the deposition until this Court could rule on defendants' Motion for Preliminary Injunction. This fact is evident by looking at the relief requested in Scheff's Motion for Preliminary Injunction. It did not request "attorneys only" protection. Defendants, however, subsequently decided they wanted an "attorneys only" deposition and needed to change the agreement.

Thus, on January 19th, defendants first sought to change the agreement by faxing a proposed stipulation to plaintiff's counsel's office - closed for the Martin Luther King holiday. *See* Exhibit E. Spencer Siebers, who had made the deposition arrangements, was already in Florida having altered family vacation plans to accommodate defense counsel's schedule. Fred Silvester, who was preparing for the deposition, did not receive the letter until Tuesday, January 20th. Defendants' counsel, Aaron Flater, called Mr. Silvester that Tuesday morning to change the deposition schedule of Lynne Pretzfeld to follow Scheff's deposition. He never mentioned the proposed stipulation. Mr. Silvester was out of the office with meetings all day and returned around 6:00 pm and was told Mr. Flater had called about the proposed stipulation. No one answered at Mr. Flater's office when Mr. Silvester returned the phone call. Mr. Silvester left for the airport the following morning at 5:30 am to catch an 8 o'clock flight to arrive in Florida by 5:00 pm. Even had Mr. Silvester read the proposed stipulation on Tuesday evening, there was no way to contact defendants to cancel the deposition.

As it was, Mr. Silvester did not read defendants' proposed stipulation until Thursday morning

when Scheff's counsel stated for the first time the deposition would be terminated without it. Mr. Siebers, who was now in attendance at the deposition, read the proposed stipulation and unequivocally told Mr. Henricksen they had never even discussed such terms, much less agreed to them. Notwithstanding, plaintiff reiterated its agreement not to publish the deposition until the Court could rule on the Motion for Preliminary Injunction. As further compromise, plaintiff's corporate representative left the deposition. Scheff still refused to go forward.

Plaintiff's counsel explained, "I cannot properly represent a client that I can't discuss the facts that I find and the discovery that is done. It's impossible. And I have an obligation under the Rules of Professional Conduct to consult with my client." *See* Transcript at 14. Counsel indeed has such a duty under Rule 1.4 of the Utah Rules of Professional Conduct. In this case, Scheff's deposition was the last major deposition. The information learned would determine what remaining discovery needed to be completed, pretrial motions to be pursued, and possibilities of pursuing settlement before trial. According to the comment to Rule 1.4, "[t]he client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so." This client was concerned enough to have a board member travel to Florida for the deposition. Plaintiff's attorneys had no basis to withhold essential information from this or other of plaintiff's officers. Scheff still refused to go forward.

At that time, Scheff knew she did not have an agreement for the deposition to be for "attorneys only." At that time Scheff knew she had failed to seek such protection as required by Rule 37(d). At that time Scheff knew plaintiff would not disseminate the deposition to third parties

until her Motion was ruled upon. At that time Scheff knew plaintiff's counsel had a professional obligation to discuss the deposition with his client and make essential trial decisions in the following weeks. At that time Scheff knew three people had traveled to Florida, at great expense, to take her deposition. At that time Scheff knew depositions are not considered private or confidential because plaintiff's counsel explained the holding of *Carter v. U.P.&L.*, 800 P.2d 1095 (Utah 1990) to her counsel while she was present. *See* Transcript at 19. Scheff knew all of this and still refused to go forward. Scheff knowingly made her decision, however ill-advised, and did so without substantial justification. Therefore, plaintiff is entitled to sanctions.

III. NOTHING IN THE MUTUAL PROTECTIVE ORDER, CASELAW OR THE FEDERAL RULES JUSTIFIES SCHEFF'S NON-APPEARANCE

The Mutual Protective Order does not justify Scheff's non-appearance. The Protective Order states "any names or organizations first revealed to either Plaintiff or Defendants in the course of discovery shall not be used for any purposes other than for use in this litigation." . Plaintiff sharing Scheff's deposition with Carey Bock did not violate this Order. Plaintiff gave Bock a copy of the deposition because Bock had been in almost constant e-mail and telephone contact with Scheff from October of 2002 through May of 2003. Bock has an insiders knowledge of Scheff's activities, accusations and contacts during that time frame in addition to her conversations with Scheff about her daughter's alleged abuse at Carolina Springs and the purpose of PURE. Since these topics and time periods were covered in Scheff's deposition, Bock was able to shed valuable light on perjured and misleading testimony in Scheff's first deposition. Scheff identified Ms. Bock as a person likely to have facts relevant to disputed issues in this case. Scheff has failed to demonstrate how sharing

sworn testimony with such a witness is not “for purposes of the litigation” or a violation of the Protective Order. Rather, it is another superficial justification put forth by Scheff attempting to excuse her inexcusable conduct.

Similarly, caselaw does not justify Scheff’s non-appearance. Scheff misstates the holding of the *Seattle Times* case. There, the Supreme Court held that since discovery was a product of court rules, the courts could accordingly place restrictions on the use of discovery without offending the Constitution. Scheff, on the other hand, states the holding as “a litigant has no first amendment right of access to information made available only for purposes of trying his suit.” See memo in opposition at 12. This comment meant First Amendment rights did not attach to information only made available through use of the federal court’s discovery rules to supercede that same court’s ability to place restrictions on the use of the discovery. Scheff, however, argues the comment means the plaintiff in this case has no right to know information discovered in Scheff’s deposition, but only attorneys have access to such information. The case stands for the proposition that a litigant does not have an unrestrained right to disseminate discovery, it does not support Scheff’s theory that discovery is for “attorneys only.” Scheff also argues she did not make her deposition public. Scheff states, “[t]he use of a small portion of a deposition in supporting a memorandum does not give the Plaintiff free license to make public the entire transcript of the deposition of Sue Scheff.” See memo in opposition at 12-13. Scheff cites no authority for her position. In contrast, Fed. R. Civ. P. 5(d) states the deposition was indeed made public when Scheff used it in connection with her various motions. Further, “[n]umerous . . . courts have also recognized the principle that the filing of a document gives rise to a presumptive right of public access.” *Leucadia, Inc. v. Applied*

Extrusion Tech., Inc., 998 F.2d 157, 161-62 (3rd Cir. 1993) (citing decisions from First and Tenth Circuits, Federal Claims Court, and New York and Illinois district courts). Scheff's disregard of the caselaw in this area invariably leads again to the conclusion she is merely making up belated justifications for her actions without any rational basis or reasoned approach.

Finally, the federal rules do not justify Scheff's non-appearance. Rule 37(d) specifically states, "[t]he failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c)." Scheff's Opposition demonstrates a misunderstanding of not only the Rule but her own Motion for Preliminary Injunction.

On December 29, 2003, Scheff filed a Motion for Preliminary Injunction and Motion to Seal Court Records. The Motion requested the following relief, "Plaintiff should be enjoined from disseminating and publishing [discovery] to prevent damage and irreparable harm, not only to Defendants, but also to other individuals who are not parties to this lawsuit and whose interest must be protected." *See* Memo in Support of Preliminary Injunction at 9; *see also* pages 2 and 11. If granted, plaintiff could not publish Scheff's deposition to non-parties. Plaintiff could, however, attend Scheff's deposition and could discuss discovery information between counsel and officers of plaintiff.

In her Opposition, Scheff states her proposed stipulation would have the "same effect" as her Motion for Preliminary Injunction but has no clear idea of what that "effect" would be. Scheff's pending Motion, even if granted, would have only prevented publication of the deposition to third parties. Yet, on pages 6 and 11 of her Opposition she states it would have prevented the publication

of the deposition to plaintiff (except for counsel) until the Court ruled. *See* Page 6 (Counsel could confer with client after Court order), page 11 (deposition could not be disclosed to parties until after court had chance to rule). Then, twice on page 7, Scheff states it would have prevented plaintiff's counsel from ever sharing the deposition with his client. The relief requested by Scheff's Motion for Preliminary Injunction, however, was clearly not "attorneys only" protection of depositions. Plaintiff agreed to not disseminate the deposition to third parties, i.e. the relief that was requested in Scheff's Motion. Scheff had no basis to insist on more, has not cited a single case which could support such draconian restrictions placed on published deposition transcripts, and simply ignores the federal rule's mandates on discovery. Therefore, Scheff had no substantial justification for her non-appearance.

IV. PLAINTIFF IS ENTITLED TO SANCTIONS

Scheff has failed to justify her non-appearance. Plaintiff, therefore, moves this Court for its costs and attorneys fees incurred in preparing for the deposition and traveling to Florida. This includes attorneys' fees in preparing for the deposition, attorneys' fees in preparing this Motion, and travel and related expenses for plaintiff's attorneys and corporate representative. Plaintiff further requests this Court order Scheff to appear in Salt Lake City, Utah for her deposition as soon as possible and pay for costs related to such deposition. Plaintiff also requests a warning from this Court that failure to appear may result in default judgment being entered against defendants Scheff and PURE.

Scheff complains she should not be responsible for all the costs since other depositions were taken. Yet, plaintiff's counsel traveled to Florida for Scheff's deposition, not the inconsequential

depositions otherwise scheduled by Defendants. Scheff knew all the expenses involved in this trip when she made her ill-advised decision to walk out on her deposition. Furthermore, Lynne Pretzfeld was represented at her deposition by Alan Kipnis from Ft. Lauderdale. Elaine Davis was represented by John Statahatkis from Columbia, South Carolina. Plaintiff's counsel sat through the depositions (actually Mr. Silvester left before Ms. Davises deposition was completed) to observe the proceedings, but there is no question the expenses incurred were incurred for Ms. Scheff. Therefore, plaintiff is entitled to sanctions for Scheff's unjustified non-appearance.

CONCLUSION

Scheff continues to treat discovery in this case like an internet chat room without rules or consequences. Her flippant attitude and gamesmanship is costing plaintiff into the tens of thousands of dollars in unnecessary expenses. Sanctions are appropriate to put an end to such conduct.

DATED this 7th day of February, 2004.

SILVESTER & CONROY, L.C.



Fred R. Silvester
Spencer Siebers

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of February, 2004 a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS AND ORDER OF DEPOSITION** was served by mailing the same via first-class U.S. Mail, postage prepaid to the following:

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