

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

4
5 CONSUMER FINANCIAL)
6 PROTECTION BUREAU,)
7 Plaintiff,)
8 -vs-) Civil Action
9 UNIVERSAL DEBT & PAYMENT)
10 SOLUTIONS, LLC, et al.,)
11 Defendants.)

12
13 Transcript of the Telephone Conference Proceedings
14 Before the Honorable Richard W. Story
15 United States District Court Judge
16 April 12, 2017
17 Atlanta, Georgia

18
19
20
21
22 Reported stenographically by:
23 Amanda Lohnaas, RMR, CRR
24 Official Court Reporter
25 United States District Court
 Atlanta, Georgia
 (404) 215-1546

APPEARANCES OF COUNSEL

For the Plaintiff: Jonathan B. Engel, Esq.
John David Thompson, Esq.
Mary Katharine Warren, Esq.

For Defendant Global Payments, Inc.: Leonard J. Gordon, Esq.
James Douglas Baldridge, Esq.
Benjamin Wayne Cheesbro, Esq.
David Lee Feinberg, Esq.
Benjamin Eric Horowitz, Esq.

For Defendant Pathfinder Payment Solutions, Inc.: John Da Grosa Smith, Esq.
Kristina Michele Jones, Esq.

For Defendant Frontline Processing Corp.: Joseph John Gleason, Esq.

For Defendant Francis David Corp.: Benjamin Ockner, Esq.

For Defendant Global Connect, LLC: Kevin Thomas Crocker, Esq.

For Defendant Varinderjit Bagga: Carolyn Cain Burch, Esq.

For Defendant Marcus Brown: Linda Heary Joseph, Esq.

1 (Wednesday, April 12, 2017, 10:35 a.m.; all
2 attorneys appearing telephonically.)

3 THE COURT: Good morning, this is Judge Story. I want
4 to thank everyone for being here this morning.

5 We will -- I do have Ms. Lohnaas, my court reporter,
6 here, as well as Mr. Biegler, my law clerk. And so before
7 you speak if you will identify yourself that will allow us to
8 have an accurate record of the proceedings.

9 I realize we have a large number of participants and
10 phone conferences are difficult with two people, so it's a
11 little hard sometimes because the way these things work, when
12 someone speaks it blocks everyone else out and it's hard to
13 manage the call sometimes. So aside from announcing who you
14 are when you speak, if, when someone finishes speaking, if we
15 will give a brief pause because sometimes I want to weigh in
16 and ask a question or redirect things and I can't get in
17 because everyone's talking and it blocks everyone else out.
18 So if we'll work together in that regard.

19 To try to move things forward a little bit I've taken a
20 quick look at what was submitted to me before our phone
21 conference. And needless to say, I haven't been able to look
22 at everything but I have tried to get a flavor of it, and let
23 me share with you what I am sensing and then give you an
24 opportunity to further clarify or to take us a different
25 direction if we need to.

1 As I understand it, we've got the 30(b)(6) deposition
2 coming up tomorrow and the concern has been raised on behalf
3 of the defendants, particularly Pathfinder, the concerns
4 about there being a written document brought that's
5 essentially a script for answers, and concerns that the
6 deposition is not truly in the nature of a deposition but
7 would simply be the reading of a written document prepared by
8 others and that you would not have the opportunity to do the
9 kind of examination of a witness that one would expect at a
10 30(b)(6).

11 From the other side, from CFPB, I've received the copies
12 of the documents that, as I understand it, they're making
13 available and that would be available to their witness for
14 use during the deposition.

15 It seems to me that there are a couple of issues that
16 come to the front here and perhaps you're seeking direction
17 from me on. One is the nature of the questioning and the use
18 of the, I don't want to say script, but the documents that
19 the witness is bringing to the deposition.

20 I don't think in a case like this, with the breadth of
21 the documents and the allegations and contentions, that it
22 should be a memory test. That, I think, is not a useful way
23 to approach this and it's an unreasonable expectation of any
24 witness to be able to sit there and recount from memory
25 specific facts about the various allegations.

1 For that reason, I think that to have the information
2 marshaled together from which that witness can get specifics
3 to the extent that they are requested through the questioning
4 is appropriate.

5 In just a very brief glance, and I'm sure there are
6 problems with it that I don't know about because I've only
7 had a chance to look at it briefly, it seemed to me, at
8 least, that these documents that the CFPB is making
9 available, the exhibits to the e-mail that was sent to me
10 just a few moments ago, is a pretty comprehensive setting out
11 of the contentions of the CFPB, not just of their contentions
12 but the facts or the factual contentions that underlie their
13 claims, and should go a long way in helping everyone
14 understand what's at issue here.

15 When I first was contacted about this conference my
16 intent, before I really had heard from either side, other
17 than having a general idea of this, my intent was to convey
18 to you that I felt the defendants should be able to come out
19 of a 30(b)(6) deposition with a good sense of what they were
20 going to face when they went to trial, what is the universe
21 of possible facts that are going to be brought out against
22 them by the plaintiff in the plaintiff's case-in-chief, so
23 that they are prepared to meet that during their presentation
24 of evidence.

25 It seems to me, and I'm sure this is broader than what

1 would be presented at trial, but it does seem to me that
2 these exhibits that the CFPB has submitted with the memo, or
3 with the e-mail, appear to be responsive to that kind of
4 need.

5 At the same time, I think there are things that you
6 can't get from a document and there's an allusion to some of
7 those in the e-mail that we received from Mr. Engel, things
8 like the industry standards, the theory of damages, those
9 kinds of things that you're going to want more of a live
10 answer and a real person kind of answer as opposed to
11 documents being handed to you.

12 So I've talked more than I intended to but I wanted to
13 give you a sense of my feeling is that, number one, it's okay
14 for a witness to have these kinds of things with him or her
15 at the time the deposition is given. It seems to me that
16 this is a good faith effort on the part of CFPB to give what
17 I said they had to give in denying many parts of the
18 protective order and the rulings on the protective order,
19 trying to make it clear that there had to be specific
20 information given. It seems that these exhibits are, at
21 least on their face, a good faith effort to accomplish that.

22 At the same time, I think the witness needs to be
23 prepared and versed, and Mr. Engel has represented in his
24 e-mail that he does intend to have a witness who has been
25 prepared to address these topics that require a more

1 generalized response or a response that's more of a human
2 touch than some listing that might be contained in the
3 exhibits.

4 Having said that, I probably have not touched on any
5 issue that either of you really wanted me to, so let me give
6 you a chance.

7 First on behalf of Pathfinder, since this conference was
8 precipitated at your request, let me hear from Pathfinder
9 about further clarification that you feel you need.

10 MR. SMITH: Good morning, Your Honor. This is John
11 Da Grosa Smith, and we appreciate you setting a conference so
12 quickly today.

13 I think the Court has a strong grasp of the issues that
14 we wanted to raise today and we appreciate the Court's
15 direction. And I thought, you know, certainly hued by the
16 Court's perspective, I wanted to share a few things that
17 perhaps could provide us some clarity and help us facilitate
18 a useful week.

19 Number one, prior to the deposition yesterday, counsel
20 for Global had requested that, if the witness was going to
21 rely on any memory aids, that those documents be provided in
22 advance so that Global would have an opportunity to review
23 them and make the deposition more productive. That request
24 was denied by the CFPB.

25 In addition, when we arrived in the deposition room

1 yesterday, Global's counsel questioned the witness and
2 started to ask the witness what, if any, documents that
3 witness relied on. And when that information was revealed,
4 counsel for Global asked if at that point the CFPB would
5 produce the document, at which time the CFPB refused on the
6 grounds that the witness hadn't relied on it yet.

7 That then necessitated Global's counsel asking more and
8 more questions, waiting for that talismanic point. And then
9 what would happen, Your Honor, is that Mr. Engel or
10 Ms. Warren would reach behind and pull out a Redweld that had
11 a lot of those documents the Court saw today and then hand
12 them out on the spot.

13 As the Court can see from the documents attached, they
14 are fairly extensive and that then necessitated counsel for
15 Global on the spot to start looking at these documents. And
16 that happened throughout the day as documents trickled out.

17 At the close of the deposition yesterday, Mr. Gleason,
18 on behalf of Frontline, whose deposition is tomorrow --
19 Pathfinder's is on Friday, Your Honor -- Mr. Gleason asked if
20 the CFPB would provide, one, the identity of the witness who
21 would testify on Thursday; and, two, if the witness intended
22 to use any memory aids, if they would please be produced in
23 advance. And that request was rejected.

24 So the first issue we raise is that to the extent the
25 witness is going to rely on memory aids, like the Court, you

1 know, has seen and that the Court noted may be appropriate in
2 a deposition like this, for the purposes of having a
3 productive deposition we certainly think it's appropriate
4 that those be given in advance and that they not be given
5 during the deposition where it only creates a more
6 challenging environment.

7 THE COURT: Let me hear from Mr. Engel on that topic
8 before we move forward.

9 MR. ENGEL: Thank you, Your Honor.

10 So two points on providing the memory aids in advance.
11 The first is a practical one. And while I wish it were the
12 case that we were just sitting on these memory aids and could
13 provide them well in advance of the deposition, the fact is
14 that they're work product that remains work in progress until
15 just about before the deposition. So that's a practical
16 concern.

17 The legal concern is that we don't believe that anyone
18 is entitled to any memory aid until that memory aid is
19 required to aid the witness's memory. If we were to go
20 through an entire deposition and counsel did not ask a
21 question that required the witness to rely on a memory aid,
22 then they would not be entitled to what is effectively work
23 product up until the point that the witness relies on it.

24 So that is the basis for not providing the memory aid
25 until the witness requires the aid to refresh his memory.

1 As to identifying a witness beforehand, it has been the
2 practice of Pathfinder in particular not to identify a
3 30(b)(6) witness before a deposition has taken place.
4 Pathfinder specifically rejected the Bureau's request to
5 identify its 30(b)(6) witness in advance of the Bureau's
6 30(b)(6) depositions of Pathfinder.

7 THE COURT: All right. I'll hear from Pathfinder about
8 that in just a moment but let's stay for just a moment with
9 the production of the memory aid and the timing of that.

10 Here's the problem I have with that, and it is with a
11 recognition that you have a good argument about work product
12 here. I don't doubt that the entirety of this production
13 that you attached to your e-mail to us today, or at least
14 substantial portions of it, there would be a legitimate
15 argument about work product and what should and should not be
16 produced and so forth. So let me preface these comments with
17 that acknowledgement.

18 But having acknowledged that, as a practical matter, the
19 approach that you are taking essentially requires the lawyer
20 to ask the very kinds of questions to which you are
21 objecting, which is, Judge, it's absurd to expect a witness
22 to be able to come in and to give these kinds of specifics,
23 which also means that we then must waste time at a deposition
24 having the lawyer, as Mr. Da Grosa Smith just said, look for
25 that talismanic question that will prompt the production of

1 that information which is really what it is that the deposing
2 party is seeking.

3 And so we're wasting time just going through an exercise
4 to be able to flip the switch to get that -- to be
5 forthcoming.

6 And then, in fairness, when I look at what you submitted
7 to me today, and again I want to be very positive about it
8 because I think it really moves the ball forward for us, but
9 if I were handed that at a deposition I would have to at
10 least consider asking to adjourn the deposition to allow me
11 to actually digest what's there. This is very dense
12 material. I mean, there's a need to grasp the organization
13 and how one part relates to another. And I realize that's
14 based on about a ten-minute review before we had this phone
15 conference and it may be easier to grasp than what I'm
16 suggesting, and for you folks more familiar with the case
17 maybe it's easier. But I still think there would be problems
18 there.

19 So for me, I appreciate the give and take of litigation
20 and the process of litigation, but for me as the judge
21 sitting here wanting to move this case forward, there's the
22 pragmatic part that really is my focus, and I just struggle
23 with how much more difficult these depositions are going to
24 be if we've got to go through this kind of process and the
25 deposing attorney is going to get this piecemeal through the

1 deposition. I don't know, it just seems to me there's got to
2 be a better way, though I'm not necessarily certain of what
3 the answer to that is, in order to get the efficiency I seek,
4 but also to protect your rights, Mr. Engel. I'm not trying
5 to run over your rights and your responsibilities as an
6 attorney and your desire to protect your work product.

7 But to some extent, as we've talked about, we're walking
8 a bit of a fine line here because the plaintiff is an agency,
9 and work product, there's a gray area here in terms of work
10 product and facts and contentions and so forth, but I don't
11 know if -- I'd like to hear from you again, Mr. Engel, in
12 terms of how can we be efficient and get where we need to get
13 and you have some degree of comfort that you are not just
14 having to unlock your cabinet and give up all your strategy
15 and everything else.

16 MR. ENGEL: Well, I think, as you point out, Your Honor,
17 there's a fine line here, and I think we've gone about as
18 close to that line as we reasonably can here.

19 As you've seen, we've provided this information in
20 chronological form, you know, organized by subject, in many
21 different ways, we provided annotated complaint, annotated
22 interrogatories. There's not a whole lot more we can give
23 here.

24 But in terms of the timing, this is effectively a
25 preview of the witness's testimony and I certainly have never

1 had the benefit of a preview of a witness's testimony in
2 taking a deposition.

3 And there is no talismanic question here that prompts
4 the production other than a question that is related to any
5 of the facts supporting the barest contentions, which any
6 questions related to facts supporting the barest contentions
7 would trigger the production of the memory aid here.

8 And just to be clear, the memory aid itself is not
9 produced piecemeal. When there's a question that requires
10 the witness to rely on the memory aid, the entire document is
11 produced; we're not producing it section by section.

12 THE COURT: With the e-mail that you sent to me there
13 were several exhibits to that, five or six exhibits, and they
14 were different things. They were the statement of facts,
15 there's the annotated complaint, and so forth.

16 If we were in a deposition and specific -- there was a
17 question about the specific facts underlying a contention,
18 what is it that's forthcoming at that point? What is the
19 memory aid that is prompted by those questions?

20 MR. ENGEL: So when -- if, I guess is a better way to
21 put it, a question is asked about the basis for a contention
22 that has expressed in an answer to interrogatory, the witness
23 presumably would have to rely on the annotated interrogatory,
24 we would then provide that to all the parties upon the
25 witness's reliance, and also provide, if it hadn't been

1 provided already, the entire memory aid.

2 And I also want to be clear about another thing. The
3 memory aid in yesterday's deposition was produced as soon as
4 we got through introductory questions about the witness.
5 Counsel had the entire memory aid.

6 THE COURT: And what was the memory aid yesterday? What
7 did that look like?

8 MR. ENGEL: So when I refer to the memory aid, I'm
9 chiefly referring to the large 200-something-page document
10 that's organized by subject heading and noted.

11 THE COURT: That Exhibit A to your e-mail?

12 MR. ENGEL: Yes, Your Honor.

13 THE COURT: Okay.

14 MR. ENGEL: But I also want to point out that for the
15 most part counsel did not ask any questions about that memory
16 aid, which, again, contains all the facts on which the Bureau
17 is relying.

18 MR. GORDON: Your Honor, this is Leonard Gordon for
19 Global Payments. I am lead counsel who took the deposition
20 yesterday.

21 We did ask some questions about the memory aid. Most of
22 the time when we asked questions about the memory aid and
23 tried to sort of understand what was behind it or to clarify,
24 we were met with objections that we were seeking work product
25 and the witness was instructed not to answer.

1 We don't know that today is really going to resolve
2 those, we think those questions will better be resolved once
3 we have a transcript so you can look at the question in its
4 proper context. But I did want to alert the Court that
5 that's an issue that we anticipate following up with you once
6 we have the transcript and we may seek more time, for
7 multiple reasons. One, because of the work product
8 objection, but also, you know, confronted with about 400
9 pages of summary, we did not have a lot of time to formulate
10 questions.

11 And this was not really a memory aid. This was a
12 script. The witness simply read answers. He did not sort of
13 use it as a refresher of his memory. And frequently the
14 witness would not answer the question asked. But you would
15 ask the witness for the factual basis for something,
16 especially outside Global's knowledge, and he would read, in
17 one instance for an hour, about things that had nothing to do
18 with Global's knowledge.

19 So, again, we're going to have to follow up with you
20 separately but I wanted to alert the Court that those issues
21 were there and we would like more time with the witness after
22 having a chance to actually read the documents upon which he
23 relied to testify.

24 THE COURT: And when he was reading to you he was
25 reading from that memory aid, is that what your understanding

1 was?

2 MR. GORDON: Yes, yes.

3 THE COURT: And, Mr. Engel, is there going to be -- I
4 guess there will be a different memory aid for each
5 deposition, depending upon which defendant is deposing; is
6 that fair?

7 MR. ENGEL: That's correct, Your Honor.

8 THE COURT: Okay.

9 MR. GLEASON: Your Honor, this is Mr. Gleason for
10 Frontline.

11 I also wanted to point out that some of these memory
12 aids refer back to each other. For example, you know, the
13 annotated complaint, the annotated interrogatories, the
14 annotations in those appear to refer to the primary memory
15 aid and which pages of that memory aid to read in support of
16 this allegation or that allegation.

17 So when you hand the witness CFPB's, you know, third
18 supplemental interrogatory responses, we say what is the
19 basis for this statement, you have the entire interrogatory
20 response highlighted in pink and there's one footnote, and
21 the one footnote says to the witness, hey, read these 13
22 pages from the memory aid into the transcript.

23 The result of that is that yesterday when, for example,
24 Global was asking about a very specific contention that the
25 CFPB is making, and that very specific contention in this

1 case was that Mr. Bagga lived with somebody who was a
2 convicted felon, the question was what is your factual
3 support for that. And the witness read into the record for
4 over an hour, something like 13 pages of this memory aid, and
5 then he was finally interrupted and was asked if you were to
6 continue your answer here, how much more would you read. And
7 I think he identified more than ten additional pages that he
8 would have continued reading.

9 MR. ENGEL: Your Honor, we can take this up once we have
10 a transcript, but I'm going to take some issue with
11 Mr. Gleason's recollection of events. And as Mr. Gordon
12 suggested, we're going to need a transcript to go through
13 these question-by-question issues.

14 THE COURT: I guess my concern is -- I think you're
15 right, I think that's what we'll have to do. But my concern
16 is going forward, because I know you have more of these
17 scheduled, that there's got to be a better way. And I
18 just -- I don't -- if the witness is going to have the memory
19 aid there, and once we get into the specific contentions and
20 facts supporting, if the entire memory aid is at that point
21 going to be turned over, I struggle a little bit -- because
22 that's going to be an inevitability. I mean, I realize and I
23 appreciate the position of the CFPB that until a question is
24 asked that the witness can't testify from his own memory,
25 there's no need for the memory aid. But knowing that, I

1 can't imagine any lawyer in this crowd not being able to come
2 up with a question that the witness can't answer without his
3 memory aid, especially if that unlocks the door to the memory
4 aid.

5 So I struggle a little bit under those circumstances,
6 and now understanding what the memory aid is and how it's
7 used, why we wouldn't all be better served by providing that
8 memory aid to the deposing counsel sometime in advance of the
9 deposition so as to just expedite the matter and move through
10 it, and just stipulating that were the witness asked about
11 these matters the witness would have answered this way.

12 And then from CFPB's perspective you've got that in
13 because -- here's the downside I saw for CFPB when I was
14 considering what we were going to talk about today and what I
15 felt CFPB had to take into account in terms of how you handle
16 this, is that this is the opportunity of CFPB to state its
17 factual basis for these matters, and to the extent that you
18 hold back and don't disclose, you're bound by what you
19 disclose. So when you get to trial you don't have these
20 matters.

21 Well, if we just stipulate this is what the testimony
22 would have been concerning these contention issues, then it's
23 there, it's in the record. I'm not suggesting you have to
24 put this in the record but it's been produced and the CFPB is
25 protected to the extent that it has provided this

1 information, we don't go through some kind of just
2 dog-and-pony show to put it in. And then the depositions can
3 really move to issues that actually require a response.

4 My understanding going in from the defendants about your
5 concern here was you just wanted to know what the factual
6 bases were that would be relied upon so that you could
7 prepare for trial. And if this gives you that, then that
8 should really reduce the time needed for this deposition and
9 bring you into focus because this 30(b)(6) witness is not
10 going to be able to really talk about those facts; this was
11 just your vehicle to lock in the CFPB as to what the facts
12 were.

13 So I really struggle with why it's not in all our best
14 interests to just get this memory aid in the hands of counsel
15 so that if there's some specific question in there you want
16 to ask, you do it, and then we move on to the other matters
17 and get through this.

18 Being practical again, Mr. Engel, it seems to me it just
19 makes sense.

20 MR. SMITH: Your Honor, this is John Da Grosa Smith
21 again.

22 We appreciate the Court's pragmatic approach. And I
23 know for Pathfinder and I know for other defendants on this
24 call, Your Honor, this process has been extraordinarily
25 expensive, and part of the effort was try to avoid redoing

1 all these things again.

2 It might be of interest to the Court to know that
3 certain of these memory aids, when a question was posed to
4 the witness, Mr. Engel would hand the witness a document and
5 then distribute it.

6 So when the witness was asked a question, the witness
7 didn't say, for example, I don't know the answer to that
8 question. And then followed up by, Well, could something
9 refresh your recollection. Well, yes, there's this document.

10 That's not how it went for all of them. Sometimes a
11 question would be posed and then Mr. Engel would just hand
12 him a memory aid and he would start reading from it.

13 So in those instances, Your Honor, they weren't relied
14 on by the witness; it was just obvious to the CFPB that their
15 witness needed to read from a document so they just handed it
16 to him.

17 MR. ENGEL: Your Honor, let me -- this is Jonathan
18 Engel. Let me try to solve a problem here.

19 We're willing to provide the memory aids but we simply
20 cannot because they're not going to be completed far in
21 advance of the deposition, we'll provide them at the
22 beginning of the deposition. But it's simply not possible
23 for us to provide them before then.

24 MR. SMITH: Your Honor, this is John Smith.

25 As I'm sure the Court can tell, the issues that the

1 Court identified at the beginning of this call, which was
2 what would happen if the Court were taking a deposition and
3 Your Honor was handed that document during the examination, I
4 would submit to the Court that there's really not much
5 difference than if all those documents are just put on a
6 table at 9:30 in the morning the day of the deposition.

7 MR. ENGEL: Your Honor, if what is at issue here is
8 obtaining the facts, then we are going to provide that
9 information and the soonest we can do it is at the outset of
10 the deposition.

11 THE COURT: Well, let's do this. I think the best we
12 can do here -- well, before I go there, let me ask this. In
13 terms of the disclosing of the 30(b)(6) witness, was
14 Pathfinder's approach you wouldn't disclose either until the
15 deposition; is that -- I mean, are we good for the goose,
16 good for the gander here? What's with that?

17 MR. SMITH: I do believe that's accurate, Your Honor.
18 Frontline asked yesterday and Pathfinder doesn't -- you know,
19 as to with respect to the identity of the witness, the issue
20 is the memory aids for us.

21 MR. GLEASON: Your Honor, this is Mr. Gleason for
22 Frontline.

23 Frontline did identify its witness in advance of its own
24 30(b)(6) depositions and would appreciate knowing the
25 identity of the witness who will be testifying tomorrow.

1 That seems like something that could be provided pretty
2 easily.

3 MR. ENGEL: If I may, the difference here is that the
4 (indiscernible) witness is not someone with any personal
5 knowledge, whereas in Frontline and any other defendant's
6 case the witness was also someone with personal knowledge.

7 THE COURT: Okay. Well, let's do this, on the
8 identifying witnesses let's be -- let's just be fair about
9 it.

10 Mr. Engel, if they provide you theirs beforehand, you
11 provide them yours. If they don't provide you theirs, you
12 don't have to provide them yours. So we'll just treat
13 everybody the way they were treated.

14 And the truth is, I mean I can't imagine more than
15 the -- sooner than the day before is really necessary there
16 because these aren't folks that you're going to need to do a
17 whole lot of background research on because they're really
18 just there to be a conduit for information, it seems to me,
19 for the most part.

20 So the day before, Mr. Engel, if you don't mind, if you
21 would provide those if they've provided them to you. If they
22 gave you that courtesy, give it to them.

23 On this thing with the memory aid, you know, I can't
24 imagine that aid is not ready sooner than the minute the
25 deposition starts. But you've got a lot on your hands, I

1 know.

2 So let me suggest this, that by the end of business the
3 day before a deposition is taken that it be provided to --
4 that the memory aid be provided to the deposing counsel. If
5 you cannot meet that deadline then I will say to you now that
6 the Court will take that into account as a significant factor
7 to consider in whether to allow the deposition to be reopened
8 following the original taking of the deposition.

9 You know, if the memory aid is so substantial that the
10 deposing attorney can show me, Judge, there's no way in the
11 time we were allotted for the deposition that we could fairly
12 look at this and get to where we needed to get in the
13 deposition and therefore we need this many more hours, then
14 there will be a presumption, or maybe not a presumption,
15 let's go with an inference, presumptions are not favored, so
16 there will be an inference that perhaps that additional time
17 would be needed.

18 Again, I'm really trying to be fair to both sides here.
19 Mr. Engel, I know you've got a lot of defendants and you've
20 got a lot of preparation to pull this together and I
21 understand that and so I'm not trying to be unreasonable.
22 But it seems to me that that memory aid hopefully would be
23 pretty close to ready by the night before, the evening
24 before.

25 And I know I've just ruined the life of some young

1 associate, or maybe even a partner, who gets stuck dealing
2 with this all night, but I think that's at least a shot at
3 trying to be fair both ways on that.

4 MS. JOSEPH: Your Honor, this is Linda Joseph asking for
5 a clarification.

6 THE COURT: Yes.

7 MS. JOSEPH: What about individual parties who obviously
8 don't identify anybody for a 30(b)(6) deposition since
9 they're not a corporate entity? In terms of, you know, the
10 ruling that you made that if the defendant provides the
11 information identifying the witness in advance, then the CFPB
12 should provide the information, I would ask that the CFPB be
13 required to provide that information to all the individual
14 defendants since they don't provide any.

15 THE COURT: Let me make that -- that's a fair question,
16 and to make it more clear, they're not required to provide it
17 to anyone who did not provide it to them upon request. So
18 that if there's no 30(b)(6) of yours, you weren't required
19 to, so they would give you theirs.

20 MS. JOSEPH: Thank you, Your Honor.

21 MR. SMITH: Your Honor this is John Smith.

22 I know we were kind of walking through the points that I
23 was hoping the Court could address with respect to the memory
24 aid in advance, Your Honor, that certainly addresses the
25 first one.

1 The second point, if I may raise with the Court, and
2 perhaps, you know, it could be resolved in part by the
3 Court's idea about identifying the aspects of the memory aid.

4 But what happened yesterday, Your Honor, was when a
5 question -- I think Mr. Gleason noted it -- was asked, for
6 example, what facts does the Bureau rely on to demonstrate
7 that Global had actual knowledge of something, that was
8 either met by a work product objection, Your Honor, which to
9 the extent -- and I think other counsel may concur -- that
10 basically anything that was asked that would require the
11 witness to give, I think as the Court, you know, the Court
12 indicated as kind of the human touch, I could be wrong on
13 this, Your Honor, but it's quite possible that in the seven
14 hours yesterday there was no human touch; everything was
15 read. And when anything was asked that would be, well, what
16 facts do you have to support that, it was either met with
17 objection, work product, don't answer; or the witness would
18 just read lengthy narratives, often that were nonresponsive,
19 that sometimes went as long as 45 minutes and often an hour.

20 And when Mr. Gordon made an opportunity and took a
21 chance to try and interrupt the witness, saying that wasn't
22 responsive, it was met by the CFPB insisting that the witness
23 be allowed to finish his answer, which sometimes went on for
24 an additional 30 minutes.

25 So there really wasn't any deposition per se and I think

1 the way the Court had noted it, which made a lot of practical
2 sense, was if this is going to be the testimony, these aids,
3 then they're in the record, and to the Court's point, that
4 protects the CFPB.

5 And then if there are other questions of that witness,
6 as I understand the rules, the witness should be prepared to
7 be able to provide the human touch and answer in a responsive
8 fashion.

9 But what happened over a period of time was that when
10 you read for an hour and the question wasn't, Tell me all
11 facts you know about something, it wasted a lot of time and
12 wasn't responsive.

13 Second, Your Honor, when all the work product objections
14 came it will be very costly to all the defendants and
15 time-consuming to the Court to have to deal with dozens and
16 dozens of work product objections spread across a half a
17 dozen depositions, so we were hoping we could get some
18 guidance from the Court in advance to avoid that mess.

19 THE COURT: Well, I hope that in the rulings the Court
20 has made in the motion for protective order and in the other
21 discovery orders that we've entered, I've tried to draw as
22 clear of lines as we can. And I alluded earlier to the fact
23 we're in a gray area, it's not a clearcut area, but that
24 factual support for contentions is an area of inquiry that's
25 appropriate, it's not protected by work product.

1 So there's an allusion in Mr. Engel's e-mail to me today
2 that the witness will be prepared by the CFPB to be able to
3 address matters that aren't just memory tests, which some of
4 the factual aspects of it are. So my expectation is that the
5 witness would answer those questions and, for lack of a
6 better term, the human touch questions, but would be prepared
7 to answer those and to represent the position of the CFPB.

8 I mean, that's the party at interest here, someone's got
9 to speak for the party at interest. This is not a criminal
10 case; it's a civil case, we're under the Rules of Civil
11 Procedure. So that's the way discovery works, someone's got
12 to speak for the plaintiff and 30(b)(6) witnesses are
13 expected to do that.

14 Again, I realize we've got a fine line between work
15 product and evidence and facts, but my expectation is that
16 they would do that.

17 And to cut to your question, sadly, I suspect that
18 that's another one of those, and I don't want to do it and I
19 hope you all don't either, but we may have to get a
20 transcript and look at the questions and make the call. But
21 I hope that I have intimated to everyone my view of this in
22 terms of this so that you would not be surprised by any
23 ruling you got from me if we get to that point.

24 MR. ENGEL: Your Honor this is Jonathan Engel.

25 I think it would be helpful to understand what Your

1 Honor and Pathfinder mean when they refer to a "human touch."
2 Because our understanding of the Court's order is that we're
3 required to provide all facts supporting contentions that we
4 made and that's what we're prepared to do.

5 This witness is not prepared to offer opinions or to
6 apply facts to law because it's our position, and I think the
7 Court agrees, that that is protected work product.

8 THE COURT: I think a great example you cited in your
9 e-mail, which was, you know, talk about industry standards,
10 talk about publications sent to the -- to the theory of
11 damages, industry standards, theory of damages, those kinds
12 of things. And those are the kinds of things that -- the
13 theory of damages perhaps not as much in terms of the numbers
14 and so forth, that's more of a finite matter. But standards,
15 those kinds of topics I can see not necessarily being
16 something that you read off of a sheet, but maybe they are.
17 But it seems to me that that would be the type thing that I
18 would be thinking of that's not reading off of a set of
19 interrogatory answers or off a set of -- a prewritten
20 document necessarily.

21 MR. SMITH: Your Honor, this is John Smith.

22 And I think maybe just for some highlight for the Court,
23 at least as it went yesterday, I would suspect that if the
24 CFPB were to say in evidence now are all of our memory aids,
25 at least as it went yesterday, the witness literally would

1 have nothing else to say other than what's in those
2 documents. And any question posed at that point would simply
3 say, you know, could literally be an asked and answered. And
4 I'm trying to be practical. Literally, the witness has
5 nothing to say other than the passages in those documents.

6 So perhaps if we were able to admit all those at the
7 beginning of the day and then ask the human touch questions,
8 that could potentially be more efficient.

9 THE COURT: Give me an example of what you would
10 anticipate would be one of those human touch questions,
11 Mr. Smith.

12 MR. SMITH: Well, yesterday I believe Global asked the
13 question, there were a series of allegations that were made,
14 Your Honor, for example, that -- that were read into the
15 record. And one of those examples was something about the
16 fact that one of the debt collectors had a prior criminal
17 record and that was read throughout a series of passages that
18 a Google search could show a criminal record, et cetera,
19 et cetera.

20 Well, then the question that was posed by Global was
21 what facts does the Bureau rely on to show that Global had
22 actual knowledge of that at the time, and that was objected
23 to as work product.

24 MR. ENGEL: Your Honor, to respond to that --

25 MR. SMITH: I think that's accurate and Global can

1 correct me if I misstated what happened.

2 UNIDENTIFIED SPEAKER: That's correct.

3 MR. ENGEL: We are prepared to provide the factual basis
4 for contentions that we've asserted either in the complaint
5 or in answers to interrogatories.

6 This fact witness is not going to provide the factual
7 basis for hypothetical contentions, which is what -- which
8 was the basis for virtually all our work product objections
9 in yesterday's deposition. This is a fact witness who was
10 not there to formulate the Bureau's contentions on the spot
11 or repeat what is pure work product.

12 So if formulating contentions is what Pathfinder has in
13 mind for the human touch, we're going to continue to object
14 to that line of questioning unless instructed otherwise by
15 the Court.

16 THE COURT: What about --

17 UNIDENTIFIED SPEAKER: Your Honor, this is --

18 THE COURT: What about, though, to ask the factual basis
19 for a contention that a defendant had knowledge of a matter?
20 I mean that would be -- that to me seems not to be work
21 product as opposed to, well, we found in your files this or
22 this was readily available on the Internet or, you know,
23 there's got to be -- I mean that, to me, is more of a factual
24 question than a work product question.

25 MR. ENGEL: There is a lack of particularity, in

1 particular in yesterday's deposition notice, which included
2 generally one topic, which was all relevant facts.

3 If a party specifies in its notice which facts support
4 knowledge, which facts support reasonable belief, et cetera,
5 we're able to prepare a witness to testify, you know, to
6 distinguish between those allegations. But a fact witness is
7 not prepared to go in and make that distinction, which is, I
8 submit, a legal distinction on the spot.

9 THE COURT: And I --

10 UNIDENTIFIED SPEAKER: Your Honor, I'm sorry --

11 THE COURT: Hold on just a second. Certainly I would
12 not expect -- I think you definitely cross over the line when
13 you get into legal conclusions, legal distinctions. I don't
14 disagree with you there and I think that would be an area
15 that the witness would not be expected to testify about.

16 And in terms of the notice, the 30(b)(6) notice, I don't
17 have it before me, and whether you could be expected to have
18 a witness to testify to some matters or whether if there were
19 matters that were within the notice, but this is a big case
20 in terms of transactions and so forth, whether there would be
21 an opportunity to supplement a response by saying that we
22 don't have that information here but we'll supplement our
23 response promptly with that information. Those are not
24 uncommon ways of dealing with these issues.

25 But I think that my intention and the breadth of these

1 30(b)(6) depositions was that it would be directed toward
2 factual underpinnings for contentions and positions taken by
3 the Bureau.

4 So when we're talking about what are the facts, then
5 those are the types of things it seems to me are permissible.
6 But what's your theory, not so much so. Then you're getting
7 over to -- that's clearly attorney work product and not an
8 area where they are permitted to tread.

9 I cut someone off, I'm sorry, who was that?

10 MR. GORDON: I apologize, Your Honor, I think I cut you
11 off. This is Leonard Gordon for Global.

12 And the issue that arose repeatedly yesterday is that we
13 were trying to determine whether the Bureau was alleging
14 whether we had actual knowledge of things or disregarded
15 things. And when the interrogatory answers and the memory
16 aid would sort of lump those two together and we were trying
17 to parse out whether they had facts that we had actual
18 knowledge of certain red flags, let's say, or they were
19 claiming that we, you know, should have known those things
20 and disregarded those.

21 That's a key issue in this case and the witness was
22 repeatedly instructed not to answer that question. And that
23 goes to the guts of the case, Your Honor. And that's, you
24 know, the reason I think we're going to seek to reopen the
25 deposition, again, the factual basis upon which they relied

1 to say that we had actual knowledge of something and they
2 wouldn't let the witness answer.

3 MR. ENGEL: We let the witness answer -- I'm sorry, go
4 ahead, Your Honor.

5 THE COURT: Mr. Engel, were you responding? Mr. Engel?

6 MR. ENGEL: I was just trying to perhaps sharpen the
7 distinction. Where we have actually made a contention we
8 permitted the witness to provide the factual basis for that
9 contention.

10 Where we have not made a contention, and we invited
11 Global's counsel to identify where we had made
12 (indiscernible) the contention, the witness was instructed
13 not to answer because he was effectively being asked to
14 provide facts in support of a hypothetical contention.

15 THE COURT: Let me say --

16 MR. GORDON: Your Honor, this gets to the other --

17 THE COURT: Let me say that I agree that this witness
18 should not be put in the position of supporting or not
19 supporting what are hypothetical contentions.

20 But, again, we're into a gray area here because I think
21 one of the areas that they are permitted to question the
22 witness about, to the extent this witness has knowledge, and
23 again I haven't seen the notice so I'm not sure if this is
24 included within the notice but it is an area of inquiry, that
25 I believe I have ruled the defendants are entitled to

1 question and it's exculpatory information, and I know I'm
2 using criminal terms and we just talked about this being a
3 civil case, but evidence that would be in the possession of
4 the Bureau that would show that the defendants had not
5 violated these provisions.

6 So to that extent it's not a contention of the Bureau
7 but it is an area of inquiry that is permissible. And so I
8 don't know if one calls that a hypothetical or if that's an
9 inquiry into a matter that's not a contention.

10 So, to me, just coming up with hypotheticals that are
11 not based in the contentions of the Bureau or that are not
12 specifically directed toward evidence that might be in the
13 possession of the Bureau, that's the distinction for me.

14 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

15 THE COURT: Again, this is --

16 UNIDENTIFIED SPEAKER: Your Honor, this --

17 THE COURT: -- this is going to some extent have to work
18 itself out and we will have to deal with it as we can. But,
19 again, I think the best we shoot at today is somewhat broad
20 parameters, guidelines, what have you, to help us get there.
21 Someone had another point?

22 UNIDENTIFIED SPEAKER: Your Honor --

23 MR. GLEASON: This is Mr. Gleason and --

24 THE COURT: Mr. Gleason, yes.

25 MR. GLEASON: Thank you, Your Honor.

1 The example that I wanted to raise was a question
2 yesterday where Global Payments asked the witness what facts
3 does the Bureau rely on to establish that Global Payments
4 knew that the debt collectors were collecting debt illegally.

5 To that question, the witness was instructed not to
6 answer on the basis of work product.

7 The next question was what facts does the Bureau rely on
8 to establish that Global Payments recklessly disregarded the
9 facts that the debt collectors were collecting debt
10 illegally.

11 To that question, there was an objection on the basis of
12 work product and again the witness was instructed not to
13 answer.

14 Now, that is the most fundamental contention with
15 respect to the substantial assistance claim, and because the
16 witness was not handed a piece of paper that had the right
17 annotations on it the witness was instructed not to answer
18 those questions.

19 Now, I would submit that if the Bureau is going to
20 instruct a witness not to answer questions on the basis of
21 privilege, that at the very least the Bureau is going to be
22 precluded from introducing evidence or testimony on the
23 subjects on which it instructed its witness not to answer.

24 And in that case the result from yesterday's deposition,
25 I would submit, would be that you have to strike the

1 substantial assistance claim against Global Payments. I
2 frankly was shocked when these objections were being made.

3 THE COURT: Mr. Engel, why would the witness or why
4 would a witness not have to answer a question for the facts
5 that -- on which you're relying to establish that there was
6 actual knowledge on the part of Frontline?

7 MR. ENGEL: If a deposition notice had asked for that
8 information the witness would have been prepared to provide
9 it. But this witness was a fact witness who is not in a
10 position to make a distinction between facts that support
11 knowledge versus recklessness.

12 UNIDENTIFIED SPEAKER: Your Honor, I think that goes to
13 a --

14 THE COURT REPORTER: Who is speaking, please?

15 THE COURT: You need to identify yourself when you
16 speak. Who was the last person that spoke?

17 MR. GORDON: That was Leonard Gordon from Global
18 Payments. I'm sorry.

19 THE COURT: If you will repeat what you said.

20 MR. GORDON: Your Honor, first, I think it goes to the
21 exculpatory point that you raised earlier. And, secondly,
22 that issue, as Mr. Gleason noted, is the heart of the case
23 and it's incomprehensible to us that the witness wasn't
24 prepared to distinguish between what the Bureau's claims are,
25 facts in the possession of Global and things that Global

1 should have known, that's what this whole case is about.

2 MR. ENGEL: Just so everyone is clear on what this is,
3 the topic that is at issue here, the (indiscernible) says any
4 and all facts that (indiscernible) to be obtained about
5 Global and (indiscernible) pleaded in its complaint.

6 And you narrowed that topic in your order to encompass
7 only information or facts relevant to claims against Global
8 Payments. The witness was prepared to testify and he had in
9 front of him all facts that CFPB obtained relevant to its
10 claims against Global. He was prepared to answer the
11 question.

12 THE COURT: Mr. Engel, let me get you to repeat that.
13 You're muffled, I wasn't quite getting it. I don't know if
14 someone's got papers near their phone or their microphone but
15 you were muffled and I couldn't quite understand what you
16 said. Do you mind repeating that?

17 MR. ENGEL: Not at all. I want to reiterate that the
18 topic that is at issue here, and that topic broadly requests
19 any and all facts that the CFPB obtained about Global through
20 its investigation and/or that CFPB pleaded in its complaint.

21 Your Honor narrowed that topic in your order to all
22 facts relevant to the Bureau's claims against Global. The
23 witness was prepared to respond to questions about that
24 topic.

25 Had Global provided some particularity in that topic and

1 distinguished between all facts relevant to the Bureau's
2 claims that Global had knowledge or all facts relevant to the
3 Bureau's claims that it acted recklessly, the witness would
4 have been prepared to make that distinction.

5 But the lack of reasonable particularity in the topic
6 led to us having to make an instruction not to answer because
7 they're effectively making the witness, or forcing the
8 witness to make a legal distinction that he was unprepared to
9 make.

10 THE COURT: But it seems to me that --

11 UNIDENTIFIED SPEAKER: Your Honor, Your Honor --

12 THE COURT: It seems to me if you're asking for --

13 UNIDENTIFIED SPEAKER: This is --

14 THE COURT: -- the facts relevant to the claim, it would
15 be the fact -- the claim is that they had knowledge of this
16 situation, so it seems to me that would be a fact relevant to
17 the claim.

18 MR. ENGEL: The claim is that Global acted with
19 knowledge or with reckless disregard, the same facts support
20 both of those claims.

21 THE COURT: Well, in my --

22 UNIDENTIFIED SPEAKER: Your Honor, this is Christina
23 Jones for Pathfinder.

24 It seems to me Mr. Engel is suggesting that the 30(b)(6)
25 deposition notices should have identified every question that

1 defendants intended to ask during the deposition and that's
2 not what's required.

3 And we agree with Mr. Gleason that if the CFPB is
4 instructing a witness not to answer questions that go to the
5 heart of their arguments against defendants, then they
6 shouldn't be able to rely on any of that information later
7 on.

8 THE COURT: To me, to ask, if the claim is that the
9 defendant either knew or recklessly disregarded information
10 or facts, if that's the contention, then to ask, well, what
11 facts show that they actually knew, it seems to me to be a
12 question directed specifically at the claim. It then asks,
13 well, any facts that support that they recklessly
14 disregarded.

15 I realize what you're -- I guess what you're saying is
16 that's asking the witness to figure out which facts show
17 which of those matters. But those are essential elements of
18 those claims and so if one were going to testify about the
19 facts supporting the claim -- you know, I guess we could
20 debate whether if the witness put the wrong fact under the
21 wrong claim whether you could use it for either, I'm guessing
22 I'd probably let you do that. But the fact is that would be
23 a fact that would be relevant.

24 I don't know that we can plow through every one of these
25 questions but the point is that those are facts -- I think

1 what you do is when the question is asked, you look at what
2 it goes to, and if it goes to an element of the claim, then
3 that is a fair question. If it's asking the witness to
4 analyze it beyond offering the facts then you're getting out
5 of bounds and you're arguably getting over into work product
6 or you're getting into questions that the witness is not
7 qualified to answer and that are subject to legitimate
8 objections.

9 But so long as the inquiries are into facts that are
10 within the knowledge of the Bureau and that are within the
11 scope of the notice, then I think they've got to be answered.
12 And the notice did include the facts related to the claims
13 against, and limited to the claims, against that defendant.
14 And so I think the example that was just given would be one
15 where I would expect the question to be answered.

16 Anything else that we can address at this time?

17 UNIDENTIFIED SPEAKER: Thank you very much, Your Honor,
18 appreciate you making yourself available.

19 MR. ENGEL: Your Honor, I'm sorry, just one more thing.

20 THE COURT: Yes.

21 MR. ENGEL: The conduct by attorneys at yesterday's
22 deposition was something that cannot continue throughout the
23 rest of these depositions.

24 We had counsel who was not questioning, you know,
25 yelling objections, offering commentary, speaking out of

1 turn, speaking over each other. It was complete mayhem.

2 And I think it would be helpful if the Court could offer
3 some guidance -- for example, don't threaten the witness and
4 that sort of thing -- that can kind of guide attorney conduct
5 going forward.

6 UNIDENTIFIED SPEAKER: Your Honor, I did not threaten
7 the witness.

8 MR. ENGEL: No, that wasn't Mr. Gordon. That was
9 Mr. Smith who threatened the witness.

10 MR. SMITH: Your Honor, I did not threaten the witness
11 either.

12 And I do think Mr. Engel makes a good point, Your Honor.
13 There were issues with, first of all, two people from the
14 CFPB were present and both of them would echo each other with
15 objections. So when a question was posed by Global you had
16 two lawyers from the CFPB making objections.

17 And I want to request that -- Pathfinder would ask that
18 the CFPB designate one attorney to defend the deposition and
19 make objections so they're not coming from two different
20 witnesses.

21 As it relates to objections around the table, I can
22 defer to the others on the call with that.

23 THE COURT: Well, what are you doing in terms of your
24 stipulations about objections? Are objections being reserved
25 or are you having to state them only as to form of the

1 question? What are your ground rules? What are you using?

2 Well, I mean, I would suggest, one possibility, you
3 know, except as to form of the question, reserve objections
4 and then you aren't talking over each other. And if you're
5 not quite comfortable with that, then to agree, one
6 possibility would be to agree that all counsel are presumed
7 to adopt the objections of any other counsel who makes that
8 objection. That way you don't have five objections.

9 Folks, let me be honest with you, we're getting down to
10 the basic playground rules now and I think we all should be a
11 little embarrassed we're talking about this. But let me just
12 say there's a level of professionalism, I have high
13 expectations in this regard. I trust counsel to behave as
14 professionals, not just in court but in all proceedings
15 related to cases before me and that's my expectation. And I
16 treat people as if they're going to conduct themselves in
17 that way until they prove otherwise.

18 You know, these cases are hard enough. Let's conduct
19 ourselves in a professional manner with civility and the
20 depositions will go better, they'll be more effective,
21 they'll be more productive. Our blood pressures will stay at
22 a better rate and we'll live longer and be happier people.

23 I think enough said about that. Let's all step up and
24 do it the right way.

25 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

1 THE COURT: All right, have a good day.

2 UNIDENTIFIED SPEAKER: Thank you, Your Honor.

3 THE COURT: Good bye.

4 (Proceedings concluded at 11:35 a.m.)

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

C E R T I F I C A T E

UNITED STATES DISTRICT COURT:

NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 43, are a true and correct copy of the proceedings in the case aforesaid.

This the 13th day of April, 2017.

/s/ Amanda Lohnaas

Amanda Lohnaas, CCR-B-580, RMR, CRR
Official Court Reporter
United States District Court