

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

NATIONAL URBAN LEAGUE, INC.,
Plaintiff,

v.

**URBAN LEAGUE OF GREATER
DALLAS & NORTH CENTRAL TEXAS,
INC.,**
Defendant.

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CIVIL NO. 3:15-CV-3617-B-BK

ORDER

Pursuant to the District Judge's *Order Referring Motions*, [Doc. 104](#), the Court now considers Plaintiff's *Motion for Sanctions*, [Doc. 98](#). For the reasons stated below, Plaintiff's motion is **GRANTED**.

I. BACKGROUND

This case arises from a trademark and service mark dispute. [Doc. 1](#). In December 2016, Plaintiff noticed Edward Smith, Jr. ("Smith")¹ for a deposition to take place on January 26, 2017, and a Rule 30(b)(6) designee deposition to take place on January 27, 2017. [Doc. 95 at 19-26](#). On January 23, 2017, defense counsel contacted Plaintiff's counsel to ask whether he would be amenable to moving the date of Smith's deposition to January 27 or later so that Smith could attend the funeral of Bishop Eddie Long in Atlanta, which was scheduled for January 25, 2017. [Doc. 95 at 9](#); [Doc. 98 at 5-6](#). After Plaintiff declined, Defendant moved on January 25, 2017, for a protective order as to Smith's deposition and requested that the Court quash the Rule 30(b)(6) deposition notice. [Doc. 95 at 2](#).

¹ Smith is the chairman of Defendant's Board of Directors. [Doc. 110 at 2](#).

On January 26, 2017, District Judge Boyle summarily denied Defendant's motion, ordered the depositions to proceed as scheduled, and warned Defendant that failure to appear would result in sanctions including, but not limited to, contempt of court. Doc. 96. Neither Smith nor Defendant's corporate designee appeared for the depositions. Instead, on January 27, 2017, Defendant filed a motion to reconsider Judge Boyle's ruling. [Doc. 97](#). On May 24, 2017, the Judge Boyle summarily denied the motion to reconsider, noting that Defendant's filing of the motion for reconsideration did not operate as a stay of the Court's order directing Defendant's witnesses to appear for deposition. Doc. 121.

In the meantime, in February 2017, Plaintiff filed the instant *Motion for Sanctions*, requesting that the Court enter an order (a) prohibiting Defendant from using, for dispositive motion purposes or at trial, the testimony of Smith and Defendant's corporate designee; and (b) awarding Plaintiff's attorneys' fees and costs that it incurred in relation to the depositions. [Doc. 98 at 4](#). Plaintiff asserts that a party is relieved of its obligation to appear for a deposition only if the court grants its motion for a protective order. [Doc. 98 at 8](#) (citation omitted). Plaintiff also contends that Defendant made no effort to produce or educate a corporate designee and, instead, waited until Plaintiff's counsel had traveled to Dallas to seek a protective order. [Doc. 98 at 9-10](#).

Plaintiff argues that due to Defendant's failure to produce the only two deponents it sought discovery from in this case: (1) Defendant should not receive the benefit of any testimony, during dispositive motion practice or at trial, by Smith or any witness with information about any noticed 30(b)(6) topic because it failed to make such testimony available;²

² Defendant does not rely on any testimony or affidavit by Smith and does not appear to have relied on any Rule 30(b)(6)-type testimony in its response to Plaintiff's summary judgment motion. *See generally* [Doc. 116](#).

and (2) Defendant should be responsible for the costs and fees Plaintiff incurred for each deposition Defendant failed to attend. [Doc. 98 at 10-11](#), 13. With regard to the latter category, Plaintiff seeks to recover (1) the time spent by one attorney preparing for each deposition (13 hours x \$250/hr = \$3,250.00) and waiting for witnesses to arrive (six hours x \$250 = \$1,500); the cost of hiring a court reporter for each deposition (\$592.50); and the cost of airfare and hotel expenses incurred by two Plaintiff's attorneys who traveled from New York to Dallas to take the depositions (\$1,658.00). [Doc. 98 at 10](#), 12-13; [Doc. 100-1 at 2-3](#).

Defendant responds that: (1) "Plaintiff incurred damages which it intentionally failed to mitigate in order to support its unfounded Motion for Sanctions"; and (2) Smith was substantially justified in attending the funeral, providing immediate notice thereof, and suggesting an immediate alternative date to appear. [Doc. 107 at 6](#). Further, Defendant contends, it informed Plaintiff that it had no corporate designee who could respond to the topics listed in the Rule 30(b)(6) deposition notice³ and that "excusable neglect and/or good cause existed to issue a Protective Order." [Doc. 107 at 4](#), 11. Defendant concludes that there are no grounds for sanctions because no bad faith was involved with its witnesses' failure to appear. [Doc. 107 at 11](#).

Plaintiff replies that Defendant has provided no substantial justification as to why (1) Smith could not return from Atlanta in time for his deposition when Bishop Long's funeral was the day before the deposition and Plaintiff offered to delay the start time of the deposition; (2)

³ In particular, Defendant asserts that the topics were overbroad, irrelevant, and sought privileged opinion work-product. [Doc. 107 at 9-10](#). Defendant also avers that since the fact witnesses are no longer with its organization, and those individuals were known to Plaintiff, it was Plaintiff's responsibility to notice them for deposition individually or seek the information through other discovery methods. [Doc. 107 at 7](#), 9.

Defendant failed to object to Plaintiff's corporate deposition topics until less than two days before the deposition was to take place; and (3) it failed to prepare and produce a Rule 30(b)(6) witness. [Doc. 110 at 2-4](#).

II. APPLICABLE LAW

For good cause, the Court may “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” [FED. R. CIV. P. 26\(c\)\(1\)\(A\)](#). “[T]he burden is upon [the party seeking the protective order] to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements.” [In re Terra Int'l](#), 134 F.3d 302, 306 (5th Cir. 1998) (quotation omitted). Under [Federal Rule of Civil Procedure 37\(d\)](#), “[t]he court where the action is pending may, on motion, order sanctions if: (i) a party . . . fails, after being served with proper notice, to appear for that person's deposition . . .” [FED. R. CIV. P. 37\(d\)\(1\)\(A\)\(i\)](#). A failure to appear is not excused on the ground that the discovery sought was objectionable unless the non-appearing party previously filed a motion for protective order under Rule 26(c). [FED. R. CIV. P. 37\(d\)\(2\)](#).

Sanctions for a violation of Rule 37(d)(1)(A) may include “prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence.” [FED. R. CIV. P. 37\(d\)\(3\)](#); [FED. R. CIV. P. 37\(b\)\(2\)\(A\)\(ii\)](#). “Instead of or in addition to [such a sanction], the court must require the party failing to act, the attorney advising the party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.” [FED. R. CIV. P. 37\(d\)\(3\)](#).

III. ANALYSIS

A. Use of Testimony

On the facts presented here, it is clear that Defendant's actions were willful and did not stem from an inability to comply with the notices of deposition and the Court's explicit order that the deponents appear as directed. Bishop Long's funeral was held in Atlanta on January 25, 2017, the day before Smith's scheduled deposition in Dallas. Defendant does not dispute that Plaintiff offered to push back the start time of the deposition to accommodate Smith's travel schedule, and Defendant inexplicably refused the offer. Defendant's refusal to appear was certainly less than justifiable given its timing in moving for a protective order after Plaintiff's counsel already had traveled from New York to Dallas to conduct the depositions. Moreover, Defendant's actions likely hampered Plaintiff's litigation strategy as Plaintiff was forced to file its motion for summary judgment, [Doc. 111](#), without the benefit of Smith's and Defendant's corporate representative's testimony.

In light of the foregoing, it is **ORDERED** that Defendant is precluded from offering the testimony of Smith in any form and on any subject. It is further **ORDERED** that Defendant is precluded from offering testimony in any form of any witness on the topics listed in Plaintiff's Rule 30(b)(6) deposition notice. [FED. R. CIV. P. 37\(b\)\(2\)\(A\)\(ii\)](#); see [Dreschel v. Liberty Mut. Ins. Co.](#), No. 14-CV-162-M, 2015 WL 7067793, at *3 (N.D. Tex. Nov. 12, 2015) (excluding various witnesses for purposes of motions, hearings, or trial where plaintiff failed to timely disclose their identities) (Horan, J.); see also [Arevalo v. Wells Fargo Bank](#), No. SA-13-CA-1148-XR, 2014 WL 6810189, at *2-3 (W.D. Tex. Dec. 2, 2014) (awarding costs and fees to defendant when plaintiff willfully failed to appear for his deposition and warning plaintiff that his claims would be dismissed with prejudice if he did not pay as ordered, supplement his discovery

responses, and reschedule his deposition); *Talkington v. City of Fort Worth*, No. 12-CV-585-A, 2013 WL 6065442, at *2-3 (N.D. Tex. Nov. 15, 2013) (McBryde, J.) (dismissing plaintiff's claims with prejudice upon finding that plaintiff willfully failed to appear for deposition, thereby seriously impairing defendants' ability to use the deposition in filing any dispositive motions).

B. Monetary Sanctions

Although Defendant attempts to justify its actions by pointing to its filing a protective order, it did not file its motion until 7:30 p.m. the night before the first scheduled deposition, after Plaintiff's counsel already had arrived in town. Doc. 121. The Court denied the motion at 10:22 a.m. the next morning. Doc. 96; Doc. 121. At that point, there was no "pending" motion for protective order, and Defendant had no acceptable excuse under Rule 37(d)(2) for failing to appear for the depositions. Indeed, the Court warned Defendant that sanctions would result should it fail to appear, but Defendant instead chose to file a motion for reconsideration immediately before the first deposition was to begin. Doc. 96; Doc. 97; Doc. 121. The District Judge was clear that the motion for reconsideration did not operate as a stay of the Court's order directing Defendant to appear for the scheduled depositions. Doc. 121.

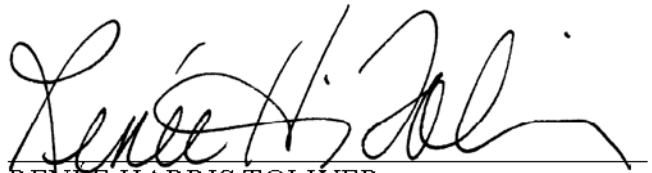
Upon consideration of the law and the parties' arguments, the Court finds that Defendant's failure to produce the witnesses for deposition was not substantially justified and, therefore, Plaintiff is entitled to recompense for the costs and fees it incurred due to Defendant's actions. See FED. R. CIV. P. 37(d)(1)(A)(ii); FED. R. CIV. P. 37(d)(3). The Court further finds that Plaintiff's affidavit, Doc. 100-1, is sufficient to prove up the requested fees and costs. Defendant did not object to the amounts and has thus waived any argument in that regard. See *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006) (finding that inadequately briefed claims are waived). Accordingly, Defendant is **ORDERED** to pay to Plaintiff a total of

\$7500.50 – representing attorneys’ fees in the amount of \$4,750.00 and costs in the amount of \$2,250.50 – **by October 8, 2017.**

IV. CONCLUSION

For the reasons stated above, Plaintiff’s *Motion for Sanctions*, [Doc. 98](#), is **GRANTED**.

SO ORDERED on August 8, 2017.



RENEE HARRIS TOLIVER
UNITED STATES MAGISTRATE JUDGE