

**AMERICAN ARBITRATION ASSOCIATION
Employment Arbitration Tribunal**

In the Matter of the Arbitration between

TODD E. GRAYSON, Claimant,

and

VERVE, A CREDIT UNION, Respondent.

Case No. 01-20-0004-9314

Appearances:

Attorneys Stuart J. Chanen, Chanen & Olstein, 7373 Lincoln Avenue, Suite 100, Lincolnwood, Illinois 60712, Stuart@chanenolstein.com, and Jonathan S. Quinn, Neal, Gerber & Eisenberg LLP, 2 N La Salle Street, Suite 1700, Chicago, Illinois 60602, Jquinn@nge.com, appearing on behalf of Claimant Todd E. Grayson.

Attorneys Jonathan R. Eiden and James R. Macy, von Briesen & Roper, S.C., 2905 Universal Street, Suite 2, Oshkosh, Wisconsin 54904, Jeiden@vonbriesen.com, Jmacy@vonbriesen.com, appearing on behalf of Respondent Verve, A Credit Union.

ARBITRATION AWARD

The Claimant in this matter, Todd E. Grayson (hereafter “Grayson” or “Claimant”), and the Respondent, Verve, A Credit Union (hereafter “Verve” or “Respondent”), are parties to an Executive Employment Agreement (hereafter “Employment Agreement”) in effect at all times relevant to this dispute. The Employment Agreement provides for final and binding arbitration of disputes arising thereunder, with the neutral arbitrator to be selected through the procedures and governed by the rules of the American Arbitration Association (hereafter “AAA”).

On April 14, 2020, Grayson filed a Demand for Arbitration and a Claim for Relief with AAA. On July 13, 2020, AAA informed the parties that the undersigned had been appointed to serve as Arbitrator in this matter. After a subsequent period during which disclosures were made and no objections raised, the appointment was confirmed.

Hearing was held on September 14, 2020, and September 15, 2020. Due to ongoing public health restrictions and concerns, and with the consent of the parties, the proceeding was conducted remotely using the Zoom video conferencing platform. Nevertheless, the parties were afforded a full opportunity to present such testimony, exhibits, and arguments as were relevant. A stenographic transcript of the proceeding was made.

Following the hearing, the parties submitted initial written arguments and responsive written arguments. The latter were received and exchanged between the parties on October 20, 2020, and on that date the record in this matter was closed. Upon receiving objections from each party regarding the contents of the written submissions by the opposing party, the undersigned issued an Order directing the reopening of the record for the limited purpose of allowing the parties to submit revised briefs cleansed of any reference to any fact not established in the record. Upon receipt of these revised submissions on October 26, 2020, the record in this matter was again closed.

Now, having considered the testimonial and documentary evidence, the arguments of the parties, and the record as a whole, the undersigned makes and issues the following Arbitration Award.

FACTUAL BACKGROUND

Originally established in 1965 as a community bank, South Central Bank (hereafter “SCB”) had carved a niche over the years as a successful community lender. In March of 2019, SCB had acquired \$296 million in assets, and in January of 2020, it had five branches in and around the near South and near West sides of Chicago.

SCB was also a family business. It was started two generations ago, by the Claimant’s grandfather and great uncle. In the 1970s, the Claimant’s father, Marc Grayson, joined SCB. In 1991, Marc Grayson and others in an investor group created First Business Bancorp, a holding company through which they purchased SCB from the prior generation’s investment group. When he took control of the bank, Marc Grayson became SCB’s President, Chairman, and CEO.

In 1992, Grayson—this is the previously established shorthand reference to *Todd* Grayson, the Claimant in this matter, not his father Marc Grayson—came to work at SCB. Grayson recalls that he initially joined SCB to develop a new mortgage operation. Then, as SCB’s mortgage department grew in fits and starts over the years (depending on interest rates), Grayson began overseeing its commercial and consumer lending operations. Starting in approximately 2008, Grayson’s focus at SCB became ensuring that the bank did not lose money through a period of widespread financial crises now known as the Great Recession.

Around 2013, the economy had improved, and Grayson was becoming the Chairman of the Community Bankers Association of Illinois. Because Grayson was achieving a more prominent status in the larger banking community, because SCB would be focusing more on selling during the economic upswing, and because Marc Grayson was then in his seventies, the decision was made that the younger Grayson should become the outside face of the organization. In 2013 or 2014, Grayson became SCB’s President, and as such served as a director on both SCB’s board of directors and the board of director of SCB’s holding company, First Business Bancorp. Marc Grayson remained the CEO of SCB, the Chairman of the SCB Board of Directors and Chairman of First Business Bancorp Co.; and, Chuck Rudy remained SCB’s CFO and COO, as he had been since 2001. These three individuals would remain in these executive roles until SCB ceased to exist in January of 2020.

In 2018, SCB began exploring the possibility of a sale. With an improved economy, there was a positive yield, and banks were selling for a premium. As Chairman of the Community Banker's Association, Grayson also observed that banks were being merged and acquired at a very rapid pace. Grayson spoke to his father, and they agreed that they did not want to be the "last drugstore in town" as an independent entity. Marc Grayson was ready to retire, and they decided to sell.

In the fall of 2018, after consulting with certain senior banking professionals in the Chicago area for the names of investment banking firms, SCB engaged the services of FIG Partners. Once they had consulted with SCB to determine their objectives—Marc Grayson, for example, as the largest SCB shareholder, was willing to accept some stock in a couple large to middle market banks in Chicago, but he was generally looking for a cash offer—Paul O'Connor of FIG Partners created a forty-six page "Confidential Information Memorandum" entitled "Project Compass". Providing an overview of SCB as an available acquisition, Project Compass was confidentially circulated to solicit indications of interest from potential buyers.

While several banks initially placed bids on SCB, the final, competing offers came from two potential buyers. One was West Town Bank, another small community bank in the western suburbs of Chicago, which had a need for deposits and therefore an interest in SCB's relatively low loan-to-deposit ratio. The other potential buyer was Verve, the Respondent in this matter. Verve was interested in SCB for the same reason as West Town Bank, but also because they wanted to expand into Illinois. Verve is based in Wisconsin, and Grayson testified at hearing that he understood it had maxed out its growth potential in that market. Kevin Ralofsky, Verve's President, testified that he had looked at over a hundred potential acquisitions in the Chicago area for a period of two years, and the SCB deal was one that really stood out to him.

In March and April of 2019, potential bidders had the opportunity to conduct due diligence of SCB's books and records. At some point during this period, Verve entered into a nondisclosure agreement with SCB, and Verve took the opportunity to conduct such due diligence. As President of Verve, Ralofsky's role in the due diligence process was primarily to examine contracts, the potential for obtaining regulatory approval, management of the board of directors, and how strategy might be handled post-acquisition in a new market. According to Ralofsky, these considerations relative to the SCB prospect were all handled at a "very high level".

Scott Willmott, Verve's CFO, was primarily responsible for leading the review of financial documents made available during due diligence. During this preliminary stage, Verve's due diligence team did not have access to certain confidential documents, but they were able to review thousands of pages of information regarding SCB's operations. Among other things, loans were examined by loan experts on the Verve team, and financial accounting was examined by Verve's experts in that area. Verve's due diligence team also met on a regular basis to talk about who was discovering what. At hearing, Willmott described this as a complex process that incorporated many leaders in the Verve organization.

Among other things, Verve was able to establish that SCB had received clean audits for twenty-eight years. Moreover, these audits had been performed by a large, respected accounting and auditing firm which has had different names over the years but is referred to in this matter as “Crowe”. Although Verve did not have access to the auditing process at that point, the final auditing reports established for Willmott that SCB was “in good shape”.

On April 23, 2019, Willmott sent correspondence to Paul O’Connor of FIG Partners which contained the subject line “Non-Binding Letter of Intent” (hereafter “Letter of Intent”). The correspondence outlined the key terms of a proposal to purchase SCB, subject to additional due diligence and the negotiation of a mutually acceptable, definitive purchase agreement. O’Connor forwarded the Letter of Intent to SCB, and Marc Grayson signed it as “accepted and acknowledged” under the title “Chairman” on that same day.

After this event, Verve’s due diligence process continued. According to Willmott’s testimony, what emerged from the process that continued after the Letter of Intent was the sense that Verve was standing on three “pillars” as an acquisition prospect. One of them was SCB’s fixed assets schedule (without supporting documents) and audited financial statements going back far enough; and a second was SCB’s available examination documentation. They both allowed Verve to develop a level of confidence that the SCB acquisition was a good idea. The third pillar was Grayson.

Grayson testified at hearing that his father had wanted him and Chuck Rudy, SCB’s long-time CFO and COO, to land on the other side of the transaction with jobs. Neither was ready to retire and, in the spring of 2019, it appeared that both gentlemen would be hired by Verve. As SCB’s President, Grayson was the clear choice as President of Verve Chicago, and the initial idea was that Rudy would be employed by Verve for a period of twelve months, to assist with the integration of SCB into Verve’s operation. These concepts were recited in Willmott’s Letter of Intent.

At some point during the due diligence process, Willmott offered Rudy a twelve-month position at Verve as “Head of Transition” or a title very close to that. The base salary for the position would be the same as Rudy’s base at SCB, but the position would be in a lower bonus tier than Rudy had enjoyed in the past. Rudy turned down the offer, evaluating it as substantially less lucrative than the SCB severance package he would forego if he accepted.

Even after Rudy turned down Willmott’s offer, Grayson and his father continued to express the opinion that it was important to have access to Rudy’s institutional wisdom, suggesting as an alternative to full employment that Verve might consider obtaining his services on an independent contractor basis. Verve, however, would never again seriously consider the option of hiring Rudy. As Willmott and his team worked through the due diligence process, their primary SCB contact, of course, was Rudy. What they had discovered in him was an individual who, by his own admission, kept his arms wrapped very tightly around SCB’s accounting functions. He routinely did not share information even with his own team, using his controller and account managers at SCB more as clerks than accountants. True to form and much to Willmott’s frustration, throughout the months of due diligence Rudy was also often reluctant to share requested information with Willmott’s team, insisting that Verve did not yet have “the keys to the house”. Indeed, Rudy’s perceived

unresponsiveness would nearly lead to a delay in closing the transaction, until Grayson persuaded Verve’s executives to stick with the plan. A later memorandum drafted by Ralofsky and Willmott expressed the extent to which their opinion of Rudy eroded over time:

By this time Verve had decided to not employ [sic] Chuck. Marc and Todd Grayson repeatedly stressed that Verve was making a mistake in not retaining Chuck. Suggestions were made to either carry Chuck as an employee in the short-term or to somehow make him a 1099 employee. With such little benefit received by working with Chuck through the due diligence phase and his poor communication and leadership style among his team, management was firm in not continuing his employment, even in the short term.

As indicated, Grayson always had been the obvious choice for President of the new Verve Chicago region. In fact, the record establishes that he was viewed by Verve executives as a critical part of the deal. Ralofsky indicated at hearing that he was a “key” employee and Verve would not have completed the transaction without the assurance that Grayson would be coming over; and Willmott described the following to illustrate why Grayson was viewed as a “linchpin”:

Todd was early the leader of the – of the sale. So he – He was the one who came to visit Oshkosh. He was the one who we spoke to regularly when we talked about the deal. His father, Marc Grayson, was clearly a majority shareholder but didn’t get involved until later in the negotiations, at least from a communications side with Verve. Todd spoke intelligently of the organization. When we looked at his credentials and his background, as he mentioned, he has an undergraduate degree in economics from Emery. He has a master’s degree from one of the best business schools in the country in finance. He was a Chairman of the Illinois Bankers – or the Community Bankers Association. He just had tremendous credentials. He had nearly 30 years of experience at the bank. As the documents as we operated under [sic], he had been an officer for that entire time and he had been involved in not just the operations of the bank but the operations of the bank holding company, which would then understand all the intricacies of the other elements of the business that were held under that. So we felt very comfortable and very excited to have him come board.

According to Ralofsky, due to the breadth of Grayson’s experience, his seniority in the field, and his educational pedigree, Verve would pay Grayson more in compensation than other Verve regional presidents. As Ralofsky recounted, “A lot of stuff was there. So we felt we were making a solid offer.” On the same day that Verve entered into the Letter of Intent with Marc Grayson regarding the purchase of SCB, Ralofsky issued a similar letter to Grayson, setting forth terms that would constitute the foundational elements of Grayson’s Employment Agreement with Verve.

In the context of this already high level of regard for Grayson, Rudy’s steadily declining valuation as a potential Verve employee caused Grayson’s to spike even more. The SCB deal was not Verve’s first acquisition—Verve had grown quickly through a series of prior

mergers and acquisitions—and Verve executives knew from experience that they needed someone intimately familiar with the former institution to make the acquisition transition successful. Ralofsky described his view on the matter this way:

There – And we’ve done this several times through merger; this is our first bank purchase. The institutional knowledge is important because there’s so many moving parts within the organization. And primarily, there’s a lot of loose ends that are undone, and they just need to find either answer or manage, you know, the organization through a transition. We, as an organization that is servant led, is a servant-led organization, we value the fact that our team members are served well through a transition. We understand that through that transition there’s a lot of volatility, and we look for leaders to be able to help those team members not only come across the acquisition transition, merger transition, but also at the same time sort of break down the walls or barriers of some of the major issues that do come up so that they feel they can do a good job and transition at their pace that they need to.

And Willmott described it this way:

Early on, particularly early on, it’s to help that transition take place. There will be so much of the organization that we’re not familiar with, people, the past, the financial reporting, past performance, any lawsuits, any member concerns. All of that initial information, that really isn’t available to us through the due diligence process. But we know it’s essential to a good transition into the new institution. It’s so important. So early on, we expect a Regional President, and we have another Regional President that operates in Wisconsin. They take complete leadership, management, and ownership of that – of the region. And in this case, it was a \$300 million set of books.

Once Grayson realized that Verve was not going to employ Rudy in any capacity, Grayson assured them that he, alone could handle the transitional duties, in addition of course to the non-transitional duties associated with a regional president position. In fact, it appears that Grayson provided such assurances more than once. At hearing, Willmott recalled one such exchange as follows:

It created some concern, and that is why we came to Mr. Todd Grayson and asked for assurances that the work would be done. He assured us, both Kevin and I, that he could manage the process, that he could manage the entirety of the bank, giving the example that Marc, Chuck, and Todd all collectively could manage the bank. Now, we don’t expect each of them to be experts at every person’s job. But they assured us when they were out on vacation, Todd gave an example of Chuck being gone for the past two weeks at a scout camp and that he was able to continue to manage the process.

According to Willmott, even knowing that Rudy had been the “go-to guy” for SCB’s accounting and bookkeeping functions, Grayson’s assurances, along with his credentials, constituted the third “pillar” of the SCB deal. In June of 2019, Grayson and Verve (through

Ralofsky) executed the three-year Employment Agreement. Pursuant to its terms, on the first legal date following regulatory approval of the acquisition of SCB by Verve, Grayson would become “President, Verve – Chicago”. A one paragraph description of the position is set forth starting on page one, as follows:

1.2 Duties and Authority. Executive’s duties and authority shall be consistent with those of a Regional President of a company in the financial services industry. Executive shall devote his best effort, diligence, abilities and attention to the business and affairs of Verve and to the performance of his duties as Verve’s President, Verve-Chicago. Executive shall abide by all policies, practices and procedures of Verve as they are established by the Board and as directed by Verve’s President and Chief Executive Officer. Executive will deal with Verve in all matters relating to or affecting the business and business relationships of Verve with the highest degree of good faith, fidelity and loyalty. Executive shall report directly to the President and Chief Executive Officer.

Alongside these arrangements, Verve was also moving forward on the acquisition of SCB. On June 11, 2019, Verve, SCB, and SCB’s holding company entered into a Purchase and Assumption Agreement (hereafter “Acquisition Agreement”) in which Verve agreed to purchase substantially all the assets and to assume substantially all the liabilities of SCB. As with Grayson’s Employment Agreement, the acquisition was to become effective on the day after final regulatory approval.

Ultimately, Verve’s purchase of SCB closed on January 10, 2020. Thus, SCB ceased to exist on January 11, 2020, and Grayson commenced his employment with Verve on that same date. Now, with keys to the house in hand, the work of integrating SCB into Verve’s operations would begin. Ralofsky, again, as Verve’s President, managed the work from a very high level. He described his role as continuing to operate Verve as a complete organization and to ensure that they were folding in and managing Verve’s new Chicago region to the best of their ability. It was Willmott’s team, again, that oversaw the detailed work required to review SCB’s books and to close them by rebooking the entries on Verve’s financial statements. Willmott described the undertaking in this way:

I work with my team. We have a controller; we have an accounting team. And particularly on closing the books, we have to go in and move all of their systems, all their books, their fixed assets, their liabilities, their loans, everything we could, their investments. Everything we could pick up of their core system, we had to rebook onto our system. One of the main reasons we did this early on was so that we could relieve the accounting team of much of the responsibility that was taking place at the Chicago branch. So even though we were going to run two parallel systems for a period of time, we wanted to remove much of the work and put it on one system, the nonmember impacting work. So accrued liabilities, fixed assets, those sorts of things.

Lori Thiel is Verve's Controller. According to Willmott, Thiel handled a great deal of the work necessary to integrate SCB's financial statements into Verve's. This task involved drilling down into many detailed inquiries. Thiel described the work this way:

To help try to figure out which assets and liabilities are going to come over that we have to carry over onto our books after the transactions takes place.

When asked to state what specifically she would be looking for when trying to bring information over onto Verve's books, she expanded as follows:

Well, we have to take the balance of whatever the item is and get some backup documentation so when we put it in our books, we have something to validate what it is and what's the backup reason for it, and is it going to go away, and how long is it going to be out there.

Thiel was communicating with Willmott, and Willmott was communicating with Ralofsky regarding these matters on an almost daily basis. Further, Ralofsky was maintaining communications with Verve's Board of Directors regarding the effort to close the books on the SCB acquisition. He spoke with the Board Chair and Vice Chair weekly to discuss what was happening with the effort to close SCB's books.

In the process of conducting this post-acquisition work, Verve executives quickly began to discover what they came to characterize generally as "accounting irregularities". In fact, one such irregularity came to Willmott's attention immediately, on the night of January 10, 2020, as transitioning documents were being signed following the closing. According to Willmott, he and Grayson were in Willmott's office, enjoying a break from a busy day, and from across the desk Grayson handed Willmott an invoice, asking Willmott about Verve's process for having it paid. The invoice turned out to cover meals from the preceding twelve months for SCB's management team and customers at a restaurant called "Manny's". It amounted to about \$3,000. At hearing Willmott described the submission of an invoice that he believed should have already been paid by SCB as "stunning", and he recalled asking Grayson to hold off on submitting it so they could discuss the matter further.

Although Willmott recognized that a \$3,000 invoice would not tank what had been a \$36 million dollar deal, he also described the incident as "just the first of what became a long stream of additional bills that came in". In fact, what Verve executives believed they were discovering were three kinds of accounting irregularities in three areas. For one, in addition to the Manny's invoice, Verve contends that unpaid SCB bills kept coming in which, at the time of hearing in this matter, amounted to \$270,000. Willmott testified that a list of services rendered prior to close, which Verve views as undisclosed liabilities, includes armored truck invoices, storage facility fees, cleaning services bills, flower services, IT services, and is "quite extensive". Second, with respect to a technology firm called "Realnets", Verve executives came to believe that SCB had failed to follow generally accepted accounting principles ("GAAP") with respect to certain IT-related fixed asset capitalizations. GAAP allows for the capitalization of fixed assets over time, but SCB appears to have capitalized routine IT services provided by Realnets. Further, it believed that certain, legitimately capitalized fixed assets had not been appropriately depreciated over time. Third, Verve executives were

finding a lack of documentary support for certain fixed assets. To carry a fixed asset from SCB's financial statement to Verve's financial statement, Verve wanted supporting documentation regarding the history of the asset, such as purchase date, value, and depreciated schedule.

It should be apparent that, certainly in the eyes of Verve executives and board members, each of the three categories of irregularities represented a potential impact on Verve's balance sheet and income statement for the relevant period. Obviously, any liabilities (disclosed or otherwise) have that effect, but so do assets that cannot be properly supported. In the absence of support, they would become unanticipated expenses that, in the most basic sense, would cause Verve to make less money as an organization.

Starting on almost day one of his employment, Verve executives, and Willmott and Thiel in particular, sought Grayson's assistance in sorting through these matters. Their requests for help and Grayson's responses lie at the very heart of this case and will be addressed in detail in the "Discussion" section of this Award.

Ultimately, as the concerns continued to mount, Verve executives decided to seek independent feedback regarding the various issues they believed they were uncovering. Willmott suggested an outside forensic audit, and Ralofsky agreed, recalling at hearing that Verve executives were questioning themselves and did not want to make a mountain out of a molehill. On an unestablished date in February, Verve outlined their concerns in detail to Ryan Cislo, the lead of the forensic audit team at the accounting and auditing firm of Plante Moran. Although Plante Moran has a robust presence in the financial, credit union, and banking industry, Verve had not enlisted its services in the past, which Willmott described as an important criteria for the firm that would perform the audit regarding the SCB accounting matters.

On March 6, 2020, at 4:02 p.m., Cislo wrote an email message to Willmott, which contained the following subject line: "Potential Adjustments 3/6/2020". The body of Cislo's email message purported to contain a "high-level summary" of the "findings thus far" in the SCB audit. In Verve's view, the report validated the three issues Verve had submitted to Cislo. Specifically, Plante Moran's audit confirmed that there were undisclosed liabilities in the form of unpaid invoices for goods and services that should have been expensed prior to the acquisition; that certain Realnets expenditures had been capitalized in a manner that was inconsistent with GAAP; and that support was missing for certain capitalized SCB assets.

Although Willmott contends that the intended purpose of the Plante Moran audit had *not* been to identify or justify adjustments to SCB net equity such that Verve could demand money back from the Acquisition Agreement, Cislo framed some of his findings in those terms. There are references in the summary on building a basis for making a "demand" of the seller based on the "adjustments" and whether certain adjustments would be more or less difficult to "prove". Willmott acknowledged at hearing that the Plante Moran findings certainly helped Verve understand the potential size of the impact to SCB's net equity, and that understanding certainly formed a substantial basis for a demand letter that would be sent on March 17, 2020, to SCB's three former officers (and SCB's holding company), as well

as a suit that would be filed on June 8, 2020, in the Illinois Circuit Court of Cook County, against the same entities, seeking damages for allegedly fraudulent conduct.

There also is no suggestion in the express content of Cislo's correspondence that he had been asked by Verve to perform the forensic audit for the purpose of contributing to a decision regarding Grayson's continued employment with Verve. Yet, upon receiving Cislo's communication on a late Friday afternoon, Willmott quickly responded with only the following:

Ryan –

Thank you for the report. We are working with our labor attorney in regard to terminating Todd. We are evaluating giving Todd two options. Terminated for cause or resignation. In order to terminate for cause, we would reference Breach of Duty and Habitual Neglect. From your forensic work and the preliminary report below, would you consider the executive suite of the bank (CEO, CFO and President) to be in breach of duty and habitual neglect?

On the following day, Cislo replied:

Scott,

These are legal terms I would like to discuss with you and your attorney. Are you available this Monday for a call?

Thanks,
Ryan

Neither Ralofsky nor Willmott recalled having the proposed telephone call with Cislo and Verve's labor attorney.

On the afternoon of March 9, 2020, Ralofsky, Willmott, William Wuske, who was Verve's COO, Heather Williams, who oversaw Verve's human resource functions, and Verve's outside employment counsel participated in a Microsoft Teams meeting, to discuss the logistics for Grayson's termination meeting. They planned to inform Grayson of his termination on the next morning. Ralofsky, who was the ultimate decision-maker with regard to Grayson's employment, recalls that he made the final decision a few days leading up to that day, but it also was a decision he made gradually over the sixty-day course of Grayson's employment with Verve.

On the morning of March 10, 2020, Grayson received an email message from Ralofsky which contained the following subject line: "Meeting 10am Today". The message read as follows:

Good morning Todd –

I need you to meet me at the Union League Club (fourth floor, room 4 in the library) at 10 am this morning.

Verve has received the report from Plante Moran regarding the forensic audit, and I need to discuss the findings at a high level with you.

If you have a conflict at this time, please reschedule so that we can meet at 10.

Thanks,
Kevin

It is undisputed that Grayson did not know, beyond what is stated in Ralofsky's message, the purpose of the meeting. When he arrived at the Union League Club a few minutes late, he found Ralofsky and Wuske present, and Williams and Verve's outside labor attorney were connected by telephone. The meeting broke down in minutes, nearly as soon as Grayson came to understand he had been summoned for termination. He recalled at hearing that he was upset and left the room because he needed some air. Ralofsky recalled that Grayson was belligerent, interruptive, and slammed the door when he abruptly stormed out. In any case, once Grayson gathered himself and returned to the meeting, Ralofsky read and then handed to Grayson correspondence stating the following:

Re: Notice of Termination of Employment

Dear Mr. Grayson:

This letter is to notify you that pursuant to Section 6.2 of the Executive Employment Agreement entered into between you and Verve, a Credit Union ("Verve"), we have made the decision to terminate your employment with Verve, effective today, Tuesday, March 10, 2020 for cause. The reason for this decision includes but is not limited to breach of duty and habitual neglect through the capitalization of certain intellectual property/help desk support; prior expenses and undisclosed liabilities; and missing support for capitalized assets such as significant leasehold improvements.

During your transition to Verve, you assured us that accounting was in order, you were fully capable of handling such responsibilities and no such problems existed. We are left with no alternative but to terminate your employment immediately.

Please note that as set forth in the Executive Employment Agreement, the restrictive covenants set forth in section 7 do continue and remain enforceable.

It was this adverse employment action that gave rise to the current matter. Additional material facts are recounted in the Discussion section.

DISCUSSION

Grayson’s Demand for Arbitration seeks relief in three areas: first, for allegedly having been terminated from his employment as Verve’s Regional President without “cause” as that term is defined in the Employment Agreement; second, for country club dues he contends were unlawfully withdrawn from an account Grayson shared with Verve at the time of his termination; and, third, as indemnification for non-arbitration attorney fees incurred as a result of his termination from Verve. Finally, Verve has asserted that, pursuant to the terms of the Employment Agreement, Grayson owes Verve a reimbursement for AAA filing fees.

1. Termination for Cause

The basis for Grayson’s wrongful discharge claim is found at Article 6 of the Employment Agreement, which provides in pertinent part as follows:

6. Termination of Employment.

6.1 Termination at Will. Verve may terminate this Agreement at will, without cause or reason. The Executive shall be notified in writing of the decision which shall state the date of termination.

6.2 Termination by Cause. Verve may terminate this Agreement for breach of duty, habitual neglect or incapacity by the Executive to perform his duties and obligations under this Agreement, or for theft, fraudulent, or misdemeanor or felony criminal acts of the Executive. The Executive shall be notified in writing of the decision of the chief Executive Officer and provided with a copy of the resolution, which shall state the reason and date of termination. The Chief Executive Officer may, at his sole discretion, request that the Executive provide the Chief Executive Officer with an explanation for his conduct, but the failure to make this request does not invalidate this paragraph.

...

6.5 Termination Compensation.

...

- (b) In the event this agreement is terminated under section 6.2 (termination for cause), the Executive shall forfeit all termination compensation, except for vested benefits, accrued salary, accrued vacation, or other retirement programs. Executive will not receive any current year incentive compensation as set forth in Section 3.2.

- (c) In the event of termination by Verve pursuant to Section 6.1 (termination at will), or Verve’s non-renewal of the Term of this Agreement pursuant to Article 2, the Executive shall solely be paid termination compensation equal to: (i) twenty four (24) months of salary and health insurance premiums covered under COBRA and thereafter up to the premium amount paid by Verve if terminated during the first year of this Agreement; (ii) eighteen (18) months’ salary and health insurance premiums covered under COBRA if terminated during the third year of this Agreement or in the case of non-renewal. Termination compensation paid under this provision is made in addition to any other compensation, retirement program and vested benefits.

...

6.7 Condition for Receipt of Termination Compensation. The Credit Union’s obligation to pay termination compensation under this Agreement is conditioned on Executive signing a release agreement acceptable to Verve which be comprised of standard releases of Verve regarding known and/or potential claims (e.g., age, gender, etc.)] Termination compensation, if any, shall be paid after termination of employment and execution without revocation of the release agreement (“Measuring Date”) as follows: (a) one hundred eighty (180) days after the termination date of the Employment Agreement, or, (b), in the event the Measuring Date is within one hundred-eighty (180) days before the end of a fiscal year, then, not later than the 15th day of the third calendar month following the Measuring Date. However, in no event shall Credit Union be obligated to pay, and no Measuring Date shall be established, if Executive refused to sign the release and only once seven (7) days have passed after Executive signs and elects not to revoke said signature and the Agreement.

As these provisions establish, Verve had the ability to terminate Grayson’s Employment Agreement at will, without cause or reason. If Verve had “cause” to terminate Grayson’s employment, however, that basis would forfeit any entitlement on Grayson’s part to severance compensation, pursuant to Section 6.5(b) of the Employment Agreement. On the other hand, if Grayson’s termination was *not* for “cause”, he is entitled to the compensation outlined at Section 6.5(c).

The definition of cause is established at Section 6.2 of the Employment Agreement. Verve has neither contended that Grayson’s conduct was criminal nor that he suffered from incapacity. The focus on this case, therefore, is on whether Grayson engaged in “breach of duty” or “habitual neglect” with respect to his Regional President position. Importantly, there is no dispute between the parties that the burden to prove cause is on Verve.

To determine whether Grayson breached or committed habitual neglect with respect to his duties, it is first necessary to establish at least the scope of the duties associated with

a Verve Regional President position. The parties have debated this question at length. The Agreement, of course, contains a provision that outlines the “Duties and Authority” of the position. Most of this provision is not dedicated to a substantive description of duties—it merely indicates that the duties “shall be consistent with those of a Regional President of a company in the financial services industry”—but rather mandates that any duties should be carried out with best efforts and loyalty to Verve. Such generalities are perfectly appropriate for an executive employment contract, and Verve’s witnesses have depicted the duties of a Regional President with equivalent breadth.

At various points in this proceeding, Grayson has attempted to suggest ways in which he understood that the duties of his position with Verve were somehow limited. Specifically, he contends that he had been told by Verve management that he would be judged on employee engagement and customer satisfaction; and he asserts that he was told by Ralofsky not to get too far into the details of the day-to-day operations. Verve disputes these contentions and insists that it placed no such limitation on the scope of Grayson’s duties.

These distinctions, however, are not dispositive. Verve never has contended that Grayson failed to perform the duties Ralofsky described as the “laundry list of really the interesting things and the things that are important”. These might be described as the regular, ongoing duties of a Regional President. There is no assertion that Grayson failed, for example, to oversee and manage commercial or consumer loan production, deposit gathering and matters related to liquidity, or the general operations of the bank’s business. There also has been no assertion on Verve’s part that Grayson either failed to understand the overall strategy for the Chicago region, which Ralofsky identified at hearing as an important component of the job, or that he failed to take care of customers. Rather, Verve has taken the position that Grayson failed to perform his job duties in only one area.

Both Ralofsky and Willmott spoke of the special “transitional” set of duties that came with Grayson’s Regional President position. What emerged through the due diligence and negotiations process was a revelation that Rudy had overseen SCB’s accounting functions almost single-handedly; a preference by Grayson and his father that Verve employ Rudy for that reason, at least for a short period; and an ultimate conclusion that Verve was not interested in employing Rudy for any period of time. In the context of this debate, the parties clearly engaged in discussions about whether Grayson could handle the transitional duties on his own. Grayson has neither denied that these discussions took place, nor has he asserted that these expectations were somehow inappropriate. Indeed, the record in this matter establishes that he reassured Verve’s executives he could do the job.

The record further establishes that all Verve’s alleged concerns regarding Grayson’s performance focused on these transitional duties. In the days and weeks following the closing date, Verve executives were discovering what they believed were accounting irregularities in the areas of undisclosed liabilities, improper capitalization and depreciation of IT-related expenditures and fixed assets, and an absence of documentation to substantiate certain fixed assets, and they began to turn to Grayson for help with these issues. Ultimately, Ralofsky testified that he fired Grayson because he was not sufficiently “helpful” in addressing these issues during the transitional phase. Verve executives have contended that Grayson was “dismissive” of their concerns and simply unresponsive to their requests for assistance in

resolving the issues. These failures, Verve argues, provided sufficient cause for Grayson’s termination.

Before analyzing the merits of Verve’s argument, it is necessary to address something of a threshold issue raised by Grayson. Sections 6.1 and 6.2 both provide that Grayson was to be notified in writing of the termination decision. Moreover, because Verve contends that it was terminating Grayson for cause, it also was obligated under Section 6.2 to “state the reason” for the action. The termination letter provided to Grayson provides the following in terms of a reason:

... The reason for this decision includes but is not limited to breach of duty and habitual neglect through the capitalization of certain intellectual property/help desk support; prior expenses and undisclosed liabilities; and missing support for capitalized assets such as significant leasehold improvements.

During your transition to Verve, you assured us that accounting was in order, you were fully capable of handling such responsibilities and no such problems existed. We are left with no alternative but to terminate your employment immediately. ...

Grayson argues that these written reasons only pertain to the accounting irregularities that must have occurred prior to SCB’s acquisition. Thus, Grayson argues, the explanation provided by Verve in the context of the present case—that being that Grayson was fired not for creating the accounting issues but rather for not being helpful in resolving them—has been waived. The fact that this Award evaluates the merits of Verve’s contention obviously represents a rejection of Grayson’s position on this point. The letter Verve provided to Grayson could have been clearer, more explicit, and perhaps more detailed, but it is sufficiently related to the reasons Verve has presented here that a finding of waiver, which the law generally and arbitral tradition specifically abhors, would be inappropriate.

The most significant documentary evidence presented by Verve to support its allegations appears in the form of nine email exchanges between Grayson and Verve executives. In service of absolute clarity, they are worth reproducing here. Although many of the exchanges are happening on overlapping dates, they are set forth in the chronological order of the first communication in the exchange.

Bank Artwork

One of the email exchanges relates to approximately \$40,000 in bank artwork for which Verve was attempting to find supportive documentation. On January 2¹, Marc Grayson had sent an email message to his son, stating the following:

These are from a folder on bank artwork that I kept.

¹ Unless otherwise noted, every date referred to in the Discussion section occurred in 2020.

In addition to these files, there is a physical file with receipts or appraisals on all the bank owed artwork in the “middle office” at main building; also on the back of each painting or other media there should be an information sheet copy.

Dad.

Subsequently, Grayson was asked by Thiel for information regarding these assets, and on January 17, Grayson forwarded the message from his father to Thiel, along with others at Verve, explaining a little bit about the process he had gone through to track it down:

Ok – I found the file by searching under subject. (I will need to get used to that unless I could somehow get it the way I used to.)

This hopefully should help.

Todd

On January 21, Thiel responded to Grayson, copying Willmott, as follows:

Thank you for the documents you sent me but I am still in need of more that might help justify the total being carried in the GL. Can you dig a little deeper please.

Thank YOU!

Grayson responded that same morning:

I am having Angela scan some more documents in an older paper file.

The next morning, Thiel responded to him, copying Willmott:

Good morning Todd!

The document I received yesterday total \$22,683.24 of the GL balance – Yea!!! However there is another \$15,916.25 that we need to find in documentation yet. The GL # 90162100 shows a balance of \$38,599.49. I think we have a game of where’s Waldo here!

Thank YOU!

Lori

A few minutes later, Grayson wrote reply all:

Someone will have to match *[sic]* what is on the lists to the paintings on the way, which I do not have time to do this week. I am wondering if you have a

-Karen

Thiel responded to Garcia:

It looks like there might be something in the safe deposit box that ties to this....maybe you need to get Todd to help you out with that...? []

Still on the same day, Garcia responded again to Thiel, copying Willmott:

Hi Lori,

I had to reach out to Chuck for this question. Here is his response:

“The Stock South Central safe deposit acct 90195100 is the value of the corporation that the bank owns to hold the safe deposit boxes. On my computer in my C:/ drive is a file folder ledger balancing with a sub-file names other asset balancing. The is [sic] a 2018 South Central Safe deposit file with the balance sheet for that entity. The only asset of South Central Safe Deposit Co is cash. There is an account under South Central Safe Deposit Co cif with virtually the same amount of cash in it that matches the balance sheet. The company was set up to shield the Bank from liability from the safe deposit boxes.”

Do you want me to get that balance sheet he has in his computer for this and send it to you?

Thanks,

_Karen

On January 18, Willmott responded to Thiel’s message, copying Grayson and Todd Slagter, a Vice President of Legal and Risk Management with Verve, stating the following:

Todd G. –

Here is some safe deposit box company info that might be helpful if you haven’t already seen it.

Scott

On January 21, Grayson responded to Willmott with the following:

Scott, I am going to touch base with Todd S. And Ryan on legal and operation on the boxes tomorrow and circle back to you. I was always taught to never waste a good shell corporation when you have one.

Thanks,

Todd G.

Then on January 23, Melissa Lliegl, an Administrative Assistant with Verve, forwarded the same string to Willmott:

Hi Scott – Bumping this to the top of your inbox. I am not sure if Todd has follow [sic] up with you on this, but I know you want to keep this top of mind.

Thanks! []

On January 29, Willmott forwarded the message string to Grayson, copying Slagter, with the following:

Todd – Any progress on this?

Next, on February 11, Slagter responded with the following:

Todd:

It looks like this is the form that needs to be completed and filed with the State of Illinois. Since you are the only one familiar with the corporation, please complete the form as best you can. If you have any questions, please feel free to contact me. Once the form is completed, I will take care of getting it filed with the State of Illinois.

Thanks,

Todd S.

One minute later, Grayson responded to Slagter with the following:

I will give it a shot. I only play a lawyer on TV.

On February 25, Slagter wrote to Grayson and Willmott with the following, copying Thiel:

Todd & Scott:

Letter with Articles of Dissolution for the South Central Safe Deposit Co. along with the \$5 dissolution fee has been sent to the State of Illinois Secretary of State.

Todd S.

That same day, Grayson sent a reply all with the following:

Thank you Todd.

BOLI Plans

On January 15, Thiel wrote to Grayson seeking information regarding SCB “BOLI” or bank-owned life insurance plans, stating the following:

Hi Todd!

I was told you could provide me the contact information I need at NFP to cancel the BOLI plans. If you could please email me that information so I can proceed I would very much appreciate it!

Thank YOU!

Lori

Grayson responded later that same morning, with the following:

The Boli was not through NFP. I will find out who the broker was, but before you cash mine out, I heard it may be used for another purpose.

Thanks, Todd

This was Thiel’s response of a few minutes later:

All the documents that Chuck provided me for the BOLI accounts say NFP on them.

Per Scott I was told we were cashing them all in.

Do you have the actual physical policies in a safe deposit box there??

Thank YOU!

Grayson responded the next day with the following:

Lori – Yes, there is a NFP relationship – I was not aware as the broker sold his business to NFP.

These are the links and passwords to see the policy values and contract information. I got these from Chuck late yesterday.

- For Marc Grayson policies: On the Pangburn platform:
<https://secure.pangburngroup.com> User [] password []
- For Todd Grayson, Chuck Rudy and Joe Graf (not sure if Bob R. had Boli) its on the Equis platform.
 - <https://cpads.ngp.com> user [] password []

Apparently these links will provide all of the policy information including the agent to call and handle the transaction.

Let me know if there is a problem.

Todd

Prepaid Insurance

On January 16, at 5:48 in the afternoon, Thiel sent Grayson a message, copying Wilmott, with the following subject line: “Can you see if you can find out....”. This was her message:

On the Prepaid Insurance spreadsheet Chuck has these two titles that Todd S. / nor I have been able to find out where they are for – and a copy of the invoices so we can request cancellations and refunds.

Thank YOU!

[Balance sheet omitted.]

Grayson responded just after 12 am, with the following:

I will look into it tomorrow.

Real Network & Bank Artwork

On January 16, Thiel sent an email message to Grayson, copying Willmott, with the subject line “I need help understanding these two items on the Fixed Asset report”, stating the following:

Hi Todd –

I’m not bothering Karen – I am bothering YOU!! []

I need to understand why the two items shown below are listed on the fixed asset list and have not been depreciated. Can you please see what you can find out in regard to that? I do need this asap so we can set up on our books to alleviate any more burden on the Accounting team in Chicago! I will also need some documentation if I am going to have [to] continue to carry it going forward.

M	Real Network	5	9/30/2003	36,610.05	0.00	0.00	0.00	36,610.05	Why No Deprc?		\$0.00
M	File System Down Payment	7	3/2/2000	10,000.00			0.00	10,000.00	Why No Deprc?		\$0.00

Thank YOU!

Lori

Grayson responded to Thiel that same day with the following:

Lori – what was the date and type of fixed asset on this fixed asset file? (I reached out to Chuck and he will help me, but he needs a little more information. Are they F&E, leasehold...and details would help.

Todd

Two minutes later, Grayson also wrote an additional message to Thiel:

Ok – I see the dates....sorry, any other info?

Todd

Later that day, Thiel responded with the following:

That’s all the information I have – thus my delemia [sic]!!

A minute later, Grayson wrote what appeared to be a clarification:

On the Equipment listing.

Exactly twenty minutes later, Grayson also responded with the following:

Lori – Chuck made two comments.

First, “I have no idea on 18 year old stuff must have been a spreadsheet mistake that Crowe (our auditor) missed.” Other comment, “over 5 years old, just increase depreciation expense and it will be gone this year.”

I don’t think he was trying to be snarky....its old stuff; and I guess if it gets past the auditors it can just hang out there forever....

I wish I could help more.

Todd

Still that same day, Grayson sent another follow-up message to Thiel:

We thought it might be the artwork....but Chuck said separate GL

Two minutes later, Thiel came back with the following:

I need some documentation and the spreadsheet for the ARTWORK yet –
Karen didn't know where it was – Help please????!!

90162100	FIXTURES - ARTWORK	38,599.49
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Thank YOU!

Grayson responded at 6:27 p.m. that evening with the following:

I have some ideas. My father sent me stuff.

The next day, Grayson wrote to Thiel, copying Willmott and a few others, stating the following:

Lori – My father sent me emails with attachments about the artwork before day 1, while he was cleaning his office knowing someone would want the information. Apparently all of my work related emails during our time together at South Central Bank have been wiped from my history – so I am unable to get you the information I thought I had.

This lack of email history will also make it difficult for me to get you anything I know on the Rothschild situation as I doubt emails from Chuck are around either. I have always kept historical emails on issues such as these as my journal of what has happened. So without access to historical emails between me and any former employee of South Central Bank, it will be difficult to be helpful on a lot of questions.

I am sorry, Todd.²

Sand Castle Field Services

On February 5, Thiel received this message from Sand Castle Field Services, a property inspection entity, which stated the following:

Good Afternoon Lori.

² This final message relates to the earlier recounted exchange regarding artwork. Grayson's explanation of how he was able to track down the message from his father (with a file search) is an apparent effort on his part to note that he has resolved the broader problem of not having access to old email messages.

I hope all is well and you're having a great week! We received notification that South Central Bank and Verve have merged. We are in the process of updating our records.

I wanted to confirm that the letterhead for the field visit orders should also change to Verve, a credit union.

Thank you,

Michele Bellante

That same day, Thiel forwarded the message to three Verve employees, none of whom were Grayson, requesting the following:

Can anybody tell me if me if YES is the right answer for this – I think so but I'm not totally clear as to what they are doing for us and if we will continue to use them – Thanks [sic] YOU for guidance and direction as to WHO I should be asking!!

Lori

On that same day, one of these individuals responded, copying Grayson:

Good afternoon Lori,
We used their services for property inspections of delinquent properties or to verify completion.

Todd would be a contact person.

Regards,

Jolanta Tomasik

Grayson then also responded, on that same day:

Please see Jolanta's answer. I do not know if Verve visits properties on collections to check occupancy and/or condition nor do I know if Jolanta still needs them before funding the last home improvement loans.

Todd

Mortgage Insurance

On February 8, Grayson forwarded a billing statement from Arch Mortgage Insurance to Thiel, copying Karen Garcia. His message stated the following:

Mortgage insurance. For Monday.

Thiel responded to Grayson that same day:

So who has log ins to this site currently????

Thanks!

Lori

Grayson responded the same day:

I have no idea. I think Chuck or Erika paid these bills.

Medallion Stamps

In February of 2019, Rudy had received the following email communication from Gira Sanchez of Kenmark Financial Services, Inc., which stated the following:

Hi Charles,

Our records indicate that written confirmation of the two Medallion stamps issued in the bank's former name has yet to be sent to us. Also, the employees who certified under the bank's former Medallion stamps have yet to update their registrations to reflect their new stamp assignment.

Attached is a copy of correspondence issued in 2015 as a result of the bank's name change.

Please provide written confirmation of the destruction of the two Medallion stamps issued to South Central Bank, via fax or e-mail.

Let me know if you have any questions.

Subsequently, Sanchez wrote to Rudy in April and July of 2019. Receiving no response to these communications, she wrote again to Rudy on February 4, 2020, stating the following:

Hi Charles,

As of today, we have not received written confirmation of the destruction of the 2 Medallion stamps issued in the bank's former name. Also, the employees which certified under the bank's former name have yet to update their registration to reflect their new stamp assignments.

Please note that failure to comply with the Program requirements may jeopardize the bank's membership.

Let me know if you have any questions.

Thank you.

Then, on February 20, 2020, Sanchez wrote the following message to Rudy, which he forwarded to Willmott, along with the string of prior, ostensibly unanswered communications from Sanchez:

Hi Charles,

Please provide status of the destruction of the 2 Medallion stamps issued in the bank's former name, South Central Bank. Although these stamps have been coded inactive, the bank is still required to submit confirmation of the description of the stamps. In the event that the bank cannot account for these stamps, please complete and return the attached Lost STAMP Affidavit along with applicable fees.

Thank you.

In response, Willmott wrote later that same day to Grayson, copying Thiel, Ralofsky, and Slagter:

Todd G. –

These Medallion stamps seems to be from years ago. I think 2015. I will send a second email following this one with that support. We need to have this taken care of ASAP. If there is a fee because the stamps have been lost, that needs to be resolved. This is a long outstanding issue and we can't have it pending any longer.

Grayson responded the next morning, with the following:

Scott -- If you read the affidavit, how could I sign it? I had nothing to do with operating South Central Bank's Medallion program as we discussed on the phone.

If it just said, there are not stamps easy. I can't describe a program I was not trained in nor managed. I only learned about the program taking the classes to be a signer for Verve.

Willmott then wrote to Slagter, copying Grayson, Thiel, Ralofsky:

Slagter –

Please take a look at the attached affidavit regarding lost Medallion stamps. These are from WELL before the acquisition of the bank. We have emails

between Chuck and Gina [*sic*] Sanchez from as early as February 2019 referencing the lost stamps from 2015. Todd G. is uncomfortable attesting to the program and the destruction. If not the President of the Bank, who? Please advise. We do still have an ongoing relationship with the Medallion program.

In all honesty, perhaps we write the affidavit saying the bank ignored the repeated requests and now all knowledgeable individuals have been removed from the organization. We can state that we have never seen or been informed of 2015 stamps but that we will pay the fine. Can we pay the fine but blame prior management?

Grayson wrote later that same day:

Scott – thank you for understanding. As a signer in the program, I don't want to lie to the organization.

Todd G.

Administrative Assistance from Karen Garcia

Finally, on February 26, Karen Garcia wrote the following message to Thiel, copying Willmott:

Hi Lori,

Here is the 1-31-2020 CSI bill with Todd's initials. Todd asked me to mention to you to refer to his e-mail concerning the one-time items.

Willmott forwarding this communication to Grayson, writing the following with no other individuals copied:

Todd –

Thank you for approving the CSI invoice. I asked you to specifically do it, because we needed someone with familiarity with billing and the core system.

At this point, Karen is probably the busiest person at Verve Chicago. Not only is she managing the same responsibilities as prior to the acquisition, she is doing much of Chuck's job, working to correct historical errors, consolidating financials, and taking member calls; not to mention she is now taking on an active part of our Pantone 551 project. In the future, please do not use her as an admin to pull reports and scan files. She simply does not have the time and we cannot risk pushing her to a point where she may leave. I have been speaking with her a couple of times a week to keep her prioritization accurate and her engagement high.

I know everyone is busy, but if you can't do it, maybe rely on Maeve in the meantime.

Thank you,

Scott

Grayson responded to Willmott that same afternoon, with the following:

For sure. She offered this time as the bill was by her desk. I am well aware how busy Karen is.

We actually asked our new CSI rep Erik Dombrowski a few hours ago to send a copy of the bills directly to me.

So I am a step ahead of you! []

Todd

In addition to these email communications, Verve presented testimonial evidence by Ralofsky, Willmott, and Thiel regarding these matters. Close inspection of this evidence, together, leads to a troubling array of discrepancies. Some of them are general in nature, and others are more specific.

Willmott testified generally, for example, that Grayson was “not trying to help assist in any way”; and Ralofsky testified that Grayson’s general responses were that the issues were “not a big deal”, “nothing to worry about”, and “not worth losing sleep”. In all the email exchanges reproduced above, however, one is hard-pressed to locate an instance in which Grayson responds with words that could be construed to convey these sentiments. In many instances, Grayson appears to be appropriately responsive: he searched for and turned over information regarding the bank artwork; he obtained and provided the links and passwords that would reveal the values and contact person for the BOLI policies; and when Willmott wrote to ask that Grayson not use Karen Garcia for administrative tasks, he responded with apparent understanding, a willingness to follow instructions, and an indication that he already had given the matter consideration.

Along the same lines, regarding the medallion stamp email exchange, and the desire to have Grayson sign an affidavit, Willmott testified that Grayson “responded back that there was nothing he could do about it, he wouldn’t sign it, he wouldn’t look any further into it”. Yet that is not at all what Grayson’s message says. Rather, he expresses (appropriately, it seems) unease with signing an affidavit attesting to matters of which he had no personal knowledge, and then appreciation for the understanding.

Similarly, when testifying about the South Central Safe Deposit Company exchange, Willmott stated:

So as you can see as of the dates of the e-mail string, it took weeks in order for us to get any kind of response. And ultimately, I just had my attorney that works for Verve do it, even though it was a very simple piece of paperwork.

In the context of Verve's allegations in this case, this testimony implies that *Grayson* took weeks to respond to an inquiry regarding this issue. It is obvious how this impression would support Verve's case. What the printed email messages reveal, however, is that Thiel and Willmott went to others first with their questions, and when Grayson was brought into the loop he responded within two days. Moreover, a review of all the messages regarding the South Central Safe Deposit Company issue, which cover a span of forty-two days rather than two weeks, creates the impression of several people (including Grayson) exerting reasonable efforts to solve a problem together.

As for the timing of other communications, Grayson sometimes responded to messages within minutes, sometimes within the same day, and sometimes he took longer. In a general sense, he does not appear to have taken any longer to respond to inquiries than anyone else involved in transitional communications that are a part of the record in this case.

This disconnect between the testimony of Verve's witnesses and the words on paper has the impact of creating both a general level of distrust as to whether hyperbole is also driving the most damning allegations launched at Grayson, which in this case are contained only in the testimonial evidence. These include, for example, allegations that Grayson was "dismissive" and he "never took the first step forward", according to Ralofsky; and that he was "angry" and "he either couldn't understand or refused to understand the importance of having the proper documentation and accounting records", according to Willmott.

The disconnect also causes skepticism regarding the supervisory expectations under which Grayson was operating with respect to these transitional issues. The record paints the picture of a hierarchy of executives who were under tremendous pressure to make the SCB acquisition run smoothly. Verve had made acquisitions in the past, but this was its first purchase of a bank. Verve's Board of Directors wanted regular reports from Ralofsky and expected explanations for any impediment; Ralofsky was hearing from Willmott regarding the potential financial impact caused by the irregularities, and Ralofsky observed Willmott to be "highly agitated" regarding the transitional issues; and Willmott testified that he, in turn, was attempting to manage Thiel's frustrations. The record establishes that it was Thiel who was performing the most detailed work to consolidate the financial statements. In doing so, she was in direct and seemingly constant communication with Grayson. Moreover, the record establishes that Ralofsky's impressions of Grayson were based, at least in part, on reports he was receiving from Willmott, who was relying on the reports he was receiving from Thiel. Ralofsky testified that he routinely (and in this instance) relied on the reported experiences of others on his team when making the decision to terminate Grayson. The reason all of this is a concern is because Thiel revealed herself at hearing to have an exceptionally high expectation in terms of Grayson's performance. When asked, for example, to verify that Grayson had, in fact provided the necessary information regarding the BOLI plans, Thiel acknowledged that he had, but indicated that it took him until the end of the day and he had to ask Rudy first.

There is no question that Grayson's failure to carry all the information around in his head did not constitute cause for his discharge. That fact that he took a few hours to reach out for help from Rudy was not dismissive, it was not unhelpful, and it was not a failure to perform his duties. To the extent that the record hints that Grayson's perceived failures were based on such high expectations—and it does—Verve's ability to meet its burden in this case is harmed.

Furthermore, Thiel's expectations are not the only ones that seem to have been out of line. Ralofsky testified that Verve executives knew there would be many "loose ends" to deal with after closing. Importantly, this expectation seems to have dovetailed with Ryan Cislo's experience with such things. Specifically, in his March 6 email message to Willmott, Cislo stated the following:

Regardless of whether an adjustment is warranted, I think it would be beneficial to obtain support for these assets if possible. Lori has already started reaching out to vendors to see if they still have copies of supporting invoices for work performed in recent years. Another option is to reach out to the SCB's old auditors.

Generally, auditors will have communication with the predecessor auditor when they are taking on a new client. If Hawkins Ash has not done so already, I would suggest that they ask Crowe whether they audited certain large additions to fixed assets, such as leasehold improvements, in past years and if so, what testing was performed. Crowe may also be amenable to sharing a copy of their prior year workpapers with Hawkins Ash. These workpapers will detail what tests were performed over these assets and may contain missing invoices. I would be happy to join this call with Hawkins Ash if they would like me to.

Here, an expert forensic auditor who has been hired by Verve is telling Willmott that it is not uncommon for auditing firms to have to communicate with one another, and to have to share documentation, to be able to run these transitions smoothly. He is telling Verve that it is routine to have to consult with others. His message carries the implication that the work might be more than what a single individual, namely Grayson, could reasonably be expected to handle.

Moreover, Verve already had the ability to understand that this transition could be a little more bumpy than some, because they would not have the access they would have had to Rudy had he become even a temporary employee. Any assurances Grayson provided, such as saying that he could serve effectively as President of Verve Chicago, did not extinguish the warnings of Grayson and his father that Verve may benefit from access the institutional wisdom possessed only by Rudy. Verve executives needed only to use common sense to realize this was true. While the record indicates that the three SCB executives had a system where they each could run the bank in someone else's absence, being able to cover Rudy's necessary duties while he was away at Boy Scout camp with his son is different than knowing everything about how Rudy did his job.

For Verve, much of this case comes down to the “assurances” it says had been provided by Grayson. Ralofsky testified no fewer than seven times at hearing that Grayson had made “assurances”, “representations”, and “warranties” to Verve regarding his ability to handle things. This testimony again, however, is burdened with complex problems. First, Ralofsky’s testimony on this point, though often repeated, always seems to lack adequate grounding. He said Grayson provided assurances, but he did not speak in any disciplined way about the nature of the assurances. Further, it is impossible to tell whether Ralofsky was speaking of assurances provided before the close of the sale (assurances, for example, made in the form of representations regarding the integrity of SCB’s operations) or if he was speaking of assurances Grayson was making, during the course of his employment with Verve (as issues came up, that things would be fine). A notable exception is when Ralofsky specifically testified that the reference to assurances in Grayson’s termination letter was intended to cover the period after he became employed at Verve. The problem with this contention, however, is that the words of the letter refer to the period time of “during [Grayson’s] transition to Verve”.

Verve would argue that Grayson’s assurances were simply that he would be helpful, and those assurances were sufficiently specific in the context of the transitional phase. Verve’s narrative of this case, however, fails to recognize any way in which Grayson could have been sufficiently “helpful”, in their eyes, without having achieved complete resolution of all outstanding issues. For example, Grayson was able to find some information related to the bank artwork, but not enough information to address all Verve’s artwork questions. The record indicates that his effort to respond to these issues included (1) communications with his father, (2) searches through old or archived email messages, (3) searches through boxes in the basement for old receipts; (4) and the discovery of a physical file that he then had scanned and provided.

According to Ralofsky, these efforts cleared approximately \$24,000 in artwork, but remaining informational gaps left approximately \$16,000 in artwork for Verve to expense. The record suggests that some of the documentation Verve was seeking may simply not have existed, due to SCB’s specific record retention policies or for other reasons not within Grayson’s control at the time of his employment with Verve. The record also creates the impression that, because the situation resulted in an unanticipated expense, it simply was not satisfactorily resolved for Verve. Importantly, however, the Employment Agreement does not contain a provision hinging Grayson’s ability to remain employed by Verve on the complete verification of pre-acquisition representations; and no one in this case has argued otherwise.

Of course, the central question in this case is whether the perceived accounting irregularities so displeased Verve that they (and not Grayson’s performance) constituted the primary basis for his discharge. The record in this case simply makes it impossible to conclude otherwise, and there is a litany of reasons for why this is true. The first is the timing of the decision relative to the receipt of the Plante Moran findings. Verve executives have repeatedly testified that Cislo’s communication was significant only for the purpose of verifying Verve’s concerns regarding the accounting irregularities. While Verve has acknowledged that Plante Moran’s audit certainly contributed to its ultimate decision to sue Grayson and the other SCB executives, Verve executives insist that it did not play a role in

Grayson’s termination. Yet the termination occurred within days of Verve’s receipt of Cislo’s memorandum. Willmott received Cislo’s memorandum on Friday evening, Verve executives met with their attorney to discuss Grayson’s termination on Monday afternoon, and Grayson was terminated at a 10:00 a.m. Tuesday morning meeting.

Further, the sixty days from the beginning to the end of Grayson’s tenure with Verve was too little time for Verve to have concluded, reliably, that it had cause for his termination. Verve has pointed to the Plante Moran findings as confirmation that the accounting irregularities Verve was finding were significant and that Grayson should have been taking them more seriously. Yet Verve did not really have a handle, on March 10, as to how serious the accounting irregularities really were. With regard to the capitalization of IT assets, Cislo had stated the following: “Based on its own website, all of the services offered by RealNets appear related to routine outsourced IT support that would not be capitalized.” Yet the record indicates that Verve executives likely knew (or at least had reason to know) that SCB’s relationship with Realnets had gone beyond routine IT support, as Cislo assumed. Willmott testified that he was aware that SCB had been working with Realnets to build a platform for borrowers and suppliers of home improvement construction. This apparent shortcoming in Cislo’s understanding could have resulted in a significant error in his findings. Cislo also had written, in his high-level summary to Willmott, that a “detailed review of [the Realnets] invoices would be required to determine an accurate amount of software costs that were improperly capitalized”. Yet Verve chose to simply accept the Plante Moran findings at face value as they had been provided on March 6, and they did so despite SCB having received years of clean audits by Crowe.

The other concern with the sixty-day timeframe is that some of Grayson’s alleged failures had a certain subtlety about them. In employment-based cause analyses, there is a sliding scale that plots the hypothetical intersection between the seriousness of the offense and the severity of the punishment. Contrary to Verve’s arguments, there is no reason to forego the application of that concept under the cause standard that applies in the present case. If Grayson had committed a felony, that conduct likely would have justified his termination immediately, on day one of his employment with Verve or any day thereafter. Here, however, Grayson was slow to pick up on the fact that he should not have been using Karen Garcia for administrative assistance. Hiccups like these, which seem inevitable when marrying two separate and distinct organizations, and which always seem to require a period of adjustment, were nuanced and not serious or cumulative enough on March 10 to rise to the level of cause for termination.

If these traits had continued to manifest over time—that is, if, after the dust from the Plante Moran memorandum had settled, Grayson had conducted himself as the apathetic employee portrayed by Verve—Verve executives likely would have accumulated a sufficient quantity of reliable evidence of this unacceptably laissez faire attitude. Knowing there was a cause standard, they likely would have taken time to not only discuss their concerns with Grayson, but also document those discussions in a detailed manner. Eventually, such material might have risen to the level of “breach of duty” or “habitual neglect”, but that was not the case less than sixty days into his tenure.

The other red flag relative to the Plante Moran memorandum is Willmott's response to Cislo. Within approximately ninety minutes, Willmott responded to Cislo with an email message that was focused on a single topic: Grayson's discharge. Although, as indicated, Verve executives have insisted that there was no connection between Cislo's memorandum and the termination decision, Willmott's email message suggests that, at that moment in time, the two items were inextricable, at least in the mind of Verve's CFO, who was at the center of this process. It is impossible to ignore the degree to which Willmott's message implies that the accounting irregularities were going to be the basis for Grayson's discharge.

Further, although it has been found that the content of the termination letter did not result in a waiver of Verve's opportunity to present what appears to be a somewhat evolved explanation for the termination decision, the focus of the letter unquestionably harms Verve's ability to meet its burden in this case. A reading of its plain language leads directly to the conclusion that Grayson was being fired because of the accounting irregularities, and not because he was not sufficiently helpful. The idea that he was unhelpful, dismissive, or *laissez faire* is mentioned nowhere.

Moreover, the termination letter is book-ended with meeting notes that support the very same conclusion. On March 9, Ralofsky, Willmott, Wuske, and Heather Williams participated in a Microsoft Teams meeting with Verve's labor, and Williams produced the following notes from the meeting:

March 9, 2020; 1:00 pm

Microsoft teams meeting (Kevin Ralofsky, Scott Willmott, William Wuske, Heather Williams, Jim Macy)

Re: Conference call to discuss termination of Todd Grayson

Jim stated that the external audit has displayed irregularities. The audits are not matching Todd's representations. There are 3 areas of concern that are present:

1. Breach of duty/habitual neglect
2. Prior expenses/undisclosed liabilities
3. Missing support for capitalized assets

It was mentioned by Jim and agreed to by Kevin and Scott that Todd had stated in discussions prior to the acquisition that he knows how the bank runs; don't worry about Chuck leaving.

Decision to move forward at 10:00 am on March 10, 2020 with the termination. Kevin will call a meeting with William and Todd at Union League Club, Chicago. Jim and Heather will attend via phone.

All termination paperwork to Catherine to put together for Kevin to present to Todd.

Kevin will start the meeting off about the Plante Moran investigation and the info that we had received of Friday. Jim will redirect as needed to address the concerns in the investigation.

Heather will present benefit information and talk through what Verve items he has to return. Arrange time for Todd to collect personal items from the office (Tuesday, March 10th or Wednesday, the 11th at 6:30 pm at Roosevelt or we can box and ship)

Williams also produced notes of the March 10 termination which read as follows:

3.10.20 Conversation with Todd at Union League Club, Chicago. William, Todd, Kevin present. Jim and Heather joined via phone

Todd entered the conference room and was informed by Kevin that Jim, our HR attorney, and Heather were on the line.

Kevin stated that as Todd was aware, Verve had been working with Plante Moran for a neutral investigation. We received the preliminary info on Friday. The information provided so far is strong, showing irregularities and inconsistencies that are contrary to the warranties made by SCB and its officers.

Todd stated it sounds like he is losing his job. He didn't do anything wrong and is going to have to talk to his attorney.

Jim stated that the Plante Moran report shows a significant problem, specifically the capitalization and reporting of intellectual property and help desk support. It represents approximately \$1,000,000.

Todd stated that SCB had a CFO and they worked alongside auditors and examiners. His father (Marc) told him that Chuck (CFO) did the books and Todd does his job (book loans).

Jim stated that there were representations made by Todd that he could understand the duties of the CFO in Chuck's absence. As an officer of the bank, he had an understanding.

Todd became agitated and loud, stating he did nothing wrong; he played clean his entire life. He has 2 expensive kids. He asked if we wanted his car key. He stated he told Kevin last week he understood that Chuck did something wrong, but they had a trusted accounting firm that they used for the last 20 years and he trusted that everything was done correctly. He is going to get his lawyer and fight this. Todd stated he was going to the branch to leave the car and would catch the train. Kevin asked that he leave his keys. Todd stormed out stating he would leave the car at the bank.

Jim instructed William and Kevin to head to the branch and may need to get security.

Offline, Kevin called Todd and asked him to come back to finish the conversation.

Todd re-entered the conference room with William and Kevin in person, Heather and Jim on the phone.

Jim reiterated that that [*sic*] the issue has to do with the capitalization and representation of Verve that is approximately \$1,000,000.

Todd again stated that they hired accountants to look at the way SCB did things. Todd did his job as bank president in a highly regulated trust system. He wasn't the CEO, that was his father. It wasn't his job to look at the books except alongside examiners. His father is a shareholder so why would he do this to affect the shareholders? Todd told Kevin that he's doing this to minimize costs due to the costs Verve is now accruing with this investigation. Todd said Verve can cut costs by exiting him and not paying out his contract. This is going to cost him \$600,000-700,000. They (SCB) should have just taken the second offer and he could have walked away with the money. He will need an attorney.

Kevin stated that they could talk about this later. The goal was to continue the process and allow for Jim and Heather to wrap things up. Todd asked what Kevin meant by "we would talk later" about items. Kevin stated this would continue with the attorneys and conversations may be had through the attorneys.

Jim stated that Todd should receive a copy of his term letter. Kevin stated he was given it.

Heather informed him of the additional information that was provided with the letter that would discuss his termination of benefits and final pay information. She advised him to read it over later and reach out to her directly if he had any questions.

Heather asked that he turn in his laptop, keys, fob and any other Verve property that he had in his possession. When asked if he had anything at home that had access to anything SCB, Todd stated no. Heather told told(**SIC**) Todd that William and Kevin could meet with him tonight (Tuesday) or tomorrow at 6:30 pm at the office to box up his belongings. When prompted to pick a night, Todd stated that it was short notice and he didn't know. Jim stated that we could box his belongings and send it to him. Todd stated he needed his coat from the office and also his medications and his safety deposit box items. He stated that there were lots of items there to collect, including pictures. Kevin assured him that we do not want to keep any of his items and that we would

ensure that he would receive them. Todd also stated that he would be walking a block to _____ to call for a ride. Kevin offered to send someone to the location with any necessary items. Todd said he would text the address.

Todd handed over facility keys, fob _____ and left.

[Underlines in original.]

These documents are littered with indications that Grayson was being fired because of the conclusion that he (and the other SCB officers) had misrepresented matters related to SCB's capitalization prior to the close of the acquisition. Nevertheless, casting Verve's arguments in their best possible light, one must pay special attention to these two sentences from the March 10 notes:

Jim stated that there were representations made by Todd that he could understand the duties of the CFO in Chuck's absence. As an officer of the bank, he had an understanding.

If a potential employee makes representations as to his or her qualifications, and it is discovered during a subsequent period of employment that those representations were inaccurate, that discrepancy can be a basis for termination. Here, however, as discussed, Verve has not established that Grayson made specific assurances that he would be able to help in some way that exceeded the assistance he provided.

At hearing, Verve executives had a final opportunity to establish that their decision to terminate Grayson was based not on the perceived misrepresentations of SCB's capitalization prior to the close of the sale, but rather on his performance on the job. Ralofsky insisted on this point repeatedly, in general terms. Yet in the following testimony, where Ralofsky describes the reason for Grayson's discharge, he does not maintain clear separation between the accounting irregularities and Grayson's performance on the job:

The concerns were that these dollar figures that we're just talking about right now, the past due bills or invoices, they were mounting on a daily basis. So his concern was obviously there are things that we didn't know existed prior to the fact. And additionally to that, there were accounting irregularities as well. And additionally to that, he and his team were working with Todd to help resolve these issues, and the issues that Todd was asked to resolve were met with either a dismissive attitude, you know, whether he decided not to help or not, he couldn't resolve the issues, didn't think that they were material, or didn't think that they were important. So it was just mounting frustration.

There is a similar level of inextricability in this description provided by Willmott:

But at this point, when he/we hired Plante Moran, we were very frustrated with Todd's support. We were very frustrated with the growing numbers that were coming, in, and we really wanted to make sure we had an outside perspective of what was happening.

The situation these executives found themselves in was legally and operationally difficult. They really needed to compartmentalize their negative reactions to the purportedly mounting accounting irregularities from their assessments of Grayson's performance. Doing so would have been particularly challenging when the perceived irregularities were arising from the financial statements of an organization that had been built by Grayson and his family. This reality made the situation personal in an uncommon way, and the task of keeping these things separate was perhaps too difficult for individuals who are unquestionably competent professionals but also, after all, only human.

The final piece of evidence supporting this conclusion is a memorandum drafted by Ralofsky, Willmott, and Thiel after Grayson's termination. It read as follows:

Due diligence on South Central Bank included a multi-department strategy under the direction of different senior leaders. The PMO office managed overall coordination while regular bi-weekly meeting where [sic] held to facilitate communication; overseen by the credit union's inhouse attorney.

On October 7-8, 2019 Controller Lori Thiel and I traveled to Chicago to meet with Chuck Rudy and attempt to solve challenges taking place with receiving timely and clear accounting reports. The backdrop of this meeting is that the Verve due diligence team was being pressed for completion of the due diligence without clear channels to work through at the bank. Bank CFO, Chuck Rudy was the only direct contact, but responses were slow and rarely contained all necessary information to resolve questions. Attached is an email from 10/7/2019 from Attorney Todd Slagter expressing some of these concerns.

Additionally, attached is an email string that concludes with CEO, Marc Grayson aggressively responding to repeated requests for necessary filing requirements. Marc specifically highlights his frustration at any possible delay in the acquisition. The email response from Marc is dated 12/16/2019.

The visit to Chicago for me and Lori showed some promise in trying to spread out work throughout the team and take on additional workload by Verve to allow for better responsiveness in due diligence requests. We were unable to work directly with Chuck on any projects as planned as he did not allow us access to any current work or procedures. I sent an email to Todd Grayson on 10/10/2019 summarizing our discussions and seeking support in the recommendations (attached). I also emailed a follow up to Chuck on the same day reminding him of his "to-dos" from the meeting (attached). Todd reached out to me by phone after my email informing me that none of the recommendations would be accepted and that we were to have no additional accounting access for due diligence.

I specifically recall this conversation because Todd used an analogy of buying a home. He told me that just because someone strikes a deal to buy a house, you still can't move in until you have the keys. He claimed that the OCC would

not allow further access to accounting reports and procedures until we “had the keys,” meaning regulatory approval. Todd also told Kevin that access was limited because SCB was concerned of the OCC regulations prohibiting us doing so.

This background is given to illustrate the efforts that were made in attempting to do thorough accounting due diligence. We learned that Chuck maintained strict controls over the entire department and did not share much of the work. He worked extremely long hours and used his Controller and Accounting Managers as clerks. He was solely responsible for fixed assets, expense payments, monthly closings, reconciliations, call report, etc.. Though we received standard reporting, the detail and opportunity to “dig in” was withheld.

The week of November 11th, Verve met with the majority of Bank employees to provide clarity on new roles, pay, benefits, and leaders for staff transferring to the credit union. By this time Verve had decided to not employ [sic] Chuck. Marc and Todd Grayson repeatedly stressed that Verve was making a mistake in not retaining Chuck. Suggestions were made to either carry Chuck as an employee in the short-term or to somehow make him a 1099 employee. With such little benefit received by working with Chuck through the due diligence phase and his poor communication and leadership style among his team, management was firm in not continuing his employment, even in the short-term.

I met with Todd and Verve CEO Kevin Ralofsky to express my concern with closing the deal with minimal time between regulatory approval and close. Chuck had not provided enough information to allow comfort in the accounting due diligence. I recommended that Verve be allowed a few weeks post approval, with Chuck required to respond and provide all access to the Verve Accounting team. In essence, we needed some time with “keys to the house.”

Todd was insistent that the deal not be “delayed” any further. The bank was in the process of requesting a minimum equity adjustment of \$163,486 of which Verve was refusing. I have attached the 11/19/2019 email from the bank’s attorney to ours outlining the request. Emotions were [sic] high and the bank was feeling that the credit union was intentionally delaying the deal to strike an arbitrary 12/31 closing date. Todd was clear that any further delay for due diligence would severely jeopardize the deal. He was clear that his father would not tolerate any further delays and that the bank would withdraw from the deal. Since regulatory approval was pressing up against the definitive agreement deadline of 1/30/2020, we believe this was not a veiled threat.

Todd was very clear that he, Chuck and Marc were all senior leaders of the organization. Though Chuck was a critical member of the executive team, Todd regularly maintained Chuck’s responsibilities while he was out. Each of them could manage the affairs of the bank entirely, covering for others. Todd

represented that he could attest to the proper accounting and could navigate everything needed to see the deal through, without the employment or assistance of Chuck. This assurance combined with a clean exam and audit created enough mitigation to the accounting due diligence to rely upon the steps which had been taken.

By this time, Todd had already agreed to the principles of an employment contract with Verve. He claimed repeatedly and often that he was the President of the Bank and that he was aware and in control of all elements of the operations, as any president would be. In addition to these many assurances and warranties, Todd also stated on several occasions that Marc rarely came into the office, mostly to show up when the examiners and auditors were present. Todd repeatedly assured Verve that he managed the day to day goings on of the bank as the President. Management felt it was reasonable to rely on this assurance as one, he was agreeing to a contract with Verve and two, it is consistent with past experience that the President of a small financial institution be intimately familiar with all operations, lending, compliance, etc..

The assurances of Todd that he could manage the organization lead to his hire and placement as the Regional President of the Chicago Market. Following the close of the deal, it became immediately apparent that Todd had minimal knowledge of the accounting functions and knew nearly nothing about the processes. He relied completely on the remaining accounting team, that though talented, had not been given exposure to the very work we needed access to.

When approached about invoices not being paid, Todd shared with me, Kevin and Lori, on different occasions, that Chuck would often not pay invoices until pressed by Todd; usually forced by threat of services being disrupted. When approached about poor support for fixed assets or receivables, Todd stated repeatedly that we “should just book it as it is.” His reasoning was that “we’ve been audited before and they didn’t have a problem with it.” When I would press that we could not book unsupported assets or receivables, Todd would get angry and treat the accounting team as though we were out of line and trying to make a big deal out of things that are not.

I shared my concerns with Kevin, that we were not getting help from Todd and that he was aggressive toward the team at inquiries. Kevin asked Todd to withdraw from the discussions outside of helping find documentation/support in files. It was at this time that we engaged Plante Moran to do a forensic audit on the accounting due to discrepancies that were being brought to light.

This fourteen-paragraph memorandum, reportedly drafted for the purpose of explaining the decision to discharge Grayson, spends the first nine paragraphs expressing frustration regarding events that occurred during the pre-closing, due diligence phase of the acquisition. The document recounts visits to Chicago in October of 2019 in an attempt to “solve challenges” regarding the receipt of accounting reports; inadequate and untimely responses from Rudy during this time; “aggressive” responses from Marc Grayson during this

time, and specifically in an email message from him in December of 2019; frustrations with Rudy culminating in an October 2019 email message from Willmott to Grayson; Grayson's statement in response to that email message stating that no additional accounting access would be given during the due diligence phase, and Grayson's use of the "keys to the house" analogy to support that position; the struggle to perform adequate due diligence when encountering uncooperativeness from Rudy who had "strict controls" over his department; Verve's decision not to hire Rudy, and Marc and Todd Grayson's insistence that the failure to do so was a mistake; whether there was enough time between regulatory approval and when the deal was to be closed, referring back to Grayson's "keys to the house" analogy; and a period in which "emotions were high" in November of 2019. It is not until paragraph ten that the document turns its attention to the matter of Grayson's employment with Verve.

Again, this document is evidence that there was no discernable separation in the minds of Verve's executives between the possibility that SCB's pre-acquisition representations had been untrue and Grayson's acceptability as an employee. It was all, as they say, one giant ball of wax.

2. Withdrawal of Country Club Dues

At the time that Grayson was receiving his final paycheck from Verve, he also received notification from Williams, on March 25, 2020, that Verve had removed \$3,003.90 from an account he shared with Verve, for the purpose of recouping country club membership dues that had been paid out into the future by Verve. Grayson has argued that this withdraw constituted a violation of Section 103.445, Wis. Stats., which reads as follows:

103.455 Deductions for faulty workmanship, loss, theft or damage. No employer may make any deduction from the wages due or earned by any employee, who is not an independent contractor, for defective or faulty workmanship, lost or stolen property or damage to property, unless the employee authorizes the employer in writing to make that deduction or unless the employer and a representative designated by the employee determine that the defective or faulty workmanship, loss, theft or damage is due to the employee's negligence, carelessness, or willful and intentional conduct, or unless the employee is found guilty or held liable in a court of competent jurisdiction by reason of that negligence, carelessness, or willful and intentional conduct. If any deduction is made or credit taken by any employer that is not in accordance with this section, the employer shall be liable for twice the amount of the deduction or credit taken in a civil action brought by the employee. Any agreement entered into between an employer and employee that is contrary to this section shall be void. In case of a disagreement between the 2 parties, the department shall be the 3rd determining party, subject to any appeal to the court. Section 111.322 (2m) applies to discharge and other discriminatory acts arising in connection with any proceeding to recover a deduction under this section.

As an alternative, Grayson relies on Section 109.11(2)(a), Wis. Stats., which reads as follows:

109.11 Penalties.

...

(2) CIVIL PENALTIES.

(a) In a wage claim action that is commenced by an employee before the department has completed its investigation under s. 109.09 (1) and its attempts to compromise and settle the wage claim under sub. (1), a circuit court may order the employer to pay to the employee, in addition to the amount of wages due and unpaid and in addition to or in lieu of the criminal penalties specified in sub. (3), increased wages of not more than 50 percent of the amount of wages due and unpaid.

These provisions apply strictly to wage deductions, and Grayson has not shown that the recoupment of country club fees constituted a wage deduction. Further, aside from the two cited provisions, Grayson has provided no other statutory or contractual basis for awarding the requested amount. Even the termination compensation expressly permitted at Section 6.2 of the Employment Agreement does not include the ongoing payment of country club dues by Verve.

3. Indemnification Claim

Grayson also has made a claim for indemnification of attorney fees he purports to have generated after his termination but before his legal counsel began preparing for this arbitration case. Pursuant to the following provision from the Employment Agreement, it is undisputed between the parties that he is not permitted to collect fees generated in relation to this arbitration matter:

8.11 Dispute Resolution. Notwithstanding any procedures set forth in Verve employee handbook, in each and every instance where a dispute may arise in connection with the Agreement stated herein, and if the parties cannot reach a mutually acceptable resolution of same within thirty (30) days after written notice of the dispute, the matter shall be referred to and settle by final and binding arbitration. The arbitrator shall resolve disputes in accordance with the laws of the State of Wisconsin, and shall have the power to order, among other things, specific performance of the Agreement. Judgment upon the award rendered by the arbitrators may be entered in the Circuit Court for the State of Wisconsin and shall be final and legally binding.

The fees of the arbitrators shall be split between the parties. The respective expenses and attorney's fees incident to the arbitration proceeding shall be borne by the respective party. The neutral arbitrator will be selected through the procedures and be governed by the rules of the American Arbitration Association.

Grayson contends that the attorney fees for which he claims the right to be indemnified are not arbitration-related fees and, therefore, are not prohibited by this provision.

Rather, he contends that his claim for attorney fees is covered by Section 8.15 of the Employment Agreement, which reads as follows:

8.15 Indemnification. Verve shall indemnify, defend and hold and save Executive, his heirs, administrators, or executors and each of them harmless from any and all actions and causes of action, claims, demands, liabilities, losses, damages, or expense, of whatsoever kind and nature, including settlements, judgments, interest and attorney’s fee and all other reasonable costs, expenses and charges which Executive, his heirs, administrators, or executors and each of them shall or may at any time or from time-to-time, subsequent to the date of this Agreement, sustain or incur, or become subject to by reason of any claim or claims against Executive, his heirs administrators or executors and each of them from carrying out the terms and conditions of this Agreement, except for gross negligence, willful misconduct, criminal acts or omissions on the part of the Executive, or by reason of any act deemed outside the scope of Executive’s employment, provided that Executive, his heirs, administrators or executors or one of them, promptly notifies Verve of adverse claims or threatened or actual lawsuits. Executive, to the extent reasonably possible, shall provide complete cooperation to Verve, its attorney, and agents in such case.

This indemnification provision, however, is premised on several conditions that do not exist here. First, it assumes that a claim or claims have been brought against the Executive. Grayson has not had any claims brought against him. Rather, he initiated the claim. Further, the provision assumes that Verve will “defend” the Executive from such claims and that the Executive is therefore required to “provide complete cooperation” to Verve and its attorneys. This concept is in line with a traditional employment-based indemnification provision, which shields an employee from legal actions brought by third parties. It is not a concept that applies here. Thus, the Award does not indemnify Grayson for any attorney fees.

4. Reimbursement of Verve for AAA Filing Fees

Finally, Verve has sought reimbursement for the amount it paid to AAA that exceeded fifty percent of the total filing fee for this case. Relying on Section 8.11 of the Employment Agreement, which states that “the fees of the arbitrators shall be split between the parties”, Verve argues that it should share the AAA filing fees equally with Grayson.

The record in this case shows that AAA, in communications with the parties in the present case, provided confirmation that it views arbitration filing fees as being separate and distinct from arbitrator fees. Insofar as the Employment Agreement refers to “the fees of the arbitrator”, but not the “arbitration filing fees”, there is no contractual basis for adjusting the fees as they have been assessed by AAA. For this reason, Verve’s request for reimbursement of AAA filing fees has been rejected.

AWARD

Grayson’s claims for relief are granted, in part. The Respondent is hereby ordered to pay Grayson the following relief:

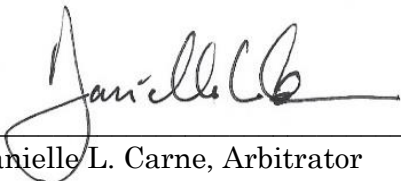
Two (2) years of salary x \$215,000.00 per year:	\$430,000.00
Two (2) years of COBRA x \$2,134.10 per month:	<u>\$51,218.40</u>
TOTAL TERMINATION COMPENSATION:	\$481,218.40

Further, pursuant to Section 815.05(8), Wis. Stats., the Claimant is awarded daily interest on the total awarded termination compensation at a rate of 4.25 percent per annum or \$56.03228 per day. Pursuant to Section 6.7 of the Employment Agreement, Grayson was to receive payment of any termination compensation within 180 days of March 10, 2020. Thus, Respondent is directed to pay the Claimant this daily interest rate beginning on September 6, 2020, up to and including the day on which the payment ordered here is made to Grayson.

The above sums are to be paid on or before thirty (30) days from the date of this Award.

This Award is in full settlement of all claims and counterclaims submitted in this arbitration. All claims not expressly granted herein are hereby denied.

Signed at the City of Madison, Wisconsin, this 25th day of November, 2020.



Danielle L. Carne, Arbitrator